

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

Civil Suit 533 of 2007 (OS)

KIMONDO GACHOKA & CO. ADVOCATES.....PLAINTIFF

VERSUS

JOAKIM KIARIE KAMERE T/A KIARIE KAMERE & CO. ADVOCATES....DEFENDANT

RULING

The defendant is an advocate of the High Court of Kenya trading as Kiarie Kamere & co. Advocates. They were acting for M/S EVG-THREE D Construction Systems Limited (purchasers) in a sale transaction of a property known as LR. No.12610/4. The plaintiff herein M/S Kimondo Gachoka & Co. Advocates were the advocates acting for the vendor M/S Matunda Estates Limited. It was agreed that the vendor shall sell and the purchaser shall buy the said property at an agreed price of Kshs.100 million. Through a letter dated 28th March 2007, the firm of Kiarie Kamere & Co. Advocates gave a professional undertaking to forward and pay a sum of Kshs.84 million upon the successful transfer of the property to the purchaser and the registration of the charge in favour of Development Bank of Kenya. The undertaking was given to the firm of Kimondo Gachoka & Co. Advocates. It appears substantial part of the money was paid in bits and pieces to the Advocate for the vendor or to the vendor directly leaving a balance of Kshs.45,900,000/=.

It is contended that pursuant to and on reliance upon the defendant's undertaking, the plaintiff forwarded the necessary completion documents and as such facilitated the transfer of the subject property and the subsequent charge to **Development Bank of Kenya** as per the terms of the letter of undertaking on the 28th March, 2007. The Advocate for the purchaser forwarded a cheque of Kshs.51,900,000/- dated 31st May, 2007 drawn in favour of Kimondo **Gachoka** & Co. Advocates but the same was dishonoured. It is alleged that attempts to rectify the situation or issue a fresh and proper cheque has been unfruitful. However it is clear subsequent to the dishonour, the purchaser paid a sum of Kshs.6 million leaving a balance of Kshs.45,900,000/=. In this suit the defendant has been sued for that amount, which is alleged enforcement of the undertaking given through the letter dated 28th March, 2007.

The defendant has now filed an application dated 28th January, 2008 seeking to join **M/S EVG-THREE D Construction Systems Limited** as a 2nd defendant in this suit. It is contended by the applicant that the professional undertaking given in favour of the plaintiff was overtaken by events when the purchaser and the plaintiff started dealing directly regarding the balance of the purchase price and passed the same directly to the plaintiff. And that when the cheque of Kshs.51,900,000/= was dishonoured, the plaintiff and the intended 2nd defendant agreed on how to liquidate the said balance and several payments were subsequently made by the proposed 2nd defendant directly to the plaintiff without involving the defendant.

Mr. Nyang'au learned counsel for the applicant submitted that the professional undertaking was spent and/or overtaken by events when the plaintiff and the purchaser entered into separate arrangements contrary to the earlier arrangements between the parties. And that it is therefore necessary that the 2nd defendant be joined to this suit as its presence is necessary to enable the court to completely and effectively settle all questions involved in this suit.

Mr. Kimondo learned counsel for the respondent submitted that the cause of action in this suit is failure to honour a professional undertaking by a defendant to the plaintiff in the sum of Kshs.45,900,000/=.

And that there is no cause of action between the plaintiff and the intended 2nd defendant. He contended that the very nature of the Originating Summons is that this court is being asked to look into the conduct of an Advocate as an officer of the High Court of Kenya and to enforce an undertaking.

I have considered the application and the submissions made by the learned counsels for the parties herein. It is clear that the case between the plaintiff and the defendant relates to a professional undertaking given by an Advocate in the course of a sale transaction to another advocate. On 6th March 2008 this court gave direction on the plaintiff's Originating summons that the Originating Summons would be heard by way of affidavits. **Mr. Kimondo** learned counsel for the plaintiff submitted that if this court allows joining the 2nd defendant in this suit, such act would completely complicate the procedure already given. No doubt that it is admitted that the defendant gave a professional undertaking on behalf of the intended 2nd defendant. The Advocate and/or the intended 2nd defendant gave a cheque in satisfaction of professional undertaking which was dishonoured. It is clear that the defendant is acknowledging that he was never in possession of the money before he gave an undertaking. In my understanding the present case is distinct and unique because it involves the conduct and relationship between two officers of this court. I appreciate that there is a pending suit which is related to the issues for consideration in this application. And that there is real danger that any comments made in this application on the issues pertinent to the main suit would greatly prejudice the intended determination of the suit.

The point for determination is whether the 2nd intended defendant is a necessary party for the determination of the real matters in dispute between the plaintiff and the defendant. I agree that the intended 2nd defendant is related to the issues that brought this dispute. However, in my humble view the intended party is not a party whose presence before this court may be necessary in order to enable this court effectually and completely adjudicate upon and settle all questions involved in this matter. The question for determination in this suit is whether the defendant gave a professional undertaking to remit certain monies after the completion of the subject sale transaction. The court will be called upon to determine the circumstances surrounding the sale transaction and whether each party fulfilled its obligation towards the other. The defendant in the alleged professional undertaking undertook to forward the balance of the purchase price upon successful registration of the transfer to the purchaser and registration of the charge in favour of **Development Bank of Kenya**. In this application, the defendant contends that the professional undertaking was spent or overtaken by events due to the conduct of the plaintiff and the purchaser. They also contend that the plaintiff initiated and entered into a separate arrangement with the purchaser thereby removing the defendant from performing their obligation as given in the letter dated 28th March 2007.

It is clear in my mind that having analyzed the issues for consideration in this suit that the presence of the intended 2nd defendant would create a situation where the court would be unable to determine the issues between the plaintiff and the defendant. The simple issue in this matter is whether there is a valid professional undertaking given by the defendant in favour of the plaintiff. And whether the said professional undertaking is enforceable against the defendant. The court in addressing such a simple matter would not need and/or require the presence of the intended 2nd defendant. I therefore think that the intended 2nd defendant's presence will not assist this court in order to determine the real issues in dispute between the parties herein. In short it is my decision that the intended 2nd defendant is not a necessary party for the determination of the real matter in dispute. And that any judgement and/or decree given against the defendant would not relate to the intended 2nd defendant.

In conclusion I make a finding that there is no relief or remedy relating to or connected with the issues in dispute between the parties herein that would substantially or directly affect the intended 2nd defendant. It is my finding that all the questions or issues relating to or connected with the professional undertaking by the defendant can be resolved in this suit without the involvement or presence of the intended 2nd defendant. **In the premises it is my decision that the application has no merit and it is dismissed with costs to the plaintiff.**

Dated, signed and delivered at Nairobi this 9th day of May, 2008.

M. A. WARSAME

JUDGE