



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO. 47 OF 2011**

**CHARLES LUTTA KASAMANI T/A KASAMANI & CO.  
ADVOCATES.....PLAINTIFF**

**VERSUS**

**PATRICK JEREMY OKWARO OTIENO.....1ST  
DEFENDANT**

**GEOFFREY DENIS OLUOCH YOGO T/A OTIENO YOGO & CO. ADVOCATES.....2ND  
DEFENDANT**

**J U D G M E N T**

The originating summons dated 20-3-2011 seeks the determination of the following question:

**“Is the plaintiff entitled to enforce the undertaking set out in the affidavit of Charles Lutta Kasamani annexed hereto against the defendants in the sum of Kshs. 300,000/= plus interest thereon at the rate of 19 (percent) (19%) from the 19th January 2009 until payment in full”.**

Both parties gave oral testimonies to back up their case. The facts of this case are that by an agreement dated 30-5-2008 the plaintiff herein PW1 sold his parcel of land known as Kisumu Municipality Block 8/464 to M/S Triple Trojan Investments Ltd for a total purchase consideration of Kshs. 7,750,000/=. At the signing of the contract the purchaser paid Kshs. 2 million and it was agreed that then balance would be paid within 45 days of delivery of all the necessary completion documents.

On 28-5-2008 Mr. PJ Otieno (1st defendant) requested for the document vide a professional undertaking which stated:

**“As a consideration, you have our professional undertaking that we shall hold the same to your order, returnable on demand and that if we shall be unable to pay to you the balance of the purchase price in terms of the agreement, then we shall return to you the document in the form you shall have forwarded them to us”.**

Pursuant to the above undertaking on 16-6-2008 the plaintiff forwarded the completion documents as requested. Save for the consent from the commissioner which the plaintiff explained that he was in the process of procuring the same.

On 23-7-2008 the purchaser paid Kshs 1.2 million which was to enable him get validation from the Ministry of Housing and subsequently the consent from the commissioner. The plaintiff did not obtain the said consent as the ministry demanded Kshs. 2.8 million being validation fees as the property fell under the list of properties named in what is called Ndungu Report. The said report earmarked the property as

alienated government land.

On 15-12-2008 the purchaser's advocated made a proposal to the plaintiff where the offered to pay Kshs 2.8 million to the Ministry of Housing on condition that such amount would be factored in from the purchase consideration. The purchaser's was to pay Kshs. 2,800,000/= for validation and Kshs. 1,750,000/= to the plaintiff which was the remaining balance. The plaintiff accepted the offer on the following conditional terms:

**“Subject to production of proof of Kshs. 2.8 million being validation fees to the Ministry of Housing, we have no difficulty receiving the balance of Kshs. 1,750,000/=. The sale shall be considered concluded to our satisfaction upon production of Ministry's Official Receipt”.**

On 14-1-2009 the purchaser through the defendants paid to the plaintiff the sum of Kshs. 1.1 million via a cheque and on 27-1-2009 the 1st and on 27-1-2009 the 1st defendant paid to the plaintiff in cash Kshs. 550,000/=. On the same day the plaintiff signed an acknowledgement and again stated that the sale would be complete subject to presentation or validation receipts. It was further acknowledged that the 1st defendant paid a sum of Kshs. 100,000/= on behalf of the plaintiff to an auctioneer.

It is further the plaintiff's case that the title passed from him to M/S Tripple Trojan Investments Ltd despite being no proof of validation fees beinf paid to the Ministry of Housing.

Mr. Otieno PW1 told the court that no validation fees had been paid to the ministry since there was no mechanism created by the ministry for the payment of this monies. He confirmed that his client had the money and he was prepared to pay once such channel is created. He confirmed that according to him validation was an encumbrance to the transaction which was still unresolved to date. He produced a letter dated 16-11-2012 from the County Director of Housing to that effect.

DW2 an employee of the purchaser testified that he was aware of the outstanding balance of Kshs. 2.8 million payable to the Ministry of Housing.

In his written submissions the plaintiff contends that the Ndungu Report was never an encumbrance as if that was the case then the purchaser would not have had the title passed to him. He dwelt heavily on the professional undertaking by the defendants which according to him if there were any problems then they ought to have returned the same to him. Since the validation fees remained unpaid todate the professional undertaking ought to be enforced.

In their submissions the defendants maintained that the validation fees was an encumbrance which subsistent trade and thus no good title could be passed to the purchaser. They argued that the agreement to pay Kshs. 2.8 million to the Ministry of Housing altered the terms of the contract and by extension the professional undertaking.

