



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
MISCELLANEOUS CIVIL SUIT NO 965 OF 2003

FEISAL SHARIFF MOHAMMED PLAINTIFF

VERSUS

DUBAI BANK KENYA LIMITED DEFENDANT

JUDGMENT

The Plaintiff has filed this application under Order XXXVI Rule 3A Civil Procedure Rules and Sections 98 and 3A of the Civil Procedure Act. The application seeks delivery to M/s Barclays Bank of Kenya Limited, and or to M/s Waruhiu K'Owade & Njenga or to this Honourable Court certain documents in its possession or power.

Mr Wamalwa argued the application while Mr Kiplagat opposed it.

It is common ground that Shariff Forex Bureau Company Limited are indebted to the defendant who hold a charge over L R No 209/11118/7. It is also common ground that the Plaintiff is a purchaser of the said property pursuant to an agreement of sale dated 29th April, 2003. It is further common ground that the Plaintiff paid Kshs.500,000/= towards the purchase price for the said property.

The main points in dispute between the Plaintiff and the defendant are these:-

- 1. Has the Plaintiff locus standi to bring the action against the defendant?***
- 2. Was the undertaking sought by the defendant given?***
- 3. If the undertaking was given is the Plaintiff entitled to enforce the same?***

Both counsel did not cite any case in support of their respective submissions. I have given serious consideration to the submissions made before me. I do not have to recite them here. I have also perused the Plaintiff's originating summons dated 24th November, 2003 together with affidavit in support thereof sworn by the Plaintiff on 24th November, 2003. I have gone over the numerous annexures on the Plaintiff's said affidavit and I am alive to the Replying affidavit of Faiz Kader sworn on 8th January, 2004. My answer to the dispute between the Plaintiff and the defendant is this.

Firstly, the Defendants proposed undertaking was as follows:

“We undertake to pay you the sum of Kshs.1,155,000.00 (One million one hundred fifty five thousand only) within seven (7) days of successful registration of a first charge in favour of our

customer over the above named property. If however the charge in favour of our customer will not have been registered within thirty (30) days from the date we receive from your lawyers the executed Discharge of Charge and the original title documents, we will upon demand by yourselves return to you the original title documents in the state and conditions they were in at the time of being forwarded to us.”

The undertaking that was made by M/s Barclays Bank of Kenya Limited was this:-

“We undertake to pay you the sum of Kshs.1,155,000.00 (One million one hundred fifty five thousand only) together with interest thereon at prevailing market rates within fourteen (14) days of successful registration of a first legal charge in favour of our customer over the above named property. If however the charge in favour of our customer will not be registered within (90) days from the date we receive from our lawyers the executed Discharge of Charge and the original title documents we will upon demand by yourselves return to you the original title documents in the state and condition they were in at the time of being forwarded to us.”

A glance at the proposed undertaking and the undertaking that was finally given shows that the undertaking given fell far short of what the defendant wanted.

For instance the payment of the sum owed was to be made within 7 days yet the undertaking given provided for 14 days. The registration of the security documents was to be effected within 30 days the undertaking provided for 90 days.

Surely, the defendants cannot be said to have failed to comply with an undertaking which he had not proposed or subsequently agreed to.

In any event Barclays Bank of Kenya Limited is not a party to these proceedings. We cannot know whether it is still prepared to furnish a further undertaking.

For the court to make the orders sought in the Plaintiff's Originating Summons it would cease to be an arbiter for disputes and will descend into the arena of play that has the parties hereto as players and other parties that are not properly before it.

I believe I have answered the second issue for resolution posed above in favour of the defendant. This alone is enough to dispose of the Plaintiff's application dated 24th November, 2003 which stands dismissed with costs.

I do not have to decide the question of locus. Orders accordingly.

Dated at Nairobi this 13th day of February, 2004.

F. AZANGALALA

JUDGE

13.2.2004