



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 696 OF 2016 (O.S)

NICHOLAS KILATYA MBINDYO.....1ST PLAINTIFF

CHARITY KILATYA.....2ND PLAINTIFF

VERSUS

JOEL MBALUKA

ROSEMARY MONYANGI

JUSTUS M. MUTIA

CATHERINE S. MUTUKU T/A MBALUKA & COMPANY ADVOCATES.....1ST DEFENDANT

JANE ORIOKI & PAULINE M. MUSEE (TRUSTEES OF DIVINE

PROVIDENCE FRANSISCAN MISSIONARIES).....2ND DEFENDANT

FAMILY BANK LIMITED.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiffs seek to enforce the professional undertaking given by Joel Mbaluka, Rosemary Monyangi, Justus Mutia and Catherine Mutuku trading as Mbaluka and Company Advocates (the 1st Defendant) in their letter dated 28/8/2015 to pay Kshs. 5,000,000/= together with interest at 20.5% per annum from 1/11/2015 until payment in full; and the undertaking in the letter of 3/9/2015 to pay the outstanding balance of Kshs. 3,000,000/= owed to the Plaintiffs together with interest. The Plaintiffs seek to have the 1st Defendant honour the professional undertakings to pay to the Plaintiffs the outstanding balance of Kshs. 8,000,000/=.

2. The background to the claim is that the Plaintiffs agreed to sell land reference number 13459/36 (IR No. 56960) (“the Suit Property”) to Divine Providence Franciscan Missionaries (the 2nd Defendant) at the agreed consideration of Kshs. 50,000,000/=. The 2nd Defendant paid a deposit of Kshs. 7,000,000/= to the Plaintiffs leaving a balance of Kshs. 43,000,000/=. The Plaintiffs claim that as the advocates for the purchaser, the 1st Defendant gave a professional undertaking to pay the Plaintiffs Kshs. 40,000,000/= within 14 days of the successful registration of the transfer in favour of the 2nd Defendant, and charge in favour of the 3rd Defendant which was financing the purchase of the Suit Property to the tune of Kshs. 40,000,000/=. The Plaintiffs also claimed that the 1st Defendant issued a second undertaking to ensure payment of the balance of Kshs. 3,000,000/= to the Plaintiffs before the end of October 2015.

3. The Plaintiffs averred that based on the two undertakings given by the 1st Defendant, they released the title documents to the 1st Defendant who registered both the transfer in favour of the 2nd Defendant and the charge in favour of the 3rd Defendant. Only Kshs. 35,000,000/= as opposed to Kshs. 40,000,000/= of the purchase price was paid leaving a balance of Kshs. 8,000,000/= made up of Kshs. 5,000,000/= from the first undertaking and Kshs. 3,000,000/= from the second undertaking. The Plaintiffs claimed that under clause 9 of the sale agreement, interest was chargeable on all sums due until payment in full at the rate of 2% above the base lending rate of Barclays Bank of Kenya Limited.

4. The 1st Plaintiff swore the affidavit in support of the Originating Summons and attached the sale agreement dated 1/11/2013. He attached

copies of the two letters dated 28/8/2015 and 3/9/2015. The relevant part of the Defendant's letter of 28/8/2015 reads as follows:

"We hereby give you our firm and irrevocable professional undertaking to hold the documents to your order returnable on demand and to let you have the financed balance of the purchase price in the sum of Kshs. 40,000,000/= only without any deductions within 14 days of successful registration of transfer in favour of the purchaser and charge in favour of Family Bank Limited."

5. The relevant paragraph in the Defendant's letter of 3/9/2015 read as follows: -

"We hereby give you our firm and irrevocable professional undertaking to hold the documents to your order returnable on demand and to use them solely for purposes of registering a transfer in favour of the purchaser and a charge in favour of the Family Bank Limited. We further undertake not to release the documents to a third party except the lands official or the Bank without your authority in writing.

We shall ensure payment to your account or your order of the sum of Kshs. 3,000,000/= being the balance of the purchase price herein by end of October 2015."

6. The trustees of the purchaser sought to participate in the proceedings on 17/2/2017 and were joined as the 2nd Defendant on 31/5/2017. Jane Orioki, one of the trustees swore the replying affidavit filed in court on 28/6/2017. She averred that the 2nd Defendant paid the sum of Kshs. 16,500,000/= on 8/4/2014, 1/9/2015 and 13/9/2015 and Kshs. 35,000,000/= on 16/12/2016 towards the purchase price. She maintained that the 2nd Defendant paid Kshs. 51,500,000/= in total which meant it overpaid the purchase price by Kshs. 1,500,000/=. She maintained that the Plaintiffs demand for further payment was unjustified.

7. The court gave parties time to retrieve the bank statements and establish whether the purchase price was indeed paid in full. Parties reconciled accounts after the 2nd Defendant retrieved copies of its bank statements which confirmed that the Plaintiffs refunded the amount that was in issue to the 2nd Defendant in January 2015. Parties agreed to dispose of the suit through written submissions.

8. The 1st Defendant opposed the suit through the replying affidavit of Joel Kyatha Mbaluka sworn on 9/1/2017. He deponed that the suit was brought in bad faith against the 1st Defendant who was not a party to the sale of the Suit Property. He stated that his firm only represented the 3rd Defendant in the transaction to perfect the securities. He averred that since the law firm was not a financier in the purchase of the suit land it could not be compelled to pay any outstanding sums or interest.

9. Part of the purchase price, that is Kshs. 40,000,000/= was to come from the loan which the 3rd Defendant had agreed to advance to the 2nd Defendant. This sum was to be secured by a charge over the Suit Property. The 3rd Defendant instructed the 1st Defendant to issue a professional undertaking to the Plaintiffs to pay Kshs. 40,000,000/= to enable the release of the title document to facilitate the registration of the transfer in favour of the 2nd Defendant and a charge over the Suit Property in its favour. When a dispute arose as to payment of the outstanding purchase price, the 2nd Defendant's Chairperson requested Mr. Mbaluka to give another undertaking to pay the difference of Kshs. 3,000,000 to the Plaintiffs. Mr. Mbaluka issued the professional undertaking when the 2nd Defendant indicated that it was making arrangements to sell two buses so pay this sum.

10. He stated that upon receipt of the completion documents from the Plaintiffs and registration of the transfer in the 2nd Defendant's name and charge in favour of the 3rd Defendant, his firm handed over the registered documents to the 3rd Defendant and sought the release of the financed sum for onward transmission to the Plaintiffs. He advised the Plaintiffs to pursue the 3rd Defendant directly for payment of the financed sum, and the 2nd Defendant for the balance of Kshs. 3,000,000/=. He was stunned when he received the Plaintiffs' advocate's letter dated 7/3/2016 demanding payment of Kshs. 8,000,000/= as the unpaid purchase price. Mr. Mbaluka responded that he was not aware that the issue had not been sorted out. He wrote to the 3rd Defendant requesting it to remit the balance of Kshs. 5,000,000/= and also wrote to the 2nd Defendant urging it to pay the balance outstanding. Mr. Mbaluka stated that he tried to contact the 2nd Defendant's Chairperson to no avail and eventually reported the matter at the Central Police Station under OB No. 122/25/7/2016. When he traced the 2nd Defendant's Chairperson, she claimed that she had overpaid the consideration for the Suit Property.

11. The 1st Defendant maintained that it was not a party to the sale transaction and was not therefore liable to pay interest arising from the agreement. He maintained that the 1st Defendant did not undertake to finance the purchase of the Suit Property and that it should not be liable to pay the balance of the purchase price to the Plaintiffs.

12. The 1st Plaintiff swore a further affidavit which was filed in court on 20/3/2018 giving the breakdown of all the payments made. He deponed that while the transaction was going on, the 2nd Defendant was a tenant of the Plaintiffs' and was liable to pay rent. The rent from November 2013 to February 2014 added up to Kshs. 2,990,000/=. He added that the earlier sale transaction of 1/1/2013 was cancelled and the Plaintiffs set off the rent arrears of Kshs. 2,990,000/= against the sum of Kshs. 15,000,000/= which was being held as a deposit and that they returned the balance of Kshs. 12,010,000/= to the 2nd Defendant. The Plaintiff entered into another agreement for the sale of the Suit Property at Kshs. 50,000,000/= sometime in 2015. Kshs. 43,000,000/= of this sum remained unpaid. The 1st Defendant gave the professional undertaking dated 28/8/2015 to pay Kshs. 40,000,000/= upon release of the documents and successful registration of the transfer and charge. In addition, the 1st Defendant gave another professional undertaking dated 3/9/2015 in respect of the sum of Kshs. 3,000,000/=.

13. Parties filed submissions which the court has considered. The Plaintiffs submitted that the two professional undertakings given by the 1st Defendant were unequivocal and enforceable. The Plaintiffs relied on the Encyclopedia of Forms and Precedents, 5th Edition, Volume 39 which defines a professional undertaking as an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It is made by a solicitor in the course of his practice either personally or by a member of his staff, and can also be made by a solicitor but

not in the course of his practice. The Plaintiffs submitted that an undertaking by an advocate is binding on him and must be honoured. They submitted that the three elements of a professional undertaking are: a clear declaration or promise to do something; the promise is made by an advocate in the course of his business as an advocate; and the party to whom the professional undertaking is addressed relies upon it. The Plaintiffs submitted that 1st Defendant should be called upon to honour his solemn undertaking given in the letters dated 28/8/2015 and 3/9/2015 to pay specified sums of money to the Plaintiffs upon release of the title and completion documents.

14. The Plaintiff relied on the case of **Harit Sheth t/a Harit Sheth Advocates v K. H. Osmond t/a K. H. Osmond Advocates [2003] eKLR**. The court noted that the ruling attached dealt with the issue of whether or not the order *vide* which the court had dismissed the suit for enforcement of a professional undertaking could be appealed against. The Plaintiff also relied on the case of **Nelson Andayi Havi t/a Havi and Company Advocates v Jane Muthoni Njage t/a J. M. Njage and Company Advocates [2015] eKLR** on the contention that an advocate must ensure he is in funds before giving a professional undertaking.

15. The 1st Defendant filed submissions. The 1st Defendant maintained that there is a difference between an undertaking given by an advocate personally and, one given as an agent of his client where the advocate holds the money at the time of giving the undertaking. The 1st Defendant submitted that if the advocate holds the money then the undertaking is given personally and that if he does not hold the money, then the undertaking is given merely as an agent of his client. The 1st Defendant maintained that at no time did it hold the monies forming the basis for the undertakings and that it therefore gave the Plaintiffs a professional undertaking as an agent of the 2nd Defendant. The 1st Defendant added that professional undertakings do not transfer the burden of paying the purchase price to the advocate issuing it as this was merely the oil that keeps the wheels of conveyancing transactions moving. The 1st Defendant submitted that the power of the court to enforce professional undertakings is a drastic one and must be invoked with caution and only in clear cases.

16. The 1st Defendant added that where it is shown that the advocate never held the purchase price, the court should not rush to enforce the professional undertaking unless there are no other remedies. In this case the 1st Defendant submitted that the 2nd Defendant had admitted owing the monies claimed by the Plaintiffs. It added that the Plaintiffs should have first made attempts to recover the outstanding balance of the purchase price from the 2nd Defendant before seeking to enforce the professional undertakings. The 1st Defendant added that since the 2nd Defendant had been added as a party to this suit, any orders for the payment of the outstanding sum should be issued against the 2nd Defendant and not the 1st Defendant. The 1st Defendant contended that the letters of 25/8/2015 and 3/9/2015 were not professional undertakings given by the 1st Defendant in his capacity as an advocate but they were undertakings he issued as an agent of a client and they are therefore not clear for enforcement purposes. The 1st Defendant urged the court not to enforce the undertakings until the Plaintiffs determine that they cannot recover the outstanding sum from the 2nd Defendant. The 1st Defendant urged the court to dismiss the suit with costs.

17. The 2nd Defendant submitted that the letter of 28/8/2015 constituted a professional undertaking by the 1st Defendant to pay the Plaintiffs Kshs. 40,000,000/= but the letter of 3/9/2015 did not amount to a professional undertaking to pay Kshs. 3,000,000/=. Rather, that the 1st Defendant undertook to hold the completion documents to the Plaintiffs' order returnable on demand for purposes of registering a transfer and charge; and not to release the documents to a third party other than the bank or lands officials without the Plaintiffs' written authority. The 2nd Defendant maintained that it had paid the cumulative sum of Kshs. 51,500,000/= which meant that it overpaid the purchase price by Kshs. 1,500,000/=.

