



**National Social Security Fund Board of Trustees v Ngisa & another (Practicing
as Morara Ngisa and Company Advocates) (Civil Case E146 of 2022)
[2023] KEHC 2669 (KLR) (Commercial and Tax) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2669 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E146 OF 2022
DAS MAJANJA, J
MARCH 30, 2023**

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES PLAINTIFF

AND

ALICE NYOMENDA OERI 1ST DEFENDANT

RONALD MORARA NGISA 2ND DEFENDANT

PRACTICING AS MORARA NGISA AND COMPANY ADVOCATES

JUDGMENT

1. The Plaintiff has filed the Originating Summons dated April 22, 2022 ('the Summons') seeking an order that the Defendants do honour its professional undertaking and in default the court order enforcement by compelling it to pay Kshs 6,000,000.00 together with interest at 14% p.a for the period of delay in honouring the undertaking. The application is supported by the affidavit sworn by Austin Ouko, the Plaintiff's Legal Manager sworn on April 22, 2022.
2. The facts leading to this case are largely not disputed. The Plaintiff sold LR No 140/571/008 situate at Nyayo Embakasi Estate ('the suit property') to Rahab Wanjiru Mbugua (/the Vendor') on terms contained in a tenant purchase agreement dated January 15, 2016 including payment of the purchase price amounting to Kshs 6,100,000.00. The Plaintiff states that the Vendor notified it that it was selling the suit property to George Ngatia Gichuru and Lydia Wambui Ngatia ('the Purchasers') represented by the Defendants.



3. In order to facilitate the sale, the Plaintiff received an irrevocable professional undertaking dated December 9, 2012 from the Defendants undertaking to pay Kshs 6,000,000.00 upon release of the title documents to the Defendants ('the Undertaking') on the following terms:

'We hereby give you our unconditional, unequivocal and irrevocable professional undertaking, as the Financier's Advocates that we shall hold the executed Transfer and the original Title to the property ('the documents') to your order, returnable on demand, and that we shall not release the documents to any advocate or person whatsoever (except the Lands Office for the purposes of registration of the Transfer in favour of the Purchaser and Charge in favour of our client) for any purposes whatsoever without first obtaining your written consent and that the same will only be granted on such other advocate giving a professional undertaking in terms similar to the present one and on the understanding that whether such advocate complies with the undertaking or not, you will continue to hold us liable on our understanding to yourselves as herein provided.

That we shall not make use of the documents for any purpose other than for stamping and registering the Transfer and Charge at the Department of Land.

We shall also, upon receipt of the Transfer and Charge duly registered at the Department of Lands, notify you of such registration and pay to yourselves net of all bank charges without any deductions or withholdings whatsoever the sum of Kshs 6,000,000.00 within 14 days of registration of the Transfer and Charge. In this regard, we will exercise our best endeavours to ensure that the registration formalities are completed expeditiously.

We further undertake to present for registration the Transfer and Charge simultaneously, such joint registration being on the strict condition that if any of the said Transfer or Charge in favour of our client as rejected, then none of them should be registered.

Finally, if the registration of the said Transfer and Charge is not effected within Sixty (60) days from the date of receipt of the documents by us, then we shall upon demand return the documents to yourselves in the same condition in which they were when they delivered to us.'

4. The Plaintiff confirmed and acted on the Undertaking by releasing the documents on January 18, 2016. The documents included the signed transfer document in triplicate and the letter of consent. The Rent and Rates Clearance Certificates were forwarded by the letter dated May 23, 2016. Despite releasing the documents the Defendants failed to honour the Undertaking by releasing the money to the Plaintiff. As the money was not paid, the Plaintiff issued a notice of rescission of the sale agreement dated December 19, 2016 to the Purchasers. When the Purchasers received the rescission notice, they wrote to the Plaintiff the letter dated January 20, 2017. In that letter, the Purchasers explained that they contacted Mr Ngisa who informed them that the Plaintiff had yet to reconcile its accounts. They also referred to a letter dated April 28, 2016 by which Mr Ngisa released the original title deed, together with the registered transfer and other documents in relation to the suit property. They stated that they were surprised that the debt of the account had not been cleared and when given a printout of the statement of account, the statement showed that Mr Ngisa had issued dishoured cheques.
5. The Plaintiff, through its advocate issued a demand letter dated March 23, 2022 but the Defendants did not respond to it.
6. Upon entering appearance, the Defendants filed a Notice of Preliminary Objection dated May 4, 2022. It stated that the issues in this suit have already been dealt with in NRB ELC Case No 74 of 2008 (formerly HC COMM 288 of 2016) Felix Mecha Nyakundi and 2 Others v NSSF, Morara Ngisa and



