



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL CASE NO 13 OF 2019(O.S).

MOSES KIPTANUI DANIEL & SUTER TANUL.....APPLICANTS

VERSES

BEATRICE NJERI NJAGUA T/A NJERI NJAGUA & CO ADVOCATES.....RESPONDENT

JUDGEMENT

1. In their Originating Summons dated **4th November 2019**, the applicants have sought from this court the following orders;

(a) Whether the respondent should pay to the applicants the sum of Kshs 9,573,400.

(b) Whether the respondent should be ordered to pay the applicants the interest accrued on the above sum of money.

(c) Whether the respondent honoured her aforesaid undertaking and if not so should she be compelled by the honourable court to honour.

(d) Costs.

2. In the supporting affidavit of **Moses Kiptanui** dated 4th November 2019 he has deponed that he purchased land parcel number **Suwerwa plot no 003174 Transnzoia** from the beneficiaries of the estate of the late Evans Kamau Mwaura as per the sale agreements dated 25th February 2014 and 15th January 2015 and at the time of executing the agreements he paid a sum of **kshs3,455,000** to them.

3. He went on to state that the balance of **kshs 7,100,400** was deposited at the respondents account at Bank of Africa Nakuru branch which she was to hold till the successful completion of the conveyancing exercise.

4. In the cause of time a dispute arose between the beneficiaries of the estate which culminated in the Succession Cause no 260 of 2006 at Kitale where the respondents clients lost the matter. In the meantime, the respondent on the 1st of November 2016 gave a professional undertaking not to release the funds held in the account till the dispute was resolved.

5. The respondent on 20th June 2017 gave another professional undertaking to release the funds should her clients not emerge victorious in the dispute.

6. This court on 2nd April 2019 delivered its judgement in which the respondent's clients lost the case. Consequently, the applicant

wrote to the respondent to honour her professional undertaking but the respondent instead wrote back acknowledging the position but argued that her clients had appealed against the decision of this court and thus they should await its outcome.

7. The applicants therefore pray that the respondent should be compelled to honour her professional undertaking as they are no longer interested with the land and that they cannot await any further litigation.

8. The respondent in her replying affidavit dated 30th June 2020 has reiterated the above facts and that the only amount that was deposited in the said account is kshs, 7,100,400 and not kshs9,384,000 as claimed by the applicants. She went on to state that her clients have already filed an appeal against this court's judgement namely Appeal no.2 of 2020 at the Court of Appeal in Eldoret.

9. She deponed that they have been granted stay of judgement in this court pending appeal. For this reason, her clients have advised her not to release the sum in the fixed account as they await the outcome of the appeal. In other words, since the appeal is pending the applicants cannot be paid as the undertaking was premised on the conclusion of the case.

10. The court then advised the parties to file written submissions which they have and the same have been perused. The applicant has submitted that the undertaking was very specific and clear namely that the respondent was to pay back the total amount to the applicants should the succession cause goes against her clients.

11. Further, since the case went against them, they were no longer interested in the land but want their money back in full together with interest. They relied on the case of **Equip Agencies Ltd V. Credit Bank Ltd. Nairobi HCC No.773 of 2003.**

12. The respondent submitted that she could not be compelled to pay the amount which was not in her custody and the only amount for discussion is kshs.7,100,400. She further submitted that the applicants should await the outcome of the pending appeal as that was the letter and the spirit of the undertaking.

13. She said that since she was acting for both the applicants and the vendors she was obliged to safeguard the interest of both parties.

ANALYSIS AND DETERMINATION.

14. It is not in dispute that the applicants purchased land parcel number 003174 Suwerwa scheme Transzoia from the respondent's clients for a total purchase consideration of kshs9, 573,400. They paid Kshs, 3,455,000 to the vendors on various days and in various sums and forms as per the attached acknowledgments in his supporting affidavit.

15. As a result of that the titles were transferred to him. However, a dispute arose between the beneficiaries leading to the judgement in Succession Cause no 260 of 2006 in which the respondent's clients lost. It must be noted that the applicants were not parties in that case which pitted the deceased beneficiaries.

16. It appears that during the pendency of that cause the respondent on 20th June 2017 wrote to the applicant's lawyers as follows.

“...As agreed we do hereby wish to confirm that the consideration paid by yourselves to our clients is currently deposited in a fixed account and is accruing interest. We hereby undertake that in the event our clients shall emerge victorious in the ongoing court litigation, the total consideration paid plus all accrued interest shall be released to yourselves. On the other hand, in the event that our clients shall emerge victorious, then the total consideration paid by yourselves plus accrued interest shall be released to our clients.”

