



**Karanja t/a Ndungu Karanja & Co Advocates v Omuga John Otieno Maurice
(Practicing in the Name of) Otieno-Omuga & Ouma Advocates (Civil Suit
12 of 2017) [2024] KEHC 4435 (KLR) (Civ) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 12 OF 2017

CW MEOLI, J

APRIL 26, 2024

BETWEEN

**NDUNG’U ALEX KARANJA T/A NDUNGU KARANJA & CO
ADVOCATES APPLICANT**

AND

**OMUGA JOHN OTIENO MAURICE (PRACTICING IN THE NAME OF)
OTIENO-OMUGA & OUMA ADVOCATES RESPONDENT**

JUDGMENT

1. Ndung’u Alex Karanja t/a Ndung’u Karanja & Co. Advocates (hereafter the Applicant) filed an originating summons dated 18.01.2017 seeking inter alia that Omuga John Otieno Maurice t/a Otieno-Omuga & Ouma Advocates (hereafter the Respondent) be compelled to honour his professional undertaking made to the Applicant vide his letter dated 01.10.2015, by surrender to the Applicant of the completion documents contemplated by the sale agreement dated 04.06.2015; that the court be pleased to fix the time within which the completion documents are to be surrendered by the Respondent to the Applicant; and that in default of the above, an order for enforcement of the said undertaking be made and a decree for surrender of the remaining completion documents do issue.
2. The OS is expressed to be brought inter alia under Order 52 Rule 7 & 10 of the Civil Procedure Rules (CPR) and is premised on grounds on its face, as amplified in the supporting affidavit sworn by the Applicant, described as counsel having conduct of the matter, hence competent to swear the affidavit.
3. The gist of the affidavit is that counsel was instructed in respect of a transaction by which his instructing client purchased the property described as LR. No 1070/VIII/204 (hereafter the suit property) situated in Nairobi. That the parties to the transaction having agreed on terms had on 04.06.2015 entered into an agreement for sale of the suit property, and that the Respondent represented the vendor



in the said transaction. He goes on to depose that under the sale agreement, the purchase price of the suit property was Kenya Shillings Forty-Four Million (Kshs. 44,000,000/-) and the purchaser having paid the initial sum of Kenya Shillings Fourteen Million (Kshs. 14,000,000/-) left an outstanding balance of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) was to be paid upon surrender of the completion documents to the purchaser.

4. That the Respondent subsequently evincing readiness to conclude the said transaction had called for the balance of the purchase price. In facilitating payment of the balance, the Respondent by a letter dated 01.10.2015 wrote to the Applicant giving his irrevocable professional undertaking that he would release the completion documents upon receiving the balance of the purchase price.
5. Counsel contends that, upon receipt of the balance, the Respondent acknowledged receipt by a letter dated 05.11.2015, which however introduced fresh conditions not contained in his earlier undertaking and thereafter, the Respondent refused to surrender the completion documents. That despite the Applicant writing severally to the Respondent to honour the undertaking, he had persisted in refusal to do so, showing bad faith and ill motive. He concludes that the Applicant is yet to receive the completion documents, necessitating this suit.
6. The Respondent filed an affidavit in reply dated 22.02.2017 in opposition to the originating summons. His response was to the effect that an agreement of sale between the vendor and purchaser was executed on 04.06.2015; that the said transaction was to be completed within ninety (90) days from the date of the agreement which was on or before the 03.09.2015 or end of September 2015; that because the purchaser failed to pay the balance of the purchase price, a twenty-one (21) day completion notice was served upon the Applicant on 14.09.2015; that despite the notice the purchaser failed to remit the balance of the purchase price; that the balance of the purchase price was eventually remitted on 04.11.2015 some sixty-one (61) days after the completion date in the agreement for sale, and without explanation.
7. He further stated that pursuant to a meeting held on 01.10.2015 at the Respondent's offices, the respective parties agreed upon express conditions, to unlock the stalemate but the Applicant failed to comply with or issue undertakings agreed upon, to facilitate the conclusion of the matter. He goes on to contend that under Clause 1.1(e) and Clause 12 interest would accrue from the date the unsettled amount fell due until actual payment, in this case sixty-one (61) days from the date when the purchase price fell due.
8. Counsel asserts that on 05.11.2015 upon acknowledging receipt of the balance of the purchase price, on a without out prejudice basis, he sent a copy of the vendor's demand to the Applicant demanding payment of Kenya Shillings two million (Kshs. 2,000,000/-) as accrued interest and an indemnity by the purchaser on future claims in respect of capital gains tax. That to mitigate her loss the vendor requested for release of the balance of the purchase price while insisting on the purchaser's compliance with the agreed terms.
9. That the Applicant's advocate had thereafter purported to demand for return of the balance of the purchase price on account and despite attempts to resolve the impasse, no communication was forthcoming from the Applicant until the filing of the instant application. In conclusion he deposes that the originating summons is an abuse of the process of the court and ought to be dismissed with costs.
10. The originating summons was disposed of by way of written submissions. However, before summing up the submissions, it would apposite to note that by a ruling delivered on 25.09.2019 by Mbogholi J. (as he then was) the court granted leave to the firm of Kabugu & Co. Advocates to replace the firm



of Ndung'u Karanja & Co. Advocates in representing the Applicant, following the demise of Alex Ndung'u Karanja, Advocate, who was the proprietor of Ndung'u Karanja & Co. Advocates.

11. The Applicant's submissions were anchored on the definition of the term "professional undertaking" in the Encyclopedia of Forms and Precedents, 5th Edition at Pg. 581 and the Court of Appeal decision in Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investments Limited [2016] eKLR. Counsel proceeded to submit that a professional undertaking contains an unequivocal promise issued by an advocate (or a member of his staff on his behalf) to another party to either do something or refrain from doing something. That in the transaction in question the Applicant was acting for the purchaser whereas the Respondent was acting for the vendor, and the contents of the letter from the Respondent dated 01.10.2015, constituted a valid and enforceable professional undertaking. That thereby, the Respondent gave an unequivocal promise to release the completion documents to the Applicant upon receipt of the balance of the purchase price.
12. Submitting on whether the Respondent is bound by the professional undertaking, counsel placed reliance on Clause 9 of the LSK Code of Standards of Professional Practice and Ethical Conduct and the decision in Conrad Masinde Nyukuri & Another v Robson Harris & Another [2021] eKLR and Joseph Wathua Kigwe v Bernard Pius Njoroge Kariuki & Another [2014] eKLR to argue that onus is upon the Respondent as an advocate and officer of the court to discharge himself from the professional undertaking issued, before embarking on any claims against the Applicant or its client and that it is gross professional misconduct for an advocate to issue a professional undertaking and renege thereon.
13. Counsel contended that it was not in dispute that the Respondent received the balance of the purchase price but has refused to honor his professional undertaking by releasing the completion documents which he is duty bound to do in compliance with the professional undertaking. In conclusion, calling to aid the decision in Firdosh Jamal v Boniface Njiru [2021] eKLR counsel asserted that the Applicant has demonstrated that the Respondent issued a valid and enforceable professional undertaking and that allowing the Respondent to renege on the said undertaking without ramifications is likely to set bad precedent. That as such it is in the interest of justice that the OS be allowed as prayed.
14. Counsel for the Respondent on his part contended that the Applicant was in breach of Clauses 2.1, 2.2, 11, 12 & 13.1.1 of the sale agreement and that the Applicant having acted with impunity in total disregard of the agreement has not approached the court with clean hands as required by equity. Counsel here reiterating that despite the agreement having been rescinded and the subsequent contract setting out conditions for reviving of the rescinded agreement, the Applicant failed to comply with the said terms. It was further submitted that the rescission of the sale agreement occurred when the notice of completion was served upon the Applicant although during the intervening period of the notice, parties were engaging to find an amicable solution, hence the Respondent's letter dated 01.10.2015.
15. Citing the decisions in Bilha W. Mwangi & Another v Njeri Benson Ngugi & 2 Others [2021] eKLR, Issac Githua Kihara v J.M Mwaniki [2017] eKLR and Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndanga [2017] eKLR counsel submitted that the Respondent's undertaking had obligations placed on both the parties respectively and the two issues at hand were to be read, understood and effected conjunctively.
16. Asserting that the Respondent's undertaking was conditional upon the Applicant issuing a professional undertaking on the issue of capital gains tax, counsel stated that the documents were to be released once the Respondent received the latter undertaking. Counsel pointing out that more than six (6) years later, no undertaking has been provided by the Applicant now seeking to benefit at the Respondent's expense. In conclusion counsel cited the decision in Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR regarding the mandate of the court to dispense



substantive justice. Attributing blame for the present situation to the Applicant, counsel urged the court to dismiss the OS with costs.

