



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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. E.395 OF 2018**

**KIRUTI & COMPANY ADVOCATES.....PLAINTIFF**

**VERSUS**

**KAPLAN AND STRATON ADVOCATES.....DEFENDANT**

**JUDGMENT**

1. This Court is asked to invoke its supervisory jurisdiction in respect to an Advocate's professional undertaking and to grant the following prayers:-

1. THAT the firm of KAPLAN & STRATON ADVOCATES the Defendant herein do honour their professional undertaking give on 28.9.2017 to the firm of KIRUTI & CO. ADVOCATES the Plaintiff herein by procuring payment by their clients, namely The Standard Bank of South Africa Limited, Stanbic Bank of Kenya Limited, NIC Bank Limited and Barak Fund to the Plaintiff's client M/S PRIME BANK LIMITED of the sum of Khss.311,488,575.33 being the amount owed by Multiple Hauliers (EA) Limited as at 31.10.2018 together with interest thereon at the rate of 13% pa. up to the drawing limit and 22% pa on the excess from 1.11.2018.

2. THAT the said undertaking be honoured within fourteen (1) days from the date of the order herein and in default the same be enforced by the Defendant making the said payment.

3. THAT the costs of this application be met by the Defendant.

2. The proceedings, commenced by way of an Originating Summons dated 23<sup>rd</sup> November 2018 and filed on 26<sup>th</sup> November 2018, are taken out by Kiruti and Co. Advocates (The Plaintiff Firm). These proceedings revolve around a conveyance in which the Plaintiff firm represented Prime Bank Limited (Prime Bank).

3. The facts that form the backdrop to the dispute herein are not involved. On 14<sup>th</sup> July 2017 Kaplan & Stratton Advocates (the Defendant Firm) wrote to the Plaintiff firm informing them that its clients namely, The Standard Bank of South Africa Limited and Barak Fund had agreed to lend an aggregate sum of approximately US \$ 138,000,000 to Multiple Hauliers (E. A) Limited (The Borrower). Part of the money was to be utilized to refinance outstanding liabilities due to Prime Bank from the borrower.

4. So as to move the transaction forward, the lenders needed to charge land reference number MN/1/124, Maweni-Kisauni (**the charged property**) which was already charged in favour of Prime Bank and a professional undertaking had to be given by the Defendant firm to the Plaintiff firm.

5. After an exchange of correspondence, the terms of the undertaking were eventually firmed up in a letter of 28<sup>th</sup> September 2017. On the strength of that undertaking, the Plaintiff firm, on 8<sup>th</sup> November 2017, forwarded the original provisional certificate of title (I.R. 2701) in respect to L. R. No. MN/1/214 and a Bank to Bank undertaking dated 5<sup>th</sup> October 2017 from Prime Bank Limited addressed to the Standard Bank of South Africa Limited.

6. After some delay, the supplemental charge in favour of the lenders was registered. On 5<sup>th</sup> April 2019, the Defendant firm wrote to the Plaintiff firm asking the latter to confirm that all amounts due to Prime Bank had been settled in full. In the same communication it asks to be released from its undertaking. It turned out that full payment had not been made and on 4<sup>th</sup> May 2018, the Plaintiff firm wrote to the Defendant firm demanding the immediate payment of the redemption amount which stood at Kshs.301,849,523.00 as at 26<sup>th</sup> April 2018. In the alternative, it sought the return of the original certificate of title before close of business of 11<sup>th</sup> May 2018 in the same condition it was at

the time of forwarding it to the Defendant firm with all subsequent entries cancelled.

7. On 8<sup>th</sup> May 2018, the Defendant firm wrote to the Plaintiff firm proposing to return the original title but with the lenders supplemental charge still endorsed on it. This proposal was rejected by the Plaintiff firm. The firm asserts that the Defendant firm had acted contrary to the terms and conditions of the irrevocable and unconditional undertaking it had issued in the various respects which are set out in the latter part of this decision.

8. A standoff between the two firms has led to the present proceedings.

9. On its part, the Defendant firm takes the position that it was understood by all the parties that its undertaking was only in respect to the handling of the Prime Bank Securities and that it did not undertake, agree and/or commit to make payment directly to Prime Bank. It asserts that the lenders were to make payment of the redemption amounts to Prime Bank. The Defendant affirms that the conditions of the letter of undertaking were explicitly subject to and subordinate to the conditions precedent contained in the facility agreement. It also takes a view that its duty and responsibility under condition (5) of the letter of undertaking was fully and completely discharged upon it procuring the lenders to equally comply with the covenant to pay.

10. By consent of the parties and upon concurrence by Court, the Originating Summons was disposed off on the strength of affidavit evidence and written submissions which were augmented by oral highlights.

11. In the course of the hearing, the Defendant firm put in considerable effort in urging that the controversial condition 5 of the letter of 28<sup>th</sup> September 2017 was not sufficiently certain as to be enforceable. Indeed most of the authorities cited by the Defendant firm were premised on the proposition that condition 5 is uncertain and ambiguous. Counsel for the Plaintiff firm criticized this approach and argued that the Defendant firm was departing from its stated defence.

12. In Originating Summons, the affidavits filed by parties contain, not only the evidence they seek to rely on, but also the respective cases they present. In that way the affidavits are both the pleadings and the evidence. Just like in any other suit, parties to proceedings commenced and prosecuted by way of Originating Summons are not exempt from the general rule that parties are bound by their pleadings. In defending the matter before court, the Defendant firm filed a response by way of a replying affidavit of Ruth Kuringa sworn on 30<sup>th</sup> January, 2019. Noteworthy is that she is the advocate who handled the transaction that has given rise to the present matter. In none of her twenty eight paragraph affidavit does she allege that the undertaking issued was uncertain or ambiguous. Quiet to the contrary her thesis is that the undertaking was fully and completely discharged. In these circumstances to allow the Defendant firm to take up the plea of uncertainty and ambiguity would be to allow the said firm to traverse outside its pleaded defence, something this court is unwillingly to permit.

13. That strips the matter to just two issues:-

(i) What were the obligations of the Defendant firm under the terms of the undertaking?

(ii) Did the Defendant firm breach those obligations?

14. The Plaintiff's case is founded on the letter of 28<sup>th</sup> September 2017, which because of its centrality in the matter at hand, needs to be reproduced on its entirety;

*Kiruti & Co. Advocates*

*Concert House – Wood Garden*

*Wood Avenue – Kilimani*

*P.O. Box 13160 – 00100,*

*NAIROBI.*

*Attn: Ms. Caroline Lajah*

*Dear Madam,*

*Senior facilities from the Standard Bank of South Africa Limited, Stanbic Bank of Kenya Limited, NIC Bank Limited (together the “Senior Lenders”) and Mezzanine Facilities from and Barak Fund (the “Mezzanine Lender”)*

*Borrower: Multiple Hauliers (E.A) Limited*

*We refer to the above matter in which we act for the Standard Bank of South Africa Limited, Stanbic Bank of Kenya Limited, NIC Bank Limited (together the “Senior Lenders) and Barak Fund (the “Mezzanine Lender”) (together the “Lender”)*

*We understand that you act for Prime Bank (‘Prime Bank’) who was advanced banking facilities to Multiple Haulies (E.A) Limited (the ‘Borrower’).*

We further understand the Prime Bank currently holds the following;

(i) A legal charge dated 9<sup>th</sup> February, 2015 (the "PBL Charge") over Land Reference Number MN/1/214, Maweni-Kisauni, Mombasa (the "property"), registered in the name of the Borrower, as security for its facilities to the Borrower; and

(ii) The original Certificate of Title (Number C.R 2701) in respect of the Property (the "certificate of Title")

The Lenders have, subject to certain being satisfied, agreed to lend an aggregate amount of approximately United States Dollars One hundred and Thirty Eight Million (U.S. \$.138,000,000) (the 'Facilities') to the Borrower. The Facilities are to be secured by, amongst other things, a first ranking Legal Charge over the Property (the "Lenders' Supplemental Charge")

The Facilities will be utilized, amongst other things, to liquidate the outstanding liabilities due to Prime Bank from the Borrower as specified in Paragraph 5 below together with all accrued interest thereon up to the date of payment (hereinafter referred to as the "Redemption Amounts" and which are secured by the PBL Charge (hereinafter defined). It is intended that the Lenders Supplemental Charge will rank subsequent to the PBL Charge until Prime Bank has been paid the Redemption Amounts in full after which the Lenders' Supplemental Charge will automatically become first ranking.

