



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NYERI**

**CIVIL SUIT NO. 2 OF 2020(OS)**

**IN THE MATTER OF A PROFESSIONAL UNDERTAKING BETWEEN**

**ADVOCATES FOR THE VENDOR AND THE FINANCIER**

**IN THE MATTER OF SALE AND PURCHASE OF LAND REFERENCE BLOCK 2/15**

**NDERI & KIINGATI ADVOCATES.....APPLICANT**

**VERSUS**

**KIRUTI & COMPANY ADVOCATES.....RESPONDENT**

**J U D G M E N T**

1. On the 4<sup>th</sup> June, 2020, the plaintiff filed this suit by way of Originating Summons seeking for orders that the defendant be called upon to honour an undertaking in favour of the applicant for payment of part of the balance of the purchase price of Kshs.25,000,000/= together with interests at the rate of 8.5p.a from 01/10/2019 until payment in full. The plaintiff also seeks for an order of enforcement of payment of the said sum in the event of failure by the respondent to honour the undertaking within the time that the court may stipulate.
2. The Originating summons is supported by the affidavit of James Njenga Nderi who describes himself as an advocate of the High court practicing in the name and style of Nderi Kiingati Advocates. He states that on or about 18/07/2018, he was engaged by the vendor one Peter Ndegwa Muriithi in a sale and purchase transaction of the property known as L.R. Block 2/15 whose property was being purchased by Executive Super Rides Limited. The sale was subject to finance to the purchaser by Guardian Bank Limited guided by separate terms between the purchaser and the financier.
3. The respondent represented the financier in the transaction and issued a professional undertaking to the plaintiff on 25/02/2019 binding himself to pay the applicant the balance of the purchase price within 14 days upon successful registration of a charge in favour of the financier, Guardian Bank Limited. By 20/09/2019 the registration of the charge was completed and the plaintiff informed by a letter dated 01/10/2019.
4. Before the release of the balance of the purchase price to the vendor as undertaken could be effected, a suit was filed in Milimani court by a third party claiming to be paid agent commission at the rate of 5% amounting to Kshs.18,000,000/= by the vendor. On 05/12/2019 an order was issued on interim basis directing the defendant Guardian bank to deposit Kshs.18,000,000/= out of the amount held by them of Kshs.25,000,000 in court as security for judgement in favour of the 3<sup>rd</sup> party. The said orders were later set aside on appeal to the High Court.
5. The parties in this case agreed to open an escrow account where the funds retained by the defendant would be deposited. However, due to some disagreements between the parties the funds were not deposited in the said account. The plaintiff then made a demand to the defendant to honour the undertaking in his letter dated 03/03/2020.
6. In his replying affidavit, the defendant admitted the existence of land sale transaction between the parties, the act of financing the purchaser by Guardian Bank Limited of the balance of the purchase price and the engagement by the parties of their respective advocates and the completion of the registration of the charge in favour of the financier since the property L.R 2/15 was to be utilized as the security for the facility.
7. In regard to the undertaking dated 25/02/2019, the defendant stated that the plaintiff misunderstood the document which did not require him or his firm to pay the balance of the purchase price within 14 days of the registration of the charge in favour of the financier but only bound him to inform the financier to make payments of the financed balance of the purchase price to the plaintiff at its Consolidated Bank

Limited account. The defendant was categorical that nowhere in the professional undertaking did he agree or undertake to make payment of any amount of the purchase price and as such there is no payment capable of being enforced.

8. The defendant further stated that it is the financier who made a financial undertaking dated 25<sup>th</sup> February 2019 to the plaintiff and that all the defendant did was to forward the same to the plaintiff. The defendant further states that he fulfilled his obligations of informing the financier to make payment of the financed purchase price of Kshs.330,000,000/= further that the plaintiff supports this fact in his pleading by stating that only Kshs.25,000,000/= remain unpaid by the financier.

9. The defendant states that he is aware that a civil suit was filed against the financier being **Milimani CMCC No. 3532 of 2019 Mutai Githaiga -vs- Peter Ndegwa Muriithi, Guardian Bank & Executive Super Rides Limited** claiming Kshs.18,000,000 and an order compelling the financier to deposit the said amount in court which orders were subsequently set aside on appeal.

