



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CIVIL APPEAL NO. 135 OF 1999
BETWEEN

KARSAM LALJI PATEL APPELLANT
AND
PETER KIMANI KAIRU Practising
as KIMANI KAIRU & COMPANY ADVOCATES RESPONDENT

(Appeal from a Ruling and Order of the High Court of
Kenya at Nairobi (Hon. Justice Mbogholi) dated 9th
March, 1999

in

H.C.C.C. NO. 2452 OF 1998(O.S))

JUDGMENT OF THE COURT

KARSAM LALJI PATEL, the appellant, took out an Originating Summons in the superior court under *Order L11 rules 7 and 10(2)* of the Civil Procedure Rules (the Rules) to enforce a professional undertaking given to his Advocates by Mr Peter Kimani Kairu, an Advocate of the High Court of Kenya practising as **Kimani Kairu and Company Advocates**, in a letter dated 26th August, 1998. The appellant was represented by the firm of Rayani Rach & Sevany Advocates.

By an agreement for sale dated 9th April, 1998 made between Gateway Insurance Company Limited (the Vendor) and Karsam Lalji Patel (the Purchaser) the Vendor agreed to sell to the Purchaser the property known as Plot L.R. No.330/1077 Nairobi (the suit land) for Shs. 6,250,000/-. The sale was with vacant possession and completion date was 31st May, 1998. A deposit of Shs 625,000/-, being 10% of the purchase price, was paid by the Purchaser to the Vendor's Advocates, Kimani Kairu and Company Advocates (the Advocates).

Along the way difficulties arose, as a result of which the Vendor was unable to give vacant possession in breach of condition No.5 which provided that the suit land was sold with vacant possession. Apparently there was some encroachment upon the suit land by a third party and the Vendor was unable to clear this. On 26th August, 1998, long after the date fixed for completion had passed, the Purchaser's Advocates wrote to the Advocates in the following terms-

“Dear Sirs SALE OF L.R. NO.330/1077 NAIROBI -GATEWAY INSURANCE COMPANY LIMITED TO KARSAM LALJI PATEL We refer to your two letters dated 17th August, 1998 and in particular the one referring to retention of Shs.750,000/- as well as your letter dated 20th August, 1998. We have instructions to state that our client is agreeable to complete the transaction on the following terms and conditions:-

1. Our client will pay to you through us a sum of Shs.4,875,000/- which is the balance of purchase price payable to you under agreement dated 9th April, 1998 between your client and ours less Shs.750,000/-. 2. Upon receipt of confirmation hereunder requested from you we will immediately attend to stamping and registration of the Conveyance.

3. The sum of Shs.750,000/- retained by us shall only be payable on vacant possession of the whole of the property (with all encroachments removed) being handed over to our client.

4. The purchase price held by you shall be subject to your professional undertaking to us to release the same to your client only upon receipt by you from us confirmation that (a) the Conveyance in favour of our client has been registered at the Land Office and **(b) our client has been handed the vacant possession of the whole of the property** (with all encroachments removed). (emphasis added)

5. If vacant possession of the whole of the property (with all encroachments removed) is not given to our client within the next 75 days, our client would be entitled to pursue legal remedies for specific performance and or damages for breach of the agreement by your client as well as the right to retain the said sum of Shs.750,000/- which your client will forfeit.

Please confirm your agreement to the aforesaid (including your professional undertaking as set out above) immediately so that we can attend to stamping and registration of the Conveyance in favour of our client. It is on this basis our cheque for Shs.4,875,000/- is enclosed herewith. In case you are unable to confirm the terms of this letter within next seven days the enclosed cheque is to be returned to us.

Yours faithfully, RAYANI,RACH & SEVANY JIMMY RAYANI”

That is the letter which contained the professional undertaking the purchaser sought to enforce. On 1st September, 1998 the Advocates replied to the Purchaser’s Advocates as follows

“Dear Sirs SALE OF L.R. NO.330/1077 NAIROBI: GATEWAY INSURANCE COMPANY LIMITED TO KARSAM LALJI PATEL We acknowledge receipt of your letter dated 26th August, 1998 together with the enclosed cheque. Our official receipt is attached herewith. With regard to the contents of the said letter, points 1 to 4 are acceptable to us and are hereby confirmed. However, with regard to point number 5, the contents thereof are not acceptable. We shall discuss this matter further with our client and shall revert to you shortly.

Yours faith fully,
Kimani Kairu & Co.”

Point No.5 which the Advocates said categorically was unacceptable related to the removal of the encroachments on the land and one would have thought that there would be no argument about this as it had been made a condition of the sale. In the last paragraph of the letter of 26th August, 1998 the Purchaser’s Advocates made it clear that the cheque for Shs.4,875,000/- was forwarded on condition that the Advocates complied with all the 5 conditions and they made clear in the last sentence that-

“In case you are unable to confirm the terms of this letter within the next seven days the enclosed cheque is to be returned to us.”

In spite of the fact that the Vendor was unable to give the Purchaser vacant to possession the Advocates did not return either the cheque or proceeds thereof to the Purchaser’s Advocates. So on 1st October, 1998, the latter wrote to the Advocates in the following terms-

“We refer to our letter of 26th August, 1998 addressed to you and your response thereto v ide your letter of 1st September, 1998. Our instructions are that in view of your client’s failure to accept the conditions set out in our letter of 26th August, 1998 and further conditions stated in our letter of

23rd September, 1998, we are under instructions to demand that all proceeds paid to you be forthwith released to us.

