



Daniel & Kenneth Advocates LLP v Daniel Orege & Company (Civil Case E032 of 2022) [2023] KEELC 17908 (KLR) (22 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL CASE E032 OF 2022**

JA MOGENI, J

MAY 22, 2023

**IN THE MATTER OF: AN APPLICATION BY DANIEL & KENNETH
ADVOCATES LLP FOR AN ORDER OF AN ENFORCEMENT
OF AN UNDERTAKING GIVEN BY AND AN ADVOCATE**

-AND –

IN THE MATTER OF: THE ADVOCATES ACT CAP 16

-AND –

**IN THE MATTER OF: RULE 9 OF THE CODE OF STANDARDS
OF PROFESSIONAL PRACTICE AND ETHICAL CONDUCT**

BETWEEN

DANIEL & KENNETH ADVOCATES LLP APPLICANT

AND

DANIEL OREGE & COMPANY RESPONDENT

JUDGMENT

1. The Applicant herein, Wamae & Allen Advocates, filed the Originating Summons dated 20/07/2022 seeking the following orders;
 - a. Spent
 - b. The firm of Daniel Orege & Company do, and hereby be ordered to honor the professional undertaking dated 21/12/2021 and given to Daniel & Kenneth Advocates LLP the sum of Kenya Shillings Twenty-One Million Five Hundred Thousand Only (Kesh. 21,500,000.00), with interest calculated at court rates at 14% from 17th February 2022 until payment in



full, being the deposit in the purchase price for the property L.R. No. 1/1381(I.R. 200711) (Original No. 1/835).

- c. The said undertaking be honored within Seven (7) days from the date of the Order therein and the aforesaid monies in prayer (2) above to be paid to the Applicant's Advocates
 - d. Costs of this suit be borne by the Respondent.
2. The summons are based on the following grounds and supported by the affidavit of Daniel Muriungi Muriungi.
- i. Vide a Sale Agreement dated 14th December 2021, Frank Logistics Limited (hereinafter the Vendor) and Saif Properties Limited (hereinafter the Purchaser), entered into an agreement for the sale and purchase of the property known as L.R. No.1/1381(I.R. 200711) (Original No. 1/835).
 - ii. In respect of the aforesaid transaction the firm of Daniel & Kenneth Advocates LLP acts for the Purchaser, whilst the firm of Daniel Orange & Company acts for the Vendor, and as per the further terms of the transaction as a stakeholder for both parties therein.
 - iii. Vide a Professional Undertaking dated 21st December 2021, the firm of Daniel Orange & Company expressly undertook to hold the funds on stakeholder basis in trust of the vendor pending completion, which reads verbatim;
Transaction Leading to the Professional Undertaking
 - a. "That we will hold the deposit of Kshs. 21,500,000 as per the terms of the sale agreement dated 14th December 2021 and on stakeholder basis in trust of the vendor pending completion.
 - b. That we will not release the said funds to anyone unless that other person has given a similar undertaking like this one and in similar terms.
 - c. That despite that other person giving the said undertaking, we will continue to be liable for the funds as per the undertaking terms herein."
 - iv. From the above, the Respondent not only had an obligation to the Purchaser herein but was bound to Applicant to hold the aforesaid terms expressly on the terms and conditions to Professional Undertaking.
Payment of Funds to the Respondent
 - v. In accordance with the Respondent issuing a professional undertaking and providing their professional indemnity, the Applicant herein proceed to transfer the sum of Kshs. 21,500,000.00 to the account of the Respondent Account Number 01100093494300 at Co-operative Bank Kenya Limited.
Rescission of the Agreement
 - vi. Subsequently, material facts pertaining to the transaction emerged and the Applicant herein issued a rescission notice dated 17th February 2022, wherein the Respondent was sought to refund the deposit paid.
Particulars and Admission of Breach of Professional Undertaking
 - vii. However, to date, the Respondent has never issued a refund, to the contrary the following blatant breach of the professional undertaking emerged;



- a. The Vendor proceeded to file Nairobi ELC No. E059 of 2022 Frank Logistics Limited vs Saif Properties Limited & Another, wherein the Respondent herein was sued as an interested party.
- b. In the abovementioned proceedings, the Respondent is on record affirming to be holding the deposit, as noted in the Affidavit of the Respondent sworn on 23rd March 2022, which reads verbatim;

“7. THAT it is indeed not denied that I am holding a deposit of the Purchase price in the sum of Kshs. 21.5 million and the terms of holding the said deposit are clearly spelt out in the agreement for sale and I cannot therefore be compelled to release or account for the said deposit when it is not in dispute that I am holding the said deposit and there is an existing suit on specific performance in respect to the said transaction”

- a. Further to the above, vide the Order issued on 9th June 2022, by Honourable L.Komingoi the Respondent was ordered to refund the sum of Kshs. 21,500,000 together with all accrued interest to the firm of Wamae & Allen Advocates within twenty-one (21) days from the date of the ruling, which days lapse on 30th June 2022.
 - c. Vide the Respondent's letter dated 29th June 2022, the Respondent admits that it released the said deposit to their client and seek an extension of 90 days as the client shall avail the funds.
- viii. The above action is not only in breach of the terms of the professional undertaking expressly that the funds were to be held pending completion, which completion had not occurred to warrant any transfer.
 - ix. Further to the above, the inability to effect the refund despite the rescission notice and the express orders of the court, the Respondent continues to be personally liable for the funds as per the terms of the Professional Undertaking.
 - x. This matter should be heard expeditiously as the Respondent is on record having admitted the breach of the terms of the Professional Undertaking, therefore, no substantive defence is attainable.
 - xi. It is therefore in the interest of justice and fairness that the orders sought herein above compelling Daniel Orege & Company to refund the deposit paid together interest therein be granted.

3. He further avers that there are multiple suits pertaining to the same suit property and which are:

- a. ELC 059 of 2022
- b. ELC 144 OF 2017
- c. ELC 792 OF 2015

And therefore seeks to have the application to be allowed summarily.

4. The background to the claim is that the Respondent agreed to sell land reference number L.R. No. 1/1381(I.R. 200711) (Original No. 1/835). L.R. No. 1/1381(I.R. 200711) (Original No. 1/835) (“the



Suit Property”) to Saif Properties Limited who are the clients of the Applicant. The client was to pay a deposit of Kshs. 21,500,000/= which they paid and the Respondent gave a professional undertaking dated 21/12/2021 on the deposit of the purchase price.

5. The applicant rescinded the agreement and the respondent/vendor moved to court and vide ELC 059 of 2022 seeking specific performance but the court ordered the respondent to refund the deposit to the applicant through its ruling of 9/06/2022. The respondent did not refund the deposit and vide his letter dated 29/06/2022 informed the applicant that he had released the deposit to the vendor’s directors trusting that the sale agreement would be concluded.
6. The respondent disclosed that the director of the vendor used the deposit funds to purchase and supply fertilizer for the National Cereals Produce Board and that he is yet to be paid owing to the change of government and he sought time for a period of 90 days from 30/11/2022 to enable him pay. Further he averred that he had reported the matter to his insurer who are investigating the case with a view to paying the deposit funds. He averred that his client does not deny receiving the deposit and is committed to have it refunded.
7. The Respondent though opposed to the Originating Summons did not file any written submissions. The Court will therefore consider the available pleadings, the relevant provisions of law and the cited authorities in arriving at its findings.
8. The applicant has anchored its case on the undertaking given by the Respondent herein. The applicant relied on the definition of undertaking as was given in the case of Naphatali Paul Radier vs David Njogu Gachanja D. Njogu & Co. Advocates [2006] eKLR where Waweru J held that:-

“An undertaking given by an advocate is personally binding upon him and must be honored. Failure to honor an undertaking is prima facie evidence of professional misconduct. This court has power to enforce the professional undertakings of advocates. A power that the court will not hesitate to exercise in appropriate cases. This is such appropriate case.”

9. Another case that the applicant quoted is the case of Kenya Commercial Bank vs Adala (1983) KLR 467, the Court of Appeal held: -

1. 1. The courts have an inherent power to commit an advocate for breach of an undertaking on the basis that the order sought seeks the court to exercise its punitive and disciplinary power to prevent a breach of duty by an officer of the court, which is quite distinct and separate from the client’s legal right.
2. The purpose of the punitive and disciplinary powers of the courts’ jurisdiction over advocates is not (to enforce) legal rights, but (to enforce) honorable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Cap 16”.

10. In addition I would like to quote the case of S.T.G Mubia T/A S Thuo Mubia & Co. Advocates Vs J M Chege T/A Thuo Mubia & Co. Advocates Vs J. M Chege T/A J M Chege & Co. Advocates (2009) eKLR where J Kimaru (as he then was) quoted the definition of undertaking as set out in Halsbury Laws of England 4th edition re-issue volume 44(1) at page 223 to mean:-

“an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by (i) a solicitor or a member of staff in the course of practice or (2) a solicitor but not in the course of practice whereby the solicitor becomes personally bound”.



