



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, AZANGALALA & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 51 OF 2008

BETWEEN

ARTHUR K. IGERIA T/A IGERIA & CO. ADVOCATES.....APPELLANT

AND

MICHAEL NDAIGARESPONDENT

(An appeal from the ruling & order of the High Court of Kenya (Waweru, J) delivered on 4th March, 2005

in

H.C.C.C. NO. 1215 OF 2005)

JUDGMENT BY JUSTICE G.B.M. KARIUKI SC

1. **The appellant, Arthur K. Igeria**, is an advocate of the High Court of Kenya practicing law under the name and style of Igeria & Co. Advocates. He appeals to this court against the decision of the High Court (Waweru J) delivered on 4th March 2005 in which the learned Judge found the appellant liable to pay costs of the suit which **the respondent, Michael Ndaiga**, who is an estate agent by profession, instituted for recovery of his commission.

2. The genesis of the litigation leading to this appeal was the failure of the appellant to honour his professional undertaking to pay to the respondent commission which the respondent claimed to have earned from the appellant's client, **Town Villas Limited**, for introducing to the latter a buyer for the purchase of the property known as No.21972, Unit A. The commission letter was written on 20th February 2002b by Town Villas Limited to the respondent. It stated -

"20th February 2002,

Mr. Micheal Ndaiga,

P.O. Box 58024,

NAIROBI

RE: L. R. 21972, UNIT A, LAVINGTON, NAIROBI

We hereby instruct you to identify a purchase for the above captioned property at a price of Ksh.6 million or nearest offer acceptable to us. Commission will be 5% of the purchase price, payable on completion. Our advocates are Igeria & co. of 5th Floor, Hughes Building, Nairobi. These instructions are valid for 14 days from the date hereof.

Your faithfully,

M. K. Micheu,

Director

c.c Igeria & Co. Advocates”

3. It seems the respondent embarked on the task immediately and with alacrity procured a buyer, one Jane Wanjiku Ngunjiri, who was able, ready, and willing to purchase the property and who, on 15th March 2002, executed as a purchaser a sale agreement with the Vendor, Town Villas Limited, in which the consideration was stated to be Ksh.5.7 million and completion was within 60 days from the date of execution of the sale agreement.

4. On 23rd July 2002 while the sale transaction was on-going, the appellant *qua* advocate and agent of the vendor, and on the vendor's instructions, wrote to the respondent professionally undertaking to pay to the latter commission amounting to Shs.285,000/=. The letter stated –

“23rd July 2002

Mr. Micheal Ndaiga,

P. O. Box 58024,

NAIROBI

Dear sir

RE: SALE AND PURCHASE OF L. R. NO.21972, UNIT A, LAVINGTON, NAIROBI

We refer to the above matter and confirm that we have received instructions from our client, Town Villas Limited, to pay your commission amounting to Kshs.285,000/= upon completion of the transaction herein.

We therefore undertake to pay your commission upon completion of the transaction.

Yours faithfully

Igeria & Co. Advocates

ARTHUR K. IGERIA

5. It is to be noted that the respondent procured a buyer for the appellant's client, Town Villas Limited, soon after the latter's commission letter of 20th February 2002 and this led to execution of a sale agreement on 15th March 2002 between Town Villas Limited as Vendor, and Jane Wanjiku Ngunjiri as the purchaser.

6. The property No L.R. No.21972, Unit A, Lavington, Nairobi was transferred to the purchaser on 9th October 2002. The record of appeal shows that the appellant remained mum regarding the date on which the appellant received from the purchaser the purchase price (less Shs.360,000/= which the appellant later indicated after the institution of the suit by the respondent in the High Court) was paid to his (appellant's) firm on 29th January 2003).

7. After the transfer of the property to the purchaser, the appellant refused to pay the commission to the respondent on the ground that the transaction was not completed because the sum of Kshs.386,000/= out of the purchase price remained unpaid by the purchaser.

8. The respondent, aggrieved by the appellant's refusal to pay the commission, instituted in the High Court Civil Suit No.121 of 2002 by way of Originating Summons seeking an order for enforcement of the appellant's professional undertaking contained in the latter's letter of 23rd July 2002 (supra) and costs of the suit. The respondent sought two orders in the suit namely –

“(1) that the defendant (i.e. the appellant) be ordered to honour his understanding within the next seven (7) days from the date of filing this application.

(2) That the costs of this application be borne by the defendant (i.e. the appellant).

9. The appellant paid the commission but did not pay the costs of the suit. As a result, the Court had to determine who between the parties was liable to pay the costs of the suit. The appellant contended that he was not liable to pay the costs because the suit was instituted prematurely, as completion had not occurred, all the purchase price not having been paid. On the other hand, the respondent argued that completion had taken place and transaction had been concluded notwithstanding retention by the purchaser of Shs.386,000/= from the purchase price. It was the contention of the respondent that the appellant was liable to pay the costs of the suit as the appellant's refusal to pay the commission after completion rendered the institution of the suit necessary.

10. Although the appellant did not disclose the precise date on which he received the purchase price (less Ksh.386,000/= which was later paid on 29th January 2003), it is inconceivable that the property

would have been transferred to the purchaser without receipt of the purchase price or of an undertaking from the purchaser's advocates to pay it within a specified period after registration of the transfer instrument. But no matter. The respondent had performed his part of the contract dated 20th February 2002 and had earned his commission from Town Villas Limited which the appellant professionally undertook to pay on behalf of the vendor "upon completion of the transaction."

11. In his impugned ruling in favour of the respondent, the learned Judge found that as at the time the respondent instituted the suit against the appellant for recovery of his commission, the sale transaction had substantially been completed and therefore, although the commission was paid, the appellant was liable to pay the costs of the suit because the suit was not brought prematurely or before the commission had become due. The learned Judge stated –

“any person whose rights had been affected by an undertaking given by an advocate, or in whose favour the undertaking was given should be able to enforce the same under rule 7 of Order 52 of the Civil Procedure Rules”

The learned judge further stated –

“for the purpose of payment of the respondent’s commission, the completion date was 9th October 2002 when the vendor transferred the property to the Purchaser.”

