



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 7 OF 2020 (O.S)

NJERU, NYAGA & CO. ADVOCATES.....PLAINTIFF

VERSUS

NJERI MBURU T/A NJERI MBURU & CO. ADVOCATE.....DEFENDANT

RULING

This is a suit by way of Originating Summons brought by the applicant for enforcement of a professional undertaking said to have been made by the defendant herein.

The summons is under Article 40 of the Constitution, Order 52 Rule 7 1B of the Civil Procedure Rules, Sections 43,44, and 157 (1) (a) of the Land Act and Sections 37, 40 and 103 (1) (a) of Land Registration Act. There are only two questions for determination in this matter.

Whether an order should issue directing the defendant to honour a professional undertaking made on 19th March, 2019 and who should bear the costs of the summons. There is a supporting affidavit sworn by Martin Njeru Nyaga who is an advocate of this court.

The summons was followed by a Notice of Motion dated 21st January, 2020 essentially seeking the same orders, but it will be noted that, having been filed on the same date the summons was taken out, the said Notice of Motion was premature in that no directions had been given under Order 37 of the Civil Procedure Rules. Subsequently however, affidavits were filed and both parties filed written submissions which I have considered.

The genesis of this dispute is a letter dated 19th March, 2019 authored by the defendant herein and addressed to the plaintiff. It is important to cite the entire letter in this ruling because it is the contents that will eventually determine this matter.

“RE: MICHAEL KARIUKI WANJOHI

We refer to a letter dated 4th March, 2019, from the above gentleman and confirm that he has instructed us to pay to yourselves the sum of Kshs. 19.2 Million on account of Njoroge and Wambui. (Full particulars are unknown to us)

We wish to confirm that our client owes the above gentleman amounts in excess of Kshs. 19.2 Million whose payment date cannot be ascertained. Part of the debt has been paid in the past and your payment will be discounted from the outstanding balance.

As instructed, we confirm that any amount received in the future on account of the above gentleman shall be forwarded to you. However we reiterate that we are also pursuing the 3rd parties for the payment and the due date of the payment is not known. We therefore urge for patience.

Yours faithfully,

Signed

NJERI MBURU & CO

ADVOCATES”

Apparently a sum of Kshs. 8,000,000/= was remitted because on 18th September, 2019 the plaintiff wrote to the defendant in the following terms,

“Dear Madam,

RE: DEBT OF KSHS. 19,040,000 OWED TO OUR CLIENT BY MICHAEL KARIUKI WANJOHI

We refer to your letter of undertaking dated 19th March, 2019 and acknowledge receipt of Kshs. 8,000,000/=.

Please remit the balance by the end of the month as promised through Messrs Michael Kariuki Wanjohi.

Yours faithfully

Njeri, Nyaga & Co

Advocates

Singed

M.N. NYAGA”

It would appear this letter was not acted upon resulting to the filing of this suit. There is no doubt that this court has jurisdiction to enforce an undertaking given by an advocate as clearly provided for in Order 52 Rule 7 of the Civil Procedure Rules and Section 14 of the Advocates (Professional Conduct) Regulations.

Ordinarily, professional undertakings are made by counsel as a convenient way of facilitating transactions between clients, and the underlining consideration is that the party addressed accepts, in good faith, the communication from the author. By obvious implication, the author of such an undertaking must be confident and honest that, whatever is being communicated shall be fulfilled without question or debate, and therefore utmost good faith underlines such communication. Counsel involved in such transactions may make such undertakings either personally or under the name in which they practice. – **Nairobi HCCC NO. 773 of 2003 Equip Urgencies Limited vs. Credit Bank Limited.**

Unless an advocate is a party to the transaction as an individual, the professional undertaking must be made in the official capacity of the advocate. Further, the undertaking must be clear and unequivocal, calling for no explanation of the wording, context or tenure. It follows therefore, if any undertaking has attached conditions, then those conditions must be exhausted and or fulfilled before it can be enforced – see **Halsbury’s laws of England 4th Edition Vol 44 (1) pages 222, 223,224.** See also **Land Aly Sukhdev Singh vs. Onesmus Mwangi Muraguri (2020) e KLR.**

In the letter upon which the Originating Summons is premised, the advocate who is said to have given an undertaking clearly stated that their client had instructed them, but full particulars were unknown to the advocates. Further, the advocates are recorded as having said their client owed a sum in excess of Kshs. 19.2 million whose date of payment cannot be ascertained. The said letter further goes to state that any amount received in the future on account of the cited individual shall be forwarded to the plaintiff. Further, third parties were being pursued but the due date of payment was not known.

What emerges from the said letter is that, the defendants were not in possession of any money due and payable from their client to the plaintiff’s client. The cited parts of the letter above are clear in that regard. In fact, in the letter by the plaintiff dated 18th September, 2019 that position is made clear by the contents of the last line which stated, **“Please remit the balance by the end of the month as promised through Messrs Michael Kariuki Wanjohi”**

It is clear to me that there was no professional undertaking in the plain meaning of that term. The letter dated 19th March, 2019 cannot qualify to be a professional undertaking because it is not an unequivocal promise to pay the said sum to the plaintiff but above all, it had several conditions attached thereto and vague promises, dependent on the defendant’s clients.

The defendant therefore cannot be held liable for the indebtedness of their client to the plaintiff’s client for the reason that, the letter relied upon is not a professional undertaking within the meaning of the law and circumstances attendant thereto.

The Originating Summons is therefore dismissed with costs to the defendant.

Signed at Nairobi this 8th day of December, 2020.

A.MBOGHOLI MSAGHA

JUDGE

Dated, signed and delivered online via Microsoft Teams at Nairobi this 16th day of December, 2020

J.K. SERGON

JUDGE