



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO. 171 OF 2017

DANIEL OCHIENG OGOA T/A

OGOLA OKELLO & CO. ADVOCATES.....PLAINTIFF

VERSUS

JOEL KYATHA MBALUKA T/A

MALUKA & ASSOCIATES ADVOCATES.....DEFENDANT

RULING

The Plaintiff filed an Originating Summons application dated 24th April 2017, under the provisions of **Section 1A, 1B, and 3A of the Civil Procedure Act, Order 37 Rule 14 and order 52 Rule 7 (1) (b) of the Civil procedure Rules**, seeking orders;

a) That the Defendant honours the professional undertaking dated 11th March 2016 and forwards to the Plaintiff, within seven (7) days of the making of the order hereof, completion documents arising out of the sale and purchase of **Title No. Ngong/Ngong/47331**.

b) That the Defendant fully indemnifies the clients in respect of all claims of interest to the tune of Ksh 800,000/- suffered by reason of breach of the Defendant of the professional undertaking by withholding the sum of Ksh 6,831,923.40/-

SUPPORTING AFFIDAVIT

The Application was supported by Affidavit dated 24th April 2017, sworn by Daniel Ochieng Ogola Managing Partner of the Plaintiff. He stated that on or about 7th March 2016, the Plaintiff was retained by one Jenipher Nkuene Riria to act for her in the purchase of property known as Ngong/ Ngong/47331 from Denise Kemunto Nkatha for the sum of Ksh 6,831,923.40.

That the Defendant on the other hand was acting for Messrs National Bank of Kenya who had charged the property for certain facilities to the said Denis Kemunto Nkatha .

That on or about 11th March 2016 the amount of Ksh 6,831,923.40/- was sent by **RTGS** on the strength of a professional undertaking from the Defendant.

That the amount of Ksh 6,831,923.40 was to be used to clear the Vendors liabilities with National Bank Kenya with respect to the Mortgage owned by the Vendor to the Lender.

That on or about 14th March 2016 the Plaintiff wrote to the Defendant confirming remittance of the purchase price and also forwarded Transfers and Land Control Board Applications for Consent to Transfer for execution.

That on diverse dates between 31st March 2016 and 30th May 2016 the Plaintiff wrote to the Defendant to follow up on the completion documents and the Defendant responded that they were waiting for a response from the financiers.

That on or about 30th May 2016 it became apparent that the Defendant despite receiving cleared funds on 11th March 2016 had not released the purchase monies to the financier leading to the listing of the vendor as a defaulter at Credit Reference Bureau.

That from the correspondence from the Bank it was clear that Defendant communicated to the Bank for the first time on 23rd May 2016 and the Bank spelt its terms on 3rd June 2016.

That on or about the 6th June 2016 the Plaintiff objected to the new claim made by the Defendant in their letter of 3rd June 2016 including handling fees of Ksh 118,500/- which was way above the sum contained in the professional undertaking dated 3rd March 2016.

That on or about 10th June 2016, the Plaintiff served the Defendant with a completion Notice, completion period of 90 days having lapsed on 7th June 2016.

That the requests were not heeded leading to the Vendor proceeding to obtain balances herself.

That on 26th August 2016 the Defendant/Respondent stated that they were unable to continue acting in the matter due to the Plaintiff threatening them.

That on 31st August 2016, the Plaintiff responded yet again reiterating the demand for the Defendant to meet his obligations as per his professional undertaking. The Plaintiff sought their account details which he had all along so that they could refund the purchase monies.

That in the same correspondence the Defendant was seeking to refund the purchase monies they had held without any interest.

That on 5th September 2016 the Plaintiff/Respondent reiterated that the Defendant will only send the discharge upon complying with the terms of the professional undertaking of 3rd March 2016 that particular time a further sum of Ksh 800,000/- had been paid to the bank under protest.

That on 8th September 2016 an email was dispatched to the Defendant by the Plaintiff noting that he was the obstacle in the matter, the bank having been fully repaid its loan.

That on 28th October 2016 the Plaintiff received a letter dated 26th August 2016 in which the Defendant was now claiming handling fees of Ksh.118,500,000/- to be paid before release of the completion documents.

That several reminders were sent between 1st November and 7th December, 2016 but the Defendant failed and neglected to honour his professional undertaking.

REPLYING AFFIDAVIT

The Application was opposed through an affidavit dated 7th July 2017, sworn by Joel Kyatha Mbaluka, Managing Partner of the Defendant's firm. He stated that on or about March 2016, Denise Kemunto Nkatha who introduced herself as a member of staff of National Bank of Kenya Limited approached the Defendant's firm and requested the Defendant firm to act on her behalf. The Defendant's firm was to procure the release of her Title in respect of property known as Title No. Ngong/Ngong/47331 charged to the Bank to secure a loan facility of Kenya Shillings Six Million Eight Hundred and Thirty One Thousand, Nine Hundred and twenty three and forty cents (Kshs.6,831,923.40). She was not willing to disclose her identity and she could not want to appear to be the one asking for the Title for the Bank would decline to release the title.

That, Denise Kemunto informed them that she would give them details of an individual to prepare a sale agreement so that they push the Bank for her to release the securities (it later turned out the name and details of the person she gave were for her aunt). The Purchaser would deposit the funds in Defendant's current account in cash to be ready once the Bank confirmed that, it would release the title, they released the funds to them. The vendor, however failed to explain why she could not directly deposit the money to her bank account so that the Title could be released to her if the transaction was that straight forward.

That the vendor also gave instructions that the money was not to be deposited in her loan account unless the Bank confirms in writing that it will release the Title upon Defendants depositing the money. So the purchaser's Lawyers demanded an undertaking from the Defendant; that the Defendant shall strictly only exchange the money with the title from the Bank to transmit to Plaintiffs upon release of the funds.

That the Defendant did not suspect any foul play and they proceeded to prepare a sale agreement dated 7th March 2016 between Denise Kemunto Nkatha and the intended purchaser of the property Dr. Jennifer Nkuene Riria whom they later came to know was the Vendor's Mother/Aunt.

That clause 4 of the Sale Agreement stated that;

“the Purchase price shall be Kenya Shillings Six Million Eight Hundred and Thirty One Thousand, Nine Hundred and Twenty Three and Forty Cents (Ksh 6,831,923.40/-) which shall be deposited with the Vendor's Advocates Account No. 01037090144000 held with National Bank to clear the liabilities with the said institution specifically, with respect to the mortgage owed by the vendor to National Bank of Kenya Limited upon confirmation by the Bank that it would release title”.

That believing that their client, the purported Vendor had given them true and genuine instructions on the amounts due to the Bank which she had indicated were Ksh 6,831,923.40/-, the defendant prepared a professional undertaking in the format requested by their client and approved by the Purchaser's Lawyers; to the effect that the money would be given to NBK in exchange of the title documents and taking into

account **clause 4** of the sale agreement on the Purchase Price and release of title upon transmission of funds to the Bank.

That contrary to the Plaintiff's allegations in paragraph 10 of the supporting affidavit; that the Defendant communicated with the Bank for the first time on 23rd May 2016, the Bank was copied in the professional undertaking to the Lawyers dated 11th March 2016 and was aware of the terms of the professional undertaking and the transaction herein.

That on 15th March 2016, having confirmed that funds were available and the Defendant could settle with the bank immediately upon confirmation that funds were received, it would release the title, the Defendant wrote to the Bank requesting for the Vendor's outstanding account balances to facilitate release of the Original Title and execute discharge of charge which was a condition/prerequisite before release of the funds to the Bank.

That, by 23rd May 2016, the bank had not yet responded or given the defendant the green light to deposit funds or assurance that they would release the title and discharge so they actually went ahead and wrote to the bank on 23rd May 2016 giving them, professional undertaking that the Defendants shall pay the bank the redemption amount of Ksh 6,831,923.40/- which was the total amount owing to the bank (in accordance with Defendant's client's instructions) upon receipt of the original title and executed discharge of charge or confirmation.

That, the Defendants were surprised when the Bank wrote to them on 3rd June 2016 showing the outstanding balances owed by the vendor was Ksh 7,560,904/- as at 2nd June 2016 and not Ksh 6,831,923.40 as the client had misled them to believe and on that basis issued an undertaking. That the additional sums had arisen as a result of amalgamation of other unsecured facilities owed by the vendor (defendants client) to the bank and since the vendor was no longer in the employment of the bank, the unsecured facilities had to be paid before release of the original Title and executed discharge of charge. This information had not been availed to the Defendants by the vendor at the time of preparation of the sale agreement.

That, on 3rd June 2016, defendants wrote to the Plaintiff/Purchaser Lawyers informing them of the Bank's position, the additional sums demanded by the bank and requesting them to deposit both their handling charges of Ksh 118,500/- and additional sums of Ksh 847,480.15 demanded by the bank to defendants account.

That on 6th June 2016 defendants received a long letter from the Plaintiff claiming that it is a stranger to the sum of Ksh 7,560,904/- demanded by the bank and threatened legal action if the Original Title and executed discharge of charge were not released to them immediately.

That true to Defendants' client's words, on 5th September 2016 they received a letter from the Plaintiff/Purchaser's Lawyers informing them proceed as the additional funds of Ksh 800,000/- had now been paid by the vendor through them to her account with the bank. It is instructive to note that they wanted to be discharged from the Defendants' undertaking and the Defendant to refund them the funds since the transaction had become strange and protracted.

That upon the differences that arose, Defendant also transferred the funds held in their current account to the bank account for the vendor with the bank and on the same date, 5th September 2016. The defendant wrote to the bank informing them of the payment of the outstanding balances by the vendor and that they should release the original Title and duly executed discharge of charge. That the bank gave a demand for accrued interest of Ksh 10,000/- which the vendor/client settled promptly through the Purchaser's Lawyers.

That, the Defendant tried communicating with the vender/client so that she could settle their legal fees (handling charges) before release of her original Title and executed discharge of charge to the "purchasers" but Defendant could not get her on phone and her husband avoided the issue of fees saying she had entrusted all the funds with Ogolla Okello & Company Advocates (Plaintiff Law firm) they would settle everything and the Defendant should thus direct their legal fees claim to them to settle.

That they were tossed from the Vendor, to Vendor's husband and the Plaintiff Law firm requesting for settlement of their fees that they were served with the suit herein, which was clearly made to blackmail and arm-twist them to release the security documents. Yet it was after all they did without a single cent in payment for their legal services.

The Defendant stated that;

It will be sad if the court is drawn in; as an unwitting pawn to lend hand in the blackmail bid to defraud the defendant of their legal fees. They already released the original title documents and discharge from National bank to Plaintiff/Applicant without their legal fees being settled todate.

DETERMINATION

The Court considered the OS application of 24th April 2017 and the

written submissions by parties. It is also noted that the matter was dealt with prior to this Court by the Trial Court and was pending Judgment of an appeal filed in the Court of Appeal delivered on 19th July 2019.

This Court will reiterate the legal position of a professional undertaking from the binding judgment of Court of Appeal; the case of **Waruhiu K'owade & Nganga Associates vs Mutune Investment Ltd [2016] eKLR** on enforcement of a professional undertaking;

“...a professional undertaking is an unequivocal promise made by a party to another either to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party, to which liability may attach. See Equip Agencies Ltd vs Credit Bank Ltd [2008] 2 EA 115 (HCK). Generally speaking, professional undertakings are given by advocates in order to make transactions easier, faster and more convenient. Where an advocate breaches a professional undertaking, the Court has jurisdiction to order enforcement of that undertaking.

In enforcing undertakings, the Court is guided not by considerations of contract, or of securing the legal rights of parties but mainly by ensuring the honesty of advocates.”

In the case of Nelson Havi Andayi t/a Havi & Company Advocates vs Jane Muthoni Njage t/a JM Njage & Company Advocates HCCC 59 of 2009 [2015] eKLR held among other pertinent legal issues;

a) That a professional undertaking given by advocates is separate and distinct contract which is enforceable between the parties. The respective clients of the advocates in the undertaking are not parties in the undertaking. Therefore, only the advocates as the parties in can enforce the undertaking. See also David Karanja Thuo vs Njage Waweru HCCC 209 of 2008.

b) Whether an order to honour undertaking needs to issue before enforcing the undertaking herein; Order 52 Rule 7 (2)CPR 2010

Reads;

“Save for special reasons to be recorded by the Judge, the order shall in the first instance be that the advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made.”

c) Should the Defendant as advocate for the Purchaser [be] responsible to pay interest under a professional undertaking or whether the Defendant’s professional undertaking issued to the Plaintiff in the capacity of an advocate obliged the Defendant to assume responsibility for and to pay interest ordinarily payable by the Purchaser itself.

A question of whether interest is payable and by whom could only be determined by looking at the agreement and all documents which apply to the contract and then the law.

Applying the above legal requirements to the instant case, this Court considered the following;

a) It is not disputed that the Defendant acting for National Bank of Kenya gave a professional undertaking vide letter dated 11th March 2016 addressed to the Plaintiff as follows;

We hereby irrevocably and unconditionally confirm and undertake within 30 days of the remittance of the Purchase Price we shall forward to you the following Completion documents....

b) It is also not disputed that thereafter on the strength of the Professional undertaking, on 11th March 2016 the Plaintiff remitted the purchase price Ksh 6,831,923.40/- by RTGS to the Defendant to be used to settle the Vendor’s mortgage liability with NBK bank. The Plaintiff confirmed remittance of funds vide their letter of 14th March 2016.

c) The 30 days period elapsed on 11th April 2016 at most 14th April 2016, the dates the monies were remitted and the confirmation letter sent to Defendant by the Plaintiff. Despite various reminders from the Plaintiff to the Defendant, the completion documents were not availed.

d) On 3rd June 2016, the Defendant wrote to the Plaintiff and informed them of the Bank’s new and preferred terms of engagement in release of the Vendor’s Title documents of the mortgage. The National Bank by their letter to the Defendant of 3rd June 2016 gave the amount as at 2nd June 2016 was Ksh 7,560,904.15/- . The Defendant’s handling fess of Ksh 118,500/- was added which now totalled to Ksh 847,480.80/=.

e) The Plaintiff in reply to the Defendant’s claim(s) on the Professional undertaking vide letter dated 6th June 2016 objected to the new terms set by the Defendant as varying the terms of the Professional undertaking.

f) On 8th June 2016, the Defendant enclosed executed transfer documents, application for consent and 3 passport sized photographs to the Plaintiff, this was over 3 months later from the contracted 30 days period from receipt of the purchase price.

g) The Plaintiff by the letter of 6th June 2016 reiterated that the Defendant was in breach of **Clauses 1,3, 4 & 5** of the Professional undertaking. The Defendant also failed to comply with **Clause 6** where time was of the essence. **Clause 6** the Defendant undertook to keep the Plaintiff indemnified in all respect of all clauses, loss or damage which they may suffer by reason of breach of the professional undertaking.

h) As at 24th April 2017, when the Plaintiff filed the Originating Summons seeking enforcement of professional undertaking and interest for breach of the undertaking, the Defendant had/has not complied fully with the terms of the professional undertaking.

i) The Defendant contended that one Denise Kemunto Nkatha approached the Defendant advocate in February 2016 as a member of staff of National Bank of Kenya. She instructed the Defendant to retrieve Title Ngong/Ngong/47331 she pledged for loan security and she had a willing buyer of the property.

j) The Client gave the Defendant the go ahead and he issued a professional undertaking to the Purchaser's advocate to deposit the sum of Ksh 6,831 923.15 cts in the Defendant's account so that in turn the defendant may issue the requisite undertaking to the bank holding the title to release it with the discharge in exchange of the said sum.

k) Upon receipt of funds the Defendant wrote to the National Bank to release the title and due to the bank's delay in replying, the date of compliance of the undertaking elapsed. When the Bank responded the claim for redemption of the property and release of title escalated.

l) The Client failed to disclose to the Defendant the other parallel unsecured loan facility that increased the undertaking amount. The Client settled the increased amount 8 months later and thereby obtained the title. Following the client's intimation of payment of handling fees by the Plaintiff, the Defendant demanded handling fees only to be rebuffed and finally after being tossed and turned between the Purchaser, Plaintiff, Client, Client's husband and non payment of Handling fees the defendant released to the Plaintiff the title documents.

After considering the rival submissions against the legal principles and case-law set out above, This Court makes the following findings;

1) The Defendant in the letter of 11th March 2016 intimated that they acted for National Bank of Kenya. How the Defendant was later instructed by the client Denise Kemunto Nkatha; former employee of National Bank; who was being investigated for cheque-kitting fraud remains a mystery. Suffice is to state that the Defendant failed to disclose the instructing client up front to the Plaintiff at the earliest opportunity.

2) There is ample evidence that the Defendant gave professional undertaking on 11th March 2016 to the Plaintiff, on receipt of the Purchase Price Ksh 6,831,923.40 within 30 days the Defendant would release completion documents.

3) A year later, on 24th April 2017, when the OS was filed in Court; the original title deed, original discharge of charge of subsisting charge for NBK, copy of Vendor's PIN certificate, Vendor's ID card, Copies of receipts of payment of water and electricity charges, Receipts of payment of service charge, sketch plan of the location of the property and Stamp Duty Valuation as part of the remaining documents comprising of Completion documents were not provided to the Plaintiff by the Defendant under the irrevocable and unconditional professional undertaking.

4) The Defendant deposed in written submissions, that the Defendant released the title documents after he realised he was duped and was not paid legal/handling fees by the client(s).

