



**Tetezi House Limited & another v Ahmednasir Abdullahi & Mahamud Asli Osman
t/a Ahmednasir Abdullahi Advocates LLP & another (Civil Suit E053 of 2023)
[2024] KEHC 11942 (KLR) (Commercial and Tax) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11942 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E053 OF 2023**

PM MULWA, J

OCTOBER 3, 2024

**IN THE MATTER OF AN APPLICATION BY JOHN MBURU AND COMPANY ADVOCATES
AN ORDER OF ENFORCEMENT OF AN UNDERTAKING GIVEN BY AN ADVOCATE**

BETWEEN

**TETEZI HOUSE LIMITED 1ST APPLICANT
JOHN MBURU & COMPNAY ADVOCATES 2ND APPLICANT**

AND

**AHMEDNASIR ABDULLAHI & MAHAMUD ASLI OSMAN T/A
AHMEDNASIR ABDULLAHI ADVOCATES LLP 1ST RESPONDENT
ANISHAB INVESTMENT LIMITED 2ND RESPONDENT**

JUDGMENT

1. This suit was commenced by way of Originating Summons dated 8th February 2023 accompanied by an affidavit sworn by John Mburu on even date. It was premised on the provisions of Order 52 Rule 7 of the Civil Procedure Rules 2010 and other enabling provisions of the law. The summons seeks the following orders;
 - i. That the 1st respondent be ordered to honour the professional undertaking of 4th July 2022 and remit the balance of Kshs. 2,185,086.00 with interest calculated at court rates from 16th September 2022.



- ii. An order for enforcement of payment of Kshs 2,185,086.00 together with interest accrued from the date of completion in the event of failure by the 1st respondent to honour the undertaking within the time the court may stipulate.
 - iii. An order of interim injunction against the 1st respondent barring the transfer of Land Reference No. 209/5533/3 to the 2nd respondent pending the hearing and determination of this application.
 - iv. The costs of the application be borne by the respondents.
2. In response to the suit Ms. Asli Osman swore the replying affidavit on 30th October 2023. She acknowledges the delay in making the payment but avers the last instalment of Kshs. 2,185,086.00 was paid on 16th February 2023. She further states the inconveniences were unforeseeable when it required the 2nd respondent to deposit the entire purchase price into its accounts. The 1st respondent disputes the issue of interest and avers that the professional undertaking did not provide for payment of interest in the event of a delay in payment. The inconveniences were beyond their control and therefore charging interest would prejudice the firm. That the applicant's claim on interest is not justified.
 3. The gist of the applicant's case is that the 2nd applicant and the 1st respondent are both advocates of the High Court of Kenya, who were engaged in a sale and purchase of Land Reference Number 209/5533/3. The 2nd applicant represented the vendor while the 1st respondent represented the purchaser. Under clause 3 of the agreement dated 16th June 2022, the purchaser paid a deposit of Kshs 42,358,187.86 upon the execution of the agreement leaving a balance of Kshs. 9,641,812.20. On 4th July 2022, the 1st respondent issued a professional undertaking that the balance of the purchase price would be paid provided the obligations of the 1st applicant were fulfilled. The 1st applicant complied with the provisions of clause 5 of the agreement, and the 2nd respondent on 31st August 2022 transferred a further sum of Kshs. 1,000,000.00. After repeated demands the 1st respondent paid the sum of Kshs. 6,456,724.00 leaving a balance of Kshs. 2,185,086.00 as of 20th January 2023.
 4. The applicant alleges the 1st respondent issued several cheques that were dishonoured. Citing the case in *Mohammed Muigai Advocates vs Daniel Orange & Company Advocates (2020) eKLR*, the applicant argues that it is entitled to payment of interest as the last instalment was paid after the institution of this suit, and also considering the length of time the Advocate held the payment.
 5. The application was heard through written submissions. The applicant's submissions are dated 2nd April 2024, while the 1st respondent's submissions are dated 28th May 2024.
 6. I have considered the application, the affidavits in support and against as well as the respective arguments by the parties in their submissions. The main issue is whether the 1st respondent should be condemned to pay interest.
 7. The 1st respondent urges the court to consider the intention of the parties. That the professional undertaking as well as the contract of sale did not have a provision for "late payment". He states that clause 12(b) of the agreement dated 16th June 2022 provided only three remedies in instances of default to wit; in case of default on the part of the purchaser the vendor would extend the time of completion, rescind the agreement and retain 10% of the purchase price paid and or sue for specific performance.
 8. It was argued for the 1st respondent that the non-action against the purchaser for specific performance meant the applicant elected to extend the time.
 9. On the other hand, the applicant avers it is entitled to interest for the delay or late payment of the purchase price.



