



Mundui & another t/a Mundu Murai Advocates v Abdulrahman & another t/a Abdulrahman Saad & Associates Advocates; Alondo (Interested Party) (Civil Case E595 of 2023) [2024] KEHC 9824 (KLR) (Civ) (26 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9824 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL CASE E595 OF 2023
FG MUGAMBI, J
JULY 26, 2024

BETWEEN

TITUS WANJOHI MUNDUI & DONALD GITAU MURAI T/A MUNDU MURAI ADVOCATES PLAINTIFF

AND

DAWID ABDULRAHMAN & SAAD M SAAD T/A ABDULRAHMAN SAAD & ASSOCIATES ADVOCATES RESPONDENT

AND

ELIAKIM CHARLES OOKO ALONDO INTERESTED PARTY

RULING

1. The respondent filed the Originating summons (OS) dated 4/12/2023 seeking orders to compel the applicants to honour their written undertaking of 5/2/2020 and pay the sum of Kshs. 7,246,000/= with interest and in the alternative an order directing the applicants to procure the cancellation of the charge registered against Title No I.R. 96382 (L.R. No. 27024/30) and return the original title to the respondents.
2. The genesis of the dispute between the parties is a loan of Kshs. 8,000,000/= advanced by Edwan Agency Limited (the respondent's client) to the intended interested party. The purpose of the loan evidenced by an agreement dated 22/3/2019 was the purchase of land to wit L.R. 12410/39. In furtherance to the loan agreement the intended interested party deposited as security, an original title for another parcel, L.R. No. 27024/30, together with an executed transfer.
3. The respondent's case is that the applicant called the respondent's law firm and requested for the original title that the interested party had deposited with them, for the purposes of registering a charge



with Gulf Bank. The respondent on the strength of an undertaking issued by the applicant advocates for payment of Kshs. 8,000,000/= released the original title to the applicants. The respondent contends that the registration of the charge was completed but that the applicants are yet to pay up the amount of Kshs. 8,746,000/=, in breach of the undertaking given by the applicant firm.

4. The applicants have filed an application dated 19/1/2024, seeking to join the intended interested party to these proceedings. This application is supported by an affidavit sworn by Saad Migdad Saad. The applicants assert that the purported undertaking is based on a transaction between the respondent's client and the proposed interested party.
5. They argue that only the intended interested party can address certain allegations made by the respondents. Furthermore, they contend that the undertaking is now moot, as the intended interested party has already repaid the loan owed to the respondent's client.
6. The applicants argue that the presence of the proposed interested party is necessary to enable the court to effectually and completely adjudicate upon all questions involved in the suit, especially those related to the sale transaction. They claim that the suit affects the proposed interested party and that the submissions of the proposed interested party are important to the proceedings.
7. The application is opposed vide a replying affidavit sworn by Titus Wanjohi Mundui on 4/3/2024. The respondents' main argument is that the interested party is a stranger to the professional undertaking dated February 5, 2020. They assert that the interested party neither issued nor was issued the undertaking, and therefore cannot be joined to the proceedings.
8. The respondents further argue that the professional undertaking is personally binding on the applicant as an advocate, not on the proposed interested party. Finally, they contend that there is no proof of payment of the amount due by the intended interested party.

Analysis and determination

9. I have carefully considered the pleadings, submissions and evidence presented by the parties.
10. The applicant has cited the case of *Francis Kariuki Muruatetu & Another V Republic & 5 Others*, Petition No. 15 as consolidated with No. 16 of 2013, [2016] eKLR. The Supreme Court set out the requirements for a successful application for joinder as an interested party as follows:
 - “(i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
 - (ii) The prejudice to be suffered by the intended interested party in case of nonjoinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
 - (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”
11. The issue as to whether the proposed interested party meets the threshold outlined by the Supreme Court lies in understanding the nature of a professional undertaking. The *Law Society of Kenya Code*



of Standards of Professional Practice and Ethical Conduct (2014) has been cited by the respondent. It defines a professional undertaking as:

“A formal promise whose effect is to make the person giving it responsible for the fulfillment of the obligations in respect to which it is given. An Advocate’s undertaking is a personal promise as well as a professional and legal obligation. It is based on the concept of the legal professional as an honourable profession and the expectation that an honourable person will honour his/her word. In legal practice professional undertakings are a standard method of mediating transactions. Without such undertakings there would be much difficulty and inconvenience suffered by clients.”

12. Aligned to the above is the holding of the Court of Appeal in the case of *Harit Sheth T/A Harit Sheth Advocate V K. Osmond Advocates*, [2011] eKLR. The Court stated as follows:

“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.” (emphasis mine)

13. Finally, the *Halsbury’s Laws of England, 4th Edition* by Lord Hailsham of St. Marylebone, Vol. 44(1), pages 222, 223, 224, also states as follows:

“Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the Court in the course of proceedings, that undertaking may be enforced summarily upon application to the Court:

- i. It must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client.
- ii. It must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.
- iii. The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the Court, and the undertaking must be one which is not impossible ab initio for the solicitor to perform.
- iv. If the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced.”

14. The common ground in the discourse above is that a professional undertaking issued by advocates is done so in their capacity as professionals and binds them personally. An advocate who issues an undertaking is obligated to honor it without reference to any other party.

15. Juxtaposing the legal pronouncements against the claim before this court, it is undisputed that the claim by way of Originating Summons (OS) is for the enforcement of an undertaking issued by the applicant advocate to the respondent advocate. The letter of undertaking, dated 5/2/2020, is drawn on the applicant’s letterhead and signed by the applicant. Therefore, the enforcement of the undertaking



is between the advocates, independent of their clients' actions. An advocate cannot use their client as an excuse for failing to fulfill an undertaking.

16. As was stated in the case of *Conrad Masinde Nyukuri & Another v Robson Harris & Another*, [2021] eKLR:

“The law gives the advocate the right to sue his client to recover whatever sums of money he has incurred in honouring a professional undertaking but they cannot however sue to recover that amount unless he has first honoured his professional undertaking.”

17. The above finding aligns with the fact that although the applicant issued the undertaking on behalf of the intended interested party as its client, this is not a relevant factor in the OS proceedings before this court. The applicant, being the person required to honor the undertaking, would be at liberty to sue the intended interested party to recover the amount of the undertaking once they have fulfilled their promise to the respondent.

Disposition

18. Accordingly, I find and hold that the joinder of the proposed interested party is not necessary in this case and will serve no useful purpose. The application dated 19/1/2024 is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JULY 2024.

F. MUGAMBI

JUDGE

