



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCC NO.22 OF 2007**

**MOHAMED ALI MOTH A.....PLAINTIFF**

**VERSUS**

**IMPERIAL BANK LIMITED.....DEFENDANT**

**R U L I N G**

1. This is a ruling on a Summons in chambers dated 8/5/2014 and filed on 12/5/2014. It is an application brought by the Applicant – **IMPERIAL BANK** – against the respondent – **MOSES WAWERU NDUNGU & JASPER ODUOR OMONDI T/A OMONDI WAWERU & CO. ADVOCATES** - and the issues arising are part of or intricately intertwined with the main suit, which is between **MOHAMED ALI MOTH A** as plaintiff and **IMPERIAL BANK** as the defendant.

2. The application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Order 51 Rule 1, Order 52 Rule 7(1)(a) and (2) of Civil Procedure Rules.

The following orders are sought:

- (i) That the Respondent do honour their professional undertaking made to the applicant on 20/2/2013 and 15/5/2013. The applicant claim is for Kshs.23,000,000 due and owing.**
- (ii) That there be an order that the undertaking by the respondent to the applicant as set out in prayer (1) above be honoured within 7 days from the date of the Court order.**
- (iii) That in default of prayers 1 & 2 above, an order of enforcement of the undertaking given by the respondent to the Applicant and for attachment do issue without further notice to the respondent.**
- (iv) That the respondent's firm do pay accrued interests amounting to Kshs.1,163,552.39.**
- (v) That the respondent to pay costs of this application.**

**These prayers are styled prayers 1, 2,3,4 and 5 respectively in the application.**

3. A reading of the application and the submissions filed by the applicant shows that the plaintiff in the suit borrowed some Kshs.7,500,000 from the defendant on 8/5/2014. The plaintiff defaulted in payment and the defendant sought to realize payment by sale of land parcel No.**KISUMU/MUNICIPALITY/BLO 7/81** charged to it by the plaintiff.

4. The defendant resisted this side this suit and successfully filed for, and obtained, interim restraining orders. In the meantime, parties entered into negotiations with a view to reaching an out-of-Court settlement.

5. The respondent was acting for the plaintiff and on 20/2/2013, wrote to the defendant intimating possession of authority from plaintiff to settle the amount then standing at Kshs.22,500,000/=. Following that communication, the respondent gave a professional undertaking promising to deposit the stated amount into plaintiff's loan account with the bank. There was a further undertaking to fully indemnify the bank in the event of any loss and damage in case of breach on their part. The undertaking was contained in a letter dated 20/2/2013 written and addressed by the respondent to the applicant. It was availed here as annexure "MW4".

6. There were various other correspondences affirming the undertaking; see for instance annexures MW5, MW6, and MW7.

7. Ultimately however, the respondent did not honour the undertaking and this application therefore became necessary.

8. It appears clear that the respondent was served. In spite of that however, the respondent did not respond to the application. There was an attempt however at informal appearances. The court records show that when the matter came up in court, some counsels intimated that the respondent had given them instructions to appear and that some response would be made.

9. Both the Applicant and the court were very patient with the respondent. But the respondent did not respond and as things stand, this application is not opposed.

10. I have the submissions of the applicant. By and large, the submissions are an erudite and well reasoned articulation of both the statutory and judicial view - points on the issue of professional undertaking. In addition, the following cases, which are authoritative pronouncements on the issue were availed:

**1. MALINDI HOLDINGS & ESTATE AGENTS LIMITED VS MORRIS MWAMBUI KUPALIA: (2011) eKLR.**

**2. HARIT SHETH T/A HARIT SHETH ADVOCATE VS K.H. OSMOND T/A K.H OSMOND ADVOCATE (2011) eKLR.**

**3. In the matter of Section 50(1) of the Advocates Act VS MURIU MUNGAI & CO. ADVOCATES (2006) eKLR.**

**4. NAPHTALI PAUL RADIER VS DAVID NJOGU GACHANJA T/A D. NJOGU & CO. ADVOCATES (2006) eKLR.**

11. I have read the authorities and would wish to state that most of them are on all fours with the issues arising here. And I am indeed indebted to Applicant's counsel for his effort and industry.

12. All things considered, it is clear that the respondent made a professional undertaking to the applicant, which it failed or refused to honour. And instead of offering plausible explanations for not doing so, it chose to go silent on the matter. This matter represents one of the rare instances in which the goings-on in a case mutate to affect a counsel personally. A professional undertaking is not a contract; it is a promise. But the undertaker can only renege on it on pain of some nasty legal consequences.

13. The application herein is well merited. It is shown clearly that an undertaking was given, only for the giver to later resile from the obligations that would go with it. Such behaviour is a blot on legal profession; it brings dishonour and when it comes to court, it comes across as a sacrilege at the temple of justice.

The application herein is therefore allowed. The respondent is to be granted time to honour the undertaking. Counsel for Applicant asked for 7 days to be given. My view is that we enlarge time a bit. The respondent is therefore granted 14 days, failing which the order for enforcement must surely follow.

14. For the avoidance of doubt, prayers 1,2,3,4 and 5 are granted with variations as follows:

**(i) 14 days are given instead of the 7 days asked for in prayer 2.**

**(ii) Prayer 3 becomes enforceable if and when prayer 2 is not honoured.**

**A.K. KANIARU – JUDGE**

**19/3/2015**

**19/3/2015**

Before A.K. Kaniaru – Judge

Diang'a G – court clerk

No party present

No counsel present

**COURT:** There was a notice for delivery of the ruling herein sent to both sides. The notice is dated 10/3/2015. Accordingly, the ruling on Chamber Summons dated 8/5/2014 is read and delivered in open **COURT.**

Right of Appeal – 30 days.

**A.K. KANIARU – JUDGE**

**19/3/2015**