REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 283 OF 2011

ORION EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

ITE FARMERS CO-OPERATIVE SOCIETY LIMITED.....DEFENDANT

JUDGMENT

The plaintiff instituted this suit against the defendant on 14th June, 2011 seeking the following reliefs:

a) A declaration that there was a binding agreement for sale between the plaintiff and the defendant and that the defendant was contractually bound to complete the sale and transfer of the suit property to the plaintiff.

b) A declaration that the purported rescission of the agreement for sale by the defendant is illegal and/or unlawful and/or had been waived by the defendant.

c) An order for specific performance be issued directing the defendant to complete the sale and transfer of Plot No. L.R 12672/47 I.R 47800 to the plaintiff free from all encumbrances.

d) An order of permanent injunction be issued restraining the defendant from ingressing, egressing, accessing, selling, offering for sale, charging and or in any other way whatsoever interfering with the plaintiff's ownership and or quiet possession of Plot No. L.R 12672/47 I.R 47800.

e) An order vesting Plot No. L.R 12672/47 I.R 47800 in the plaintiff free from all encumbrance.

f) Costs of the suit and interest.

g) Any other order that the court shall deem just and fit to grant.

The plaintiff averred that it entered into an agreement for sale with the defendant under which the defendant agreed to sell to it and it agreed to purchase from the defendant a portion of land known as Plot No. 28 (hereinafter referred to as "the suit property") which was part of a larger parcel of land known as L.R No. 12672/47 situated at Kigwaru Estate along Limuru Road at a consideration of Kshs 13,000,000/-. The plaintiff averred that pursuant to the said agreement, it paid to the defendant a sum of Kshs. 2,000,000/- as a deposit receipt of which was acknowledged by the defendant. The plaintiff averred that it was a term of the said agreement that upon payment of the said deposit the defendant would avail all completion documents to the plaintiff after which the defendant would pay the balance of the purchase price in the sum of Kshs. 11,000,000/-.

The plaintiff averred that it was at all material times able, willing and ready to complete the agreement by paying the balance of the purchase price subject to receipt of the completion documents as aforesaid. The plaintiff averred that due to the defendant's refusal to furnish the completion documents, it decided to seek financing from a bank to pay the balance of the purchase price. The plaintiff averred that it managed to obtained a banking facility from Equity Bank which through its advocates gave the defendant a professional undertaking to pay to the defendant a sum of Kshs. 9,100,000/- upon successful registration of the transfer of the suit property in favour of the plaintiff. The plaintiff averred that it paid to the defendant a further deposit of Kshs. 1,900,000/- making a total deposit of Kshs. 3,900,000/-. The plaintiff averred that this deposit of Kshs. 3,900,000/- together with Equity Bank's undertaking of Kshs. 9,100,000/- was sufficient to meet the purchase price of Kshs. 13,000,000/-.

The plaintiff averred that on 17th February, 2010, the defendant purported to serve it with a completion notice and on 8th March, 2010, the defendant purported to rescind the agreement for sale on account of non-completion by the plaintiff. The plaintiff averred that the purported rescission was unlawful, irregular and in bad faith as it had completed the sale agreement notwithstanding the fact that the defendant was yet to furnish it with the completion documents.

The defendant filed a statement of defence on 2nd October, 2012. The defendant admitted that it entered into an agreement for sale of the suit property with the plaintiff. The defendant also admitted the terms of the said agreement which it averred was subject to Law Society Conditions of Sale (1989) Edition. The defendant averred that pursuant to the terms of the said agreement for sale the defendant was to release the completion documents only upon receipt of a professional undertaking from the plaintiff's advocates that they shall pay to the defendant a sum of Kshs. 11,000,000/- being the balance of the purchase price upon registration of the transfer in the plaintiff's favour. The defendant averred that the plaintiff was at all material times not in a position to complete the transaction.

The defendant averred that after paying a deposit of Kshs. 2,000,000/- and providing a professional undertaking in the sum of Kshs. 9,000,100/- there was a balance of Kshs. 1,900,000/- payable by the plaintiff to the defendant. The defendant averred that it was this balance of Kshs. 9,000,100/- that prompted the completion notice dated 10th February, 2010. The defendant averred that the agreement for sale between it and the plaintiff stood rescinded as at 3rd March, 2010 due to the plaintiff's failure to pay the said sum of Kshs. 1,900,000/- or furnish a professional undertaking in respect thereof.

The defendant averred that notwithstanding the fact that the agreement for sale had been rescinded as aforesaid and the plaintiff duly notified, the plaintiff deposited into the defendant's account a sum of Kshs. 1,900,000/- on 24th March, 2010. The defendant averred that upon receipt of the said amount, it sought a confirmation from the plaintiff whether the professional undertaking that had been given by Equity Bank was still in force which confirmation did not come forth.

