



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

Civil Case 290 of 2007

**TITUS OKUMU ALAI (also known as Tito Alai)
.....1ST PLAINTIFF**

LUCY ACHIENG OJANY ALAI.....2ND PLAINTIFF

VERSUS

JUDAH KAIRIMA MAGAMBO.....1ST DEFENDANT

SUSAN NKATHA KAIRIMA.....2ND DEFENDANT

RULING

By a plaint dated 30th May, 2007 filed on 11th June, 2007 the two Plaintiffs have sued the two Defendants for balance of purchase price for a house, herein after referred to as the suit premises, in the sum of Kshs.8,100,000/=, together with interest at 24% per annum, from 3rd January, 2007 until payment in full and for loss of rent at the rate of 60,000/= per month until judgment sum is paid or until the Defendants deliver to the Plaintiffs a clean title and possession. Alternatively the Plaintiffs seek, inclusive of rent at monthly rate of Kshs.60,000/= that the Defendants be ordered to procure cancellation of their registration as proprietors of the suit property and any other registration made thereafter.

The brief facts of the case are that the Plaintiffs and the Defendants entered into a written agreement dated 2nd August, 2006 in which the Defendants agreed to purchase, and the Plaintiffs agreed to sell, the Plaintiffs leasehold interest in

LR.NO.209/9350/9 – IR 58556 Kilimani. The purchase price was Kshs.9,000,000/=.

The Plaintiffs case is that after the Defendants paid 10% deposit, the Plaintiff's transferred the suit property to them and also gave them possession. Despite taking over the property, the balance of the purchase price has not been paid.

The Defendants admit the entire facts of the Plaintiffs case save the issue of the balance of the purchase price. The Defendants case is that they deposited Kshs.8,100,000/= with Mssrs. Mbichi Mboroki & Co. Advocates after the Advocates gave professional undertaking to release the said amount after 7 days as per paragraph B of the special conditions of the Sale Agreement dated 2nd August 2006. The Defendants contend that they have discharged their duty under the Sale Agreement and that any

claim by the Plaintiffs lies against the said firm of Advocates.

It is with this background that the Applicants have, by a chamber summons dated 27th August, 2007 expressed to be brought under Order VI Rule 13(1)(b),(c),(d) and 16 of Civil Procedure Rules, applied for the striking out of the Defendants statement of defence dated 28th June, 2007 and for judgment to be entered in favour of the Plaintiffs. There are two grounds cited as the basis of this application.

a) The said statement of defence does not answer the claim made by the Plaintiffs and is meant to delay the disposal of the suit.

b) The statement of defence does not disclose any reasonable defence and is an abuse of the process of this Honourable Court.

The application is supported by the affidavit sworn by the 2nd Plaintiff and annexures thereto, which I have considered. The application is opposed. The 1st Defendant has sworn a replying affidavit, undated but filed on 11th December 2007, with annexures thereto.

I have considered submissions by Mr. Chacha Odera for the Plaintiffs, and Mr. Macharia for the Defendants, together with the authorities cited by both Counsel, the instant applications and the pleadings filed herein. Having considered the above it emerges that the only issue in this application is whether the Defendants defence, that the Defendants paid their Advocate the balance of purchase price sought in the plaint, for onward transmission to the Plaintiffs Advocate, raises a triable issue that should entitle the Defendants to defend. The issue is whether having paid their Advocates the balance of the purchase price for onward transmission to the Plaintiffs Advocates, the Defendants were discharged from their obligation under the Agreement, if the money did not reach the Plaintiff or their Advocate.

Mr. Odera submitted that Mbichi Mboroki & Co. Advocates, hereinafter referred to as the Third Party, having been agents of the Defendants, the Defendant had a case against them. However, Counsel submitted, the Defendants are not discharged until the 3rd party released the funds. Counsel relies on the case of **KAMAU & ANOTHER VS KAHINDO MILIMANI HCCC NO.578 OF 2004** for this proposition. The case is in all forms similar to the instant case. In the cited cases, **Azangalala J**, struck out the defence for not disclosing a reasonable defence. On the issue of professional undertaking Mr. Odera submitted that it was true the Plaintiffs Advocate under the Agreement could have sued the 3rd party to enforce the said undertaking. Mr. Odera submitted that the Plaintiff had opted to sue on the primary contract which is the Sale Agreement and which was their right to do. For that proposition Mr. Odera relied on **KENYA RE VS MURIU [1995-98] I.E.A 107** where the Court of Appeal held that the Advocate who was the Respondent in the case was bound by his professional undertaking as it was unambiguous unequivocal and binding on him.