17. The court has considered the pleadings, affidavit evidence as well as the submissions of the respective parties. At the heart of the dispute is a professional undertaking issued by the Respondent to the Applicant vide a letter dated 01.10.2015 pursuant to an undisputed sale agreement dated 04.06.2015 and executed between the parties' respective clients as "purchaser" and "vendor" of the suit property, respectively.
18. The undisputed background to the suit is that by a sale agreement dated 04.06.2015 between the "purchaser" and "vendor" it was agreed that the suit property would be purchased at a price of Kshs. 44,000,000/- (Kenya Shillings Forty-Four Million) (hereafter the purchase price). It was further agreed that Kshs. 13,000,000/- (Kenya Shillings Thirteen Million) was to be the deposit on the purchase price and to be paid to the vendor's advocate (the Respondent) on or before execution of the sale agreement and was later to be released to the vendor pending completion. The balance of the purchase price, Kshs. 31,000,000/-, was to be paid on or before the completion date that was effectively agreed as ninety (90) days from the date of execution of the sale agreement which was on or before 02.09.2015.
19. The dispute appears to have arisen because as of 02.09.2015 the payment of the balance of the purchase price and therefore completion of the sale had not happened. It was only on 03.11.2015 that the purchaser settled the sum of Kshs. 30,000,000/- being the balance of the purchase price in respect of the suit property. While a notice of completion had been issued on 14.09.2015 to the Applicant, there were ongoing deliberations and correspondence between the parties' advocates during the intervening period between 02.09.2015 and 03.11.2015. Pursuant to these discussions, the Respondent had proceeded on 01.10.2015 to issue the undertaking that is the subject of the suit.
20. It is useful to set out in verbatim the contents of the undertaking by the Respondent. The undertaking was to the following effect:-

"We refer to the above stated matter, the previous correspondence and the meeting in our office this afternoon which was attended by Mr. Karanja, the undersigned and our client

We confirm that the following issues were agreed upon;

- 1) that parties do proceed on the basis of a transfer by our client to Heaven's Oak Limited
- 2) that as advocates for the purchaser you give our client professional undertaking to the effect that your client shall sort out the issue of Capital Gains Tax should the same arise in future.
- 3) that we give you our professional undertaking that on receipt of the balance of the purchase price we shall hold it as stakeholders for a period not exceeding 30 days from the date it is credited to our account to enable you complete the registration.

In the foregoing premise, we hereby give our irrevocable professional undertaking that on receipt of the balance of the purchase price in our account specified in the agreement of sale, we shall hold it on stakeholder basis for a period not exceeding 30 days from the date of its credit to enable you complete registration process and further that you should you fail to complete registration within the said 30 days, we shall be at liberty to release the entire amount to our client and this undertaking shall stand discharged.



Kindly, therefore remit the money to our account and forward to use your letter of undertaking to enable us forward to you the completion documents which as you confirmed in our office are ready for delivery to you.” (sic)

21. It is on the premise of the foregoing letter that the Applicant moved this court by way of the OS seeking performance of the Respondent’s professional undertaking. It would be pertinent at this juncture to further contextualize the dispute by setting out in part the germane Clauses of the Sale Agreement dated 04.06.2015, that is the genesis of the dispute regarding the professional undertaking. Clauses 1, 11, 12, 13 and 23 of the foregoing agreement provided as follows; -

“ 1. DEFINITION AND INTERPRETATION

1. Definitions

- (a)
- (b)
- (c)
- (d)
- (e) “Interest Rate” means the per annum rate of three per cent (3%) above the base lending rate as published by Kenya Commercial Bank from time to time.

11. PROPERTY CONDITION

The purchaser having been afforded the opportunity of viewing the property prior to signing of this agreement and having viewed and inspected the property purchases the property with the full knowledge of its actual state and condition and shall take the property as it stands and will not call upon the vendor to improve or make good the property in any way howsoever. Provided the vendor shall pending the transfer of the property to the purchaser maintain the property in its current state and condition and ensure the tenant currently in occupation carries out repairs pointed out by the purchaser.

12. INTEREST

All sums due from one party to the other under this agreement shall bear interest at the interest rate from the date such sum or sums fall due until the date of actual payment.