The defendant averred that on 28th June, 2010, it gave the plaintiff a 14 days completion notice to complete the agreement for sale within which period the plaintiff failed to affirm the professional undertaking for Kshs. 9,100,000/- that had been provided by Equity Bank for the balance of the purchase price. The defendant averred that the agreement for sale stood rescinded on 10th July, 2010 and that it was not ready to receive a further deposit of Kshs. 5,000,000/- that was paid by the plaintiff on 26th April, 2011. The defendant averred that following the rescission of the said agreement, it entered into another agreement for sale with a third party in respect of the suit property. It averred that this suit had been overtaken by events.

At the trial, the plaintiff's director, Peter Ruo Maina (PW1) who was the plaintiff's sole witness testified as follows. In July, 2009, one, Ernest Kaka Kamau advocate who was his friend visited his office and informed him of a plot that was being sold by one of his (Ernest Kaka Kamau) clients. The said advocate showed him the title document for the plot and organised for him to visit the plot with the defendant's secretary, one, Francis Kago. The defendant which was the owner of the plot asked for Kshs. 14,000,000/- as the purchase price for the plot which was revised to Kshs. 13,000,000/-. The plaintiff paid a deposit of Kshs 2,000,000/- which was acknowledged by the defendant through a receipt dated 18th

February, 2010. The plaintiff never received the completion documents as stipulated in clause 2 of the agreement for sale even after giving the defendant a professional undertaking in the sum of Kshs. 9,100,000/-. The defendant demanded the payment of Kshs. 1,900,000/- before releasing the completion documents which was contrary to the provisions of clause 2 aforesaid. The plaintiff subsequently paid the said sum of Kshs. 1, 900,000/- thereby bringing the entire deposit paid to Kshs. 3,900,000/-. The said deposit of Kshs. 3,900,000/- when added to the sum of Kshs. 9,100,000/- in the professional undertaking aforesaid, covered the entire purchase price. The defendant confirmed receipt of the said sum of Kshs. 1,900,000/- and indicated through its advocates that it was in the process of obtaining the completion documents. Despite the said confirmation, the defendant did not comply with its obligation under the agreement for sale by forwarding the completion documents to the plaintiff.

On 15th April, 2011, the defendant sent to the plaintiff a letter purporting to rescind the agreement for sale and to refund the deposit. The plaintiff rejected the purported rescission of the agreement and sent back to the defendant by registered mail the cheques that the defendant had sent to it under cover of the said letter. On 26th April, 2011 the plaintiff paid to the defendant Kshs. 5,000,000/- as a further deposit towards the purchase price which payment the defendant returned to the plaintiff after a few days. The plaintiff thereafter moved to court and obtained an injunction restraining the defendant from selling the suit property. The defendant refused to furnish the plaintiff with the completion documents despite the plaintiff's readiness and willingness to complete the transaction. PW1 produced documents in the plaintiff's bundle of documents filed in court on 14th June, 2011 as plaintiff's exhibits1-23 and the documents in the plaintiff's further bundle of documents as plaintiff's exhibits 24-25.

In cross-examination, PW1 admitted that the professional undertaking did not cover the entire balance of the purchase price in the sum of Kshs. 11,000,000/-. He also admitted that by the time the plaintiff gave a professional undertaking through its advocate's letter dated 2nd February, 2010, the 45 days for completion provided for under clause 2 of the agreement for sale had lapsed. He also admitted that the professional undertaking aforesaid did not cover the amount of Kshs. 1,900,000/ that remained outstanding. PW1 denied that clause 2 of the agreement for sale required the said balance to be paid before the handing over of the completion documents.

PW1 admitted that he warned Equity Bank Limited to be cautious in making hefty payments to the defendant through his letter dated 13th March, 2010 addressed to the managing director of the said bank. He contended that a letter dated 13th April, 2010 from Kimani & Michuki Advocates seeking to affirm the professional undertaking that had been given earlier by Equity Bank Limited was not necessary since the said undertaking had not been withdrawn. He stated that Equity Bank Limited subsequently withdrew from the transaction and Eco Bank Ltd. was brought on board by the plaintiff as its new financier. PW1 denied that the plaintiff paid a further sum of Kshs. 5,000,000/- because Equity Bank Limited had refused to affirm their earlier undertaking.

In re-examination, PW1 stated that clause 1(c) of the agreement for sale did not provide a period within which the financier was to provide an undertaking. He stated that the defendant acknowledged receipt of the undertaking which was issued outside the 45 days' completion period. PW1 stated further that under clause 2 of the agreement for sale, completion documents were to precede the payment of the balance of the purchase price. He reiterated that the plaintiff was yet to receive the completion documents. He averred that the acknowledgment of the payment of Kshs 1,900,000/- was outside the 45 days' completion period.

PW1 stated that his letter dated 13th March, 2010 to Equity Bank Limited was not an indication that the plaintiff was pulling out of the transaction but a caution to the said bank since completion documents had not been furnished. He contended that the sale agreement was subject to the Law Society of Kenya Conditions of Sale and that a party must have been able, ready and willing to complete to be able to issue a completion notice. He contended that he demonstrated his readiness and willingness to complete the transaction by sending Kshs 5,000,000/- to the defendant.

The defendant called 2 witnesses. The first witness was Francis Kago Gathuo (DW1). DW1 was a

director and secretary of the defendant. He testified as follows. The suit property belonged to the defendant. On 24th June, 2009, he issued a letter of offer to PW1 for the purchase of the property at a consideration of Kshs. 14,000,000/-. On 1st July, 2009, the plaintiff paid a deposit of Kshs. 2,000,000/- to the defendant. Following further negotiations, the purchase price was revised to Kshs. 13,000,000/-. The parties executed the agreement for sale on 10th December, 2009. As at the time of execution of the said agreement there was a balance of Kshs. 11,000,000/- on account of the purchase price outstanding. The completion date was 45 days from 10th December, 2009. On 2nd February, 2010, the plaintiff's advocate issued a professional undertaking for Kshs 9,100,000/-. That undertaking together with a deposit of Kshs. 2,000,000/- paid earlier came to a total of Kshs. 11,100,000/-. There was a balance of Kshs. 1,900,000/- of the purchase price that remained unsecured. After paying the deposit of Kshs. 2,000,000/-, the plaintiff was supposed to provide an undertaking for the entire balance of the purchase price in the sum of Kshs. 11,000,000/- pursuant to clauses 1(c) and (d) of the agreement for sale.

The 45 days' completion period lapsed on 24th January, 2010. On 10th February, 2010, the defendant issued a 21 days' completion notice with respect to the balance of Kshs 1,900,000/- that had remained unsecured. On 25th February, 2010, the defendant's advocates informed the defendant that they had received a cheque for Kshs. 1,900,000/- which could not be cashed as the transfer of such amount had to be made by way of Real Time Gross Settlement (RTGS). The defendant gave its bank details to facilitate the transfer of the said sum of Kshs. 1,900,000/- to their account as aforesaid. On 3rd March, 2010, the agreement for sale stood rescinded on the lapse of the completion notice.

DW1 averred that having failed to compete the agreement by 3rd March, 2010 and having cast aspersions on them through the letter that the plaintiff wrote to Equity Bank Limited, the defendant decided to terminate the agreement. He reiterated that the plaintiff deposited a sum of Kshs 1,900,000/- to the defendant's bank account on 24th March 2010, 21 days after the agreement had been rescinded. He contended that the defendant was still ready to proceed with the transaction and in that regard, the defendant through its advocates sought a confirmation from the plaintiff as to whether the undertaking for Kshs.9,100,000/- was still in force. DW1 stated that the plaintiff did not respond to that inquiry and on 13th April, 2010 the plaintiff wrote to Equity Bank asking it to confirm the undertaking. DW1 stated that a reminder letter dated 28th June, 2010 to the plaintiff's advocates was also not responded to. He contended that the 14 days additional notice that was issued to the plaintiff through the said reminder letter dated 28th June, 2010 lapsed on 12th July, 2010.

DW1 averred that on 4th January, 2011, the defendant received an email from PW1 complaining that Equity Bank Limited had refused to finance the purchase of the suit property. DW1 stated that as at 4th January, 2011 when the same e-mail was received, 176 days had passed since the defendant's notice of completion dated 30th March 2010.

DW1 stated that the defendant's chairman informed PW1 that the suit property was no longer available for sale and that on 8th March, 2011, the defendant entered into an agreement with Mr. and Mrs. Kinyua for the sale of the suit property at Kshs. 13,000,000/- pursuant to which the new purchasers paid a deposit of Kshs. 5,000,000/-. He averred that the plaintiff refused to accept refund cheques for Kshs. 2,600,000/- which was the amount of Kshs 3.9 million paid by the plaintiff as a deposit less 10% in accordance with clause 14 of the agreement for sale.

DW1 stated further that on 27th April, 2011, PW1 deposited a sum of Kshs. 5,000,000/- to the defendant's bank account without notice. He stated that on 18th May, 2011, the defendant remitted the money back to the plaintiff. He contended that the plaintiff did not accept the Kshs. 2,600,000/- refund which was still with the defendant's advocates. DW1 contended that the plaintiff was not ready to complete the sale transaction and that the defendant received Kshs. 3,900,000/- only from the plaintiff. He stated that the defendant was ready to furnish the plaintiff with the completion documents and that the open market value of the suit property was Kshs 30million.

In cross-examination, DW1 stated that the title in their bundle of documents was the mother title and that the title for the suit property was not in existence. He contended that the defendant had reasons for not forwarding the completion documents to the plaintiff pursuant to clause 2 of the agreement for sale. DW1 admitted that the title for the suit property was not available as at the time of his testimony. When shown the letters dated 10th February, 2010, 26th February, 2010, 4th March, 2010 and 30th March, 2010, DW1 admitted that the defendant's advocates did not complain but instead gave an undertaking to forward the completion documents.

DW1 stated that it was the defendant who terminated the agreement and not the plaintiff. He stated that the plaintiff refused to receive the cheques for the refund of Kshs 2,600,000/-. He reiterated that no title had been issued in respect to the suit property and that the suit property had not been transferred to the third parties to whom it had been sold.

In re-examination, DW1 stated that under clause 2 of the agreement for sale, the completion documents were to be forwarded after clause 1 of the said agreement had been complied with. He averred that the deposit of Kshs. 2,000,000/- was paid pursuant to clause 1(a) of the agreement for sale and that a professional undertaking was required under clauses 1(b) and (c) of the agreement. He stated that the defendant did not have a title for the suit property but the mother title and deed plans for the entire property and suit property were available. DW1 stated that the defendant did not process a title in respect of the suit property because the initial deed plan for the suit property had been misplaced. He averred that the defendant decided to effect a direct transfer of the suit property from the head title. He contended that the defendant had subdivided the initially larger parcel of land into 220 plots and that the suit property was the only plot which was still tied to the head title.

DW1 stated that the defendant accepted payment after rescission of the agreement because the defendant thought that it could still complete the sale. DW1 stated that it was clear from the email dated 4th January, 2011 from the plaintiff to Equity Bank Limited that the professional undertaking by Equity Bank Limited was not confirmed and that the plaintiff was approaching Eco Bank Limited for another undertaking. He stated that the defendant never received any undertaking from Eco Bank Limited. He stated that the defendant did not agree on any updated sale agreement with the plaintiff. DW1 maintained that the defendant rescinded the agreement for sale in March, 2010 owing to a breach thereof by the plaintiff.

The defendant's second witness was Alice Karani (DW2). DW2 was the advocate who acted for the defendant in the sale transaction between it and the plaintiff. She testified as follows. On 9th November, 2009, she received instructions from the defendant to prepare a draft agreement for sale between the defendant and the plaintiff. As at the date of her instructions, a deposit of Kshs. 2,000,000/- had already been paid by the plaintiff to the defendant leaving a balance of Kshs. 11,000,000/-. She prepared the agreement for sale which was signed and sealed on 10th December, 2009. After paying the said deposit of Kshs. 2,000,000/- the plaintiff provided a professional undertaking for Kshs. 9,100,000/- leaving a balance on account of the purchase price of Kshs. 1,900,000/-. She wrote a letter dated 4th February, 2010 to the firm of Kimani & Michuki Advocates who were acting for the plaintiff and Equity Bank Limited demanding the payment of the said sum of Kshs. 1,900,000/-. On 10th February, 2010, the plaintiff was given 21 days notice to complete agreement.

On 25th February, 2010, the plaintiff dropped a cheque for Kshs. 1,900,000/- in her office which could not be cashed due to the regulations that had been issued by Central Bank of Kenya. The plaintiff was duly informed of this position through her letter dated 4th March, 2010. On 24th March, 2010, the plaintiff deposited a sum of Kshs 1,900,000/- in the defendant's account although the 45 days completion period in the agreement for sale had lapsed on 3rd March, 2010. On 30th March, 2010, she wrote to the plaintiff's advocates asking for confirmation whether the professional undertaking that had been given by Equity Bank Limited was still valid. On receipt of that letter, the plaintiff's advocates wrote to Equity Bank Limited on 13th April, 2010 asking it to affirm the professional undertaking.

DW2 contended that the said letter by the plaintiff's advocates was an indication that the said advocates were not sure if the said professional undertaking was still in force. She stated that the defendant could

not handover the completion documents as at that time since Kshs 9,100,000/- was not secured. DW1 contended that she sent to the plaintiff a reminder on 28th June, 2010 through which she also gave to the plaintiff 14 days completion notice pursuant to clause 4(7)(g) of the Law Society of Kenya Conditions of Sale. She stated that her letters dated 30th March, 2010 and 28th June, 2010 were never responded to and that the 14 days completion notice lapsed on 12th July, 2010.

DW2 stated that she did not hear from the plaintiff or its advocates again until she received emails dated 4th January, 2011 and 5th January, 2011 about the change of the plaintiff's financiers from Equity Bank Limited to Eco Bank Limited. She stated that she did not receive any undertaking from Eco Bank Limited and that after the said emails, there was no further communication from the plaintiff and its advocates.

DW2 contended that as at that time, the plaintiff had not obtained any professional undertaking for the balance of the purchase price and had therefore not complied with clause 1 of the agreement for sale. She stated that she was later informed that the defendant had sold the suit property to someone else and was instructed to prepare a new agreement for sale. She stated that on 27th May, 2011, she wrote to the plaintiff and forwarded a refund of the purchase price that had been paid less 10% penalty under clause 14 of the agreement for sale.

In cross-examination, DW2 stated that clause 1(c) of the agreement for sale required a professional undertaking before release of the completion documents. She contended that the defendant had procured all the completion documents required. She admitted however that the certificate of title that was produced in evidence was for the entire parcel of land and not the suit property.

DW2 contended that the certificate of title for the suit property was not one of the completion documents. She contended that what was required was the original grant and the deed plan. With leave of the court, the defendant was allowed to file and serve a further supplementary list and bundle of documents which contained a certified copy of a search on the title for L. R No. 12672 and a complete valuation report on the property.

After the close of evidence, the parties made closing submissions in writing. In its submissions dated 7th May, 2018, the plaintiff urged the court to be persuaded by the findings that were made in the ruling delivered on 6th October, 2011 in the plaintiff's interlocutory application where the court found that the plaintiff was not in breach of the agreement for sale. The plaintiff cited the case of Boniface Kevin Omondi & another *v* Marlborough Properties Ltd. [2015] eKLR, paragraphs 7(a) and (b) of the Law Society of Kenya Conditions of Sale (1989 Edition) (LSK Conditions of Sale) and paragraph 931 of Halsbury's Laws of England (Vol.9(1) Reissue)/8 in support of its submission that the defendant which was not ready, able and willing to complete the sale could not properly issue a completion notice. The plaintiff submitted that the title to the suit property was subject to a charge and the defendant had not supplied the documents set out under clause 2 of the agreement for sale. The plaintiff submitted that the purported completion notice that was issued by the defendant was invalid, null and void.

The plaintiff submitted further that by acknowledging receipt of Kshs. 1,900,000/- and the professional undertaking that was given by the plaintiff, the defendant waived the purported completion notice as was held by the court in its ruling aforesaid. The plaintiff argued that the defendant could not issue a subsequent completion notice as it was not in default. The plaintiff cited the case of Sarah Njeri Mwobi *v* John Kimani Njoroge [2013] eKLR, and submitted that the defendant's actions allowed the contract to proceed as though the completion notice never existed.

The plaintiff submitted further that the professional undertaking that it had given was never withdrawn to warrant the confirmation that was sought by the defendant. The plaintiff argued that the essence of a professional undertaking would be defeated if it had to be affirmed at every stage of the transaction. The plaintiff cited the case of Waruhiu K'Owade & Ng'ang'a Advocates *v* Mutune Investment Ltd. [2016] eKLR where a professional undertaking was defined as an unequivocal promise made by a party to another to which liability may attach. The case of S.T.G Muhia T/A Thuo Muhia & Co. Advocates *v* J.M Chege T/A J.M Chege & Co. Advocates [2009]eKLR that was cited with approval in the case of Eastend

Ltd. *v* Ben Njau Kayai T/A Njau Kayai & Co. Advocates [2017]eKLR was also cited by the plaintiff in support of its submission that a professional undertaking constitutes a separate independent agreement and can be enforced against an advocate independent of the transaction in which the undertaking was given.

The plaintiff submitted that the professional undertaking dated 2nd February, 2010 was at all material times valid and binding and required no affirmation. The plaintiff argued that the correct procedure for enforcing the undertaking in the event of breach was to seek its enforcement in court. The plaintiff cited the case of Openda *v* Ahn[1984]eKLR and submitted that at the time of the purported repudiation of the agreement for sale, it was under no obligation to show that it could settle the purchase price. The plaintiff referred to clause 2 of the agreement for sale and argued that its capacity to complete could only arise after the defendant had obtained and furnished the completion documents which it had failed to.

The plaintiff submitted that the defendant purported to issue multiple completion notices despite being the party in breach. The plaintiff relied on the case of Njamunyu *v* Nyaga[1983]eKLR in support of its submission that at the time of the purported rescission, it had duly fulfilled its obligations under the agreement for sale by paying the deposit and furnishing an undertaking for the balance. The plaintiff submitted that under clause 2 of the agreement, this ought to have been followed by the handing over of the completion documents.

The plaintiff submitted that it had an equitable right to specific performance. In support of this submission, the plaintiff relied on the case of Wetlands Residential Resort Ltd *v* Kawakanja Ltd & 2 others [2013]eKLR and para 814 Halsbury's Laws of England/Specific Performance(vol 44(1)(Reissue)/1). The plaintiff urged the court to find that there existed a valid contract between it and the defendant and order specific performance. In support of this submission, the plaintiff relied on the case of Njogu Mangethi *v* Francis Wakaria Kanogu [2005]eKLR.

In its submissions in reply dated 25th September, 2018, the defendant argued that it would be wrong for the court to adopt its interlocutory ruling as the final judgment of the court since the said ruling was made before the hearing of the case. The defendant submitted that the said ruling was intended to preserve the suit property and did not require it to surrender ownership to the plaintiff. The defendant conceded that the 21 days completion notice dated 10th February, 2010 was negated by the defendant's acceptance of the payment of Kshs. 1,900,000/- that was paid outside the completion period. The defendant argued however, that after the implied extension, parties did not agree on another completion date and as such clause 4(7)(g) of the LSK Conditions of sale was to apply. The defendant submitted that under paragraph (c) of sub condition 7, the extended completion period was to lapse on 3rd April, 2010 which was 10 days from the date when the defendant received the additional payment.

The defendant submitted that the extension of the completion period could not be assumed to be perpetual. The defendant submitted that the defendant issued another notice dated 28th June, 2010, 90 days after the implied extension, for the plaintiff to affirm the professional undertaking. The defendant admitted that the title for the larger parcel of land had not been discharged. The defendant however relied on clause 4(7)(b) of the LSK Conditions of Sale and submitted that it was ready, able and willing to complete the transaction.

With regard to the professional undertaking, the defendant submitted that on 4th January, 2011, the plaintiff also reached out to the bank that had provided the undertaking seeking an affirmation that the undertaking was still in force. The defendant submitted further, that the plaintiff went ahead to source for alternate funding from Eco Bank Limited after it severed relationship with Equity Bank Limited. The defendant submitted that it could not release the completion documents when the lack of affirmation of the professional undertaking meant that Equity Bank Limited was no longer willing to finance the balance of the purchase price.

The defendant argued that after the plaintiff failed to complete the transaction and ignored the notice dated 28th June, 2010, it had a right under clause 4(7)(d)(ii) of the LSK Conditions of Sale to rescind the

agreement and retain 10% of the monies paid by the plaintiff. The defendant relied on the maxim of equity that, he who seeks equity must come with clean hands and argued that it was the plaintiff who was in breach of the agreement for sale and that it would be unfair to compel it to sell the suit property at the initial agreed price of Kshs. 13,000,000/- when the market price had gone up to over Kshs. 50,000,000/-.

Determination:

I have considered the pleadings and the evidence tendered by the parties in support of their respective cases. I have also considered the submissions by the parties' advocates and the authorities cited in support thereof. The parties did not agree on the issues for determination by the court. From my perusal of the pleadings, the following in my view are the issues that arise for determination in this suit;

1. Whether the rescission by the defendant of the agreement for sale between the plaintiff and the defendant dated 10th December, 2009 was lawful.

2. Whether the plaintiff is entitled to the reliefs sought in the plaint.

3. Who is liable for the costs of the suit?

Whether the rescission by the defendant of the agreement for sale between the plaintiff and the defendant dated 10th December, 2009 was lawful.

It was not disputed that the agreement for sale between the plaintiff and the defendant was subject to the LSK Conditions of Sale in so far as the same was not inconsistent with the conditions of the agreement. The said agreement for sale provided that the completion date was 45 days from the date of execution of the agreement or such other date as the parties shall agree on. It was not disputed that the plaintiff paid a deposit of Kshs. 2,000,000/- before the execution of the agreement for sale. Receipt of the payment by the defendant was acknowledged in the agreement. According to clause 1 (c) of the agreement for sale, the balance of the purchase price was to be obtained by the plaintiff from a financial institution and in that regard, the advocates for the said financial institution was to give the defendant's advocates a professional undertaking to pay the balance of the purchase price in the sum of Kshs. 11,000,000/- within 7 days of registration of the transfer in favour of the plaintiff and the said financier's security against the title of the suit property.

From the evidence on record, the plaintiff notified the defendant that it was being financed by Equity Bank Limited which had instructed the firm of Kimani & Michuki Advocates to handle the transaction on its behalf. On 2nd February, 2010, the firm of Kimani & Michuki Advocates gave to the defendant's advocates a professional undertaking to pay to them a sum of Kshs. 9,100,000/- within 10 days of successful registration of the transfer of the suit property in favour of the plaintiff and the charge in favour of Equity Bank Limited. In the same letter of undertaking, the said advocates requested the defendant's advocates to arrange with the defendant to execute the instrument of transfer that was forwarded to the said advocates and to forward the completion documents.

In a letter dated 4th February, 2010, the defendant's advocates informed the plaintiff's advocates that the defendant was unable to execute the instrument of transfer because the undertaking that had been provided by the said advocates did not cover the entire balance of the purchase price. The defendant's advocates demanded the payment of the balance of the purchase price in the sum of Kshs. 1,900,000/- that was not covered by the undertaking before the defendant could execute the instrument of transfer. On 10th February, 2010, the defendant's advocates gave to the plaintiff's advocates 21 days notice to complete the transaction. On 25th February, 2010, the plaintiff forwarded to the defendant a cheque for Kshs. 1,900,000/- being the balance of the purchase price that was not covered by the professional undertaking from the advocates for Equity Bank Limited. This cheque was not banked due to the new banking regulations that required all payments of Kshs.1,000,000/- and above to be effected through RTGS. The plaintiff was informed of the problem with the cheque but did not take steps to pay the said sum of Kshs. 1,900,000/- through RTGS or through other modes of payment.

On 8th March, 2010, the defendant's advocates notified the advocates for Equity Bank Limited who were also acting for the plaintiff that the defendant had rescinded the agreement for sale due to the plaintiff's failure to comply with the 21 days completion notice dated 10th February, 2010. Despite the expiry of the completion period and rescission of the agreement, the plaintiff made payment of the said sum of Kshs. 1,900,000/- to the defendant subsequently and receipt thereof was acknowledged by the defendant's advocates on 30th March, 2010. In their letter dated 30th March, 2010, the defendant's advocates informed the plaintiff that the defendant was in the process of obtaining the completion documents and that the same would be forwarded to the plaintiff's advocates in due course. I am of the view that by accepting the payment of Kshs. 1,900,000/- after the expiry of the completion notice and subsequent rescission of the agreement for sale, the defendant waived its rights under the said completion notice and letter of rescission dated 10th February 2010. DW2 conceded that the defendant had by its actions waived the completion notice dated 10th February, 2010. This concession was also made by the defendant in its submissions.

On 30th March, 2010, the defendant's advocates wrote a separate letter to the plaintiff's advocates in which they confirmed receipt of Kshs. 1,900,000/- from the plaintiff. In the letter, they also sought confirmation from the said advocates whether the undertaking that they had given on behalf of Equity Bank Limited was still valid. The defendant's advocates did not get any response to that inquiry. On 28th June, 2010, the defendant's advocates gave to the plaintiff's advocates 14 days notice to complete the agreement failure to which the defendant would sell the suit property to another party. No response was received to this notice. In its submissions, the defendant argued that the completion notice of 28th June, 2010 was issued under clause 4(7)(g) of the LSK Conditions of sale which provides for 21 days completion notice for the first notice and 10 days for subsequent notices.

As I have mentioned earlier, clause 3 of the agreement for sale provided that the LSK Conditions of Sale shall apply in so far as the same was not inconsistent with the conditions in the agreement. Clause 12 of the agreement provided for service of a 21 days completion notice upon a defaulting party. As I have found above, the 21 days completion notice dated 10th February, 2010 that had been served by the plaintiff upon the defendant was waived. This means that if there was a necessity for the defendant to serve another completion notice, the same had to be a fresh notice which had to comply with clause 12 of the agreement. Having waived the first notice, the defendant could not resort to clause 4(7)(g) of the LSK Conditions of sale to justify service of a 14 days notice instead of the 21 days notice provided for in clause 12 of the agreement. It is my finding that the purported completion notice dated 28th June, 2010 was issued in breach of the agreement for sale and as such was ineffective to terminate the agreement.

The other issue arising from this completion notice which the court has been called upon to determine is whether it was justified. Under clause 12 of the agreement for sale, a completion notice could only be issued to a party in default. The question then arises whether the plaintiff was in default of the agreement as at 28th June, 2010 when the said notice was issued. My answer to this question is in the negative. I am in agreement with the plaintiff that as at 28th June, 2010, it had fully complied with its obligations under the agreement for sale dated 10th December, 2009 and that what remained was for the defendant to perform its part by furnishing its advocates with the completion documents.

The fact that the plaintiff had fulfilled its part of the bargain was confirmed by the defendant through its advocates letter to the plaintiff dated 30th March, 2010 which I referred to earlier. The agreement between the parties did not provide for confirmation of the financier's undertaking. The professional undertaking that was given by Kimani & Michuki Advocates to the defendant's advocates on behalf of Equity Bank Limited was not limited in time. The defendant's service of the purported completion notice dated 28th June, 2010 on the ground that the plaintiff's said advocates had failed to confirm the undertaking had no basis in the circumstances.

In The Encyclopaedia of Forms and Precedents 5th Edition, Volume 39, professional undertaking is defined as follows:

"**An undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it…….an undertaking is therefore a promise made by a solicitor, or on his behalf by a member of his staff to do or to refrain from doing something."**

In Fidelity Commercial Bank Limited *v* Onesmus Githinji & Co. Advocates [2013]eKLR, the court stated as follows with regard to the liability of the advocates on their professional undertakings:

"This court was able to glean further assistance on the liability as regards undertakings from pages 379 of **The Encyclopaedia of Forms and Precedents paragraph 30** in relation to the English Law Society's Guide Principle as follows:

> **"An undertaking given by a solicitor is personally binding on him and must be honoured. Failure to honour an undertaking is prima facie evidence of professional misconduct and the Counsel of the Law Society will require the undertaking to be honoured as a matter of conduct. Although consideration for the promise will often be present, an undertaking is enforceable even if it does not constitute a legal contract……. Any ambiguity in the terms of an undertaking is generally construed against the party who gave the promise. In general, no terms will be implied into a professional undertaking and extraneous evidence will not be considered."**

I believe that the principle as enunciated above applies in Kenya just as much as it does in England."

The firm of Kimani & Michuki Advocates having given a professional undertaking to the defendant's advocates on behalf of Equity Bank Limited to pay Kshs. 9,100,000/- within 10 days of registration of transfer and a charge in favour of Equity Bank Limited against the title of the suit property, it was their responsibility to inform the defendant's advocates upon receipt of the completion documents which were to be sent to them on the strength of their professional undertaking that the circumstances had changed and as such they were unable to honour the undertaking. That would have discharged the defendant from their obligation to complete the agreement. Anything short of that was to leave the defendant as the party in default.

