REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPLICATION 168 OF 2012(O.S)

TOGETHER INVESTMENT LIMITED…….……
PLAINTIFF

VERSUS

EVANS A. ONGICHO T/A ONGICHO –ONGICHO & COMPANY ADVOCATES.....…
DEFENDANTS

RULING

The plaintiff/Applicant moved this court by way of originating summons under order 52 Rule 7(1) and (2) of the civil procedure rules seeking for orders that Evans Ongicho, an advocate of the High Court of Kenya practising in the name and style of Ongicho-Ongicho& Company Advocates do honour his irrevocable and unconditional professional undertaking to pay the applicant the sum of Kshs. 185,400/=being accrued interest at 15% p.a on Kshs.12 Million being the deposit paid to him by the applicant for the purchase of a parcel of land known as LR No. 15107 situate in the city of Nairobi.The applicant is also seeking for costs of the suit.

To support his application Mr.Premji Gondarita deposed a supporting affidavit on 13th March 2012 in which he stated that he was a director of the plaintiff company. He averred that he entered into a sale agreement with one Isaac Wanjohi Gathungu the vendor for the purchase of L.R No. 15107 at a purchase price of Kshs 12,000,000/= .Both parties instructed advocates to act for them in this transaction .The firm of M/s Kyalo& Associates Advocates acted on behalf of the applicant while the firm of M/s Orora & co. Advocates but later changed to the respondents herein, Ongicho –Ongicho& Co. Advocates .The sale agreement wa executed on 20th August 2010 and 10%deposit was forwarded vide a letter dated 28th September 2010 through cheque No. 0005641 and 0005651 to the respondent to hold as stakeholders deposit pending the completion of the said transaction. He further avers that after discussion with the vendor it was mutually agreed that the transaction for the purchase of the said parcel be abandoned.It is his averment that the applicant instructed his advocate to notify the Respondent being the purchasers advocate calling for refund of the said deposit which they did vide a letter dated 14th October 2010 .Further he states that the Respondent in letter dated 2nd February 2011 gave an irrevocable and unconditional professional undertaking to refund the said deposit within (30) days thereof. However he avers that the 30 days period asked by the Respondent without him refunding the deposit.He says that payment left the accrued interest of Kshs 185,400/= on the principle sum of Kshs 1, 200,000/= and efforts to recover the same were futile.

The Respondent in response swore and filed a replying affidavit on 12th April 2012.He confirmed that indeed there was an agreement and that the parties mutually agreed to pull out of the agreement. He avers

that the agreement to terminate the agreement cannot be said to have fallen under clause 16 of the initial agreement.He also pointed out clause 13 (a) of the sale agreement which provided that any variation or amendment to the agreement shall be in writing and signed by both parties and their advocates which he says the letter marked as annexure PG4 did not show that the letter complied with the stated clause 13(a).He also states that the grounds for the delay in the refund of the deposit was well known to the three firms of advocates who handled the transaction and it was therefore unfair and unfortunate for the applicant to accept payment of the full deposit of the purchase price in final settlement then a week later receipt of the deposit turn around demand for the payment of the interest that had not been agreed upon and at a rate that did not have any basis in law and fact. He concludes that the interest rate used by the plaintiff to arrive at the amounts sought does not have any basis neither does the duration used being 1.03 years and that the RTGS made to the plaintiffs advocates on 6th October 2011 all the obligations toward the plaintiffs were completed.

The applicant filed his submissions on 1st March 2013.In his submissions, he outlined that the plaintiff and the vendor Mr Wanjohi agreed among themselves that the transaction could not be completed and the deposit returned to the plaintiff .He submitted that the defendant did not pay the said deposit even after giving an undertaking to do so vide a letter dated 2ndFebruary 2011.He stated that according to the terms of the sale agreement if the deposit was not returned by the contract completion date which was 28th August 2010 the sum attracted an interest of 15%p.a until payment in full which the defendant continued to default for a period of fifteen months until he was threatened with court action bet then he paid the principle sum.He contended in his submissions that the respondent had breached his undertaking and that he should pay the 15% interest to the applicant. On the issue of the breach of his professional undertaking, he submitted that on 2nd February 2011 the defendant undertook to return the sum of Kshs 1,200,000/= that he had failed to return since 14th October 2010 but did not return the money until 8 months later.He defined what undertaking meant by quoting the **Encyclopaedia of Forms and Precedents 5th Edition .Vol 39 at Pg 581** which defined an undertaking as "*an equivocal declaration of intention addressed to someone who reasonably places reliance of it made by a solicitor or member of solicitor's staff in the cause of practice or a solicitor but not in the cause of practice*"

To support this proposition he relied on the case of **CA No. 48 of 1994 Kenya Reinsurance Corporation –vs- VE Muguku Muriu T/a VE Muguku & Company.** He also relied on the case of **Peter NgangaMuiruri –vs Credit Bank and Charles AyakoNyachae t/a Nyachae& Co. Advocates CA No. 263 of 1998** which referred to an undertaking as a *solemn thing*. He further submitted that the defendant had no reason why he failed to pay within 30 days and referred to paragraph 5 (a0 and 5(b) of the Respondents affidavit that the parties could not mutually agree not to agree with the transaction; and that the mutual decision was the decision to vary provisions of the agreement hence it was to be done in writing and signed by both the parties and their advocates which he makes it appear that the plaintiff did not agree to mutually stop the transaction. The applicant relied on the case of **Harith Sheith –vs-K.H Osmond [2011] Eklr** which stated that "*An advocate who gives an undertaking takes a risk .The risk is his own and he should not be heard to complain that it is too burdensome that someone else should shoulder the responsibility of recovering the debt no matter how painful it might be to honour the advocate is obliged to honour it*" and stated that the plaintiff actually denies any involvement in those consultations and that since the money was paid directly to the defendant as stakeholder his duty was to hold for both parties and in the event of failure of the transaction, his duty was clear.

On whether the breach of undertaking entitles the applicant to 15%interest in the sale agreement the applicant submitted that one had to understand the agreement for sale and therefore not possible to separate the undertaking and the sale agreement the salient clause being Clause 16 of the sale agreement which required the purchaser to pay vendor an interest in the event of default which in essence the failure to pay the balance of the A purchase price in time. He relied on the case of **Naphtali Paul Radier –vs-David NjoguGachanja T/a Njogu& Co.Advocates HCC 582 of 2003** where it was held that "*whether interest should be payable upon the sum of the undertaking the defendant has withheld the plaintiff's money from August 2002justice demands that he now pays it with interest*"

He submitted that payment of interest is not just contractual in this matter but also justice demands it.The

defendant has both a contractual obligation and a just cause to make good his fault.

The Respondent did not file his submissions neither did he appear in court on 6th March 2013 nor during the hearing before me for submissions .In the applicant's submissions before me, counsel took me through the originating summons and the correspondence exchanged between the parties and urged me to hold the respondent liable for his professional undertaking.

The issue for determination before me is whether the Respondent advocate had given an undertaking capable of being enforced.

The dispute stems from clause 16 of the agreement which states that "*if any cause whatsoever other than non-compliance cause by the default of the vendor the transaction shall not be completed on the completion date the purchaser shall pay to the vendor interest on the balance of the purchase price at the rate of 15% p.a from the completion date until date of payment of the purchase price in full both days inclusive and vice versa*"

My understanding of this clause is that the parties to the agreement are the only parties that are bound by this clause and not any agents who witnessed or given any responsibility to undertake any agreement made by the parties. In this case the respondent was an agent of the plaintiff as his advocate and the fact that he was nominated to receive the 10%deposit of the purchase price as stakeholder, clause 16 of the agreement did not bind him at all. Further it is the applicant's averment in his affidavit at paragraph 5 of his supporting affidavit that the parties mutually agreed to compromise the agreement therefore the agreement fell through and no clause would be used against any party whatsoever. Looking at the letter dated 14th October 2010 which was addressed at the Respondent, it is clear that he was informed of the fact that the parties had mutually agreed not to pursue the transaction and that a request for the immediate return of the deposit paid.This letter of undertaking must be read together with clause 16 of the agreement for the respondent to be held responsible in paying the interest as paid for by the plaintiff. Having decided on that issue I look at the letter dated 2nd February 2011 which is the undertaking by the Respondent to refund the deposit within 30 days. He however makes the payment on 6th October 2011 through RTGS. Having given a solemn undertaking to pay a certain amount of money and given a date within which to pay the money an advocate is bound by the same and he therefore cannot negate therefore. It is unfortunate that the respondent even after giving the undertaking to pay the deposit it took him almost 9 months to actually pay the stated amount. This is a conduct unbecoming of an officer of this court. The case of **STG Muhia t/a S.Muhia vs JM Chege t/a JM Chege &Advocates** states that "*A professional undertaking by an advocate constitutes a separate agreement independent of the transaction that resulted in such as advocate being required to give a professional undertaking. A professional undertaking can therefore be enforced against an advocate independent of the transaction in which the professional undertaking was given"*

I will therefore hold the Respondent accountable to his undertaking and since he has withheld the said amount 9 months after making the undertaking he will be liable to pay the money at the interest rate of 14% on the deposit of Kshs 1,200,000/= from the date he made the undertaking to the date he fully pays the whole amount of interest. Prayer 1 is granted .Prayer 2 is granted but the interest rate shall be 14% on the deposit of Kshs 1,200,000/= from the date he made the undertaking to the date he fully pays the whole amount of interest. Costs to the applicant.

Orders accordingly.

Dated, signed and delivered this 7th Day of May 2013.

R. OUGO

JUDGE

In the Presence of:-

….....Plaintiff/Applicant

….....Defendant/Respondent

…….…….....Court clerk