Having summarised the facts herein what are the sticking issues for determination? Basically, they are:

- a. **Did the professional undertaking vary the terms of the agreement?**
- b. **Was the sale conducted by the plaintiff passing a good title free from any encumbrance?**
- c. **Is the plaintiff entitled to the amount claimed?**

It is the plaintiff's case that the professional undertaking is still in force and thus he should be allowed to enforce since the whole amount of the purchaser consideration has never been remitted. On the other hand it is the defendants' case that the professional undertaking had been raised due to the alteration or contract for sale where it was agreed that the defendants pay Kshs. 2.8 million directly to the Ministry of Housing.

From the plaintiff's letter accepting the defendants' offer to get the validation on his behalf, it is clear that he did not lift the defendants responsibility to pay the full amount of the purchase price. The

agreement was not that the defendant could retain the money so long as they figured a way to acquire the validation but that they actually had to pay the validation amount and present the same to the plaintiff. Anything contrary would render the sale incomplete. This court finds that all it did was to change the recipient of the money, that is the money was now to be paid to the Ministry of Housing instead of the plaintiff but with a rider that such payment would be proved to the plaintiff by production of the relevant receipts.

However, did this alter the undertaking? It was a term of the undertaking that the defendants would return the completion documents if payment was not made in full. The professional undertaking did not specify that the money could only be paid to the plaintiff alone. The requirement was the payment in full of the purchase consideration regardless of whomsoever received the money. Further, by having registered themselves without any payment of the validation fees did not eliminate their duty to make payment in full. Completion of the agreement in my understanding was dependent on the ability to register the transfer but on the pay of the validation fees and production of proof of such payment. In any case if the defendants felt that the undertaking had been altered it was their duty to return the documents if for any reason they did not intend to honour the undertaking.

The Court of Appeal in **Kenya Reinsurance -VS- T/A Muguku Murui Muguku Muriu & Co. [1996]e KLR** stated as follows:

**“ We hold that the undertaking given by the respondent advocate was unambiguous, unequivocal and binding on him. An advocate cannot, after giving such an undertaking, quantify the same on account of accounting dispute between the parties”.**

In this scenario as observed above the only change was whom to pay the money. This did not in my view change the undertaking.

The suit property was registered pursuant to the provisions of the now repealed Registered Land Act Chapter 300 Laws of Kenya. Section 28 thereof stated as follows:

**“The rights of a proprietor, whether acquire on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and opportunities belonging thereto, free from all other interests and claims whatsoever, but subject:**

- a. **to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and”.**

It appears from the above that any encumbrances must be shown on the register. Apparently nothing was shown to the effect that there was any encumbrances on the register and that is why in my finding the defendant was able to have the property in its name.

DW1 told the court that the acting County Director wrote a letter dated 16-11-2012 informing him that the land belonged to the government and ordered them to submit several documents which included:

- a. **Copy of letter of allotment from Commissioner of Lands.**
- b. **Copy of Certificate of Lands.**
- c. **Copy of actual lease extended by Commissioner of Lands.**
- d. **Copy of Land Plan.**
- e. **Evidence of validation by the Permanent Secretary, Ministry of Housing.**

A closer perusal of the said letter clearly does not show whom it is addressed to. The same does not even mention the particulars of the property. I do find the same suspect and has come too late in the day in any event.

Even if Ndungu report was an encumbrance in the register why was the same not registered by the ministry or whoever was interested. Why did they allow the title to pass from the plaintiff to the purchaser?

In the premises this court find that all that the defendants ought to have done was to return the completion documents the plaintiff in the event that they were unable to pay the validation fees as agreed. Even better they should have rescinded the agreement instead of having it transferred to themselves as they were going against their word of paying the whole amount by keeping the sum of Kshs. 2.8 million. Though the defendants claim they are not in possession of the money, it is them who gave the undertaking and so it became their duty to advise their client.

As to the amount due it became apparent from the proceedings in court that the amount due charged from Kshs. 3 million to Kshs. 2.8 million and this I find is the right figure. The plaintiff had demanded that he paid an interest of 19% pursuant to the Law Society conditions of sale and further that the court ought to take into consideration the prevailing fl actuating interest rates. I am not however inclined to grant the percentage prayed by the plaintiff as it appear from the proceedings that the plaintiff prior to filing this suit was fully cognisant of the happenings and events. He even participated in trying to emeliorate the situation. The only failure by the defence was to hold onto the money instead of paying it off or at least placing it in an escrow account pending the validation exercise.

In conclusion therefore this court enters judgment as follows:

- a. **The defendant do pay the sum of Kshs. 2,800,000/= to the plaintiff within the next 30 days from the date of this judgment.**
- b. **The sum of Kshs. 2,800,000/= shall attract interest at the rate of 14% from the date of filing of this suit.**
- c. **The plaintiff shall have the cost of this suit.**

**Dated, signed and delivered at Kisumu this 23rd day of July, 2014.**

**H.K.  
JUDGE**

**CHEMITEI**