In Harit Sheth Advocate *v* K. H. Osmond, Advocate (2011) eKLR the Court had this to say on the obligation of the advocates to honour professional undertakings:

> **"….. a professional undertaking is given to an advocate on the authority of his client. It is based on the relationship which exists between the advocate and his client. An advocate who gives such a professional undertaking takes a risk. The risk is his own and he should not be heard to complain that it is too burdensome and that someone else should shoulder the responsibility of recovering the debt from his own client. A professional undertaking is a bond by an advocate to conduct himself as expected of him by the court to which he is an officer. No matter how painful it might be to honour it, the advocate is obliged to honour it if only to protect his own reputation as an officer of the court. The law gives the right to sue his client to recover whatever sums of money he has incurred in honouring a professional undertaking. He cannot however sue to recover that amount unless he has first honoured his professional undertaking."**

I am of the view that failure on the part of the firm of Kimani & Michuki Advocates to respond to the defendant's advocates' letter dated 30th March, 2010 seeking confirmation of their professional undertaking and the plaintiff's letter dated 13th March, 2010 to Equity Bank Limited in which it asked the said bank "to avoid making any hasty payments" to the defendant did not release the defendant from its obligation to complete the agreement for sale. It is therefore my finding that the completion notice dated 28th June, 2010 was unjustified and had no basis under the agreement for sale as the plaintiff had already fulfilled its part of the said agreement for sale. I therefore answer the first issue in the negative.

Whether the plaintiff is entitled to the reliefs sought in the plaint:

The plaintiff has sought declarations, a permanent injunction and, an order for specific performance as the principal relief. The law is settled that a party seeking specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. In Gurdev Singh Birdi and Marinder Singh Ghatora *v* Abubakar Madhubuti CA No.165 of 1996 it was held that:

> **"…It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."**

As I have held above, the plaintiff has performed his part of the agreement for sale between it and the defendant. I am satisfied that the plaintiff has met the conditions for granting an order for specific performance. Specific performance is however a discretionary remedy. It follows therefore that even if the plaintiff has satisfied all the conditions for grant of the relief, the court can decline to grant the same for good reason. In the case of Amina Abdulkadir Hawa *v* Rabinder Nath Anand& Another [2012] eKLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors have stated as follows:

> **"Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles…….specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party…..severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible."**

In the Supreme Court of Uganda case of Manzoor *v* Baram [2003] 2 E.A 580 that was cited in the case of Thrift Homes Limited *v* Kays Investment Limited [2015]eKLR, the court stated as follows on specific performance:

> "**Specific performance is an equitable remedy grounded in the equitable maxim that "equity regards as done, that which ought to be done". As an equitable remedy, it is decreed at the discretion of the court. The basic rule is that specific performance will not be decreed where a common law remedy such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach. In that regard, the courts have long considered damages an inadequate remedy for breach of a contract for the sale of land, and they more readily decree specific performance to enforce such contract as a matter of course. In the instant case, I find no circumstances that would make it inequitable to order the respondent to complete the contract. On the contrary, it seems to me that to deny the appellant that relief would be to give unfair advantage to a respondent, who sought to avoid his contractual obligations through false claims, as found by the trial court, and through inapplicable technicalities. After taking into consideration the equities of this case, I am satisfied that the discretion ought to be exercised in favour of the appellant. I would hold that the appellant is entitled to specific performance. …….. In the result, I would allow the appeal, and set aside the judgments and decrees of the Court of Appeal and the High Court, and substitute a judgment and decree of specific performance of the suit agreement,**

ordering the respondent to transfer the suit property to the appellant. I would order the respondent to pay to the appellant costs of this appeal as well as costs in both courts below."

The defendant pleaded in his defence that it had sold the suit property to a third party. In his evidence, DW1 stated that the defendant had sold the suit property to Mr. and Mrs. Kinyua at Kshs. 13,000,000/- and had been paid a deposit of Kshs. 5,000,000/-. After this suit was filed, an order of a temporary injunction was issued on 6th October, 2011 restraining the defendant from selling or transferring the suit property to any third party pending the hearing and determination of the suit. At the trial, no evidence was produced showing that the suit property had been transferred to Mr. John Kinyua and Mrs. Susanne Kinyua or to any other person. A part from its contention that it would be unfair to sell the suit property which is now valued at over Kshs. 50,000,000/- to the plaintiff at the initially agreed price of Kshs. 13,000,000/-, the defendant did no adduce any evidence showing that it would have any difficulty in transferring the suit property to the plaintiff. I am of the view that Mr. and Mrs. Kinyua who purchased the suit property at the same price as the plaintiff can be refunded the deposit that they paid to the defendant. It is my finding that no valid reason has been put forward to deny the plaintiff an order for specific performance. The plaintiff is therefore entitled to an order for specific performance in addition to the other reliefs sought in the plaint.

Who is liable for the costs of the suit?

Costs normally follow the event unless the court for good reason orders otherwise. I am of the view that the plaintiff contributed to some extent to this dispute. Although, it was not necessary for the plaintiff's advocates to confirm the undertaking they had given to the defendant, this suit could have been avoided if they had done so. Due to the foregoing, I will deny the plaintiff the costs of the suit.

Conclusion:

In conclusion, it is my finding that the plaintiff has proved its claim against the defendant to the required standard. I therefore enter judgment for the plaintiff against the defendant in terms of prayers (a), (b), (c) and (d) of the plaint dated 13th June, 2011. Each party shall bear its own costs of the suit.

Delivered and Dated at Nairobi this 28th day of March 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Omollo h/b for Mr. Nganga for the Plaintiff

Mr. Githinji for the Defendant

C. Nyokabi-Court Assistant