



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL CASE NO. 39 OF 2014 (O.S)**

**IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF PROFESSIONAL  
UNDERTAKING BY MWANIKI GITAU & COMPANY ADVOCATES**

**BETWEEN**

**ISAAC GITHUA KIHARA.....PLAINTIFF**

**VERSUS**

**J.M. MWANIKI GITAU T/A**

**MWANIKI GITAU & COMPANY ADVOCATES.....DEFENDANT**

**RULING OF THE COURT**

**The Application**

1. The application before the court is Originating Summons dated **15<sup>th</sup> August, 2014** filed by the plaintiff pursuant to **Order 37 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act**. The Originating Summons prays that this court may make a determination on the following issues;

- a. Whether the plaintiff/applicant is entitled to the sum of Kshs. 1,200,000/- from the defendant/respondent on account of the latter's Professional Undertaking furnished for the benefit of the former for the said sum.**
- b. Whether the plaintiff/applicant is entitled to interest at the court rates on the sum of Kshs. 1,200,000/- claimed from the defendant/respondent from 17<sup>th</sup> March, 2011 until payment in full.**
- c. Whether the defendant/respondent's failure to honour its Professional Undertaking constitutes professional misconduct and thus amendable to the summary jurisdiction of the court over its officers.**
- c. Whether the plaintiff/applicant is entitled to the costs of these proceedings to be borne by the defendant/respondent.**

2. The Summons is supported by affidavit of the applicant **Isaac Githua Kihara** sworn on **15<sup>th</sup> August, 2014** and a Further Affidavit sworn on **6<sup>th</sup> May, 2016**. The applicant's case is that on or about 20<sup>th</sup> August, 2008, he entered into an agreement with Misori Construction Company Limited (the "Vendor") to purchase twelve (12) plots each measuring naught decimal one (0.1) of a hectare or thereabouts that were to be hived off the parcel of land registered as L.R.NO. 337/1631 (Grant Number I.R. 72197) at the price of Kshs. 1,000,000/- per plot. The aggregate purchase price for the twelve (12) plots was Kshs. 12,000,000/-. At all material times the defendant/respondent acted for the Vendor in the transaction between the Vendor and the applicant.

3. The applicant states that it was a term of the said agreement for sale that the aggregate purchase price of the twelve (12) plots was to be paid in the following terms;

**i. Kshs. 1,200,000/- that was to be paid to the Vendor directly upon execution of the agreement for sale;**

**ii. Kshs. 1,200,000/- was to be paid to the Vendor through the defendant/respondent who were to hold the same as stakeholders' deposit pending the completion of the transaction; and**

**iii. The balance of the sum of Kshs. 9,600,000/- was to be paid upon completion of the sale transaction.**

4. The agreement for sale further provided that if for any cause whatsoever other than non-completion caused by the default of the Purchaser the transaction was not completed on the completion date then the defendant/respondent would refund to the vendor the deposit of the sum of Kshs. 1,200,000/- paid to them as stakeholders' deposit pursuant to the agreement for sale without any deductions whatsoever. The applicant's advocates on record in the said transition were initially the firm of King'oo Njagi & Company Advocates whom the applicant replaced with M.P. Makumi & Company Advocates and whom were later replaced with Makumi, Mwangi, Wang'onde & Company Advocates.

5. The applicant's case is that on or about 20<sup>th</sup> August, 2008, his advocates forwarded to the Defendant/Respondent Equity Bank Limited's Banker Cheques Numbers 041004 and 041005 for the total sum of Kshs. 2,400,00/=. That the defendant/respondent were to release one of the said cheques for Kshs. 1,200,000/- to the vendor and hold the other sum of Kshs. 1,200,000/- as stakeholders' deposit on their Professional Undertaking not to release the same to the Vendor pending completion of the transaction. The defendant/respondent did, by their letter dated 28<sup>th</sup> August, 2008, furnish a Professional Undertaking to hold the aforesaid sum of Kshs. 1,200,000 pending completion of the transaction. Soon thereafter, there arose disputes as to the validity of the Vendor's ownership of the subject land which ended up in the High Court of Kenya at Machakos being **Civil Case Number 277 of 2010- Misori Construction Company limited versus Ubora Housing Co-operative Society Limited**, seeking for an injunction, damages for trespass and other reliefs in respect of the land as a result of which the said transaction could not be completed. The applicant then demanded back the deposit of Shs. 1,200,000 from the defendants due to the apparent collapse of the said transaction but the defendant refused and has continued to hold the said sum of Kshs. 1,200,000/- despite their knowledge that the said transaction has failed. The application before the court is therefore to secure orders to enforce Professional Undertaking.

### **The Response**

6. The Originating Summons is opposed by the defendant vide a Replying Affidavit sworn by the defendant herein dated **4<sup>th</sup> June, 2015**. The defendant's case is that it is premature for the applicant to seek the release of the said sum since the condition upon which the money is held by the defendant is yet to take place, the process having been delayed by a case dispute on the validity of the Vendor's ownership of the subject matter.

### **Submissions**

7. With leave of court parties filed submissions. The applicant filed his submission on **28<sup>th</sup> January, 2016** and Further Submission on **6<sup>th</sup> May, 2016**, while the respondent filed submission on **16<sup>th</sup> February, 2016** and Supplementary submission on **27<sup>th</sup> June, 2016**.

