



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO 59 OF 2009**

**NELSON ANDAYI HAVI t/a**

**HAVI & COMPANY ADVOCATES.....**

.....**PLAINTIFF**

**Versus**

**JANE MUTHONI NJAGE t/a**

**J.M NJAGE & COMPANY ADVOCATES .....DEFENDANT**

**JUDGMENT**

**Suit for enforcement of professional undertaking**

[1] This suit was commenced by way of an Originating Summons dated the 27<sup>th</sup> January, 2009 and seeks for five(5) reliefs, but the significant ones are:-

- a. That the Defendant be ordered to pay the Plaintiff the sum of Kshs. 45,000,000/= in terms of the Defendant's professional undertaking given to the Plaintiff on the 8<sup>th</sup> October 2008.
- b. That the Defendant to be ordered to execute and release to the Plaintiff a consent letter authorizing release of Kshs. 5,000,000/= to the Plaintiff, which was deposited in a joint account with NIC Bank, being the Deposit in the sale transaction of Land Reference Number 7879/9 Ruaraka Nairobi.
- c. The Defendant be ordered to pay the Plaintiff interest on the sum of Kshs. 45,000,000/= and Kshs. 5,000,000/- being a total of Kshs. 50,000,000/= at a rate of 15.5% per annum from 1<sup>st</sup> October, 2008 until payment in full.

[2] The OS is supported by the Supporting Affidavit of Nelson Andayi Havi sworn on the 27<sup>th</sup> January, 2009. The following are the brief facts of the case.

**Background facts**

[3] The Plaintiff and the Defendant are advocates of the High Court of Kenya. The Plaintiff acted for the Vendor while the Defendant acted for the Purchaser in respect of sale of Land Reference Number 7879/9 Ruaraka, Nairobi by Rafiki Enterprises Limited (Vendor) to Berkshire Holdings Limited (Purchaser) for a sum of Kenya Shillings Fifty Million (Kshs. 50,000,000/=). An agreement for sale was negotiated and duly executed. The Agreement required an undertaking

to be provided which the Defendant furnished to the Plaintiff in a letter dated 8<sup>th</sup> October 2008 in the following terms:-

**“We acknowledge safe receipt of your letter dated 3<sup>rd</sup> October 2008 and the enclosures therein with thanks.**

**We hereby give you our professional undertaking to pay you the balance of the Purchase price in the sum of Ksh.45,000,000/= within seven (7) days of successful registration of the Conveyance in favour of the Purchaser or within thirty (30) days upon release of the completion documents whichever is the earlier. Kindly therefore forward to us the Title, Transfer and completion documents to facilitate the registration process”.**

But, the Plaintiff defaulted on the undertaking which necessitated the filing of this suit. The Agreement was to be completed within 90 days from the 1<sup>st</sup> July, 2008 (i.e. on being 1<sup>st</sup> October, 2008) or on or before the date indicated at clause 9 of the Agreement. Clause 9 of the Sale Agreement provided that The Agreement was subject to the Law Society Conditions of Sale (1989 Edition).

[4] During the pendency of this suit, and more specifically on 6<sup>th</sup> July, 2009 the Defendant paid the Plaintiff a sum of Ksh.43,000,000/= and thereafter consented to the release of the deposit of Kshs. 5,000,000/= totaling Kshs 48,000,000/= as the amount duly paid to the Vendor. As per the submission of the Plaintiff, although the purchase price was Kshs. 50,000,000/= the Defendant deducted a sum of Kshs. 2,000,000/= on account of claimed “cleansing” which neither the Plaintiff nor his client objected to as the completion of the sale transaction had been unduly delayed. After this payment was made, a balance of Kshs. 3,249,997 remained. And, according to the Plaintiff, the balance consists in agreed interest at 17.5% per annum with effect from the 6<sup>th</sup> July, 2009 on the delayed completion under the Agreement for sale.

### **Issues**

[5] The Court issued the following directions on 16.4.2013;

- a. **The suit be disposed off (sic) by way of Affidavit evidence;**
- b. **The parties do file a statement of agreed facts within 7 days of today;**
- c. **The parties do file a statement of agreed issues for determination within the said 7 days;**
- d. **The plaintiff do file and serve his written submissions within 14 days of filing the statements in 2 and 3 above;**
- e. **The defendant to file written submissions within 14 days after service by the plaintiff;**
- f. **The matter be listed on 23/5/13 for highlighting**

[6] Despite these directions, and the claim by the Defendant that she filed own version of statement of issues, I have not seen any statement of agreed facts or issues for determination by the court as was directed by the court. That notwithstanding, the parties in their respective submissions have framed the issues for determination. The affidavits filed herein as the pleadings provide the factual situation of the case and the cause of action, respectively. Accordingly, from these pleadings, it is discernible the following are the issues for determination by the Court:

- a. **Whether an order to honour the undertaking should be issued before enforcing the undertaking herein;**
- b. **Whether the Plaintiff is entitled to claim interest on delayed completion in the enforcement of the Advocates undertaking in this matter;**
- c. **Whether the Defendant is liable to pay the interest on account of delayed payment of the sum she gave an undertaking on;**
- d. **Whether the Plaintiff is liable to costs of this suit.**

[7] The Plaintiff filed two sets of submissions; one is dated 15<sup>th</sup> December 2013 and the other 12<sup>th</sup> June 2014. Both sets of submissions basically address similar issues. The Defendant also filed submissions. The submissions, affidavits and pleadings shall be given appropriate proportion of weight in the resolution of the issues formulated above.

### **Can the Plaintiff enforce the undertaking herein?**

[8] There is no doubt a professional undertaking was given by the Defendant to the Plaintiff in terms set out in the letter date 8<sup>th</sup> October 2008. The correct question to ask, therefore, is whether the Plaintiff is entitled to enforce the undertaking herein, and if so, whether he is entitled to the interest claimed. This question is double-faceted. It encompasses; 1) an issue of a general nature, that is, the locus standi of an advocate who has been given an undertaking by another in a conveyance transaction to enforce the undertaking; and 2) whether the Plaintiff is entitled to interest for delayed completion under the undertaking. The first one is simple and straight forward and I will begin with it.

[9] The Plaintiff submitted that a professional undertaking between Advocates should properly be enforced by either of the advocates and not their prospective clients. This is because none of the clients is a party to such an undertaking and as such the clients have no privity of contract in the undertaking. The Plaintiff relied on the case of **NBI HCC NO 209 of 2008 David Karanja Thuo t/a D.K. Thuo & Company Advocates vS. Njagi Wanjeru t/a Njagi Wanjeru & Company Advocates**. According to the Plaintiff, enforcement of the undertaking includes interest payable under the undertaking as the claim for interest cannot be severed from an action seeking to enforce the undertaking. To him the argument by the Defendant that the advocate is not the proper person to enforce the undertaking is untenable in law. In support thereof, he cited the case **HK Advocate V. Muciimi Mbaka [2004] eKLR**.

[10] The Plaintiff contended that the undertaking given Defendant was unambiguous, unequivocal and binding on him. The Defendant undertook to pay a sum of Kshs. 45,000,000 to the Plaintiff within thirty days of the release of the completion documents but decided to honour the payment nine months later-which was a classical breach of honesty and ethical standards. The justification given for the breach of the undertaking by the Defendant is just extraneous considerations, namely: delay in the transfer process. The alleged circumstances were non-existent at the time of the undertaking. Further, the undertaking did not subject payment of the purchase price to transfer of the property but rather to the release of completion documents. Therefore, the Defendant's undertaking stands as a separate contract between the parties herein and was not contingent upon any terms of the contract between their respective clients. Hence, the Plaintiff submitted that he is the proper party to claim interest. On this point, they referred the Court to the decision of the Court of Appeal in **Kenya Re-insurance Corporation vs. Muguku Muriu t/a V.E Muguku Muriu & Co. (Civil Appeal No.98 of 1994.)**

[11] The Plaintiff did not relent. He is of the view that the basis for the argument that interest is payable on this claim is on the principle that an Advocate should give an undertaking only when he is in the funds. The said principle was enunciated in the case of **Harit Sheth –v- K.H Osmond Advocate [2011] eKLR**. The law, therefore, presumes that by the time the Defendant Advocate issued the subject undertaking, she was in possession of Kshs. 45,000,000. She however withheld the money from November 2008 to July 2009. On that basis, the Plaintiff is entitled to interest. The case of **David Karanja Thuo t/a D.K Thuo & Co. Advocates vs. Njagi Wanjeru t/a Njagi Wanjeru & Company Advocates, supra**, imposed an obligation on an advocate to pay interest on a sum withheld by such Advocate when it stated:

**“The Defendant has withheld the money from March, 2008, and justice demands that he should pay interests. As no particular rate was agreed upon, I shall order interest at Court rates”.**

Similar obligation was imposed on the advocate who withholds funds by Mwera J. in **Nairobi**

**HCCC No. 30 of 2001 Ibrahim & Isaack Advocates vs. Wambugu & Company Advocates & Another.** The Defendant withheld funds herein for over eight months and it is only fair and just that the late payment should attract interest.