10. It was averred that the plaintiff has not disclosed to the court that the parties had agreed to sign a Deed of Variation which was not executed so as to have the Kshs.25,000,000/= deposited in an interest earning account in the joint names of the advocates on record.

11. The plaintiff in his further affidavit filed on 31/08/2021 stated that the defendant's professional undertaking was irrevocable and unconditional undergirded by the financier's undertaking and in the ordinary course of a conveyance the two are inseparable as to their meaning, intents and tenor. That the plaintiff proceeded on the mutual understanding that the balance of the purchase price was to be paid upon registration of the charge. That the unpaid amount is in the hands of the defendant and that a suit by a 3<sup>rd</sup> party ought not affect a legal and valid contract between the parties. It was further argued that the financier continues to charge interest on the whole amount advanced to the purchaser while it still holds part of the funds which is unfair and contrary to the interests of justice.

12. I have perused the pleadings evidence and the submissions of the parties and I find that the issues for determination are as follows:-

- a. What was the nature and extent of the professional undertaking between the parties and is it capable of being enforced.
- b. Whether the undertaking was altered by the consensus of the parties.
- c. Whether the defendant is liable to release the unpaid amount to the plaintiff.
- d. Whether the said amount attracts interest, and if so how much.
- e. Who between the parties will be condemned to pay the costs of this suit.

13. This suit revolves around an undertaking given by the defendant who was acting for his client the financier in a conveyancing transaction. The first question to be addressed herein is "what is an undertaking?"

Black's Law Dictionary describes undertaking thus:

"A promise pledge, or engagement on behalf of another...."

In this regard, a professional undertaking was described in the case of **David Karanja Thuo T/a D.K Thuo & Company Advocates -v- Ishvinder Kaur Kalsi Marwa t/a Kalsi & Company Advocates 2019 eKLR** as follows:-

An undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a Solicitor in the course of his practice, either personally or by a member of his staff; or a Solicitor as "solicitor". but not in the course of his practice, under which the Solicitor...becomes personally bound. An undertaking is therefore a promise made by a solicitor....to do or refrain from doing something. In practice, undertakings are frequently by Solicitors in order to smooth the path of a transaction, or hasten its progress and are convenient methods by which some otherwise problematic areas of practice can be circumvented"

14. In this case, the respondent on behalf of his client Guardian bank Limited gave the following undertaking on 25/02/2019 to the plaintiff:-

We act for Guardian Bank Limited ("the financier") who have agreed to extend certain banking facilities (the "Facilities") to Executive Super Rides Limited ( the "Purchase") which Facilities will inter alia be utilized towards the payment of the balance of the purchase price in respect of the property known as land Reference Number 2/15, Ngong Road, Nairobi (the "Property") registered in the name of Peter Ndegwa Mureithi (the "Vendor"). The said Facilities are to be secured by, inter alia, a Legal Charge in favour of the Financier over the Property to be registered simultaneously with Transfer thereof.

In this regard and on the instructions of the Financier, in exchange of the completion Documents requested hereunder, we hereby give our irrevocable and unconditional professional undertaking in the following terms:-

1. That we shall hold the completion Documents in trust for you and your order, and that we shall not release or allow to be released the Completion Documents to any other Advocate or person whomsoever, other than to relevant government officials concerned with the registration of the Transfer in favour of the Purchaser (the "Transfer") and the Legal Charge in favour of the Financier (the "Charge") without your prior written consent and that notwithstanding such consent we shall continue to be liable to you for the handling of the Completion documents by any third party.

2. That we shall within fourteen (14) days of receipt by us of the duly registered Transfer and Charge from the Lands Registry and the companies Registry (as applicable) time being of essence), inform the Financier to make payment of the sum of Kenya Shillings Three Hundred and Fifty Million (Kshs.350,000,000/=)(the “Financed Amount”), being the financed balance of the purchase price, by way of Real Time Gross Settlement(RTGS), to the Vendor’s Advocates designated account whose details are as hereunder:

Bank Name: Consolidated Bank of Kenya Limited

Bank Branch: Nyeri

Account number: \*\*\*\*\*

Account name: Nderi & Kiingati Advocates, Client’s Account

3. That we shall not utilize the completion Documents for any purpose other than for registering the Transfer and the Charge at the Lands Registry.

