REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 579 OF 2015

DANIEL OCHIENG OGOLA T/A OGOLA OKELLO & CO. ADVOCATES…….....PLAINTIFF

-VERSUS -

GEORGE MUGOYE MBEYA T/A MUGOYE & ASSOCIATES ADVOCATES.....DEFENDANT/APPLICANT

MAURICE OMONDI OGOLA……..…….....…….INTENDED 3RD PARTY

RULING

1. The defendant, **GEORGE MUGOYE MBEYA** Trading As **MUGOYE & ASSOCIATES ADVOCATES,** seeks leave to issue a Third Party Notice to **MAURICE OMONDI OGOLA.**

2. The said Maurice Omondi Ogola *(hereinafter "Maurice")* was the purchaser of Apartment No.2 on **L.R No.2/258 NAIROBI.**

3. The purchase price was agreed upon in the sum of Kshs. 19,000,000/-, out of which the **CONSOLIDATED BANK** financed Kshs. 17,146,416/-.

4. Meanwhile, the purchaser had deposited the sum of Kshs. 1,000,000/- towards the purchase price. In the result, the balance of the purchase price was Kshs. 1,800,000/-.

5. It is the plaintiff's case that the defendant gave his professional undertaking to the plaintiff, that the defendant would pay to the plaintiff the balance of Kshs. 1,800,000/- with interest thereon at 6% above the Base Lending Rate of Barclays Bank of Kenya Limited. The defendant was to pay the said sums within 14 days of the registration of the Assignment of Lease and the Charge.

6. There is no doubt that the Assignment of Lease and the Charge were registered.

7. However, the defendant had not yet remitted to the plaintiff the money which is the subject of his professional undertaking to the plaintiff.

8. It was for that reason that the plaintiff brought these proceedings, with a view to enforcing the professional undertaking.

9. In the face of the said proceedings, the defendant now seeks leave to enjoin the purchaser, to the suit, in the capacity of a Third party.

10. The application is premised upon the defendant's intention to seek indemnity from Maurice, for any monies which the defendant may be found to be liable for, to the plaintiff.

11. According to the defendant, he had demanded from Maurice, the balance of the purchase price, but Maurice had failed to remit payment. It was for that reason that;

> ***"The plaintiff now demands the unsecured sum of Kshs. 1,800,000/- together with interest, which exposes the Defendant to civil suit herein".***

12. The defendant submitted that it was in the interests of justice that Maurice be enjoined to the suit, so as to facilitate the final and effectual determination of the issues arising in this suit.

13. According to the defendant, he had issued his professional undertaking;

> ***"…on understanding that the unsecured amount of Kshs. 1,800,000.00 shall be paid on or before the completion date".***

14. It is in those circumstances that the defendant asked the court to issue the Third Party Notice.

15. In his understanding, the Third Party procedures were intended for trial of questions between the defendant and the Third party, on the issue of the liability of the Third party to make contribution or indemnity.

16. As far as the defendant was concerned, the situation in this case is well covered by the provisions of Order 1 Rule 15 of the Civil Procedure Rules.

17. He therefore submitted that the court was under a duty to give each and every party a fair opportunity to ventilate its case.

18. The defendant expressed the view that neither the Court nor any other parties could dictate to him how to conduct his case.

19. When the claim by a party was within the confines of the law, the defendant believes that the court was under an obligation to allow the party to conduct his case. It was only after the party had presented his case that the court could determine in favour of the claimant, if the claimant had proved his case.

20. As present, the defendant asserts that he had discharged his obligation in the transaction. He therefore insists that he did not owe the plaintiff any money.

21. The defendant pointed at the plaintiff's letter dated 24th November 2014, as providing proof that the plaintiff confirmed that any sums due to the vendor, was owed by Maurice.

22. In the circumstances, the defendant believes that the issue of liability between the Plaintiff, the Defendant and the proposed Third party be determined in this suit.

