



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. CASE NO. 69 OF 2019(OS)

(FORMERLY, NAIROBI ELC. NO. 1218 OF 2014 (OS))

**IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF A PROFESSIONAL UNDERTAKING BY MESSRS
GAKURU & CO. ADVOCATES TO MESSRS MILLIMO, MUTHOMI & COMPANY ADVOCATES**

BENSON W. MILLIMO AND STEPHEN M. MUTHOMI

P/A MILLIMO, MUTHOMI & COMPANY ADVOCATES.....APPLICANT

VERSUS

SAMUEL GAKURU P/A GAKURU & CO. ADVOCATES.....RESPONDENT

JUDGEMENT

By an Originating Summons dated the 15th September, 2014, brought pursuant to Sections 3 and 3A of the Civil Procedure Act as well as Order 37 including 52 Rule 7 of the Civil Procedure Rules; the Applicant seeks for cancellation of the title of land parcel number Kajiado/Kaputiei North/75, hereinafter referred to as the 'suit land', in the name of the Martha Muthoni Mburu. It further seeks for enforcement of the professional undertaking for remittance of Kshs. 24 million with interest of 2% above the commercial rate from 16th August, 2013, until payment in full, as against the Respondent in respect to transaction over the suit land.

The originating summons is premised on the grounds on the face of it and the supporting affidavit of STEPHEN MWANIKI MUTHOMI who is an Advocate in conduct of the transaction herein. He explains that vide a Sale Agreement dated the 24th January, 2005, one Martha Muthoni Mburu was the purchaser of the suit land, owned by Fidei Holdings Limited, a wholly owned subsidiary of United Insurance Company Limited (under statutory management) for the consideration of Kshs. 24,000,000/=. He contends that prior to releasing the completion documents, they sought from the Respondent, a written undertaking that they will forward the purchase price of Kshs. 24,000,000/= within fourteen (14) days of successful registration and transfer of the title documents in favour of their client. Further, the Respondent undertook that if the sum of Kshs. 24,000,000 is not paid within the stated period from the date when the originals of title documents would be deemed to be received in their offices, then they shall upon demand, return the documents to the Applicant in the same condition in which they were delivered to themselves. He confirms that on 3rd May, 2013, the Respondent wrote to them and forwarded the proposed professional undertaking adopting the same with minor amendments as their own unequivocal undertaking till conclusion of the transaction. Further, they undertook to forward the purchase price within thirty days of registration of the transfer in favour of the purchaser. He avers that based on the Respondent's undertaking, they caused their client to facilitate registration of the title in favour of the Respondent's client. Further, the registration was concluded and a title was issued to the purchaser on 16th July, 2013, and the Respondent ought to have released the balance of the purchase price on or before the 16th August, 2013. He reiterates that the Respondent has failed to honour the terms of his undertaking to date yet the property has changed hands in favour of their client. Further, that the willful and deliberate non performance on the part of the Respondent is unprofessional, unlawful, without bias and meant to frustrate their client's who surrendered its land a long time ago. He insists the vendor, is at liberty to rescind the agreement as per the terms therein if the purchaser is unable to remit the balance of the purchase price as the delay herein is occasioning immeasurable losses to the Applicant.

In response to the Application, the Respondent filed two affidavits both sworn by SAMUEL GAKURU Advocate. In the replying affidavit he confirms that vide an Agreement dated the 24th January, 2005 between Fidei Holdings Limited (as vendor) and Martha Muthoni Mburu (as purchaser), the vendor sold to the purchaser the suit land at a price of Kshs. 24,000,000. Further, in the said transaction he acted for the vendor while the firm of Mwathi Njue & Co. Advocates acted for the purchaser. He explains that it was a term of the Agreement that the deposit on the purchase price being Kshs. 24,000,000 would be paid to his firm, on execution of the Agreement and the balance of purchase price being Kshs. 21,600,000/= shall be paid on completion. Further, at the time of the sale of the suit land, there was a caution registered against the said title by the Statutory Manager of United Insurance Company Limited (under statutory management). He avers that by an advertisement appearing in the Daily Nation Newspaper, the statutory manager requested parties to provide agreements for purchase of property entered into before 15th July, 2005 for verification. He states that vide a letter dated the 7th January, 2013, he informed the Statutory

Manager that the suit land was sold to Martha M Mburu in January, 2005 and forwarded a copy of the Sale Agreement dated the 24th January, 2005 to him. Further, in the said letter, he confirmed his firm had received and was then holding the entire purchase price of Kshs. 24,000,000/= which he undertook to remit to the Statutory Manager against receipt of the original title document. He claims on 17th April, 2013, he wrote to the Statutory Manager and informed him that there were matters affecting the purchase of the suit land and this included the advertisement in the newspaper placed in October 2012 including the missing land records at the registry. He reiterates that the Statutory Manager instructed the Applicant herein to act for him and vide a letter dated the 29th April, 2013, the Applicant informed him that they may surrender the title documents for the suit land subject to professional undertakings, which undertaking he confirmed through his letter dated the 3rd May, 2013. Further, vide the said letter, he sought for the Applicant to forward to him the completion documents namely original title deed, duly executed transfer in favour of purchaser, application for the Land Control Board Consent, Letter of Consent, Copies of Identity Card, PIN Certificate and Passport Size photographs of the vendor. He reaffirms that on the 28th July, 2014, the Applicant wrote to him informing him that the purchaser had successfully done the transfer of the suit land to herself and they requested for the balance of the purchase price. Further, he explains that the balance of the purchase price was to be paid from the sale of a portion of the suit land and avers that on 4th August, 2014, he wrote to Mwathi Njue & Co. Advocates seeking to know if the purchaser had sold a portion of the said land and settled the debt. He further confirms that on 6th August, 2014, Mwathi Njue & Co. Advocates wrote to him indicating that their client who was the purchaser of the suit land would require upto 31st August, 2014 to clear the balance of the purchaser price. He further reiterates that the Applicant is holding the original title documents for the suit land awaiting payment of the balance of the purchaser. He proceeded to enumerate how the balance of the purchase price would be paid to wit: Kshs. 5,000,000/= immediately and Kshs 19,000,000 to be paid on 28th February, 2015. In the further affidavit he reiterates some of his averments but insists the Applicant breached paragraph (1) of the Professional Undertaking as it did not forward to him the completion documents sought for. He further contends that since he did not receive the completion documents, he did not undertake registration of the transfer of suit land in favour of the purchaser and this was the basis of the professional undertaking. He made reference to paragraph (4) of the undertaking that had a default clause to the effect that if the sum of Kshs. 24,000,000/= was not paid and or forwarded within the stated period, then he shall upon demand, return the documents to the Applicant in the same condition in which they were delivered to him. Further, the Applicant has not demanded any documents from him because none were delivered to him. He further reiterates that the Applicant cannot enforce a professional undertaking that it flagrantly breached.

The Originating summons was canvassed by way of written submissions which were highlighted in court.

Analysis and Determination

Upon consideration of the Originating Summons, respective affidavits, annexures and rivalling submissions, the following are the issues for determination:

- Whether Messrs Samuel Gakuru Advocate, practicing as GAKURU & CO. ADVOCATES should be directed to honour the professional undertaking dated the 3rd May, 2013 and remit the purchase price of Kenya Shillings Twenty Four Million (Kshs. 24,000,000) plus interest accruing thereon at the rate of 2% p.a above the commercial rates as from 16th August, 2013 until payment in full.
- Whether the title for Kajiado/Kaputiei North/75 including any resultant subdivisions, in the name of Martha Muthoni Mburu, should be cancelled and the register rectified by reinstating Fidei Holdings Limited as its owner.

The Applicant in its submissions highlighted the law on enforcement of undertaking and relied on the following decisions: **Waruhiu K'owade & Nganga Advocate Vs Mutune Investment Limited (2016) eKLR; Nelson Andayi Havi t/a Havi & Company Advocates Vs Jane Muthoni Njage t/a J. M. Njage & Company Advocates (2015) eKLR**. It insisted that the letter dated the 3rd May, 2013 was an unequivocal binding undertaking between the Applicant and the Respondent which the Respondent has breached. Further, the Respondent has not returned the documents to the Applicant and he should be compelled to honour its obligation in the undertaking. It further submits that the Respondent should be directed to pay interest as sought by the Applicant. It insists there is undisputed evidence that the Respondent received and is withholding Kshs. 24,000,000 since the 7th January, 2013. Further, by retaining the said monies, the Respondent denied the Applicant's client opportunities available. To support these averments, it relied on the following decisions: **Naphtali Paul Radier Vs David Njogu Gachanja HCCC No. 582 of 2003'OS' and Feroz Nuralji Vs Housing Finance Company of Kenya & Another (2015) eKLR**.

The Respondent in his submissions insist since the suit land is registered under the Registered Land Act, the provisions of Order 37 of the Civil Procedure Rules as well as section 143 of the Registered Land Act bars the court from cancelling the title. He submits that the Originating Summons is bad in law and lacks merit. Further, the professional undertaking it gave to the Applicant is vitiated by the Applicant's material breaches which were highlighted. To buttress his averments, he relied on the following decisions: **Malindi Musketeers Limited V Attorney General & 2 others (2014) eKLR; Ngomeni Swimmers Limited V the Commissioner of Lands & 2 Others Malindi HCCC No. 18 of 2013 OS; Cyril J. Haroo & Another Vs Uchumi Services Limited & 3 Others (2014) eKLR; Equip Agencies Limited Vs Credit Bank Limited (2007) eKLR; Diamond Star General Trading LLC V Ambrose D. O. Rachier Advocates (2017) eKLR**.

Before I proceed with the issues cited above, I wish to provide a brief background of this matter as well as highlight an excerpt from the professional undertaking. The fulcrum of this dispute revolves around a Sale Agreement dated the 24th January, 2005 between Fidei Holdings Limited (as vendor) and Martha Muthoni Mburu (as purchaser), where the vendor sold to the purchaser the suit land at a price of Kshs. 24,000,000. Further, the firm of Mwathi Njue & Co. Advocates acted for the purchaser while the Respondent acted for the Vendor. The deposit of the purchase price being Kshs. 24,000,000 was to be paid to the Respondent firm. As per the letter dated the 7th January, 2013, (annexure '**SM 1a**') the Respondent informed the Statutory Manager that the suit land was sold to Martha M Mburu in January, 2005 and forwarded a copy of the Sale Agreement dated the 24th January, 2005 to him. Further, in the said letter, he confirmed his firm had received and was then holding the entire purchase price of Kshs. 24,000,000/= which he undertook to remit to the Statutory Manager against receipt of the original title document. I note the Sale Agreement dated the 24th January, 2005 was drawn by the Respondent.

According to the Respondent's letter dated the 7th January, 2013 to the Statutory Manager, United Insurance Co. Ltd, he stated thus: **'RE: KAJIADO/KAPUTIEI NORTH/75. We refer to the advertisement appearing in the Nation Newspaper where you request parties to provide agreements entered into before 15th July, 2005 for verification. We wish to point out that this property was sold to Martha M Mburu in January, 2005. We attach an Agreement for sale dated 24th January, 2005 to confirm this. We received and currently hold the entire purchase price of Shs. 24,000,000/= . We hereby undertake to remit to you Kshs. 24,000,000/= against receipt of the original title documents held by yourselves.'**

The Applicant responded to the said letter vide its letter dated the 29th April, 2013 where it confirmed that it would surrender the title document for the suit land to the Respondent subject to the professional undertaking which terms it provided.

The Respondent accepted the terms of the Professional Undertaking vide his letter dated the 3rd May, 2013, where he stated thus: **'We hereby confirm our undertaking to hold the documents of title in terms of 1, 2 and 4 of your letter. We do however undertake to forward to you the amount of Kshs. 24,000,000 within thirty (30) days of registration of the transfer in favour of Martha M. Mburu. In view of the foregoing please provide the following documents: Original Title Deed; Duly executed Transfer in favour of the purchaser; Application for land board consent; Letter of Consent; and Copies of Identity Card, PIN Certificate and passport size photographs of the vendor.'**

The Applicant vide its letter dated the 28th July, 2014 confirmed to the Respondent that the purchaser successfully transferred the title to herself and sought for the balance of the purchase price. The Respondent through his letter dated the 7th August, 2014 annexed a copy of a letter dated the 6th August, 2014 from messrs Mwathi Njue & Co. Advocates dated the 6th August, 2014 where they promised to settle the purchase price by 31st August, 2014.

What is not clear is how the purchaser proceeded to obtain registration of the transfer to her name on 26th July, 2013. Be that as it may, the main issue in contention is whether the Respondent is bound by the Undertaking he gave. The Respondent in his replying affidavit at paragraph 19 confirmed on oath that the balance of the purchase price would be paid by 28th February, 2015. In the further affidavit, the Respondent has made a turnaround and insists he is not bound by the undertaking since the Applicant never furnished certain completion documents to him and was not responsible for the registration of the purchaser's title. The Respondent insists, the professional undertaking dated 3rd May, 2013 cannot be enforced as the Applicant breached certain terms therein. The Respondent has however not denied that he is holding the purchase price amounting to Kshs. 24,000,000. I have highlighted the aforementioned letters so as to demonstrate that the Respondent had already confirmed that he was holding the purchase price. I note from the court records that the parties had even attempted to solve this matter out of court but in vain.

