



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 91 OF 2019 (OS)

SALI ALI SHEIKH.....PLAINTIFF

VERSUS

ABIB ZAM ZAM ABDI T/A

ABIB & ASSOCIATES ADVOCATES.....DEFENDANT

R U L I N G

1. Before court is the Originating Summons dated **1st March 2019** in which **SALIM ALI SHEKH** the Plaintiff/Applicant seeks the following orders:

“1. SPENT

2. SPENT

3. SPENT

4. That the Honourable court be pleased to compel the Defendant to deposit the sum of Kenya Shillings Twenty one million being the principle amount plus the interest in court.

5. That this Honourable Court be pleased to issue orders compelling the Defendant to furnish the Plaintiff with certified copies of the extracts of the Defendant’s client account no. 0013879801 demonstrating the movement of the Plaintiff’s funds or any parts thereof from the point of receipt to date pending hearing and determination of this summons.

6. That the Honourable Court be pleased to compel the Defendant to pay a sum of Kenya Shillings Twenty One Million (21,000,000) in terms of professional undertaking.

7. That the Orders issued herein be served upon First Community Bank.

8. Any other orders this Honourable Court deems fit and just in the circumstances.

9. Costs of this application be provided for”.

2. The application was premised **order 40 and order 53 Rule 7 and 10** of the Civil Procedure Rules, 2010; **Section 1A, 1B, 3A and 63** of the Civil Procedure Act, Cap 21, Laws of Kenya and all enabling provisions of law and was supported by the Affidavit of even date sworn by the Plaintiff/ Applicant.

3. The Defendant/Respondent **ABIB ZAM ZAM ABDI T/A ABIB & ASSOCIATES ADVOCATES** opposed the application and doing so relied on the Affidavit dated **21st May 2019**, sworn by **MOHAMED ALI MOTHA**, a Director of **HALAL MEAT PRODUCTS LIMITED**.

4. Thereafter, the Plaintiff/Applicant filed a supplementary Affidavit dated **26th April 2019** in response to the Replying Affidavit. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **6th September 2019** whilst the Defendant/ Respondent filed its submissions on **25th September 2019**.

BACKGROUND:

5. This summons revolves around an irrevocable professional undertaking dated **30th November 2018** to remit the sum of **Kshs. 21,000,000** issued by the Defendant to the Respondent. The said letter of undertaking appears as **Annexure “SAS-2”** to the Plaintiff’s supporting Affidavit dated **1st March 2019**.

6. The events leading up to the issuance of this letter as professional undertaking were as follows. The Defendant who was an Advocate had engaged the Plaintiff to assist in pursuing payment which was due from the **National Land Commission** to **HALAL MEAT PRODUCTS LTD.** who were the Defendants/Clients as compensation for the compulsory acquisition of the clients property brown as **Ngong/Ngong/2221, 2628 and 2629**.

7. The agreement between the Plaintiff and the Defendant was that the Plaintiff would pursue the said compensation to ensure its release from the **NLC**, and in consideration of this assistance the Plaintiff would be paid the sum of **Kshs. 21,000,000**.

8. The Plaintiff submits that he held up his side of the bargain and handed over the letter of offer form **NLC** dated **29th November 2019** [**Annexure SAS-1** to supporting affidavit]. Eventually the compensation payment was made.

9. On **29th January 2018**, the Defendant issued the Plaintiff with a cheque for **Kshs. 6,000,000**. Before encashing the said cheque the Plaintiff claims that the Defendant ‘**cajoled**’ it into signing a document which effectively discharged the Plaintiff from the undertaking dated **30th November 2018**. However, when the Plaintiff then attempted to encash said cheque, he was informed by the Bank that the Defendant had stopped payment of the **Kshs. 6,000,000**.

10. The Plaintiff efforts to follow up the matter with the Defendant have not borne fruit. Hence the present application.

11. On its part the Defendant denies having breached the letter of undertaking issued on **30th November 2018**. The Defendant submits that their client **Halal Meat Products Limited** received letters of compensation from the **NLC**. The Plaintiff then represented to the Defendant that he was in a position to facilitate release of the said compensation to **Halal Meats Ltd.** within seven (7) days. In return for this assistance the Plaintiff demanded an undertaking for **Kshs. 21,000,000** which was duly issued.

