



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & OKWENGU, JJA.)

CIVIL APPEAL NO. 250 OF 2017

BETWEEN

JOEL KYATHA MBALUKA T/A

MBALUKA & ASSOCIATES ADVOCATES.....APPELLANT

AND

DANIEL OCHIENG OGOLA T/A

OGOLA OKELLO & CO ADVOCATES.....RESPONDENT

*(Being an Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi Commercial & Tax Division, (R. Ngetich, J.) dated 10th July, 2017*

in

H.C. CIVIL SUIT NO. 171 OF 2017 (O.S))

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**JUDGMENT OF THE COURT**

[1] The following appeal arises from the ruling of the High Court, (R. Ngetich, J.) delivered on 10th July, 2017 where the High Court declined to grant the appellant's application to have the suit transferred to the Environment & Land Court (ELC) and for the learned Judge to disqualify herself from deciding on the matter.

[2] A recount of the facts leading to the above is as herein. The appellant and respondent are both advocates of the High Court trading as **Mbaluka & Associates Advocates and Ogola Okello & Co. Advocates respectively**. On the 7th March, 2016, the respondent was retained by his client, **Jenipher Nkuene Riria** to act for her in the purchase of the property known as **Title Number Ngong/Ngong/47331** (hereinafter referred to as the property) which she was purchasing from one **Denise Kemunto Nkatha** for the sum of Kshs. 6,831,923.40. The appellant was acting for **National Bank of Kenya Limited** who had charged the property to Denise Kemunto. On the strength of a professional undertaking by the appellant dated 11th March, 2016, the appellant undertook to release the completion documents that included among other documents, the original title deed over the property, duly executed transfer forms, discharge of charge and consent forms to the respondent within 30 days upon the respondent receiving the full purchase price of Kshs. 6,831,923.40. The respondent remitted the money, but by the end of the 30 days, the appellant had still not forwarded the completion documents. The respondent claims that the appellant has yet to honour the terms of the professional undertaking, the actions of which led the respondent to institute the suit before the High Court. In the respondent's originating summons, he seeks orders that the appellant honors his professional undertaking and that the appellant fully indemnify his client due to the breach of his undertaking.

[3] The claim before the High Court was instituted by way of an Originating Summons (OS) that was accompanied by a supporting affidavit sworn by the respondent. The respondent sought orders that the appellant be ordered to honour his professional undertaking and forward the completion documents, and that the appellant fully indemnify his client in respect of claims of interest due as a result of his breach of the professional undertaking.

[4] The appellant responded to the OS through a fairly lengthy replying affidavit in which he averred that the reason he failed to honour his

professional undertaking was because his client, the vendor, Denise Kemunto Nkatha, failed to disclose to him that she had taken out another unsecured loan facility with the bank leading to the outstanding balance owed to the bank raising from Kshs. 6,831,923.40 to Kshs. 7,560,904; that this difference is what caused the delay in forwarding the completion documents; that the vendor had failed to pay the appellant's legal fees and was acting in cohort with the respondent to arm twist the appellant into releasing the completion documents before his legal fees were settled.

[5] Before the matter proceeded for hearing of the OS, the appellant raised a preliminary objection on grounds that the affidavit sworn in support of the OS was defective for not being executed in the presence of a commissioner for oaths hence the OS was incurably defective and should be struck out. Before this preliminary objection was heard, the appellant made an oral application in court to have the matter transferred to the Environment & Land Court (ELC) contending that the dispute arose of a land transaction. The appellant also made an oral application to have the learned Judge recuse herself from handling the matter.

[6] In the impugned ruling subject of the appeal, the learned Judge rejected the application for her recusal finding that the appellant had not demonstrated the likelihood of partiality on her part. The learned Judge also declined to have the matter transferred to the ELC. In the memorandum of appeal, the appellant has listed eight ground of appeal. In a nutshell the grounds fault the learned Judge in failing to appreciate that the matter before her arose out of a professional undertaking involving a land transaction; and in failing to appreciate that the orders the respondent sought were for release of land title documents hence better handled by the ELC.