In order to complete this transaction, and on the instructions of the Lenders, we would be grateful if you could forward to us the original Certificate of Title in respect of the Property against our irrevocable and unconditional professional undertaking that we shall comply with the following conditions:-

1. That we shall hold the original Certificate of Title in respect of the Property forwarded to us in trust for you and to your order returnable on demand, pending full payment of Prime Bank by the Lenders of the Redemption Amounts due and owing to Prime Bank.

2. That We shall not utilize the original Certificate of Title in respect of the Property for any purpose other than for registering the Lenders' Supplemental Charge at the applicable Land Registry to rank after the PBL Charge.

3. That we shall not release or allow to be released the original Certificate of Title in respect of the Property to any other person whomsoever, other than to relevant government officials concerned with the registration of the Lenders' Supplemental Charge without your prior written consent.

4. That we shall be entitled at any time prior to registration of the Lenders' Supplemental Charge to withdraw our undertaking by returning the original Certificate of Title in respect of the Property to you. In these circumstances, the undertaking set out in this letter shall be deemed to be null and void for all purposes.

5. That we shall within seven (7) days of receipt by us of the (i) registered Lenders' Supplemental Charge from the relevant Land Registry and the Companies Registry and (ii) confirmation from yourselves or Prime Bank of the outstanding amounts in accordance with paragraph 6 below (the 'payment date'), procure that the Lenders pay directly to Prime Bank in cleared funds the Redemption Amounts then due and owing to Prime Bank from the Borrower (as advised by yourselves or Prime Bank at the time), by way of Real Time Gross Settlement (RTGS) to Prime Bank's designated account as follows:

Bank Name: Prime Bank Limited

Account Number: 0012310000095

Account Title: Multiple Hauliers (E.A) Limited

Branch: Riverside Drive

Branch Code: 001

Swift Code: PRIEKENX

We understand that the outstanding balance due to Prime Bank from the Borrowers as at 31<sup>st</sup> August, 2017 stood as follows:-

Account Name: Multiple Hauliers (E.A) Limited				
Account Type	Account Number	Drawing Limit (DL)	Outstanding Balances (Dr.)	Interest Rate upto (DL (p.a)
Kenya Shillings (K.Shs.) Accounts				
Overdraft	3000021563	300,900,000.00	299,339,210.72	14% per annum
Loan	700000019089	131,027,777.82	131,027,777.82	14% per annum

Total – K.Shs		431,927,777.82	430,366,988.54	
<i>United States Dollars (USD) Accounts</i>				
Loan	700100020570	1,952,822.63	1,952,822.63	8.84 per annum
Total - USD		1,952,822.63	1,952,822.63	

· Interest on the Overdraft and Loan Accounts hereinabove was last applied on 31<sup>st</sup> August, 2017.

· Any arrears in the Kenya Shillings (K.Shs) Overdraft and Loan Accounts will attract interest at the rate of 23% per annum (revisable).

· Any arrears in the United States Dollars (USD) Loan Account will attract interest at the rate of 13% per annum (revisable).

6. That prior to the payment of the Redemption Amounts by the Lenders we shall confirm the outstanding balances from yourselves or Prime Bank for purposes of taking into account the accrued interest thereof as at the payment date.

7. We confirm that we are aware that the outstanding balance in the Overdraft Account may fluctuate and that we shall procure that the Lenders pay the actual balances together with accrued interest thereon which you or Prime Bank confirm is payable on the Payment Date.

8. That we shall exercise our best endeavors to ensure that the registration of the Lenders' Supplemental Charge is completed expeditiously and shall send to you a Photostat copy of the Application for Registration Form showing the Day Book Number of the Lenders' Supplemental Charge as soon as shall be practicable following submission for registration at the Land Registry and the Companies Registry and thereafter keep you well informed of all the progress made in the registration.

9. That we shall immediately upon receipt of the duly registered Lenders' Supplemental Charge notify you of such registration.

10. That we acknowledge and confirm that unless and until the Redemption Amounts are paid in full, we shall not be discharged from our undertaking and obligations herein.

11. That within two (2) business days following the remittance in full of the Redemption Amounts to Prime Bank by the Lenders, and written confirmation of receipt thereof, the following documents shall be forwarded to us by yourselves:-

i. The duly executed Discharge (in triplicate) in respect of the PBL Charge (the 'PBL Discharge of Charge')

ii. The original stamped and registered PBL Charge; and

iii. The certificate of Registration in respect of the PBL Charge.

