



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.21 OF 2020

(Formerly Civil Suit No. 233 of 2018)

IN THE MATTER OF : THE CIVIL PROCEDURE ACT (CAP 21 LAWS OF KENYA)

AND

IN THE MATTER OF: THE ADVOCATES ACT (CAP 16 LAWS OF KENYA)

AND

IN THE MATTER OF: AN APPLICATION FOR ENFORCEMENT OF A PROFESSIONAL UNDERTAKING

BETWEEN

BILHA W. MWANGI1ST PLAINTIFF

KEMBOY JULIUS KIPKOSGEI T/A

KEMBOY LAW ADVOCATES LLP.....2ND PLAINTIFF

V E R S U S

NJERI BENSON NGUGI.....1ST DEFENDANT

IGERIA ARTHUR KONYE.....2ND DEFENDANT

NJOROGE DAVID NGUMBU T/A

IGERIA & NGUGI ADVOCATES.....3RD DEFENDANT

JUDGMENT

1. Before this Court is the Originating Summons dated 20th September 2018 by which the Plaintiffs **BILHA MWANGI** and **KEMBOY JULIUS KIPKOSGEI T/A KEMBOY LAW ADVOCATES LLP** seek the following orders:-

“1. THAT the Defendants NJERI BENSON NGUGI, IGERIA ARTHUR KONYE, NJORGE DAVID NGUMBU T/A IGERIA & NGUGI ADVOCATES do fulfil his irrevocable and unconditional undertaking dated 7th May 2018 and pay the Plaintiffs Kshs. 102,378,022.93 forthwith with interest thereon and [sic] the rate of 14% per annum until payment in full.

2. THAT the Judgment be entered against the Defendants in the sum of Kshs. 107,378,022 upon their undertaking.

3. THAT the Defendants do bear the costs of this suit.”

2. The Summons was premised upon **Order 37 Rule 3, Order 52 Rule 7** of the **Civil Procedure Rules 2010**, and all enabling provisions of the law and was supported by the Affidavit of even date sworn by **BILHA W. MWANGI** an Advocate of the High Court of Kenya

practicing as partner incharge of the Conveyance Department in the firm of **Kemboy Law Advocates LLP**.

3. The Defendants **NJERI BENSON NGUGI, IGERIA ARUTHUR KONYE** and **NJOROGE DAVID NGUMBU T/A IGERIA & NGUGI ADVOCATES** opposed the Summons vide the Replying Affidavit dated **19th November 2018** sworn by **BENSON N. NGUGI**, the 1st Defendant who is the Managing Partner in the firm of **M/s Igeria & Ngugi Advocates**. The Summons was canvassed by way for written submissions. The Plaintiffs filed their written submissions dated **4th June 2020** whilst the Defendants filed submissions dated **4th August 2020**.

BACKGROUND

4. On **19th June 2017** the Plaintiffs clients entered into an agreement with a third party one **Dr. Samuel Thenya Maina** for the sale of their entire issued share capital in **Adlife Plaza Limited** (hereinafter 'APL') and **Adlife Management Company Limited** (hereinafter 'AMCL'), **Adlife Plaza Limited (APL)** was then and still is there registered proprietor of the property known as **LR No. 111366** and **Adlife Building** located thereon and the Plaintiffs said clients held the beneficial shares in the said company.

5. The Defendants herein were the law firm which was retained by **Kenya Commercial Bank Ltd** (hereinafter 'KCB') to finance the transaction. By way of a Share Purchase Agreement ("**SPA**") dated **19th June 2017** the Plaintiffs clients offered to sell their shares in **APL** for a consideration of **Kshs. 1,077,000,000/-**. Thereafter by a Deed of Amendment dated **7th May 2018** the **SPA** and the consideration was amended and agreed at **Kshs. 1,382,000,000/-**. It was agreed that the consideration would be paid in two lump sums as follows. The sum of **Kshs. 442,000,000/-** was payable before the execution of the agreement and the sum of **Kshs. 940,000,000/-** which **KCB** undertook to pay was to be paid on the completion date. It is common ground that the first lumpsum of **Kshs. 442,000,000/-** was paid out.

6. In order to facilitate the release of the title documents and transfer forms the Defendants acting for **KCB** issued to the Plaintiffs a Professional Undertaking dated **7th May 2018** to pay the outstanding balance of **Kshs. 94,000,000/-** on the completion date.

7. The Plaintiffs aver that acting upon that profession at undertaking, they forwarded all the transfer documents to the Defendants as agreed. The purchasers then took full control of **APL** and **AMCL** management and accounts and also took possession of all the companies' assets. The shares were duly transferred to the purchasers and the property was charged to **KCB** (the Defendants client) for the sum of **Kshs. 940,000,000/-**. The sale was then completed and transfers were effected on the basis of the documents which had been submitted by the Plaintiffs in reliance of the Professional Undertaking made by the Defendants.

8. The Plaintiffs claim that out of the agreed consideration of **Kshs. 1,382,000,000/-** only the sum of **Kshs. 1,279,621,977.07** has todate been paid leaving a balance of **Kshs. 102,378,022.98** outstanding. The Plaintiffs are aggrieved that the Defendants have refused and/or declined to pay that outstanding balance despite constant reminders to do so. That the Defendants acting upon instructions of the Purchasers Advocates have continued to withhold the said balance of **Kshs. 102,378,022.98** without any justifiable cause. Hence the filing of this Originating Summons in order to enforce the Defendants Professional Undertaking.

9. On their part the Defendants concede that they did indeed issue the Plaintiffs with their Professional Undertaking which the Defendants aver was done on the basis of instructions from **KCB** to the Plaintiff on **7th May 2018**. That said professional undertaking was issued in exchange for the relevant completion documents as was agreed between the parties.

10. The Defendants cite **Clause 1K** of the undertaking which contained a condition precedent to the fulfillment of the undertaking. That said Clause provided that the undertaking would be honoured **subject to "the sellers warrantees being true and accurate at completion and sellers not otherwise being in breach of their obligation under the Share Purchase Agreement."**

11. The Defendants claim that prior to completion of registration the firm of **M/s Kaplan & Stratton Advocates**, acting for the purchasers vide their letters dated **20th June 2018** and **16th July 2018** indicated that the Plaintiffs clients had occasioned a breach thereby stopping the Defendants from honouring the said undertaking.

12. The Defendants allege that upon final registration of the securities on **18th July 2018** they wrote to the Plaintiff advising them of the transfer and registration of the charge and requesting that the breaches pointed out by the Purchasers Advocates be addressed to facilitate the finalization of the transfer and release of the outstanding balance. That the Plaintiff in response vide their letter of **19th July 2018** requested that an amount of **Kshs. 837,621,977.10** be released to them and further the Plaintiffs requested the Defendant to hold onto the sum of **Kshs. 102,378,022.93** whilst the said breaches were being looked into to ascertain whether the same were valid and ultimately with a view to agreeing whether or not the outstanding amount of **Kshs. 102,378,022.93** was payable. The Defendants claim that at a meeting held on **29th August 2018** in the Defendants chambers it was agreed that the Purchasers Auditor undertake a verification process to confirm whether or not this sum of **Kshs. 102,378,022.93** ought to be released. The Defendants state that at said meeting it was agreed that the Plaintiffs clients would not call up the Professional Undertaking issued by the Defendants pending this reconciliation process.

ANALYSIS AND DETERMINATION

13. I have carefully perused the material before me as well as the submissions filed by both parties. In my view two issues arise for determination as follows:-

(i) Was the Professional Undertaking issued dated **7th May 2018** unconditional.

(ii) Is the Plaintiff entitled to Judgment as prayed in the Originating Summons dated **20th September 2018**.

(i) **Professional Undertaking**

14. The Plaintiffs by this summon seek to have the Defendants compelled to honour the Professional Undertaking dated 7th May 2018, issued by the Plaintiffs to the Defendants. **Black's Law Dictionary – 10th Edition** defines an 'Undertaking' as "A promise, pledge or engagement." The US legal definitions defines an undertaking in the following terms:-

"Undertaking in general means, an agreement to be responsible for something. In legal context, it typically refers to a party agreeing to surety arrangements, under which they will pay a debt or perform a duty if the other person who is bound to pay the debt or perform the duty fails to do so."

15. It is not in contest that the Defendants acting for KCB did issue to the Plaintiffs a Professional Undertaking dated 7th May 2018 to pay the outstanding balance of the purchase price in the amount of Kshs. 940,000,000/- on the completion date. A copy of said undertaking is annexed at pages 64-70 of the Plaintiffs Bundle of Documents filed on 3rd October 2018 which undertaking read inter alias as follows:-

"... we are instructed to undertake to pay the balance of the consideration amounting to the sum Kenya Shillings Nine Hundred and Forty Million only (Kshs. 940,000,000/-) upon successful registration in favour of the borrower (or his nominee) of the share transfer Forms relating to 100% of the Shares in Adlife Plaza Limited (APL) and 80% of the shares in Adlife Management Company Limited (AMCL) herein after referred to as "the companies" and the successful registration of the charge in favour of KCB over the title relating to LR No. 1/366 and completion of the transaction ..." [own emphasis]

16. The Plaintiffs contend that the Undertaking as issued by the defendants was unconditional and that in the event there was any conditions the same were met. The Plaintiff further submitted that there was no evidence of any breach, nor had there been any determination by a judicial or a quasi-judicial body that the documents submitted in exchange for the undertaking were in any way defective and / or inaccurate. According to the Plaintiffs the only condition attached to the undertaking was the delivery of the documents which documents the Defendants confirm having received, therefore this condition was met.

17. On their part the Defendants submitted that their undertaking was conditional and contend that the conditions attached thereto were not fully met by the Plaintiffs client. The Defendants claim that the Plaintiff consented to monies in question being withheld pending the verification of accounts between all the parties as a condition to the release of the outstanding funds.

18. The principles guiding Professional Undertaking were dealt with in the case of **EQUIP AGENCIES LIMITED –VS- CREDIT BANK LTD. NAIROBI HCCC No. 773 OF 2003**, where Warsame J. stated:-

"An undertaking is usually given to ease and smoothen the path of transactions carried out by Advocates. It is a convenient method or tool to circumvent delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between Advocates. It is a contract between Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another. ... An undertaking is a promise to do or refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an Advocate either personally or through the name of the firm he usually practices under ... The breach of professional undertaking can result in lack of mutual or cordial trust between Advocate and invariably puts the administration of justice into disrepute. The Advocates by relating together through a professional undertaking are officers of the court; therefore as far as possible it is mandatory for them to respect their words for the benefit of mutual continuity of their respective relationship. ... The courts have inherent power to commit an Advocate for breach of an undertaking." [own emphasis]

19. The Plaintiff herein relying on the professional undertaking performed the conditions upon which the undertaking was to be issued by supplying the requisite documents in order to facilitate completion of the transaction. This is confirmed by the Defendants. As it is the Defendants Clients have already secured a charge over the property in question for the full amount. Similarly the shares in question have been transferred and the purchaser (who was not a party to the undertaking) has taken over control of the assets and management of the Companies. None of the above is denied by the Defendants.

20. The Defendants cite on an alleged breach of the SPA pointed out by the Purchasers Advocates. The Purchasers were **not** parties to the undertaking. Aside from the facts that no breach of the warranties has been proved, even if the same were shown to exist, this would be an entirely separate and independent matter not related to the undertaking at all.

21. In **STG MUHIA T/A MUHIA –VS- J. M. CHEGE T/A J. M. CHEGE & COMPANY ADVOCATES [2009]eKLR** the Court stated:-

"A professional undertaking by an Advocate constitutes a separate agreement independent of the transaction that resulted in such an Advocate being required to give. A professional undertaking can therefore be enforced against an Advocate independent of the transaction in which the transaction in which the professional undertaking was given." [own emphasis]

22.. The undertaking was clear that the same was to be honoured upon completion of the sale. The sale is now complete. No other conditions were attached for fulfillment of the Professional Undertaking. The Defendants cannot now seek to plead the cause of a third party in an attempt to evade fulfilling their obligation under the Professional Undertaking. The Defendants are obliged to fulfil the terms of their undertaking dated 7th May 2018 and to immediately pay to the Plaintiffs this sum of **Kshs. 102,378,022.93** and I so find.

(ii) **Is the Plaintiff entitled to Judgment**

23. Having found that an undertaking was made by the Defendants and further have found that the transaction in question has been completed, this Court hereby enters judgment in favour of the Plaintiff's against the Defendants in the sum of **Kshs. 102,378,022.98** with interest thereon at the rate of **14%** per annum until payment in full. Costs of this suit are awarded to the Plaintiffs.

Dated in Nairobi this 5TH day of FEBRUARY, 2021.

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MAUREEN A. ODERO

JUDGE