12. Aggrieved by the decision, the appellant moved to this court in this first appeal and proffered in his memorandum of appeal three grounds of appeal as follows –

(i) That the learned Judge erred in law and in fact in failing to find that the respondent's suit in the superior [sic] Court was premature as at the date of its filing on 28th November 2002 as the transaction which was the subject of the suit was not complete as at that date. The appellant's obligation to honour the undertaking given to the respondent had therefore not arisen as at the date the suit was filed.

(ii) That the learned Judge erred in law and in fact in finding that as the transaction was substantially completed, the respondent had earned his commission and there was no reason to deny him the same pending payment of the balance of the purchase price.

(iii) The learned Judge erred in law and in fact in failing to apply the definition of “completion” as set out in “ Blacks Law Dictionary” 6th Edition which defines as “ the finishing or accomplishing in full of something therefore began”. The completion date herein was 20th February 2003 when the entire or full purchase price was paid.”

The appellant prays for the following orders:

a) that this appeal be allowed with costs.

b) that this court do dismiss the respondent's suit in the superior [sic] court with costs.

Submissions of counsel

13. When the appeal came up for hearing before us, **Mr Wilfred Nderitu**, learned counsel for the appellant, submitted that the learned Judge erred in holding that the transaction had been completed on 28th November, 2002, when the suit was filed. Counsel referred to the appellant's letter dated 23rd July 2002 to the respondent indicating that the respondent's commission would be paid upon completion of the transaction. The learned Judge took the view that the definition of "completion" in **Black's Law Dictionary**, 6th Edn was not helpful in the circumstances of this case. *The Dictionary* defines completion as -

"The finishing or accomplishing in full of something therefore begun". [Emphasis added]

14. Counsel submitted that the transaction was stated in the sale agreement to be subject to the 1989 Law Society of Kenya [LSK] Conditions of Sale; that immediately upon payment of the balance of the purchase price by the Purchaser's financier's lawyers to the Vendor, the appellant made payment to the respondent; that the appellant was under an obligation to his client [the vendor] not to pay the respondent the commission until the purchase price was paid in full. Counsel urged us to allow the appeal.

15. The appeal was opposed by the respondent whose learned counsel, **Ms Matu**, contended that the transfer of the lease in respect of the suit property was registered on 9th October, 2002 in favour of the purchaser while the respondent filed the suit on 28th November, 2002 long after completion had substantially occurred; that the respondent was entitled to sue the appellant for enforcement of the terms of the Sale Agreement; that nothing had been communicated to the respondent regarding a change in completion date; that the learned Judge did not err in awarding costs and urged us to dismiss the appeal with costs.

16. In response, Mr Nderitu submitted that the transfer of the property was registered on 9th October 2002 and that as at that date, full payment of the purchase price had not been made by the purchaser to the vendor and the transaction was therefore not yet completed.

Analysis and Determination

17. I have perused the record of appeal and duly considered the submissions of both parties. As this is a first appeal the court is enjoined to re-evaluate the matter to ensure that the lower court arrived at the correct decision. In the *locus classicus* case of **Selle v. Associated Boat Co.** (1968) EA 123, Sir Clement De Lestang V – P of the E.A. Court of Appeal, the forerunner to this court, put the principle aptly as follows –

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the

impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan [1955], 22 E.A.C.A. 270)."

18. The issue for determination in this appeal is whether the respondent instituted the suit for recovery of his commission (of Shs.285,000/=) prematurely. If he did, then the respondent must bear the burden of paying the costs of the suit. The terms on which it was payable were set out in the letter of undertaking dated 23rd July 2002. The appellant was the advocate for the Vendor and was ostensibly mandated by the latter to pay the commission to the respondent from the proceeds of sale upon completion of the sale transaction. There can be no dispute about that. The gravamen of the matter is the meaning of the term "upon completion of the transaction" in the appellant's letter of undertaking.

19. It is plain, that the appellant's letter of undertaking dated 23rd July 2002 contained a professional undertaking by the appellant to pay to the respondent the commission upon completion of the transaction.

20. An undertaking by an advocate is enforceable. In enforcing undertakings by advocates, the court is guided not by considerations of contract, or of securing the legal rights of parties, but mainly to ensure the honesty of advocates. In **Muiruri v. Credit Bank & Another** [C.A. No.263 of 1998] this court stated that –

"an undertaking is a solemn thing. In enforcing undertakings, the court is not guided by considerations of contract, but the court aims at securing the honesty of its officers."

21. Apart from constituting a contract in law, an undertaking is also viewed, as it should, as a word of honour by an officer of the court which must be his/her bond. It cannot be gainsaid that professional undertakings are the oxygen without which conveyancing practice would be stifled. The importance of undertakings cannot be over-emphasized. Templeman LJ highlighted the importance of undertakings in conveyancing practice in the case of **Domb v. Isoz** [1980] 1 KB 76 at pg 81 when he stated –

"Conveyancing is a complicated business. A chain of transactions is frequently involved where no vendor will sell until he can purchase and no purchaser will buy until he can sell. Each client as vendor and purchaser needs time to make up his mind and change his mind after studying surveys and legal reports and other related matters and each client expects everyone else to be ready when he is ready. Skillful conveyancers are required to forge the chain, to see that no bargain is lost and that no one is left without a home. Binding and enforceable undertakings between professional men play an essential part at different stages."

22. Closer to home, this court held in in **Kenya Reinsurance Corporation v. Muguku Muriu t/a Muguku Muriu & Co. Advocates** [C.A. No 48 of 1994] that the undertaking given by the advocate was binding on him.