Others and that the matter is pending before the Advocates Disciplinary Tribunal Case No 182/17 between the parties. The Defendants further filed an application dated July 12, 2022 for orders that Alice Nyomenda Oeri be struck out, removed or expunged from the proceedings and another Notice of Preliminary Objection dated September 20, 2022, seeking to stay the suit on the ground that the issues in this suit were already being dealt with by the Advocates Disciplinary Tribunal.

7. I heard the Preliminary Objection and the application together and delivered a ruling dated October 7, 2022 where I stated as follows:

'Whether a party is a partner is a question of fact and evidence hence it cannot form the basis of a Preliminary Objection. Moreover, counsel for the Defendants concedes that the name of Ms Oeri appeared on the letter head of the firm. She therefore held herself out as a partner of the firm and may be liable. All these question will now be determined at the hearing of the suit.'

8. I therefore dismissed the Preliminary Objection and the application. I directed the Defendants to file their replying affidavits in response to the Summons.
9. The Defendants opposed the Summons through the replying affidavit of Ronald Morara Ngisa sworn on November 2, 2022. It urges the court to dismiss the application. The substance of the deposition is that the Undertaking was not an unambiguous and professional undertaking. That the Undertaking was conditional and subjected to fulfilment of other conditions to be accepted by the Plaintiff other than release of the title documents. It points out that there is no evidence that the Plaintiff ever confirmed the acceptance of his proposal hence the Undertaking did not crystallise. The Defendants claim that they should not be personally liable as they were acting for known clients and that the Undertaking is not a guarantee for payments supposed to made in the transaction. It states that without prejudice to the said argument, the claim of Kshs. 6 million is not supported and is unjustified from the documents presented by the Plaintiff and that there is evidence in the form of a handwritten note stating that the amount is in fact Kshs 5,777,157.00.

Analysis and Determination

10. The matter was heard by way of affidavits and written submissions filed by the parties in support of their respective submissions. From the parties' pleadings and submissions, the main issue for determination is whether the Defendants should be ordered to honour the terms of the Undertaking and pay the Plaintiff Kshs 6,000,000.00.
11. The Court of Appeal, in *Harit Sheth T/A Harit Sheth Advocate v KH Osmond T/A KH Osmond Advocate [2011] eKLR* set out the nature of an Advocate's undertaking and its consequences. The court observed as follows:

'One last point we need to comment on is the submission by Mrs Rashid, that the appellant and his client should have followed the debtor, [...], to recover the money it owes. In her view this case is peculiar and the Court should depart from the usual practice of enforcing professional undertakings. 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. The law gives him the right to sue his client to recover whatever sums of money he has incurred in honouring a professional undertaking. He cannot however sue to recover that amount unless he has first honoured his professional undertaking.

12. The appellate court further held in [Arthur K Igeria t/a Igeria & Co Advocates v Michael Ndaiga \[2017\] eKLR](#) that:

'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 dubiety 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.'

13. Before I consider the substance of the case against the broad principles I have cited, I propose to deal with some preliminary issues. First, I accept that an advocate can give a professional undertaking to a corporate body which undertaking can be enforced in like manner as any other professional undertaking issued to an advocate. The reason for this as well explained by Tuiyot J, in [Musti Investments Limited v Moses Kibathi t/a Osoro Chege Kibathi and Company Advocates HCOMM No 400 of 2017 \(OS\) \[2019\] eKLR](#) as follows:

(16) While more often than not, the receiver of a professional undertaking is an Advocate, this Court cannot think of any reason why the receiver who does not make a counter promise (or undertaking), need only be an Advocate. This is because the onus to discharge the promise in the professional undertaking is on the giver.

(17) On this debate, I choose to be on the side of Justice DG Thomas in *Legal Services Commissioner vs Consultancy Legal [2015] QCAT 174* in which he remarked,

'In the circumstances of this case, that response has no merit. The undertaking was clearly provided, and was referable to the settlement contemplated by the Federal Magistrates Court orders and the transfer documents provided in response to that undertaking. An undertaking can be given either to other lawyers or to non-lawyers direct. The duty on the practitioner is the same regardless of the person to whom it is given'.

