



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NANYUKI

CIVIL CASE NO E004 OF 2021

J M MWANGI & COMPANY ADVOCATES, LLP..APPLICANT

VERSUS

1. CONRAD MALOBA

2. NICK NDEDA (T/A CONRAD MALOBA & ASSOCIATES,

ADVOCATES).....RESPONDENTS

R U L I N G

1. The application herein brought under **Order 52, Rule 7** of the *Civil Procedure Rules, 2010* is for enforcement of a professional undertaking given by a firm of advocates. Enforcement was initially sought in respect of KShs 1,675,000/00 “with interest from 19th March 2021 till payment in full, being the balance of the purchase price secured by the undertaking dated 24th November 2020.” In the course of the proceedings, the Respondents paid the outstanding principal sum of KShs 1,300,000/00, leaving only the interest component in the sum of KShs 375,000/00.

2. I have read through the supporting affidavit, replying affidavit and supplementary affidavit and have perused the documents annexed thereto. I have also given due consideration to the submissions of the learned counsels appearing, including the one case cited.

3. The original professional undertaking was admitted by the Respondents. That undertaking was contained in the letter of undertaking dated 24th November 2020. The undertaking was for payment of KShs 24,300,000/00 “upon registration of transfer in favour of the purchaser or within forty-five (45) days from the date of receipt of the completion documents, whichever (came) earlier.”

4. As it turned out, this undertaking was not fully met; there was an outstanding sum of KShs 1,300,000/00. The Respondents then requested in writing for extension of time to fully meet the undertaking, the consideration being payment of interest of KShs 375,000/00 upon the outstanding sum. This offer was duly accepted by the Applicant in writing, and they extended the time as requested to fully meet the professional undertaking.

5. Subsequently the Respondents refused to pay the agreed interest of KShs 375,000/00, arguing that it was not part of the professional undertaking, and further, that the Respondents’ undertaking to pay the interest was given on a “without prejudice” basis; and that therefore it cannot form the basis of the claim for payment of the interest.

6. An advocate’s professional undertaking is in essence a contract between the giver of the undertaking and the person to whom it is given. There is nothing in law to prevent the re-negotiation and alteration of such contract. Any admissions made or positions taken on a “without prejudice” basis during such negotiations will normally not be admissible in evidence where such negotiations do not result in any agreement or settlement. See the English cases of **Oceanbulk Shipping and Trading SA V TMT Asia Limited and 3 Others [2010] UKSC 44** and **Rush and Tompkins Ltd V Greater London Council [1989] AC 1280**.

7. On the other hand, where such “without prejudice” negotiations result in a new agreement that alters the old state of affairs and establishes a new one, a new complete contract is established; evidence of such new agreement will be admissible even though reached from “without prejudice” negotiations. See the case of **Walker V Wilsher (1889) 23 QBD 335**. See also the case of **Lochab Transport Ltd –VS- Kenya Arab Orient Insurance Ltd [1986] eKLR** where it was held –

“...if an offer is made ‘without prejudice’, evidence cannot be given on this offer. If (the) offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of that ‘without prejudice’ letter.”

8. In the present case the Respondents made an offer to pay interest of KShs 375,000/00 upon consideration of extension of time for them to fully honour their professional undertaking. The Applicants accepted that offer and duly extended time. That was a new agreement that altered the original contract contained in the original professional undertaking given by the Respondents, which was for the benefit of both parties. The Respondents cannot now resile from that fresh contract after the Applicants fulfilled their part of the new bargain.

9. In the result, I will allow the application and order that the Respondents do honour their undertaking to pay the interest of KShs 375,000/00 within twenty-one (21) days of delivery of this ruling. In default an order in enforcement may be made upon further application. It is so ordered.

10. The Applicants shall have the costs of this application.

DATED AND SIGNED AT NANYUKI THIS 26TH DAY OF JANUARY, 2022

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 27TH DAY OF JANUARY 2022