



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 104 of 2008

T/A J.N. MBUTHIA & CO. ADVOCATES .....  
PLAINTIFF

VERSUS

DASON MURIITHI MURAGURI

ONESMUS MWANGI MURAGURI

T/A MURAGURI AND MURAGURI ADVOCATES ..... DEFENDANTS

JUDGEMENT

The defendants practicing law under the name and style of Muraguri & Muraguri advocates gave a professional undertaking to the plaintiff requesting the release of the discharge of charge and title documents in respect of **LR MURANG'A MUNICIPALITY/BLOCK3/369** which were charged by Consolidated Bank. The defendant intended to use the titles to secure a loan from Equity Bank who had agreed to advance some facilities to the defendant's client. The defendant gave a professional undertaking in the following terms:

***“To enable us effect the charge to the EQUITY BANK we are kindly asking you to release the title document of the above property to ourselves ON OUR PROFESSIONAL AND IRREVOCABLE UDNERTAKING to pay the total balance of the loan WITHIN 14 DAYS from the date of the charge in the favor of the Equity Bank”***

The plaintiff accepted the professional undertaking by a letter dated 6<sup>th</sup> October 2006 on condition that the loan outstanding as at 29<sup>th</sup> October 2006 amounting to Ksh.3.504,915.45/- which continued to accrue interest would be paid. It was not until 2<sup>nd</sup> April 2007 when the defendant forwarded the cheque of Ksh.3.504,915.45/-. The plaintiff has now taken out an originating summons under order 52 of rule 7(1) b seeking the enforcement of the undertaking given by the defendant. The plaintiff is particularly seeking for an order that the defendant be ordered to honor their professional undertaking given vide their letter of 5<sup>th</sup> October 2006 and be ordered to pay a sum of Ksh.550,779.63/-. Secondly in default, the court be pleased to allow an enforcement of the professional undertaking.

The application is supported by the affidavit of **Jeremiah Ndungu Mbuthia** who has given a detailed account of how he forwarded the title documents to the defendant against their professional undertaking to pay the balance outstanding. The amount outstanding as at 29<sup>th</sup> October 2006 was Ksh 3.504,915.45/- which continued to accrue interest until settlement. The settlement was made by a cheque sent on 2<sup>nd</sup> April 2007, the defendant were supposed to settle the entire account which they failed to do even after demand was made they refused to settle.

This application was opposed, the defendants contends their professional undertaking was for a sum of Ksh.2.103,017 according to the letter dated 5<sup>th</sup> October 2006. The claim for the sum of over 3 million was an after thought and was never disclosed to the defendant at the time of giving professional undertaking. Moreover proper accounts were not taken and the statement sent to the defendant included

monies from other accounts like Mwea Farmers Rice which had nothing to do with the defendant. The cheque of Ksh.3.504,915 was sent by the defendants in good faith because the amount had not been disclosed. Both the defendants and the plaintiff filed written submissions and the questions asked particularly by the defendant is whether the title document were forwarded to the defendant on the strength of the defendants letter dated 14<sup>th</sup> July 2006, whether the professional undertaking was unequivocal, and whether the inclusion of independent accounts in the name of Mwea Farmers rice can form part of the undertaking.

I have analyzed the rival submissions and the pleadings herein, I find the letter by the defendant dated 14<sup>th</sup> July 2006 and 5<sup>th</sup> October 2006 contains an unequivocal professional undertaking to pay the balance of the loan within 14 days. It is not clear the actual date when the documents were released to the defendants, what is clear is that they were forwarded and the discharge of charge was registered on 13<sup>th</sup> November 2006. However, the balance of the loan was not paid until 2<sup>nd</sup> April 2007 when the defendant forwarded a cheque of Ksh.3.504,915.45/-.

The defendant's professional undertaking was to the effect that the balance would be paid within 14 days of the registration of the charge in favor of their client. The defendants were therefore in breach of the professional undertaking because the discharge of charge and charge were registered on 13<sup>th</sup> November 2006 from the 27<sup>th</sup> of November 2006 until 2<sup>nd</sup> April 2007. The defendants are liable to pay the interest on the loan account from the time the documents were forwarded until the account was settled. The accounts that was to be settled by the professional undertaking was the loan account held by the Eliud Munene Rigu T/a Erick Motors and Contractors which was secured by a property known as MURANGA MUNICIPALITY BLOCK3/369. The defendants cannot settle the account outstanding under Mwea Farmers Rice.

Accordingly, the plaintiff is ordered to honor the professional undertaking and settle the balance on the loan account within a period of thirty (30) days. Failure to do so, the plaintiff would be entitled to enforce the professional undertaking. The plaintiff shall also have the costs of this suit.

JUDGMENT READ AND SIGNED ON 25<sup>TH</sup> NOVEMBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**