13. BREACH BY EITHER PARTY

- 11. If the purchaser fails to comply with any of the conditions hereof or the condition subject to which this sale is made including the condition relating to the completion of the sale the vendor may give to the purchaser at least twenty-one (21) days’ notice in writing confirming the vendor’s readiness



to complete the sale in all respects and specifying the default and requiring the purchaser to remedy the same before the expiration of such notice (time being of the essence) and if the purchaser is unable to remedy the defect, he shall forfeit ten per cent (10%) of the purchase price being the agreed liquidated damages and vendor shall be at liberty to resell the property.

11. if the vendor fails to comply with his obligations under the agreement, the purchaser may give the vendor 21 days' notice in writing to comply with his obligation and such notice shall specify the default and require the vendor to make it good within 21 days of such notice (time being of the essence) and if the vendor then fails to comply with the notice, the purchaser may at its discretion and without prejudice to its rights and remedies rescind this agreement and the vendor shall forthwith refund the deposit to the purchaser with interest at the interest rate.

23. ENTIRE AGREEMENT

This agreement constitutes the whole agreement between the parties hereto and no variation thereof shall be effective unless made in writing and signed by all the parties. This agreement supersedes and replaces any agreement whatsoever that may be subsisted between the parties hereto in any way relating to the subject matter hereof.” (sic)

22. It is well to reiterate the freedom and agency of contracting parties as underscored by the Court in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR:-

“A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”

23. Here the court is called upon to determine whether on the material before it, it ought to issue an order for specific performance of the professional undertaking made to the Applicant vide the Respondent's letter dated 01.10.2015. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR while discerning the question of legal and evidential burden held inter alia;

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if



called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

24. Upon a consideration of the respective parties’ affidavit material and applying the dicta in National Bank of Kenya Ltd (supra) the following matters come to the fore. On execution of the sale agreement on 04.06.2015 the “purchaser” was obligated to pay the “vendor” and or the Respondent Kshs. 13,000,000/- as a deposit of the purchase price. The Applicant deposes that the “purchaser” paid Kshs. 14,000,000/- leaving a balance of Kshs. 30,000,000/-. The former payment was however disputed by the Respondent, who asserted that the amount actually paid was Kshs. 12,700,000/- and not the agreed deposit sum (Annexure 2b), as the “purchaser” purported to withhold Kshs. 300,000/- allegedly applied to repairs to the suit property of which the purchaser had taken possession.
25. As earlier noted, as of 02.09.2015, the agreement had not been completed, prompting the letter from the Respondent dated 08.09.2015 (annexure 2a) that in addition to taking up the issue of non-completion raised matters which were not captured in the sale agreement , such as the “failure by the “purchaser” to pay monthly rent upon taking up possession of the suit property and the “vendors” power of attorney.” This letter was followed by an exchange of correspondence between the parties’ advocates, including the letter dated 11.09.2015 from the Applicant in response to the previous letter (annexure 3); and letter from Respondent dated 14.09.2015(annexure 4) by which the Respondent issued a twenty-one (21) day notice to the Applicant pursuant to Clause 13.1.1 of the sale agreement to complete the transaction, and further, notice of activation of Clause 12 on interest as from 03.09.2015.
26. The above letter elicited a response by the Applicant in the form of the letter dated 15.09.2015 (Annexure 5) regarding “part payment of the purchase price vide a cheque dated 12.07.2015 for Kshs. 700,000/- and costs of repairs expended by the “purchaser” towards the suit property totaling Kshs. 300,000/- that have been factored in the purchase price”. It was followed by the several letters, including, the Respondent’s dated 16.09.2015 (Annexure 6a) acknowledging receipt of Kshs. 13,700,000/- as part of the purchase price and a reminder to the “purchaser” to comply with completion notice; letter from Applicant dated 16.09.2015 (Annexure 6b) in acknowledgment of prior letter; letter from Respondent dated 28.09.2015 (Annexure 7) acknowledging addressing the revised transfer, the issue concerning the power of attorney and demanding the release of the balance of the purchase price being Kshs. 30,300,000/-; and the letter from Respondent dated 01.10.2015 (Annexure NAK 2) being the Professional Undertaking to the Applicant.
27. On the part of the Applicant the response to the undertaking above was the letter dated 06.10.2015 (Annexure NAK 4) reiterating that the balance of the purchase price was Kshs. 30,000,000/-; a further letter from Applicant dated 07.10.2015 (Annexure NAK 4), the latter which was followed by a letter from Respondent dated 09.10.2015(Annexure 8a) being a notice of rescission by 12:00 noon of the same date due to lapse of the completion notice as at 05.10.2015. The Respondent therein further raised issues relating to indemnity on Capital Gains Tax (CGT) as a condition for completion.
28. The rescission notice was followed by several letters from the Respondent, including the letter dated 12.10.2015 (Annexure 8b) indicating the rescission of the sale agreement and terms thereof; letter dated 13.10.2015 (Annexure 8c); and the letter dated 26.10.2015 reiterating recession conditions and demanding surrender of the suit property (Annexure 8d). In response, the Applicant sent the letter dated 04.11.2015 (Annexure 9a & 9b) evincing remittance of Kshs. 30,000,000/- being the balance of the purchase price, which was followed by a letter from Respondent dated 05.11.2015 (Annexure 10a) acknowledging on a without prejudice basis the balance of the purchase price and a demand letter from the vendor dated 04.11.2015 (Annexure 10b) rescinding the rescission on condition of payment of interest and issuance of indemnity on payment of CGT by the Applicant. There followed a flurry of



