



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO 354 OF 2012 (O.S)

A.H. MALIK & CO., ADVOCATES.....PLAINTIFF

VERSUS

FRED MUTUA

(T/a NZIOKI MUTUA & ASSOCIATES, ADVOCATES).....DEFENDANT

RULING

1. Both parties in these proceedings are advocates. The **originating summons dated 20th June 2012** brought under **Order 52, rule 7(1) (b)** of the **Civil Procedure Rules, 2010** (the **Rules**) seeks enforcement of an advocate’s professional undertaking. The actual prayer is rendered as follows -

“That the Defendant advocates do honour their professional undertaking and pay the Plaintiff the sum of US Dollars 3,098/- equivalent to KShs 260,387/00 or at the prevailing rate at the time of payment [3,098 X 84.08] within fourteen days from the date of service of (the) order of this...court failing which this... court do issue an order in enforcement to compel the Defendant...to pay the sum of US Dollars 3,098/00 equivalent to KShs 260,387/00 or at the prevailing rate at the time of payment [3,098 X 84.05] plus interest thereon immediately.”

2. It turns out that the professional undertaking was given, not by the Defendant, but by one **A F Kisebu, Advocate** who subsequently died. It is stated in the supporting affidavit annexed to the originating summons, which is sworn by one **Mr Malik** from the Plaintiff firm that after the death of Mr Kisebu the “matter at hand” was taken up by the Defendant. Indeed the Defendant adopted the undertaking made by Mr Kisebu by his letter to the Plaintiff dated 17th November 2011. That letter states in the material portion -

“We hereby irrevocably undertake to adopt the undertaking made to yourself by the firm of Kisebu & Co. Advocates and shall keep you informed of the developments herein.”

3. It is the Plaintiff’s case that the undertaking in question is contained in their letter dated 15th

February 2011 addressed to A F Kisebu & Co. Advocates. This letter is exhibited at paragraph 3 of Mr Malik's affidavit. The letter states –

“Dear Sirs,

RE: LAND REFERENCES NUMBER 330/403 –

JOSEPHINE NTHAMBI KIOKO (DECEASED)

We refer to your letter of 10th instant and as requested we are enclosing: -

- 1. Indenture dated 31st December 1974 conveying the property to Dr. Kioko and Mrs Kioko.**
- 2. Indenture of Re-Conveyance dated 10th March, 1997 between East African Building Society and Dr. Kioko and Mrs Kioko registered in volume N 64 Folio 19/21 file number 10949.**
- 3. Deed dated 21st November, 1996 between Josephine Nthambi Kioko and Gideon Musyimi Kioko whereby the property was conveyed to Josephine Nthambi Kioko.**

These documents are sent to you upon your irrevocable professional undertaking that within seven (7) days of the registration of the conveyance to the Purchaser Chrisanthus Musambayi Katumanga and Anne Murambi as detailed in the Agreement for Sale dated 14th July 2004. (Sic)

Kindly confirm the undertaking by signing the duplicate of this letter.”

Mr Kisebu confirmed the contents of the letter dated 15th February 2010 by signing on the same, and thereby gave his undertaking.

4. What immediately comes to mind is that there is actually no undertaking contained in the above quoted letter when viewed by itself. After the date “14th July 2004” at page 2 of the letter, that is where the words constituting the undertaking should have appeared. But such words are missing, perhaps due to inadvertence.

5. The next letter annexed to Mr Malik's affidavit is dated 15th November 2011 addressed by the Plaintiff to the Defendant. The letter states –

“Dear Sirs,

RE: LAND REFERENCE NUMBER 330/403 –

JOSEPHINE NTHAMBI KIOKO (DECEASED)

Please refer to our letter of 13th September 2011 (copy enclosed) which you received from us on 14th September, 2011.

Are you now in a position to pay to us the sum of USD 3,098?

An early reply will be appreciated.”

In response to that letter, by his letter dated 17th November 2011, the Defendant undertook to adopt the

“undertaking made by Mr Kisebu”. Thereafter the Plaintiff made a demand for payment of US Dollars 3,098 by the Defendant “in satisfaction of the undertaking given by Mr Kisebu”.