4. That we shall not present or cause to be presented for registration the Transfer without simultaneously presenting the Charge for registration, to the intent that if one is not accepted for registration at the Land Registry then none will be presented for registration.

5. That we shall immediately upon receipt of the duly registered Transfer and charge notify you of such registration.

6. That we shall exercise our best endeavours to ensure that the registration of the Transfer and the charge is completed expeditiously.

7. That if payment of the Financed Amount as specified hereinabove or the registration of the Transfer and the Charge is not effected within Sixty (60) days from the date you forward to us the Completion Documents, or such other period as shall be extended by you in writing, we shall immediately upon written demand by you, return the Completion Documents to you unutilized and in the same condition that they were on being delivered to our offices, and with any entries that may have been made on the completion documents by the Lands Registry as a result of such attempted registration duly cancelled.

15. The relevant documents requested in the undertaking were forwarded to the defendant and the charge had been registered by 25/09/2019. However, the amount paid in the bank account of the plaintiff was Kshs.305,000,000/= instead of the undertaken or agreed sum of Kshs.330,000.

16. It is not in dispute that a suit was filed by a 3<sup>rd</sup> party at Milimani CMCC No. 3532 of 2020 against the vendor, his advocate and the bank. Thereafter, the parties orally agreed that the sum of kshs.25,000,000/= that remained unpaid could be deposited in an escrow account in the joint names of the Vendor’s and the financier’s advocates. In this regard, the parties concerned failed to agree on the institution for depositing the funds. The financier wanted to have the funds deposited with it while the plaintiff chose Housing Financé Company of Kenya (HFCK).

17. The parties discussed the issue of variation of the agreement to provide a legal basis for investing the money pending the determination of the civil suit at Milimani. The Deed of Variation was drafted by the defendant but the plaintiff declined to sign it due to some disagreements between them.

18. The plaintiff relied on the following authorities among others in support of his case that the undertaking was indeed binding on the defendant:-

**a. Nelson Andayi Honi T/a Havi & Company Advocates –Vs- Jane Muthoni Njage T/a J.M Njage & Company Advocates (2015) eKLR**

28)Also, the law is that, the jurisdiction of the Court in enforcing an undertaking by an advocate is not exercised for purposes of enforcing legal rights or obligations of the client but for purposes of enforcing honourable conduct on the part of the advocate as an officer of the court. Thus, it enforces the undertaking strictly as a contract on its own separate from the primary contract between the parties. The honourable conduct of the advocate is embedded in the undertaking. (See the case of Karsam Laji Patel vs. Peter Kniamai Kairu t/a Kimani Kairu & Co Advocates [200] eKLR (supra). In saying these things, I am fully aware that this is not a suit against the purchaser by the vendor on a claim for interest as provided for in the contract. It is one for enforcement of an undertaking. There is,however, a clear delayed completion and late honouring of the undertaking by the Defendant. In the absence of special reasons or circumstances the court would normally have little difficulties in ordering the Defendant to honour the undertaking. But the Defendant was fully aware that the undertaking she gave was explicit that she was:-

“...to pay...the balance of the Purchase price in the sum of Ksh.45,000,000/= within seven (7) days of successful registration of the Conveyance in favour of the Purchaser or within thirty (30) days upon release of the completion documents whichever is the earlier”. And as the law stands, it was not up to the Defendant to care about whether honouring of the undertaking will produce unfavourable results to her clients. Any advocate would, of course, be concerned that it would be safe to honour such undertaking after effective registration of the conveyance. But such fear would be unfounded as an undertaking is always given on full instructions of the client and is anchored on the primary contract between the clients. The advocate must ensure he is in funds before giving an undertaking. In this case, the undertaking was that the advocate was to pay...the balance of the Purchase price in the sum of Kshs 45,000,000/= within seven (7) days of successful registration of the Conveyance in favour of the Purchaser or within

thirty (30) days upon release of the completion documents whichever is the earlier” Although there is an element of successful registration of the Conveyance, the operative words are... “or”...”whichever is the earlier”. The completion documents were sent to the advocate and 30 days lapsed before the registration of the Conveyance; that was the earlier occurrence as per the undertaking and so she should have paid the agreed sum within 30 days of release of the completion documents by the Plaintiff, unless, the undertaking had been lawfully varied. The communication in the letter dated 24th July, 2019 that:- “In view of the foregoing it is our honest opinion that the interest should be waived in appreciation of the circumstances operating then”...was not variation of the undertaking herein. Therefore, having failed to do as required by the undertaking, the Defendant was clearly in breach of the undertaking. In such circumstances where the advocate did not honour the undertaking until after a suit had been filed and did not seek the consensus of the other counsel to vary the terms of the undertaking constitute special reasons on which the court may issue a coercive order of enforcement especially given that the Defendant was in funds all this time but just did not honour the undertaking. To hold otherwise would encourage a practice where advocates will give undertaking without the intention of honouring them as stipulated. Such conduct would undermine the noble purpose of professional undertaking in conveyancing and the effect would be that conveyancing would be made extremely difficult if the trust in professional undertaking is lost.

**b. Patrick Lutta T/a Lutta & Company Advocates –V- Ishvinder Kaur Kalsi Marwa T/a Kalsi & Company Advocates 2019 eKLR** where the court relied on the holding in the case of **Harit Shethi T/a Harit Sheth Advocate (2011)eKLR. The court of Appeal HELD :-**

“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 and an officer of the court”.

**c. Fidelity commercial Bank Limited –vs- Onesmus Githinji & Company Advocates (2013) eKLR** where J.B Havelock held –

“ An undertaking given by a solicitor is personally binding on him and must be honored. Failure to honour an undertaking is prima facie evidence of professional misconduct and the Council of the Law society will require the undertaking to be honoured as a matter of conduct. Although consideration for the promise will often be present, an undertaking is enforceable even if it does not constitute a legal contract.....Any ambiguity in the terms of undertaking is generally construed against the party who gave the promise. In general., no terms will be implied into a professional undertaking and extraneous evidence will not be considered”.

19. The relevant part of the undertaking to this case given by the defendant is for payment of Kshs.330,000/= to the plaintiff upon completion of the registration of the charge.

20. It is not indispute that the plaintiff fulfilled his part of the undertaking by forwarding all the required documents to facilitate the registration of the charge in favour of the financier. The charge was indeed registered and the plaintiff informed of the progress after that the ball was in the court of the defendant and the financier to deposit Kshs.330,000/= in the account of the plaintiff as described in the undertaking. It is not indispute either that only Kshs.305,000,000/= was deposited leaving Kshs.25,000,000 outstanding.

21. The defendant does not deny the undertaking but disputes the allegation that it involved the payment of the funds to the plaintiff arguing that his obligation was limited to informing his client to pay the funds which he did. My reading of paragraph of the undertaking signed by the defendant is that he would inform the financier to pay the total amount of the financed balance of Kshs.350,000/= into the plaintiff’s account. Having been retained by the financier as its advocate, the defendant was under a legal obligation to advise his client that upon registration of the charge the full agreed amount is payable and must be paid. To limit the instructions to informing would be outside the scope of conveyancing transactions. The financier depended on the defendant to do what it takes to complete the transaction as per agreement.

22. If any issues of legal nature arose, the defendant retained the authority to advise the financier on the implications of such issues. The Milimani civil suit had little or no bearing on the undertaking by the defendant in that it involved a contract between the 3<sup>rd</sup> party and the vendor. There are no court orders in the suit that compelled the financier to provide security for judgement by retaining the sum of Kshs.18,000,000/= or Kshs.25,000,000/= It does not matter that the financier was sued in court in the Milimani case but the undertaking remained a legal obligation on part of the defendant. The defendant was under a legal obligation to advise his client to pay the funds. I do not agree with the defendant that his obligation was limited to only informing his client to pay.

23. It was held in the **Nelson Havi –vs- Jane Njage case (Supra) that** “ a professional undertaking given by an advocate is a separate and distinct contract which is enforceable between the parties and that only advocates in the undertaking can enforce the undertaking.”

24. The plaintiff having fulfilled his legal obligation in the land sale and purchase transaction, the defendant as the financier’s advocate cannot wash his hands of the matter by refusing to fulfill the undertaking that he had given. It did not make sense as argued by the defendant that the undertaking was given by his client and that he only forwarded it to the plaintiff. The undertaking dated 25/02/2019 was signed by the defendant and sent to the plaintiff.

25. The purchaser wrote to the plaintiff an email on 16/06/2020 to the effect that the full amount of the financed balance owed to the vendors had been deposited in the defendant’s account. The defendant did not deny the existence and the truth of the said email which was produced in evidence neither did the defendant write to the plaintiff thereafter to say that he had returned the funds to the financier in view of the pending civil suit. Even if the defendant sent such communication, he had given an unequivocal and irrevocable undertaking to have the full

amount of the financed balance paid into the plaintiffs account. Both parties are in agreement that a Deed of Variation had been drafted but was not executed. As such the original undertaking or contract had not been altered. Even though there was a mutual agreement to deposit the unpaid sum of 25,000,000/= in an interest earning account, this remained an oral agreement which expired the moment the parties differed on the financial institution for the deposit. Even if the oral agreement subsisted, it is trite law that an oral agreement cannot alter a written agreement. The written undertaking remained the contract to guide the parties unless altered by a Deed of Valuation executed by the parties.

26. It has not been explained by the defendant why he should continue holding the unpaid sum which is a right of the vendor under the land sale and purchase contract. In my view, there exists no provision that allows the defendant to protect the rights of 3<sup>rd</sup> parties by violating the rights of parties to an undertaking. The rights of a 3<sup>rd</sup> party are protected by the law and will be adjudicated upon by the court enjoined of the suit at the right time upon proof. Civil Procedure Rules takes care of recovery and enforcement decretal amounts. It is, therefore, not a duty that the defendant should abrogate himself.

27. Is the plaintiff entitled to an order of enforcement? Should this court find the claim herein successful, the law provides for enforcement of the judgement given in favour of a party to a suit.

28. It was held in the case of **Daniel Ochieng Ogola T/a Ogola Okello & Company Advocates –vs- Joel Kyatha Mbaluka T/a Mbaluka & Associates**

“Where an advocate breaches a professional undertaking, the court has jurisdiction to order enforcement of that undertaking.”

29. I am in agreement with the holding of Muigai J. in the foregoing case. The plaintiff has come to court for a remedy and if he is successful, he ought to be given his right.

30. The plaintiff claims interest at the rate of 8.5 per annum on the unpaid balance. He relies on the case of **Nelson Andayi Havi (supra) 2015 eKLR** where the defendant delayed payment of the amount of the undertaking which had been agreed to be payable within 30 days of release of the completion documents, and the court held:-

29 “It may be said that, conduct such as being complicit or deliberately withholding plaintiff’s money would earn the advocate penalty in form of interest for having denied the plaintiff his money.

31. It follows that money held by a person against the interest of the deprived over a period of time ordinarily, loss occurs in that the owner of the funds had plans on how to invest or spend that money. Such a deprived person requires to be compensated with an order for payment of interest.

32. In the case of **Naphtali Paul Radier –Vs- David Njogu Gachanja HCC No. 582 of 2003 (O.S)** where justice H.P.G Waweru held:-

“The defendant has withheld the plaintiffs money from August 2002. Justice demands that he pays it with interest”

33. It is trite law that so long as monies that was undertaken to be paid remains unpaid, interest on it for the unpaid period provided.

34. In regard to who is liable to pay the costs of the suit, the law gives discretion to the Judge in Section 27 of the Civil Procedure Act. The proviso to this Section provides:-

“Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”.

35. Courts have always been guided on the issue of costs by Section 27 in awarding costs in a host of cases.

36. The plaintiff filed this suit after the defendant had failed to pay part of the agreed balance in the undertaking between the parties. Breach of an undertaking is by itself a misconduct and as such, the defendant should be ordered to pay costs of the suit

37. Consequently I find that the plaintiff has proved his case on the balance of probabilities.

38. I enter judgement in favour of the plaintiff as follows:-

a. That the defendant to pay within thirty (30) days the unpaid balance owed to the vendor of Kshs.25,000/= with interest of 8.5 per cent from the date of demand 3<sup>rd</sup> March 2020 until payment in full.

b. That in default, execution to issue against the defendant.

c. That the defendant do meet the costs of the suit

39. It is hereby so ordered.

**DELIVERED, DATED and SIGNED at NYERI** this 11<sup>th</sup> day of February, 2021.

**F. MUCHEMI**

**JUDGE**

Judgment delivered through video link this 11<sup>th</sup> day of February 2021