14. This Court takes the view that for as long as in the nature of a transaction, a non-advocate is not required also to give an undertaking in return, a professional undertaking can be given by an Advocate directly to a non-advocate. Further, enforcement of such an undertaking is consistent with the court's obligation to enforce the highest standards of conduct by officers of the court. As the court stated in [Warubiu K'Owade and Ng'ang'a Advocates v Mutune Investment Limited \[2016\] eKLR](#) that:

'In enforcing undertaking, the court is guided not by considerations of contract, or of securing the legal rights of parties, but mainly by ensuring the honesty of advocates.'

15. Second, its Preliminary Objection, referred to the other pending proceedings in respect of the same issues. The existence of the other suit pending could not be the subject of a preliminary objection as this would require consideration of evidence by way of the pleadings and other documents to demonstrate the existence of those proceedings. When given an opportunity to defend the case, the Defendants did not raise the issue or provide such evidence in the replying affidavit.



16. Third, the issue of Alice Nyomenda Oeri was raised in the application to remove her from the proceedings. I rejected the plea and dismissed the application after counsel for the Defendants admitted that her name appeared on the firm letter head and there was evidence of holding out. When given the opportunity to formally respond to the Summons, the Defendants did not raise this issue in the replying affidavit or provide contrary evidence. I note that from the letter dated January 20, 2017 addressed to the Plaintiff by the Defendants' advocates, they stated that Mr Ngisa's wife, AN Oeri, who was practising in the same firm was present when they went to deliver the Plaintiff's demand letter to the Defendants. The Defendants have not discharged the burden of showing that the said AN Oeri is not a partner of the firm or at any rate held herself out as such.
17. Turning to the substance of the Summons, I have reproduced the terms of the Undertaking at Para. 3 above. It is clear and unequivocal in its terms on the parties' obligations. The Undertaking was not conditional as urged by the Defendants. The Plaintiff complied with it by forwarding the registration documents. The Defendants' own clients, the Purchasers admit that the documents were indeed received by their counsel and the transfer in their favour registered. There is also sufficient evidence that the Defendants have not paid over the money yet the Purchasers confirm that the Defendants received their money from them.
18. In their submissions, the Defendants point out the Plaintiff has avoided the issue of the proposed charge which was to be registered with the transfer. It is correct that the Undertaking referred to the transfer and charge being lodged together. It was upon the Defendants to register both documents and whether the charge was registered or not, their obligation to the Plaintiff was to pay the amount in the Undertaking or return the documents forwarded to them. Since the Defendants were the ones to register the transfer and charge, registration thereof was a matter within their knowledge and they had a duty to explain what transpired otherwise they remain liable to honour the Undertaking. The Defendants also allude to accounts being taken but this issue is not established or even raised in the replying affidavit. If the Defendant has paid the money to the Plaintiff, nothing would have been easier than to show evidence of payment. Their replying affidavit does not contain any such evidence.
19. Apart from bare assertions in the replying affidavit which is unsupported by any documents, the Defendants have not shown that they have complied with the Undertaking. Their defence is a bare denial, as such, I have no option but to allow the Summons.

Disposition

20. I allow the Originating Summons and enter judgment for the Applicant against the Respondents as follows:
 - a. Ronald Morara Ngisa And Alice Nyomenda Oeri Practising As Morara Ngisa And Company Advocates be and is hereby ordered to honour the professional undertaking dated December 9, 2015 to the National Social Security Fund Board Trustees by paying Kshs. 6,000,000.00 within 30 days from the date hereof.
 - b. In default of such compliance, judgment be and is hereby entered for the Plaintiff against the Defendant for Kshs 6,000,000.00 together with interest at 12% p.a from the date of filing suit until payment in full.
 - c. The Respondent shall bear the costs of this suit assessed at Kshs 250,000.00.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MARCH 2023.

D. S. MAJANJA



JUDGE

Court of Assistant: Mr M. Onyango

Mr Muuo instructed by P. K. Mbabu and Company Advocates for the Plaintiff.

Mr J. T. Makori, Advocate instructed by the Defendants.

