



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL COURTS)
Civil Case 623 of 2008

PARIS FELGONE KOMBE..... PLAINTIFF
VERSUS
ASHANA RAIKUNDALIA
T/A RAIKUNDALIA & CO.ADVOCATES.....DEFENDANT

JUDGMENT

The plaintiff filed this suit by way of originating summons seeking to enforce a professional undertaking allegedly given by the defendant to the plaintiff's advocate, Mssrs Eboso & Wandago Advocates to refund the sum of Kshs.1.6 million which was deposited with the defendant in her capacity as a stakeholder in an agreement which was entered between the plaintiff and one Rajendrakumar Govindji Karsandas Karia, which was subsequently rescinded. According to the plaintiff, the agreement was rescinded in April 2008. Thereafter the plaintiff requested the defendant to refund the sum of Kshs.1.6 million that she was holding as a stakeholder. It was the plaintiff's case that pursuant to the said request, the defendant did on 10th June 2008, issue the plaintiff with a cheque drawn on the defendant's clients' account which upon presentation to the bank, was dishonoured. It was in that regard that the plaintiff, through her advocate, did write a letter to the defendant demanding payment of the said sum of Kshs.1.6 million. According to the plaintiff, in response to the letter, the defendant issued a professional undertaking to pay the said amount by the close of business on 18th July 2008. The defendant did not honour her undertaking. It was the plaintiff's case that to date, the defendant had only paid to her the sum of Kshs.300,000/= leaving a balance of Kshs.1.3 million which is yet to be paid. It was in that respect that the plaintiff was seeking the court's intervention to enforce the professional undertaking given by the defendant.

There is evidence on record that the defendant was served with the originating summons. She however failed to enter appearance. Neither did she file any papers in opposition to the plaintiff's suit. The plaintiff sought and was granted directions by the court to the effect that the hearing of the case would be disposed off by the parties making oral submissions. The defendant was again served with the hearing notice on the date that the case was fixed for hearing i.e. 13th November 2009. The defendant failed to make an appearance. The hearing of the plaintiff's case proceeded, the absence of the defendant notwithstanding. Mr. C. N. Kariuki for the plaintiff made oral submissions urging the court to find in favour of the plaintiff.

I have carefully read the pleadings of the plaintiff in this suit. I have also considered the submissions made by counsel for the plaintiff. Under **Order LII Rule 7** of the **Civil Procedure Rules**, this court has power to make an appropriate order with a view to enforcing a professional undertaking given by an advocate. In the present suit, the plaintiff adduced uncontroverted evidence which established to the required standard of proof on a balance of probabilities that she indeed paid to the defendant the sum of Kshs.1.6 million as a stakeholder in an agreement for the purchase of land which latter was rescinded. As a stakeholder, the defendant was expected to refund the said purchase consideration deposited with her. According to the evidence adduced, the defendant issued a cheque to the plaintiff, which upon presentation to the bank, was dishonoured.

It is professional misconduct for an advocate to issue a cheque drawn on her clients' account which does not have funds to cover such cheque. Upon being notified of the bouncing of the cheque, the defendant gave professional undertaking in her letter dated 14th July 2008 undertaking to pay the said sum before the close of business on 18th July 2008. In the said letter, the defendant gave the following unequivocal professional undertaking:

“Further to the telephone conversation between the undersigned and your Mr. Wandago, we hereby give you our professional undertaking to pay the above-referenced amount due to your client by the close of business on Friday 18th July 2008.”

The letter was referenced:

“RE: KSHS.1,600,000/= - DEPOSITED WITH US BY MS PARIS FELGON ATIENO”.

As stated earlier in this judgment, the defendant, though served, did not file any papers in opposition to the plaintiff's suit. The plaintiff states that out of the said sum of Kshs.1.6 million, she was only paid the sum of Kshs.300,000/=.

In the premises therefore, I direct the defendant to honour her professional undertaking by paying the plaintiff the sum of Kshs.1.3 million within fourteen (14) days of the service of this court's decision. In default thereof, the plaintiff shall be at liberty to execute against the defendant. It goes without saying that the plaintiff shall be paid the costs of the suit. It is so ordered.

DATED AT NAIROBI THIS 25TH NOVEMBER 2009

L. KIMARU
JUDGE