



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**MISC NO. 155 OF 2015 (OS)**

**IN THE MATTER OF AN APPLICATION BY SAMUEL KARANJA FOR AN ORDER OF ENFORCEMENT OF A PROFESSIONAL UNDERTAKING GIVEN BY AN ADVOCATE**

**AND**

**IN THE MATTER OF CIVIL PROCEDURE RULES**

**BETWEEN**

**SAMUEL KARANJA.....APPLICANT**

**VERSUS**

**J.K. KOSKEI E.J. RUTO & MONDA**

**T/A KOSKEI MONDA & CO. ADVOCATES.....RESPONDENTS**

**JUDGEMENT**

1. The Applicant filed the Originating Summons herein dated 31<sup>st</sup> March 2015, pursuant to the provisions of Section 3A of the Civil Procedure Act and Order 52 Rule 7(1)(b) and (2) and Rule 10 of the Civil Procedure Rules.

2. He was seeking for orders that:

***i) The Honorable Court be pleased to order the Respondents to honour their professional undertaking of 22<sup>nd</sup> October 2013 and remit to the Applicant the sum of Kshs.4, 000,000.00 with interest at court rates from 23<sup>rd</sup> December 2013.***

***ii) The Respondent to bear the costs of this application.***

3. The background facts of this matter are that, Benard Kairu Kihara (herein “the vendor”), by an agreement dated 23<sup>rd</sup> July 2013, agreed to sell to Vincent Kaunda and Katherine Adongo Kaunda (herein “the purchasers”), all that properties known as L.R. No. Ngong/Ngong/50093 and Ngong/Ngong/50092, at an agreed price of Kshs.29,000,000.00

4. The terms of the said agreement provided *inter alia* that:

*i. The sum of Kshs.2,900,000.00 would be paid as the deposit within 60 days from the date of signing of the agreement.*

*ii. The balance of Kshs.26,100,000.00 to be paid by the purchaser's financiers to the Respondents offices on completion for onward transmission to Mr. Bernard Kairu.*

*iii. The completion date was one hundred and fifty (150) days of execution of the agreement or within 14 days of the successful registration of the transfers in favor of the purchasers' and a charge in favor of the purchasers' financiers Messrs Housing Finance Company of Kenya Limited.*

5. On 18<sup>th</sup> October, 2013 the purchasers made a deposit of Kshs. 2,900,000 towards the purchase price and on 22<sup>nd</sup> same month the Respondents, acting on instructions from the vendor, wrote a letter, to the Applicant in which they undertook to remit to him a sum of Kshs.4,000,000.00 from the purchase price. The same letter indicated that the transaction was expected to be concluded by 23<sup>rd</sup> December 2013.

6. The Applicant avers that, despite the properties having been successfully sold, the Respondents have failed to honour their professional undertaking and/or declined to release the said sum, despite the demand through his Advocates. The Applicant's Advocate by a letter dated 14<sup>th</sup> January 2014, sent a reminder to the Respondents to honour the professional undertaking, and the Respondents replied vide letter dated 29<sup>th</sup> January 2015, promising to revert back shortly but did not. The Applicant argues that, the Respondents are bound to honor the professional undertaking. It is therefore in the interest of justice that this Honorable Court grants the orders sought.

7. The Application was opposed by the Respondents vide a Replying Affidavit dated 9<sup>th</sup> April 2015, sworn by a Rodgers. O. Monda, a practicing partner in the Respondents' firm. He deposed that E. J. Ruto, named in this matter, as a party is no longer with the Respondent's firm and therefore should not be included in these proceeding. However, he gave a detailed account of the sale transaction between the vendor and the purchasers in relation to the two properties referred herein.

8. In relation to the subject Application, he averred that, acting on instructions of the vendor on 22<sup>nd</sup> October 2013, he wrote to the Applicant intimating that:

*i. They act for Mr. Bernard Kairu Kihara the registered proprietor of Ngong/Ngong/50093 and Ngong/Ngong/ 50092 which were on sale.*

*ii. He confirmed that there was a Sale Agreement which was expected to be completed by the 23<sup>rd</sup> day of December 2013.*

*iii. They would undertake to pay the said sum of Kshs.4,000,000.00 from the Sale proceeds to the Applicant.*

*iv. They would undertake to pay the said sum on successful completion of the agreement*

9. He deposed that however, the transaction between the vendor and the purchasers was not completed on 23<sup>rd</sup> December 2013 as anticipated and the purchasers were accorded more time to 16<sup>th</sup> January 2014. On 16<sup>th</sup> January, 2014, the Respondent wrote a letter to the Applicant informing him that they had encountered difficulties and that the vendor was making alternatives ways to settle the debt directly him. According to the Respondents, the sale agreement for all intents and purposes extinguished on the expiry of the completion notice issued on 6<sup>th</sup> January 2014 and the initial deposit was released on the vendor's instructions. Mr. Monda averred that he has never met the Applicant in person, was not even aware why he was being paid. That he did not have his postal address, telephone contact or email address and could therefore only update him through the vendor, Mr. Bernard Kairu. He stated that at all times the vendor informed him, that he updated the Applicant and was looking for other alternatives to settle the debt and

he had no reason to doubt the vendor.