Yours faithfully
RAYANI RACH & SEVANY”

In the final letter dated 7th October, 1998 addressed to the Purchaser’s Advocates, the Advocates delivered what amounted to a **coup de grace**, saying-

“There has been no fundamental breach of the agreement for sale by our client. Accordingly your client is not entitled to rescind the contract. Your client should now take possession of the above property. After all, the part of the said property that has been encroached by the neighbour’s wall is a very small part of the entrance to the driveway.”

The application was supported by an affidavit sworn by the Purchaser and the relief sought was to pay back to the Purchaser the sum of Shs.4,875,000/- together with interest at bank rates. The replying affidavit dated 19th November, 1998 was sworn by Mr Peter Kimani Kairu of the Advocates in which he deposed inter alia-

“(8) Based on what I state in paragraph 7 above the plaintiff’s Advocates retained Shs.750,000/- from the balance of the purchase price and forwarded Kshs.4,875,000/- to me in terms of the letter dated 26th August, 1998.

(9) I undertook not to release the purchase price to my client, the Vendor, until the issue of encroachment was resolved.

I continue to hold the said amount in terms of the undertaking.

(10) The above undertaking was given to the plaintiff’s Advocate and the plaintiff not being privy to the undertaking, cannot purport to enforce the same in his favour.

(12) In an effort to resolve the issue of encroachment, the Vendor instituted proceedings against the encroaching party to compel him to remove the encroachment, and this fact is within the plaintiff’s knowledge.”

The application was heard by Mbogholi J. He held that the Advocates were not in breach of the undertaking and dismissed the application with costs. It is against that decision that the Purchaser now appeals to this Court.

Although the memorandum of appeal sets out 8 grounds of appeal, Mr Nagpal, for the Purchaser, argued them all together. The learned Judge referred to a number of English decisions concerning the jurisdiction of the court in an application for enforcement of a professional undertaking. He noted that it is a summary jurisdiction over Advocates which should be exercised only in a clear case. That it is an inherent jurisdiction which the court has over Advocates who are officers of the court. And that it is a jurisdiction which is exercised, not for the purpose of enforcing legal rights, but for the purpose of enforcing honourable conduct on the part of the court’s own officers.

The learned Judge directed himself correctly that the court must be satisfied that there has been a breach of an undertaking given by an Advocate acting professionally. All these principles which are a correct rehearsal of the law on the point can be gleaned from the cases of **Geoffrey Silver & Drake v Thomas Anthony Baines** [1971]1 All ER 473 and **John Fox v Bannister, King & Rigbeys** [1987]3 WLR 480. Having stated the principles the learned Judge then referred to paragraph 9 of Mr Kimani’s affidavit and continued-

“With respect, I see no breach of the undertaking given by the defendant. Even if I were to find there is a breach thereof the effect of an order thereunder would be to compel the defendant to release the money to his client and not to the plaintiff as sought in the application before me. In that regard I am inclined to agree with the submission that by this application the plaintiff is trying

to enforce his rights and interest under the agreement.”

With greatest respect, we find it difficult to follow the reasoning of the learned Judge. He found as a fact that there was an undertaking the terms of which were explicit and it was made abundantly clear to the Advocates that if the terms were not acceptable to them, they had to return the cheque. It was not part of the undertaking that the Advocates were to retain the amount in question and not to release it to their client ***until the issue of encroachment had been resolved***. That was a new element injected into the matter by the Advocates to justify their illegal retention of the money. The conditions of sale were clear and the Vendor was required to give vacant possession. Mr Kairu, for the Advocates, did not disown the undertaking but his submission, which was cleverly tailored to fit in with the averments contained in Mr Kimani's affidavit, was that the undertaking had not been breached as the money had not been passed on to the Vendor. Obviously the money could not be passed to the Vendor because it had failed to give the Purchaser vacant possession of the suit land. The Advocates have no right to retain the money when their client is in no position to give vacant possession.

The remark by the learned Judge that if he granted the order sought on the Originating Summons the money would be released to the Vendor and not the purchaser is not understood. The order sought required the Advocates to pay over the money to the Purchaser. This money was paid by the Purchaser to his Advocates with instructions to pass it on to the Advocates on the conditions stated in the letter of 26th August, 1998. It was a payment made by an agent on behalf of a disclosed principal, and at the end of the day, it does not matter whether the suit for its recovery was brought by the Purchaser or his Advocates.

Be that as it may, there would be nothing illegal if the enforcement of the undertaking achieved the unintended result of enforcing the Purchaser's legal rights under the agreement for sale. The undertaking did not cover the full purchase price. It was limited to Shs.4,875,000/- being the amount sent with the letter of 26th August, 1998. As the Advocates did not accept payment under the terms stipulated in that letter they were obliged to return the cheque or its proceeds either immediately or on demand. Having failed to do so they were clearly in breach of the undertaking and the learned Judge was clearly wrong to deny the Purchaser the orders he sought on the Originating Summons.

For the reasons we have given, this appeal succeeds and is allowed. The ruling and order of Mbogholi J dated 9th March, 1999 are set aside and substituted by an order directing the Advocates to honour their professional undertaking by paying to the Purchaser the sum of Shs.4,875,000/- together with interest at 12% p.a. from 1st September, 1998 within 14 days from today.

The Purchaser will also have his costs in the superior court and of this appeal.

Dated and delivered at Nairobi this 7th day of April, 2000.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR