



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT

ELC NO. NO. 1077 OF 2015[OS]

IN THE MATTER OF: THE SALE AND PURCHASE OF L.R NO 7785/646 (ORIGINAL NUMBER 7785/10/471), NAIROBI BETWEEN EASTEND LIMITED (PURCHASER) AND GEOFFREY MUTUNGA NZAU and LEAH NZISA NZAU (VENDORS).

BETWEEN

EASTEND LIMITED.....APPLICANT

AND

BEN NJAU KAYAI T/A NJAU KAYAI & CO. ADV.....RESPONDENT

JUDGEMENT.

By an Originating Summons dated **12th October 2015**, the applicant **Eastend Ltd** has sought for these orders against the Respondent that;-

- 1. Ben Njau Kayai, an advocate of the High Court of Kenya trading as such in the name and style of NJAU KAYAI & Company Advocates, be ordered to pay the Applicant herein the sum of kshs.7,200,000/= being the refund of part of the purchase price received by him to hold as a stakeholder on 9th July 2014.**
- 2. Ben Njau Kayai, an advocate of the High Court of Kenya trading as such in the name and style of NJAU KAYAI & Company Advocates be ordered to provide an account of all interest accrued on the sum of Kshs.7,200,000/=from 9th July 2014, until the date of filing this suit.**
- 3. Ben Njau Kayai, an advocate of the High Court trading as such in the name and style of NJAU KAYAI & Company Advocates be ordered to pay to the Applicant herein all interests accrued on the sum of kshs.7,200,000/= received by him from 9th July 2014 until the date of filing this suit.**
- 4. That the Court be pleased to make such other orders as it shall deem fit and just in the circumstances.**
- 5. That costs be awarded to the Applicant in any event.**

The Originating Summons is supported by the grounds stated on the face of the Originating Summons and on the supporting affidavit of **Fatima Dharahi**, a Director of the applicant. These grounds are;-

- 1. The applicant was at all material times the intended purchaser in a sale transaction for all that property known LR No.7785/646 (Original No.7785/10/471), Nairobi (Suit Property) from the Vendors GEOFFREY MUTUNGA NZAU and LEAH NZISA NZAU.**
- 2. The Respondent was at all material times representing the Vendors.**
- 3. The sale transaction was pursuant to Sale Agreement dated 2nd July 2014. The deposit for the purchase price was paid by two instalments, the first instalment of Kshs.400,000/= by way of a direct payment to the Vendors and the second instalment(kshs.7,200,000/=) hereinafter the second instalment by way of payment to the Respondent.**
- 4. On 24th June 2014, the Respondent irrevocably undertook to hold the second instalment as a stakeholder pending the registration of the transfer in favour of the purchaser and to refund the same if the transaction was not completed for whatever reasons.**
- 5. The second instalment was duly paid to the Respondent on 9th July 2014 ,and who confirmed receipt by way of his letter dated 23rd July 2015.**
- 6. The sale transaction was terminated by the Applicant. The Respondent has failed to refund the second instalment despite his admission and commitment to pay the same on or before 30th August 2015. There is no lawful reason why the Respondent has declined to make the payment.**
- 7. The Respondent having been in receipt of the second instalment ought to give an account of all the interest accrued from 9th July 2014 until the date of filing this suit.**

In her Supporting Affidavit, **Fatima Dharani**, the Director of the applicant reiterated the averments contained in the grounds in support of the Originating Summons.

The Originating Summons is opposed and **Benson Njau Kayai** an advocate practising in the name and style of **M/s Njau Kayai & Co.Advocates** swore a Replying affidavit and averred that he did admit that he represented the vendors in the sale Agreement as per exhibit marked as **D1** in the said Affidavit of **Fatima Dharani**. He further admitted that he received the 1st deposit of **Kshs.7,200,000/=** although it had been clearly agreed between the Applicant and the Vendors that part of this amount was to be paid to a third party who was holding the title to this suit property.

He also admitted that the said sale transaction collapsed and it was terminated due to the Applicant and the Vendors disagreement to the completion procedures. It was his contention that thereafter the applicant started demanding the entire amount of **Kshs.7,200,000/=** despite the fact that part of this amount had been released to the third party and a further amount of **Kshs.400,000/=** that had been paid directly to the vendors prior to the said Agreement for sale as per annexure “**BNK1**”.

He also contended that he made efforts not only to recover the amount paid to the third party but also the one paid directly to the vendors by the Applicant, but the applicant instead of giving him time rushed to Court. The Respondent deposed that he should not be penalized for the actions of the Applicant and the Vendors. He urged the Court to dismiss the suit with costs.

The Court directed that the Originating Summons be canvassed by way of Affidavits evidence and written submissions. In her response, the applicant filed a further affidavit and averred that there has never been any agreement to have part of **Kshs.7,200,000/=** released to a third party as alleged by the Respondent.

Further that in any event the, the Respondent had confirmed that he would not release any part of the money before obtaining their authorisation. This was through his letter of **21st August 2014**, produced as **Exhibit FD3**. She reiterated that the applicant had not given any authorisation for payment of any part of

the **Kshs.7, 200,000/=** and the Respondent has never sought any authorization for the release.

Further the applicant through the Law Firm of **Kimani & Murithi Associates** filed their written submissions on **1st April 2016**, and relied on various decided cases. The applicant relied on the case of **Harit Sheth t/a Harit Sheth Advocates Vs K.H Osmond t/a K.H Osmond Advocates (2011) eKLR** where the Court held 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”.

Applicant also relied on the case of **S.T.G Muhia T/A S Thuo Muhia & Co.Advocates Vs J M Chege T/A Thuo Muhia & Co. Advocates Vs J. M Chege T/A J M Chege & Co. Advocates (2009) eKLR** in which the Court stated 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 can therefore be enforced against an independent of the transaction in which the professional undertaking was given”.

It was further submitted that admissions have to be plain and obvious as plain as pikestaff and clearly readable because they may result in Judgement being entered.

The Respondent though opposed to the Originating Summons did not file any written submissions. The Court will therefore consider the available pleadings, the relevant provisions of law and the cited authorities in arriving at its findings.

The applicant has anchored its case on the undertaking given by the Respondent herein. The applicant relied on the definition of undertaking as was given in the case of **S Thuo Muhia & Co. Advocates Vs J. M Chege (Supra) where J Kimaru** quoted the definition as set out in Halsbury Laws of England 4th edition re-issue volume 44(1) at page 223 to mean:-

“ an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by (i) a solicitor or a member of staff in the course of practice or (2) a solicitor but not in the course of practice whereby the solicitor becomes personally bound”.

Further, in the said findings, the Court quoted the definition of undertaking as given in the Encyclopaedia of Forms and Precedents, 5th Edition Vol.3a at page 581 to mean:-

“ An undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance of it and made by a solicitor or member of solicitors staff in the course of practice.....An undertaking is therefore a promise made by a solicitor or on his behalf by a member of his staff, to do or refrain from doing something.In practice undertakings are frequently given by solicitors in order to smooth the path of transactions or to hasten its progress and are convenient methods by which some otherwise problematic areas of practice can be circumvented”.

From the above definition of undertaking and the circumstances of the case, the court is to determine whether there was an undertaking herein given by the Respondent and whether the same was fulfilled. Further the Court is to determine whether the applicant is entitled to the prayers sought.

From the available evidence, there is no doubt that the applicant herein was an intended purchaser for a sale transaction for all the property known as **LR No.7785/646**, which was to be purchased from **Geoffrey Mutunga Nzau** and **Leah Nzisa Nzau**. There is a sale agreement dated **2nd July 2014**, attached to the Originating Summons. It is also evident that the Respondent herein was representing the Vendors.

There is also no doubt that vide a letter dated **24th June 2014**, the Respondent irrevocably undertook to hold the second instalment of **Kshs.7200,000/=** as a stakeholder pending the registration of the transfer in favour of the purchaser and he was to refund the same in case the transaction was not completed for whatever reasons. It is also evident that the second instalment was paid to the Respondent on **9th July 2014**, and he did acknowledge receipt of the same vide a letter dated **23rd July 2014**. It is therefore not in doubt that the Respondent is holding **Kshs.7200,000/=** as stakeholder. The parties have all admitted that the transaction was terminated by the applicant. The applicant has alleged that the Respondent has failed to refund to it the second instalment despite his admission and commitment to pay the same before **30th August 2015**, vide a letter dated **14th August 2015**. The Respondent has alleged that part of the money held as stakeholder was paid to a 3rd party and so he cannot remit **Kshs.7200,000/=**. However the Respondent made a professional undertaking to remit the money to the applicant's advocate in the event the sale was to collapse.

The Respondent never indicated in the said transaction that part of the money had been paid out to a 3rd party. Taking into account the definition of a professional undertaking to be an unequivocal declaration of intention addressed to someone who reasonably places reliance on it, then the Court finds that the Respondent made an undertaking herein in which the applicant made reliance on which the Respondent did not at all undertake to remit part of the money held as second instalment as stakeholder but undertook to remit the whole of **Kshs.7200,000/**. The Respondent cannot now breach the said undertaking.

The Respondent has admitted in his Replying Affidavit that he indeed received **Kshs.7200,000/=** as stakeholder pending the completion of the transaction. However the transaction collapsed and the Respondent should have adhered to his professional undertaking and refunded the money deposited as per the term of the agreement. Though the Respondent has alleged that he paid part of the **Kshs.7200,000/=** to a 3rd party there is no evidence that the applicant authorized him to release any money to any third party and that alleged 3rd party is not even named.

It is also evident that, the money was held as stakeholder in the client account at **Commercial Bank of Africa** as is evident from the letter dated **24th June 2014**. The said deposit must have accrued interest and since the money was paid by the applicant, the interest earned belongs to the applicant. Further clause no.13;2;2;3 of the sale agreement provides that :-

“ Shall refund the second payment together with interest and the balance respectively to the purchaser”.

The applicant is therefore entitled to be refunded the sum of Kshs.7.2 million together with interests.

On the issue of costs. It is evident that vide a letter dated **19th August 2015**, the applicant issued its Notice of intention to sue. The Respondent did not make good the demand. The Respondent is therefore condemned to pay costs of this Originating Summons.

Having now carefully considered the instant originating summons and the annexures thereto and the written submissions, the court finds that it is merited and consequently the court enters Judgement for the applicant against the Respondent as prayed in the Originating Summons in terms of prayers no.1, 2 and 3.

The applicant is also entitled to costs of the Originating Summons to be borne by the Respondent herein.

It is so ordered.

Dated, Signed and Delivered this 20th day of January 2017

L.GACHERU

JUDGE

In the presence of :-

.....Plaintiff/Applicant

..... Defendant/Respondent

.....Court Clerk