10. The legal profession treats an undertaking as a word of honour by the advocate which binds the parties. The Black's Law Dictionary describes an undertaking as "a promise pledge, or engagement."
11. In *David Karanja Thuo t/a D.K Thuo & Company Advocates v Ishvinder Kaur Kalsi Marwa t/a Kaisi & Company Advocates* (2019) eKLR the court held that:

"An undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a Solicitor in the course of his practice, either personally or by a member of his staff; or a Solicitor as "solicitor". But not in the course of his practice, under which the Solicitor becomes personally bound. An undertaking is therefore, a promise made by a solicitor to do or refrain from doing something. In practice, undertakings are frequently by Solicitors in order to smooth the path of a transaction, or hasten its progress and are convenient methods by which some otherwise problematic areas of practice can be circumvented."
12. The terms of a professional undertaking must be strictly adhered to, the Court of Appeal in *Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited* [2016] eKLR stated:

"The professional undertaking is a smooth and binding contract between the donor and the donee who are the advocates. It should be adhered to with a standard of ethics higher than that of the marketplace. Professional undertakings to lawyers by colleagues are like a religion and are the underpinning of the relationship that governs the activities, transactions and actions between them. A professional undertaking embodies and manifests the practice of the legal profession in a characteristically methodical, courteous and ethical manner. That is why the immediate offer and acceptance of a professional undertaking triggers a monumental transaction and huge financial relationship which must be observed by both sides. In our view, that is the basis of professional undertakings in the legal profession. In fact, the conditions, terms and implications must be strictly adhered to for the legal profession to thrive, and for advocates to deal with each other freely and openly."
13. It is not in dispute that the applicant fulfilled his part of the obligation as provided under clause 3 of the agreement. Having perused the record, I noted that in a letter dated 28th September 2022, the applicant wrote to the respondent informing him the squatters had moved out of the suit premises. Thereafter he procured all the completion documents as per clause 5 of the agreement and delivered the same to the 1st respondent in exchange for the balance of the purchase price. This was not forthcoming prompting the purchaser to issue a completion notice dated 14th October 2022. The 1st respondent did not make the payment, and subsequently, the applicant instituted the instant suit.
14. The applicant faults the 1st respondent for failing to honour the terms of the professional undertaking and withholding the money until 16th February 2023.
15. The 1st respondent does not dispute the professional undertaking issued on 4th July 2022. He faults the bank for the late payment and urges the court to consider this was a special circumstance which could not have been avoided. Besides, the 1st respondent's issue of concern is that the professional undertaking as well as the agreement dated 16th June 2022 did not provide for interest on late payment, and contends the levying of interest by the applicant has no backing.



16. In *Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga* [2017] eKLR the court stated that:

“An undertaking by an advocate is enforceable. In enforcing undertakings by advocates, the court is guided not by considerations of contract, or of securing the legal rights of parties, but mainly to ensure the honesty of advocates.”

17. The notice of completion dated 14th October 2022 informed the 2nd respondent that the vendor had complied with the provisions of clause 3 of the agreement, and called for the balance of the purchase price of Kshs. 8,641,812.20. It also informed the purchaser that the 90-day completion had lapsed and proceeded to give a 21-day completion.

18. According to the 1st respondent the notice was received on 1st November 2022 and that is the time when the count for 21 days should commence. It therefore follows that the applicant extended the completion date which fell on 22nd November 2022. The 1st respondent ought to have paid the balance by 22nd November 2022. The same remained unpaid with the last instalment, which was the subject of this suit, being paid on 16th February 2023.

19. It can be said that the 1st respondent withheld the vendor’s money for close to 72 days, and the last instalment was paid after the institution of this suit. The applicant incurred costs in filing the instant suit, it is thus in the interest of justice that he ought to be compensated.

20. From the record the Vendor dutifully performed his obligation as per the contract and it was the duty of the Advocate to ensure that he honoured the professional undertaking. To the mind of this court, the delay deprived the applicant of the use of his money for some time and he ought to be reimbursed for the deprivation thereof.

21. In the case of *Naphtali Paul Radier v David Njogu Gachanja HCCC No.582 of 2003* (OS) the court held as follows:

“The Defendant has withheld the plaintiff’s money from August 2002. Justice demands that he pays it with interest. As no particular rate of interest was contracted, I shall award at court rates.”

22. A similar obligation was imposed in *Nelson Andayi Havi t/a Havi & Co. Advocates v Jane Muthoni Njage t/a J.M. Njage & Co. Advocates* (2015) eKLR where the defendant delayed payment of the amount of the undertaking which had been agreed be payable within 30 days of the release of the completion documents, and the court held:

29. “It may be said that conduct such as being complicit or deliberately withholding plaintiff’s money would earn the advocate penalty in the form of interest for denying the plaintiff his money.”

23. To this end, I hold that it is in the interest of justice that the applicant is entitled to interest occasioned by the 1st respondent’s action of withholding money entitled to the vendor. And since, as argued by the 1st respondent, the contract did not provide for interest, I direct that the interest be paid at the court rates from the date of completion. The applicant will have the costs of the suit.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024.

.....

P. MULWA



JUDGE

In the presence of:

Mr. Makori for applicants

Mr. Towett for respondents

Court Assistant: Carlos

