



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE No 307 of 2015 (O.S.)

JOSEPH KING'ORI NDUNG'U.....APPLICANT

Versus

KOSKEI JOEL KIPKURUI and MONDA OMBORI ROGERS

AND E.J. RUTO T/A KOSKEI MONDA & COMPANY

ADVOCATESRESPONDENTS

R U L I N G

1. The Application before the Court is brought by an Originating Summons that was filed on 23rd June 2015. It seeks to enforce a professional undertaking for the payment of the sum of KShs.4,000,000/=. The undertaking was given in relation to and against the framework of a sale of a piece of land. The Vendor (Bernard Kairu Kihara) owed the Applicant herein the sum of KShs.4,000,000/=. The Application also seeks interest at the rate of 24% from the date of the undertaking to payment in full.

2. The Application seeks the following Orders:

1. *The Defendants be ordered to honour their professional undertaking issued to the Plaintiff on 22/10/2013 for the payment of Kshs.4,000,000/=.*
2. *The Defendants be ordered to pay the Plaintiff interest on the sum of Kshs.4,000,000/= at the rate of 24% per annum from 22/10/2013 until payment in full.*
3. *The costs of this suit be borne by the Defendants*

The Grounds on which the Summons is founded are:

1. *On 22nd October, 2012, the Defendants issued the Plaintiff with an undertaking for payment of Kshs. 4,000,000/= on account of a debt owed by the Plaintiff by BERNARD KAIRU KIHARA*
2. *The Defendants have refused to pay the aforesaid Kshs. 4,000,000/= as per the terms of their undertaking and therefore rendering this suit necessary.*

The Supporting Affidavit is sworn by the Applicant (who refers to himself as Plaintiff). In the main it explains that “*the Defendants were stake holders of the purchase proceeds of parcels of land*”

which were being sold by the said BERNARD KAIRU KIHARA”

3. The Respondents have filed a voluminous Replying Affidavit exhibiting numerous Exhibits that have very little relevance to the issue the Court has to decide. The Replying Affidavit runs to 41 paragraphs and the Exhibit to 77 pages including an agreement for sale and a Certificate of Registration showing the membership of the Law Firm. The Background facts are relatively straightforward. The Vendor owed the Applicant Kshs4 million. The Creditor/Applicant was to be paid from the proceeds of sale. It seems that was an arrangement entered into to reassure the Applicant by informing him he would be paid from the proceeds of sale. That was done by way of an undertaking from the Vendor's Advocates. The Undertaking was set out in a Letter. It is dated 22nd October and is typed on the Respondent's Letterheaded paper. It states:

“We wish to confirm that a sale agreement dated 23rd July 2013 was signed and it was agreed that our firm would hold the sale proceeds payable in two tranches, as stake holders pending completion... We further confirm that we have instructions from Bernard to remit to you the sum of Kenya Shillings Four Million (KShs. 4,000,000.00) from the sale proceeds. We undertake to remit the said sum to you or to your order on successful completion of the agreement and we shall keep you posted on any developments in the matter.”

4. That undertaking makes clear that the Advocates are acting under instructions from their Client, Bernard. There can be no confusion as to that. Secondly it makes clear that any payment is dependant “on successful completion”. Thirdly the payment was to emanate from the proceeds of sale.

5. The Application is premised on an interpretation that the undertaking was, in effect iron clad. In other words it would endure in time regardless of whether or not there was a successful completion. The Application has put forward no evidence whatsoever of a successful completion demonstrating his case that it is not relevant. Further, the Applicant's interpretation seeks to remove primary liability for the debt from the main debtor (the Vendor) and place it on his Advocates. This is further demonstrated by the fact that the Applicant has not joined the Debtor as a Party to these proceedings. If his sole intention was to be paid, he would have said both promised to repay me, if not one then the other. He has not done that. Therefore his bona fides are questionable. Thirdly, the Applicant seeks to impose principal liability upon an agent of a disclosed principle. The Applicant's Submissions do not address that point.

6. The Claim for interest further demonstrates the Applicant's motives. He seeks interest from the date of the undertaking. That means by not joining the principal debtor he is willing to forego the interest between the date the debt arose and the “undertaking” was given?

7. Any analysis cannot ignore the additional fact that a “professional undertaking” is sought to be enforced yet nothing has been said to the body that regulates the profession in relation to the breach of an undertaking. That suggests the Applicant is not as sure of his case as he now seeks to assert.

8. The Parties agreed that the Matter should proceed by way of Written Submissions and Highlighting. The Written Submissions and Oral Submissions form part of the record and have been considered carefully. They are not repeated here for the sake of brevity.

9. It is clear to the Court that the “Undertaking” is not the Advocates taking over the Debts of the Vendor. It is clear from the face of the undertaking that it was made on two conditions (1) the Advocate-Client relationship continuing and (2) there being successful completion. The Applicant has not put forward any evidence of either eventuality. In the circumstances the Application is dismissed with costs.

10. In addition, the inconsistencies enumerated above demonstrate that the Applicant was acting in bad faith. These proceedings were not justified at all in the way that they were brought. A properly presented case may have had a different outcome. As a result they caused the Respondents distress and to incur unnecessary costs. Such conduct must sound in costs. Therefore under the powers granted by Article 159(2), Section 1A, 1B and 3A and 27 of the Civil Procedure Act, it is ordered that the Plaintiff/Applicant to pay the Defendants/Respondents costs on an indemnity basis.

Order accordingly

FARAH S.M. AMIN

JUDGE

Signed and Delivered in Nairobi on this the 3rd day of March 2017

In the Presence of:

Court Assistant: Wangeci and James

Plaintiff/Applicant: Mr Murchigi

Defendants/Respondents: Mr Wambugu HB Mr Monda