10. Subsequently on 15<sup>th</sup> May 2014, the vendor and purchasers entered into a further agreement, with a 90 days completion period from the date of the agreement or 14 days from the successful registration of the transfer in favour of the purchasers and a charge in favour of the financiers. On 8<sup>th</sup> October 2014, the Respondents released the completion documents to the purchasers' advocates. On 21<sup>st</sup> October 2014, the sum of Kshs.17,745,655.00 being the balance of the purchase price was paid and released by the purchasers, and a sum of Kshs.11,245,655 thereof was released to the Respondents. The said sum was allegedly released on 29<sup>th</sup> October 2014, to Watersmart Construction Ltd, on the instructions of the vendor, with the seller paid the balance sum of Kshs.245,000 in cash.

11. The Respondents further averred that since they wrote to the Applicant informing him that the transaction had been frustrated and he had not communicated, they surprised on 16<sup>th</sup> January 2014, to receive a letter from the Applicant's advocate seeking to enforce the undertaking. The Applicant's letter was acknowledged on 29<sup>th</sup> January 2014.

12. The Respondents submitted at length as to how the sale transaction took so long to conclude. That the Respondents issued a Notice to the purchaser's advocates noting that the time of completion had lapsed and that the purchasers had not remitted the balance. In the meantime, on 3<sup>rd</sup> March 2015, the Applicant's advocate wrote a reminder demanding the payment.

13. However, on 5<sup>th</sup> March 2015, the Respondents wrote to the Applicant's Advocate indicating that, they had not received any communication from the Applicant; Mr. Karanja and the transaction had not been successfully concluded. That as aforesaid they had instructions not to pay Mr. Karanja as the seller was looking for alternative ways to settle the debt and that had been indicated to Mr. Karanja who never objected. However, on 16<sup>th</sup> March 2015, the Applicant's Advocates replied informing the Respondents that they were aware that the sale was completed. But the Respondents argued that, although the transfer has been registered in favour of the purchasers and the charge in favour of the financiers, this was only pursuant to Kshs.17,745,000 that the financier was paying and the balance has never been paid. That after issuing of the completion notice on the expiry of the time of the agreement dated 23<sup>rd</sup> July 2013; the Respondents were no longer required to hold any monies.

14. In response to the Respondent's averments, the Applicant swore a further Affidavit dated 19<sup>th</sup> May 2015, basically denying having received the letter dated 16<sup>th</sup> January 2014, from the Respondents allegedly delivered to him by the vendor. He argued that the Respondents gave him a professional undertaking and it's only him who could have discharged the Respondents from their obligation and not their client/vendor. He rebutted the Respondents' argument that the "*the sale agreement extinguished for all intents and purposes on expiry of the completion Notice on 16<sup>th</sup> January 2014*". He argued that in spite of the delays encountered in completion of the sale dated 23<sup>rd</sup> July 2013, the agreement was never cancelled and/or rescinded, rather the parties agreed to mutually vary the terms from time to time, and the further Sale Agreement dated 23<sup>rd</sup> September 2014 clearly defines the completion date. Subsequently, the sale is completed and a transfer registered in favour of the financiers, therefore the Respondents are bound to honour the undertaking.

15. The Applicant averred that Mr. Monda has committed perjury by deposing in the Replying Affidavit that he did not have his postal address, as the Respondents wrote him a letter dated 16<sup>th</sup> March 2014, signed by Mr. Monda, and which quotes his postal address, thus, all along, the deponent knew his postal address. But the Respondents in response swore a further Affidavit dated 25<sup>th</sup> July 2015 reiterating that, communication was sent to the Applicant through Bernard Kariuki and the Applicant never visited their offices on the matter at all. That, indeed even the undertaking was delivered to the Applicant by hand. Mr Monda averred that, is currently seeking a meeting, planned in the first week of August 2015, to resolve the matter as per the letter he attached to the further Affidavit marked "ROM 1" 15.

16. At the conclusion of the arguments by the Parties, the Parties agreed to dispose of the Application by filing of submissions. I have now considered the Application in total and find the following issues require determination:

*i. Does the Respondent's letter dated 22<sup>nd</sup> October 2013 amount to a professional undertaking. If so, is it valid and enforceable?*

*ii. Has the Respondent breached the professional undertaking, if so, has the Respondent offered a reasonable explanation for the failure to honour the professional under-taking.*

*iii. Should the Court grant the prayers sought.*

17. I shall first deal with the issue of a professional undertaking although all these issues are inter-linked. What then is a professional undertaking? Black Law dictionary gives the definition of an undertaking as, “**a promise, pledge or engagement**”. The US Legal Definitions.com states that:

*“Undertaking in general means, an agreement to be responsible for something. In Legal context, it typically refers to a party agreeing to surety arrangements, under which they will pay a debt or perform, a duty if the other person who is bound to pay the debt or perform the duty fails to do so”.*

18. The Encyclopedia of Forms and Precedents, 5<sup>th</sup> Edition by Hon. Sir Peter Millet, M.A. Vol. 39 pages 859, 860 describes a professional undertaking as follows:

*“An unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor in the course of his practice, either personally or by a member of his staff, or a solicitor as ‘solicitor’ (or in case of a member of his staff, his employer) becomes personally bound.*

*It's a promise to do or to refrain from doing something. In practice undertakings are frequently given by solicitors in order to smooth the path of a transaction or to hasten its progress, and are convenient method by which some otherwise problematic areas of practice can be circumvented”.*

19. The Halsbury's Laws of England, 4<sup>th</sup> Edition by Lord Hailsham of St. Marylebone, Vol. 44(1), pages 222, 223, 224, states as follows:

- *Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the Court in the course of proceedings, that undertaking may be enforced summarily upon application to the Court.*
- *It must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client.*
- *It must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client.*
- *It must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.*
- *The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the Court, and the undertaking must be one which is not impossible ab initio for the solicitor to perform.*
- *If the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced.*

20. In the case of Equip Agencies Limited vs. Credit Bank Ltd. Nairobi HCCC No. 773 of 2003, Warsame J. stated:

*“An undertaking is usually given to ease and smoothen the path of transactions carried out by*

***advocates. It is convenient method or tool to circumvent 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.***

***It is a promise to do or to 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”.***

21. The procedural provisions of Order 52 Rule 7 of Civil Procedure Rules, 2010 gives the Court the power to order for enforcement of the 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”.***

22. The question then is: Does the letter 22<sup>nd</sup> October 2013 amount to a Professional undertaking? For a deeper understanding of the matter, I shall reproduce the relevant sections of the subject letter. It states:

*i. That Respondents acts for Bernard Kairu Kihara;*

*ii. That a sale agreement dated 23<sup>rd</sup> July 2013 was signed and it was agreed that they hold the sale proceeds, payable in two tranches, as stakeholders pending completion, the first tranche having been paid;*

*iii. That the transaction would be completed by 23<sup>rd</sup> September 2013 or earlier;*

*iv. The Respondents were instructed by Bernard Kairu Kihara to remit the sum of kshs.4,000,000.00 to Samuel Karanja (Applicant herein);*

*v. The Respondents undertake to remit the said sum to Samuel Karanja or to his order on successful completion of the agreement. (Emphasis added)*

23. It is therefore clear that, the Respondents indeed, gave an undertaking to the Applicant on behalf of Bernard Kairu Kihara, which clearly states that:

***“We undertake to remit the said sum (Kshs.4, 000,000) to you or to your order”.***

The Respondents are not even disputing that indeed this letter amounts to an undertaking.

24. The next question is this: Is the undertaking valid and enforceable. The Respondent submitted that, a conditional undertaking can only be enforceable upon the fulfillment of the condition. The case of ***Harit Sheth t/a Harit Sheth Advocate VS K.H. Osmond t/a K.H. Osmond Advocates (2011) e KLR*** was cited. It was further submitted that, as stated in the Halburys Laws of England, an undertaking must be clear in its terms. That, the professional undertaking in the instant case, was enforceable upon the successful

completion of the sale and the sale agreement was not and is yet to be completed. Reference was made to the case of William C. Githara t/a Githara & Associates Advocates Vs Vurrell International Ltd & 3 Others 2014 e KLR, where the Court held that:

***“Until the proceeds of Arbitral award have been cleared and have reached the accounts of the Plaintiff, there would not arise any obligation on the Plaintiff to pay paramount Bank”.***

25. However, the Applicant maintains that the completion of the sale took place as evidenced by the official search on the 10<sup>th</sup> March 2015, which revealed that, the subject property are transferred and registered in the names of the purchasers, and also charged to HFCK. The Applicant thus, argues that the condition upon which the undertaking was pegged has already been fulfilled and therefore, the excuses advanced by the Respondents for not honouring the undertaking are not justifiable. The Applicant argued that the Professional undertaking was given by the Respondents in their capacity as Advocates and not in their personal capacity. Reference was made to the cases of United Mining Ltd Vs Becher KBD (1908 – 1910) and Re A. Solicitor Ex Parte Hales. The Applicant concluded by submitting that, the Respondents cannot have unilaterally withdrawn from its obligation by relying on the alleged letter dated 16<sup>th</sup> June 2014, sent to the Applicant, which in any event, was not received.

26. In conclusion, the Applicant invited the Court to adopt the findings in the case of Re A Solicitor where it was held:

***“Where in the course of proceedings, a solicitor undertake to pay money to a person not a client out of sums received by him for that purpose from his client, and on the faith of that statement, the person to whom it was made alters his position, the Court will enforce the fulfillment of the undertaking by the exercise of its disciplinary jurisdiction over solicitors as officers of the Court.”***

27. I have already ruled that, the letter written to the Applicant by the Respondent dated 22<sup>nd</sup> October 2013 is indeed a professional undertaking. That is not in dispute. I have considered the reasons advanced by the Applicant for failure to honour the same and I find they hold no water. The Respondents clearly state in the undertaking letter that they act for a client/vendor; Bernard Kairu Kihara, in the sale transactions. They go on to state *“We further confirm we have instructions from Bernard to remit to you a sum of Kenya Shillings Four Million (Kshs.4,000,000) from the sale proceeds”*. Obviously they were legally bound to release the said sum upon receipt of the sale proceeds. Under Paragraph 31 of the Replying Affidavit, by the Respondent, it is deposed that:

***“On 21<sup>st</sup> October 2014, the sum of Kshs.17,745,655 was disbursed by the Purchasers Advocate as follows:***

***a) John Maina Guyo Kshs.6,000,000***

***b) Koskei Monda & Co. Advocates Kshs.11,245, 655.00.***

***c) Moses Kuria Ngumo Kshs.500,000,000.***

28. Its clear therefore the Respondents received the purchase price of the subject properties and are liable to honour the professional undertaking given to the Applicant, which crystallized upon receipt of the proceeds of sale on the 21<sup>st</sup> October 2014. The other alleged condition upon which the undertaking was based, was the ***“Successful completion of the sale”***. When is a sale between the vendor/purchaser in relation to land concluded? What is the prima facie evidence of conclusion of such a sale?

29. Under Section 7 of the Lands Act No. 6 of 2012, (herein “the Act”), *“Transfer”* is one of the method of acquisition of title to land. Section 43 of the Act stipulates that *“transfer”* includes a conveyance, an assignment, a transfer of land or lease or other instrument used in the disposition of an interest in land by way of transfer”. Section 43 (2) provides that:

*“The transfer shall be completed by the registration of the transferee as proprietor of the land, lease or charge”,*

30. And Section 44 provides that; *“Transfer takes effect immediately not on the happening of an event or on fulfillment of any condition or at any future time”*. In the instant case, the search document annexed to the Affidavit in support of the Application reveals, the sale property has been effectively transferred to the purchasers and then charged HFCK. What is this other sale that remains to be concluded, as argued by the Respondents? In that regard, I find the condition upon which the Respondent is *“hanging”* on is already complete and concluded. Therefore they are legally bound to honour the professional undertaking given. If they released all the money to the vendor, then, they did so at their own risk. They can seek for indemnity from the vendor. I also find that, a professional undertaking obligation cannot be discharged by the person giving it unilaterally. It was therefore unprofessional for the Respondent to disregard the interests of the Applicant.

31. All in all, I find that the Applicant has satisfied the Court that, the Orders sought for herein should be granted. I therefore enter judgement in favour of the Applicant as against the Respondent as prayed for in the Originating summons dated and filed on 31<sup>st</sup> March 2015, save for interest which shall accrue from date of filing the suit at Court rates. Costs are awarded to the Applicant.

32. Orders accordingly.

**Dated, signed and delivered on this 21<sup>st</sup> day of June 2017 at Nairobi.**

**G. L. NZIOKA**

**JUDGE**

**In open Court in the presence of:**

Mr. Angwenyi for the Applicant

Ms. Wambugu for Mr. Monda for the Respondent

Teresia - Court Assistant