8. I have carefully considered the Originating Summons and the response to it together with submissions.

9. The brief history of the Originating Summons is as follows;

By a sale of land agreement dated 20<sup>th</sup> August, 2008 the plaintiff/applicant entered into a purchase of land agreement with Misori Construction Company Limited. In the transaction, Misori Construction Company Limited was the vendor and was represented by the defendant. The plaintiff (purchaser) was represented by the firm of King'oo Mwangi & Company Advocates. Vide a letter dated 28<sup>th</sup> August, 2008, addressed to the plaintiff's advocates the defendant issued a Professional Undertaking ("*the Professional Undertaking*") in terms of the **clause 4** of the agreement. The material part of the letter read as follows:

***We do hereby give our Professional Undertaking not to release the sum of Kshs. 1,200,000/= in terms of clause 4 of the agreement for sale.***

**Clause 4** of the agreement provided that;

***The vendors advocates shall disburse the said deposit of the sum of Kshs. 2,400,000/- by releasing to the vendor a sum of Kshs. 1,200,000/- and retain the balance of the purchase price being Kshs. 1,200,000/- as stakeholder deposit to be released upon completion.***

The completion date was provided in **clause 5** of the agreement as follows:

*i. The thirtieth day after the date on which the Deed Plans together with duly executed Transfers in respect of the twelve (12) plots are supplied to the Purchaser's Advocates for registration; or*

*ii. The thirtieth day after the day of which valid Rates Clearances Certificates, other clearance certificates and consents as may be required are supplied to the Purchasers' Advocates for purposes of registration of Transfer; or*

*iii. The seventh day after the date of successful registration on the transfers and issuance of Title Certificates in respect of the twelve (12) plots in favour of the Purchaser.*

Whichever is the latter (*herein called "the completion date"*)

10. Subsequently, the plaintiff appointed the firm of M.P Makumi & Company advocates to represent him in the transaction in the place of King'oo Njagi advocates. From the submissions of the respondent, it is apparent that the plaintiff thereafter had a tentative understanding with the vendor in which the plaintiff was to be co-opted into the vendor's company as a shareholding director. The effect of this arrangement was to have the property developed jointly by the plaintiff and the vendor. The registration of the transfers in the name of plaintiff would therefore be done away with in this new arrangement. However, it appears that before the completion of the transaction in the new arrangement, a dispute arose as to the validity of the vendor's ownership of the subject matter which ended in the High Court at Machakos involving the vendor – HCC No. 227 of 2010 ***Misori Construction Company Limited versus Uboru Housing Co-operative Society Limited***. That case is still pending. The plaintiff now seeks to have the Professional Undertaking enforced by this court, while the defendant submits that the application should be dismissed as the Professional Undertaking has not been breached by the defendant.

11. The issue for determination by this court is whether the said Professional Undertaking has been breached. Before an order for enforcement of a Professional Undertaking is given, the court must be satisfied that there has been a breach of an undertaking given by an advocate acting professionally. This

Principle of the law on the point was emphasized in the case of **Geoffrey Silver & Drake V. Thomas Anthony Baines [1971]1 All ER 473**, with the court observing that the powers of the court to enforce undertakings is a summary and drastic power and must, as is usual in the exercise of such powers be invoked with caution and in clear cases. In addition, a Professional Undertaking must be enforced according to the intention of the parties, thus in **Mboya Wangongu & Waiyaki Advocates v. Hamilton Harrison & Mathews [2012] eKLR** the court explained that in order to achieve this;

***The plain and literal meaning of the undertaking is sought, ascertained and enforced accordingly.***

12. This means that where the undertaking is conditional the condition must be met before the undertaking is fulfilled. In **Halsbury's Law of England, 4<sup>th</sup> Edition (Re-Issue) Vol. 44(1)** paragraph 354 at pages 222-223;

***“The undertaking must be clear in terms. The whole of the agreement to which it relates must be before the courts, and the undertaking must be one which is not impossible ab initio for the solicitor to perform. Nevertheless, an undertaking will be enforced against the solicitor even through, after it is given, the client dies, or instructs the solicitor not to perform it, or changes his solicitor. If performance of the undertaking has been waived the undertaking will not be enforced afterwards. Similarly, if the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced”***

The undertaking in the present case was predicated upon the completion of the sale of land transaction between the plaintiff and the Vendor. The intention of the parties in this case was that the defendant would release the amount of Kshs. 1,200,000 to the vendor only on completion of the transaction as defined in the terms of the Agreement. The plaintiff has specifically pleaded in paragraph 10 of his supporting affidavit that the transaction was not completed as there was a dispute concerning the validity of the ownership of the subject matter. That dispute is the subject of a civil suit that is still pending. In the premises, the Professional Undertaking cannot be enforced in the manner in which the plaintiff is seeking in the application. Payment of the amounts claimed by the Plaintiff would amount to breach of the terms of the Professional Undertaking on the part of the defendant and a violation of **clause 4** of the agreement.

13. It is the finding of this court that the plaintiff's application is premature.

14. The upshot is that the Originating Summons under consideration fails with costs in the cause.

Orders accordingly.

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**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 8<sup>TH</sup> DAY OF MARCH, 2017**

.....

**DAVID KEMEI**

**JUDGE**

**In the presence of:**

Miss Mutiso – for Miss Mwangi

Court Assistant - Munyao