



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL & ADMINIRALTY DIVISION
AT MOMBASA
COMMERCIAL CAUSE NO. 150 OF 2015 (OS)

HUSSEIN SERVICE STATION.....PLAINTIFF

-VERSUS-

KENNEDY MOKAYA T/A

MOKAYA OGUTU & CO. ADVOCATE.....DEFENDANT

RULING

1. Before the court for determination is the originating summons dated 4/11/2015. It, on the file of it seeks resolution of some 7 questions. However in reality all questions narrow down to whether or not the Respondent/advocate is bound to honour the professional order taking given by him to court on the 24/12/2004. The record at trial reveal as follows:-

“24.12.2004

Before C.A. Opolu (SPM

Court clerk – Lewa

MOKENYA

I have instructions to give professional undertaking for I am on behalf of the defendant which I hereby do for the decretal sum entered herein against the defendant for Kshs.170,000/-. I apply that motor vehicle Registration No. MSJ 894 and trailer 210 AAL lodged at Changamwe. I apply that motor vehicle Registration No. MSJ 894 and trailer 210 AAL lodged at Changamwe Police Station be released.

COURT

Upon counsel for the defendants professional undertaking to pay Kshs.170,000 as and when required by court, I hereby order that the said motor vehicle (sic vessel) MSJ 894 and Transfer No. 210 AAL lodged at Changamwe Police Station be released forthwith”.

2. From the pleadings filed, it is apparent that the motor vehicle was indeed released and being the only known asset of the judgement debtor, a Tanzanian incorporated company, the plaintiffs have been unable

to execute in satisfaction of the judgment dated the 10/6/2015.

3. To the originating, summons, no Replying affidavit, as evidence was ever filed but the Respondent filed grounds of opposition dated 6/4/2016. In those grounds the advocate contend and opposes the originating summons on the grounds that:-

- **The plaintiff lacks locus standi as the undertaking was strictly between the advocate and the court.**
- **That the originating summons, was premature because the trial court was yet to give an order directed at the defendant to honour the undertaking.**
- **That the undertaking has become unenforceable because it was in consideration of an unconditional leave to the defendant to defend the suit in Mombasa CMCC No. 4402 of 2004.**
- **The suit is malicious, frivolous and an abuse of the court process.**

4. From the pleadings filed, it is common ground that the defendant did give the undertaking and that it remains to be discharged.

5. As said before, the only question for resolution by the court is whether or not the undertaking is enforceable. The defendant seems to resist the summons on the basis that the undertaking was to court and not to the plaintiff. Do me this is a pedantic argument. The court had no interest nor lien in the sum subject of litigation between the parties. It was purely an uninterested arbiter. It was merely called upon to release the motor vehicle because the same had been attached before judgement. The true and only person entitled to the sum was the plaintiff who now has an infertile decree by virtue of its valuable security having been released on the bond provided by the defendant, an officer of the court. It is interesting to note that undertaking was tendered *ex parte* and while a ruling on an application to lift the attachment before judgment had been argued and a ruling reserved for the 10/2/2005 and eventually delivered on the 20/2/2005.

6. Come the ruling date the trial court delivered itself as follows:-

“On 24/12/2004, Mr. Mokaya counsel for the Defendant appeared before me and gave a professional undertaking to pay Kshs.170,000 as and when required by the court as a consequence of the motor vehicles the subject matter of the application were set free for release. I believe upon this professional undertaking the court is enjoined to grant applicant unconditional leave to defend. The consequence of making the professional undertaking is known to both parties.

In light of the same, I hereby grant prayers 4, 5, 6 and costs of the application be in the course. The defence should be filed within 14 days from the date of the ruling”.

7. Those words on the court record, no doubt say that the advocate obtained for his client, by giving the undertaking to court, the unconditional leave to defend. It cannot therefore be said that the undertaking was conditional upon the leave being granted. Even if it was, which is not born on the face of the record, the condition was met by the court granting conditional release.

8. All in all, I find that none of the grounds advanced by the defendant merits granting to him a reprieve or, ground to run away from his word of honour and bond given to court if he is to remain a recognised officer of the court.

9. I am in no doubt that an undertaking by an advocate whether given to Court, to a fellow advocate or to any other person remains a professional undertaking with full tenure and effect and ought to be honoured when it falls due if not for anything but for the law profession to continue to command the respect of the society. The day it shall be easy to shift the terms of an unequivocal undertaking by trick or some ingenious arguments, even if grounded on the best phrased legal phrases would be the day that the tool only available to lawyers would turn ottios, worthless and or just irrelevant. A responsible Court cannot

or indeed anybody who derives a living by practice of law, having trained as a lawyer, would shudder at the prospects of such happening. It would be the legal profession would meet its Waterloo.

10. The upshot of the foregoing is that there is no basis to resist or decline the 7 issues posed in the originating summons dated the 4th November 2015 in the affirmative. I find and order that the undertaking given to Court by Mr Mokaya in open Court on the 24.12.2004 before Hon. C. A. Opolu is a valid undertaking that must and ought to be enforced. It shall be enforced by the advocate KENNEDY MOKAY t/a MOKAYA OGUTU & CO ADVOCATES paying to the plaintiff's advocate the sum of Kshs 170,000 within 30 days from today. Should there be a default to so pay the plaintiff shall be at liberty to take out execution proceedings.

11. This matter has been in Court since 2015 when it was filed but the sum was due for payment by the 10.6.2015 when the judgement was entered. For that reason and pursuant to section 26 of the Civil Procedure Act, I award to plaintiff the interest on that sum at Court rates from the 10.6.2015 till payment in full.

12. I further award to the plaintiff the costs of the suit to be agreed and if not agreed taxed by the Deputy Registrar of this Court.

Dated and delivered at Mombasa this 20th day of **April 2017**.

HON. P. J. O. OTIENO

JUDGE

Ruling delivered in the presence of:

Mr Mnyala for Odigo for plaintiff

Mr Maosa for the defendant

Hon. Justice P.J.O. Otieno J