- letters from the Applicant demanding completion and from the Respondent insisting on settlement of accrued interest and provision of indemnity on CGT. A stalemate led to filing of the instant summons.
29. The Respondent had communicated that owing to the delay on the part of the purchaser in completing payment within the 90-day completion date period stipulated in the agreement, the contract had been rescinded. However, and despite the issuance of the 21-days' completion notice by the vendor on 14.9.2015 followed by the letter dated 12.10.2015 indicating that the contract had been rescinded, the parties thereafter engaged in multiple correspondence regarding the said contract, effectively reviving it by their correspondence and conduct.
 30. Having reviewed the foregoing correspondence and related matters, I find it helpful to first consider the matter regarding the sum of Kshs. 300,000/- earlier demanded by the Respondent as outstanding. A reading of the various correspondence exchanged between the parties reveals that this issue was settled vide the letter dated 9.10.2015 addressed by the Respondent to the Applicant. The contents of this letter which preceded the payment of the balance of the purchase price i.e. Kshs. 30,000,000/- appear to indicate that the sum of Kshs. 300,000/- previously demanded by the Respondent had been forfeited, and the consensus that the sum of Kshs. 30,000,000/- be paid as full and final settlement of the outstanding balance of the purchase price. There is therefore no reason to address the matter regarding the sum of Kshs. 300,000/- further.
 31. As observed earlier, the multiple correspondence reveals the parties' intention despite the earlier setbacks, to proceed with the contract regarding the sale of the suit property. And in furtherance of this, the purchaser performed her contractual obligations by paying the outstanding balance of the purchase price (albeit outside the 90-day completion timelines stipulated in the sale agreement dated 4.6.2015). On that basis and upon consideration of the fact that she has been in possession of the suit property at all material times both preceding and during the pendency of the suit, the court is satisfied that she was entitled under the contract to receive all the completion documents from the Respondent's client (the vendor) in respect of the suit property.
 32. On the other hand, the court is equally of the view that owing to the delay on the part of the purchaser in completing payment, the vendor would be entitled to interest on the sum outstanding amount as of the completion date, pursuant to Clause 12 of the sale agreement. Further, on the facts of the case, the interest payable would be calculated on the sum of Kshs. 30,000,000/- being the balance which was paid outside the completion timelines. Clause 12 of the sale agreement stipulated that all sums due from one party to the other under the agreement would bear interest from the date such sum(s) fell due until the date of actual payment. Consequently, the interest payable would accrue from 4.9.2015 [being the date on which the 90-day completion date lapsed from the date of execution of the agreement on 4.06.2015, pursuant to Clause 1.1 (c)] to 4.11.2015 [being the undisputed date of receipt of the balance of Kshs. 30,000,000/-].
 33. However, the sale agreement provided that any sums outstanding would attract an interest of 3% above the base lending rate published by the Kenya Commercial Bank Limited, at the time such balance fell due. The said published rate was not demonstrated to the court, in order to operationalize Clause 1 (1.1) (e) of the sale agreement. Hence justify the Respondent's claim to accrued interest of Kshs. 2,000,000/- on the balance of the purchase price. Moreover, the Respondent's purported hinging of completion, on the "purchaser" issuing an indemnity on future claims for CGT was contrary to the terms of the executed sale agreement.
 34. Ideally, if parties intended to introduce new terms and or conditions to the sale agreement, Clause 23 ought to have been operationalized by way of an addendum. Ultimately, the only justifiable demand on the part of the "vendor" was entitlement to interest given that the "purchaser's" failure to timeously



