



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 98 OF 2016**

**BETWEEN**

**ISHMAEL NYASIMI.....1<sup>ST</sup> APPELLANT**

**CHARLES MICHIEKA NYONGO.....2<sup>ND</sup> APPELLANT**

**AND**

**DAVID ONCHANGU ORIOKI suing as personal representative of**

**ANTONY NYABANDO ONCHANGO (DECEASED).....RESPONDENT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF ENFORCEMENT OF A PROFESSIONAL UNDERTAKING**

**BETWEEN**

**MESSRS MOHAMED MADHANI &**

**COMPANY ADVOCATES.....APPLICANT**

**AND**

**MR. ISAAC OYUGI MEROKA t/a**

**MESSRS MEROKA & COMPANY ADVOCATES.....RESPONDENT**

**RULING**

1. By a chamber summons dated 8th August, 2018, brought under Section 1A, 1B, and 3A of the Civil Procedure Act; Order 52 rule 7 of the Civil Procedure Rules, 2010; Section 56 of the Advocates Act, Chapter 16 Laws of Kenya and all enabling provisions of the law, the applicant prays for orders that

**1) .....spent**

**2) That the Honourable Court do order the respondent's advocate and specifically Mr. Isaac Oyugi Meroka t/a Messrs Meroka & Company Advocates to honour the undertaking given in court pursuant to a consent dated 21st February, 2017 and release to the appellants' advocate Messrs Mohamed Madhani & Company Advocates the sum of Kshs. 3,000,000.00 held as security for the appeal within 7 days**

**3) That in default of compliance with order given under prayer No. 2 above, there be an enforcement order to the effect that the appellants be at liberty to execute as against Mr. Isaac Oyugi Meroka t/a Messrs Meroka & Company Advocates to the extent of Kshs. 3,000,000.00**

**4) That the costs of this application be borne by the respondent**

2. The application is based on the grounds among others that:

- a) *The appellants' advocates and the respondent's advocates executed a consent dated 21st February, 2017 in which Kshs. 3,000,000/- was paid to the respondent's advocates to hold as security pending the determination of the appeal*
- b) *That it was a term of the consent that the sum would be released to the appellants' advocate in the event that the appeal is determined in favor of the appellants*
- c) *That judgment in favor of the appellants was delivered on 19th March, 2018 but the respondent's advocate has neglected and/or refused to refund the said sums contrary to the terms of the undertaking*

3. The application is also supported by an affidavit sworn on 8th August, 2018 by Elizabeth Waichigo, Head of Claims with Messrs. Direct Line Assurance Company Limited, which is the appellants' Insurer in which she reiterates the grounds on the face of the application.

4. The application is opposed on the grounds set out in a replying affidavit sworn on 20th September, 2018 by the respondent. He concedes that his advocate received from **Messrs Mohamed Madhani & Company Advocates the sum of Kshs. 3,000,000.00 to hold as security for the appeal.** The respondent **also concedes that his advocate gave an undertaking** to refund to said sums to the appellants' advocate in the event that the appeal is determined in favor of the appellants. The respondent additionally concedes that the appeal was indeed determined in favor of the appellants but avers that the appeal process has not been concluded since he had filed **Kisumu CA NO. 91 OF 2018** which he says has a high chance of success.

### **SUBMISSIONS**

5. Mr. Kisinga, advocate for the applicant submitted that the undertaking given by the respondent's advocates was unequivocal and placed a contractual obligation on the advocate to honour it. Counsel further submitted that the undertaking was specifically in respect of this appeal and not any other including **Kisumu CA NO. 91 OF 2018**. He urged the court to give effect to the contractual obligations of the parties.

6. Mr. Meroka, advocate for the respondent while not denying giving the undertaking to refund **the sum of Kshs. 3,000,000.00 paid by Messrs Mohamed Madhani & Company Advocates to his firm of advocates to hold as security for the appeal,** submitted that **this application is meant to take away the security for the Kisumu CA NO. 91 OF 2018 which is pending at the Court of Appeal.**

### **ANALYSIS AND DETERMINATION**

7. The procedural provisions of Order 52 Rule 7 of Civil Procedure Rules, 2010 gives the Court the power to order for enforcement of an professional undertaking after giving an opportunity to the advocate to be heard and honour the undertaking. It provides as follows:

*(a) "An application for an order for the enforcement of an undertaking given by an Advocate shall be made:*

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

*(ii) In any other case, by Originating Summons in the High Court.*

*(b) Save for special reasons to be recorded by the Judge, the order shall in the first instance be that the Advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made".*