6. There is a **supplementary affidavit** (titled *further* affidavit) sworn by Mr Malik and filed in court on 17th May 2011. To this affidavit are annexed three letters addressed by A F Kisebu & Co Advocates to the Plaintiff. The first letter dated 10th February 2010 states –

“Dear Sirs,

RE: LAND REFERENCE 330/403

JOSEPHINE NTHAMBI KIOKO (DECEASED)

Refer to your letter dated the 16th December 2009 and to Malik/Kisebu telephone conversation of the 10th February 2010, in respect of this property.

We undertake to pay to you the 3,098 Dollars that the Deceased owed you after the completion of the sale of the property.

Accordingly kindly do release the original certificate of title for this property to us so that we may take the next essential step towards the completion of the sale.”

The second letter dated 12th May 2010 states –

“Dear Sirs,

RE: LAND REFERENCE NUMBER 330/403

JOSEPHINE NTHAMBI KIOKO (DECEASED)

Your letter dated the 11th May, 2010 in this matter refers.

The transfer is not yet registered.... Kindly rest assured that your money will be paid to you when the transaction is completed.

We bear this in mind as we understand our undertaking and your Mr Malik’s help to us.”

The third letter dated 10th August 2010 states –

Re: LAND REFERENCE 330/403:

JOSEPHINE NTHAMBI KIOKO:

Your letter dated the 28th July 2010 refers.

The transfer has not been effected yet. We apologize for not replying earlier than this.

We reiterate our commitment earlier that we shall own our professional undertaking immediately the transfer is done.

Accordingly we do request that we be allowed to pay when the transaction is completed.

Once more, our apologies.”

7. The Defendant has opposed the originating summons by his **replying affidavit filed on 20th November 2012**. He also filed a further replying affidavit on 22nd May 2013. The grounds of opposition emerging from the two affidavits are –

(i) That the undertaking made by the late Mr Kisebu which the Plaintiff adopted in good faith does not contain any conditionality capable of being enforced at all.

(ii) That in any event “the projected sale has never crystalized and the sale is the subject of **HCCC 236 of 2012 (Anne Mugambi –vs- John Munyao Nyamu & An)**”, and that therefore this suit has been filed “prematurely and maliciously, the property not having passed over to Anne Mugambi and her husband”.

8. The originating summons was canvased by way of written submissions. The Plaintiff’s submissions were filed on 29th July 2013 while those of the Defendant were filed on 8th October 2013. The filing of the submissions was not brought to the attention of the court until 16th June 2014. I have considered the submissions, including the one case cited by the Plaintiff.

9. Though the letter that is supposed to contain the professional undertaking (letter dated 15th February 2010 – annexure “MZAM1” to the supporting affidavit) cannot of itself be said to contain any undertaking, it is nevertheless clear from Mr Kisebu’s letter dated 10th February 2010 addressed to the Plaintiff what the undertaking was. That undertaking is rendered in these words of the second paragraph of that letter -

“We undertake to pay you the 3,098 Dollars that the Deceased owed you after the completion of the sale of the property”.

There then follows a request for the release of the documents, which the Plaintiff released to Mr Kisebu by the letter dated 15th February 2010, upon his aforesaid undertaking. That therefore is the undertaking that the Defendant subsequently adopted upon the death of Mr Kisebu.

10. I am thus satisfied that the undertaking in question here was unambiguous, unequivocal and binding upon the Defendant. See the case of *Kenya Reinsurance Corporation v Muriu [1995-1998] 1 EA 107*.

11. The only issue to determine is whether the condition precedent for the professional undertaking has taken place to enable the Plaintiff to enforce the undertaking. That condition precedent was “completion of the sale of the property”. The 3,098 Dollars was to be paid **after** completion of the sale of the property. The Defendant’s main defence is that there has not been completion of the sale agreement.

12. The sale agreement upon which the undertaking was given has not been placed before the court, as it should have been. An undertaking must not only be clear in its terms, but the whole of the agreement to which it relates must be placed before the court.

13. At paragraph (3) of the supporting affidavit the Plaintiff states that the sum of US Dollars 3,098 was to be paid within seven days of the registration of the conveyance. The Plaintiff has not placed before the court any evidence of such registration. There is thus substance in the Defendant’s assertion that the condition precedent for the professional undertaking has not taken place. There is no evidence of completion of sale agreement as yet. The Defendant has alluded to pending proceedings before the High Court that appear to be hindering such completion.

15. That being my view of the matter the Plaintiff cannot succeed. This originating summons is hereby dismissed with costs to the Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2014