[7] Upon the appeal coming for hearing, both parties were present and relied on both their oral and written submissions. The appellant argued that the High Court Commercial and Admiralty Division where the OS was filed lacked jurisdiction to preside over the matter as the professional undertaking was subject of a matter involving land. The appellant relied on *The Owners of Motor Vessel "Lillian S" – vs- Caltex Oil Kenya Limited (1989) KLR 1653 (C.A)*; for the proposition that the issue of jurisdiction is fundamental and goes to the root of this matter. This was because Article 162(2)(b) of the Constitution as read with section 13 of the Environment and Land Court Act granted the ELC jurisdiction to entertain all matters relating to disputes arising from land transactions. The appellant urged that since the undertaking arose from a land transaction that involved search, registration of discharge of charge, consent by the Land control Board, transfer and registration of transfer, the ELC was best placed to handle the matter. The appellant also relied on *Equip Agencies Limited vs Credit Bank Limited Nairobi HCCC No. 773 of 2004* in which Warsame J (as he then was) stated that an undertaking is usually given to ease and smoothen the path of transactions carried out by advocate. The appellant asserted that since the undertaking he had given was to facilitate the transfer of the property, it touched on land and use of the same and should therefore be heard in ELC.

[8] The respondent countered the appellant's submissions arguing that on the issue of recusal there was nothing to show that the learned judge improperly exercised her authority such as to justify her recusal. On the issue of jurisdiction, the respondent argued that the issue raised in the OS was contractual in nature as he only sought to have a professional undertaking enforced; that there was no dispute arising from the purchase of the property; and that there was therefore no reason for the matter to be transferred to the ELC. The respondent asserted that the jurisdiction of the court in enforcing a professional undertaking by an advocate is not for purposes of enforcing legal rights or obligations of the client, but for purposes of enforcing honourable conduct on the part of the advocate as an officer of the court. The respondent therefore urged the Court to dismiss the appeal for want of merit.

[9] We have considered this appeal and the submissions made before us. The first issue that requires consideration is the issue of jurisdiction. That is, whether the High court lacked jurisdiction to entertain the respondent's suit, in light of **Article 162(2)(b) of the Constitution** as read with section 13 of the ELC Act. In *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR* this Court had occasion to address a similar issue regarding the contest of jurisdiction between the High Court and the ELC in a matter where the appeal had originated from a suit filed in the High Court seeking to restrain the Bank from exercising its statutory power of sale over charged property. In dismissing the argument that the ELC was the court mandated to handle the matter by virtue of **Article 162(2)(b) of the Constitution** and section 13 of the ELC Act, this Court stated as follows:

*“Another contention advanced by the appellant was that the dispute fell under the jurisdiction of the ELC on account of section 13 (2) (d) of the ELC Act. The said section provides that;*

*2. In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes-*

*“d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;...”*

40. To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section

13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to „use? of land as discussed herein above. Such contracts, in our view, ought to be incidental to the „use? of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.

....., the dominant issue in this case was the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender.

42. While exclusive, the jurisdiction of the ELC is limited to the areas specified under Article 162 of the Constitution, section 13 of the ELC Act and section 150 of the Land Act; none of which concern the determination of accounting questions.

Consequently, this dispute does not fall within any of the areas envisioned by the said provisions. On the other hand, the jurisdiction of the High Court over accounting matters is without doubt, for under Article 165(3) of the Constitution provides *inter alia*, that;

1. subject to clause (5), the High Court shall have-

a. unlimited original jurisdiction in criminal and civil matters.

For the above reasons, the appellant's objection on jurisdiction was rightly dismissed.”

[10] For purposes of clarity we reproduce herein Article 162(2) of the Constitution and section 13 of the ELC Act:

“Article 162.

(1).....

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land. (any other dispute relating to land section must be construed in

accordance with the purpose of Parliament stated under Article 162 and the purpose of the Act as stated in the preamble.)”

[11] It is evident from **Article 162(2) of the Constitution** that the intention of the framers of the Constitution was the creation of special courts to determine disputes relating to the environment and the use and occupation of, and title to, land. This is confirmed by the preamble to the ELC Act wherein it is stated that the purpose of the ELC Act is:

***“To give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.”***

[12] We reiterate the position taken in ***Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna*** (supra), that in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land. The dispute between the appellant and the respondent related to the professional undertaking given by the appellant to facilitate the land transaction between his client and the respondent’s client.

[13] In ***Waruhiu K?owade & Ng?ang?a Advocates v Mutune Investment Limited [2016] eKLR*** while deciding on an appeal over enforcement of an undertaking this Court stated as follows:

***“The issue in dispute is fairly simple and straight forward. The matter involves the extent, intent, purpose and objective of a professional undertaking given by an advocate in satisfaction of a condition precedent for obtaining documents and permission from the bank, which was holding the titled documents needed for the conclusion of a sale transaction. We start by asking what constitutes a professional undertaking.***

***Our answer is that a professional undertaking is an unequivocal promise made by a party to another either to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party, to which liability may attach. See Equip Agencies Limited v Credit Bank Limited [2008] 2 EA 115 (HCK). Generally speaking, professional undertakings are given by advocates in order to make transactions easier, faster and more convenient. Where an advocate breaches a professional undertaking, the court has jurisdiction to order the enforcement of that undertaking.***

***In enforcing undertakings, the court is guided not by the considerations of contract, or of securing the legal rights of parties, but mainly by ensuring the honesty of advocates.”***

[14] We could not have put it more clearly. A professional undertaking in a legal transaction is a separate contract between advocates that creates legal obligations anchored on professional relationship and etiquette between the advocates. It creates an independent cause of action separate from the transaction undertaken by the advocates’ clients. Such an independent cause of action is reflected herein in the OS lodged by the respondent (who was the plaintiff) wherein the respondent sought orders against the appellant (who was the defendant) that:

***“the defendant do honour the professional undertaking dated 11th March 2016 and.....fully indemnify the clients in respect of all claims of interest to the tune of Kshs 800,000/= suffered by reason of breach of the defendant’s professional undertaking.....”***

[15] The dominant issue in the dispute that was before the learned Judge was the honouring of the professional undertaking, and not the land transaction between the advocates’ clients. The undertaking had nothing to do with the environment, or the use and occupation of land, or title to land. The land transaction that the advocates’ clients were engaged in was not in issue. The learned Judge therefore properly rejected the application to have the respondent’s suit transferred to the ELC.

[16] From the record of the proceedings, the appellant’s request to the trial Judge to recuse herself from the suit was made immediately after the trial Judge rejected the appellant’s application for transfer of the suit to ELC. The only reason given by the appellant for the trial Judge to recuse herself was that the appellant was apprehensive that he will not get justice because the trial Judge had in his view brushed aside his application. This is what gave rise to allegations of lack of impartiality on the part of the learned Judge. **Article 50(1) of the Constitution** provides that:

***(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

[17] Therefore, the appellant had a right to be heard by a judge who was impartial. The question is whether the appellant’s apprehension that the learned Judge would not be impartial was justified. In ***Attorney-General v. Anyang? Nyong?o &***

**Others [2007]1E.A. 12**, the Court identified the test for bias as follows:

*“The objective test of „reasonable apprehension of bias? is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially[“] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case...” (Underlining added)*

[18] Litigation is about determining a dispute between two contesting parties. The court has to make a decision, and in most times one party will have to lose in an adversarial system. It does not necessarily follow that the court is against the losing party. In the circumstances that were before the trial court there was nothing that could lead to an inference of bias. A fair minded and reasonable person who comes to court, and more so an advocate, would have understood that a dispute before the court can go either way, and would harbor no reasonable apprehension of bias, by the mere fact that the court has ruled one way and not the other. We find that there was no justification for the learned Judge to recuse herself.

The upshot of the above is that we find no merit in this appeal. It is accordingly dismissed with costs.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of July, 2019. W. OUKO, (P)**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**