



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO 31 OF 2018 (O.S)

**IN THE MATTER OF AN APPLICATION BY MOHAMMED MUIGAI ADVOCATES FOR
AN ORDER OF AN ENFORCEMENT OF AN UNDERTAKING GIVEN BY AN ADVOCATE**

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES

BETWEEN

MOHAMMED MUIGAI ADVOCATES.....APPLICANT

VERSUS

DANIEL ORENGE & COMPANY ADVOCATES.....RESPONDENT

JUDGMENT

1. The Applicant herein, Mohammed Muigai Advocates, filed the Originating Summons dated 19th January 2018 seeking the following orders;

a. The Honourable Court be pleased to order the Respondent to honour their written undertaking of 4th October 2016 and remit the applicant the sum of Kshs. 15,000,000 with interest calculated at court rates from 28th December 2016.

b. The respondent to bear the costs of this application.

2. The application is supported by the affidavit of MWANGI MBOGO who avers that the applicant's client, **Gulf Energy Limited**, agreed to sell to the respondent's client a portion of land measuring 0.92 from the property known as Land Reference Number 12422/3 located on Kiambu/Coffee road in Muthaiga North Nairobi. He states that one of the conditions of the agreement, specifically clause 3.1, was to the effect that the applicant or the client would pay a deposit of Kshs. 15,000,000 to the respondent for the facilitation of subdivision of the property upon receipt of an acceptable undertaking.

3. The applicant's deponent states that through a letter dated 4th October 2016, the respondent undertook to refund the deposit of Kshs 15,000,000 to the applicant or its client in the event of failure to procure a subtitle and other completion documents. He further deposes that by the completion date of 28th December 2016, the respondent had failed to procure a subtitle and the completion documents thus prompting the applicant to write a letter dated 30th November 2017 demanding that they honour their undertaking. He states that the respondent responded seeking six months to honour the professional undertaking but has not honoured it to date.

4. The respondent opposed the application through the replying affidavit of DANIEL ORENGE who avers the deposit amount of Kshs 15,000,000 was utilized by the vendor for the subdivision as per clause 3.1 of the sale agreement. According to the respondent's deponent, the irrevocable undertaking was conditional in the sense that the vendor would utilize the deposit amount to subdivide its land and obtain a subtitle of the land. He further states that the vendor did not fail to procure the subdivision but that the process took longer than envisaged by the parties in their agreement. He further states that the vendor paid approval fees to the Nairobi City County where he was informed that the review of grants and Dispositions should be done at the National Lands Commission and a consent order was given dated 6th February 2017.

5. He states that the vendor has engaged the Nairobi City County for compensation as the County Government is in the Process of compulsorily acquiring the land. He adds that it is upon the said compensation that the Vendor would be in a position to refund the purchaser

the deposit amount. It is the respondent's case that he did not benefit from the monies directly and that it would be punitive to require him to pay the amount.

6. The application was canvassed by way of written submissions which I have considered. Having considered the pleadings filed herein together with the parties' submissions, I find that the issues for determination are as follows:

- a. Whether the respondent issued a professional undertaking through the letter dated 4th October 2016.*
- b. Whether the conditions required for the undertaking have been met.*
- c. Whether the respondent has failed to discharge its professional undertaking as per the agreed terms.*
- d. Whether this court should enforce the said professional undertaking by ordering the payment of Kshs 15,000.000.*
- e. Whether the applicant is entitled to costs and interest on the said sum.*
- f. Whether the respondent issued a professional undertaking.**

7. The applicant's case is premised on the breach of the professional undertaking issued by the respondent in a letter dated 4th October 2016.

8. Black's Law dictionary defines an undertaking as "**a promise, engagement, or stipulation**". It states that an "*undertaking*" is frequently used in special sense of a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtain some concession from the Court or opposing party.

9. In *Waruhiu K'Owade & Ng'ang'a Advocates v Mutune Investments Ltd (2016) eKLR* the Court of Appeal explained what amounts to a professional undertaking as follows: -

"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."

10. The letter dated 4th October 2016 was worded, in part, as follows:

“The purchaser or his advocates shall upon receipt of an acceptable undertaking and on the execution of this Agreement pay a deposit of Kenya Shillings Fifteen million only (Kshs 15,000,000/-) to the vendor’s advocate to facilitate the subdivision and issuance of a separate new title over the portion measuring 0.92 Acres (receipt whereof is hereby acknowledged).”

14. From the foregoing, it is clear that the condition to be met by the applicant was to pay Kshs 15,000,000 as deposit for the facilitation of the completion documents and subdivision of the parcel. The respondent on the other hand undertook to refund the said amount in the event that it did not procure the sale agreement within 90 days.

c. Whether the respondent failed to discharge its professional undertaking as per the agreed terms

15. From the above foregoing, it is evident that the respondent has not been able to procure the said subtitle of the property together with the completion documents. I note that through a letter dated 11th December 2017 the respondent wrote to the applicant seeking an extension for 6 months to be able it refund the deposit. Similarly, by admission, the respondent in its written submissions stated that the intended subdivision was frustrated by circumstances beyond the control of the respondent.

d. Whether this court should enforce the said professional undertaking by ordering the payment of Kshs 15,000.000.

16. Having established that the respondent did not meet the conditions of the undertaking, the question which then arises is whether this court should enforce the professional undertaking by ordering the payment of Kshs 15,000,000. In *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.”

17. The respondent submitted that the suit is premature and that the court should order the advocate to honour the undertaking and fix the timelines within which the same can be achieved, failure of which the court would therefore compel or enforce the professional undertaking. The respondent relied on **Order 52 Rule 7 of Civil Procedure Rules** which gives the court the power to order for enforcement of the professional undertaking after giving an opportunity to the advocate to be heard. It provides that;

(a) “An application for an order for the enforcement of an undertaking given by an Advocate shall be made:

(i) If the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or

(ii) In any other case, by Originating Summons in the High Court.

(b) Save for special reasons to be recorded by the Judge, the order shall in the first instance be that the Advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made”.

18. In *Harit Sheth T/A Harit Sheth*

letter dated 4th October 2016 and pay to the applicant the sum of Kshs. 15,000,000.

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.

Dated, signed and delivered via Skype at Nairobi this 16th day of September 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kigata for the defendant.

Mr. Ngugi for plaintiff

Court Assistant: Silvia