[12] The Plaintiff stated that the facts, the pleadings and the law support his contention that, he received the undertaking from the Defendant who acted for the Purchaser after she had received copies of the completion documents sent to her by the Plaintiff through the letter dated 3<sup>rd</sup> October 2008. In the same letter of 3<sup>rd</sup> October 2008 the Plaintiff reiterated that the vendor was all along ready to complete the transaction as per the terms of the sale agreement. The Plaintiff vide the letter dated the 15<sup>th</sup> October, 2008 forwarded the completion documents receipt whereof was acknowledged on the 16<sup>th</sup> October, 2008 by the Defendant.

[13] But, despite issuing an undertaking in the terms herein above the Defendant failed to release the balance of Kshs. 45,000,000/= on the lapse of thirty (30) days prompting the Plaintiff write the letter dated 19<sup>th</sup> November, 2008 requesting for release of a cheque for the said amount and execution of the letter authorizing release of deposit of the purchase price. Therefore, the Plaintiff submitted that the undertaking having been to the Plaintiff personally and was not contingent upon any other terms only he can enforce the terms thereon and not the client. An undertaking is personal and it is an Agreement given by another party to be responsible for something. In the instant case the Defendant is responsible for not only payment of the balance price but also the interest due for delayed completion. The Plaintiff cited the case of **David Karanja Thuo vs. Njage Waweru HCC No.209 Of 2008 (OS)**.

[14] Again he cited the case of **Ibrahim & Issak Advocates – Vs- Wambugu & Company Advocates & Housing Finance Company of Kenya HCCC No 38 of 2001**, where Justice Mwera was of the view that the Advocates being the person who gave the undertaking should honour the same. This prepositions fit the circumstances at hand and only the Plaintiff can enforced the terms of the undertaking fully

[15] The Defendant admitted that she gave the Plaintiff an enforceable undertaking and the Defendant's obligations were expressly provided in the professional undertaking that it was the payment of the balance of the purchase price in exchange for the documents, and no more. She asserted that the right and remedy for a default of the Purchaser's advocate for which the Plaintiff as an advocate could sue in his own name, without involving his client, was either a suit for return of the documents or for enforcement of the professional undertaking. Interest remains, and was left by the parties as an obligation between the contracting parties in the Sale Agreement, namely the Vendor and the Purchaser. Ordinarily, the Defendant submitted, an advocate does not have a *locus standi* to sue in his name for a remedy belonging to, or on behalf of his client, except where the advocate has extracted an undertaking from a colleague. Even if an enforceable undertaking specifically requiring the Defendant as an advocate to pay interest is issued, the Court's power would have in that instance been limited to issuing an order under the provisions of Order 52 Rule 7 of the Civil Procedure Rules directing the advocate to honour his undertaking by paying interest. The Defendant, however, stated that an undertaking is always a separate and distinct contract between advocates, and must be interpreted strictly without increasing the burden of the advocate to obligations which such advocate never contracted to fulfill.

[16] The foregoing arguments by the parties who are advocates are eminently powerful. But one thing is not in doubt; that a professional undertaking given by advocates is separate and distinct contract which is enforceable between the parties. The respective clients of the advocates in the undertaking are not parties in the undertaking. Therefore, only the advocates as the parties in can enforce the undertaking. There is ample judicial decision on this point and I do not wish to multiply them. Like Njagi J in the case of **David Karanja Thuo vs. Njage Waweru HCC No.209 Of 2008 (OS)** I say;-

**“In the first instance, it should be noted that the professional undertaking was**

**between the advocates and none of the clients was a party to such an undertaking”.**

That rendition opens the way for resolution of yet another important legal issue below;

**Whether an Order to honour the Undertaking needs to issue before enforcing the undertaking herein**

[17] This issue calls for an interpretation of Order 52 rule 7 of the Civil Procedure Rule, 2010 which provides that;-

**7.(1) An application for an order for the enforcement of an undertaking given by an advocate shall be made-**

(a) .....

(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.**

[18] Rule 7(2) of Order 52 of the Civil Procedure Rules, is particularly relevant here. The Plaintiff is of the opinion that, whether an order for honouring the Undertaking needs to issue before enforcing it depends on the circumstances and facts of each case. He asserted that the circumstances of this case are such that the Defendant only honoured the undertaking after noting that an Order shall be made that she enforces the undertaking. Also, the fact that the Defendant owned up and honoured the undertaking, removes the necessity for an order for enforcement of the same in terms of prayer number 1 and 2, but ONLY for enforcement of prayer 3 of the OS.