12. That time shall be of essence in respect of all our obligations herein and that if payment of the Redemption Amounts herein or the registration of the Lenders' Supplemental Charge is not effected within Ninety (90) days from the date you forward to us the original certificate of Title in respect of the Property, or such other period as shall be extended by you in writing, we shall immediately, upon written demand by you, return the original Certificate of Title in respect of the Property to you unutilized and in the same good condition that it was on leaving your offices, and with any entries that may have been made on the original Certificate of Title in respect of the Property in favour of the Lenders by the Lands Registry and/or the Companies Registry as a result of such attempted registration duly cancelled.

13. That by accepting, retaining or utilizing the original Certificates of Title in respect of the Property that shall be sent by you to us, we shall be deemed not only to have accepted and confirmed the foregoing undertaking's, terms and conditions as set forth herein-before but also to have acknowledged and confirmed that we are solely liable and responsible for full compliance with the said undertakings, terms and conditions.

On the strength of the above undertakings please forward to us the original Certificates of Title in respect of the Property.

We look forward to hearing from you.

Yours faithfully,

Partner

15. The Plaintiff firm asserts that the Defendant firm breached the irrevocable and unconditional undertaking in the following four respects.

(i) Contrary to condition 5 of the irrevocable undertaking, the Defendant firm failed to procure payment of the Redemption Amounts to the Bank within seven (7) days of registration of the Supplement Charge in favour of the Lenders.

(ii) Contrary to condition 9 of the irrevocable and unconditional undertaking, the Defendant firm failed to notify the Plaintiff Firm of such registration immediately upon receipt of the duty registered Lenders' Supplemental Charge.

(iii) Contrary to condition 12 of the irrevocable and unconditional undertaking the Defendant firm failed, upon written demand by the Plaintiff firm, to

(iv) immediately return the original Certificates of Title in respect of the property utilized and in the same good condition that it was on the leaving the Plaintiff's firm offices, when it failed to procure payment of the redemption amounts within the stipulated period.

(v) Contrary to condition 13, the Defendant firm, as one which was solely liable and responsible for full compliance with the irrevocable and unconditional undertaking has failed to take responsibility for full compliance with the undertaking.

16. At the very heart of this matter is clause 5 of that undertaking which reads:-

5. That we shall within seven (7) days of receipt by us of the (i) registered Lenders' Supplemental Charge from the relevant Land Registry and the Companies Registry and (ii) confirmation from yourselves or Prime Bank of the outstanding amounts in accordance with paragraph 6 below (the 'payment date'), procure that the Lenders pay directly to Prime Bank in cleared funds the Redemption Amounts then due and owing to Prime Bank from the Borrower (as advised by yourselves or Prime Bank at the time), by way of Real Time Gross Settlement (RTGS) to Prime Bank's designated account as follows:

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· Any arrears in the United States Dollars (USD) Loan Account will attract interest at the rate of 13% per annum (revisable).

17. Counsel for the Plaintiff referred the Court to two dictionary meanings of the word to “procure”. In Cambridge Advances Dictionary, 4<sup>th</sup> Edition, the word means:-

“to get something especially after an effort”.

In Oxford Advances Learners Dictionary of Current English, 4<sup>th</sup> Edition, it means:-

“obtain something, especially with care and effort”.

18. It is proposed by the Plaintiff firm that from the meaning assigned to the word and in the context of the case, the Defendant firm was required to ensure that the lenders paid the redemption amounts to the Bank. It is submitted that merely informing the lenders of the registration of the supplemental charge and requiring them to pay was not enough.

19. The Defendant firm retorts by arguing that the word procure falls short of the sense of compulsion which the Plaintiff firm asserts is the meaning to be adopted. The Defendant firm preferred the meaning found in the Shorter Oxford English Dictionary where the word is defined to include;

“Prevail upon, induce, persuade (a person) to do something”.

20. It is common cause that it was the Plaintiff firm which suggested the inclusion of this clause in the undertaking. The tenor of the application before Court is that the Defendant firm should honour its professional undertaking by procuring payment from the client of Kshs.311,488,575.33 and if the same is not be paid then it should be enforced by requiring the Defendant firm to make the said payment. It is in this scheme of things that the Court must discuss the scope of responsibility placed on the Defendant firm by the undertaking. Does it extend to an obligation to pay up in the event the lenders failed to do so?

21. It is true that from the different dictionary meanings cited above, the word procure is assigned a compulsive duty as well as a more liberal responsibility. Yet because it was used to prescribe a duty of one of the parties to a professional undertaking context is important. So, what constitutes a professional undertaking? An answer was given by the Court of Appeal in the case of *Waruhiu K'OWade & Ng'ang'a Advocates-vs- Mutune Investments Ltd (2016) eKLR* in which it stated:-

*‘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’.*

22. Given the importance of professional undertakings in easing and facilitating transactions carried out by advocates, this Court takes the view that the word ‘procure’ should not be assigned a casual meaning. For this reason, I hold that the word required the Defendant firm to do something more than to simply prevail upon, induce or persuade its clients to pay up the outstanding sums of money.

23. The firm was under a duty to advise the lenders when the responsibility to pay fell due and to lean on its clients to pay up. Without pretending to be able to prescribe the nature of advice that the firm was expected to give, that advice would have to be an unequivocal advice to the clients to pay. While circumstances would differ from case to case, such advice could include reminding the lenders of the seriousness of the legal obligations to pay and any ramifications in the event of failure. To simply inform the lenders to pay would be to fall short of the responsibility of the promise to ‘procure’.

24. And the Court adds that it does not agree with the argument by the Defendant firm that its undertaking was limited to handling of the security documents. By making the promise that it would procure its clients to pay, the Defendant firm was making a promise that it would be proactive in seeking its clients to pay when the occasion for payment was due. It could not be a casual or passive bystander.

25. Yet, on the other hand, that responsibility does not extend to forcing the clients to pay or as it were holding a gun to their heads to pay. The undertaking was given by a firm of advocates and was to be carried out within the scope of legal work. While a lawyer may have some leverage over a client through persuasion, he may not have coercive authority to force the client to do or refrain from doing something. If the duty expected of the Defendant firm was intended to be more compulsive than would ordinarily be expected of advocates then the Plaintiff firm, which worked out the wording of Clause 5, needed to have expressly said so. Even greater still, was the need to be explicit that the promise included the duty to pay in the event of default by the clients.

26. So did the Defendant firm discharge its undertaking? It claims to have done so. This is what Ruth Kuringa desposes,

*“25 THAT the Defendant has discharged its mandate of informing the lenders of the registration and requiring them to pay the redemption Amounts to Prime. Accordingly, the Defendant has fully honoured its professional undertaking to the plaintiff. Annexed hereto and marked RK 6 are various e-mails to the Lenders”.*

27. The Court has looked at those e-mails and the e-mail of 12<sup>th</sup> July, 2018 catches its attention. It reads;-

*Dear All,*

*We are in receipt of the attached letter, the effect of which is to require the payment of the sum of Kshs.295,995,174.43 together with accrued interest to Prime Bank Limited within 7 days from the date of the letter.*

*Condition 5 of our letter of undertaking, which was issued on your instructions (copy attached for ease of reference), requires us to procure that you, as the Lenders, would pay directly to Prime Bank Limited any Redemption Amounts due from the Borrowers as soon as we shall have received: (i) the Lender's Supplemental Charge from the relevant Lands Registry and the Companies Registry; and (ii) confirmation from Prime Bank's lawyers or Prime Bank of the outstanding amounts. As you will recall, these two requirements have been met and we informed you accordingly.*

*Therefore, unless other conditions have been breached so as to justify the non-payment of the amounts envisaged under condition 5, it is our considered view that the amount would be payable.*

*With respect to our responsibility under the undertaking, we have responded as we should and hope that the advocates will act reasonably. However, the advocates and Prime Bank Limited may take a different view and proceedings could ensue. Please see attached a copy of our response to the letter received this afternoon.*

*Kind regards*

*Ruth Kirunga/Kaplan & Stratton*

*Partner*

28. In that communication, the Defendant firm not only forwards the demand made by the Plaintiff firm but also advises that the two requirements upon which payment was predicated had been met. It in fact reminds the lenders that it had advised as much earlier. It is then unequivocal in the following remarks:-

*"Therefore, unless other conditions have been breached so as to justify the non-payment of the amounts envisaged under condition 5, it is our considered view that the amount would be payable".*

29. This is the legal opinion by the Defendant firm advising that the condition for payment had been met and that payment should be made. In my view, the defendant firm was not simply informing the lenders to pay. It was legal advice that the payment was due and should be made. That email, this Court holds, passes for the duty to procure the lenders to pay as envisaged in the undertaking. There could have been no further obligation on the Defendant firm to force its clients to pay or to pay on their behalf.

30. It would seem that with that the substantial complaint by the Plaintiff firm is therefore without merit.

31. At this juncture it would be remiss if this Court were not to make an observation. As earlier stated, at the time the Plaintiff firm accepted the professional undertaking from the Defendant firm it did not insist on the Defendant's clients giving to its clients a Bank to Bank undertaking to pay. If this had been done, then the Plaintiff's client would have been able to enforce that undertaking once the Defendant firm had advised the lenders that their obligation to pay had arisen.

32. Let me now consider the other complaints raised. The first is that the Defendant firm failed to notify the Plaintiff firm of registration of the lenders supplemental charge immediately upon receipt of the duly registered supplemental charge. From the common evidence of the parties, the registration of the supplemental charge suffered some delay and it required indulgence from the Plaintiff for it to be registered outside the 90 days period initially agreed by the parties. In this regard is the e-mail by the Plaintiff firm of 21<sup>st</sup> February 2018.

33. That indulgence expired on 13<sup>th</sup> March 2018 but still the registration had not happened. On 16<sup>th</sup> March 2018, the Defendant advises the Plaintiff that the Land Registrar had asked it to collect the registered charge by the end of the week following. The next letter is that of 5<sup>th</sup> April 2018 from the Defendant firm to the Plaintiff firm seeking to be discharged from its undertaking on the basis that the lenders had paid Prime Bank in full. Nothing is said of the fate of the supplemental charge.

34. It would seem however that by 9<sup>th</sup> May 2018, the Plaintiff was aware about the registration of that supplemental charge. Hence in a letter of that date demanding for its cancellation if the redemption sums would not have been paid.

35. From the evidence available it is not clear when the supplemental charge was registered. However, it is clear that the Defendant firm did not advise the Plaintiff firm when the charge was registered and that would be breach of Clause 9 of the undertaking. Nonetheless, given that there was no undue delay in the Plaintiff firm learning of the registration, nothing much can turn on this breach.

36. In regard to condition 12, it reads;

*"Contrary to condition 12 of the irrevocable and unconditional undertaking the Defendant firm failed, upon written demand by the Plaintiff firm, to immediately return the original Certificates of Title in respect of the property unutilized and in the same good condition that it was on the leaving the Plaintiff's firm offices, when it failed to procure payment of the redemption amounts within*

*the stipulated period”.*

37. So as to understand the full purport of this particular promise, the undertaking must be read as one whole document. I do not understand the Plaintiff firm to be calling up the undertaking because of the delay in registration of the supplemental charge. It does so because of failure of the lenders to pay up the redemption sum. So as to determine whether the Defendant firm failed in its duty under this clause, one has to locate when payment of the redemption sum became due. In this regard, Clause 5 is not without importance. Under that clause the lenders were obliged to pay the redemption sum within seven (7) days of receipt of the Defendant firm of the supplement charge and confirmation of the payment date from the Plaintiff firm or Prime Bank. Whilst there is no contestation that the supplement charge was duly registered, the Court has been unable to get evidence of the date of registration of the charge or when it was received by Defendant firm. Yet in so far as the Court has held that the Defendant firm carried out its duty by ‘procuring’ the lenders to pay the redemption sum then the said firm cannot be made to pay the said sum or return the original certificate of title in the same condition as it was received by them as required under Clause 12.

38. This Court would think that the Plaintiff firm finds itself in some difficulty because of the manner in which the Plaintiff firm worked out the wordings of Clause 5 and 7 of the undertaking. Yet it may still be some consolation to the Prime Bank that it still holds a charge which is first in priority and all may not be lost.

39. For reasons given I do not find merit in the Originating Summons of 23<sup>rd</sup> November 2018. On the issue of costs, both firms may well be to blame for using a word in the undertaking that has fomented a dispute. Although the Plaintiff firm has lost the argument it is not entirely to blame for seeking this Courts intervention in the matter. For that reason each side shall bear its own costs.

**Dated, Signed and Delivered in Court at Nairobi this 2<sup>nd</sup> Day of August, 2019**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Wanjohi for Plaintiff

Ojiambo and Ouma for Defendant

Nixon: Court Assistant