



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL APPLICATION NO 507 OF 2017 (OS)

CONSOLIDATED BANK OF KENYA LTD.....PLAINTIFF

-VERSUS-

KINYUA NJAGI & COMPANY ADVOCATES....DEFENDANT

RULING

This ruling relates to Originating Summons dated 4th September 2017 and filed on 21st December 2017, pursuant to **Sections 1A & B of the Civil Procedure Act; Order 37 Rule 3 and 4 and order 52 Rule 7(1) and (2) of the Civil Procedure Rules** and all other enabling provisions of the law.

The Applicant is seeking orders;

- a. The law firm of Kinyua Njagi & Company Advocates be compelled to honour their professional undertaking given on 21st November 2013 within 14 days;**
- b. That in the alternative the Defendant be ordered to surrender back to the Plaintiff the original Title document No. Mbeti/Kiamuringa/2289 Mbeere South District within 14 days;**
- c. That in any event, the Plaintiff be awarded the costs hereof and interest at Court rate from the date the undertaking was breached until payment in full.**

The application was premised on grounds that;

- a. By a letter of offer dated 25th October 2012, the Plaintiff granted Pius Mukundi Njagi T/A Kenmax General Suppliers (the borrower) a Mortgage Loan facility for Ksh 8,000,000 and term loan facility in continuation of existing facility with an outstanding balance of Ksh 791,667/-;**
- b. The facilities were secured by First legal charges over Title No. Embu/Municipality/611 and Title No. Mbeti/Kiamuringa /2289;**
- c. Original Title No. Mbeti/Kiamuringa/2289 was released to the Defendant upon their professional undertaking, dated 21st November 2013, to remit the sum of Kshs 1,550,000/- to the Plaintiff within 45 days;**
- d. Following the release and discharge of original Title No. Mbeti/Kiamuringa/2289, the Defendant refused to honour terms of their professional undertaking;**
- e. A green card obtained by the Plaintiff indicates that Title No. Mbeti/Kiamuringa/2289 is now charged to SMEP Microfinance Bank Limited;**
- f. Failure by the Defendant to honor terms of their professional has and continues to cause great loss due and prejudice of the part of the plaintiff.**

REPLYING AFFIDAVIT

The Application is opposed vide a Replying Affidavit dated 3rd July 2018, sworn by **Njagi Nicholas Nyaga** who is an Associate Advocate in the Defendant firm. He avers that on 28th October 2013, he wrote to the Company Secretary of the Plaintiff Bank requesting for the release of the original Title Deed over the property known as L.R. No. Mbeti/Kiamuringa/2289 together with a duly executed discharge of charge on their professional undertaking to remit the sum of Kenya Shillings One Million, Ninety Eight Thousand Eight Hundred and Eighty Three (Kshs 1,098,883/-) to themselves within a period of Forty Five days (45) upon receipt of the documents.

That on 15th November 2013, the Plaintiff's advocates **G. K. Kibira & Co. Advocates**, wrote to them requesting for a professional undertaking in terms they set out in their letter.

That on 20th November 2013, the Plaintiff wrote to Defendant's advocates enclosing the original title deed for **L.R. No. Mbeti/Kiamuringa/2289** and a legal charge dated 10th April 2012 to enable them draw a discharge of charge to be executed by the bank upon receipt of a professional undertaking from Defendants.

That on 21st November 2013, they wrote to the Plaintiff's advocates **G.K. Kibira & Co. Advocates** providing them a professional undertaking under terms acceptable to them and on 26th November 2013, the Plaintiff's advocate wrote providing them with original Title Documents for **L.R. No. Mbeti/Kiamuringa/2289** and a duly executed discharge of charge.

He further states that on 22nd January 2014, they wrote to the Plaintiff's Advocates informing them of delay regarding the sale of the subject property and that they had advised their client to secure the principal amount as they awaited the conclusion of the sale transaction and that their client had already deposited a substantial amount of the proceeds with them.

That the defendant received instructions from the client Pius Mukundi Njagi on 14th March 2014 stating that the Plaintiff bank had proceeded to auction his property **L.R. Embu/Municipality/611** and the client demanded that the monies held by him for forwarding to the Plaintiff Bank be refunded to the client, Pius Mukundi who threatened legal action upon the Defendant.

That he wrote to the client on 17th March 2014 informing him that they were unable to effect his instruction in view of their undertaking and that the sums held by them were not forwarded for reason that they awaited the balance before remitting the entire sum to the Plaintiff Bank.

