



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 4 OF 2017**

AND

**IN THE MATTER OF SECTION 55 AND 56 OF THE ADVOCATES ACT**

AND

**IN THE MATTER OF 52 RULES 4 AND 7 OF THE CIVIL PROCEDURE RULES 2010**

AND

**IN THE MATTER OF AN UNDERTAKING**

**BY THE FIRM OF ODHIAMBO & WEDA ADVOCATES**

**HENRY KIPKORIR KIMUTAI.....APPLICANT**

**-VERSUS-**

**WEDA AMBROSE OTIENO.....1<sup>ST</sup> RESPONDENT**

**ODHIAMBO DISMUS OMONDI WAKLA....2<sup>ND</sup> RESPONDENT**

**(Both respondents formerly trading as Odhiambo & Weda advocates)**

**JUDGMENT**

1. By an Originating Summons taken out by Henry Kipkorir Kimutai the applicant on the 13<sup>th</sup> February 2017, the applicant sought that:

***(1) This Honourable Court does make a declaration that the Respondents breached an undertaking given by them.***

***(2) This court does order the Respondents to pay sums expended on account of legal fees by the Applicant as a direct result of breach of the undertaking given by the Respondents herein.***

***(3) That this Honourable Court does order the defendants herein to pay the sum of Kshs.4,000,000/= plus interest to the plaintiff being sums that were deposited to their client/Advocate account to secure conditional stay orders granted by the court.***

2. The Originating Summons was brought under provisions of **Order 52 rules 4 and 7 of Civil Procedure Rules and Section 55 and 56 of the Advocates Act**, and supported by grounds as stated on the face of the application and a very detailed supporting affidavit sworn by the applicant on the 13<sup>th</sup> February 2017, and a further affidavit sworn on the 16<sup>th</sup> April 2018.

3. It is opposed by a Replying Affidavit sworn by the 1<sup>st</sup> Respondent Weda Ambrose Otiemo on the 26<sup>th</sup> March 2018 and filed on the 3<sup>rd</sup> April 2018 together with a Preliminary Objection dated 15<sup>th</sup> March 2008 and filed on the 16<sup>th</sup> March 2018. The **Preliminary Objection**, in the main, objects to this courts jurisdiction to hear a matter under **Section 55 and 56 of the Advocates Act** and disputes involving Advocate-client remuneration under **Section 44-52 of the Advocates Act**.

4. Further, it is stated that the subject of this matter being complex requires substantial evidence hence cannot be addressed under an Originating Summons, but by a plaint.

5. On the 19<sup>th</sup> March 2018 when directions on the manner of hearing of the Originating Summons were taken under **Order 37 rule 18 of Civil Procedure Rules**, parties agreed that the Originating Summons shall be determined upon the affidavits filed by all the parties and that the Preliminary objection filed by the Defendants shall form part of the Originating Summons and submissions filed on the same. The 1<sup>st</sup> Defendant was duly represented.

I have considered the entirety of the Originating Summons, the affidavits and annexure thereto.

#### 6. **Matter of Jurisdiction**

It is trite law that jurisdiction is everything, and that a question of jurisdiction ought to be raised at the earliest opportunity. Without jurisdiction, the court has no power to take any action, but has to down its tools – **Owners of the Motor Vessel “Lillians” -vs- Caltex Oil (Kenya) ltd (1989) KLR 1.**

It is also trite that a court's jurisdiction flows from either the law or legislation, or both, and a court ought not arrogate itself jurisdiction in any other way - **Supreme Court Civil Appeal (Application)No. 2 of 2011 - Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others.**

7. The Originating Summons is brought under **Order 52 rule 4 and 7 of Civil Procedure Rules.**

**Rule 4 states:**

***4(1) “Where the relationship of Advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for***

***(a) Delivery by the advocate of a cash account***

***(b) The payment or delivery up by the advocate of money or securities.***

***4(2) Applications under this rule shall be by Originating Summons, supported by affidavit and shall be served upon the advocate.***

8. **Order 52 Rule 7** states:

7(1) An Application for an order of enforcement of an undertaking given by an advocate shall be made

***(a) if the undertaking was given in a suit in the High Court, by summons in chambers in that suit, or***

***(b) In any other case, by originating summons in the High Court.***

9. The undertaking under interrogation was given in respect of court orders issued on the 23<sup>rd</sup> March 2012 in **HCCC No. 56 of 2006 – Henry Kipkorir Kimutai -vs Kenindia Assurance Co. Ltd.** The plaintiff in that case is the plaintiff in this Originating Summons.

10. The undertaking was given on the 24<sup>th</sup> May 2012 by the firm of **Odhiambo & Weda** Advocates who were then acting for the plaintiff. Ambrose Otieno the 1<sup>st</sup> Respondent was the signatory to the undertaking on behalf of the said firm of Advocates, or on his own behalf as it will be shown herebelow.

11. There is no dispute that at the time the undertaking was given there existed an Advocate-client relationship between the plaintiff and the Defendants in the case HCCC No. 56 of 2006.

This is reinforced by a retainer and legal fees agreement signed between the plaintiff and the Advocates on the 24<sup>th</sup> April 2016 – **PExt HKKI – See Order 52 Rule 4(1) of Civil Procedure Rules.**

12. Further, the same order empowers the court to order an Advocate to deliver a cash account or pay up money or deliver securities held by the Advocate – See **Peter Furmetz -vs- James G. Mouko T/A Mouko & Co. Advocates (2015) e KLR**, and **Malindi Holdings & Estate Agents Ltd -vs- Morris Mwambui Kupalia (2011).**

13. In this case, the Court of Appeal rendered the following on **Order 52 rule 4,**

***“In our view the intendment of the rule was to secure quick resolution to disputes between advocates and their clients without undue regard to technicalities. It is a noble procedure which has since been augmented by the enactment of Sections 1A and 1B of the Civil Procedure Act --- as well as the provisions of Article 159 (2) (b) of the New Constitution ---”***

14. I do not agree with the 1<sup>st</sup> defendant's submission that the matter is complex and that it requires more than affidavit evidence to be resolved. Having read through the affidavits by all the parties, I find no complexity at all to demand a plaint to be filed. In any event, I have stated earlier that while parties were taking directions, they agreed that the issues for determination be determined on the affidavits and submissions as filed, and specifically on Prayer 3(O.S.).

15. I am therefore satisfied that this court has the requisite jurisdiction to hear and determine the issues raised in the Originating Summons, such jurisdiction having been conferred to it by legislation in terms of **Order 52 rule 4 and 7 of Civil Procedure Rules** and re affirmed by judicial pronouncements cited above.

16. The matter of Advocate - client remuneration is governed by **Sections 44-52 (Part ix) of the Advocates Act, Chapter 16. The Originating Summons** filed hereof, in my view, does not touch on issues as to advocates remuneration and or legal fees to the Advocates.

17. A reading of the reliefs sought in the Originating Summons, under prayer (3), which the applicant/plaintiff seeks is on the undertaking and not on legal fees or the Advocates remuneration

-See **Omulele & Tollo Advocates -s- Mount Holdings Ltd (2016) e KLR** where the court was clear that under the provision of **Section 45 (5) of the Advocates Act,**

**“-- an advocate who is party to a retainer agreement and who has acted for the client diligently is entitled to sue and recover for the whole retainer fee should his client default in payment thereof--”**

18. The Originating Summons does not way shut out the defendant advocates from pursuing their legal fees from their client, the applicant. **Order 52 Rule (3) of Civil Procedure Rules** states:

**(3) “If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment ---”**

The Advocates are at liberty to move the court in that direction.