17. The lawyers for the applicants on 16th April 2019 demanded to be paid the sum of Kshs, 7,100,400 seeing that the case had gone against the respondent's client. On 8th August 2019 the applicant's lawyers gave a final demand for the payment of the above sum and indicated that their clients were no longer interested with the issue of the land.

18. The respondent on 10th May 2019 responded as follows;

“...That the court matter is still ongoing since after judgement on 2/4/2019, our clients filed a Notice of Appeal and sought stay of the judgement and which stay was granted. (We herein attach a copy of the Notice of Appeal and order for your client’s record.)

Consequently, let your clients hold on as we await the hearing and determination of the appeal where after the issue of refund or taking possession of the land will be addressed. In the meantime, the funds (consideration) remain in an interest earning account.”

19. On 1st August 2019 the respondent wrote again to the applicant’s lawyers as follows.

“...Upon instructions from our client we wish to herein reiterate contents of our earlier letter dated 10th May 2019. Of importance, it is worth noting that our respective clients entered into the land sale arrangements based on trust. Your clients did not get vacant possession due to the ongoing litigation, it is therefore imperative that your clients exercise patience.

Further we advise that judgment given 2/4/19 has been stayed pending hearing and determination of the appeal. Our clients is still in pursuit of the court case.”

20. Having quoted the above correspondences, it is apparent that the respondent premised the refund of the consideration on the pending appeal. Even before addressing this line of argument, what is the total amount the applicants are supposed to be refunded. Is it the entire purchase consideration or the amount in the fixed deposit account."

21. It is the finding of this court that what should be paid to the applicants is Kshs. 7,100,400 for the simple reason that the pleadings and annexures to his affidavit like the afore quoted letters are asking for the said amount. It is also within the parties’ knowledge that the vendors had separately received up to a total of Kshs, 3,455,000 paid to them directly. There is no evidence that the amount was paid to the respondent.

22. This being the case did the undertaking presuppose that the same will crystalize after the determination of the appeal or the High court decision" In my view, the parties understood that the same will take effect after the decision of the high court and not the Court of Appeal.

23. If for any reason the same was to crystalize after the final outcome whether this courts or the Court of Appeal, then there was no reason why the parties would not have agreed on those lines. For now, this courts reading wholesomely of the undertaking concludes that it was to crystalize after this court’s decision in the succession cause a copy of the judgement has been attached by all the parties in their respective affidavits. It is also worthy to note that the undertaking was given while the succession cause was alive and ongoing.

24. There is therefore no reason why the respondent should not honour her undertaking. In any case the applicants through their counsel’s letter dated 8th August 2019 have indicated that they are not interested in the transaction again. They cannot be held at ransom again more so now that they are not in physical occupation of the land. The titles they have in any case havebeen cancelled by this court.

25. Undertaking really is a pledge or a promise. The respondent on behalf of her clients received kshs7,100,400 from the applicants on the promise to pay them once litigation over the estate was successful. Of course it was not successful and the only logical thing is to release the money back to the owner. Had her clients succeed then she would have released the money to them and the land would have been formally taken over by the applicant.

26. Now that the applicants do not want the land, the outcome of the appeal shall be to the interest of her clients and not the applicants. For the purposes of the undertaking the respondent acted for both the applicants and her clients as by then the applicants acted in person.

27. In **HARITH SHETH VS. K.H. OSMOND (2011) eKLR**, the Court of Appeal clearly spelt out the seriousness of professional undertaking by advocates. It said that;

“With due respect to the learned counsel, a professional undertaking is given to 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 it if only to protect his own reputation as an officer of the court.”

28. There is no doubt that the entire transaction was destabilised by the judgement of this court in the succession cause. For that reason, the respondent although her clients are of the opinion that they should await the outcome of the appeal, that was not the spirit and the letter of the undertaking. That would have been tenable if another undertaking would have been undertaken.

29. The amount of Kshs3,455,000 paid by the applicants directly to the respondent’s clients as contained in the annexures to his supporting affidavit ought to be recovered directly and separately from them as there is no evidence that the same was paid to the respondent or through her.

CONCLUSION

a. For now, the respondent should release all the money amounting to Kshs, 7,100,400 to the applicants being held at Bank of Africa. She should beside providing the statements release the interest that has accrued from the date the amount was deposited till the final payment. This should be undertaken within 14 days from the date of this judgement.

b. Each party shall bear their respective costs.

Delivered, Signed and Dated at Kitale this 11th day of December 2020.

H. K. CHEMITEI

JUDGE



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