However, there is no evidence on record from the Defendant that these documents were released to the Plaintiff or from the Plaintiff that these documents were received. Secondly, parties informed the Court of ongoing negotiations which the Court granted time by allowing adjournment and in the meantime any time before the Court's Ruling, parties were at liberty to file the Consent with Deputy Registrar Commercial Division and the same be brought to the attention of the Court if the matter was settled. None was filed.

5) The Defendant did not fulfil the professional undertaking and even if it is pleaded or submitted that the title documents were released to the Plaintiff, in the absence of cogent evidence to the effect by either party to the undertaking, of when and how this was effected, on the Court record, the Defendant breached the professional undertaking.

6) Relying on **Order 52 Rule 7 CPR 2010**, in the absence of any special reasons advanced by the Defendant, to this Court, then this Court finds that the Defendant shall honour the Professional undertaking as prescribed by Clause 1 of the letter of 11th March 2016 to provide **ALL** documents listed as comprising of Completion documents albeit way past the contractual timelines.

7) The Defendant's explanation for breach of compliance of professional undertaking is that the Bank delayed in response to enquiry of the client's mortgage and when it did the figures increased from the undertaking figure. Secondly, the client failed to disclose other/further claims against her by the Bank.

The Professional undertaking contract is a separate and distinct contract between advocates and only the parties who are privy to this contract can enforce it. The Plaintiff exercised their right after non compliance and in order to enforce its right in the professional undertaking. The Defendant cannot rely or defend itself from liability and/or compliance by actions of 3rd parties who are not privy to this contract. The Defendant is at liberty to pursue legal redress from the 3rd Party /Parties including pursuing legal fees from the Client(s), through Taxing the Bill of costs against Denis Kemunto Nithatha. Until then the Defendant ought and shall comply with the terms of the Professional undertaking.

8) The Defendant gave an irrevocable and an unconditional professional undertaking and there was no condition precedent required or allowed. To allow a demand of extra funds and/or handling fees and extension of time to comply contrary to the undertaking amounts to varying the terms of the Professional undertaking without consent of the Plaintiff.

9) This Court adopts the statement by the Trial Court in the ***Nelson Andayi Havi case, supra***;

“The Court's jurisdiction in enforcing an undertaking by an advocate is not exercised for purposes of enforcing legal

rights or obligations of the client(s) but for purposes of enforcing honourable conduct on the part of the advocate as an officer of the Court. Therefore, The Court enforces the undertaking strictly as a contract on its own separate from the primary contract between parties. See Karsam Lalji Patel vs Peter Kimani Kairu t/a Kimani Kairu & Co Advocates”

10) Clause 6 of the Professional Undertaking, the Defendant contracted that it was solely responsible for full compliance with the terms and conditions of this undertaking and that it would keep the Plaintiff fully indemnified in respect of all claims, loss and damage which the Plaintiff or client may suffer by reason of any breach by the Defendant’s undertaking.

11) By the Plaintiff’s own admission vide letter of 6th June 2016,

Is that in the said undertaking there was no agreement for payment of interest and/or that the said sum would attract interest neither was any rate agreed upon. From the evidence on record the full sum of the undertaking was remitted to the bank, but the redemption of the title was withheld due to increased undisclosed amounts incurred by the Client. There cannot be any interest visited on the undertaking amount.

12) However, upon full compliance of the undertaking by the Defendant to release /avail and deliver the documents that constitute completion documents, any claim, loss or damage proved by the Plaintiff due to undue delay in compliance with the undertaking shall be liable to be indemnified by the Defendant.

13) The Issue of Costs, costs follow the event, at the institution of the claim by filing the OS, the Plaintiff had a cause of action and therefore the order of enforcement of the professional undertaking by the Defendant is granted and any claim, loss or damage that shall be proved only then can/may costs be provided for.

DISPOSITION

1. The Plaintiff’s OS of 24th April 2017 is granted on the following terms;

a) The Defendant shall honour the Professional undertaking dated 11th March 2016 forthwith

b) The Defendant shall indemnify the Plaintiff any/all claims loss or damage that shall be proved to have arisen out of breach and/or delayed compliance of the Professional undertaking.

c) The Defendant shall pay costs of the suit herein.

d) In default, the Plaintiff may pursue enforcement/execution procedures and/or contempt of Court proceedings against the Defendant after normalcy resumes from the ongoing corona virus pandemic lockdown upon official communication from the Government

e) The Defendant is at liberty to sue the client for any loss, damage incurred in fulfilling the professional undertaking and/or tax bill of costs for handling fees..

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH APRIL 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

OGOLLA OKELLO ADVOCATES FOR PLAINTIFF

MBALUKA COMPANY ADVOCATES FOR DEFENDANT