



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, SHAH & PALL, JJ.A.)
CIVIL APPEAL NO. 20 OF 1997

BETWEEN

WALKER KONTOS ADVOCATES.....APPELLANT
AND
S. MWIRIGI M'INOTI & COMPANY ADVOCATES.....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at
Nairobi (Mr. Justice Mbiti) dated 9th October, 1996

in

Civil Case No. 1717 of 1996 (O.S))

JUDGMENT OF THE COURT

This appeal raises one simple but important issue. Important, as it relates to undertaking given by conveyancing advocates.

The respondents (hereinafter referred to as "the advocates") acting for a client of theirs, one Mr. Samson Mureithi, called for documents of title relating to a parcel of land known as TIMAU SETTLEMENT SCHEME/152. This parcel of land was charged to Stanbic Bank Kenya Limited and Stanbic Finance Kenya Limited (formerly known as Grindlays Bank Limited and Grindlays International Finance Limited) as security for a loan advanced to Mr. Mureithi who had apparently not serviced the loan properly and had agreed to sell the property so as to be able to pay up the loan.

By their letters of 10th May, 1995 the advocates informed the appellants (the plaintiff applicants in the superior court) inter alia as follows:

"Kindly let us have the title documents together with the discharge of charge on our professional undertaking that once the land is registered in the name of the buyer we shall send you our cheque for shs.661,333/- made up as follows:

(a) Amount of the loan together with the interests Shs.600,533/80

(b) Your fees 60,799/20 661,333/00"

The appellants responded by their letter of 16th May, 1995 which letter in parts material reads as follows:

"We understand that you have called for the documents pertaining to Title No. Timau Settlement Scheme/152 which is presently charged to our clients by Mr. Samson Mureithi to secure advances to himself. We enclose photocopies of the title documents and will forward the originals to you upon receipt from you of your professional undertaking:-

(a) that you will hold the documents to our order, returnable on demand pending discharge of the liabilities outstanding in the account of Samson Mureithi and that you will not release them to any Advocates or person whatsoever for any purpose whatsoever without first obtaining our written consent which will only be granted on such other Advocates giving an undertaking in similar terms to the above undertaking and then on the understanding that whether such Advocate complies with the undertaking or not, we will continue to hold you responsible on your undertaking.

(b) you will pay us the sum of Kshs.599, 632.50 outstanding and owed by Mr. Samson Mureithi to our clients as at 28th April, 1995 on which sum interest continues to accrue at the rate of 28% per annum together with our handling and approval charges amounting to Kshs.60,799.20 plus VAT and disbursements; such payments to be made within seven (7) days from the date of registration of the Discharge; time being of the essence; and"

To this letter of 16th May, 1995 the advocates responded materially as follows:

"We hereby give you our professional undertaking in terms of your letter save for part of paragraph (b) of your letter regarding VAT and Disbursements. (Emphasis added) how much is (sic) VAT and Disbursements?"

The letter of 16th May, 1995 addressed by the appellants to the advocates is specific and in our view brooks of no two interpretations. This letter seeks a professional undertaking clearly to the effect that the advocates shall pay a sum of shs.599,632/50 to the appellants on which sum interest continued to accrue at the rate of 28% per annum. It is obvious that such interest continues to accrue until date of repayment. Further professional undertaking sought was that the title documents will be held by the advocates to the appellants' order, returnable on demand pending discharge of liabilities outstanding in the account of Mr. Samson Mureithi.

By their letter of 12th June, 1995 the advocates called for the documents. Those documents were sent to them. If the advocates did not accept the undertakings proposed to be imposed on them by the appellants they were obliged to return the documents to the appellants.

We revert to the letter of 12th June, 1995. The only items the advocates were querying were VAT and disbursements. They did not query interest. That can only mean that they undertook to abide by the undertakings sought to be imposed on them save VAT and disbursements. This they did by saying so in so many words.

But Mr. Kithinji for the advocates relied on that part of the advocates' letter of 12th June, 1995 which reads: "We hereby confirm that our client has deposited the following sums of money in our client's account with instructions to forward the same to you once the transfer is registered.

(a) Kshs.599,632.50 being the outstanding amount of the loan.

(b) Kshs.60,799.20 being your fees.

We confirm that we will send you the above mentioned sums of money within 7 days after discharge is registered. Kindly let us have documents urgently."

Mr. Kithinji's submission was that despite the preceding paragraph of the letter of 12th June, 1995 earlier reproduced by us, his client's undertaking was limited to shs.660,431/70. In our view that submission is not correct as the advocates had given a professional undertaking to pay sums referred to in the said letter of 16th May, 1995. That solemn undertaking cannot be watered down by reference to specific figures. The advocates knew, or ought to have known, that interest on the sum due by the chargor (Mr. Mureithi) had to be paid and that the appellants had made that fact clear

It appears that the learned judge in the superior court (Mbito J) without going into the effect of the contents of paragraphs (a) and (b) of the appellant's letter of 16th May, 1997 went simply and literally by that part of the letter of 12th June, 1997 to which we have already alluded. That part of the letter could not be read in isolation to say that the undertaking is fully discharged. With respect, the learned judge erred in giving a simplistic interpretation.

The upshot of all this is that this appeal is allowed and the ruling and order of the learned judge, dated 9th October, 1996 is set aside. The advocates are ordered to pay (to leave no room for doubt) to the appellants a sum of shs.51,688/60 with interest thereon at 28% per annum from 12th August, 1995 until date of payment in full. The appellants will have costs of this appeal and the costs of the proceedings in the superior court.

Dated and delivered at Nairobi this 24th day of October, 1997.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR