



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 740 OF 2014

IN THE MATTER OF ORDER LII OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

IN THE MATTER OF THE ADVOCATES' ACT CAP 16 LAWS OF KENYA

IN THE MATTER OF PROFESSIONAL UNDERTAKING

BETWEEN

GARO CO-OPERATIVE SAVINGS

CREDIT SOCIETY LTD.....PLAINTIFF

AND

J.D MURIMI & CO.ADVOCATES.....DEFENDANT

MASTERMIND TOBACCO (K) LTD.....INTERESTED PARTY

JUDGEMENT

1. This is a Judgement in respect of an amended Originating Summons filed by the Plaintiff seeking to enforce a *professional undertaking* by the defendant. The undertaking arose out of a sale agreement between the Plaintiff as the registered owner of a property known as LR No.209/7141/4 and Ofafa Maringo Housing Co-operative Society Limited as the beneficial owner and Vendor on the one part and the Interested Party as the purchaser on the other part.

2. The defendant was acting for the interested party which was purchasing the property. By a letter dated 28th March 2011, the defendant gave a professional undertaking to remit a sum of **Kshs.17,550,000/=** to the Plaintiff's Advocates being the balance of the purchase price upon successful transfer of lease in the name of the interested party and vacant possession being given. The transaction was completed on or around January 2012. The defendant paid **Kshs.14,975,000/=** leaving a balance of **Kshs.2,575,000/=**.

3. When the Plaintiff's Advocate called for the balance as per the undertaking, the defendant declined to release the balance prompting the Plaintiff to file the present suit against the Defendant.

4. The defendant through replying affidavit sworn on 15th February 2016 and filled in court on the following day contends that he remitted the amount in the undertaking less **Kshs.2,575,500/=** which he

retained on account of legal fees owed to him by the interested party. The defendant contends that since he is holding the said money as lien for his legal fees, the interested party should settle the sum being claimed by the Plaintiff.

5. The interested party filed a replying affidavit sworn on 10th February 2017 and filed in Court on 15th February 2017. The interested party contends that once it took possession of the purchased property it realized that the plaintiff had not settled an outstanding water bill due to Nairobi City Water and Sewerage Company Ltd amounting to ***Kshs.3,190,602.15***. That the Plaintiff failed to disclose this material fact and therefore the Plaintiff should first settle the outstanding bill and that the Plaintiff's claim should fail on this account.

6. I have considered the Plaintiff's claim as well as the opposition to the same by the defendant and the Interested Party. I have also considered the submissions by the parties herein. The issues which emerge for determination as follows:-

a. Should the defendant honour his professional undertaking

b. Should the issue of settlement of the outstanding water bill affect the enforcement of the undertaking?

c. If there is any outstanding water bill, and if so who should settle the same.

7. On the first issue, the defendant claims in his replying affidavit that he is holding the amount as lien on account of his legal fees. However, in the submissions he contends that he is holding the money because the Plaintiff did not hand over the property to his client free of any encumbrances. I have looked at the sale agreement which clearly distinguished between the registered owner and the beneficial owner of the property who was also described as the Vendor.

8. If there is any dispute as to fees between the defendant and the interested party that should not be brought into the issue of the undertaking given. A professional undertaking is a separate contract which should not be affected by any disputes between the person undertaking and his client. This was the holding in the case of **Kenya Re-insurance Co-operation Vs Muguku Muriu T/A V.E Muguku & Co. Advocates (1996) eKLR**. The undertaking given by the defendant was unambiguous and unequivocal. The defendant should therefore not raise the issue of his fees as a basis for not honouring his professional undertaking.

9. The issue of the outstanding water bill should not affect the undertaking. The Plaintiff had sold the property to Ofafa Maringo Housing Co-operative Society Limited. This is why in the agreement; the society was brought in as a beneficial owner and described as vendor. The property is said to have been sold to Ofafa Maringo Housing Co-operative Society Ltd in 2003. If there is any outstanding water bill, it is this Society who should settle the same and this should not affect the professional undertaking given by the Defendant.

10. Clause 16.4 of the agreement indicated that it was the vendor/and or the registered owner who was to disclose all material information relating to the property. As the property had already been sold to the vendor, it was the vendor who was obligated to disclose all material facts and not the registered owner. The defendant cannot therefore seek to retain the balance of the amount on account of non-settlement of the water bill. I find that the Plaintiff's claim is well founded. I proceed to enter judgement in favour of the Plaintiff against the defendant in the sum of ***Kshs.2,575,000/=*** with interests at Court rates from January 2012 until payment in full. The defendant shall also bear costs of this suit.

Dated, Signed and Delivered at Nairobi on this 31st day of July 2017.

E. O. OBAGA

JUDGE

In the Presence of :-

Mr Onsando for Plaintiff

Mr Limo for defendant who is also holding brief for Mr Onyango for Interested Party

Court Assistant: Hilda

E .O. OBAGA

JUDGE