remit the entirety of the balance of the purchase price. The purchaser was in breach for failure to pay the balance of the purchase price on time, but the vendor's remedies, some of which had already been invoked, were confined to the terms of the contract of sale. The purchaser could not escape payment of interest, having delayed payment of the balance of the purchase price beyond the completion date in the contract. However, the vendor could not, having agreed to revive the contract and received the balance of the purchase price unilaterally introduce new terms such as provision of indemnity on payment of CGT, usually the responsibility of the vendor.

In these circumstances, it is not surprising that the parties became prisoners of a stalemate.

35. The conduct brings to mind the words of Kuloba, J (as he then was) in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where in his characteristic pithy style, the learned Judge stated:-

“No one can improve his condition by his own wrong. The latin of it is *Nemo ex suo delicto meliorem suam conditionem facere potest*...it is an ancient dictum of our law, that a person alleging his own infamy is not to be heard. People whose wisdom I cannot profane by making modern comparisons to them abbreviated their wisdom in the saying, *Allegans suam turpitudinem non est audiendus*.... By which they meant that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a right or claim. No one shall be allowed to set up a claim based on his own wrongdoing. A person cannot take advantage of his own wrong and in equity, the maxim holds good that he who comes into equity must come with clean hands... *Null prendra advantage de son tort demesne*... meaning no man shall profit by the wrong that he does, and *Nullus commodum capere potest de injuria sua propria*... which means, no one can gain an advantage by his own wrong.”

36. Unreservedly, performance and/or enforcement of the Respondent's undertaking issued pursuant to the letter dated 01.10.2015 was predicated on the Respondent receiving the balance of the purchase price, and interest. However, as of the date of filing the originating summons, the Applicant had not remitted the accrued interest on account of her default. In the absence of evidence concerning the applicable Kenya Commercial Bank Limited base lending rate the material time, the Respondent's demand for interest amounting to Kshs. 2,000,000/- cannot be justified.

37. In *CFC Stanbic Limited v John Maina Githaiga & Another* [2013] eKLR the Court of Appeal addressing itself to a situation where the interest rate in a contract was not specified observed that: -

“Sections 26 and 27 of the *Civil Procedure Act*, [CPA], lay down the law relating to the grant of interest and the setting of effective dates thereof. The said provisions provide that the court has a wide discretion to grant interest and to determine the effective dates of payment of such interests.

In *Shah v Guilders International Bank Ltd*, [2003] KLR, the Court of Appeal regarding S 26 (1) of the CPA held:

“This section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages, namely:

- (1) the period before the suit is filed;
- (2) the period from the date the suit is filed to the date when the court gives its judgment; and



- (3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix.

We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the court has not discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent.”

Accordingly, the High Court should in its discretion award and fix the rate of interest payable.

Regarding the issue of the commercial rate of interest applicable and the total amount of interest payable could only, in our view, be proved with evidence. From the record, the respondent did not produce any documentary evidence to show the contractual rate of interest applicable. Accordingly, the interest payable would, therefore, be discretionary as provided for by S 26 of the CPA and subject to evidence produced to support the claim.....”

38. Consequently, upon considering the material canvassed in respect of the originating summons, and the salient fact that the purchaser is presently in possession of the suit property, it is this court’s reasoned finding that the interest of justice would best be served by allowing the originating summons dated 18.01.2017 on the following terms:
- a. The Applicant’s client (the purchaser) shall, within twenty-one (21) days from the date of this judgment, pay interest to be assessed at court rates, on the sum of Kshs. 30,000,000/- and calculated from 4.9.2015 to 4.11.2015, to the Respondent’s client (the vendor).
 - b. The Respondent’s client (the vendor) shall, within 7 days of receipt of payment of the accrued interest in (a) above release all the pending completion documents to the Applicant’s client (the purchaser).
 - c. In the event of default by the Applicant to comply with (a) above within the prescribed time, the interest will continue to accrue at court rates from the date of such default.
 - d. In the circumstances of the dispute, each party shall bear its own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: Ms. Vuchocho h/b for Mr. Mugalo

C/A: Erick

