



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 149 OF 2000 (O.S.)

G. KAMONDE ADVOCATE.....PLAINTIFF

Versus

ISEME, KAMAU & COMPANY

ADVOCATES.....DEFENDANTS

JUDGMENT

This is an application made by way of an amended Originating Summons, made under order LII Rule 7(b).

The applicants are G. Kamonde advocates, acting for the vendor of the property known as LR No.209/12251 Nairobi, in a sale transaction whose agreement was dated 22nd April 1999. The respondents are Iseme, Kamau & Company advocates, who acted for the purchaser in the said transaction.

The application is based on an alleged professional undertaking, given for the payment of Shs.1,350,000.00, which was the balance of the purchase price, and which undertaking, the applicant contends, the respondents have not honoured.

The applicants now seek orders to compel the respondents to honour the said undertaking by paying the sum of Shs.1,350,000.00 plus interest thereon at the rate of 23% p.a., or at such other rates as the court may deem reasonable. In default, that the undertaking be enforced against the respondents. The applicants also pray for costs of the suit.

The respondents oppose the application. It is their contention, that there is no binding undertaking to warrant the granting of the orders being sought herein. It was Mr. Iseme's submission that the application lacks in merit, as there is no binding and enforceable undertaking.

Upon perusal of the pleadings herein I find that the applicants forwarded Documents of Title to facilitate the transfer of the property, under cover of their letter of 21st June 1999. They stated therein that the documents were forwarded to the respondents

“Upon your professional undertaking to pay ... the balance of the purchase price within seven (7) days upon registration of transfer in favour of your client”.

It was the submission of Mr. Kamonde, that when the respondents accepted the documents and

proceeded to lodge them for registration, they became bound by the terms of the aforementioned letter. Further, that they had a choice, and could have returned the documents if the terms of the undertaking were not acceptable to them, but having proceeded with the registration, it amounted to acknowledgement and acceptance of the terms of the said undertaking which could thus be enforced.

Order LII rule 7(b) under which this application is made, stipulates that:

“(1) An application for an order for the enforcement of an undertaking given by an advocate shall be made

(a).....

(b) in any other case, by originating summons in the High Court.”

In my view, the operative words are to be found in sub-rule (1) of the rule, which clearly indicates that the enforcement shall be of an undertaking given by an advocate. That advocate should be the one against who the orders are being sought. Further, if the court does find that the advocate gave an undertaking, it is imperative that it be one that is clear and unequivocal.

This view is further supported by “Cordery on Solicitors”, 8th Edn. at par 110 which stipulates that:

“The court has a discretion to exercise its summary jurisdiction, and will do so only in clear cases. Whether an undertaking given by a solicitor to the court, his client or a third party may be enforced against him personally will depend upon the fact of each case, but the undertaking must be a personal undertaking and given by the solicitor. It must clear in its terms. The whole of the undertaking must be before the court; and the undertaking must be one which is capable of being enforced ab initio.”

In this instance, where the orders being sought are of a summary nature, I find that save for accepting the documents and lodging them for registration, the respondents did not give any undertaking at all. That being the case then no orders can be granted under the aforesaid rule.

In the circumstances, the application thus fails, and it is hereby dismissed. The applicants shall bear the costs of the suit.

Dated and delivered at Nairobi this 23rd day of January 2001.

JEANNE GACHECHE

COMMISSIONER OF ASSIZE

Delivered in the presence of Mrs. Kamau holding brief

Mr. Kamonde for the apoplicant, & Mr. Iseme for the respondents.