11. Further, in the said findings, the Court quoted the definition of undertaking as given in the *Encyclopedia of Forms and Precedents*, 5th Edition Vol.3a at page 581 to mean;-

“An undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance of it and made by a solicitor or member of solicitors staff in the course of practice.....An undertaking is therefore a promise made by a solicitor or on his behalf by a member of his staff, to do or refrain from doing something. In practice undertakings are frequently given by solicitors in order to smooth the path of transactions or to hasten its progress and are convenient methods by which some otherwise problematic areas of practice can be circumvented”.
12. From the above definition of undertaking and the circumstances of the case, the court is to determine whether there was an undertaking herein given by the Respondent and whether the same was fulfilled. Further the Court is to determine whether the applicant is entitled to the prayers sought.
13. In case of *Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga* [2017] eKLR the Court of Appeal observed 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.”
14. From the available evidence, there is no doubt that the applicant herein who is the advocate for the intended purchaser for the sale transaction for all the property known as L.R. No. 1/1381(I.R. 200711) (Original No. 1/835) which was to purchase from Frank Logistics. There is a sale agreement dated 14/12/2021, provided as an annexure to the Originating Summons. It is also evident that the Respondent herein was representing the Vendor.
15. There is also no doubt that vide a letter dated 21/12/2021, the Respondent irrevocably undertook to hold the funds paid as the deposit of the purchase price of Kshs.21,500,000/= as a stakeholder pending the completion of the sale agreement. It is evident and admitted by the respondent that the deposit funds were paid into his account at Cooperative Bank, Account Number 01100093494300 and the balance was to be paid on completion in terms of clauses iii, iv and v of the sale agreement. It is therefore not in doubt that the respondent was holding Kshs.21,500,000/= as stakeholder. The parties have all admitted that the transaction was terminated by the applicant.
16. Upon termination the respondent on behalf of the vendor filed ELC No. E059 of 2022 seeking to compel the purchaser to complete the transaction but the court found in favour of the purchaser and ordered that the respondent refund all the deposit funds paid including interest. The order was issued on 9/06/2022. The deposit funds had not been paid back with interest as ordered to date and that is what necessitated the applicant to file this application.
17. The Respondent has admitted that he released the deposit funds to the vendor trusting that the sale transaction will be completed despite having given an undertaking that he would hold the deposit funds and not release to any party. Taking into account, the definition of a professional undertaking to be an unequivocal declaration of intention addressed to someone who reasonably places reliance on it, then the Court finds that the Respondent made an undertaking herein in which the applicant made reliance on which the Respondent did not at all undertake to remit part of the money held to anybody



until the sale agreement process was complete. Therefore, the Respondent cannot now breach the said undertaking.

18. The Respondent has admitted in his Replying Affidavit that he indeed received Kshs.21,500,000/= as stakeholder pending the completion of the transaction. However, the transaction collapsed and the Respondent should have adhered to his professional undertaking and refunded the money deposited as per the term of the agreement. Though the Respondent has alleged that he paid the money to a 3rd party and there is no evidence that the applicant authorized him to release any money to any third party and that alleged 3rd party is not even named he only refers to him as director of the vendor.
19. It is also evident that, the money was held as stakeholder in the client account at Cooperative Bank the said deposit must have accrued interest and since the money was paid by the applicant, the interest earned belongs to the applicant. The applicant is therefore entitled to be refunded the sum of Kshs. 21,500,000 together with interests.
20. Having now carefully considered the instant originating summons and the annexures thereto and the written submissions filed by the applicant, the court finds that it is merited.
21. Guided by the above cited authorities, I find that the advocate was expected to be aware of the ramifications of issuing a professional undertaking and is therefore under an obligation to honour the undertaking.
22. On the issue of the costs and interest payable, I find that given the duration that the respondent and the client have withheld the money in question, it will be in the interest of justice that the same be paid with interest at court rates after all the advocate for the vendor has stated that he released the money so that the vendor can do business with it. Therefore, he has earned his profit if I may say. After all the good book says to whom much is given then much is expected.
23. Consequently, the court enters Judgement for the applicant against the Respondent as prayed in the Originating Summons in terms of prayers number b, c and d.
24. As I have already stated the applicant is therefore entitled to costs of the Originating Summons to be borne by the Respondent herein.
25. In conclusion, I make the following final orders: -
 - a. The respondent shall within 30 days from the date of this judgment honour the professional undertaking contained in the letter dated 21/12/2021 and pay to the applicant the sum of Kshs. 21,500,000.
 - b. The respondent shall pay interest on the sum above at the courts rates to be calculated from the date of filing this suit till payment in full.
 - c. The applicant to have costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MAY 2023.

.....

MOGENI J

JUDGE

In the virtual presence of:



Mr Githinji, Mr Allen Senior Counsel for the Applicant

No appearance for the Respondent

Ms. Caroline Sagina: Court Assistant

.....

MOGENI J

JUDGE

