



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 249 OF 2015

BETWEEN

**BOOTH EXTRUSIONS LIMITED (Formerly**

**BOOTH MANUFACTURING AFRICA LIMITED.....APPELLANT**

**AND**

**DUMBEYIA NELSON MUTURI HARUN t/a NELSON**

**HARUN & COMPANY ADVOCATES.....RESPONDENT**

*(An appeal from the Judgment and Decree of the High Court*

*of Kenya at Nairobi (Onguto, J) dated 18th December, 2014*

*in*

***E.L.C NO. 937 OF 2013 (O.S)***

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**JUDGMENT OF THE COURT**

By an amended originating summons dated 6th August, 2013 and filed before the High Court at Nairobi, **Booth Extrusions Limited (Formerly Booth Manufacturing Africa Limited**, the appellant) sought the following orders against **Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates** (the respondent);

- ***The defendant do deliver up the original certificate of the title and deed plan No 115846 in respect of LR No 4953/1421 (I.R 37819) in Thika Municipality entrusted to the defendant by the plaintiff on the basis of advocate/client relationship.***
- ***The cost of this suit be borne by the defendant.***

It was supported by the affidavit of **Okoth Mackoduol** sworn on 6th August, 2013 in which he swore that on 10th June, 2017 a letter was written instructing the respondent to transfer LR. No. 4953/1421 from Kaluworks Limited into the appellant's name but he did not and to date the property remains in the name of Kaluworks Limited.

He swore further that the said Kaluworks Limited in a letter dated 14th December, 2012, wrote to the appellant demanding the original title since the sale between it and the appellant was not completed. He averred that the respondent by a letter dated 2nd April, 2013 maintained that the appellant, had forfeited its right to the property in lieu of legal fees then allegedly outstanding. This was not the case, as the respondent could not justify the summary of fees or invoices of particular work performed. Even assuming the appellant owed the respondent any fees, the deponent continued, the proper procedure was for him to file advocate/client bill of costs for taxation in court. He asserted that the respondent had no justifiable cause to keep holding to the title deed.

The respondent resisted the application by way of his affidavit sworn on 1st April, 2014. He averred that he had a right of lien and set off for the outstanding legal fees owed to him by the appellant. He exhibited a copy of a letter dated 24th May, 2005 showing that the appellant had forwarded the transfer in favour of the respondent to Kaluworks Limited for signing. He therefore contended that there was an absolute assignment as the appellant, being a beneficial owner of the suit property, surrendered its beneficial interest in lieu of the outstanding fees.

The application was heard by **Onguto, J** who dismissed it and now the appellant has come up with a memorandum of appeal citing 10 grounds which can be summarized that the learned judge erred by;

- *Finding that there was forfeiture of rights by the appellant over the title document in respect of LR. No. 4953/1421 to the respondent when there was no evidence of such forfeiture.*
- *Finding that the respondent as an advocate could enforce a claim to recover unpaid fees by misappropriating client's property and contrary to express provisions of the Advocates Act.*
- *Finding that the respondent no longer held title documents as a lien and that the lien had been ousted contrary to the legal principle that a lien is a passive and possessing right.*
- *Finding that the letter dated 1st December 2005 from Booth Extrusions Limited which purported to have transferred the property in favor of the respondent was signed by unauthorized signatories without conclusive evidence to support that finding.*
- *Proceeding on wrong principle and totally misdirected himself on the existing and settled principles of law.*

At the hearing of the application, **Mr. Muchiri**, learned counsel for the appellant submitted that the title was issued under Registration of Titles Act to Kaluworks Limited. He went on to aver that the forfeiture purportedly took place in 2005 while the RTA and **Section 3 (3)** of the **Law of Contract Act** were still efficacious.

He contended that forfeiture was not one of the methods recognized in law for disposing of an interest in land. He explained that the respondent exercised a right to lien and the appellant's Board of Management agreed to transfer the property to him but the only legally recognized modes of disposal of interests cited are transfer, transmission, gift, prescription and the like but do not include forfeiture.

