



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 1581 OF 2001 (OS)

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

AND

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

BETWEEN

KENYA RE-INSURANCE CORPORATION LTD.....APPLICANT

VERSUS

JANE NJAGI (t/a Njagi Nyaboke & Co. Advocates).....DEFENDANT

R U L I N G

1. 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 EA 279 -**

“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.”

2. The Applicant's case is that the Respondent gave her professional undertaking by letter dated 15th October 1996 to pay the sum owed to the Applicant by one Ben N. Nyatundo against release to her of the original title documents of L.R. Nairobi/Block 78/218, Buruburu Phase 4 together with discharge of charge.

3. The originating summons is supported by the affidavit of one **Margaret Orgeta**, the Company Secretary and Principal Legal Officer of the Applicant.

4. The Respondent opposed the originating summons by replying affidavit filed on 17.10.2001. The only point taken is that the Respondent fully discharged her professional undertaking by paying the sum

of KShs 246,546/95 demanded by the Applicant and indicated to be the indebtedness of Ben N. Nyatundo to the Applicant.

5. The originating summons was canvassed by way of written submissions. Those of the Applicant were filed on 7th March 2011 which the Respondent's submissions were filed on 7th May 2013. I have considered the submissions, including the authorities cited.

6. In her submissions the Respondent argues that there is no proper professional undertaking in law capable of being enforced. This is clearly an afterthought, given that the only plea she made in the replying affidavit was that she has fully discharged her professional undertaking to the Applicant. But I will deal with the issue.

7. 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.

8. The Respondent's professional undertaking to the Applicant was contained in her letter dated 15th October 1996 which stated –

“RE: NAIROBI/BLOCK 78/218

BURUBURU PHASE 4

BEN N NYATUNDO

We refer to the above property and urgently request to send to us the title documents upon our professional undertaking to release to you the total amount owing towards the redemption of the above account, and in that regard please let us know how much is due.

Our client is selling the property and as soon as we get the purchase (sic) we shall remit what is owing to you not later than 30.11.1996. Please treat this matter as urgent.”

9. The Applicant by its letter dated 29th October 1996 accepted the Respondent's professional undertaking and forwarded the documents asked for.

10. Was the Respondent's undertaking unambiguous, unequivocal, binding and capable of enforcement? By the undertaking the Respondent would receive from the Applicant the title and related documents against her undertaking to pay the amount outstanding upon the account of her client. Were there any equivocating conditionalities in the undertaking rendering it equivocal? I find none. Was the undertaking binding upon the Respondent and capable of being enforced against her? It certainly was. By it she had bound herself to pay a certain amount of money on behalf of her client. That undertaking was eminently capable of enforcement against her.

11. As already pointed out, the only defence put forward by the Respondent was that she had fully discharged her professional undertaking to the Applicant. I will now examine that issue.

12. By a letter dated 17th January 1997 the Applicant addressed the Respondent as follows –

“RE: NAIROBI BLOCK 78/218

BURUBURU PHASE 4 – B.N NYATUNDO

We refer to the above property and advise that the redemption amount as at 31.1.97 shall be Shs 246,546.95. Thereafter interest shall accrue at the rate of 20¹/₂ p.a. calculated on daily balances with monthly rests. Mortgage house owners insurance premiums of Shs 117.00 and Shs 176.05 respectively accrue monthly in advance.

Urgently let us have the redemption amount right away or we shall recall the title documents.”

13. The Respondent promptly paid the amount demanded before 31st January 1997, the date of the account. Then by letter dated 28th February 1997 the Applicant informed the Respondent that the amount had been understated by KShs 106,213/20 which it demanded. The Respondent retorted in effect – “Too bad; I have already discharged my undertaking to you by promptly paying the amount you demanded!”

14. I agree with the Respondent that she fully discharged her professional undertaking upon paying the amount demanded in the Applicant’s letter dated 17th January 19097. Her undertaking was to pay what owed on the account. She was duly informed that the amount was KShs 246,546/95, and she paid it promptly. If that amount had been understated due to bad arithmetic or typing error on the part of the Applicant, too bad! Errors and mistakes do occur all the time; people usually live with their mistakes and errors without seeking to push them onto others! The Applicant should have let the matter rest there. It was not as if a huge amount of money was involved (not that it would matter in law!); it was a relatively small amount of money.

15. The originating summons is entirely without merit. It is hereby dismissed with costs to the Respondent. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JUNE 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2013