18. The issue for determination is whether the 1st Defendant gave professional undertakings that are unequivocal and capable of being enforced. It is not in dispute that after parties reconciled accounts it became apparent that the 2nd Defendant only paid the Plaintiffs Kshs. 42,000,000/= towards the purchase price leaving a balance of Kshs. 8,000,000/=. The 1st Defendant urged that the Plaintiffs should first have pursued the 2nd Defendant to pay the balance of the purchase price before seeking to enforce the professional undertakings it gave. The courts have held that a professional undertaking by an advocate constitutes a separate agreement that is independent of the transaction which led the advocate to give the undertaking. It can be enforced separately. (See **Peter Mathenge Gitonga & Co Advocates v Njoroge Kibatia & Another [2018] eKLR** and **Abraham Kibet Chepkonga t/a A.K. Chepkonga & Advocates v Paul Gicheru t/a Gicheru & Company Advocates [2017] eKLR**).

19. The court will address the two undertakings separately. The salient parts of the two undertakings are reproduced at paragraphs 5 and 6 above. In the undertaking dated 28/8/2015, the 1st Defendant gave the Plaintiffs its firm and irrevocable professional undertaking to hold the documents to the Plaintiffs' order returnable on demand and to let the Plaintiffs have the financed balance of the purchase price in the sum of Kshs. 40,000,000/= without any deductions within 14 days of the successful registration of the transfer in favour of the 2nd Defendant and charge in favour of the 3rd Defendant. Both the transfer and charge were duly registered against the Suit Property. The 3rd Defendant paid Kshs. 35,000,000/= to the Plaintiffs leaving a balance of Kshs. 5,000,000/=. The undertaking was clear and unequivocal under which the 1st Defendant was bound to forward to the Plaintiffs the sum of Kshs. 40,000,000/= without any deductions within 14 days of the registration of the transfer and charge as it had undertaken to do after the Plaintiffs relied on its undertaking and released the completion documents to the 1st Defendant.

20. The court dealt with the meaning to attach to the words *to procure payment* used in the professional undertaking sought to be enforced in the case of **Kiruti and Company Advocates v Kaplan and Stratton Advocates [2019] eKLR**. Tuiyott J. held that the word 'procure' was not to be assigned a casual meaning for it required the Defendant firm to do something more than to simply prevail upon, induce or persuade its clients to pay up the outstanding sums of money. He stated that the firm was under a duty to advise the lenders when the responsibility to pay fell due and to lean on its clients to pay up. The judge added that that responsibility did not extend to forcing the clients to pay but was to be carried out within the scope of legal work. The judge observed that while a lawyer may have some leverage over a client through persuasion, he may not have coercive authority to force the client to do or refrain from doing something.

21. Turning to the undertaking given by the 1st Defendant on 3/9/2015, it basically reproduced the first part of the earlier one on the registration of the transfer and charge. The words used in the undertaking were "we shall ensure payment to your account or your order of the sum of Kshs. 3,000,000/= being the balance of the purchase price herein by end of October 2015." The Longman Dictionary of

Contemporary English defines “ensure” as *to make certain that something will happen properly*. The 2nd Defendant therefore undertook to make certain that the Plaintiffs were paid the balance of Kshs. 3,000,000/= by the 2nd Defendant by the end of October 2015. Unlike in the undertaking of 28/8/2015 where the 1st Defendant undertook to let the Plaintiffs have the financed sum, in the second one the 1st Defendant undertook to make certain that the 2nd Defendant paid to the Plaintiffs Kshs. 3,000,000/= by the end of October 2015. All that the 1st Defendant could have done was to advise the 2nd Defendant to pay up the balance of Kshs. 3,000,000/=. Mr. Mbaluka deponed that he followed up the 2nd Defendant’s chairperson to make payment and even reported the matter to the police when he could not find her. In the court’s view, the undertaking dated 3/9/2015 was not unequivocal and is not enforceable.

22. The court directs the 1st Defendant to honour the professional undertaking it gave to the Plaintiffs in the letter dated 28/8/2015 and pay to the Plaintiffs the outstanding balance of Kshs. 5,000,000/= together with interest at court rates from 7/3/2016 until payment in full.

23. The court declines to order the 1st Defendant to honour the undertaking contained in the letter of 3/9/2015 because the undertaking was to ensure payment to the Plaintiffs’ account, it was not an undertaking to pay. The Plaintiffs are awarded the costs of the suit.

Dated and delivered at Nairobi this 26th day of November 2019

K.BOR

JUDGE

In the presence of: -

Ms. Wangui Kamunya for the 1st Defendant

Mr. E. Mwangi for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiffs