



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT NAIROBI
ELC MISCELLANOUS CIVIL APPLICATION NO. 20 OF 2008 (O.S)

FRANCIS KIMANI,
SMITH MUTURI & PAUL MUCHIRI (Suing for and on behalf of)
SUPER MIND DEVELOPMENT SELF HELP GROUP....PLAINTIFFS

AND

GACHIRI KARIUKI
MARTIN KIAI NUTHU

T/A GACHIRI KARIUKI & KIAI ADVOCATES....DEFENDANT

RULING

The Application

The Plaintiffs filed an application by way of a Notice of Motion dated 22nd May 2014 seeking the following orders:-

1. That the Defendant be compelled to satisfy his professional undertaking to facilitate and effect transfer of the suit property known as I.R 36281 L.R. No. 12867/17 to the Plaintiff according to the terms and conditions of the sale agreement dated 24th May 2005, and further to release all completion documents pertaining to the suit property to the Plaintiff.
2. That the Defendant herein lodge a deed of indemnity to indemnify the Plaintiffs against any claims, costs or proceedings by any person(s), company(ies) and/or corporation(s) in respect of the suit property L.R No. 12867/17 due to be transferred to the Plaintiffs in respect to any past/future claims relating to the aforementioned property.

The application is supported by an affidavit sworn by the Plaintiff's chairman, Francis Kimani, on 22nd May 2014 wherein he depones that on 31st May 2005, the Plaintiffs entered into a sale agreement with Matumaini Ventures Limited for the purchase of the suit property for a consideration of Kshs.13,800,000/=. The Plaintiffs have annexed as evidence a copy of the sale agreement and has averred that despite paying the full consideration, the Defendant who was acting for the vendor has neglected

and/or refused to release all the completion documents.

The Plaintiffs have contended that although the Defendant released a copy of the original grant and the transfer indicating that the transfer had been effected, verification done at the land registry revealed that the transfer had been effected in the Plaintiffs' name despite its lack of capacity to own property in its name. According to the Plaintiff, efforts by its officials to correct the error through a deed of rectification whose copy has been annexed were not successful. The Plaintiffs have annexed as evidence a copy of a letter dated 13th March 2014 from the Chief Lands Registrar indicating that the original title contained a forged entry and as such, that the Plaintiffs could not claim to be the registered owner of the suit property.

While exhibiting a copy of a certificate of title showing cancellation of the entry indicating the said ownership, the Plaintiffs have contended that the suit property was never transferred to them. It is the Plaintiffs' averment that ten years after signing the agreement, the beneficiaries of the proprietary interest have never enjoyed their rights to the property despite fulfilling their end of their bargain. The Plaintiffs have contended that since the Defendant gave a professional undertaking on behalf of its client to ensure that they fulfill all their obligations with regard to the agreement, the Court has jurisdiction to compel the Defendant to honour that undertaking and to facilitate the transfer and release of a clean title and all completion documents to the Plaintiffs.

The Response

The application was opposed by the Defendant through a replying affidavit sworn by Martin Kiai Nuthu advocate, on 4th June 2014. The Defendant has averred that the application is frivolous, vexatious and an abuse of the court process since the Plaintiffs were well represented by M/S Ameli Inyangu & Partners Advocates. According to the Defendant, the issue was with the name of the Plaintiffs and not title or the land that was passed to them by Kenya Commercial Bank Limited. It is the Defendant's contention that being a mere procedural issue, the name can be rectified through a tripartite meeting between it, the Plaintiffs' advocates and the vendor's advocates.

While stating that execution of a new transfer between the Kenya Commercial Bank who were the vendor and the Plaintiffs would offer a solution to the issue, the Defendant has averred that no value will be added by issuing the orders sought since the Defendant was not capable of executing a transfer and therefore, that the orders would have been issued in vain. Lastly, the Defendant stated that the mis-statement of names was not out of their making and that they were incapable of offering a solution by themselves.

The Submissions

The Plaintiffs' application was canvassed by way of written submissions. The Plaintiff filed submissions dated 16th June 2014 wherein reliance was placed on Black Law's Dictionary, 4th Edition definition of an undertaking as a promise, engagement or stipulation. Counsel for the Plaintiffs relied on **Halsbury's Laws of England, 3rd Edition Vol 36** at page 195-196 to argue that the undertaking dated 29th May 2005 was issued by the Defendant and specifically Martin Kiai Nuthu, personally and in his professional capacity as an advocate of the High Court of Kenya. Counsel argued that the undertaking was unequivocal and that the Plaintiffs placed reliance on the same while entering into the sale agreement.

