



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 231 of 2009

KENYA ROADS SERVICES LIMITED APPLICANT

VERSUS

KIMANDU GICHOHI & COMPANY ADVOCATES RESPONDENT

RULING

1. The respondents **M/s Kimandu Gichohi & Co. Advocates** gave a professional undertaking to the Directors of Kenya Roads Services Limited the applicants herein to release and pay to the applicant a sum of Ksh.8,120,000/- upon successful registration of the transfer within 7 days and successful removal of the current tenant whichever was later in respect of the sale of **LR NO. 209/4562** by Kenya Roads Services Limited to Terry Wambuku Karinyi. It would appear the advocates were acting on behalf of both parties and a transfer was effected in the name of Terry Wambuku Karinyi but the sum of money was not remitted.
2. On 3rd April 2009 the applicant filed an originating summons under the provisions of **Order LII rule 4 (1) (a) and 7 (1) of the Civil Procedure Rules** seeking for orders that **M/s Kimandu Gichohi & Co. Advocates** be compelled to deliver cash account to Kenya Roads Services Limited on the sale transaction on LR 209/4562 within 14 days. Secondly the advocate be ordered to honor their professional undertaking given on 24th February 2009 and pay to the applicant a sum of ksh.8,120,000/- within 14 days and failure to do so, the applicant will be at liberty to enforce the undertaking by way of execution.
3. This application is premised on the grounds that the advocates have failed to honor the

professional undertaking to the applicant. The advocate was acting for both the purchaser and the applicant in the sale transaction and in that capacity he caused the transfer of the suit premises in favor of Terry Wambuku Karinyi on 26th February 2009 and failed to honor the professional undertaking.

4. This application is supported by the affidavit of **John Kagotho Kamau** sworn on 26th March 2009. He has given a detailed account of how the applicant entered into a sale agreement with Terry Wambuku Karinyi and the firm of Kimandu Gichohi & Company Advocates was acting for both parties. By a letter dated 24th February 2009 the advocates gave the applicants their irrevocable professional undertaking to pay the applicant the balance of the purchase price of Ksh.8,120,00/- within 7 days of the transfer and successful removal of the tenants. The property was registered in favor of the purchaser on 26th February 2009 and vacant possession was given on 28th February 2009. However it is contended that the advocate has failed to honor the professional undertaking.

5. This application was opposed by the advocate who relied on a replying affidavit sworn by **Kimandu Gichohi** on 3rd December 2009. According to the advocate, the transfer of the suit premises was effected on 26th February 2009 when the transfer was registered in favor of the purchaser. The purchaser was in the process of evicting the tenants from the suit premises, but on 29th February 2009 one, **Pemuga Auto Spares Limited** forcefully entered the suit premises claiming the purchasers' interests and claiming to have entered into a sale agreement with the applicant. A fact which the applicant did not disclose to his honorable court. There is also another suit being **HCCC NO ELC 75 OF 2009** where an order to maintain status quo in respect of the suit premises was issued.

6. Thus it was submitted that all the dealings concerning the suit premises were stopped by dint of that order. That suit was subsequently withdrawn and another suit being **HCCC ELC 148 OF 2009** in which the applicant is a plaintiff was filed. There is an order to maintain the status quo preventing any dealing with the suit premises. Terry Wambuku Karinyi is not fully ceased of the possession of the suit premises as provided by rules 3(b) of the sale agreement.

7. Moreover the applicant also filed a complaint which is pending arbitration before the Advocates Complaints Commission. Due to the existing orders by the court granting stay of any dealings with the suit premises and the multiplicity of suits pending in court, counsel for the respondent urged the court to allow this matter to proceed by way of viva voce evidence.
8. I have analyzed the pleadings herein and the rival submissions as summarized above. Although the letter dated 24th February 2009 contains unequivocal professional undertaking to release and pay Ksh.8,120,000/- there are certain factors which need to be verified by way of oral evidence. I have gone through the affidavit evidence which reveals that there are other suits which are pending between the parties. One of the suits involves the applicant that is HCCC ELC 148 OF 2009 wherein an interim order of injunction was granted to the applicant over the same subject matter. This court needs to understand the effect of those orders. The applicant also did not reveal that information to court when this action was filled.
9. In view of those matters, the truth which cannot be established until the deponents are subjected to the court room processes of examination and cross examination, this matter cannot be determined to finality by way of affidavit evidence. What is clear is the applicant's property was transferred to Terry Wambuku Kirinyu who may or may not have taken possession of the premises as there are orders to maintain a status quo.
10. Pursuant to the inherent powers under Section 1 A of the Civil Procedure Act, I am inclined to order that this matter be heard by way of viva voce evidence. Meanwhile the firm of **Kimandu Gichohi and Co. Advocates** is ordered to deposit the sum of Ksh.8.120,000/- being the balance of the purchase price and the amount represented by the letter dated 24th February 2009 in court within 30 days. The hearing of this Originating Summons to be given priority in the registry.

RULING READ AND SIGNED ON 26TH MARCH 2010 AT NAIROBI

M.K. KOOME
JUDGE