[19] The Defendant is of a contrary opinion; that the order to honour the undertaking must come first before enforcement of the undertaking. She took the view that even when such order to honour the undertaking is made; it is limited to the obligations under the undertaking and does not extend to the obligations of their respective clients under the contract. Again, I admit these arguments present kind of a squirm, but the court is experience at handling such matters. The law, the way I know it, is that, when an application is made under Order 52 rule 7 of the Civil Procedure Rules for an order for the enforcement of an undertaking given by an advocate, Court shall order in the first instance that the advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made. it is only where there are special circumstances and the court should record the special reasons, shall a court of law order otherwise. Therefore, the rule of thumb is to order the advocate to honour the undertaking before coercive enforcement order is given by the court. There are good reasons for that approach of the law, and I think has more to do with the nature and purpose of undertaking which is given in good faith within an atmosphere of trust whose aim is to facilitate conclusion of a transaction at arms-length. Are there special circumstances in this case which would impel the court to order a coercive order of enforcement against the Defendant? The Plaintiff argued that the Defendant only honoured the undertaking in part when she left a balance of Kshs. 3,249,997 unpaid. And since the said balance consists in interest which the Plaintiff argued emanates from the terms of the contract, this question should be determined in the next issue on interest. I will so proceed.

**Is the Plaintiff entitled to interest claimed?**

[20] This issue is most and hotly canvassed by the parties herein. The Plaintiff argued that the Defendant honoured the undertaking herein eight months from its due date, i.e. 6<sup>th</sup> July, 2009. The lateness in payment in payment of the purchase price constituted delayed completion which attracted interest at 17.5% as agreed in the contract. Indeed, the late honouring of the undertaking even came after the suit. To support the claim that he is entitled to pursue the claim for interest,

the Plaintiff fell back on Clause 3 of the Agreement of Sale dated the 1<sup>st</sup> July, 2008 which provided that:-

**“The sale is subject to the Law Society Conditions of Sale (1989 Edition) and all other applicable laws in so far as they are not inconsistent with the conditions contained in this agreement”.**

[20] The Plaintiff submitted that, at the time of entering into the agreement, the Vendor, Purchaser as well as the Plaintiff and Defendant were aware of the conditions the Law Society Conditions of Sale (1989 Edition) which they agreed would apply to the transaction. The Plaintiff averred that this is the normal practice in conveyance and that the relevant Condition is 8(3) & (4) of the Law Society Conditions of Sale (1989 Edition) which is on interest and applied.

[21] On the basis of the above condition, the Plaintiff wrote a demand letter on the 8<sup>th</sup> July 2009 to the Defendant calling for the interest due on the balance of the purchase price of Kshs. 45,000,000/= for the period commencing 1<sup>st</sup> October, 2008 being the completion date to 7<sup>th</sup> July, 2009, being the date when the undertaking was complied with. According to the Plaintiff, the Defendant paid the balance of the purchase price 8 months outside the period undertaken and so interest is due. To support this view, the Plaintiff relied on the case of **Naphatali Paul Radier vs. David Njogu Gachanja HCCC No.582 of 2003 (OS)** where Justice H.P.G Waweru held as follows:-

**“The Defendant has withheld the Plaintiff’s money from August 2002. Justice demands that he pays it with interest. As no particular rate of interest was contracted, I shall award at court rates”.**

[22] The second reason the Plaintiff believes interest should be paid is that the Defendant did NOT AT ALL contest the interest that was payable and indeed in the letter dated the 9<sup>th</sup> July, 2009 and the 24<sup>th</sup> July, 2009 the Defendant stated that the interest ought to be waived. The Defendant in the letter of 24<sup>th</sup> July, 2009 stated in part:-

**“In view of the foregoing it is our honest opinion that the interest should be waived in appreciation of the circumstances operating then”.**

[23] The Defendant is of the contrary view. She stated that this case is not concerned with whether the transaction was delayed. Even if it were, was the delay caused by the Vendor or the Purchaser? According to her, the scope of this case should be limited to the question whether the Defendant, as advocate for the Purchaser is responsible to pay interest under a professional undertaking. The Defendant thinks that, the Plaintiff’s exclusive reliance on the Sale Agreement dated 1<sup>st</sup> July, 2008, is a confirmation that the agreement did not contain any specific provision requiring the Purchaser, Berkshire Holdings Ltd to pay interest and so incorporated the Law Society Conditions 1989 Edition, which under Condition 8(3) stipulates for a Purchaser to pay interest for delay in completion. The said provision does not place this obligation on the Purchaser’s advocate. Therefore, the question is whether the Defendant’s professional undertaking issued to the Plaintiff in the capacity of an advocate obliged the Defendant to assume responsibility for, and to pay interest ordinarily payable by the Purchaser itself.

[24] After careful consideration of the arguments put forth by the parties, the question of whether interest is payable and by whom could only be determined by looking at the agreement and all other documents which apply to the contract, and then the law. It is correct to state that the agreement did not carry an express provision on interest on its body. But through its clause 3 it incorporated the Law Society Conditions of Sale (1989 Edition) which they agreed would apply to the transaction. The relevant Condition on interest is 8(3) & (4) of the Law Society Conditions of Sale (1989 Edition) which provides as follows:-

**Condition 8(3) Where the completion is, for any reason whatsoever, other than the default of the vendor of his mortgage, delayed beyond the completion date, the purchaser shall, subject as is herein after otherwise provided, pay to the vendor on completion interest on the balance of the purchase money in full (both dates inclusive) provided however that, where any portion of the purchase money is secured by an undertaking under the provisions of condition 4(2)(b) interest on the secured balance shall only be payable from the earlier of the following dates namely:**

- a. **A date seven (7) days after successful registration of conveyance; or**
- b. **A Date Thirty (30) days after the completion.**

**Condition 8(4) If any payment provided for in the Special Conditions is not paid on the date agreed on completion the purchaser shall pay to the vendor interest on such payment from the date agreed until actual payment.**

[25] Therefore, Condition 8(3) & (4) of the Law Society Conditions of Sale (1989 Edition) governed the agreement especially on interest on delayed completion. These conditions on interest were not expressly excluded by the agreement. From the condition above, two things are discernible; the obligation to pay interest on delayed completion is on the purchaser, and it also sets out the time frame interest is payable. Does the undertaking expressly or by necessary implication impose an obligation on the advocate for the purchaser to pay interest on delayed completion? This question, however, should be distinguished from interest which may be visited on an advocate who deliberately gives an undertaking knowing he is not in funds or withholds funds which are payable on the undertaking for reasons which are not in fulfilment of the primary transaction. The two will be considered.

[26] Let me examine the undertaking herein and its foundations. Clause 2.4 of the sale agreement herein carries a requirement for a professional undertaking. It reads as follows:-

**“The balance of the purchase price amounting to Kenya Shillings Forty Five Million (Kshs. 45,000,000/=) shall be secured by a professional undertaking from the Purchaser’s advocates to pay the same within seven (7) days of successful registration of the conveyance in favour of the Purchaser or within Thirty (30) days upon release of the completion documents (hereafter defined) to the Purchaser’s advocates, whichever shall be earlier”.**

Further, clause 9:2 stipulates as follows:-

**“The Purchaser, through the Purchaser’s Advocates, shall on before the completion date furnish an irrevocable professional undertaking in the manner and form acceptable to the Vendor’s Advocates to pay the balance of the Purchase price within seven (7) days of the successful registration of the conveyance or within thirty(30) days of receipt of the completion documents, whichever is earlier, to facilitate the registration of the indenture of Conveyance in respect of the Property in favour of the Purchaser”.**

[27] Pursuant to these provisions, the Defendant furnished the Plaintiff with an undertaking in the following terms:-

**“We acknowledge safe receipt of your letter dated 3<sup>rd</sup> October 2008 and the enclosures therein with thanks.**

**We hereby give you our professional undertaking to pay you the balance of the Purchase price in the sum of Ksh.45,000,000/= within seven (7) days of successful registration of the Conveyance in favour of the Purchaser or within thirty (30) days upon release of the completion documents whichever is the earlier. Kindly therefore forward to us the Title, Transfer and completion documents to facilitate the registration process”.**

[28] This case presents difficult matters. The undertaking did not create an express obligation on the Defendant to pay interest for delayed completion. It is an obligation of the purchaser. I should state that although there is a duty on the advocate to act in the client's interest, this does not imply a duty to assume or underwrite the client's financial or other obligations under the contract. Also, 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. See the case of **Karsam Laji Patel vs. Peter Kniamai Kairu t/a Kimani Kairu & Co Advocates [200] eKLR (supra)**. In saying these things, I am fully aware that this is not a suit against the purchaser by the vendor on a claim for interest as provided for in the contract. It is one for enforcement of an undertaking. There is, however, a clear delayed completion and late honouring of the undertaking by the Defendant. In the absence of special reasons or circumstances the court would normally have little difficulties in ordering the Defendant to honour the undertaking. But the Defendant was fully aware that the undertaking she gave was explicit that she was:-

**“...to pay...the balance of the Purchase price in the sum of Ksh.45,000,000/= within seven (7) days of successful registration of the Conveyance in favour of the Purchaser or within thirty (30) days upon release of the completion documents whichever is the earlier”.**

And as the law stands, it was not up to the Defendant to care about whether honouring of the undertaking will produce unfavourable results to her clients. Any advocate would, of course, be concerned that it would be safe to honour such undertaking after effective registration of the conveyance. But such fear would be unfounded as an undertaking is always given on full instructions of the client and is anchored on the primary contract between the clients. The advocate must ensure he is in funds before giving an undertaking. In this case, the undertaking was that the advocate was *to pay...the balance of the Purchase price in the sum of Kshs 45,000,000/= within seven (7) days of successful registration of the Conveyance in favour of the Purchaser or within thirty (30) days upon release of the completion documents whichever is the earlier*” Although there is an element of successful registration of the Conveyance, the operative words are... “or”...”*whichever is the earlier*”. The completion documents were sent to the advocate and 30 days lapsed before the registration of the Conveyance; that was the earlier occurrence as per the undertaking and so she should have paid the agreed sum within 30 days of release of the completion documents by the Plaintiff, unless, the undertaking had been lawfully varied. The communication in the letter dated 24<sup>th</sup> July, 2009 that:- “*In view of the foregoing it is our honest opinion that the interest should be waived in appreciation of the circumstances operating then*”...was not variation of the undertaking herein. Therefore, having failed to do as required by the undertaking, the Defendant was clearly in breach of the undertaking. In such circumstances where the advocate did not honour the undertaking until after a suit had been filed and did not seek the consensus of the other counsel to vary the terms of the undertaking constitute special reasons on which the court may issue a coercive order of enforcement especially given that the Defendant was in funds all this time but just did not honour the undertaking. To hold otherwise would encourage a practice where advocates will give undertaking without the intention of honouring them as stipulated. Such conduct would undermine the noble purpose of professional undertaking in conveyancing and the effect would be that conveyancing would be made extremely difficult if the trust in professional undertaking is lost.

[29] It may be said that, conduct such as being complicit in or deliberately withholding Plaintiff's money would earn the advocate penalty in form of interest for having denied the Plaintiff his money. See the case of **Naphatali Paul Radier vs. David Njogu Gachanja HCCC No.582 of 2003 (OS)** where Justice H.P.G Waweru held as follows:-

**“The Defendant has withheld the Plaintiff's money from August 2002. Justice demands that he pays it with interest. As no particular rate of interest was contracted, I shall award at**

**court rates”.**

That approach would also prevent unscrupulous advocates from keeping money entrusted to them for completion of a transaction for their own use. But as I have stated earlier, an undertaking does not place an obligation on the advocate to pay or underwrite the client’s obligations. However, there would be nothing illegal if the enforcement of the undertaking would achieve the unintended result of enforcing the Purchaser’s obligations or rights under the agreement. Therefore, since interest had been agreed at 17.5% for delayed completion it is in order to peg interest against the Defendant for withholding the funds at the same rate of 17.5% for breach of the undertaking. I would, therefore, order the advocate to pay interest at 17.5% for the eight months she withheld the purchase price herein. I note, however, that neither the Plaintiff nor his client contested the sum of Kshs. 2,000,000 which *the Defendant deducted on account of claimed “cleansing” since the completion of the sale transaction had been unduly delayed..* I grant the claim herein in the sum of Kshs. 3,249,997 only.

**(D) What about costs of the suit?**

[30] Costs follow the event. I hold that the Plaintiff is entitled to costs of the suit because he filed this suit after the Defendant had failed to honour the professional undertaking given by her. The Defendant honoured the undertaking only upon filing of the suit. She took eight months to honour the undertaking. The Plaintiff is not guilty of any misconduct. The Plaintiff will have costs on the judgment sum herein above. It is so ordered.

**Dated, signed and delivered in court at NAIROBI this 30<sup>th</sup> day of January 2015**

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**F. GIKONYO**

**JUDGE**