8. It is important in my view to understand the principles guiding professional undertakings. **Warsame, J** (as he then was) in **Equip Agencies Limited vs. Credit Bank Limited Nairobi HCCC No. 773 of 2004** dealt extensively with the issue when he stated *inter alia* as follows:

*"An undertaking is usually given to ease and smoothen the path of transactions carried out by advocates. It is a convenient method or tool to circumvent the delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between advocates. It is a contract between Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another...An undertaking is a promise to do or refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an advocate either personally or through the name of the firm he usually practices under...The breach of professional undertaking can result in lack of mutual or cordial trust between Advocates and invariably puts the administration of justice into disrepute. The advocates by relating together through a professional undertaking are officers of the court; therefore as far as possible it is mandatory for them to respect their words for the benefit of mutual continuity of their respective relationship...The courts have inherent power to commit an advocate for breach of an undertaking. The court has jurisdiction over an advocate for breach of undertaking on the basis that the court seeks 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 right. Therefore the court even if it has no right, it has jurisdiction to make an order in exercise of its disciplinary jurisdiction. The purpose of the punitive and disciplinary powers of the court's jurisdiction over advocate is not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Chapter 16 Laws of Kenya...It is not the business of the court to oppress an advocate for no reasonable cause. The court is always reluctant to degrade an advocate unless the circumstances show that his conduct is dishonourable as an officer of the court and it is for that reason that the court would exercise its punitive and disciplinary powers to ensure that advocates conduct themselves in a manner that pleases the eyes of justice...It would be difficult if not impossible*

*for advocates to carry out their duty to each other and to the public, if an undertaking by advocates becomes unreliable and unenforceable. Failure to honour professional consideration, in the court's view, amounts to misrepresentation or fraud. The purpose of an undertaking is to achieve a desired goal of mutual trust. In the premises it is incumbent upon advocates to always honour their undertaking unless there is a vitiating factor which the court is bound to consider...".*

9. For a better understanding of the matter, I shall reproduce the relevant sections of the consent letter. It states:

**a) (i) *The Appellant releases the sum of Kshs. 3,000,000/- to the respondent's advocate on record Messrs Meroka & Company Advocates within a period of 14 days of filing this consent to be held as security pending appeal and in the event that the appeal is determined in favor of the appellants, the respondent's advocate to return the said sum of Kshs. 3,000,000/- to the appellants' advocate on record***

10. It is therefore clear that, the Respondent's advocate, indeed, gave an undertaking to the Appellants' advocate in the following terms:

***".....in the event that the appeal is determined in favor of the appellants, the respondent's advocate to return the said sum of Kshs. 3,000,000/- to the appellants' advocate on record".***

11. The Respondent and his advocate are indeed not disputing that the consent amounts to an undertaking.

11. A careful reading of the professional undertaking discloses that it was conditional upon the appeal being determined in favor of the appellants. The appeal was determined in favor of the appellants by a judgment dated 19th March, 2018. The condition has been fulfilled and the undertaking is therefore enforceable. The undertaking was specific to the appeal in **CIVIL APPEAL NO. 98 OF 2016** and cannot, by any stretch of imagination, be deemed to also secure the appeal in **Kisumu CA NO. 91 OF 2018**.

12. With due respect to the learned counsel for the respondent, a professional undertaking is ordinarily given by an advocate on the authority of his client. An advocate who gives such a professional undertaking takes a risk. The risk is his own. 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.

13. From the foregoing analysis, I find that the Applicants have satisfied the Court that, the Orders sought herein should be granted. The chamber summons dated 8th August, 2018 is considered and found to have merit and it is allowed in the following terms:

***1) The respondent's advocate and specifically Mr. Isaac Oyugi Meroka t/a Messrs Meroka & Company Advocates be and is hereby ordered to honour the undertaking given in court pursuant to a consent dated 21st February, 2017 and release to the appellants' advocate Messrs Mohamed Madhani & Company Advocates the sum of Kshs. 3,000,000.00 held as security for the appeal within 7 days from today's date***

***2) In default of compliance with order given in (1) above, there be an enforcement order to the effect that the appellants be at liberty to execute as against Mr. Isaac Oyugi Meroka t/a Messrs Meroka & Company Advocates to the extent of Kshs. 3,000,000.00***

***3) Costs of this application shall be borne by the respondent***

**DATE AND DELIVERED IN KISUMU THIS 27th DAY OF September, 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - FELIX**

**For Appellants -N/A**

**For Respondent -N/A**