The court stated –

"having given a solemn professional undertaking to pay a certain sum of money, an advocate

is bound by the same and he cannot resile therefrom.

23. In **Havi & Company Advocates versus J. M. Njage & Company Advocates** [Nbi H.C. Civil Case No.59 of 2009) Gikonyo J., with respect, correctly pointed out that –

“a professional undertaking given by an advocate is a separate and distinct contract which is enforceable between the parties...”

24. In the case of **Harit Sheth t/a Harit Sheth Advocate v. K. Osmond Advocates** [2011] eKLR (Civil Appeal No.276 of 2001), this court stated -

“a professional undertaking is a bond by an advocate on the authority of his client. It is based on the relationship which exists between the advocate and his client. An advocate who gives such a professional undertaking takes a risk. The risk is his own and he should not be heard to complain that it is too burdensome and that someone else should shoulder the responsibility of recovering the debt from his own client. A professional undertaking is a bond by an advocate to conduct himself as expected of him by the Court to which he is an officer. No matter how painful it might be to honour it, the advocate is obliged to honour if only to protect his own reputation as an officer of the Court.”

25. In **Ransam Lalji Patel v. Peter Kimani Kairu** [2000] 3 KLR, the respondent firm of advocates was sent a portion of the purchase price amounting to Shs.4,875,000/= under a letter that set out the terms under which the respondent firm was obliged to hold the money. The firm did not accept the terms and did not return the money. The appellant took out an Originating Summons in the High Court to enforce the terms of the undertaking. The High Court dismissed the Originating Summons. On appeal against the High Court decision, this court held that

“as the advocates did not accept the terms of the payment, they were obliged to return the money and having failed to do so, they were clearly in breach of the undertaking and the learned Judge of the High Court was clearly wrong to deny the purchaser the orders sought in the Originating Summons.”

26. In the instant appeal, the undertaking given to the respondent by the appellant *qua* advocate was to pay the commission “upon completion of the sale transaction.” Neither the commission letter nor the letter of undertaking defined the nomenclature ***“upon completion of the transaction.”*** What did it mean and had such completion occurred” so as to render due the payment by the appellant of the commission and hence, make costs of the suit payable by the appellant”

27. For the court to enforce a professional undertaking, it must be satisfied that the undertaking is clear in its terms and that there is no dubity or ambiguity as to what the advocate has professionally undertaken. Secondly, that what is undertaken is capable of being performed. Thirdly, that if the undertaking is contingent on the happening or occurrence of an event, such event has occurred or happened.

28. The view taken by counsel for the appellant is that completion was that provided in the sale agreement and that it had not occurred because the purchaser had not paid the entire purchase price (as a sum of Shs.386,000/= remained unpaid) and that, for that reason, the vendor retained a right to rescind the sale. But as it is common ground that the property was transferred to and registered in the name of the purchaser on 9th October 2002, the submission that the vendor could rescind does not hold any water. There can be no rescission where the sale has been finalized and title to property conveyed by the vendor to the purchaser following payment of consideration. But that was not the issue.

29. While the commission letter dated 20th February 2002 stated that the respondent's commission was payable "on completion", the letter of undertaking on which the suit was founded stated that the commission would be paid "upon completion of the transaction herein." Save for the fact that the purchaser had retained Shs.386,000/=, the transaction was finalized upon the transfer of the property on 9th October 2002 and payment of the bulk of the purchase price. The trial judge expressed the view that the transaction was substantially completed. Although his decision, in my view, was correct, he fell into error in this finding. Can it be correctly argued that the completion contemplated in the letter of undertaking is that in the sale agreement which seemed to require that there would be no completion unless the purchase price was paid to the last penny? Can it be correctly argued that because Shs.386,000/=, out of sale price was retained by the purchaser the sale transaction had not been finalized and therefore the respondent was not entitled to payment of his commission and that consequently his suit was premature, thus disentitling him to costs of the suit?"

30. In normal circumstances in transaction of this nature, commission is paid from the sale proceeds. Not surprisingly, the vendor instructed the appellant as its advocate to pay the commission to the respondent from the sale proceeds, hence the appellant's letter of undertaking. The appellant's letter of undertaking did not define the term "upon completion of the transaction" nor did it import the completion date in the sale agreement between Town Villas Limited and Jane Wanjiku Ngunjiri which was said to incorporate the Law Society conditions of sale. The undertaking was by an advocate who bound himself personally liable to pay the commission "upon completion of the transaction". Once an agent has earned his commission and the event on which the commission is payable has occurred, no act or omission by the principal or anyone else can deprive the agent of his right to receive the commission (see **Luxor [East-Bourne] Ltd versus Cooper** [1941] AC 168).

31. The condition i.e. "upon completion of the transaction" in the appellant's professional undertaking must be understood to mean upon the transfer of the property to the vendor and receipt by the appellant on behalf of the vendor of the sale proceeds. It must be understood in common parlance. It cannot be understood or construed in the context of the sale agreement between the vendor and the purchaser for the simple reason that the undertaking was a professional bond given by the appellant *qua* advocate to pay the commission to the respondent upon receiving the sale proceeds and upon registration of the transfer. Such professional obligation on the part of the appellant could not be avoided on the ground that the purchaser had not paid some amount to make up the full purchase price. The term "upon completion of the transaction" cannot bear the meaning or be understood in the context of the sale agreement between the vendor and the purchaser to which the Law Society conditions of sale applied because the letter of undertaking did not import it. To do so, would, with respect, be to unilaterally introduce a new condition to the undertaking and thus misunderstand the nature, purport, meaning and implications of professional undertakings by advocates.

32. The position posited in the concurrent decisions of my brother and sister judges in this appeal cannot, with respect, hold good. To hold that the completion date in the sale agreement between Town Villas Ltd and the purchaser, Ms Jane Wanjiku Ngunjiri, is the same as the completion date in the letter of undertaking is to miss the point. It requires no emphasis that a professional undertaking once given cannot be unilaterally amended. It must be understood and construed in the form in which it is given. It was not open to the appellant to attribute to the undertaking the completion date stipulated in the sale agreement as the latter was not imported in the letter of undertaking. The completion date in the sale agreement was irrelevant also because the respondent was not privy to it. There is evidence that the transfer of the property took place on 9th October 2002. There is evidence that prior to the institution of the suit for enforcement of the undertaking, the purchaser had paid all but Shs.386,000/=, of the consideration. In effect, Shs.5,314,000/= had been paid prior to the institution of the suit and only Shs.386,000/= was retained by the purchaser. Whether the retention of this sum was in relation to apportionment of rates and land rent or otherwise was not explained. But the event upon which the payment of the commission was payable under the professional undertaking had occurred because the sale transaction had been finalized. The appellant had in his possession sale proceeds in excess of Shs.5 million and had undertaken to pay the commission. He was entitled to use the funds in his hands to discharge his professional obligation by paying the commission. Once he gave the professional undertaking, the appellant could not resile from it. He was personally liable.

33. The high court had inherent jurisdiction to enforce the professional undertaking *“not for the purpose of enforcing legal rights but for the purpose of enforcing honourable conduct on the part of the court’s own officials”* see **Waruhiu K’Owade of Ng’ang’a Advocates v. Mutune Investment Ltd** [2016] eKLR. In **Muiruri v. Credit Bank & Another** [Civil Appeal No.263 of 1998] this court pointed out that *“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.”*

34. The appellant’s contention that the sum of Shs. 368,000/= had not been paid by the purchaser when the suit was instituted was neither here nor there. Its non-payment could not be construed to mean that completion had not occurred. Completion took place when the property was transferred and the bulk of the sale proceeds were paid. As commission had been earned and as the appellant had undertaken to pay it but failed to do so, the appellant ought to bear the responsibility of meeting the costs of the suit as he had reneged on his undertaking thereby prompting the respondent to sue.

35. I find no merit in the appeal which I hereby dismiss with costs to the respondent. However, as my brother and sister judges are of contrary view, the appeal is determined in line with the majority decision and is consequently allowed with the result that the respondent shall pay the costs of the suit in the High Court and in this appeal.

Dated and delivered at Nairobi this 3rd day of March, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF F. AZANGALALA, J.A.

[1] The appellant, **Arthur K. Igeria**, is an advocate of the High Court of Kenya practicing in the name and style of **Igeria and Company Advocates**. In the matter which gave rise to this appeal, the appellant was instructed by **M/s Town Villas Limited**, (*hereinafter "the vendors"*), who were desirous of selling **LR No. 21972 Unit A - Lavington, Nairobi** (*hereinafter "the suit property"*). The vendors also instructed **Michael Ndaiga**, (*hereinafter "the respondent"*), to identify a purchaser for the suit property at their suggested price of Kshs. 6 Million or nearest offer acceptable to them (*vendors*). If the respondent identified such a purchaser, the vendors proposed to pay him a commission of 5% of the purchase price, which commission was to be paid on completion. They indicated that their advocate was the appellant. The said instructions were contained in their letter dated 20th February, 2002, addressed to the respondent and copied to the appellant.

[2] Pursuant to the said instructions, the respondent identified one, **Jane Wanjiku Ngunjiri** (*hereinafter "the purchaser"*), who agreed to purchase the suit property for Kshs.5,700,000/=. An agreement of sale (*hereinafter "the sale agreement"*), was, on 15th March, 2002, drawn between the vendors and the purchaser by the appellant. Paragraph 2 of the agreement provided that Kshs.570,000/= was to be paid to the appellant's firm as stakeholders upon execution of the sale agreement and paragraph 5 provided that completion would be within sixty (60) days of the date of the agreement.

[3] As completion became the focus of controversy both before the High Court and before this Court I shall set out below relevant provisions of the sale agreement relating thereto in extenso:

"SPECIAL CONDITIONS

1. On the completion date the Vendor's Advocate shall deliver to the Purchaser's Advocate all the necessary completion documents including the original Title documents, lease for the Unit "A", the executed transfer in favour of the Purchaser, the Commissioner of Lands consent to transfer, the duly completed stamp duty valuation forms and the rates clearance certificate against the payment of the balance of the purchase price.

(Underlining mine).

2.

3.

4. This sale is subject to the standard Law Society Conditions of Sale so far as they are not inconsistent with the conditions contained in this agreement or hereby specially excluded.

5. If completion is delayed beyond the completion date by an act of default of the Purchaser, the Vendor may either cancel the sale in which event the Purchaser shall forfeit the deposit paid herein or the vendor may charge interest on the balance of purchase price at the rate of 20% per annum until payment of such balance.

6. The sale herein shall be subject to the Purchaser obtaining credit from Dubai Bank Limited".

On 23rd July, 2002, the appellant wrote to the respondent as follows:

"Mr. Michael Ndaiga,

P. O. Box 58024,

NAIROBI.

Dear Sir,

RE: SALE AND PURCHASE OF LR. NO. 21972 UNIT A. LAVINGTON, NAIROBI

We refer to the above matter and confirm that we have received instructions from our client, Town Villas Limited to pay your commission amounting to Kshs. 285,000/= upon completion of the transaction herein.

We, therefore, undertake to pay your commission upon completion of the transaction.

Yours faithfully,

IGERIA & COMPANY ADVOCATES Sgd".

(Underlining mine)

[4] The record shows that registration of the transfer in favour of the purchaser was effected on 9th October, 2002, but by then the entire purchase price had not been paid. The registration was effected notwithstanding non-payment of the entire purchase price on the strength of an undertaking given to the appellant by the then advocates for the Purchaser, **M/s Kimani & Michuki Advocates**. That undertaking was given vide the latter's letter dated 13th August, 2002, addressed to the appellant. The letter reads:

"Irerri & Company

Advocates,

5th Floor, Hughes Building,

Kenyatta Avenue,

NAIROBI.