12. According to the Defendant, the compensation was not paid within seven (7) days as was promised by the Plaintiff. The Defendant alleges that thereafter the Plaintiff borrowed **Kshs. 6,000,000** from the Director of **Halal Meat Products Ltd.** This comprised of **Kshs. 4.0 million** allegedly to give effect to an earlier undertaking issued to the Plaintiff **and Kshs. 2.0 million** which the Plaintiff required to cater for medical expenses for his son who was ailing. The Director of **Halal Meat Products Ltd.** later directed that the RTGS transfer for **Kshs. 6.0 million** be cancelled which was done. The Defendants position was that the Plaintiff would only be entitled to the full **Kshs. 21 million** upon a clear demonstration by the Plaintiff that the release of the compensation funds from **NLC** was a direct result of time, effort, and skill employed by the Plaintiff. That having failed to satisfactorily demonstrate the above, the Plaintiff was **not** entitled to the **Kshs. 21 million**. Accordingly, the Defendants prays that the present application be dismissed with costs.

Analysis and Determination:

13. I have carefully considered the submissions filed by both parties as well as the relevant law. The two issues which arise for determination are;

- (i) Did the Plaintiff misrepresent himself as the owner for which compensation was to be paid?
- (ii) Should the court enforce the undertaking dated **30th November 2018**.

14. The **Encyclopedia of Forms and Precedents, 5th Edition, Vol 39** describes a Profession undertaking as

“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’ (or in case of a member of his staff, his employer) becomes personally bound”.

“... An unequivocal promise made by one party to another either to do or refrain from doing something or acting in a manner that may prejudice the right to of the opposite party, to which liability may attach”.

- (i) **Did the Plaintiff misrepresent itself as the owner of the properties known as Ngong/Ngong/221, 2628 and 2629”.**

15. The Defendant submits that the Plaintiff in his supporting Affidavit **dated 1st March 2019** deliberately misrepresented that he was the owner of the property for which compensation was due to be paid by the **NLC**. They assert that given such misrepresentation the Plaintiff cannot now come before a court of equity seeking justice.

16. The Plaintiff in **clause 2** in his supporting affidavit deponed as follows:

“THAT I was approached by the National Land Commission which intended to compulsorily acquire easements on my properties known as Ngong/Ngong/2221, 2628 and 2629 for construction of the standard gauge railway”. [own emphasis].

17. The Plaintiff who described the property in question as his went on to aver that he had instructed the defendant to pursue the compensation of his behalf.

18. Further in paragraph 14 of the same Affidavit the Plaintiff avers:

“THAT it is in the interest of justice that this Honourable court urgently intervenes in view of the fact that, the NLC has already utilized my land and I therefore urgently need to acquire alternative land with the proceeds of the compensation which are at the risk of being misappropriated by the Defendant”. [own emphasis].

19. By these averments, the Plaintiff clearly represented **himself** as the owner of the properties for which compensation was to be paid by the NLC.

20. However, it later came to light that the said properties **did not** actually belong to the Plaintiff **Annexure ‘SAS-1’** to the Plaintiff own supporting Affidavit is a letter dated **29th November 2018** written by the NLC to the Defendant. In that letter, the NLC writes:

“this is to confirm that Halal Meat Products are to be compensated for loss of part of their land to the Standard gauge Railway line”.

21. The above letter reveals that the owner of the land to whom compensation of **Kshs. 140,309,557/=** was payable was **Halal Meat products** and **not** the Plaintiff. The Plaintiff later conceded in his supplementary Affidavit dated **26th April 2019** that the land in question actually belonged to **Halal Meat Products** and that he had merely been tasked by the Defendant firm of Advocates to facilitate the release of the compensation on behalf of that company.

22. The above misrepresentation by the Plaintiff in his supporting affidavit clearly amounts to an abuse of court process. It is trite law that he who comes to equity must come with clean hands. There can be no doubt that the Plaintiff was out to mislead the court and there is no doubt that the averments contained in the supporting affidavit dated **1st March 2019** were false. The clear intention was to mislead the court by misrepresenting himself as the owner of the land in question.

23. The Plaintiff only changed his position after being outed in the Replying Affidavit dated **27th May, 2019**. The plaintiff then changed his position regarding ownership of the land in his supplementary affidavit. I find the Plaintiff is not a honest litigant. He misrepresented the facts to the court and is therefore underserving of orders from this court.

(ii) Should the Professional Undertaking be enforced;

24. A copy of the Undertaking by the firm of **ABIB & ASSOCIATES** dated **30th November 2018** as Annexed to the Plaintiffs supporting Affidavit dated **1st March 2019** (**Annexure ‘SAS-2**) reads as follows:

“RE: Award Letters in respect of Title Numbers Ngong/Ngong 221, 2628 and 2629

We refer to the above matter and to previous correspondence.

We hereby issue you with our irrevocable professional undertaking to remit the sums of Kenya shillings.

Twenty One Million (Kshs. 21,000,000) to your bank account upon receipt of the said funds from National Land Commission.

Yours faithfully,

ABIB & ASSOCIATES ADVOCATES”.

