



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 144 OF 2010**

**LACTON MURITHI NJOKA.....PLAINTIFF**

**VERSUS**

**TRUSTEES NATIONAL SOCIAL SECURITY FUND.....DEFENDANT**

**RULING**

In a judgment delivered on 28<sup>th</sup> January, 2021, the court made orders that it believed would lay this long standing dispute to rest. It appears that that was not going to be. This turn of events is however not out of the ordinary. It is normal in adversarial legal system like ours. As far as this court is concerned, the judgment and orders made on 28<sup>th</sup> January, 2021 are clear and require no interpretation. The orders were on the following terms;

**“1. An injunction is issued restraining the defendant by itself or through its servants or agents from alienating, disposing, charging, selling and/or in any other manner whatsoever dealing with all that property known as Nairobi/Block146/40 Hazina estate subject to the orders set out hereunder.**

**2. The plaintiff shall within forty-five (45) days from the date hereof give the defendant a fresh undertaking from Central Bank of Kenya(CBK) or its advocates that CBK shall pay to the defendant a sum of Kenya Shillings Four Million Three Hundred and Forty-Eight Thousand Eight Hundred and Two (Kshs. 4,348,802/-) within 14 days of registration of Nairobi/Block146/40 Hazina estate in favour of the plaintiff and a Charge against the title in favour of CBK.**

**3. Upon receipt of the undertaking referred to in two (2) above, the defendant shall within a period of sixty (60) days from the date hereof release to the plaintiff through his advocates on record the following documents;**

**(i) Original Certificate of Lease in respect of Nairobi/Block146/40.**

**(ii) Original Lease in respect of Nairobi/Block146/40.**

**(iii) A transfer duly executed in triplicate in favour of the plaintiff unless the same has already been delivered to the plaintiff.**

**(iv) Rent Clearance Certificate, subject to the payment by the plaintiff of the rent that has accrued since August, 2001 less any payment already made on account upon being advised of the same.**

**(v) Rates Clearance Certificate, subject to the payment by the plaintiff of the rates that have accrued since August, 2001 less any payment already made on account upon being advised of the same.**

**(vi) Consent to Transfer if necessary.**

**(vii) Coloured passport size photographs of the defendant’s duly authorised signatories to the transfer.**

**(viii) A copy of the defendant’s PIN Certificate.**

**4. In the event that the plaintiff fails to comply with order two (2) above within the prescribed time, the injunction granted in order one (1) above shall stand discharged without any further reference to the court.**

5. The defendant's counter-claim is dismissed.

6. The defendant shall pay the plaintiff's costs of the suit."

What is before me is a Notice of Motion application dated 29<sup>th</sup> April, 2021 by the plaintiff seeking directions and/or interpretation of the judgment that was delivered by the court on 28<sup>th</sup> January, 2021. The dispute between the parties relates to the interpretation of clause 2 of the orders of 28<sup>th</sup> January, 2021 which I once again reproduce hereunder;

**"The plaintiff shall within forty-five (45) days from the date hereof give the defendant a fresh undertaking from Central Bank of Kenya(CBK) or its advocates that CBK shall pay to the defendant a sum of Kenya Shillings Four Million Three Hundred and Forty-Eight Thousand Eight Hundred and Two (Kshs. 4,348,802/-) within 14 days of registration of Nairobi/Block146/40 Hazina estate in favour of the plaintiff and a Charge against the title in favour of CBK."**

The order is clear that either the Central Bank of Kenya(CBK) or its advocates was to give an undertaking that CBK would pay to the defendant a sum of Kshs. 4,348,802/- within 14 days of registration of Nairobi/Block146/40 Hazina estate (the suit property) in favour of the plaintiff and a Charge against the title in favour of CBK. Pursuant to that order, CBK wrote to its advocates Musyoka Wambua & Katiku Advocates on 5<sup>th</sup> February, 2021 expressing its willingness to give an undertaking to pay to the defendant a sum of Kshs. 4,348,802/- upon registration of transfer and a charge in its favour against the suit property. On 15<sup>th</sup> February, 2021, the said firm of Musyoka Wambua & Katiku Advocates wrote to the defendant's advocates giving an undertaking on behalf of CBK that they shall pay to the defendant a net sum of Kshs. 4,348,802/- within 14 days of receipt of the transfer and charge instruments in their offices duly registered. On 17<sup>th</sup> February, 2021, the firm of Musyoka Wambua & Katiku Advocates confirmed to the defendant's advocates that it had instructions to act for CBK and to give a professional undertaking to pay the said sum of Kshs. 4,348,802/- to the defendant. On 8<sup>th</sup> March, 2021, the firm of Musyoka Wambua & Katiku Advocates gave to the defendant another undertaking on behalf of CBK on the following terms:

**"On our client's instructions, we hereby give you our irrevocable professional undertaking to pay to you a net sum of Kenya Shillings Four Million Three Hundred and Forty-Eight Thousand Eight Hundred and Two (Kshs. 4,348,802/=) only in full and final settlement of the outstanding loan balance within Fourteen (14) days of receipt of the transfer and charge instruments in our offices duly registered in favour of the purchaser and the financier respectively."**

