



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 187 OF 2015(O.S)

NZIOKA & CO. ADVOCATES..... PLAINTIFF

- V E R S U S -

HARIT SHETH ADVOCATES.....DEFENDANT

RULING

1. Nzioka and Co. Advocates, the plaintiff/applicant herein took out the motion dated 10/11/2016, in which he sought for the following orders:

- 1. That this application may be certified as urgent and be heard exparte in the first instance on priority basis.***
- 2. That the firm of Harit Sheth Advocates do hereby honour their terms and conditions of their professional undertakings made on the 27th March 2015 and 5th April 2013, by making payment of the sum of kshs.25,000,000.00 to the applicant, the firm of Nzioka and company advocates.***
- 3. That the firm of Harit Sheth Advocates bear the costs of this application.***

2. The motion is supported by the affidavit of Joseph Muisyo Nzioka. When served, Harith Sheth Advocates, the defendant/ respondent filed a replying affidavit to resist the application. When the motion came up for interpartes hearing, a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the applicant's written submission. The respondent did not file any submissions.

4. The plaintiff/applicant avers that he was retained by Afrison Export Limited and Huelands Ltd to act for them in Milimani High Court Commercial & Admiralty Division, Civil Suit no. 617 of 2012 against the Hon. Attorney General and two other defendants herein referred to as the primary suit. The respondent took over the matter from the applicant and the legal fees agreement of ksh.200,000,000/= between the applicant and his client was secured by a professional undertaking dated 29/3/2013, which legal fees was increased by a further ksh.100,000,000/= to make it kshs.300,000,000/= in total. The further amount was secured by the professional undertaking dated 5/4/2013 signed both by the applicant and the respondent herein.

5. The applicant further avers that on or about 5/9/2014 he was paid ksh.100,000,000/= by the respondent leaving a balance of kshs.200,000,000/= owed to the applicant unpaid.

6. The applicant avers that the respondent received a further sum of ksh.600,000,000/= from the office of the Attorney General in the month of April, 2016, but he has declined and or neglected to pay the applicant the sum of 25,000,000/= provided under the professional undertaking signed between the applicant and the respondent.

7. The applicant is beseeching this honourable court to compel the respondent to pay the applicant the sum of ksh.25,000,000/= pursuant to the professional undertaking.

8. The respondent on the other hand avers that the applicant's application is misconceived and not tenable in law. He avers that the judgment delivered on 3rd November 2015 by Hon. Mr. Justice A. Mbogholi Msagha, was varied by way of the consent dated 27th April 2016 and filed in court on 4th May 2016 under which the said sum of ksh.25,000,000/= payable to the plaintiff/applicant within 7 days of the date of filing of the consent was duly paid by way of RTGS payments of ksh.25,000,000/= and kshs. 2,500,000/= respectively to the plaintiff and to his advocate M/s J. O. Owino & Co. Advocates. Accordingly, the only amount now remaining payable to the plaintiff is kshs.25,000,000/= which is payable from and out of the final instalment of the decretal sum in HCCC No. 617 of 2012 to be received by the defendant as expressly and clearly set out in the said consent.

9. The respondent avers that he received ksh.600,000,000/= as set out in the discharge voucher dated 27/04/2016, which states that the payment comprised therein is only "partial" and not full and final settlement of the said decree. There is still a final sum of kshs.600,000,000/= which amount still remain unpaid in respect of the decretal sum in HCCC no. 617 of 2012. This position the respondent avers, was duly notified to the plaintiff through M/s J. O. Owino & Company vide the letter dated 10th June 2016 and to the plaintiff vide the letter dated 8th July 2016.

10. It is trite law that with regard to professional undertaking by advocates that the undertaking must be clear, unambiguous, unequivocal, and certain.

In Civil appeal no. 276 of 2001 Harit Sheth T/A Osmond Advocate, the Court of Appeal stated:

"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. An advocate who gives such a professional undertaking takes a risk. The risk is his own and he should not be heard to complain that it is too burdensome and that someone else should shoulder the responsibility of recovering the debt from his own client. A professional undertaking is bound by an advocate to conduct himself as expected of him by the court to which he is an officer, the law gives him the right to use his client to recover whatever sum of money he had incurred in honouring a professional undertaking. He cannot however sue to recover that amount unless he has first honoured his professional undertaking."

11. The question this court must determine is whether the defendant/respondent is in default of his professional undertaking. There is no dispute that the total decretal sum from the primary suit is ksh.2,400,000,000/=. It is also not in dispute that the professional undertaking given by the respondent stated that the legal fees due to the plaintiff/applicant would be paid on a pro rata basis from the instalments remitted from the decretal amount. A quick mathematical calculation of the decretal amount remitted to the defendant/respondent now stands at ksh.2,400,000,000/=. It is therefore not true that the respondent has not received the decretal sum in full. The professional undertaking by the respondent was in clear and unambiguous terms that the legal fees will be paid to the applicant and the interested party on a pro rata basis.

12. In the end, I find the plaintiff/applicant has satisfactorily established his claim. Consequently the motion dated 10th November 2016 is allowed in terms of prayers 2 and 3.

Dated, Signed and Delivered in open court this 22nd day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant