



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.413 OF 2017

PETER MATHENGE GITONGA T/A

MATHENGE GITONGA & CO. ADVOCATES.....PLAINTIFF

VERSUS

NJOROGE KIBATIA & SIMON MAINA KARUGA T/A

KIBATIA & COMPANY ADVOCATES.....DEFENDANTS

JUDGMENT

1. The plaintiff **M/s Njoroge Kibatia & Moses Karuga T/A Mathenge Gitonga & Co. Advocates** brought an originating summons dated 3rd October 2017 and filed on 6th October 2017 pursuant to order 52 rule 7 and 10 of the Civil Procedure Rules 2010; on the following grounds:-

- 1) **THAT the Plaintiff is an Advocate of the High Court transacting in the name and style of Mathenge Gitonga & Company Advocates.**
- 2) **THAT the Plaintiff was acting and continues to act for the registered proprietors (hereinafter referred to as the vendors) of Eighty-Eight (88) parcels of land located in Laikipia County.**
- 3) **THAT the Defendants act for Kagwe Tea Factory (the purchaser) who entered into Agreements for Sale of Eighty Eight (88) parcels of land and paid a deposit of 10 percent which formed part of the purchaser price.**
- 4) **THAT the Defendants issued an irrevocable and unequivocal Professional undertaking contained in their letter of 6th February 2017 to secure the payment of the balance of the purchase price in the sum Kenya Shillings Two Hundred and Seventy-Eight Million Six Hundred and Ninety Thousand (278,690,000) payable within 30 days of successful registration of the transfers in favour of the purchaser.**
- 5) **THAT on the strength and strict reliance of the said professional undertaking, the plaintiff released ALL the completion documents to the defendants to facilitate registration of transfers in the name of the purchaser.**
- 6) **THAT the transfers were registered successfully in the month of February 2017 but the Defendants have refused and or declined to release the balance of the purchase price despite several reminders from the plaintiff and his agents.**
- 7) **THAT it is only fair and just that the Orders sought herein be granted.**

2. The originating summons is supported by affidavit of **Peter Mathenge Gitonga T/A Mathenge Gitonga & Co. Advocates** dated 3rd October 2017 and by a further affidavit dated 15th January 2018.

3. The defendant opposes the application and in doing so has filed a Replying affidavit dated 29th November 2017 and 15th May 2018 through a third party Wallace Ngugi Mbugua.

4. The plaintiff through the originating summons seeks orders to have the defendant, honour their irrevocable and unconditional professional undertaking which they gave to the plaintiff and pay a sum of Kshs. 278,690,000/- together with interest at a rate of Kshs.18% per annum from 12th of March 2017 till payment in full.

History of the dispute

5. The plaintiff was engaged by several clients to represent them in several separate land transactions, whereby its clients were the sellers of 88 parcels of lands, which parcels of lands were separate and of different sizes. The plaintiff has attached a sample sale agreement together with copies of the 88 title deeds sent to Kagwe Tea Factory Limited pursuant to the agreement thereto.

6. The purchaser **Kagwe Tea Factory Company Limited**, was represented by the defendant herein in the said transaction. The purchaser paid a deposit of 10% on execution of the agreement and the balance of Kshs. 278,690,000 was payable on completion date.

7. In order to facilitate the transaction, the defendant issued the plaintiff with an unconditional professional undertaking dated the 6th day of February 2017 to the following effect:-

"We M/s Kibatia & Co. Advocates do hereby give our irrevocable professional undertaking to cause to be paid to yourselves M/s Mathenge Gitonga & Co. Advocates a sum of Kenya Shillings Two Hundred and Seventy Eight Million, Six Hundred and ninety Thousand (278,690,000/-) on successful registration of the transfer of Eighty Eight (88) parcels of land cited in our letter dated the 18th day of January, 2017 together with the attachment received from our clients M/s Kenya Tea Development Authority (KTDA) in favour of our clients Kagwe Tea Factory, free from any deductions whatsoever within thirty (30) days from the registration and that in the event of failure to successfully register in favour of our client for any one particular parcels(s) all the completion documents will be returned on demand and in the same condition as they were when they were released to us."

8. The completion documents were subsequently released to the defendant, who proceeded to successfully register all the 88 parcels of lands in the name of their client with the 1st title being issued on 11th February 2017 and the last on 19th July 2017 as exhibited in the plaintiff's supporting affidavit. That after the agreed 30 days period, the plaintiff sought the honouring of the professional undertaking from the defendant who failed to do so.

9. The defendant after a period of exceeding 11 months was requested to honour its professional undertaking but has failed, refused and neglected to do so notwithstanding that the professional undertaking is not denied; but cited reason for their failure to honour the irrevocable undertaking under paragraph 6 and 7 of the Replying affidavit of Mr. Njoroge Kibatia as follows:-

6). **"It is accurate as averred by the Plaintiff that pursuant to clause 3.3 of the agreement we issued an unequivocal and irrevocable professional undertaking to secure payment of the balance of the purchase price amounting (278,690,000) on the strength of the compliance with terms and conditions of the agreement. In addition we reasonably believed that the properties existed as privately owned plots and not government land"**

7) **"The said professional undertaking was premised on the fact that the Plaintiff had conducted due diligence to ensure that the vendor has capacity to offer the properties in issue for sale thus complying with the terms and conditions of the agreement more particular clause 7 thereof."**

10. It is a common agreed ground between the parties that the professional undertaking issued by the defendant is not in dispute and that the same has not been honoured.

11. In this case, it was only the plaintiff side which gave evidence. The defendant did not call any witness.

12. **PW1; Peter Mathenge Gitonga**, the plaintiff herein testified that he has practiced law for 27 years and knows the defendant in this matter as their firms operate from the same building and their offices are opposite each other. He stated that he is seeking enforcement of the professional undertaking issued to him on 6/2/2017 by M/s Kibatia & Co. Advocate, signed by Njoroge Kibatia as managing partner of the firm and by Moses Maina Karuga as a partner of the firm, which was issued pursuant to an agreement for sale of parcel lands dated 30/9/2016 (**MG-1**) in respect of 88 different parcel of lands (*identified as per attached titles (MG-6)* being bundle of titles transferred to Kagwe Tea Factory.

13. **PW1** testified that he was acting for the vendors and that he discharged his undertaking by handing over all completion documents leading to the completion of the transfer of the lands on 19/7/2017 as exhibited in the titles. He then wrote several letters to the defendant requiring their compliance (*A letter dated 17/8/2017 MG-5*) within 7 days but the defendant did not comply. He instructed his lawyers to issue demand notice which was done on 22/9/2017 but there was no compliance hence filing of this suit.

14. **PW1** testified that in the defendant's Replying affidavit, they introduced new conditions asking for Gazette Notice No.21/22/26, which was not part of their professional undertaking.

15. During cross-examination of **PW1**, he testified that on generic Agreement of sale (**MG-1**) each agreement was similar save for price and size of the property being sold. He admitted if the property was public land the sale would be null and void *ab initio* and vendor would refund all the money if warranty is breached. That the professional undertaking was an independent contract. That the consent of the Land Control Board was issued as that was a private land. He stated the allegation that the 88 parcels of land sold were public lands is not supported by the National Land Commission.

16. During re-examination **PW1** testified that National Land Commission wrote a letter stating the 88 parcels of lands are not public land referring to a letter dated 28/11/2015 exhibit "**PGM-2**" and a 2nd letter dated 6/12/2017 "**PGM-3**" by Chairman National Land Commission to the defendant; making it clear to the whole world that the said 88 parcels of lands legally belonged to the vendors. He clarified none of the 88 parcels of lands sold by the vendors has any pending case before court. He further pointed out that the Ndung'u Report has been

overtaken by exhibit **PMG-3** and relied further on the unchallenged searches on the said parcels of lands. He testified the transfers were completed as per "**PMG-4**" and that all the lands are in the name of Kagwe Tea Factory "**PMG-4**". He added that the Kenya Forest Service through a letter dated 3/3/2016 confirmed the parcels of lands sold are private lands as per PW1's affidavit marked "**PMG-1**". He added Mr. Njoroge Kabatia, Advocate, was expected to do due diligence over those lands which he did and should have expressly put the conditions in the professional undertaking urging the issues raised later did not form part of the professional undertaking.

17. I have very carefully considered the pleadings; the evidence adduced; the Advocates submissions and arising from the above, the issues for consideration arising thereto can be summarized as hereunder:-

i) **Whether the sale Agreement upon which the professional undertaking was issued was valid and whether this court should answer the question of ownership of the property?**

ii) **Whether the undertaking was pegged with the compliance of terms and conditions of the agreement?**

iii) **Whether the undertaking was premised in plaintiff conducting due diligence to ensure the vendor had capacity to offer the properties?**

iv) **Whether the plaintiff was acting as an agent of the vendor in the undertaking?**

v) **Whether the undertaking should be enforced?**

i) **Whether the Sale Agreement upon which the professional undertaking was issued was valid and whether this court should answer the question of ownership of the properties?**

18. The issue regarding validity of sale Agreement and ownership of the properties is not pleaded by any party but arose during the hearing of the suit. The defendant avers that the plaintiff was in breach of condition and warranties of the agreement for sale of land which breach effectively discharged the terms of the agreement. That it is urged by the defendant that it a fundamental term of sale agreement that the property in question was not government land, nor a buffer zone, by pass or public land and its ownership hereof was not subject to any challenge from the Government of Kenya, any County Government or local authority ("*the warranty*") clause of the agreement provided thus:-

"b) The property was neither government land, no is the property a buffer zone, road reserve, by pass or public land and its ownership hereof is not subject to any challenge whatsoever from the Government of Kenya, any county government or local authority and the vendor fully indemnifies the Purchaser for any loss suffered as a result of breach of this warranty from any action, legal or otherwise that may arise with regard to proper ownership of the Property."

The clear intention therefore being to ensure the purchaser would acquire a valid Title, free from any claim or encumbrance from any third party and therefore enjoy quiet possession of the property.

19. In the instant suit, the plaintiff gave evidence challenging the defendant's contention that the property was government land or public land. He produced a letter "**PGM-2**" dated 28/11/2015; a second letter dated 6th December 2017 "**PMG-3**" by the chairman of National Land Commission and a further letter from the Kenya Forest Service dated 3rd March 2016 "**PMG-1**" all confirming the parcels of lands sold to Kagwe Tea Factory by the vendors were not government or public lands but private lands. There is further uncontroverted evidence by **PW1** through several searches in respect of the lands; that the said lands are not government lands or public lands but private lands. The Land Control Board gave consent for transfer of the lands to the purchaser and that has also been done and the titles are currently in the name of the purchaser. The defendant did not avail any evidence rebutting **PW1**'s evidence nor did the defendant demonstrate how the sale is invalid nor did the defendant demonstrate the vendors sold what they did not own. The defendant made an allegation which they have not attempted to prove. I find the allegation to be without basis.

20. In this suit the question before the court regards enforcement of an undertaking, the court's jurisdiction is limited to such an issue and the merits and/or legality of the action leading to the issuance of the undertaking. In case of **Christopher Musyoka Musau Vs. NPG Warren & 7 others t/a Daly and Figgis Advocates Misc application No.1100 of 2003** Justice G.V. Odunga held that:-

"The court is no enjoined to undertake a detailed inquiry into the legality or otherwise of the original cause in which the undertaking was given."

21. In **Kenya Reinsurance Corporation Vs. V.E.Muguku Muriu t/a M/s V.E. Muguku Muriu & Company [1996] eKLR** the court of appeal found the learned Judge to have erred in placing the respondent advocate in the shoes of the client:-

"He was only required to determine whether the Respondent advocate had given an undertaking which was capable of being enforced."

The Court went ahead to hold that:-

"Simply and plainly the Respondent advocate was bringing in the dispute between his client and the appellant corporation to qualify his clear undertaking. This was quite wrong and if allowed to stand would encourage advocates to resile (sic) from their undertaking."

22. In the instant suit, I am inclined to find that the defendant is trying to raise an excuse by raising a defence for their failure or refusal to honour the undertaking on basis of breach of warranty and on basis of ownership of the land, which disputed does not exist at all. I am alive to the fact that the issue that this court is required to determine is whether the defendant Advocate had given an undertaking which is capable of being enforced, which the defendant is allocating to derail by raising issues not relevant to this matter. The defendant's client has to date since the transfer of the lands been enjoying the titles of the land and have not to date moved to court accusing the plaintiff's clients of breach of condition of the sale agreement. The accusation by the defendant are not supported by their clients. That even if that would have arisen then the question of legality and the breach of contract of the sale agreement would entirely be a separate and independent matter as the defendant's clients has a recourse against the plaintiff's client in another forum, thus Environment Land Court. However, whatever the position may be, that does not vitiate or vary the professional undertaking given by the defendant to the plaintiff. The property having changed hands and the plaintiff having complied with his undertaking, I find the defendant's refusal and failure to honour the undertaking as a delaying tactic and without any lawful justification.

ii) Whether the undertaking was pegged with the compliance of terms and conditions of the agreement?

