



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 59 of 2009**

**HAVI & Co.**

**ADVOCATES.....PLAINTIFF**

**VERSUS**

**J.M NJAGA & Co.**

**ADVOCATES.....DEFENDANT**

**RULING**

1. Pursuant to the provisions of Order XXIV Rule 6(1) & (2) and Order XXXV Rule 1, 5, 8 and 9 of the former Civil Procedure Rules, the Plaintiff (hereinafter “the Applicant”) sought judgment against the Defendant for Kshs. 47,000,000/=, judgment for costs on the said sum and summary judgment for Kshs. 3,247,997.00/= with interest thereon at 17.5% per annum with effect from 6<sup>th</sup> July 2009 until payment in full. In his motion dated 17<sup>th</sup> May, 2010, the Applicant relies on the grounds on the body of the motion and the Supporting Affidavit of Nelson Andayi Havi sworn on 17<sup>th</sup> May, 2010.

2. The applicant contends that by way of a Sale Agreement dated 1<sup>st</sup> July, 2008, Rafiki Enterprises Limited (“Vendor”) agreed to sell to BERKSHIRE HOLDINGS LIMITED (“Purchaser”) a property known as LR No. 7879/9 for a sum of Kshs. 50,000,000/=. That according to the terms of the Agreement, the balance of the purchase price in the sum of Kshs.45,000, 000/= was to be secured by way of a professional undertaking issued by the Purchaser’s Advocates to the Vendor’s Advocates. The Vendor’s Advocates was the Plaintiff whilst the Defendant was the Purchaser’s Advocates. The said Agreement was duly executed under the seal and name of both companies. However, the transaction took a longer time to complete and the Plaintiff, having released the completion documents to the Defendant on 15<sup>th</sup> January 2009, took out an Originating summons dated 27<sup>th</sup> January 2009 against the defendants to enforce the professional undertaking given on 8<sup>th</sup> October, 2008 as aforesaid.

3. The Plaintiff submits that the Professional undertaking is not denied by the Defendant. It was averred that under clause 3 of the undertaking the sale was subject to the Law Society Conditions of Sale (1989 Edition) and all other applicable laws in so far as they are not inconsistent with the conditions contained in the Sale Agreement. It was also contended that the defendants took eight (8) months to pay the balance of Kshs. 45,000,000/00 after the filing of the Originating Summons to enforce the undertaking. However, it was contended that there was a balance of Kshs. 3, 249,997/= which is ostensibly the interest levied on the balance of the purchase price due to the delayed completion of the sale. This amount, according to the Plaintiff, is not in dispute. The Applicant therefore urged the court to enter judgment with regards to the same.

4. The Defendant opposed the motion vide a Supplementary Affidavit by Jayne Muthoni Njage sworn on 12<sup>th</sup> July, 2010. It is the Defendant’s contention that the substance of the dispute and the entirety of the Plaintiff’s case concerns a claim for interest of Kshs. 3,249,997/= for an alleged delay in the completion of the sale transaction. She further contends that the sum under the undertaking was Kshs.45,000,000/00 which has since been paid and acknowledged by the Plaintiff. The Defendant contends that the Plaintiff’s application is spent in light of this fact. Moreover, it is the contention of the Defendant that the Plaintiff has no *locus standi* to sue in his own name under the sale agreement for a claim of interest on late payment. In the foregoing, it is the contention of the Defendant that no interest in the amount of Kshs. 3, 249,997/= is owed to the Plaintiff. The Defendant further asserts that under Order 52 Rule 7 of the Civil

Procedure Rules, the nature of the originating summons demands that the court give an order in the first instance requiring the Advocate in breach, to honour the undertaking within a fixed time period before enforcement orders can be made. That in the instant case, no such order has been made. Counsel for the Defendant argued that the order for summary judgment sought by the Plaintiff is erroneous as such an order cannot be made in favour of a party who is not a participant to the suit. For these reasons the, Defendant prays that the application be dismissed with costs.

5. I have carefully considered the application, affidavits on record and the written submissions and oral hi-lights by counsel. It is not in dispute that the Defendant has since paid to the Plaintiff the sum of Kshs.45,000,000/= who has duly acknowledged the same. What is in contest is the aspect of Kshs. 3,249,997/= which is claimed to be the interest levied on the balance of the purchase price due to the delayed completion of the transaction. The Plaintiff claims that this aspect is not in contest and this court should proceed to enter summary judgment. The Defendant denied that the Plaintiff is entitled to this sum.

6. Under the provisions of order XXXV of the Civil procedure Rules (now Order 36 of the Civil Procedure Rules 2010) summary judgment is intended to allow a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick summary judgment without being unnecessary kept from what is due to him by way of delaying tactics by a defendant. The primary issue for determination in this case is whether the Plaintiff's claim is straight forward and whether the defence put up by the Defendant, by way of both the Replying Affidavit sworn on 6<sup>th</sup> March 2009 and the Supplementary Affidavit sworn on 12<sup>th</sup> July 2010 respectively, raises any triable issues.

7. It is not in dispute that there was a professional undertaking given to the Plaintiff by the Defendant, in pursuance of a Sale Agreement dated 1<sup>st</sup> July 2008. It is also not disputed that the Defendant delayed in releasing the balance of the purchase price but has since paid the said sum of Kshs.45,000,000/= albeit eight months from the date of the Professional Undertaking. The issue in contention is on the interest of Kshs. 3, 249, 997/=. The Defendant maintains that at no one time did they undertake to be liable for the fulfillment of any terms of the Sale agreement except for the purchase price. It was the submission of the Defendant's counsel that Clause 8(3) of the Law Society of Kenya Conditions of Sale that relate to the issue of interest is intended for the Vendor and Purchaser and not for the Advocates who act on their behalf. As such, it is the contention of the Defendant that the remedies for breach of contract should be available for the parties and not their Advocates. The Defendant also contended that the provisions of Order 52 requires an order calling an advocate to honour the undertaking before an enforcement order can be made. I have considered these broad submissions by counsel for the parties. It is my view that whether or not such interest is payable to an Advocate by the undertaking Advocate instead of the parties to the contract in my view is an issue to be established. From the material on record, this issue is not clear. Further since an order for honouring of the undertaking has not been sought and granted, an issue arises whether summary judgment can properly be entered against the Defendant as sought.

8. In **Attorney General-v- Equip Agencies Ltd [2006] eKLR** where the Court of Appeal held that where a case reveals contentious issues, the same cannot be determined summarily. While the purpose of proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim, when bona fide triable issues is revealed, parties must be allowed to litigate that issue without condition.

9. In the premise, I hold that the issue presented by the Plaintiff on the claim of interest of Kshs. 3,249,997/= is a triable issue that should be tried at a full hearing. Accordingly, I find that the application herein is without merit.

10. I dismiss the Notice of Motion dated 18<sup>th</sup> May, 2010 with costs to the Defendant.

Orders accordingly.

DATED and DELIVERED in Nairobi this 3<sup>rd</sup> day of December, 2012.

**A. MABEYA**

**JUDGE**