



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 52 OF 2013 (OS)

ANDREW MUKITE MUSANGI T/A

MUKITE MUSANGI & CO. ADVOCATES. APPLICANT

VERSUS

ALPHONCE MUTINDA T/A

ALPHONCE MUTINDA & CO. ADVOCATES.RESPONDENT

R U L I N G

The Application for determination by the court is dated 15th February, 2013 by way of an Originating Summons.

The same is brought under Order 52 Rule 7(1) (b) of the Civil Procedure Rules. The Applicant seeks for orders inter alia that: -

1. The Respondent do within such time to be fixed by this Court honour his irrevocable professional undertaking dated 14th December, 2011 to pay the Applicant within 30 days on demand, the sum of Ksh.300,000/- being the balance due in settlement of the Claim against the Respondent's Client in the case of ***Republic Vs. Gideon Mbuvi & another in Kibera Criminal Case No. 5093 of 2010.***
2. The Respondent to do pay interest at Court rates from 14th January, 2013 (being the date of default until the date of payment in full).
3. In the event of default in compliance with the orders of this court the Court do issue an order allowing the enforcement of the Respondent's professional undertaking to pay the applicant the sum of Kshs.300,000/- together with interest as provided above by way of execution against the Respondent.
4. The costs of the instant Application be borne by the Respondent.

The Application is based on the grounds set out on the body of the same and it's supported by the Affidavit of **ANDREW MUKITE MUSANGI ADVOCATE** sworn on 15th February, 2013.

The summary of the Applicant's Case as captured in the Affidavit in support is that the Applicant who is an Advocate of the High Court of Kenya was on record watching brief for the complainant, Tile & Carpet Limited in Criminal Case Number 5093/2010 (**R Vs Gideon Mbuvi & Another**) at Kibera while the Respondent was on record representing Gideon Mbuvi (1st Accused) and the firm of D. Ndung'u & Co. Advocates represented Daniel Ndung'u (2nd Accused).

The two accused persons had been charged before the Chief Magistrate, Kibera Law Court with forgery

and obtaining money by false pretences.

The parties to the dispute commenced out of court negotiations with a view to settling the monies owed and in the process, the Criminal case before Kibera court was mentioned severally to allow parties time to negotiate. In the meantime the Accused persons paid a substantial amount of money to the tune of Ksh.1,300,000/- leaving a balance of Kshs.725,000/- which was later reduced to Ksh.300,000/- after further negotiations.

It was agreed between the parties that the complainant would withdraw the case against the Accused persons on condition that the Plaintiff's firm of advocates received the discounted sum of Ksh.300,000/- in full and final settlement. In order to safeguard the interests of the complainant it was further agreed that the firm of Alphonse Mutinda & Co. Advocates (Respondent herein) would give an irrevocable professional undertaking to the Applicant herein that the Respondent would pay to the Applicant the aforesaid sum of Ksh.300,000/- within 30 days of the date of the withdrawal of the suit i.e. on 14th December, 2011.

The undertaking was given as aforesaid on the 14th day of December, 2011 and on the basis of the same, the Complainant withdrew the case against the 1st and 2nd Accused persons under Section 204 of the Criminal Procedure Code.

The Respondent did not honour the undertaking and on 19th January, 2012 the Applicant wrote a letter of even date demanding that the Respondent do honour the undertaking. The Respondent through his letter dated 24th January, 2012 acknowledged that it had given the undertaking and apologized for the delay in honouring the same and promised to honour it by 15th February, 2012 which he failed to do prompting the Applicant to write a further demand letter dated 13th July, 2012. Despite the demands, the Respondent did not honour the undertaking hence the Application.

The same is opposed vide a Replying Affidavit sworn by the Respondent and filed on 21st October, 2015. In his Affidavit, the Respondent admits having given the undertaking on the 14th December, 2011 but state that the same was based on the fact that the cash bail in Criminal case amounting to Ksh.300,000/- was to be refunded to the depositor and the same was to be paid to the complainant's Advocates.

He further depones that after the cash bail was refunded to the depositor he failed to remit the money to the Respondent or his client and he has since passed away. He states that the non-compliance was occasioned by the death of the depositor and it was beyond his control and that he has sought for further instructions from his client to enable him comply. He sought for a period of 30 days with a view of complying after receiving instructions.

I have carefully considered the Originating summons together with the Affidavit in support and the Replying Affidavit.

In relation to the summons herein, the law with regard to professional undertakings by Advocates is very clear as follows: -

1. The undertaking must be clear.
2. The professional undertaking must be unambiguous and unequivocal.
3. The Plaintiff must have acted in reliance on the undertaking.
4. The professional undertaking must be certain and without any conditions precedent.

The application has been brought under Order 52 Rule 7(1) (b) (2) of the Civil Procedure Rules which provides: -

An Application for an Order for the 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.

(2) 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.

I have looked at the professional undertaking dated 14th December, 2011 and in the relevant part it states:

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“... we hereby give you our professional undertaking that we shall pay to you on demand the sum of Ksh. Three Hundred Thousand (Ksh.300,000/-) being the balance due in settlement of this claim within a period of 30 days from today’s date.”

The undertaking as given was clear, unambiguous and unequivocal and it was certain without any conditions precedent.

The Respondent in paragraph 3 of the Replying Affidavit admitted having given the undertaking but on certain conditions. These conditions are not contained in the undertaking given on the 14th December, 2011 and therefore, he cannot unilaterally alter and/or vary the terms of the undertaking which he gave to the Applicant.

In Civil Appeal No. 276 of 2001 **Harti Sheth T/A Harit Sheth Advocates Vs K. H. Osmond T/A K. H. 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 a bond 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 sue his client to recover whatever sums 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.”

In the case of **Kenya Reinsurance Corporation Vs V. E. Muguku T/A M/S Muguku Miriu & Co. Advocates, Civil Appeal No. 48 of 1994**, it is contented that an Advocate is not allowed to qualify his undertaking on account of disputes between the parties or with his client or unavailability of funds.

The law relating to enforcement of undertakings is clear. It is not contractual in nature but it is a power bestowed upon the court to ensure that its officers comply with undertakings they give in the course of their dealings as such officers to third parties. Accordingly, the courts have held that an undertaking is a solemn thing and in enforcing an undertaking the court is not guided by considerations of contract but the court aims at securing the honesty of its officers. See **Peter Ng’ang’a Muiruri Vs Credit Bank and & Another**, Civil Appeal No. 263 of 1998.

The reasons advanced by the Respondent for not honouring the undertaking are neither here nor there.

Be that as it may, with the material before me, I am persuaded that the Applicant is entitled to Ksh.300,000/- being the balance due in settlement of the claim against the Respondent’s client in Criminal Case Number 5093 of 2010.

The Respondent shall pay the Applicant the sum of Ksh.300,000/- plus interest at court rate from the date of filing, within 30 days of today’s date and in default enforcement shall follow.

The Applicant shall have the costs of the Application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of January, 2016.

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L. NJUGUNA

JUDGE

In the presence of

..... for the Applicant

..... for the Respondent