Counsel next assailed the learned judge for finding application and relevance in the rule of **ROYAL BRITISH BANK vs. TURQUAND LIMITED 119 ER 886** that a person dealing with a company is entitled to assume, in the absence of circumstances putting him on inquiry, that there has been due compliance with all matters of internal management of the company. He contended that the learned judge was patently in error in so holding because there was no evidence that the assignment and surrender were ever done under deed and witnessed by the signature of the directors of the appellant. Indeed, this explained why the transfer fell through and to date the property was still in the name of Kaluworks Limited which led the appellant to file an amended Originating Summons calling for a delivery of the certificate of title.

**Mr. Muchiri** posited further that the only way a solicitor or advocate can enforce a lien is by seeking an order of the court but not by forfeiture. Placing reliance on the decision in *SHAW vs. NEALE (1858) 6 HL CASS 581; 10 ER 1422* that a lien attaches to a document not to immovable property, he maintained that the court must be moved to issue a charging order and that unilateral forfeiture will not do.

Counsel then relied on *Sarkar on Evidence (15th Edition) p. 1592 to 1593*, to urge that in the absence of competent, independent legal advice for the client, a transaction between a solicitor and the client is not competent. Counsel pressed on that the respondent did not discharge the burden of proof imposed on him under **Section 117** of the **Evidence Act** in order to demonstrate good faith touching on the transfer of the property to him from the appellant. He also cited *DEMERARA BAUXITE COMPANY LIMITED vs. LOUISA HUBBARD AND OTHERS [1923] AC 673*.

Counsel continued that the agreement relating to advocate/client fees between the parties was invalid because the respondent failed to comply with the mandatory procedural steps in instances in which a client fails to pay up fees. His actions to appropriate the property belonging to Kaluworks Limited was not in accordance with **Section 48** of the **Advocates Act**.

Referring to the minutes of the meeting of November, 2005, counsel submitted that the disposal of an interest in property belonging to a limited liability company is done under deed which to have effect must be signed under seal of the company witnessed by its directors. He therefore submitted that none of the people who signed was a director or had power to convey the appellant's property. Counsel urged us not to legitimize the learned Judge's holding and then posed a hypothetical question whether managers of Kenya Commercial Bank can agree with an advocate that in lieu of fees he can keep Kencom House an iconic building in downtown Nairobi owned by the Bank. He warned that to accept such a legal outcome would forever take advantage of lay persons.

Opposing the appeal, the respondent advocate **Mr. Muturi**, advocate in person objected that the appellant had submitted on issues that did not arise before the High Court. At the High Court, he explained, the argument was that the advocate had failed to effect instructions to transfer property and so the appellant sought the return of the title deed. They also claimed that it was not valid for the appellant to have assigned property it did not own to the advocate as the officers who purported to do so had no authority any way. He submitted that he had fully argued those claims through a comprehensive 62-page affidavit attaching the relevant documents which the learned judge found meritorious and convincing.

Counsel stated that it was untenable for the appellant's case to have mutated to now a claim that the property was theirs since it had bought it from Kaluworks Limited but had not transferred it. The true position was that it has a beneficial interest capable of being assigned, as it properly was to the respondent. He went on to point out that there was no viable challenge to the narrative in the correspondence between the parties who had an advocate/client relationship. There was a clear and binding agreement to assign the property. This was in accordance with **Section 100** of the **Evidence Act** and the language in the correspondences was plain admitting to no parole evidence.

Next the advocate contended that under **Section 34** of the **Companies Act** together with **Section 2** that was then in force, managers had authority to convey property of a company. This did occur by a letter from the appellant's managers instructing that the transfer documents for the suit property be availed for Kaluworks Limited to sign. The appellant at the time was disposing of various properties and chose the transfer to the advocate as the mode of payment of fees. He contended that taxation of costs should never have arisen because there was an agreement on the mode of settling legal fees and the appellant's complaint about non compliance with the Advocates Act betrays an intention to use the statute as an instrument of fraud.

