



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION- MILIMANI**

**CIVIL SUIT NO. E025 OF 2018 (O.S)**

**PATRICK LUTTA T/A**

**LUTTA & COMPANY ADVOCATES.....PLAINTIFF**

**-VERSUS-**

**ISHVINDER KAUR KALSI MARWA t/a**

**ISHI KALSI & COMPANY ADVOCATES.....DEFENDANT**

**RULING**

**BACKGROUND OF THE APPLICATION**

By a Chamber Summons dated **17<sup>th</sup> August 2018** and filed on 20<sup>th</sup> August 2018, the Defendant/Applicant sought orders that Ritu Magon and Rahim Mawji be enjoined in this suit as Respondents.

**DEFENDANT/ APPLICANT'S CASE**

In the Applicant's Supporting Affidavit dated 17<sup>th</sup> August 2018 and filed on 20<sup>th</sup> August 2018 provides as follows;

That on or about 11<sup>th</sup> April 2018, Ritu Magon came to Defendant's offices and informed the Defendant that she urgently required a loan of Kshs. 15 million to repay a debt that she owed to Rahim Mawji. However, she could not obtain the loan from a bank or financial institution because she did not have any securities. She was thus introduced to one Eric Ananda of **Trinity Prime Investments** who was willing to give her the loan on certain conditions. That one of the conditions was a professional undertaking from a lawyer that the loan would be paid back.

The Defendant then advised her client that she could not issue a Professional Undertaking without any security from her. In response, the client issued the Defendant with a Termination Agreement between her company and Adgeco Company whose terms specified that the client would receive **USD 9,000,182** by 15<sup>th</sup> April 2018. On the basis of the said security and the client's assurance to pay the monies, the Defendant gave a Professional Undertaking to Lutta and Company Advocates who represent Eric Ananda.

That on 12<sup>th</sup> April 2018 after the Defendant had given her Professional Undertaking, her client instructed her through text, to remit the entire **Kshs. 15 Million** to Rahim Mawji. Later on, the Defendant through his own enquiries, discovered that the client did not owe Rahim Mawji the money as a loan but it was actually a scam between her client and Rahim Mawji to obtain monies through false pretenses in order to invest in another company. It was only after 3<sup>rd</sup> May 2018 that the Defendant discovered that the circumstances under which the Professional Undertaking was obtained was under false pretenses, fraudulent acts and that the facts therein were greatly misrepresented by her client to her.

The Defendant's client made several excuses not to pay back the money which resulted to the Defendant writing a demand letter to her client on the same, which she has not responded to date.

In the meantime, the Plaintiff sued the Defendant based on the Professional Undertaking. The Defendant thus sought this court to enjoin the client and Rahim Mawji in this suit so as to enable the court to adjudicate upon and settle all arising questions in this suit. The Defendant also request orders for Ritu Magon and Rahim Mawji to remit the sum of **Ksh 35million** to the Defendant's account for transmission to the Plaintiff.

The Defendant relied on the case of George Murani Muhoro t/a A.M Muhoro Advocate vs George Ndung'u Kamiti [2011] where the court defined stakeholder as;

***“a person with whom money is deposited pending the decision of a bet or wager or one who holds money or property which is claimed by rival claimants but in which he himself claims no interest”***

The Defendant claims to have acted as a stakeholder in the transactions and was hence, not liable for failure of the client to meet their agreed terms. The Defendant also relied on the case of Alex Karanja Ndung'u v Benjamin Mwikya Musyoki [2012] eKLR; where the court held:

***“That whether an undertaking given by an advocate to the court, his client or a third party may be enforced against him personally will depend on the facts of each case.”***

The Defendant further reiterated the holding in Nelson Andayi Havi t/a Havi & Company Advocates v Jane Muthoni Njage t/a J.M Njage & Company Advocates [2015] eKLR which stated:

***“that an undertaking does not place an obligation on the advocate to pay or underwrite the client’s obligations”***

### **PLAINTIFF’S/ RESPONDENT’S SUBMISSIONS**

The Plaintiff filed his Written Submissions dated 9<sup>th</sup> February 2019 on 11<sup>th</sup> February 2019 in response to the Defendant’s Application dated 17<sup>th</sup> August 2018.

The Plaintiff submitted that an undertaking is an unequivocal declaration of intention made by a solicitor in the course of his/her practice either personally or by a member of his staff, addressed to someone who reasonably places reliance on under which the solicitor becomes personally bound. With this definition, the Plaintiff relied on paragraphs 3 and 5 of the Defendant’s letter dated 26<sup>th</sup> April 2018 which read:

***“In consideration of extending this facility, we give our unconditional and irrevocable professional undertaking that we shall repay in full settlement of the sums agreed amounting to Kshs. 35,000,000.00.”***

The Plaintiff further submitted that it was on reliance of the said undertaking that he remitted the sum of **Kshs. 15 million** into the Defendant’s account since the Defendant gave the undertaking as an Advocate. The Plaintiff relied on the case of Harit Sheth t/a Harit Sheth Advocate v.K. H. Osmond t/a K. H. Osmond Advocate [2011] eKLR where 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 as an officer of the court.”***

The Plaintiff further relied on the case of Daniel Ochieng Ogola t/a Ogola Okello & Co. Advocates v George Mugoye Mbeya t/a Mugoye & Associates Advocates & Another [2016] eKLR where the Court held:

***“In my considered view, when the defendant says that the liability of Maurice (the proposed third party) should be determined in the proceedings for the enforcement of the professional undertaking, it is akin to suggesting that the said Maurice shared in some way, in the obligations which the defendant imposed upon himself when he gave his undertaking. In my humble opinion, the proposed third party did not assume any responsibility to the plaintiff, in respect of the undertaking given on his behalf.***

***The issue of the enforcement of the bond does not require the proposed third party to be enjoined to the case, before it can be effectively and conclusively determined. Indeed, it does not matter at all whether or not the advocate who gave his professional undertaking recovers the money which he had paid out in order to honour his undertaking. He must honour his bond, regardless of whether or not his client reimburses him...***

The Plaintiff submitted that there would be no prejudice suffered by the Defendant if the interested parties are not enjoined in the proceedings as the law provides suitable remedies for the Defendant to recover the said sum from the clients if not settled.

### **1<sup>st</sup> INTERESTED PARTY’S SUBMISSIONS**

The 1<sup>st</sup> Interested Party filed his Written Submissions on 8<sup>th</sup> January 2019 in response to the Defendant’s Application dated 17<sup>th</sup> August 2018.

The 1<sup>st</sup> Interested Party in his submissions stated that he was not at any time prior to and at the time of the issuance of the professional undertaking a client of the Defendant nor was he responsible in any way for the issuance of the undertaking by the Defendant to the Plaintiff. The 1<sup>st</sup> Interested Party further submitted that he was not privy to the Defendant’s professional or other relationship between the Defendant and the 2<sup>nd</sup> Interested party and therefore, has no connection to the professional undertaking given to and relied on by the Plaintiff.

He further submitted that the Defendant had a legal obligation to consider the eventualities that would have affected her ability to honour the commitments that she was making to the Plaintiff based on her knowledge and relationship with the 2<sup>nd</sup> Interested Party. The Defendant could not thus avoid obligations that she undertook by virtue of looking for third parties to offset her obligations. It was thus the 1<sup>st</sup> Interested Party's submissions that he cannot be enjoined to these proceedings as he was neither the Defendant's client nor did he issue instructions for the issuance of the undertaking. He further supported his position by stating that the Defendant failed to demonstrate the relevance, connection and link between her and the 1<sup>st</sup> Interested Party as was held in **Rose Florence Wanjiru v Standard Chartered Bank Kenya Limited & Another [2015] eKLR** where the court reiterated that the cause of action and the relationship of the party sought to be enjoined must have a nexus to the dispute before court.

## **DETERMINATION**

The Court considers the submissions by the parties, the following is the issue to be determined by the Court: -

### **1. Whether Ritu Magon and Rahim Mawji may be enjoined in this suit as Respondents.**

Order 1 Rule 6 CPR 2010 prescribes;

**“The Plaintiff may at his option join as parties to the same suit all or any of the persons severally, or jointly or severally liable on any one contract including parties to bills of exchanges and promissory notes”**

The joinder of interested party can only be on the basis of a claim based on the instant contract. In this matter the substance of the claim is the professional undertaking agreement which/where the intended 3<sup>rd</sup> Party is not privy to.

In **David Karanja Thuo t/a D.K. Thuo & Co. Advocates Vs Njagi Wanjeru t/a Njagi Wanjeru & Co. Advocates HCCC No. 209 of 2008**; the Court cited the following definition of the phrase “Professional Undertaking” as stated in “The Encyclopedia of Forms and Precedents, 5<sup>th</sup> Edition Vol. 39”.

***“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”.***

The court further stated;

***“In the first instance, it should be noted that the professional undertaking was between the Advocates, and none of the clients was party to the undertaking. For want of a better language, there was no “privity of undertaking” between the plaintiff and the defendant. The Defendant cannot, therefore, purport to exercise a lien over the plaintiff's property since the client was not privy to the undertaking. The undertaking was of a purely professional nature between the Advocates as Advocates, and is enforceable between them as such”.***

So too in this case, the professional undertaking is between the law firms which are the parties herein. Thus it is enforceable as such, and the proposed interested parties have no role to play in the instant proceedings. Therefore, there is no issue to be determined between the Plaintiff and the Defendant, which cannot be conclusively determined with finality if the proposed interested parties are not enjoined to this suit. This is because, the suit before this court is one of enforcement of a Professional Undertaking which by law is between solicitors and not solicitors and clients.

In **Havi & Company Advocates Vs. Jane Muthoni Njage t/a J.M. Njage & Company Advocates HCCC No. 59 of 2009**, Gikonyo J. pronounced himself thus;

***“...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”.***

Therefore, the Defendant's prayer to enjoin Ritu Magon and Rahim Mawji in the suit for orders that her client and Rahim Mawji remit the sum of 35million to the Defendant's account for transmission to the Plaintiff, defeats the very reason and purpose for which undertakings were created. The Defendant ought to first discharge legal obligation under the Professional Undertaking then/while suing the client for recovery of monies.

## **DISPOSITION**

**1. There is no merit in the application dated 17<sup>th</sup> August 2018.**

**2. It is therefore dismissed, with costs to the Plaintiff.**

3. The matter be set down for full hearing of the claim/suit on a date to be obtained from Registry.

DATED, SIGNED & DELIVERED IN OPEN COURT ON 12<sup>th</sup> APRIL 2019.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MUTUA FOR 1<sup>ST</sup> INTERESTED PARTY

MR. MURIITHI FOR THE PLAINTIFF

MS JASMINE COURT ASSISTANT