



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURTS

ELC MISC NO. 232 OF 2014(OS)

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

AND

IN THE MATTER OF: THE ENFORCEMENT OF A PROFESSIONAL UNDERTAKING

ISSUED BY EDWARD M OONGE & FRANKLIN J.WERE T/A WERE & OONGE ADVOCATES

ACHELIS KENYA LIMITEDPLAINTIFF

EDWARD M OONGE.....RESPONDENT

FRANKLIN J WERE

T/A WERE & OONGE ADVOCATES.....RESPONDENT

RULING

The matter coming up for determination is the Originating Summons dated **3rd July 2014**, brought by the Applicant herein ***Achelis Kenya Ltd***, against the Respondents, ***Edward M Oonge and Franklin J Were T/A Oonge & Were Advocates***. The applicant has sought for the following orders.

i. Spent

ii. Spent

iii. Spent

iv. An order for the enforcement of a professional undertaking against Edward Oonge and Franklin J Were Advocates of the High Court of Kenya, practicing in the name and style of Oonge & Were advocates given on the 5th day of March 2014.

v. To further pay the applicant the sum of Kshs.56,000,000/=, plus interest thereon at the rate of 2% above the business and commercial rates.

vi. That the Respondents within 7 days of the date of the order of this Honourable Court honor

their professional undertaking by delivering to the applicant the original title deed of all that piece of land namely LR No.330/441 and LR No.330/442.

vii. An order that the Respondents do pay to the applicant the costs of this Summons as between the advocates and client to be certified by the Deputy Registrar of this Honourable Court together with interest at Courts rate from the date of taxation until payment in full.

The Summons herein are supported by the grounds stated on the face of the originating summons and also the supporting affidavit of **Kijana Muriuki** . These grounds are; that the Respondents practicing in the name and style of **Oonge & Were Advocates** issued an unequivocal professional undertaking on **5th day of March 2014**. However, the Respondents have despite numerous demands refused to comply with their professional undertakings and are thus in breach thereof. Therefore the applicant is entitled to bring this action to compel the Respondents to comply with their undertaking in the light of the facts, the Law, and the circumstances of the case.

In his supporting affidavit **Kijana Muriuki**, the Managing Director of the applicant averred that on or about the **10th February 2014**, the applicant entered into a sale agreement for its properties to wit **LR No.330/441 and LR No.330/442 to M/s Tofina Rom Builders Ltd** as evidenced by annexure **KM-1**. That the purchase price would be **Kshs.182,500,000/=** wherein a deposit of **Kshs.36,500,000/=** was made upon signing of the sale agreement . The balance of **Kshs. 146,000,000/=** would be released to the vendor within a period of **120 days** of the execution of the agreement. It was his contention that pursuant thereto, the vendor duly paid the **20%** deposit of **Ksh.36, 000,000/=** . Further that the said balance was to be paid on or before **10th June 2014**. He contended that on **23rd April, 2014** the vendors lawyers **Daly & Figgis Advocates**, forwarded the completion documents to the Respondents herein based on their professional undertakings as evidenced by **KM-2** . He also deposed that the Respondents then lodged the said Transfer and had the property transferred to its client's nominee. However, the Respondents have only remitted **Kshs.90,000,000/=** to the applicant leaving a balance of **Kshs.56,000,000/=** and therefore they are in breach of their **professional undertaking** . They also deposed that despite a formal demand being made to the Respondents to honour the **professional undertaking**, the Respondents have refused to and neglected to honour the same. The demand was attached as annexure **KM -3** . Therefore that if the Respondents do not honour the professional undertakings, the applicant stand to loose its property or substantial part of the sale proceeds and that would be to the applicant's irreparable detriment. It was his contention that in order to preserve the subject matter **pendete lite**, and to serve the end of justice, the Respondents should be ordered to deposit the subject conveyance in respect of both properties to wit **LR No.330/441 and LR No.330/442** in Court. Further that the Respondent should be compelled to honour the professional undertaking.

The Respondents opposed the originating summons **Edward M Oonge** , an Advocate of this Court averred that he had the authority to his partner Franklin J Were Advocate ,to swear the Affidavit on his behalf. He admitted that he acted on behalf of **Tofina Rom Builders Ltd**, who were the purchasers of **LR No.330/441 & LR No.330/442**, in which the applicant was represented by the Law Firm of **Daly & Figgis Advocates** . He also admitted that the agreement provided for the payment of the purchase price and the duration of payment as indicated in paragraph 3 of the Supporting Affidavit. Further that the agreement provided for a completion period of **120 days** from the date of the agreement that is the **4th February, 2014**. That the Applicant delivered the completion documents on **23rd April 2014**, which was a delay and the said delay affected the completion process. He further contended that the sale agreement provided for a dispute resolution measures in respect to the terms of the agreement. Further that clause **13:8** provided for payment of interest on any sum that remained unpaid at the rate of **20%**, above Commercial lending rates. It was his contention that at the time of filing the instant application, the parties had not even attempted to engage in a resolution of the dispute in light of clause **13:6** of the agreement. He also contended that on **15th July 2014** , a sum of **Ksh.56,000,000/=** the subject matter of this summons was paid to the applicant's advocates and a further sum of **Kshs.1,714,552/=** being interest as provided in the agreement was also paid and acknowledged by the applicant's Advocates as per the annexure **EMO1** . Further, that the transaction has been completed and applicant has granted vacant possession to the purchaser and therefore this application is spent.

The originating summons was canvassed by way of written submissions *M/s Wandabwa & Co. Advocates* filed their submissions on behalf of the applicant. He submitted that the balance of **Ksh.146,000,000/=** should have been paid by the **9th March 2014** and not later than **18th June 2014**. He further submitted that the applicant liquidated the purchase price and completed payment of the purchase price on **15th July 2014**, and paid part of the interest on **16th September 2014**. It was his submissions that the payments were made after the due date under the Respondents undertaking and therefore the Respondents were in breach of their undertaking. Further that the Court has inherent jurisdiction in matter concerning the conduct of the Advocates as officers of the Court and therefore the Court has unlimited jurisdiction to discipline its professional officers for breach of ethics. It was his further submissions that Judgement be granted for the interest due in the amount of **Ksh.4,679,298/=** as decretal interest on the same at **20%** from **6th September 2014**, until the date of payment.

On their part, *Were & Oonge Advocates* submitted that the applicant and the Respondents entered into a sale agreement for sale of **LR No.330/441** and **330/442** and time was of essence in the said transaction. As per clause No.1 the purchasers Advocates issued a professional undertaking. That the completion documents were delivered to the Respondents on **8th April 2014**, 70 days from the execution of the sale agreement which inordinately delayed the process in which time was of essence. It was his submissions that the payment have been made fully together with interest at **1,714,852 /=** being interest as provided in the said sale agreement. He further submitted that the applicant had handed over the vacant possession to the Respondent's client and therefore the transaction is completed and there is nothing else outstanding. It was their further submissions that the interest payable was **Ksh.1,714,852/=** which was paid and accepted by the applicant who handed over vacant possession of the suit properties to the Respondents. Further; that the application was brought without addressing all the avenues provided in the agreement and the applicant was also guilty of delaying the process by delivering the completion documents late. Therefore this application was unnecessary as all the prayers sought have been overtaken by events. Respondent prayed for dismissal of the instant application with costs.

The Court has indeed considered the instant originating summons which is brought under **Sections 55 of the Advocates Act** and **Section 3A of the Civil Procedure Act**.

The applicant main prayer is for enforcement of the professional undertaking given by the Respondents while acting for their client, purchaser *M/s Tofina Rom Builders Ltd*. The said undertaking was given on **5th March 2014**. In the aid undertaking on **clause (d)**, the Respondent had undertaken to:-

“Pay the balance of the purchase price of Ksh.146,000,000/= within a period of 14 days of the successful registration of the transfer or on completion date, which is earlier to the vendor's provided Bank account”

This suit was filed on **3rd July 2015**. It is admitted that the purchaser was registered as the proprietor of the suit property in the month of **June 2014**. The exact date of the registration is not given. It is evident by **3rd July 2014**, when the instant summons was filed; the Respondents had not remitted the balance of the purchase price. However, it is now evident from the bank sup dated **15th July 2014**, that the Respondents did deposit **Ksh.56, 000,000/=** to the Bank Account of the Applicant's Advocate. The said deposit is not disputed. Further the Respondents deposited **Ksh.1, 714,852/=** in the Bank Account of the applicant advocates which amount is alleged to be interest payable.

The applicant had sought for enforcement of the professional undertaking. The Respondents have paid the full purchase price plus the interest. The applicant has submitted that the Court should order the Respondents to pay a decretal interest of **Kshs. 4,679,298** from **6th September 2014** until payment in full. However the parties are bound by their pleadings. In the instant originating summons, the applicant did not seek for decretal interests of **Kshs.4,679,298=** but only for the enforcement of the professional undertaking and costs of the Summons.

I have noted that the Respondents have already paid the balance of **Ksh.56,000,000/=** together with interest. Therefore the main prayer **No. 4 (ii)** of the Originating Summons has been overtaken by events.

Consequently, the Court finds that the Originating Summons has been overtaken by events and that the applicant is not entitled to the decretal interest of **Kshs.4,679,298/=** as the same was not pleaded in the Originating Summons. However, the Respondents delayed in remitting the balance of the purchase price and caused the applicant to file this Originating Summons. The Respondents are therefore bound to pay for costs of this Summons.

The upshot of the foregoing is that the applicant's Originating Summons dated **3rd July 2014**, has been overtaken by events and the same is hereby dismissed. However the applicant is entitled to costs of this summons.

It is so ordered.

Dated, Signed and Delivered this **10th** day of **July, 2015**

L.GACHERU

JUDGE

10/7/2015

In the presence of

Hon. Gacheru Judge

Court Clerk : Lerionka

Mr Mungao holding brief for Mr Wandabwa for the Applicant

M/s Ombogo holding brief for Mr Oonge for the Respondents

Court

Ruling read in open Court in the presence of the above advocates.

L. GACHERU

JUDGE