Dear Sirs,

RE: JANE WANJIRU NGUNJIRI

LR. NOS. 21972 HOUSE 1

We have forth been retained to act for the Purchaser JANE WANJIRU NGUNJIRI and refer to your letter dated 26th July, 2002, and enclose herewith our other client's letter dated 5th August, 2002, for information.

We hereby give you our professional undertaking to pay to you a sum of Kshs.415,000/= upon successful undertaking registration of the Discharge of Charge, Transfer and Charge in favour of Equity Building Society.

We, in the meantime, enclose herewith the Lease Document in triplicate for execution and return the same to us and confirm the new developments.

Yours faithfully,

Sgd

KIMANI & MICHUKI

ADVOCATES".

[5] By 14th November, 2002, the said sum of Kshs. 415,000/= being the balance of purchase price had not been paid. In the interim the respondent became impatient and, through **M/s Kirundi & Company Advocates**, wrote to the appellant demanding his commission of Kshs.285,000/=. That letter elicited the following response from the appellant by letter of 19th November, 2002:

"Kirundi & Company

Advocates,

Bruce House, 9th Floor,

NAIROBI.

Dear Sirs,

RE: COMMISSION OF KSHS. 285,000/=

Thank you for your letter dated 14th November, 2002. The transaction has not been completed as we have not received the balance of the Purchase Price from the Purchaser's advocates.

We shall revert to you immediately the matter is completed.

Yours faithfully,

Sgd

IGERIA & COMPANY ADVOCATES".

[6] The respondent was not amused. Through the same advocates, (*Kirundi and Company*), he lodged an Originating Summons to enforce the undertaking to pay his commission which had been given by the appellant. In the Originating Summons, the respondent contended that the completion date had occurred on 9th October, 2002, when the transfer of lease in favour of the purchaser was registered. Accordingly, in his view, the commission became due and payable. In his response, the appellant, *inter alia*, contended that he could only honour the undertaking upon payment of the balance of purchase price of Kshs.415,000/= which event had not occurred.

[7] The appellant received Kshs.368,000/=, of this balance vide a cheque drawn in his favour on 29th January, 2003. He deposited the same into his account on 19th February, 2003 and the next day, 20th February, 2003 wrote to the respondent's advocates forwarding his cheque for Kshs.285,000/= in settlement of the respondent's commission.

[8] The Originating Summons was eventually placed for hearing before H. Waweru, J., on 24th January, 2005. Come that day, Mr. Owang', learned counsel who then represented the respondent, addressed the Court thus:

"Owang': Matter for hearing is the Originating Summons itself dated 26th November, 2002. I am ready to proceed. But as the substratum of the Originating Summons has now been met, in that the Defendant has since paid to the Plaintiff the sum of Kshs.285,000.00 and the undertaking has thereby been met, the only issue remaining is costs. I apply to withdraw the originating summons subject to payment of the Plaintiff's costs".

[9] **Mr. Njoroge**, learned counsel, who then represented the appellant, contended that the Originating Summons had been lodged prematurely as the respondent's commission could only become due and payable on completion which event occurred subsequent to the filing of the Originating Summons. **Mr. Njoroge**, therefore, urged that the appellant be awarded costs of the suit.

[10] The learned Judge of the High Court after hearing learned counsel's submissions concluded as

follows: -

"On 9th October, 2002, the vendor transferred the property sold unto the purchaser. It would appear from the material before the court that as at that date, only Kshs.415,000/= was outstanding upon the purchase price of Kshs.5,700,000/=. Upon payment of the very substantial portion of the purchase price and transfer of the property unto the purchaser the transaction was substantially completed. The plaintiff had then earned his commission, and there was no reason to deny him the same pending payment of the balance of the purchase price, a small 7.8 per centum of the purchase price. I therefore hold that for purposes of payment of the plaintiff's commission completion was on 9th October, 2002, when the vendor transferred the property to the purchaser. This date was long after the completion date as provided for in the sale agreement which was on or before 15th June, 2002, (clause 5 of the agreement). This suit was not filed until 28th November, 2002, about one-and -a-half months after 9th October, 2002. The suit was not premature.

The defendant undertook, in his capacity as advocate, to pay the Plaintiff's commission upon completion. As I have already held completion for this purpose was on 9th October, 2002. In the circumstances, therefore, the plaintiff is entitled to his costs of this suit. The originating summons dated 26th November, 2002, will be marked as withdrawn with costs to the plaintiff. It is so ordered".

[11] This appeal is against the order awarding costs to the respondent on the basis that the appellant failed to honour his undertaking to the respondent on time. It was the learned Judge's finding that completion date was the date the transfer of lease over the suit property occurred i.e. on 9th October, 2002. That was the date, according to the learned Judge, upon which the respondent's commission became due and payable. The appellant on his part, through Mr. Nderitu his learned counsel, contended that the completion date was when the entire purchase price was paid and his account credited with the same i.e. on 19th February, 2003, which date was long after the respondent had filed his suit before the High Court on 28th November, 2002. In the appellant's view therefore the respondent's suit was premature which therefore entitled him to costs. So, the gist of the appellant's complaints is that the learned Judge erred in his determination of the date of completion.

[12] **Mr. Matu**, learned counsel for the respondent, supported the finding of the learned Judge. In his view, when the transfer of the lease was effected in favour of the purchaser, there was nothing left to be performed by the respondent.

[13] I have anxiously considered the record, the ruling of the learned Judge of the High Court, the submissions of counsel and the applicable law. Having done so, I find that this appeal turns on when completion occurred. The vendor in its instructions to the respondent, vide its letter dated 20th February, 2002, reproduced hereinabove, expressly stated:

"Commission with [will] be 5% of the purchase price, payable on completion".

The appellant's undertaking to the respondent also stated, in part:

"We therefore undertake to pay your commission upon completion of the transaction".

[14] It is significant that this undertaking was given long after the purchaser had been identified and the agreement drawn. It is plain therefore that the three participants; the vendor, the appellant and the respondent pegged payment of the commission on completion of the transaction. The appellant understood completion of the transaction to be when nothing was left to be done. In this case when, in addition to registration of the transfer in favour of the purchaser, the entire purchase price was paid. The appellant gave his undertaking as an advocate instructed by the vendor. I am not therefore surprised that, in his view, completion of the transaction meant completion of the transaction between the vendor and the purchaser. There was indeed no other transaction between him and any of the parties save the transaction involving the vendor and the purchaser. The appellant was merely telling the respondent that he would pay his commission when the transaction between the vendor and the purchaser was complete. There is indeed no gainsaying that that was the interpretation given to his undertaking by the learned Judge and learned counsel who represented the parties at the High Court. The learned Judge appreciated that the transaction between the vendor and the purchaser was not completed as he stated in his judgment that *"the transaction was substantially completed" "upon payment of the very substantial portion of the purchase price and transfer of the property unto the purchaser"*. In reality therefore, the learned Judge found that at the time the respondent lodged his Originating Summons, the transaction between the vendor and the purchaser was not complete although it was *"substantially completed"*.

[15] After making the above finding, the learned Judge nevertheless, held that the respondent had earned his commission and there was no reason to deny him *"the same pending payment of the balance of the purchase price, a small 7.28 per centum of the purchase price"*. To justify that finding, the learned Judge considered the date the lease was transferred to the purchaser i.e. 9th October, 2002, and determined that that was the completion date for purposes of payment of the respondent's commission. The learned Judge, with all due respect, did not consider consequences of failure to pay the entire purchase price. If after the said transfer in favour of the purchaser, the balance of the purchase price was not paid, the transaction between the vendor and the purchaser would obviously not be complete.

[16] The relationship between the Vendor and the Purchaser was governed by their agreement of sale dated 15th March, 2002. As already observed, under the said agreement, completion was, sixty (60) days from the date of the agreement which was on or about 15th May, 2002. It is common ground that completion was delayed and therefore special condition 5 of the same agreement became operational. That special condition has already been set out hereinbefore in full. The vendor had the option to cancel the sale or charge interest on the balance of purchase price until payment of the same. It is also clear beyond peradventure that completion in terms of special condition number one (1) included payment of balance of purchase price. These conditions were never considered by the learned Judge.

[17] In my view, completion could only mean completion of the transaction between the vendor and the purchaser in terms of the express terms of their agreement. Completion was not synonymous with registration. Accordingly, in determining that completion occurred on registration of the transfer of lease in favour of the purchase, the learned Judge with due respect imported a new term into the agreement between the parties.

[18] In ***Boots -v- E. Christopher & Company [1951] ALL ER***, the English Court of Appeal held as follows on commission contracts: -

"On the true construction of the contract, commission was only payable when the purchase price was received on completion; the plaintiff was under no obligation to sue S, for specific performance or for damages so as to enable the defendants to obtain their commission; and, therefore, he had not, by a wrongful act, prevented the defendants earning their commission and he was entitled to the payment to him of the deposit free from any deductions".

[19] In that case, the Plaintiff instructed the defendants, a firm of estate agents, to find a purchaser for his business and it was agreed that only in the event of the defendants finding the plaintiff a purchaser able and willing to purchase at the price of £2,500, or such lower figure as might be accepted by the plaintiff, would the defendant's commission *"be at the rate of five per cent of the total purchase price obtained"*. The defendants found S, who did not eventually purchase the business and consequently forfeited his deposit. The plaintiff demanded release of the deposit which was held by the defendants who claimed to be entitled to deduct their commission from the deposit.

In those circumstances the court held that commission was only payable on completion when the purchase price would have been paid which event had not occurred. The defendants, (*the estate agents*), were not therefore entitled to their commission. Even though they had identified S as a purchaser, S, was not ready and willing to complete the transaction. The defendants had not therefore earned their commission. As their Lordships found in that case, payment of commission in commission agency contracts turns on the particular terms of the contract between the person who employs the agent and the agent.

[20] In this case, the contract between the vendor and the respondent and the appellant's undertaking to the respondent clearly provided that the respondent would not be entitled to his commission unless the parent transaction was completed. Completion meant not only transfer of the subject lease but also payment of the entire purchase price. Completion did not mean partial or substantial completion. The completion had to be completion in terms of their contract. That is what the appellant understood it to mean before the High Court and before us. That, in my view, is the correct construction of the commission agreement between the vendor and the respondent and the undertaking between the appellant and the respondent.

[21] The purchaser completed payment of the purchase price on or about 19th February, 2003, yet the respondent lodged his Originating Summons on 28th November, 2002. That was before he became entitled to payment of the commission. Accordingly, the respondent's Originating Summons was in my judgment, prematurely lodged. When the appellant received the balance of the purchase price, he paid the respondent's commission the very next day of receipt of the same.

[22] In those premises, it was erroneous for the learned Judge to find that the appellant had failed to honour his undertaking to the respondent. In my judgment, the appellant honoured his undertaking

immediately the transaction between the vendor and the purchaser was completed and cannot be vilified for doing so. Accordingly, I would allow this appeal.

[23] I would also award the appellant the costs of this appeal and those of the High Court.

Dated and delivered at Nairobi this 3rd day of March, 2017.

F. AZANGALALA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.

JUDGMENT OF J. MOHAMMED, J.A.:

Background

1. This is an appeal from the ruling of the High Court *Waweru, J* dated 4th March, 2005 wherein the learned Judge ordered **ARTHUR K. IGERIA T/A IGERIA & CO. ADVOCATES**, the appellant herein, to pay costs against a professional undertaking to **MICHEAL NDAIGA**, the respondent herein.

