



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 449 OF 2013 (O.S.)

IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION UNDER ORDER 52, RULE 7 OF THE CIVIL
PROCEDURE RULES 2010**

BETWEEN

KAMALJIT SINGH ATTLIA.....PLAINTIFF

VERSUS

GICHOVI EDWIN NJERU

(t/a NjeruGichovi& Co.Advocates).....DEFENDANT

RULING

This suit is for enforcement of an advocate's professional undertaking. The jurisdiction of the court is not in doubt and was expressed as follows by the Court of Appeal in **Patel – vs – Kairu[1999] 2 EA279 -**

“The jurisdiction of the court in an application for enforcement of a professional undertaking (is) a summary jurisdiction over advocates which should be exercised only in a clear case. It (is) an inherent jurisdiction which the court (has) over advocates who (are) officials of the court. It (is) a jurisdiction exercised, not for purposes of enforcing legal rights, but for purposes of enforcing honorable conduct on the part of the court's own officials. The court (has) to be satisfied that there had been a breach of an undertaking given by an advocate acting professionally.”

The Plaintiff's case is that the Defendant gave his professional undertaking by letter dated 15th July 2013 to pay the sum of Kshs. 8,600,000/- owed to him after the Defendant failed to honour a previous professional undertaking to release the sum to the vendor in a transaction for purchase of a property title number Nairobi L.R. No. 209/18604.

The Originating Summons is supported by the affidavit of the Plaintiff.

The Defendant opposed the originating summons by replying affidavit filed on 3rd July 2014. The only point taken is that there is no proper professional undertaking in law capable of being enforced.

The originating summons was canvassed by way of written submissions by the Plaintiff filed on 14th August 2014 where authorities were cited. The defendant's written submissions were filed late but before the writing of the ruling, and so I have considered both submissions.

The Court of Appeal set out the law with regard to an advocate's professional undertaking in the case of **Kenya Reinsurance Corporation Ltd –vs- Muriu [1995–1998] 1 EA 107**. It held that-

- (i) The undertaking must be unambiguous, unequivocal and binding on the advocate.**
- (ii) The undertaking must be capable of being enforced.**

The Defendant's professional undertaking to the Applicant was contained in his letter dated 15th July 2013 which stated –

“RE: COMPLETION OF THE PURCHASE OF L.R. 209/18604 AND TRANSFER OF KSHS. 8,600,000/= HELD ON ACCOUNT

The above subject matter refers;

Pursuant to a meeting held in our chambers between you and Mr. Ashfaq and the undersigned in the presence of Mr. Khamati Advocate, the undersigned undertakes to effect transfer of the sum of Kenya Shillings Eight Million Six Hundred Thousand (Kshs. 8,600,000/=) only into your account without fail on 23rd July 2013.

As agreed all other Business will be amicably dealt with after the transfer with proper charges be levied”

There is a letter by the Vendor's Advocates in the transaction dated 25th July 2013 acknowledging that indeed the final balance of the purchase price was actually paid by the Plaintiff himself (the Defendant received and stamped the letter).

The question is whether or not the Defendant's undertaking was unambiguous, unequivocal, binding and capable of enforcement. By the undertaking the Defendant undertook to deposit the amount outstanding in the account of his client. There are no equivocating conditionalities in the undertaking rendering it equivocal. Was the undertaking binding upon the Defendant and capable of being enforced against him? It certainly was. By it he had bound himself to pay a certain amount of money to his client. That undertaking was eminently capable of enforcement against him.

The other issue to be determined has to do with the consequences of the Defendant's breach of his professional undertaking. There is evidence that the Plaintiff is still owed Kshs. 8,600,000/- which he has sought to recover through this suit. The second issue is whether the court has jurisdiction to punish the Defendant for failing to pay the sum aforementioned after professionally undertaking to do so.

The court has supervisory power to enforce disciplinary power to prevent advocates who are its officers from breaking their professional disciplinary code of ethics. This power is discretionary. It can order the Defendant as a disciplinary measure to fulfill his professional undertaking within the powers derived under Section 57 of the Advocates Act (Cap 16) even if such order would in addition, assist the applicant in pursuance of his separate legal right to recover his debt. Thus the court would in addition to disciplining its officer also assist a party to recover his debt.

However, as stated in **Kenya Commercial Bank vs Adala [1979]KLR 467**, the court before granting an order against the advocate, will need to see that he is not oppressed. Accordingly,

(i) The Defendant shall within fourteen (14) days of delivery of this ruling honour his professional undertaking by paying to the Plaintiff KShs. 8,600,000/-.

(ii) In default the Plaintiff may execute for that sum, plus interest thereon at court rates from the date of filing these proceedings, as a decree of the court.

(iii) The Defendant shall pay to the Plaintiff costs of these proceedings to be agreed or taxed.

Orders accordingly.

Dated and delivered at Nairobi this **17th Day of December, 2014.**

A.MBOGHOLI MSAGHA

JUDGE