That vide the above said letter, they also requested either a letter from the Plaintiff's lawyers that they shall stand effectively discharged from their undertaking or that he deposits the original undischarged title for the property with themselves. They further informed the Plaintiff that they were strangers to matters regarding the property known as **L.R. No. Embu/Municipality/611**.

That on 24th March 2014, the Defendant wrote to the Plaintiff's advocates explaining why they were unable to transfer funds to them. The Defendant informed the Plaintiff that their client informed the Defendant that the Plaintiff had instructed auctioneers to realize the security in **Embu/Municipality/611**.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted that it is imperative to note for the avoidance of doubt that property Embu/Municipality/611 is different from property No. Mbeti/Kiamuringa/2289, the latter's title gives rise to this dispute and never were the Defendants involved in any transaction in the former.

That **Rule 9 of the Code of Ethics and Conduct for Advocates 2015** provides as follows;

“The Advocate is under a duty to honour any professional undertaking given in the course of his/her practice in a timely manner. The obligation to honour a professional undertaking remains until the undertaking is performed, released or excused. To fail to honour an undertaking is professional misconduct”

That the effectiveness of undertaking given by the Advocates depends on the confidence and belief that a party has on that reliance or can be placed on the undertaking. The Advocate's failure to honour the undertaking undermines such confidence and is detrimental to the client's interests.

That it is trite law that only advocates as the parties to an undertaking can enforce the undertaking and therefore an advocate cannot blame his client for failing to honour the terms of an undertaking. The Court in case of **David Karanja Thuo –vs- Njage Waweru HCCC No. 209 of 2008 (OS)**, held *inter alia*;

“In the first instance, it should be noted that the professional undertaking was between the advocates and none of the clients was party to such an undertaking. For want of 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 client's property since that 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.”

That further to the above, the undertaking given by the Defendant was unambiguous, unequivocal and binding. An advocate cannot, after giving such an undertaking, qualify the same on account of accounting disputes between the advocates and the client.

An advocate is not allowed to qualify his undertaking on account of disputes between the parties or with client or due to unavailability of funds.

That the Defendant has cited the Bank's decision to auction its client's property Embu/Municipality/611 as a reason for failing to honour the terms of its undertaking. The Court of Appeal in *Kenya Reinsurance Corporation –vs- V.E Muguku T/A M/S VE Muguku Muriu & Company Civil Appeal No. 48 of 1994*; held **that an advocate is not allowed to qualify his undertaking on account of disputes between the parties or with client or unavailability of funds.** The court held:

“We hold that the undertaking given by the respondent advocate was unambiguous, unequivocal and binding on him. An advocate cannot, after giving such an undertaking qualify the same on account of accounting disputes between the parties”

That further, Odunga J in *Christopher Musyoka Musau V NPG Warren & 7 others [2012] eKLR* found;

“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 law gives him the right to sue his client to recover whatever sums of money he has incurred in honouring a professional undertaking but he cannot however, sue to recover that amount unless he has first honoured his professional undertaking.”

That the Defendants failed to adhere to certain principles laid down in the Code of Ethics and Conduct for Advocates 2015 when giving a professional undertaking, among them, the principle that an advocate should only give a professional undertaking when he has full control over the ability to fulfil such undertaking.

This Court may grant enforcement of an undertaking by an advocate. The Court in *Christopher Musyoka Musau V N. P. G. Warren & 7 Others [2012] eKLR* held;

“The law relating to enforcement of undertaking is clear. It is not contractual in nature but it is a power bestowed upon the Court to ensure that its officers comply with undertakings they give in the course of their dealings as such officers to third parties. Accordingly, the courts have held that an undertaking is a solemn thing and in enforcing an undertaking the court is not guided by considerations of contract but the court aims at securing the honesty of its officers.”

That further to the above the court in *The matter of section 50(1) of the Advocates Act Muriu Mungai & Co. Advocates & Another [2009]eKLR*; held inter alia:-

“The courts have an inherent power to commit an advocate for breach of an undertaking. The court has jurisdiction over an advocate for breach of an undertaking on the basis that the order sought seeks the court to exercise its punitive and disciplinary power to prevent a breach of duty by an officer of the court, which is quite distinct and separate from the client's legal right... 2. The purpose of the punitive and disciplinary powers of the courts' jurisdiction over advocates is not (to enforce) legal rights, but (to enforce) honourable conduct among them in their standing as officers of the court by virtue of Section 57 of the Advocates Act, cap 16.”

DEFENDANT'S SUBMISSIONS

The Defendant submitted that the holding of the court in the case of; *Nelson Andayi havi T/A havi & Company Advocates –vs- Jane Muthoni Njage T/A J.M. Njage & Company Advocates [2015]eKLR*;

“But one thing is not in doubt; that a professional undertaking given by advocates is separate and distinct contract which is enforceable between the parties. The respective clients of the advocates in the undertaking are not parties in the undertaking. Therefore, only the advocates as the parties in can enforce the undertaking”

Likewise Njagi J. in the case of *David Karanja Thuo –vs- Njage Waweru HCCC No. 209 of 2008 (OS)* held as follows:-

“In the first instance, it should be noted that the professional undertaking was between the advocates and none of the clients was a party to such an undertaking.”

Further emphasizing the point that an undertaking is only between advocates, the court in the case of *David Karanja Thuo T/A (Practising as D.K Thuo & Co. Advocates) –vs- Njagi Wanjeru (Practising as Njagi Wanjeru & Co. Advocates) [2010] eKLR* held as follows;

“In the first instance, it should be noted that the professional undertaking was between the Advocates and none of the clients was party to such an undertaking. For want of 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 client's property since that 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.”

DETERMINATION

The parties through Counsel have cited the law on professional undertaking as elucidated by an array of authorities. The import of case-law is that professional undertaking is between an advocate who provides an undertaking/commitment to comply with clear express conditions in exchange for release of documents of title.

In the instant case, the Defendant by the letter of 21st November 2013 gave Professional undertaking to the plaintiff Bank Consolidated Bank of Kenya for the release of original title **Mbeti/Kiamuringa/2289** on the following terms/conditions;

- a. The Defendant shall hold the bank securities in order, returnable on demand and will not release without obtaining a written consent.
- b. The securities were released only for purposes of registering discharges
- c. The Defendant was/is to pay directly to the Plaintiff Company the outstanding balance of Ksh 1.5 m within 45 days and Legal Fes of Ksh 50,000/-

The Defendant confirms issuing undertaking as outlined above. The Defendant confirms that the terms of Professional undertaking were not complied with to date.

The plaintiff confirmed that upon search the released title was used by the Defendant's client as security for a loan facility from SMEP Microfinance bank contrary to terms of release of the original title only for registration of discharge of charge.

These uncontroverted facts confirm non-compliance of the Defendant's professional undertaking. There is no doubt that terms of the undertaking were complied with. The Defendant had not remitted the funds subject to the professional undertaking.

The Defendant disclosed that his client **Mr. Pius Mukundi Njagi ID 21402392** informed the Defendant that the plaintiff bank sold his other suit property **LR EMBU /MUNICIPALITY/611**.

The Professional undertaking is not/cannot be vitiated by extraneous factors or other circumstances. The undertaking was/is with regard to suit property **LR MBETI/KIAMURINGA/2289 and not LR EMBU /MUNICIPALITY/611**. This transaction has nothing to do with the instant Professional undertaking regarding release of title documents to the Defendant as advocate representing his client Mr. Pius Mukundi Njagi ID 21402392 in return for remitting into the Plaintiff account the amount outstanding.

Even if the Plaintiff bank sold another of the Defendant's properties; there is no evidence of the said sale and proceeds for the Court to consider offsetting the current outstanding debt. The Defendant's client has means of pursuing redress if at all against the Plaintiff Bank if any irregularity or invalidity that may have taken place.

In the absence of any exculpatory circumstances or reasons to justify legal non compliance of the Professional undertaking, the Plaintiff has established its claim of non payment of Ksh 1,500,000/- outstanding balance and Ksh 50,000/- legal fees

In the case of *Havi & Company Advocates vs Jane Muthoni Njage T/A Jm Njage & Company Advocates HCCC 59 of 2009* it was held;

“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 conduct between the parties. The Honourable conduct of the advocate is embedded in the undertaking.”

The defendant in this case had funds Ksh 1,300,000/- from his client as evidenced by the content of letter of 22nd January 2014 from the Defendant to the Plaintiff's advocate on record. The Defendant ought to have remitted what was already available which was more than half the outstanding amount. The defendant's client wrote vide letter of 14th March 2014 to the Defendant and demanded refund of funds released to the Defendant and held in his account as it was not remitted and in the process another property was sold by the Plaintiff Bank.

DISPOSITION

The totality of the evidence confirms that the defendant failed to honour the Professional undertaking. This Court finds no merit in Defendant's defence and upholds the application by the Plaintiff bank to recover from the Defendant the funds due and owing from the Defendant with interest and costs of this suit.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

KURAUKA HOLDING BRIEF MR. WAIGWA FOR PLAINTIFF

NO APPEARANCE FOR DEFENDANT

MS JASMINE – COURT ASSISTANT