



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO 506 OF 2013

JOSEPH WATHUA KIGWE.....APPLICANT

VERSUS

BERNARD PIUS NJOROGE KARIUKI

AND MAYIANI SAKALE T/A

TOBIKO, NJOROGE & COMPANY ADVOCATES.....RESPONDENT

JUDGMENT

INTRODUCTION

1. On 19th November 2013, the Applicant filed an Originating Summons dated the same date. The same was brought pursuant to the provisions of Section 52 Rule 7 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. It sought the following reliefs:-
 1. **THAT the Respondents carrying on business as Tobiko Njoroje & Company Advocates do honour their irrevocable and unconditional professional undertaking dated 26th April 2006 and pay the Applicant the sum of Kshs 1,000,000/=.**
 2. **THAT enforcement of the undertaking given by the Respondent (sic) do issue against the Respondents (sic) herein.**
 3. **THAT the Respondents (sic) do pay interest on the sum of Kshs 1,000,000/= at the rate of 21% as at 1st May 2013.**
 4. **THAT the Respondent (sic) do bear the costs of the application.**
2. The said Originating Summons was predicated on several grounds, the main one being that the Respondent firm of advocates had given the Applicant a professional undertaking to pay him a sum of Kshs 1,000,000/= against him removing a restriction on the land parcel known as Ltd (sic)/Kimama/ Tikondo/3504 which he had intended to purchase pursuant to a Sale agreement with the Vendor one, Noonkayiok Kool who was represented by the Respondent in the said sale transaction but that the Respondent had refused and/or declined to remit to him the said sum of money after he removed the said restriction. Details of what transpired in the transaction were set out in the said grounds.

AFFIDAVIT EVIDENCE

3. The Applicant swore an affidavit on 15th November 2013 in which he had set out the chronology of the events leading to the Respondent issuing the said professional undertaking.
4. He deposed that the Respondent paid him a sum of Kshs 1,000,000/= whereupon he removed the restriction but the balance was not forthcoming leading him to file the Originating Summons herein.
5. The Respondent's advocates attended court on 14th February 2014 when the court issued directions on how the Respondent was to file its Affidavit in response to the Originating Summons herein and the filing of the written submissions by both parties. A date for highlighting of the written submissions was to be taken at the registry.
6. When the matter came up in court on 21st May 2014 for highlighting, neither the Respondent nor its advocates attended court. It was evident from the court file that the Respondent had failed to comply with the court's directions as regards the filing of its response and written submissions. The Applicant had filed an Affidavit of Service sworn by Geoffrey Dazani on 25th April 2014 on 19th May 2014 evidencing service of the Hearing Notice dated 27th March 2014 which was duly acknowledged and stamped by the firm of M/S Tobiko Njoroge & Co Advocates.
7. Having been satisfied that the said Hearing Notice had been properly served, the court proceeded to consider the Applicant's pleadings and written submissions with a view to delivering its judgment. As at the time the court retired to write the judgment herein, the Originating Summons was unopposed and will be dealt with as such.

LEGAL SUBMISSIONS BY THE APPLICANT

8. In its written submissions dated 20th March 2014 and filed on 26th March 2014, the Applicant identified the following issues as those for determination by the court:-
 - i. **Whether there was a valid professional undertaking given by the Respondent capable of enforcement;**
 - ii. **Whether the Applicant relied on the said professional undertaking to alter his position in this matter; and**
 - iii. **Whether the Applicant was entitled to the prayers sought.**
9. He submitted that the Respondent had given him a solemn undertaking that was for all practical intents and purposes, valid and enforceable. His argument was based on the Respondent's letter dated 29th April 2013 which was in response to his email of 25th April 2013. The said letter had stated as follows:-

“We confirm that we are agreeable to the contents of the email and hereby given our professional undertaking as follows:-

- i. **To deposit a sum of Kenya Shillings One Million (Kshs 1,000,000/=) being a refund of the deposit for the L.R. No Loitokitok/Kimama-Tikondo 3585 in consideration of removal of the restrictions over and above the above referenced parcel of land today. A copy of the RTGS Slip is enclosed hereto.**
 - ii. **Within seven (7) days of the removal of the restriction. We undertake to pay you a further sum of Kshs 1,000,000/= being the refund for the parcel known as L.R. No Loitokitok/Kimama-Tikondo 3585” (hereinafter referred to as “the subject property)**
10. He stated that he acted on the said professional undertaking and removed the said restriction as was evidenced in his letter of 29th April 2013. It was his submission that the Respondent was bound by the said undertaking as failure to honour the same was *prima facie* evidence of professional misconduct. He urged the court to enforce the said undertaking as it had power to do so. He relied on the case of **Naphatali Paul Rair vs David Njogu Gachanje D. Njogu & Co Advocates (2006) eKLR** to buttress its argument. A copy of the said authority was not attached to his submissions as he had indicated.
 11. He averred that as a businessman, he could have applied the money elsewhere. It was his prayer

that since the Respondent had been holding on to his money since 1st May 2013, it was mete and just that enforcement do issue against the Respondent as had been prayed for in the Originating Summons herein.

LEGAL ANALYSIS

12. From the facts of the case, it is evident that when the sale transaction fell through, it was mutually agreed that the said Vendor would refund the deposit in the sum of Kshs 2,000,000/=. There was no documentation evidencing this mutual agreement. However, the reference of the said agreement was contained in the Respondent's letter of 29th April 2013. This was sufficient to satisfy this court that there was indeed such an agreement. The court noted that the sum of Kshs 1,000,000/= was paid to the Applicant in consideration of the removal of the restrictions over the parcel of land known as L.R. No Loitokitok/ Kimana- Tikondo/3585.
13. It is evident that the Applicant had placed a restriction on the said subject property in his capacity as a buyer of the same and the same was issued until the issue of his refund in respect of L.R. No Loitokitok/ Kimana- Tikondo/3504 was settled and confirmed. This was evidenced by a letter dated 2nd November 2012 from the Chief Land Registrar to the District Land Registrar of Kajiado.
14. In his letter dated 29th April 2013, the Applicant wrote to the Chief Land Registrar informing him that the disputes had been settled. His letter was written pursuant to the Respondent's letter of undertaking dated 26th April 2012. However, the balance of the sum of Kshs 1,000,000/= was not paid despite his many pleas leading to the filing of this Originating Summons.
15. The Respondent's letter of 12th June 2013 to M/S Kibati & Co Advocates, who were acting for the Applicant at the material time, indicating that it would disburse the monies once it received the same, would not come to their aid. The professional undertaking was not a mere letter. It was a confirmation or firm commitment that the Applicant would do something in the hope that the Respondent would also do its part.
16. It is a mark of honour for a total stranger to trust an advocate he does not know and accept his professional undertaking for payment of monies at a later date or upon the happening of an event that has to be done before the transaction can be concluded. The professional undertaking must be bankable as any transaction between the parties would ordinarily be hinged on the professionalism of that advocate.
17. An analogy of this is that when one party issues a cheque to another, the person to whom the cheque is issued has a legitimate expectation that the said cheque will be paid upon its presentation at the bank and that the same shall not be returned unpaid. This is an automatic assumption that the recipient of the said cheque makes.
18. In the same vein, the Applicant herein had a legitimate expectation that once he removed the restriction over the said parcel of land known as L.R. No Loitokitok/Kimana- Tikondo/ 3505, he would receive a payment of Kshs 1,000,000/= from the Respondent herein based on the professional undertaking that it had given him.
19. It is this legitimate expectation that makes issuance of professional undertakings very serious business. If that were not so, sale transactions would be impossible or difficult to transact due to mistrust amongst parties and their advocates. The losses that are to be suffered or likely to be suffered by a party relying on a professional undertaking issued by an advocate can be astronomical hence the need to preserve their integrity and jealously guard importance of the same to ensure a smooth flow in commercial transactions.
20. It is indeed serious professional misconduct on the part of an advocate to issue a professional undertaking to remit monies to another when he does not have the funds in his hands. It is therefore dishonest for an advocate to aver authoritatively that he will do something on behalf of his client but fail to honour his word. Where a party fails to put his advocate in funds but his advocate nonetheless issues a professional undertaking on the trust that that client will remit the monies in contention, that advocate will be held solely responsible and will have to bear the full liability to ensure that the party who relied on that advocate's professional undertaking does not suffer any loss or prejudice at all.
21. Accordingly, having considered the pleadings herein, the affidavit and documentary evidence placed before this court by the Applicant, the court is satisfied that the Respondent's professional

- undertaking contained in its letter of 29th April 2013 led the Applicant to act to his detriment when he removed the restriction that he had placed in respect of the said subject property. The Applicant cannot be left home and dry especially when he had taken all the precautions and steps to safeguard his interests and fulfilled his obligations to the aforesaid Vendor and/or the Respondent. The Respondent must bear full responsibility for the Applicant's loss.
22. The court therefore agrees with the Applicant that the professional undertaking given to him by the Respondent was capable of enforcement as he had acted on the same to alter his position in this matter quite to his detriment. He is therefore entitled to the enforcement of the said professional undertaking.
23. The Applicant wrote to the Chief Land Registrar on 29th April 2013 advising him that the dispute had been resolved and confirmed that the restriction could be removed. The date from when the interest was payable shown as 1st May 2013 does not appear unreasonable bearing in mind that the sum of Kshs 1,000,000/= was to be paid within seven (7) days from the date of removal of the restriction. Although there is no documentary evidence when the said restriction was removed, the court will presume that that date was on 1st May 2013 as no evidence to the contrary was adduced by the Respondent to rebut the court's presumption.
24. The Applicant did not give any plausible reason or any reason at all to justify why he would be entitled to interest at 21% per annum. Any figures advanced by any party must at all times be supported. He did not demonstrate that the sum of Kshs 1,000,000/= was a loan for which he was paying commercial interest on at the rate of 21% per annum. It was irrespective that he was a businessman who applied the said monies in another business venture. His claim for interest at commercial rates had to be specifically proven but unfortunately, he failed to persuade the court that he should be awarded the same.
25. Finally, the court wishes to point out that it did not indicate the letters "O.S" after the citation of the case herein as the same was not included by the Applicant in his original and subsequent pleadings herein.

DISPOSITION

26. It is therefore the view of this court that the Applicant was able to prove Prayer Nos (1) and (2) of the Originating Summons herein. In the circumstances foregoing, the court hereby grants Prayer Nos (1) and (2) of the said Originating Summons dated 18th November 2013 and filed on 19th November 2013. Interest on the sum of Kshs 1,000,000/= will be payable at court rates with effect from 1st May 2013 until payment in full. The Respondent shall bear the costs of the said Originating Summons.
27. It is so ordered.

DATED and DELIVERED at NAIROBI this 10th day of July 2014

J. KAMAU

JUDGE