2. The genesis of this matter goes back to an originating summons dated 26th November, 2002, in which the respondent sought to have the appellant honour his professional undertaking. The respondent contended that on the 20th February, 2002, he was instructed by a company known as **Town Villas Limited** (the Vendor) to identify a purchaser for the property known as **L.R 21972 UNIT A** (the suit property) within Lavington Estate in Nairobi, in consideration whereof he was to be paid 5% commission of the purchase price. The respondent identified a purchaser desirous of purchasing the suit property and communicated the offer of the purchase to the Vendor. The letter of offer was by one *John Ngunjiri Mwangi* but the suit property was bought by his wife, one *Jane Wanjiku Ngunjiri* (the Purchaser) for Kenya Shillings Five Million Seven Hundred Thousand (KShs.5,700,000/=). On 23rd July 2002, the appellant, counsel for the Company, under instructions from the Vendor, wrote to the respondent undertaking to pay him the agreed commission of Kenya Shillings Two Hundred Eighty Five Thousand (KShs.285,000/=). The suit property was transferred to the Purchaser on 9th October, 2002. The respondent contended that although the transaction had been completed, as the suit property had been registered in favour of the Purchaser, the appellant had failed to honour his undertaking to pay him his commission despite various requests and demands to do so.

3. The respondent filed a suit against the appellant for the unpaid commission. The learned Judge in his ruling, found that, any person whose rights had been affected by an undertaking given by an

advocate, or in whose favour the undertaking was given should be able to enforce the same under **Rule 7 of Order 52 of the Civil Procedure Rule**. Further, that for the purpose of payment of the respondent's commission, the completion date was 9th October, 2002, when the Vendor transferred the property to the Purchaser.

4. Aggrieved by that decision, the appellant moved to this Court in a first appeal.

5. In his memorandum of appeal dated 3rd April 2008, the appellant has faulted the learned Judge on the following grounds:

i. That the learned Judge erred in law and in fact in failing to find that the respondent's suit in the superior [sic] Court was premature as at the date of its filing on 28th November 2002 as the transaction which was the subject of the suit was not complete as at that date. The appellant's obligation to honour the undertaking given to the respondent had therefore not arisen as at the date the suit was filed.

ii. That the learned Judge erred in law and in fact in finding that as the transaction was substantially completed, the respondent had earned his commission and there was no reason to deny him the same pending payment of the balance of the purchase price.

iii. The learned Judge erred in law and in fact in failing to apply the definition of "completion" as set out in "Blacks Law Dictionary" 6th Edition which defines as "the finishing or accomplishing in full of something therefore began". The completion date herein was 20th February 2003 when the entire or full purchase price was paid."

The appellant prays for the following orders:

a) that this appeal be allowed with costs.

b) that this court do dismiss the respondent's suit in the superior [sic] court with costs.

Submissions

6. Mr Wilfred Nderitu, learned counsel for the appellant, submitted that the learned Judge erred in holding that the transaction had been completed on 28th November, 2002, when the suit was filed. Counsel referred to a letter dated 23rd July 2002, by the appellant to the respondent indicating that the respondent's commission would be paid upon completion of the transaction. The learned Judge took the view that the definition of "completion" in **Blacks Law Dictionary, 6th Edn** was not helpful in the circumstances of this case.

The Blacks Law Dictionary 6th Edn defines completion as:

"The finishing or accomplishing in full of something therefore begun". [Emphasis added]

Counsel submitted that the transaction was stated to be subject to the 1989 Law Society of Kenya

[LSK] Conditions of Sale. Counsel argued that immediately upon payment of the balance of the purchase price by the Purchaser's financier's lawyers to the Vendor, the appellant made payment to the respondent. Counsel argued that the appellant was under an obligation to his client [the Vendor] not to pay the respondent the commission due until payment of the purchase price was made in full. Counsel urged us to allow the appeal.

7. The appeal was opposed by the respondent through his learned counsel, Ms Matu. According to Ms Matu, the transfer of the lease in respect of the sui property was registered on 9th October, 2002, in favour of the Purchaser while the respondent filed the suit on 28th November, 2002 when completion had substantially occurred. Counsel agreed with the learned Judge's holding that the respondent was entitled to sue the appellant for enforcement of the terms of the Sale Agreement. Further, that nothing had been communicated to the respondent regarding a change in completion date. Counsel maintained that the learned Judge did not err in awarding costs and urged us to dismiss the appeal with costs.

8. In response, Mr Nderitu submitted that the property was registered on 9th October 2002 and that it is clear that as at that date, full payment of the purchase price had not been made and the transaction was therefore not yet completed.

Determination

9. I have considered the appellant's case and the respondent's position as advanced in their pleadings, submissions, authorities and the law. I remind myself that this is a first appeal and this court is enjoined to re-evaluate the matter and arrive at its own independent conclusions. See **SELLE V ASSOCIATED MOTOR BOAT CO, [1968] EA 123.**

10. It is the appellant's contention that the suit before the High Court was filed prematurely as it was filed before the sale transaction was completed. 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. See **MUIRURI VS CREDIT BANK & ANOTHER, CA NO. 263 OF 1998, LLR NO. 5676 (CAK)** where this Court stated:

“An undertaking is a solemn thing. In enforcing undertakings, the court is not guided by considerations of contract, but the court aims at securing the honesty of its officers.”

11. It is not in dispute that vide a letter of 23rd July, 2002, there was an agreement by the appellant to pay the respondent KShs.285,000/= as commission upon completion of the transaction. The letter of 23rd July, 2002 from the appellant to the respondent read in part:

“We refer to the above matter and confirm that we have received instructions from our client Town Villas Limited to pay your commission amounting to KShs.285,000/= upon completion of the transaction herein. We therefore undertake to pay your commission upon completion of the transaction.” [Emphasis added]

From the said letter, it is clear that the appellant undertook to pay the respondent commission upon

completion of the transaction.