23. In dealing with the above issue, it is of paramount importance first to consider who are the parties to the agreement and who are the parties to the professional undertaking. The two in my mind are two separate and distinct agreements each with its own terms and conditions. The sale Agreements were specifically between the various vendors represented by the plaintiff as an Advocate, whereas Kagwe Tea Factory Company Limited, as a purchaser, was represented by the defendant, as their Advocates. Both the plaintiff and the defendant were not parties to the sale Agreements. On the other hand the professional undertaking was between the Advocates being the plaintiff and the defendant herein. In this matter therefore the doctrine of privity of contract comes to play. The defendant in their submission submit that though an undertaking is separate agreement between Advocates acting on behalf of parties to the agreement, it will only exist if there is a valid sale agreement, a preceding transaction and obligations to perform. It is further urged that the obligation of the defendant in the undertaking is well defined and was to cause payment to be made to the plaintiff's firm of Advocates and the undertaking does not identify the defendant as the party to make the payment; adding further the undertaking is neither personal to the Advocate nor was it made by the Advocate on behalf of the client. The defendant relied from the text, in Halsbury's Laws of England 4th Edition Reissue Volume 44(1), the writers observed that:-

"Where a Solicitor who is acting professionally for a Client gives his Professional Undertaking...that undertaking may be enforced summarily upon application to Court. Before this remedy can be pursued it must be shown that the undertaking was given by the Solicitor personally, and not merely as an agent on behalf of his client..."

24. In the instant case, there is no dispute that the plaintiff and the defendant were not party to the sale Agreement; what is between the plaintiff and the defendant is professional undertaking issued by the defendant to the plaintiff in which the defendant gave irrevocable professional undertaking to cause to be paid to the plaintiff's firm the sum stated thereto on successful registration of the transfer of 88 parcels of lands cited in their letter dated 18th January 2017 without any conditions attached to the said undertaking. It is absolutely wrong for the defendant herein to allude to the fact that their undertaking was pegged on compliance with the terms and conditions, of an agreement, which were not set out in the professional undertaking and in an agreement in which neither of them was a party.

25. In *Nelson Havi T/A Havi & Company Advocates Vs. Jane Muthoni Njage T/A J.M. Njoge & Company Advocates (2015) eKLR* Hon. Justice F. Gikonyo held thus:-

"The law is that the jurisdiction of court in enforcing an undertaking by an Advocate is exercised for purposes of enforcing legal rights or obligations of the client but for purposes of enforcing honourable conduct on part of the Advocate as an officer of the court. This, it enforces the undertaking strictly as a contract on its own separate from the primary contract between the parties."

26. In *Waruhiu K'Owade & Ng'ang'a Advocates Vs. Mutune Investment Limited [2016] eKLR* the Court of Appeal held that:-

"Doctrine of privity demands that only parties to a contract may be affected by the rights and duties arising out of a contract....contractual rights are only binding on and enforceable by, the parties to the contract."

In *STG Muhia t/a Muhia & Company Advocates Vs. J.M. Chege & Company Advocates* as quoted in *Abraham Kibet Chepkonga t/a K Chepkonga & Company Advocates Vs. Paul Gicheru t/a Gicheru & Company Advocates (2017) eKLR* the court held that:-

"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 professional undertaking was given."

27. In view of the above, I have no hesitation to hold and find that professional undertaking issued by one Advocate to another is separate and independent obligation on part of the advocate from any underlying agreement and the two should never be confused to be the same and one thing. The professional undertaking enforcement should be dependent on its satisfaction or infringement of its conditions of the agreement.

iii) Whether the undertaking was premised in plaintiff conducting due diligence to ensure the vendor had capacity to offer the properties?

28. In the instant case, the defendant are urging their professional undertaking was discharged by material breach of the vendor; and subsequently the duty to give and issue a professional undertaking to facilitate the transaction collapsed with the said breach; urging further the undertaking cannot exist in vacuum and will ultimately collapse if there is material breach of terms by the parties discharging the contract. It is therefore urged by the defendant there is no valid professional undertaking capable of enforcement.

29. It is further urged the refusal to honour professional undertaking is on the basis that the undertaking was premised on the plaintiff conducting due diligence to ensure the vendor had capacity to offer 88 properties for sale.

30. It is of great significant to point out that conveyancing practice is well established and known amongst conveyance counsel; that it is not an obligation of the vendor's counsel to conduct due diligence but that of the purchaser's counsel. It would be weird for the defendant who represented the purchaser to abdicate their role and start pushing the blame to the plaintiff herein. The Advocate giving professional undertaking voluntarily places himself at a place of risk and cannot expect someone else to shoulder his responsibilities; neither can he be heard to complain that it is too tiring or burdensome responsibility.

31. I therefore find; that in this suit, it was the defendant who had the obligation to their client to investigate the title prior to the transaction and whether they did so or not, I find that is not a question nor issue for this forum. The defendant voluntarily and knowingly look a risk on behalf of their client; that they will pay the balance of the purchase price as per their professional undertaking after successful registration of title in their client's name. The registration was successful and the 88 Title deeds have been issued in the defendant's/client name. The plaintiff has no titles for his clients after he had surrendered all completion documents followed by successful transfer. He has neither the money nor the documents to account to his various clients. It is therefore prudent for the defendant to consider honouring their professional undertaking as there is nothing pending for the plaintiff to do save to receive the money due to his clients.

iv) Whether the plaintiff was acting as an agent of the vendor in the undertaking?

32. It is alleged by the defendant at paragraph 10, 11 and 13 of their affidavit that the plaintiff was an agent of the vendors and as such he cannot purport to have capacity to enforce the undertaking. The Encyclopedia of Forms and precedents 5th edition by **Hon. Sir Peter Millet M.A Vol 39 pages 859, 866**, defines an undertaking as follows:-

"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 a solicitor (or in case of a member of staff, his employer) becomes personally bound. It is a promise to do or refrain from doing something. The Blacks Law dictionary defines an undertaking as "a promise, engagement, or stipulation. Each of the promises made by parties to the contract, considered independently and not as mutual."

33. From the above definitions; it turns out that it is crystal clear that an undertaking is between Advocates to exclusion of either parties. The defendant is wrong in claiming that the plaintiff was acting as an agent of his client at the point of accepting the undertaking. It is further clear from the definition that an undertaking is independent. I therefore find the performance of an undertaking being independent and separate from any underlying agreement cannot be tied to the underlying agreement of sale.

34. In the case of **Peter Ng'ang'a Muiruri Vs. Credit Bank & Another Civil Appeal No. 263 of 1998** the court held that:-

"The law relating to enforcement of undertaking is clear. It is not contractual in nature. " Further the Court went ahead to state "undertaking is solemn thing and in enforcing an undertaking the court is not guided by consideration of contract but the Court aim is securing the honesty of its officers."

35. In view of the foregoing, I am satisfied and I hold that the plaintiff was not acting as an agent of his client when he accepted the undertaking. Likewise, the defendant was not acting as agents of their clients when they gave the professional undertaking. Having come to that conclusion I find that any disputes (if any) as between the Plaintiff's and Defendants' clients are not amenable to be used to dishonour the undertaking.

v) Whether the undertaking should be enforced?

36. The professional undertaking is voluntary and binding contract between the donor and the donee both of whom are Advocates. It should always be adhered to with a standard of ethics higher than that of open market place. Professional undertaking goes to the very root of integrity and should be honoured by the advocates. It creates a binding relationship which must be observed and religiously honoured. The conditions, terms and implications must strictly be adhered to for the legal profession to thrive, and for advocates to deal with each other freely, openly and enhance integrity in the profession. It is not a process of out mitting one another and embarrassing the profession.

37. I find in view of the terms and conditions given in the professional undertaking, the defendant cannot claim any justification or right of lieu over the money entrusted to them after they gave an irrevocable and unconditional professional undertaking. I find that the undertaking should be enforced as sought by the plaintiff.

38. I am satisfied that the plaintiff has established that the defendant should be compelled to honour the professional undertaking issued on 6th February 2017. The plaintiff has established on balance of probability that the defendant are duty bound to honour their professional undertaking to pay the balance of Kshs.278,690,000/-.

39. The upshot is that the plaintiff's originating summons dated 3rd October 2017 is meritorious and is allowed. I proceed to make the following orders:-

a) The defendant is given 30 days from the date of the judgment to honour their professional undertaking given on 6th February 2017 to the plaintiff by paying Kshs.278, 690,000/- together with interest as from the time sum was due for payment at court rate as no particular rate of interest was contracted in the undertaking.

b) In default of payment as under (a) above the plaintiff be at liberty to enforce the undertaking.

c) Costs of the suit to the plaintiff, to be taxed if not agreed.

Dated, signed and delivered at Nairobi this **18th** day of **October, 2018**.

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J .A. MAKAU

JUDGE