On 10<sup>th</sup> March, 2021, the defendant's advocates wrote to the firm of Musyoka Wambua & Katiku Advocates proposing that the undertaking that had been given be amended so that it was the CBK to pay the said sum of Kshs. 4,348,802/- to the defendant and not for the firm of Musyoka Wambua & Katiku Advocates to pay the same to the defendant's advocates, P. K. Mbabu & Co. Advocates. On 30<sup>th</sup> March, 2021, CBK wrote to the firm of Musyoka Wambua & Katiku Advocates confirming that the said sum would be paid directly to the defendant's account. The contents of this letter from CBK was communicated to the defendant's advocates on the same day. On 31<sup>st</sup> March, 2021, the defendant's advocates wrote to the plaintiff's advocates contending that the undertaking was supposed to be given within 45 days and as such the time for such undertaking had lapsed. The defendant's said advocates contended further that in terms of the said judgment of 28<sup>th</sup> January, 2021, the defendant was now at liberty to deal with the suit property as it deemed fit.

On 26<sup>th</sup> April, 2021, the defendant wrote to the plaintiff directly demanding vacant possession of the suit property. In the letter, the defendant indicated that if vacant possession was not delivered within 7 days as demanded, the defendant shall repossess the property at the plaintiff's own costs. It is this threat that prompted the filing of the present application.

In response to the application, the defendant filed a replying affidavit sworn by its acting General Manager, Austin Ouko on 10<sup>th</sup> May, 2021. In the affidavit, the defendant contended that the plaintiff was supposed to give an undertaking by 13<sup>th</sup> March, 2021. The defendant contended that the defendant had not received an acceptable undertaking as at that date and as such the plaintiff was in default of the terms of the judgment delivered on 28<sup>th</sup> January, 2021. The defendant contended that all the letters of undertaking that were given by the plaintiff's advocates after 13<sup>th</sup> March, 2021 were in vain. The defendant contended that following the default on the part of the plaintiff, the injunction that had been issued against the defendant lapsed and as such the defendant was within its right to demand possession of the suit property from the plaintiff.

What I need to determine is whether the plaintiff furnished the defendant with an undertaking in accordance with the terms of the orders given in the judgement delivered on 28<sup>th</sup> January, 2021 the relevant part of which I have reproduced above. My view on the matter is as follows: The purport of clause 2 of the orders given in the judgment of 28<sup>th</sup> January, 2021 was that the defendant be given an undertaking for the payment of Kshs. 4,348,802/- as a condition for the release of the completion documents. The undertaking was to be given within 45 days from the date of the judgment. I am in agreement with the plaintiff that the undertaking that was given to the defendant by the firm of Musyoka Wambua & Katiku Advocates for CBK on 8<sup>th</sup> March, 2021 was sufficient for the purposes of the orders given by this court on 28<sup>th</sup> January, 2021. This undertaking was given within the 45 days that was prescribed by the court. The defendant's advocates request on 10<sup>th</sup> March, 2021 that the said undertaking be amended so that the payment be made by CBK to the defendant directly and not through the defendant's advocates did not nullify the undertaking that was given on 8<sup>th</sup> March, 2021 aforesaid. In my view, the confirmation that was given by CBK through a letter dated 30<sup>th</sup> March, 2021 that it will make the payment of Kshs. 4,348,802/- directly to the defendant's account was not a new undertaking. It was merely a concession to the defendant's request that the payment be made directly to its account rather than through its advocates.

It is surprising that after the plaintiff conceded to that request and obtained a confirmation from CBK that it will make payment directly to the defendant's bank account, the defendant turned around and claimed that the plaintiff had defaulted in giving the undertaking. I am of the view that the defendant has acted in this matter in bad faith which has contributed to further delay in the closure of this dispute that has been conclusively determined by the court. For that reason, I will condemn the defendant to pay the costs of the present application.

Due to the foregoing, I hereby make the following orders;

1. Pursuant to the professional undertaking given to the defendant's advocates, P. K. Mbabu & Co. Advocates by the firm of Musyoka Wambua & Katiku Advocates for CBK on 8<sup>th</sup> March, 2021 and the confirmation by the CBK given on 30<sup>th</sup> March, 2021 that it will make the payment of Kshs. 4,348,802/- directly to the defendant's account, the defendant shall forthwith release to the plaintiff the completion documents in accordance with clause 3 of the orders made in the judgment of 28<sup>th</sup> January, 2021.
2. The costs of the application dated 29<sup>th</sup> April, 2021 shall be paid by the defendant.

**DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021**

**S. OKONG'O**

**JUDGE**

**Ruling read virtually through Microsoft Teams Video Conferencing platform in the presence of;**

Ms. Kirui h/b for Mr. Kwengu for the Plaintiff

Mrs. Mbabu for the Defendant

Ms. C. Nyokabi-Court Assistant