23. The defendant relied on the authority of **OCEANFREIGHT (E.A) LIMITED Vs TECHNOMATIC LTD (MSA) Hccc No. 133 of 2009,** to back his preposition that;

> ***"In a third party proceedings, it is for the defendant to satisfy the Court that there is a proper question to be tried as to liability of the third party".***

24. In the event, as Maurice was the beneficiary of the undertaking which the defendant had given to the plaintiff, it is the view of the defendant that Maurice should be enjoined to the suit, so that the court can

determine the issue of the liability of Maurice to the defendant. It is the opinion of the defendant, the court could then also determine the issue as to whether or not Maurice ought to settle the amount not covered by the financial arrangements through which Consolidated Bank had paid the bulk of the purchase price.

25. The defendant submitted that the triable issue was whether he owes the Plaintiff, the amount claimed. And by having Maurice enjoined to the suit, the defendant believes that the court would determine the real issues completely and effectually.

28. But the plaintiff did not share the defendant's views at all.

27. As far as the plaintiff was concerned, proceedings for the enforcement of professional undertakings were specialized.

28. Citing the decision of Emukule J. in **H.K. ADVOCATE Vs. MUCIIMI MBAKA Hccc No. 485 of 2004;** the plaintiff pointed out that;

> ***"…rule 7 (2) of Order LII provides that save for special reasons to be recorded by the Judge, the order shall in the first instance be that the Advocate honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made".***

29. Order 52 of the Civil Procedure Rules is titled *"The Advocates Act"*. And rule 7 of that Order provides the procedure for an application for an order for the enforcement of an undertaking.

30. The plaintiff submitted that when an advocate gives a professional undertaking, he was taking a personal risk, and that the advocate cannot be heard to complain about the burden of honouring his undertaking.

31. The plaintiff described an undertaking as a bond by an advocate to conduct himself as expected of him by the Court, to which he is an officer.

32. Therefore, the advocate would, in the opinion of the plaintiff have to honour his undertaking before he can take steps to sue his client, *(on whose behalf he had given the undertaking),* to recover the money which he had paid out, in the discharge of his undertaking.

33. I accept the opinion expressed by the plaintiff, as it is founded upon sound legal reasoning as can be found from the decision of the Court of Appeal in **HARIT SHETH Trading As HARIT SHETH ADVOCATE Vs. K.H. OSMOND Trading As K.H OSMOND ADVOCATE; CIVIL APPEAL No. 276 of 2001;**

> ***"With due respect to the learned counsel, 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 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. 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. The law gives him the right to sue his client to recover whatever sums he has incurred in honouring a professional undertaking. He cannot however sue to recover that amount unless he has first honoured his professional undertaking".***

34. In my considered view, when the defendant says that the liability of Maurice *(the proposed third party)* should be determined in the proceedings for the enforcement of the professional undertaking, it is akin to suggesting that the said Maurice shared in some way, in the obligations which the defendant imposed upon himself when he gave his undertaking.

35. In my humble opinion, the proposed third party did not assume any responsibility to the plaintiff, in respect of the undertaking given on his behalf.

36. The issue of the enforcement of the bond does not require the proposed third party to be enjoined to the case, before it can be effectively and conclusively determined.

37. Indeed, it does not matter at all whether or not the advocate who gave his professional undertaking recovers the money which he had paid out in order to honour his undertaking. He must honour his bond, regardless of whether or not his client reimburses him.

38. In **DAVID KARANJA THUO T/A D.K. THUO & Co. ADVOCATES Vs NJAGI WANJERU T/A NJAGI WANJERU & Co. ADVOCATES Hccc No. 209 of 2008;** the Court cited the following definition of the phrase *"Professional Undertaking"* as stated in *"The Encyclopedia of Forms and Precedents, 5th Edition Vol. 39".*

> ***"An undertaking is 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", but not in the course of his practice, under which the Solicitor…becomes personally bound. An undertaking is therefore a promise made by a solicitor… to do or refrain from doing something. In practice, undertakings are frequently by Solicitors in order to smooth the path of a transaction, or hasten its progress and are convenient methods by which some otherwise problematic areas of practice can be circumvented".***

39. Accordingly, the advocate who gives his professional undertaking becomes personally bound.

40. In the case of **D.K. THUO & Co. ADVOCATES Vs NJAGI WANJERU & Co. ADVOCATES Hccc No. 209 of 2008,** the court stated;

> ***"In the first instance, it should be noted that the professional undertaking was between the Advocates, and none of the clients was party to the undertaking. For want of a better language, there was no "privity of undertaking" between the plaintiff and the defendant. The Defendant cannot, therefore, purport to exercise a lien over the plaintiff's property since the client was not privy to the undertaking. The undertaking was of a purely professional nature between the Advocates as Advocates, and is enforceable between them as such".***

41. So too in this case, the professional undertaking is between the law firms which are the parties herein. Therefore it is enforceable as such, and the proposed third party has no role to play in it.

42. Therefore, there was no issue to be determined between the plaintiff and the defendant, which could not be conclusively determined with finality if the proposed third party was not enjoined to the suit.

43. In **HAVI & COMPANY ADVOCATES Vs. JANE MUTHONI NJAGE t/a** J**.M. NJAGE & COMPANY ADVOCATES Hccc No. 59 of 2009,** Gikonyo J. pronounced himself thus;

> ***"…the law is that, the jurisdiction of the Court in enforcing an undertaking by an advocate is not exercised for purposes of enforcing legal rights or obligations of the client, but for purposes of enforcing honourable conduct on the part of the advocate as an officer of the court. Thus, it enforces the undertaking strictly as a contract on its own separate from the primary contract between the parties. The honourable conduct of the advocate is embedded in the undertaking".***

44. Therefore, the defendant herein cannot be heard to say that the issue of enforcement of his professional undertaking is pegged to the payment which his client should make. If the court were to accept that preposition, it would be akin to tying up the professional undertaking from one law firm to another, to the primary contract to which the advocates were not parties. Such a situation would defeat the very reason and purposes for which undertakings were created.

45. As Gikonyo J. said in the case of **HAVI & Co. ADVOCATES Vs J.M. NJAGE & Co. ADVOCATES Hccc No. 59 of 200;**

"The advocate must ensure he is in funds before giving an undertaking".

46. If an advocate chooses to give an undertaking before ensuring that he was in funds, he cannot thereafter seek to delay the enforcement of the undertaking by asking the court to enjoin his client to the proceedings for enforcement of the undertaking, so as to compel the client to pay the requisite funds in respect to which the advocate had give his undertaking.

47. If, as the defendant has asserted, he had discharged his obligations under the professional undertaking, he would not need to have the proposed third party enjoined to the suit, for the defendant to have a complete answer to the claim.

48. Again, if the defendant had discharged his obligations to the plaintiff, he would not need to ask the court to determine whether or not the third party should either indemnify him or contribute towards the settlement of the claim made by the plaintiff against the defendant.

49. The defendant would simply need to prove to the court that the obligations under the undertaking had been discharged, and the court would dismiss the suit. Thereafter, if the defendant wished to pursue the client, to recover such sums as he may have paid, the dispute would only be between the advocate and his client. The plaintiff would not be a party to such a dispute. At most, the plaintiff could be a witness.

50. By concluding that there was no basis in law to warrant the joinder of the proposed third party to this suit, the court is not depriving the defendant from ventilating his case. The court is also not telling him how he must conduct his case.

51. The court is only telling the advocate that he cannot impose upon the plaintiff, a third party, who was not necessary for the conclusive determination of the case already before the court.

52. In the result, there is no merit in the application dated 15th December 2015. It is therefore dismissed, with costs to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **26th day** of **September** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Mbeya for the Defendant/Applicant

No appearance for the Intended 3rd Party

Collins Odhiambo – Court clerk.