



REPUBLIC OF KENYA



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Geoffrey Muriungi Kiugu t/a Kiugu & Co. Advocates v Mohammed Akram Khan t/a M.A Khan Advocates (Civil Case E123 of 2021) [2022] KEHC 13715 (KLR) (Civ) (26 July 2022) (Ruling)

Neutral citation: [2022] KEHC 13715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E123 OF 2021

DO CHEPKWONY, J

JULY 26, 2022

IN THE MATTER OF: AN APPLICATION BY GEOFFREY MURIUNGI KIUGU FOR AN ORDER OF ENFORCEMENT OF A PROFESSIONAL UNDERTAKING AND IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND CIVIL PROCEDURE RULES 2010

BETWEEN

**GEOFFREY MURIUNGI KIUGU T/A KIUGU & CO.
ADVOCATES APPLICANT**

AND

MOHAMMED AKRAM KHAN T/A M.A KHAN ADVOCATES . RESPONDENT

RULING

1. By an originating summons dated May 25, 2021, the applicant is principally seeking for an order directing the respondent to honor his professional undertaking of November 6, 2020 and remit to the applicant the sum of Kshs 5,000,000/= with interests at court rates with effect from March 1, 2021 until payment in full, in addition to costs of this application.
2. The basis of the claim is that one Saptal Kaur Bhachu and one Manohan Sigh Sagoo, (hereinafter referred to as the vendors), entered into an agreement for sale dated December 1, 2017 and a supplementary agreement dated March 22, 2019 in which they agreed to sell their property LR No 12774/2-N-W Mavoko Municipality and registered as IR 130587/1 to Faram East Africa Limited, (hereinafter referred to as the purchaser), for Kshs 96,000,000 but the sale did not materialize. The applicant was and still is the seller's advocate. The purchaser was to pay a deposit of Kshs 9,600,000/= whereas pursuant to special condition no 3 of the sale agreement, the vendors were enjoined to pay the capital gains tax. It is averred that the respondent on behalf of the vendors requested for Kshs 5,000,000/= from the applicant towards payment of the said tax and the applicant paid the same on two instalments of Kshs 2,000,000/= and Kshs 3,000,000/=:, and that upon termination



- of the aforementioned sale agreement, the respondent promised to refund the deposit and made a professional undertaking to honour the promise vide a letter dated November 6, 2020. On simple terms, the respondent vide the said letter undertook to refund the deposit of Kshs 5,000,000/= which was made towards payment of the capital gains tax by the applicant.
3. The applicant reiterates that it is the strength of the mentioned professional undertaking that on behalf of the purchaser it released the original title and the completion documents to the respondent. The applicant adds that upon the bouncing of the sale agreement, the respondent's client/ the vendor, has since refunded Kshs 9,600,000 made as the deposit whereas the respondent has never honored his professional undertaking or refund the amount made as deposit for payment of capital gains taxes even after the applicant agreed to extend the time within which the same was due.
 4. The respondent opposed application vide a replying affidavit sworn by Mohammed A Khan on July 15, 2022. He describes the application herein as malicious, premature and brought in bad faith as the amount claimed is not clear from the documents produced and is also not supported. He disputes the letter dated November 6, 2020 is being a professional undertaking as claimed by the applicant and describes it as a conditional letter which was subject to acceptance by the applicant for release of documents. That since the acceptance was never confirmed by the applicant, the alleged undertaking cannot be said to have crystalized or gained the ability of being enforced. In his view, both the applicant and respondent herein were acting for known and identifiable clients in relation to the bounces conveyance and the payments made were not made by or to the advocates in their personal capacity but on behalf of their clients hence the respondent being merely an agent, cannot be made personally liable. In alluding to the sale agreement, he was of the view that the clause enjoined the applicant as the purchaser's advocate to deliver to the respondent as the vendor's advocate the capital gains tax payment receipt or an exemption certificate and that at no point did the agreement require the applicant or his client to pay the capital gains tax or qualify them to remit any such monies to the respondent and that in any case, the vendor's and purchaser agreed to vary the above, the respondent cannot be held personally liable for such variation.
 5. The respondent further averred that it was express agreement that the dealings of the parties vide the sale agreement was to be actualized tentatively in phases and by filing this application, the applicant breached the agreement. It is for this reason the respondent then believes that the instant application is premature and has been brought maliciously in bad faith.
 6. The applicant filed a supplementary affidavit sworn by Geoffrey Muriungi Kiugu on July 23, 2021 in rebuttal on the averments made in the replying affidavit. He states that it was categorical in the professional undertaking that the respondent would forward the balance of Kshs 5,000,000/= and the deposit of Kshs 9,600,000/= will be forwarded to the applicant once he confirms in writing acceptance of the undertaking. In that respect, the applicant accepted the undertaking vide a letter dated November 9, 2020 contrary to the falsehood depositions made in the replying affidavit to mislead this court.
 7. By consent, parties canvassed the instant application by way of written submissions which i have considered together with the application and the rival affidavits by the respective parties.
 8. It is not in dispute that the parties herein acted as advocates for the vendors and the purchaser in a conveyance that did not materialize. It also not in dispute that the purchaser through the applicant advanced Kshs 5,000,000/= to the respondent for payment of the capital gains tax in addition to deposit made for the purchase.
 9. The respondent also does not dispute authorship and contents of the letter dated November 6, 2020 and the contents thereof. What appears to be the dispute as I understand is whether the said letter



date November 6, 2020 amounts to a professional undertaking and whether the respondent should be called upon to honour the same.