The Plaintiffs referred the court to the cases of **Equip Agencies Ltd -vs- Credit Bank Ltd,(2007) eKLR** and **Kenya Commercial Bank -vs- Adala, (1983) KLR 467** and urged the court to exercise its punitive and disciplinary power to remedy the breach of duty by the Defendant. Counsel submitted that whereas the Defendant was required by the undertaking to hand over a duly executed and undated transfer to facilitate registration of the transfer by the Plaintiff's advocates, the Defendant opted to pay stamp duty and register the transfer.

It was further submitted for the Plaintiffs that the main issue in the application was the indication in the original grant that the entry showing that the Plaintiffs were the registered owner was a forgery. Counsel

argued that it was mysterious how the Defendant was able to register the property in the name of a self-help group. The Plaintiffs submitted that the Defendant had failed to honour his undertaking and that his conduct bordered on fraud. It was submitted that pursuant to section 57 of the Advocates Act, the court has powers to discipline an advocate by punitive measures and reliance was placed on the case of **Daniel Muema Kivuva -vs- Victor Vinya Mule (2007) eKLR.**

In response to the Defendant's contention that the Plaintiffs' issue was the misstatement of names, the Plaintiffs submitted that their issue was the claim of forgery in the grant by the Registrar and the subsequent cancellation of the entry in the original grant. Counsel averred that efforts by the Plaintiffs to prompt an out of court settlement had not been successful and therefore, that this matter could only be effectively and conclusively determined by the court.

The Plaintiffs relied on the case of **Harit Sheth t/a Harit Sheth Advocate -vs- K. H. Osmond t/a K. H. Osmond Advocate (2011) eKLR** and **Naphtali Paul Radier -vs- David Njogu Gachanja t/a D. Njogu & Company Advocates (2006) eKLR** for the submission that the Defendant had no excuse not to honour his professional undertaking. Lastly, it was submitted that it was necessary for the Defendant to be ordered to lodge a deed of indemnity to indemnify the Plaintiffs of anything that could have transpired with regard to the suit property between 2005 to date.

The Defendant in submissions dated 30th September 2014 reiterated the facts of the case and stated that the Plaintiffs had failed to annex the professional undertaking they sought to enforce. The Defendant submitted that the material omission goes to the root of the Plaintiffs' claim and therefore, that the application was fatally defective since no evidence of the existence of the professional undertaking was tendered.

Counsel submitted that in accordance with the conditions set out in the agreement for sale prepared by the purchaser's advocates, the Defendant sent an undated executed transfer and therefore, that the Defendant's obligations set out in the professional undertaking and agreement for sale were fulfilled. It was submitted that the obligation sought to be enforced cannot be performed since Supermind Development Self Help Group had no authority or capacity to hold the property.

The Defendant relied on clause 1 of the special conditions of the agreement for sale dated 24th May 2005 and submitted that they discharged their duties under the agreement for sale by providing the original grant, an undated executed lease and all other requisite documents which were sent to the Plaintiffs' advocates for registration of the transfer. Counsel contended that the Defendant discharged their obligations under the contract and reliance was placed on the case of **Kenya Re-Insurance Corporation Ltd -vs- Jane Njagi t/a Njagi Nyaboke & Company Advocates (2013) eKLR.**

While submitting that the agreement for sale was prepared by the Plaintiffs' Advocate who indicated that Supermind Development Self Help Group was the purchaser, Counsel averred that the mistake on the agreement for sale was subsequently reflected on the transfer instrument. It is the Defendant's submission that this mistake should not be visited upon it.

In further submission, the Defendant stated that the alleged professional undertaking was given to the firm of M/s Ameli Inyangu & Partners Advocates. Counsel argued that there was no contract between it and the Plaintiff and therefore, that the Plaintiffs lacks locus to enforce the same. For this submission, the Defendant relied on the case of **David Karanja Thuo (practising as D. K. Thuo & Co. Advocates) -vs- Njagi Wanjeru(practising as Njagi Wanjeru & Co. Advocates)(2010)eKLR** where the court found that the professional undertaking was between the advocates and that none of the clients was privy to the undertaking.

It was also submitted for the Defendant that the Plaintiffs were not entitled to the prayers sought. Counsel averred that under clause 7(c) of the agreement for sale, the Plaintiffs' remedy lies in rescinding the agreement and seeking a refund of the amounts paid together with 10% interest thereon.

Further, it was submitted that the prayers sought should not be granted, as the alleged undertaking has

already been performed by the Defendant and the orders sought were misplaced and enforceable. Lastly, it was submitted that it would be unfair to grant the prayer requiring the Defendant lodge a deed of indemnity since the whole issue was brought about by an error made by the Plaintiffs who were well represented by M/s Ameli Inyangu & Partners advocates.

The Issues and Determination

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Defendant gave an undertaking to the Plaintiffs, and if so whether the said undertaking should be enforced. This court adopts the definition of an undertaking as set out in **The Encyclopedia of Forms and Precedents, 5th Edition, Volume 39**, wherein it is stated as follows:-

“An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor in the course of his practice, either personally or by a member of his staff; or a solicitor as “solicitor”, but not in the course of his practice, under which the solicitor (or in the case of a member of his staff, his employer) becomes personally bound. 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 practice undertakings are frequently given by solicitors in order to smooth the path of a transaction, or to hasten its progress and are a convenient method by which some otherwise problematical areas of practice can be circumvented.”

For such an undertaking to be enforced, it is further provided as follows in **Halsbury's Laws of England, 4th Edition (Re-Issue) Vol 44(1)** paragraph 354 at pages 222-223:

“Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person or gives an undertaking to the court of proceedings, that undertaking may be enforced summarily upon application to the court. Before this remedy can be pursued it must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client. The undertaking must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.....

The undertaking must be clear in terms. The whole of the agreement to which it relates must be before the courts, and the undertaking must be one which is not impossible *ab initio* for the solicitor to perform. Nevertheless, an undertaking will be enforced against the solicitor even through, after it is given, the client dies, or instructs the solicitor not to perform it, or changes his solicitor. If performance of the undertaking has been waived the undertaking will not be enforced afterwards. Similarly, if the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced.”

The above legal position is confirmed in the various judicial authorities relied upon by the Plaintiffs and Defendant. The Plaintiffs in their submissions have stated in this regard that the Defendant gave an undertaking dated 20th May 2005 to do the following:

1. Promptly apply the Bankers Cheque issued by Supermind Development Self Help Group in settlement of the purchase price of the land drawn in favour of Kenya Commercial Bank
2. Provide upon the payment of the purchase price with completion documents to enable them get title to the land sold under the sale agreement.

The said completion documents included the original grant in respect of the property, and the duly executed but undated transfer in respect of the property in favour of the purchaser.

The Plaintiffs did not furnish the court with a copy of the said undertaking in their application and/or supporting affidavit. However, upon perusal of the court file the Court noted that the said undertaking

dated 20th May 2005 was indeed given by the Defendant to the Plaintiffs' then Advocates and was attached to the affidavit filed in support of the Originating Summons filed herein dated 7th July 2008.

The Defendant on his part submitted that he had fulfilled all its obligations under the said undertaking and agreement for sale dated 24th May 2005. In addition, this position is confirmed by the Plaintiffs who in their submissions state that they instituted a suit on 29th July 2008 seeking to compel the Defendant to honour their professional undertaking, and that the Defendant released the original copy of the original grant on 2nd September 2008 and further, that the executed transfer and stamp duty payment form was released on 27th July 2011.

It appears that the dispute herein arose from the transfer being made and registered in the name of Supermind Development Self Help Group, and the Plaintiff submitted in this respect as follows:

“The Respondent was required according to the undertaking to hand over a duly executed but undated transfer. Further it raises a number of questions, for instance why the Respondents opted to pay stamp duty and register the transfer. According to the agreement the transfer was to be done as the Purchasers shall direct through the Purchasers Advocate.

The main issue in this Application is the indication that the entry in the original grant that Supermind Development Self Help Group is the registered owner is a forgery. Indeed it had to be a forgery as indicated by the Chief Land Registrar, this is because the Applicants could not own property as a self help group as only a body corporate or individual can own property under the laws of Kenya”

The undertaking given by the Defendant in this regard was in clear and unequivocal terms that he was to provide the completion documents including a *“duly executed but undated transfer in respect of the property in favour of the purchaser”*. The purchaser in this regard can only be the purchaser in the sale agreement pursuant to which the undertaking was being given, which is the sale agreement dated 24th May 2005 entered into between Matumaini Ventures Limited as the vendors and Supermind Development Self Help Group as the purchasers and which was attached as evidence by the Plaintiffs. There is no evidence provided by the Plaintiffs that they provided details of a different purchaser to the Defendant, and it is my finding that the Defendant in this regard is not in breach of his undertaking with regards to the said transfer.

If it turned out later that there was an error as regards the particulars of the purchaser in the said transfer and subsequent registration, then the Plaintiff's Advocates must also be equally to blame as they were under a duty to scrutinize the said transfer, and ought to have given clear instructions and taken the necessary steps to ensure and that the transfer document was in the proper names of their client. The recourse available to the Plaintiff is to take the necessary steps to ensure that that the property is transferred and registered in the correct names.

The prayers in the Plaintiffs' Notice of Motion dated 22nd May 2014 are accordingly denied for the foregoing reasons, and the Plaintiffs shall bear the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____21st____ day of ____November____, 2014.

P. NYAMWEYA

JUDGE