



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 796 of 2010**

**KILONZO & COMPANY ADVOCATES ..... APPLICANT**

**VERSUS**

**NJAU KAYAI & COMPANY ADVOCATES ..... RESPONDENT**

**R U L I N G**

1. The Application before court arises out of a Consent Order made as between the parties hereto on 7 December 2011. That Order involves the entry of a Judgement against the Respondent in the amount of Shs. 12,020,000/-. The Judgement followed upon the enforcement of an undertaking given by the Respondent as regards a conveyancing transaction involving the respective clients of the parties. The Notice of Motion for determination by this court is dated 31 October 2012 and seeks an order for the payment of the decretal sum herein to be paid by monthly instalments of Kenyan shillings 300,000/-. The grounds upon which the Application is brought are that the Respondent is an advocate of the High Court and gave an undertaking on behalf of his client. The client failed to deliver in terms of a conveyancing transaction, rendering the enforcement of the undertaking. The Respondent noted that his clients had taken the deposit paid in connection with the conveyancing transaction and utilised it. The Respondent was now suffering the consequences of having given his undertaking. The Respondent noted that he ran a small size law firm, monthly income of which was small and he was unable to pay the entire decretal sum at once, otherwise he would be rendered bankrupt.

2. The Application is supported by the Affidavit of the advocate Respondent **Benson Njau Kayai** practising in the name and style of **Njau Kayai Co. Advocates**. It is dated 31 October 2012. In the affidavit the deponent details how he came about giving his professional undertaking on behalf of his client. He noted that the Applicant's client had paid his client directly the deposit for the transaction but he had signed for the same as both clients were known to each other. The deponent's client had been allowed by the Applicant's client to utilise the deposit as he was in financial difficulties. Thereafter, the deponent's client failed to complete the transaction under which the undertaking had been given. Mr. Njau noted that he had consented to judgement being entered as against him. He then detailed what I have outlined in the grounds in support of the application above.

3. **Mutula Kilonzo Jr** swore a Replying Affidavit in response to that of the Respondent which was dated 3 December 2012. The deponent admitted as to the correct details of the transaction as contained in the Affidavit in support of the Application. However in response to paragraph 6 and 7 of the Supporting Affidavit, the deponent averred that the law is that an advocate who gives a professional undertaking is personally bound by the same and is personally liable for the amount of the undertaking given by him. In his view, it was immaterial that the Advocate/Respondent's clients had allegedly utilised the deposit amount of the purchase price as the Advocate had given his undertaking to pay the amount anyway. The Applicant was not in any way party to such arrangements. Mr. Kilonzo further maintained that the Advocate having willfully given his undertaking and voluntarily released the sums to his client, did not

warrant any discretion to be exercised in his favour by this court. The Replying Affidavit raised two further points of note. Firstly, the deponent thereof maintained that the Advocate cannot now turn to the court for mercy when he has abused the law by committing and/or abetting a criminal offence. To this end, correspondence from the Directorate of Criminal Investigation was annexed to the Replying Affidavit. In any event, the deponent maintained that the application to pay by instalment is unreasonable. The whole question of the size of the Advocate's law firm or his financial wherewithal did not arise. Mr. Kilonzo stated that he believed that the Advocate was guilty of laches as the consent Judgement had been entered into on 7 December 2012 and no payment had been made by the Advocate to date.

4. The Respondent did not file any written submissions as regards the Application before court, presumably because he was relying upon the grounds of the Application and the Supporting Affidavit. However, the Applicant filed its submissions herein on 10 January 2013. Having summarised the background to this matter, the Applicant detailed what it considered to be 3 issues that this court needed to address. The first was whether an advocate who makes a professional undertaking is personally bound by that undertaking and is personally liable for the amount of the undertaking. Secondly, the court was required to decide whether the decretal sum could be paid in instalments and thirdly, whether the Respondent had acted in good faith when he gave the professional undertaking. As regards the first issue, the Applicant went into great detail quoting 3 authorities in support of its contention that an advocate who gives a professional undertaking is bound by it and is personally liable on it. With due respect, I do not consider that this issue is relevant here as it has really been answered by the fact that a consent judgement has been entered as against the Respondent. However, on the second issue the Applicant noted the provisions of **Order 21 rule 12** which it set out in detail. The pertinent part of **rule 12** to my way of thinking is **rule 12 (2)** as follows:

**“After passing of any decree, the court may on the application of the judgement-debtor and with the consent of the decree-holder or without the consent of the decree holder for sufficient cause order that the payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgement-debtor or the taking of security from him or otherwise, as it thinks fit”.**

5. The Applicant then referred this court to the Judgement of the Court of Appeal in **Harit Sheth v K. H. Osmond (2011) eKLR** which is not only binding upon me but is the authority that I consider definitive in relation to advocates' professional undertakings *vide*:

**“..... 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. 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 of money he has incurred in honouring a professional undertaking. He cannot however sue to recover that amount unless he has first honoured his professional undertaking.”**

As I understood the Applicant's submission in this regard, it is improper for an advocate to water down his undertaking since he has to bear the risk thereof on his own.

6. On the third point raised in the submissions, the Applicant maintained that the principle of utmost good faith (*uberrimae fidei*) is applicable here. The Applicant also referred this court to the equitable maxim that: *“he who comes to equity must come with clean hands”*. From what I understood of the Applicant's submissions in this regard, it was maintaining that as the Respondent Advocate had handed over the deposit to his client without the express authorisation of the Respondent, he had not acted in good faith. As per the authority of **Peter N'gang'a versus Standard Chartered Bank (K) Ltd & Anor. (2004) eKLR** to which the Applicant referred the court, where one's hands are unclean, one cannot access equitable relief. What the Respondent was seeking before court in terms of payment of the decretal

amount by instalments was in the opinion of the Applicant, such equitable relief. The Applicant also noted that soon after the Judgement had been entered herein and the Decree issued, the Respondent had been informed by the Director of Criminal Investigation that his department was investigating a case of alleged fraud touching on the parcel of land which formed the transaction as between the advocates' clients. The Applicant referred to the annexures to the Replying Affidavit in this connection. The Applicant concluded that the Respondent's Application herein had been tarnished by his involvement in perceived criminal actions.

7. In order to clear up this point first, I have perused the annexures to the Replying Affidavit in respect of the Respondent's Application. Although it may be that the parcel of land to which the undertaking was given is the one referred to in the annexed correspondence, there is no mention of the Respondent in any of the letters exhibited. Indeed, there is no mention therein of the Respondent's said client Mr. Moiben. The evidence that the Applicant has put before court in this regard does not in any way reflect upon the Respondent as regards impropriety. I do not consider that the Respondent has come before court with his Application with unclean hands. As I have already indicated above, I do not consider that the first issue raised by the Applicant is relevant in considering the Application that the decretal sum be paid by way of instalments. As I have said, the mere fact that Judgement has been entered against the Respondent based on his professional undertaking puts that issue to bed. Consequently, I believe that the only issue that I am required to determine is whether the Applicant has put forward sufficient reason or shown sufficient cause that the payment of the decretal amount be made by instalments. To this end, I take cognizance of the **Order 52 rule 7 (2)** which reads as follows:

**“Save for special reasons to be recorded by the Judge, the order shall in the first instance be that the applicant shall honour his undertaking within time fixed by the order, and only thereafter an order in enforcement be made.”**

8. That rule was cause for comment by the Court of Appeal in the **Harit Sheth** case (supra). The Court observed:

**“The order requiring an advocate to honour his professional undertaking is like an *order nisi* which is made absolute when one becomes sure that the person to comply with it is not able to do so, or if he does not want to comply with the said order. That is why in our view the court is required to fix a time frame within which payment is to be made, failing which the plaintiff is given a final order, which order he is at liberty to enforce by way of execution proceedings.”**

I am satisfied that the Respondent herein acknowledges that he wishes to comply with the said Judgement. What he has done is to come before court to say that he is unable to do so and consequently requires time to pay the same, requesting instalments. I take on board the Applicant's observation that it is now over a year since the Judgement was entered as against the Respondent, who was not made any effort to settle the same. To my mind, this is where the Respondent has not come before court with clean hands. The fact that he has made no effort to settle the Judgement against him is indicative. It appears from the Judgement in the **Harit Sheth** case that this court is bound and required to fix a time frame within which payment is to be made by the Respondent. Accordingly, I direct that the Respondent herein will have 120 days from the date hereof to pay the decretal sum in full together with interest at Court rates as from the date of the Judgement entered herein being 7 December 2011 together with the costs of this suit as per the Certificate of Taxation dated 9 October 2012. Order accordingly.

**DATED and delivered at Nairobi this 18<sup>th</sup> day of February 2013.**

**J. B. HAVELOCK  
JUDGE**