In the case of **Fidelity commercial Bank Limited -vs- Onesmus Githinji & Company Advocates (2013) eKLR** Justice Havelock held that **"An undertaking given by a solicitor is personally binding on him and must be honored. Failure to honour an undertaking is prima facie evidence of professional misconduct and the Counsel of the Law society will require the undertaking to be honoured as a matter of conduct. Although consideration for the promise will often be present, an undertaking is enforceable even if it does not constitute a legal contract.....Any ambiguity in the terms of undertaking is generally construed against the party who gave the promise. In general, no terms will be implied into a professional undertaking and extraneous evidence will not be considered."**

While in the case of **Daniel Ochieng Ogola t/a Ogola Okello & Co. Advocates v George Mugoye Mbeya t/a Mugoye & Associates Advocates & Another [2016] eKLR** where the Court held: **"In my considered view, when the defendant says that the liability of Maurice (the proposed third party) should be determined in the proceedings for the enforcement of the professional undertaking, it is akin to suggesting that the said Maurice shared in some way, in the obligations which the defendant imposed upon himself when he gave his undertaking. In my humble opinion, the proposed third party did not assume any responsibility to the plaintiff, in respect of the undertaking given on his behalf.**

The issue of the enforcement of the bond does not require the proposed third party to be enjoined to the case, before it can be effectively and conclusively determined. Indeed, it does not matter at all whether or not the advocate who gave his professional undertaking recovers the money which he had paid out in order to honour his undertaking. He must honour his bond, regardless of whether or not his client reimburses him...'

See also the case of **Nelson Andayi Havi t/a Havi & Company Advocates Vs Jane Muthoni Njage t/a J. M. Njage & Company Advocates (2015) eKLR.**

Based on the facts before Court including the annexures and terms including conditions contained in the impugned Sale Agreement noting that the purchaser already holds title to the suit land while associating myself with the quoted decisions, I find that the professional undertaking dated the 3rd May, 2013 is binding upon the Respondent. It is my considered view that the Respondent who is an Advocate was well aware of the risk he was getting into, when he signed the impugned Professional Undertaking. Further, I find that the Respondent is not being candid by attempting to extricate himself from the professional undertaking which he did through letters and even confirmed in the replying affidavit. I find that he should not complain that he is not bound by the professional undertaking since the Applicant failed to furnish the required documents to him and he is now attempting to shift the burden to the Applicant and it is my view that this won't do. As observed in the case of **Fidelity commercial Bank Limited -vs- Onesmus Githinji & Company Advocates (2013) eKLR supra**, **'Any ambiguity in the terms of undertaking is generally construed against the party who gave the promise. In general, no terms will be implied into a professional undertaking and extraneous evidence will not be considered'** *Emphasis mine.*

In the circumstance, I hold that the messrs Gakuru & Company Advocates are bound by the professional undertaking dated the 3rd May, 2013. On the issue of interest, I note the Respondent vide his letter dated the 7th January, 2013, (annexure **'SM 1a'**) informed the Statutory Manager that the suit land was sold to Martha M Mburu in January, 2005 and confirmed his firm had received and was then holding the entire purchase price of Kshs.24,000,000/= which he undertook to remit to the Statutory Manager against receipt of the original title

document. In the case of **Naphtali Paul Radier -vs- David Njogu Gachanja HCC No. 582 of 2003 (O.S)** the Judge held as follows:’ **“The defendant has withheld the plaintiff’s money from August 2002. Justice demands that he pays it with interest”**. Since it is evident that the Respondent admitted that he held the purchase price, I find that he is entitled to pay for the interest accruing on the Kshs. 24,000,000/= from 16th August, 2013 when he promised to pay the same, until payment in full.

As to whether the title for Kajiado/Kaputiei North/75 including any resultant subdivisions, in the name of Martha Muthoni Mburu, should be cancelled and the register rectified by reinstating Fidei Holdings Limited as its owner. I note the purchaser Martha Muthoni Mburu was not a party to these proceedings and the Land Registration Act is clear on instances when a party’s title can be revoked and this include if the said title was acquired by fraud, misrepresentation, illegally, unprocedurally, or through a corrupt scheme etc. Further, I concur with the Respondent that the Applicant failed to adhere to the proper legal procedure in seeking cancellation of the title to the suit land. I opine that the Applicant can still adhere to the proper legal procedure to apply for revocation of the aforementioned title. In the circumstance, I will decline to deal with this issue but direct the Applicant to file a separate suit against the purchaser seeking for cancellation of her title.

It is against the foregoing that I find the Originating Summons dated 15th September, 2014 partially successful. I will proceed to issue the following final orders:

- a) Messrs Samuel Gakuru Advocate, practising as GAKURU & CO. ADVOCATES be and is hereby directed to honour his professional undertaking given on 3rd May, 2013 to Messrs Benson W. Millimo and Stephen M. Muthomi practising as Millimo, Muthomi & Company Advocates and do within twenty one (21) days of this order remit the balance of the purchase price of Kenya Shillings Twenty Four Million (Kshs. 24,000,000) plus interest accruing thereon at court rates from 16th August, 2013 until payment in full.
- b) The costs of this Originating Summons is awarded to the Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF OCTOBER, 2021

CHRISTINE OCHIENG

JUDGE