Mr. Macharia on his part sought to distinguish between a simple undertaking and the Third party's professional undertaking which he said was made under the Agreement between the Plaintiffs and the Defendants. Mr. Macharia submitted that the Third party's undertaking fell within exception envisaged in the text which is number four in the Plaintiffs list, i.e **CORDERY ON SOLICITORS ISSUE 13TH MAY, 2001**. Mr. Odera did not refer to it in his submission. The text

states in part as follows:-

“A solicitor’s liability to a third party for acts done in the capacity of solicitor acting for a client depends on the law of agency. The solicitor is agent for the client/principal, and as such would be liable to a third party in any circumstances where an agent would incur such liability. If therefore the solicitor acts without authority he may be liable to a third party for breach of warranty of authority. Similarly, a third person who has entered a direct contract with the solicitor, unaware at the time of the contract that the solicitor was acting on behalf of his client, may, on discovering the undisclosed principal (the client) choose to sue either the Solicitor (the agent) or the client (the principal). As a general rule, where the third party has entered a contract with the solicitor, knowing that the solicitor

was acting as agent for his named client, the third party must sue the client and not the solicitor. There are exceptions to this general rule, for example, where the solicitor chooses to bind himself personally to the contract. For a full discussion of the law of agency reference should be made to standard work on this subject”.

Mr. Macharia submitted that since the Third party personally bound himself in the undertaking, he should be held to account for any issues arising out of same. Mr. Macharia submitted that the issue of the Third Party undertaking was a triable issue that should be considered at the trial and therefore the Defendants should be allowed to defend. Mr. Macharia sought to distinguish **KAMAU & ANOTHER VS KAHINDO**, Supra from the instant case, on the grounds the undertaking in the instant case was qualified on the Sale Agreement and that the undertaking in the cited case it was a blanket one.

I have read the cited authority. The learned judge struck out the defence and counter claim in the suit on grounds it did not disclose a reasonable cause of action. The learned judge however did not enter judgment for the Plaintiff/Applicant since none was sought under the application. The application was made under Order VI Rule 13(1)(a) of Civil Procedure Rules.

The Defendants at paragraph 7 and 8 of their defence state as follows:-

7. The Defendants further avers that having paid all the money, the Plaintiffs Advocates Mr. Agimba of Agimba & Associates Advocates gave them the keys for the premises and the premises in vacant possession and further avers that this would not have been possible in absence of performance on the part of the Defendants.

8. Having paid all the amount through their Advocates as required by the Agreement and both their Advocates having seen it fit to legally transfer the property to the Defendants, the Defendants are legally in possession and the Plaintiffs claim only lies against the Advocates who may not have discharged their professional legal duty.

The Defendants admit that they did not make a direct payment to the Plaintiffs for the balance of the purchase price. It is admitted that the money was paid to the Third Party. In this suit it is not denied that the Third Party did not transmit the money to the Plaintiffs. It is quite clear that the Sale Agreement in this case was entered into between the Plaintiffs and the Defendants. The professional undertaking by the Defendants Advocate was an agreement between the Advocates for the two parties to the Sale Agreement, and between the Defendant and the Third Party. The Plaintiffs had no privity of contract between them and the Third Party and therefore they could not directly have sued the Third Party to recover the sum claimed. It is only the Defendant and/or the Plaintiffs Advocate under the Sale Agreement who could enforce the Professional Undertaking. In any event, the Plaintiffs had a right to sue the Defendants under the Sale Agreement as they opted to do in this case. See **KAMAU & ANOTHER VS KAHINDO**, supra.

It follows that the Defendants did not fulfill their part of the bargain under the Sale Agreement and that therefore they are liable to the Plaintiffs under the contract. It is not a reasonable defence to plead that the money was paid to a Third Party for onward transmission to the Plaintiffs. Once the Third Party failed to transmit the purchase price, the Defendants were liable to the Plaintiff. The Defendants have no reasonable defence and the same should be struck out as prayed. It is so ordered.

The Plaintiffs have prayed for entry of judgment in their favour. As noted at the beginning of this ruling, there are several prayers in the plaint.

Prayer (a) seeks the balance of the purchase price.

Prayer (b) seeks interest at 24% per annum from 3rd January, 2007.

The issue of interest is subject to contract between the parties. The contract between the parties to this suit is the Sale Agreement. Under clause E of the same it is provided as follows:-

“The rate of interest applicable shall be 10% per annum.”

Clearly the interest sought in the plaint contradicts the Agreement of the parties and cannot be allowed.

Prayer (6) seeks monthly rent. Being a special damages claim, it should be specifically proved. It cannot be entered in a summary procedure. The Plaintiffs can prosecute the case to prove it if need be.

Prayer (d) is an alternative prayer to prayer (a).

Having considered this application I order as follows:

- (a) The Defendants’ defence be and is hereby struck out with costs to the Plaintiffs.
- (b) Judgment be and is hereby entered for the Plaintiffs against the Defendants in the sum of Kshs.8,100,000/= in terms of prayer (a).
- (c) Interest at 10% per annum is granted on the judgment sum, from 3rd January, 2007 until payment in full.
- (d) The Plaintiff should have costs of the application and of the suit.

Dated at Nairobi this 6th day of June, 2008.

LESIT, J.

JUDGE

Read, signed and delivered in the presence of:

Mr. K. Macharia for the Defendants

Mr. Chacha Oraro & Co. Advocates for the Plaintiffs

WARSAME

JUDGE