25. It is common ground that this undertaking was not honoured by the Defendant. The Plaintiff states that although the Defendant did issue him with a cheque for **Kshs. 6.0 million** (**Annexure ‘SAS-3’**) he was unable to cash the cheque because the Defendant cancelled the payment. The Plaintiff claims that he was duped into executing a Discharge of the undertaking dated **29th January 2019**. That discharge which appears as **Annexure ‘SAS-4’** to the Plaintiff supporting Affidavit read as follows:

“DISCHARGE

AWARD LETTER IN RESPECT OF TITLE NUMEBRS: NGONG/NGONG/221 & 2628 AND 2629 AND DISCHARGE.

I SALIM ALI SHEIKH of P.O. Box 81407-80100, Nairobi and I.D. Number 0273004 hereby FULLY AND IRREVOCABLY DISCHARGE the firm of Abib & Associates Advocates from the undertaking dated Friday, 30th November 2018 and issued to me by the said firm.

That I have no further claims against the firm arising from the said Undertaking.

That I hereby FULLY DISCHARGE the firm of Abib & Associates Advocates or it's advocates from my undertaking dated 30th November 2018 the said firm having fulfilled its obligations under the said undertaking".

26. There can be no doubt whatsoever that a professional undertaking issued by an Advocate is binding. It is an unequivocal promise made by a party to another either to do or to refrain from doing a particular thing.

27. The Defendant in attempting to repudiate the undertaking submits that the plaintiff was required by said undertaking to demonstrate that he had expended effort, time and service to facilitate the release of the compensation by NLC. That the given that Plaintiff does not work for NLC, he has failed to show what role he played in release of the compensation. That it has not been proved that the full compensation was paid. In short, the Defendant submits that the conditions for payment of the **Kshs. 21,000,000** have not been shown to have been met.

28. I am mindful of the decision in **HARIT SHETH t/a HARITH SHETH ADVOCATES VS. K. OSMOND ADVOCATES (2011) eKLR** where it was held as follows:

“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 only to protect his reputation as an officer of the court”.

29. I have perused the undertaking in question very carefully. Nowhere, were any conditions set for performance of that undertaking. Nowhere was it made a condition for payment of the **Kshs. 21,000,000** that the Plaintiff must **demonstrate** the efforts expended to secure the release of compensation due to **Halal Meat Products**. I find no merit in this argument by the Defendant and the same is hereby dismissed.

30. The Plaintiff complains that though he was issued with a cheque for **Kshs. 6,000,000/=**, he was not able to realize the funds as the Defendant cancelled the payment. Again, we go back to the undertaking itself which provided that the sum of **Kshs. 21,000,000** was to be remitted to the Plaintiff **“upon receipt of the said funds from National Land Commission”**.

31. It was clearly a condition for performance of the undertaking that the compensation be received from the NLC. The full amount which was to be paid as compensation to **Halal Meat Products** was **Kshs. 140,309,557/=**. The Plaintiff claims that the said compensation was paid out by NLC. It is trite law that he who alleges must prove. There has been no evidence presented in court to prove that the full compensation was in fact paid out to **Halal Meat Products** – without such proof the undertaking was not ripe for enforcement.

32. Finally, there is the Discharge date **29th January 2019** signed by the Plaintiff. The Plaintiff alleges that he was forced into signing that discharge. He alleges fraud on the part of the Defendant. It is curious that having been promised **Kshs. 21,000,000**, the Plaintiff accepted **Kshs. 6,000,000** and signed the discharge. The Plaintiffs explanation that **Kshs. 4.0 million** represented a previous undertaking and **Kshs. 2.0 million**, a loan does not ring true.

33. The Plaintiff clearly was an enlightened person. He had claimed to have the necessary networks to facilitate release of monies from NLC. The Plaintiff voluntarily executed this Discharge and undoubtedly was aware of its binding nature. A person is as a general rule bound by a document he voluntarily executes. The Plaintiff voluntarily executed this Discharge which was clear and unambiguous in its terms. He stated that he **fully discharged**, the Defendant from the undertaking dated **30th November 2019**, No conditions were attached to said discharge and of important is the Certificate at the bottom of the Discharge which read as follows:

“THAT I Salim Ali Sheikh have read and been explained by the witnessing advocate the contents of this discharge and I am fully aware the effect it has upon my execution”. [own emphasis].

34. The Plaintiff cannot now seek to run away from his own document. In light of this discharge duly executed by the Plaintiff, I find that the Defendant was released from his obligations under the undertaking of **30th November 2018**. The same is no longer enforceable. The Plaintiff even said:

“I have no further claims against the sum arising from said undertaking”.

No mention is made of the payment of **6.0 million** it was not made a pre-condition for the discharge.

35. Finally, I find no merit in this application, I dismiss the same and make no orders on costs.

Dated, delivered and signed at Nairobi this 18th day of September, 2020.

M. A. ODERO

JUDGE