10. To ponder the question as to what amounts to a professional undertaking, I will consider various decisions including the Court of Appeal's decision in Civil Appeal No 165 of 2009, Waruhiu K'owade & Ng'ang'a Advocates – vs- Mutune Investment Limited [2016] eKLR stated:

“Our answer is that a professional undertaking is an unequivocal promise made by a party to another either to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party, to which liability may attach. See *Equip Agencies Limited v Credit Bank Limited* [2008] 2 EA 115 (HCK). Generally speaking, professional undertakings are given by advocates in order to make transactions easier, faster and more convenient. Where an advocate breaches a professional undertaking, the court has jurisdiction to order the enforcement of that undertaking.

In enforcing undertakings, the court is guided not by the considerations of contract, or of securing the legal rights of parties, but mainly by ensuring the honesty of advocates. See *Muiruri v Credit Bank & Another* (Civil Appeal No 263 of 1998) LLR No 5676 (CAK).

11. Similarly, the Court of Appeal in Harit Sheth t/a Harit Sheth Advocate –v- K Osmond Advocates [2011] eKLR (Civil Appeal No 276 of 2001),

“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)”

12. In the present case, the letter contested to be an undertaking and dated November 6, 2020 reads in part;
RE; Offer To Purchase LR No 12774/2-mavoko Municipality

“I refer to your letter of October 15, 2020. I also refer to the telephone conversation that the write had with your Mr Kiugu when I informed him that I will pay the sum of Kenya shillings five million by the end of February, 2021. I hereby give you my professional undertaking that I shall pay the sum of Kenya shillings five million 5,000,000 at the end of February, 2021 for which amount I give my said professional undertaking...”

13. I have further perused the annexure marked as GMK-4 which is the respondent's letter dated March 10, 2021 to the applicant and it reads in part;

“

I refer to the above subject matter and to my professional undertaking to pay to you a sum of Kenya shillings five million (Kshs 5,000,000) in this matter.

.....I will definitely honor my undertaking to you”



14. It is clear from the wording of the two letters above that the respondent knowingly issued an unequivocal professional undertaking to pay the sums stated therein. It's his word against himself and the letters have been authored and signed by him. I have also perused the annexure marked as GMK-6 being a letter dated November 9, 2020 by the applicant confirming acceptance of the conditions for the undertaking. For that reason, it cannot be that the letter dated November 6, 2020 is a professional undertaking and not a conditional letter as alleged by the respondent.
15. In addition, part IV of the Code of Standards of Professional Practice and Ethical Conduct under clause 130 to 133 discusses the question of professional undertakings as follows:-
 - (130) SOPPEC-9 The advocate is under a duty to honour any professional undertaking given in the course of his/her practice in a timely manner. The obligation to honour a professional undertaking remains until the undertaking is performed, released or excused. Failure to honour an undertaking is professional misconduct.

Professional undertakings:

(131) An undertaking is a formal promise whose effect is to

make the person giving it responsible for the fulfilment 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.

(132) Rationale for the Standard:

The effectiveness of undertakings given by the advocates depends on the confidence and belief that a party has that reliance can be placed on the undertaking. The advocate's failure to honour the undertaking undermines such confidence and is detrimental to the client's interests. Moreover, a breach of a professional undertaking adversely affects the advocate's reputation as well as the reputation and trustworthiness of the legal profession as a whole and potentially can jeopardize legal transactions.

(133) A professional undertaking is enforceable against the

advocate personally and therefore the advocate must exercise care when giving and accepting an undertaking, care requires that the advocate observes the following principles in giving an undertaking:

- a. Obtain the client's express authority to give it;
- b. Give the undertaking in writing and, where given verbally, reduce it into writing as soon as reasonably practicable thereafter to avoid misunderstanding as regards the interpretation to be given to the undertaking;
- c. Only give an undertaking which the advocate has full control over the ability to fulfil;
- d. Neither give nor accept an undertaking which, to the advocate's knowledge, the advocate giving the undertaking has no means with which to fulfil it;
- e. Where the advocate does not intend to accept personal responsibility for the fulfilment of the undertaking make this clear in the terms of the undertaking given;
- f. Exercise diligence when accepting an undertaking from an advocate."



16. It is presumed that an advocate who issues a professional undertaking does so in compliance with clause 133 of the Code of Standards of Professional Practice and Ethical Conduct (supra). The respondent has not shown to the satisfaction of this court that he was coerced while giving the professional undertaking or he never understood its repercussions. As already observed, in view of the judgment of the Court of Appeal in *Harit Sheth T/A Harit Sheth Advocate –vs- K. Osmond Advocates* (supra) a professional undertaking is binding on the advocate personally and must be honored. The superior court in affirming that position stated as follows;

“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)”

17. In the upshot, it has been shown to the satisfaction of this court that the respondent issued a professional undertaking which he has failed or refuse to honor and must be compelled to do so. I direct that the respondent honours his professional undertaking issued vide he letter dated November 6, 2020 within 60 days from the date of this ruling, failure to which the applicant shall be at liberty to execute. The amounts in the professional undertaking shall attract interests at court’s rates from the date of this ruling.

18. Costs of the application to applicant.

19. It is hereby ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED A NAIROBI THIS 26TH DAY OF JULY, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Njeri counsel holding brief for Kiugu for Applicant

Court Assistant - Kevin