12. In the case of *DOMB V ISOZ, [1980] 1KB 76 at 81*, Tepleman, LJ highlighted the importance of professional undertakings in Conveyancing Practice by stating as follows:

“Conveyancing is a complicated business. A chain of transactions is frequently involved where no vendor will sell until he can purchase and no purchaser will buy until he can sell. Each client as vendor and purchaser needs time to make up his mind and change his mind after studying surveys and legal reports and other related matters and each client expects everyone else to be ready when he is ready. Skilful conveyancers are required to forge the chain, to see that no bargain is lost and that no one is left without a home. Binding and enforceable undertakings between professional men play an essential part at different stages.”

13. In the case of *KENYA REINSURANCE CORPORATION V MUGUKU MURIU T/A MUGUKU MURIU & CO ADVOCATES, CA NO. 48 OF 1994*, this Court held that the undertaking given by the advocate was ambiguous, unequivocal and binding on him and stated that:

“Having given a solemn professional undertaking to pay a certain sum of money an advocate is bound by the same and he cannot resile therefrom.”

In the instant case, payment of the commission was to be made to the respondent upon completion of the sale transaction. The undertaking therefore had a condition precedent to be fulfilled prior to payment of the commission.

14. The question regarding when this transaction is deemed to have been completed is paramount in this matter. Counsel for the appellant argued that the Agreement for Sale provided that the Vendor could rescind the sale if completion was delayed by an act or default of the Purchaser. The appellant contends that the respondent filed suit prematurely on 28th November, 2002, as the transaction had not been completed. Counsel for the appellant submitted that the Purchaser's advocates, Kimani & Michuki Advocates had not yet disbursed KShs.415,000/= being the balance of the purchase price and the sale was therefore not yet completed.

15. In counsel for the appellant's view, therefore, the Vendor retained a right to rescind the sale or charge interest on the balance of the purchase price in the event that completion of the transaction was delayed by an act of default by the purchaser. Counsel argued that the balance of the purchase price was paid to the appellant on 19th February, 2003 and payment to counsel for the respondent was made on 20th February, 2003. In counsel's view, the appellant honoured his undertaking to the respondent as payment of the commission was made upon completion of the transaction.

16. Counsel for the respondent on the other hand contended that the Agreement for Sale provided that the completion was 60 days from 15th March, 2002; that the lease in favour of the Purchaser was registered on 9th October, 2002; that the transaction was substantially completed by the time he filed suit on 28th November, 2002, in that a substantial portion of the purchase price had been paid to the Vendor and therefore the Vendor should have paid the commission due to the respondent within 60 days from 15th March, 2002.

In his judgment, the learned Judge stated as follows:

“It would appear from the material before the court that as at that date, only KShs.415,000/= was outstanding upon the purchase price of KShs.5,700,000/=. Upon payment of the very substantial portion of the purchase price and transfer of the property unto the purchaser the transaction was substantially completed. The plaintiff had then earned his commission, and there was no reason to deny him the same pending payment of the balance of the purchase price, a small 7.28 per centum of the purchase price.”

The learned judge held that:

“... for purposes of payment of the plaintiff’s commission completion was on 9th October, 2002 when the vendor transferred the property to the purchaser. This date was long after the completion date as provided for in the sale agreement, which was on or before 15th June, 2002 [clause 5 of the agreement]. This suit was not filed until 28th November, 2002, about one and half months after 9th October, 2002. The suit was not premature.”

17. The agreement for sale provided that completion was to be within 60 days from 15th March, 2002, and that the sale was subject to the 1989 Law Society Conditions of Sale so far as they are not inconsistent with the conditions in the agreement for sale or are specifically excluded; that if completion was delayed beyond the completion date by an act or default of the purchaser, the Vendor had the option of either cancelling the sale whereupon the purchaser would forfeit the deposit paid or charging interest on the balance of the purchase price until payment of such balance.

18. It is clear that the sale transaction was subject to the purchaser obtaining financing and **Clause 4 (2) (b) of the 1989 Law Society Conditions of Sale** therefore applied. The 1989 Law Society Conditions of Sale **Clause 4**

(2) (b) provides that:

“Where the vendor has agreed that the whole or any part of the purchase money not paid upon completion but shall be secured by an undertaking from the purchaser’s advocate or the purchaser’s mortgagee or his advocate, the relevant undertaking, in form and substance satisfactory to the vendor, shall be delivered to the vendor’s advocate upon completion together with the payment of any unsecured balance of the purchase money.”

19. It was an agreed term in the sale agreement that the Vendor had the option of rescinding the sale if the Purchaser defaulted in payment. Special

Condition 5 of the Agreement for Sale provided:

“If completion is delayed beyond the completion date by an act of default of the purchaser the vendor may either cancel the sale in which event the purchaser shall forfeit the deposit paid herein or the vendor may charge interest on the balance of the purchase price at the rate of 20% per annum until payment of such balance.”

From the record, it is clear that the Vendor’s advocates made several efforts to obtain the balance of

the purchase price from the vendor's advocates and they were, therefore not dilatory. It is also clear that the commission was paid to the respondent on 20th February, 2003, which was one day after the appellant received the balance of the purchase price from the purchasers/financier's advocates on 19th February, 2003.

20. In the circumstances of the case, I find that as at the date of the respondent filing suit in the High Court, the sale transaction had not been completed as the sale was subject to the Purchaser obtaining financing and the Vendor had the option of rescinding the sale in the event of delayed completion on the part of the purchaser. There may have been substantial completion as the learned Judge of the High Court found but substantial completion is not what the undertaking stated. The commission was to be paid upon completion. Accordingly, I find that the transaction was not completed until the Purchaser's advocates forwarded the full balance of the purchase price to the Vendor's advocates. Accordingly, having so found, the appeal is allowed with costs.

Dated and delivered at Nairobi this 3rd day of March, 2017.

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR



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