



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

Civil Case 209 of 2008

DAVID KARANJA THUO t/a
(Practising as D.K. Thuo & Co. Advocates)..... PLAINTIFF
VERSUS
NJAGI WANJERU
(Practising as Njagi Wanjeru & Co. Advocates)..... DEFENDANT

JUDGMENT

By an Originating Summons dated 21st April, 2008, and filed in Court on the same date, the Plaintiff seeks against the Defendant the following 3 orders -

1. ***That the Defendant do honour his professional undertaking to the Plaintiff as clearly stated in his letter to the Plaintiff dated 4th March, 2008, which undertaking was to the effect that the Defendant would pay to the Plaintiff a total sum of Kshs.3,600,000.00 being the balance of the purchase price on L.R. No.14656/15 Karen.***

The amount due and agreed was as follows –

- (a) ***Balance of the purchase price as per the said undertaking Kshs.3,600,000/=.***
 - (b) ***Less a sum of Kshs.2,600,000/= already paid by the Defendant Amount due - Kshs.1,000,000/=***
2. ***That the undertaking by the Defendant to the Plaintiff for the balance of Kshs.1,000,000/= as set out above be honoured within such a period as this Honourable Court shall fix and in default thereof an order for enforcement do issue against the Defendant.***
 3. ***An order that the Defendant do pay the costs of this application and interest on the said sum of Kshs.1,000,000/=.***

The application is brought under **Order LII Rules 7 and 10 of the Civil Procedure Rules** and is supported by the annexed affidavit of David Karanja Thuo, Advocate, sworn on 21st April, 2009. In that affidavit, the Plaintiff avers that by the Defendant's letter dated 4th March, 2008, Messrs. Njagi Wanjeru & Co., Advocates, undertook to pay to the Plaintiff the balance of the purchase price in the sum of Kshs.3,600,000/=; that the Defendant has since paid a sum of Kshs.2,600,000/= leaving a balance of Kshs.1,000,000/=; and that the Defendant has totally failed to pay the said balance of Kshs.1,000,000/= alleging **“assault, breach of the peace, malicious damage to property and wrongful confinement”** on the part of Vendor. The Plaintiff takes the view that such allegations can be ventilated in a Criminal Court and should not be used as a basis for declining to honour a professional undertaking since the subject property has already been registered in the names of the purchasers and the Title Deed duly issued.

To these allegations, the Defendant filed a replying affidavit sworn on 10th December, 2008. In that affidavit, he

deposes that the Plaintiff's application is misconceived and baseless by virtue of his letter dated 13th March, 2008, by which he varied the terms of the professional undertaking and that he honestly believes that at all material times he conducted himself professionally. He also avers that he still intends to pursue his criminal complaint against the Plaintiff's client.

With leave of the Court, both parties filed written submissions which I have considered. Having done so, I find that the issues for determination in this matter are whether the Defendant gave the Plaintiff a professional undertaking; whether that undertaking was varied; and whether the undertaking is enforceable; and if so, whether the Plaintiff is entitled to interest.

By a letter dated 4th March, 2008, the Defendants wrote to the Plaintiffs as follows –

“Dear Sirs,

RE: SALE OF L.R. NO. 14656/15 KAREN

Your letters hereof dated 13th and 25th February, 2008 refer.

We hereby furnish you with our professional undertaking that we shall pay to yourself the sum of Kshs.3,600,000/= within seven(7) days of the successful registration of the Transfer hereof.

Accordingly, let us have the remaining completion documents the soonest as pledged last week.”

From this wording, it cannot be doubted by any stretch of the imagination that this letter was nothing less than a professional undertaking. The Encyclopedia of Forms and Precedents, 5th Edition, Volume 39, defines a professional undertaking as follows –

“An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a Solicitor in the course of his practice, either personally or by a member of his staff; or a Solicitor as “Solicitor”, but not in the course of his practice, under which the Solicitor ... becomes personally bound. An undertaking is therefore a promise made by a Solicitor ... to do or refrain from doing something. In practice, undertakings are frequently by Solicitors in order to smooth the path of a transaction, or to hasten its progress and are convenient method by which some otherwise problematical areas of practice can be circumvented.”

The letter of 4th March, 2008, addressed to the Plaintiffs by the Defendants conforms to this definition of an undertaking and therefore I find that it was nothing less than a professional undertaking.

According to the Defendant, this undertaking was altered by a letter dated 13th March, 2008, addressed to the Defendant by the Plaintiffs. The said letter read as follows –

“Dear Sirs,

RE: SALE OF L.R. NO. 14656/15 KAREN

Please refer to the above matter and especially to your letter dated 4th March, 2008.

We are now instructed that you have successfully transferred the above property unto your client's name.

Kindly therefore, furnish us with your cheques for the balance of Kshs.3,600,000/= made out in our client's name.”

The following day, the Defendant complied and wrote out a cheque for Kshs.2,600,000/= in the Plaintiff's client's name. I suppose it was the request to make the cheque payable directly to the Plaintiff's client which the Defendant construes as an alteration of the undertaking. However, given that the cheques was payable to the Plaintiffs, and the instructions to make a cheque payable to the Plaintiff's client emanated directly from the Plaintiff himself, it is overstressing matters to allege that such a request was an alteration of the undertaking. Indeed, the Defendants did not

raise any objection to that request but complied except that he did not give a cheque for the full amount but retained a balance of Kshs.1,000,000/=. In my opinion, there was no alteration of the undertaking as alleged or at all.

The final issue is whether this undertaking should be enforced. The only ground raised by the Defendant as to why this undertaking should not be enforced is that a professional undertaking may not be enforced where there is lawful justification. According to him, the Plaintiff's client unlawfully and unjustifiably assaulted the Defendant on 27th March, 2008 and that the Defendant was entitled to exercise a lien over the Plaintiff's client's property at common law, and that this is what the Defendant is doing. Can the Defendant lawfully do so? In the first instance, it should be noted that the professional undertaking was between the Advocates and none of the clients was party to such an undertaking. For want of better language, there was no "privity of undertaking" between the Plaintiff and the Defendant. The Defendant cannot, therefore, purport to exercise a lien over the Plaintiff's client's property since that client was not privy to the undertaking. The undertaking was of a purely professional nature between the Advocates as Advocates, and is enforceable between them as such. The undertaking given by the Defendant Advocate was unambiguous, unequivocal and binding on him. He cannot, thereafter, qualify such an undertaking on account of some extraneous matters between himself and the Applicant's client. The alleged circumstances under which the Defendant purports to exercise a lien over the Plaintiff's client's money were non-existent at the time of the undertaking and, even if they were in existence, they are extraneous to the Advocate's undertaking in his professional capacity. The undertaking stands out as a contract between the Advocates themselves, and it was not contingent upon any other terms. The Defendant's claim to exercise a lien over the Plaintiff's client's money is therefore misguided and is not enforceable. But the Defendant is bound by his professional ethics to honour the undertaking to his fellow Advocate.

For the above reasons, I find that the Plaintiff is entitled to the orders sought, and the only issue is whether he is entitled to interest on the money which is the subject of the undertaking. The Defendant has withheld the money from March, 2008, and justice demands that he should pay interest. As no particular rate was agreed upon, I shall order interest at Court rates. I accordingly enter judgment for the Plaintiff in the following terms –

- (a) The Defendant shall within thirty (30) days of the delivery of this judgment honour his professional undertaking contained in his letter dated 4th March, 2008 by paying the Plaintiff the balance of the purchase price in the sum of Kshs.1,000,000/= together with interest thereon at Court rates from the date of the filing of this suit.***
- (b) The Plaintiff shall also have the costs of this suit.***
- (c) The case be mentioned on a date to be given by the Court for further orders as may be necessary.***

Orders accordingly.

Dated and delivered at Nairobi this 21st day of May, 2010.

L. NJAGI
JUDGE