



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**HCCC 35 OF 2019 (OS)**

**NJUGUNA KAHARI & KIAI.....PLAINTIFF**

**VERSUS**

**JULIUS M. KABAIKU T/A KABAIKU & CO ADVOCATES.....DEFENDANT**

**RULING**

**BACKGROUND**

The Applicant filed Originating Summons on 31<sup>st</sup> January 2019 brought under **Order 52 Rules 7 of CPR 2010 & Section 3 of CPA** and sought following orders;

- a. That the Court orders Kabaiku t/a Kabaiku & Co Advocates to honour his Professional undertaking of 19<sup>th</sup> October, 2017 given to the Plaintiff/Applicant's firm by paying outstanding Ksh 10,000,000/- with interest at Court Rates from 5<sup>th</sup> April 2018 until payment in full within 7 days of the Court Order.

The applicant relied on the following grounds;

The Plaintiff/Applicant, representing the vendor Margaret Nyokabi Mbugua agreed to sell to the Purchaser parcels of land **LR No 12825/245 & 12825/246** for Ksh 200,000,000/- which was partly financed by Equity Bank Ltd.

The Purchaser paid Ksh 20,000,000/- & Ksh 60,000,000/- on 15<sup>th</sup> September, 2016 and 15<sup>th</sup> October, 2017 respectively.

On 19<sup>th</sup> October, 2017 the Respondent issued a Professional undertaking to M/S Njuguna, Kahari & Kiai Advocates undertaking to pay the outstanding balance of the unfinanced purchase price of Ksh 20,000,000/- within 7 days of successful transfer of the subject properties **LR No 12825/245 & 12825/246** in favour of his client. In April 2018, Equity Bank Limited subsequently charged the suit parcels after they were successfully transferred to the Purchaser.

The Respondent in utter disregard of the terms of the Professional undertaking paid further Ksh 10,000,000/- and not the Ksh 20,000,000/- as promised and contrary to the clear and unequivocal terms of the Professional undertaking.

The Respondent despite service did not file and serve Replying Affidavit to the OS as granted time to file on 14<sup>th</sup> February & 25<sup>th</sup> March 2019. The Respondent instead filed Chamber Summons of 6<sup>th</sup> February 2019 to join 3<sup>rd</sup> Party Diamond Property Merchants Limited.

The Applicant filed Grounds of Opposition on 19<sup>th</sup> February 2019. On 21<sup>st</sup> May 2019 the Respondent informed the Court that the intended 3<sup>rd</sup> Party's Director was/is deceased. The said intended Interested Party was in the process of obtaining a loan to settle the amount outstanding.

The Applicant objected that no evidence of the Respondent obtaining the loan was presented to Court. The death of one of the Director's of the intended 3<sup>rd</sup> Party Company was not confirmed by production of any document. The Applicant asserted that the Professional undertaking is between Advocates and not 3<sup>rd</sup> Parties.

This Court in form of interim orders granted the Respondent 30 days reprieve to obtain funds from the intended 3<sup>rd</sup> party to settle the debt, in default, the transfer of the suit properties be revoked to the extent of value of Ksh 10 million due and owing.

The Applicant filed application on 18<sup>th</sup> September 2019 to set aside, vary or vacate the interim orders of 21<sup>st</sup> May 2019 and have the OS heard and determined on merit scheduled to be heard on 30<sup>th</sup> July 2019.

On 30<sup>th</sup> July 2019, this Court granted the following orders;

- a. The Court record confirms that the Applicant's OS of 31<sup>st</sup> January 2019 is not contested/opposed to date, the only issue is that an intended 3<sup>rd</sup> Party failed to remit Ksh 10 million to date.
- b. Counsel for the Purchaser shall engage Counsel for the Vendor for payment/Schedule of the debt of Ksh 10million as the same arose out of a Professional undertaking.
- c. Counsel /Respondent is at liberty to sue and recover Ksh 10 million from the intended 3<sup>rd</sup> Party Diamond Properties Limited.
- d. In default of Consent/Settlement on Schedule to pay Ksh 10 m as at 16<sup>th</sup> September 2019, the OS shall stand granted as an order of this Court and especially Prayer 3 of the OS where judgment is entered for Ksh 10m against the Respondent.
- e. The matter as stated by Applicant Lawyer has delayed.

Thereafter parties through Counsel entered into Consent compromising the OS that the Respondent to settle the debt of Ksh 10m within 30 days in default execution to issue of the whole amount.

On 16<sup>th</sup> September 2019 the Court file was missing, later in the day the said file was retrieved and the Respondent's advocate sought to set aside orders of the Court of 30<sup>th</sup> July 2019. The Court sought a formal application to be filed and served for the Court to hear and determine the same on merits.

#### **INSTANT APPLICATION**

The Respondent filed application on 19<sup>th</sup> September 2019 and sought;

- a. Stay of execution of the orders of 30<sup>th</sup> July 2019 pending hearing and determination of the application
- b. The Court to review and/or set aside orders of 30<sup>th</sup> July 2019
- c. The Court to extend time to make payment by 30 days.

The Respondent relied on the following grounds,

- a. Josphat Gichunge Mwirabua already registered a charge on his property to enable him pay KSH 10 million.
- b. The charge was registered on 1<sup>st</sup> August 2019 for Ksh 12million as confirmed vide the Charge by KCB as evidenced by copy of Charge annexed to the application.

The Applicant filed the Grounds of Opposition on 30<sup>th</sup> September, 2019, opposed the application as misconceived, scandalous and vexatious and abuse of the Court's process.

#### **DETERMINATION**

**Order 45 (1) CPR 2010 on review provides;**

**(1) Any person considering himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

The OS filed on 31<sup>st</sup> January 2019 is based on a claim for dishonour of Professional undertaking by the Respondent /Advocate to the Plaintiff/Advocate for Purchaser who on the undertaking released documents of title and facilitated transfer of ownership of the suit

properties. The sale and transfer were completed. However, the Vendor has no land worth Ksh 10 million to claim or own or hold on to, neither has the balance of 10 million which is not contested paid.

The legal position of Professional undertaking is settled. In the case of Harit Sheth Advocate vs K.H.Osmond [2011] eKLR it was observed;

**“...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 professional undertaking. He cannot however sue to recover that amount unless he has first honoured his professional undertaking.”**

I took the liberty to outline the proceedings culminating to the Court order of 30<sup>th</sup> July 2019. The Respondent failed despite numerous opportunities to file Replying Affidavit or any response to the O.S of 31<sup>st</sup> January 2019. In the absence of any explanation, reasons or circumstances to be considered by this Court, there is no contest, no issue to be determined by this Court, the OS is unchallenged and hence granted.

Secondly, throughout the proceedings, the Respondent did not deny the Professional undertaking, its dishonour or the amount due and owing. All that has happened is that the Respondent sought extension of time to pay /settle the debt. In fact on 14<sup>th</sup> November 2019, the Respondent promised to remit funds in 7 days on 21<sup>st</sup> November 2019, as the Respondent was in the process of obtaining funds.

Thirdly, the Applicant contended that the Application sought orders of 10<sup>th</sup> July 2019 be set aside. The Court record confirms that no orders were made in this matter on the stated date.

For these reasons, the court finds no new evidence, error or mistake on the face of the record or any sufficient reason advanced for the review of Orders of 30<sup>th</sup> July 2019.

#### **DISPOSITION**

- 1. The application filed on 18<sup>th</sup> September 2019 is dismissed with costs**
- 2. The interim stay of execution pending hearing and determination of the application is vacated.**
- 3. If by now the amount due and owing under the Professional Undertaking is paid or is in the process of payment and settlement, these orders are overtaken by events.**
- 4. If the amount is due and owing, then orders of 30<sup>th</sup> July 2019 are in force and execution may proceed in terms of Prayer 3 of OS of 19<sup>th</sup> January 2019.**
- 5. The execution process shall only be held in abeyance for now as we are in corona virus pandemic lockdown until the Government announces resumption of normalcy.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 28<sup>TH</sup> APRIL 2020**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**NJUGUNA, KAHARI & KIAI ADVOACTES FOR APPLICANT**

**KABAIKU & CO ADVOCATES FOR DEFENDANT**