He also asserted that the appellant's bad faith was evident in its attempt to gazette loss of the title deed and even effect a reconveyance to Kaluworks Limited while all along knowing the respondent had the title. He therefore argued that it would have been unfair for him to be ordered to release the title in disregard of the manifest intentions of the parties and more particularly taking cognizance of the appellant's blatant falsehoods peddled before this Court. He then referred us to *MEGARRY'S MANUAL*

**OF THE LAW OF REAL PROPERTY 8th Edition, A.J Oakley, page 69 on Proprietary Estoppels** and urged us to dismiss the appeal.

In brief reply, **Mr. Muchiri** reiterated that the officers were not authorized persons.

We have carefully perused the record, the pleadings and the judgment. We have also carefully considered the grounds of appeal, and the parties' respective submissions and taken into account the case law cited. As a first appellate court our duty is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused by the former Court of Appeal in the oft-cited **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER (1968) EA 123**, our duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the witnesses as they testified and therefore, make an allowance in that respect. In addition, this Court will not normally interfere with the trial court's judgment on a finding of fact unless the same is founded on wrong principles. We have greater latitude to depart from those findings if warranted whereas here, the matter proceeded by way of affidavit as opposed to oral evidence.

Upon our consideration of this matter, the issue that calls for our decision is, whether the respondent has justifiable cause to keep on holding on the title deed being Grant No. IR 37819.

The respondent's argument has consistently been that the appellant agreed to wholly assign its rights to the suit property to them. This was evidenced by the appellant's letters dated 17th July, 2002, 29th April, 2004, 5th May, 2004 and 8th September, 2004 to the respondent confirming the same in lieu of paying him the outstanding fees for services already or then being rendered. This was firmly consummated by the letters dated 24th May, 2005, 1st December, 2005 and a meeting of 29th November, 2005.

From the above letters and meeting, it is clear that the respondent was entitled not only to retain the original title document which came into his possession by virtue of the contractual relationship between the parties but also to effect a transfer of the suit property in his favour.

It is not in dispute that professional undertaking existed between them. This Court in **EQUIP AGENCIES vs. CREDIT BANK LIMITED [2008] 2 EA 115 (HCK)** opined that a professional undertaking was an unequivocal promise made by a party to another or acting in a manner which may prejudice the right of the opposite party to which liability may attach. This Court endorsed that a professional undertaking protects all parties to a transaction, and it is therefore not open for one party to unilaterally and without knowledge and consent of the other to refuse to comply with the terms of the undertaking.

We also find that it is trite law that parties are bound by their commercial agreements and must keep their part of the bargain. Nor is it the proper province of the courts to rewrite contracts for parties, as was held by this Court in **NATIONAL BANK OF KENYA LIMITED -VS- PIPEPLASTIC SAMKOLIT (K) LIMITED & ANOTHER [2000] KLR 112** when it observed;

***"... A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."***

That being the law, we are of the considered view that no matter how the appellant tries to put it, it was at fault to frustrate the contract by hatching a facially fraudulent scheme to renege from its explicit commitment to the respondent. This is because it is apparent from the record that it was bound by the contents of the letters and minutes of the meeting.

It is clear to us that the respondent and the appellant expected, intended and accepted that the title document to the suit property was to be held and converted by the respondent to settlement of the legal fees owing from the appellant and in accordance with the letters express instructions.

Having carefully perused the impugned judgment and exhaustively considered the record, we find that the

trial Judge properly took into consideration the evidence adduced by the parties in arriving at his decision and we see no reason for interfering with his exercise of discretion. This appeal herein lacks merit and is hereby dismissed with costs to the respondent.

*Dated and delivered at Nairobi this 1st day of December, 2017.*

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**