19. The last limb of the Preliminary Objection by the 1<sup>st</sup> Defendant is that there is no valid undertaking in favour of the applicant capable of being enforced.

There is no doubt that the undertaking at issue was given by the Respondents/Defendants to the firm of **Sheth & Waithigo Advocates**, under instructions from their client, the Applicant/Plaintiff – see letter dated **24<sup>th</sup> May 2012**, signed by the 1<sup>st</sup> Respondent, Mr. Weda Advocate.

20. The purpose for the undertaking was to secure and comply with a court order issued on the 23<sup>rd</sup> March 2012 against the client/applicant by depositing the Kshs.4 Million failing which his property would be sold by public auction. The undertaking was conditional. The said condition having not been met, refund of the deposit was the obvious thing. In their wisdom, the Advocate in this case, Mr. Weda failed to deposit the money as ordered by the court and failed to refund the same to the client or the Advocates to whom it was given, even upon demands sent out for the refund.

21. In **Muthaura Mugambi Ayugi & Njonjo Advocates -vs- Jane Nyamboke Njage (2011) e KLR**, the court held that an undertaking

**“must be clear, unambiguous, unequivocal, certain and without any condition precedent.”**

The 1<sup>st</sup> respondent being the drafter and giver, has not told the court, either in his affidavits or in submissions what is not clear, or what is ambiguous or uncertain in the undertaking he himself gave. A party who alleges must prove – **Section 107 -108 Evidence Act.**

22. It is submitted by the 1<sup>st</sup> Respondent that the letter of undertaking was addressed to **Sheth & Waithingo Advocates**, not be to the applicant, who in the Respondent's view lacks *locus standi* to request for the refund.

23. In the case **Diamond Star General Trading LLC -vs- Ambrose D.O. Rachier t/a Rachier & Co. Advocates – Misc. Application No. 451 of 2015 (2017) e KLR**, the court held that in circumstances as in the present Originating Summons, a client can sue the advocate who gave the professional undertaking and seek for its enforcement.

24. In the case **Karsan Lalji Patel -vs- Peter Kimani Kairu t/a Kimani Kairu & Co. Advocates (2000) e KLR** – faced with the same question whether a client can sue an advocate who gave a professional undertaking to the client's advocate in order to enforce it, held that it was in order, and contrary arguments were misplaced. I am satisfied of the *locus standi* of the applicant to sue for refund of his money from the Respondents.

25. The Advocates (Respondents) in this present case gave **“-an irrevocable undertaking” to refund the money, if the advocates fail to secure extension of time---** There is no dispute that the Advocates and in particular, 1<sup>st</sup> Respondent failed to secure the extension and further failed to deposit the said sums in an interest earning account as stated in the court order.

26. It is on record that Mr. Weda Advocate admitted holding the said sum of Kshs.4,000,000/= in his account as lien for what he calls unpaid legal fees, and this clearly, not in the then Partnership account, but in his own account, not even in his legal firm's client account.

An advocate is not authorised to divert money held on a professional undertaking for a specific purpose, to another, particularly legal fees, or lien for unpaid legal fees without specific court order, or by express authority of the client/advocate.

27. If the purpose for which the undertaking was given does not materialise, then the funds must be refunded to the rightful owners, in this case the plaintiff/applicant on whose specific instructions -(See letter dated 23<sup>rd</sup> May 2012) his advocates **Sheth & Waithigo Advocates** remitted the money to the said firm of **Odhiambo & Weda Advocates**. Suffice to state that either his client and or his advocates being the beneficiaries of the undertaking can sue for refund or enforcement of the undertaking – **Karsan Lalji** case above.

28. An advocate holds a general as well as specific authority to act for a party, and an undertaking is a bond by the Advocate on authority of the client on an advocate-client relationship. In enforcing undertakings, the court is guided not by considerations of the contract or of securing the legal rights of the parties but mainly by ensuring the honesty of the Advocates. **The advocate who gives such professional undertaking becomes personally liable if he fails to do what he undertakes to do, in the undertaking.**

29. It is important to note here that the sum of Kshs.4 Million transferred to the respondents legal firm pursuant to the professional undertaking was admittedly deposited into the personal account of Mr. Weda Advocate (1<sup>st</sup> Respondent) – and not to the partnership account which had been dissolved, but fact not disclosed to the client at the time. This is demonstrated by the 1<sup>st</sup> Respondent's own affidavit sworn on the 10<sup>th</sup> July 2012 and filed on the 11<sup>th</sup> July 2017 and further by his own bank statements annexed thereto, that show the money was deposited in his personal account.

30. I find it quite dishonest of the Advocate Mr. Weda that even after the partnership was formally dissolved by letter dated 22<sup>nd</sup> May 2012, he continued to request for and collected money from his clients in the partnership name – **M/S Odhiambo & Weda Advocates**. In this matter, he received the deposit of Kshs.4 Million after the 24<sup>th</sup> May 2012.

31. That as it may, and having admitted that the said Kshs.4 Million was deposited into his own bank account and not in the partnership bank account, or his advocate-clients account, **the court has no option but to find that Mr.Weda Ambrose Otieno personally liable to refund the said money to the applicant.**

32. In the case **Harit Sheth t/a K.H. Harit Sheth Advocates, Court of Appeal Application No. 276 of 2001** the court held that:

***“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 ---- it is a bond by an advocate to conduct himself as expected of him by the court to which he is an officer – the advocate is obliged to honour it if only to protect his own reputation as an officer of the court--- accordingly, the advocate who gives his professional undertaking becomes personally bound ---”***

33. Having found that the preliminary objection lacks merit, and having carefully interrogated the applicant's application and all affidavits in support and in opposition, I come to the findings that the 1<sup>st</sup> Respondent breached the undertaking by his failure to comply with the court orders upon which the undertaking was given, and therefore is personally liable to refund the money deposited with him upon his professional undertaking to refund the said money if he failed to comply.

34. I am satisfied that the application is well grounded and the court is fully empowered to order the advocate to pay or deliver up the money he holds in the applicants-client's favour having failed to honour the undertaking – **Order 52 Rule 4 (1) (b) and 2** by paying up the said money to the applicant within a time limit that I shall specify herebelow failing which the applicant will be at liberty to enforce the payment – **Order 52 rule 7(2) of Civil Procedure Rules.**

35. Accordingly, **Judgment is entered for the plaintiff/applicant against the 1<sup>st</sup> Respondent/Defendant as prayed for in the Originating Summons dated 13<sup>th</sup> February 2017 in terms of prayer No. 1, 3 and 5 as follows:**

***1. The 1<sup>st</sup> Respondent, Weda Ambrose Otieno Advocate is directed and ordered to honour the professional undertaking dated 24<sup>th</sup> May 2012 and to pay to the Applicant, Henry Kipkorir Kimutai the sum of Kshs.4,000,000/= plus interest thereon at 14% per annum from the 1<sup>st</sup> September 2012 three months after receipt of the money and thereafter defaulted and or failed to comply with the court order dated the 23<sup>rd</sup> March 2012 until payment in full.***

***2. The 1<sup>st</sup> Respondent is granted a period of 45 days from the date of this judgment to pay the said sum Kshs.4,000,000/=failing which the applicant shall be at liberty to move the court for an order of enforcement.***

***3. The 1<sup>st</sup> Respondent is at liberty to pursue his legal fees from the Applicant under the procedure provided under the Advocates Act and Advocates Remuneration Order.***

***4. The 2<sup>nd</sup> Respondent is absorbed from liability.***

***5. The 1<sup>st</sup> Respondent shall pay costs of the Originating Summons to the Applicant.***

**Dated, signed and delivered this 31<sup>st</sup> Day of May 2018.**

**J.N. MULWA**

JUDGE