



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

**CIVIL DIVISION**

**CIVIL SUIT NO 409 OF 2011**

**LANGATA GARDENS CO. LTD.....PLAINTIFF**

**VERSUS**

**1. JUNE KATHINI MUTISYA**  
**2. C. RACHUONYO t/a RACHUONYO & RACHUONYO CO. ADVOCATES**  
**3. NATIONAL BANK OF KENYA LTD .....DEFENDANTS**

**R U L I N G**

1. It is plain from paragraphs 9 and 13 of the **plaint dated 22<sup>nd</sup> September 2011**, and also from the **witness statement** of one Winfred Nyawira Maina of the same date filed together with the plaint, that the Plaintiff's suit against the 2<sup>nd</sup> Defendant, an Advocate of this Court, is based upon a professional undertaking he is alleged to have given on 2<sup>nd</sup> July 2010 in connection with an agreement for sale/purchase of an immovable property. The relief sought against the 2<sup>nd</sup> Defendant is essentially enforcement of that professional undertaking.

2. On 21<sup>st</sup> October 2011 the 2<sup>nd</sup> Defendant filed a preliminary objection to the suit. The points taken are to the effect that the Plaintiff's suit as against 2<sup>nd</sup> Defendant is incompetent as it has not been brought within the ambit of **Order 52, Rule 7** of the **Civil Procedure Rules, 2010** (the **Rules**).

3. The 2<sup>nd</sup> Defendant did not file defence. On 30<sup>th</sup> November 2011 interlocutory judgment was entered against him in default of defence. His preliminary objection had not been canvassed.

4. The 2<sup>nd</sup> Defendant then applied by **notice of motion dated 16<sup>th</sup> July 2012** seeking two main orders –

- i. That the interlocutory judgment be set aside.
- ii. That the 2<sup>nd</sup> Defendant's preliminary objection dated 21<sup>st</sup> October 2011 be heard.

The application is made under **Order 10, Rule 11** of the Rules. Sections 1A, 1B, 3 and 3A of the **Civil Procedure Act, Cap 21** (the **Act**) are also cited.

5. The grounds for the application appearing on the face thereof are -

- (i) That by entering interlocutory judgment in the face of the notice of motion dated 21<sup>st</sup> October 2011 the Court thereby condemned the 2<sup>nd</sup> Defendant unheard

“to suffer the (Plaintiff’s) entire claim against him”.

(ii) That the preliminary objection raises substantial questions of law in respect of the claim against him and has “undeniable chances of success”.

iii. That is in the interests of justice that the application be granted.

6. There is a supporting affidavit sworn by the 2<sup>nd</sup> Defendant. Apart from giving a background to the application, it has also deponed as follows at paragraphs 8 and 9 –

**“8... the Plaintiff in any event agreed to withdraw the suit in light of the substance of the claim being extinguished.**

**“Annexed hereto in a bundle and marked “COR-6a-6d” are copies of correspondence between the parties touching on the possibility of withdrawing the suit.**

**“The only question which remained for determination was that of legal fees.**

**9... It came as a shock to me that interlocutory judgment had been entered against me...”**

7. The Plaintiff opposed the application by grounds of opposition dated 8<sup>th</sup> August 2012. The following points are taken-

(i) That the application is “fatally defective, incompetent and an abuse of the process”.

(ii) That interlocutory judgment was properly entered, and the notice of preliminary objection could not be a bar to entry of the same.

(iii) That the application otherwise lacks merit.

8. No replying affidavit appears to have been filed. But that did not stop the 2<sup>nd</sup> Defendant from swearing and filing an affidavit in response to the grounds of opposition. The affidavit is nothing more than submissions on the grounds of opposition and the application as a whole.

9. The application was canvassed by both written and oral submissions. The 2<sup>nd</sup> Defendant’s written submissions were filed on 5<sup>th</sup> February 2013 while those of the Plaintiff were filed on 4<sup>th</sup> February 2013. I have considered the submissions, including the cases cited.

10. That the Plaintiff’s suit against the 2<sup>nd</sup> Defendant is for enforcement of the latter’s advocate’s professional undertaking cannot be in doubt. As already pointed out, it is pleaded so in paragraphs 9 and 13 of the plaint. If any doubt were left, the opening sentence in the Plaintiff’s written submissions is –

**“The Plaintiff herein has sued the 2<sup>nd</sup> Defendant for failure to honour (his) professional undertaking.”**

11. Order 52, Rule 7 of the Rules provides for enforcement of advocates’ professional undertakings. The Rule states as follows –

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

**(a) if the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or**

**(b) in any 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.”**

12. The 2<sup>nd</sup> Defendant’s professional undertaking pleaded was not given in this suit. The Plaintiff should therefore have taken out an originating summons for enforcement of the undertaking. It will also be noted that the Plaintiff’s remedy in the first instance in that case would be an order that the 2<sup>nd</sup> Defendant shall honour his undertaking within a time to be fixed by the order, and only thereafter may an order in enforcement be made.

13. In the case of **Oraro & Rachier, Advocates – vs – Co-operative Bank of Kenya Ltd, Court of Appeal at Nairobi, Civil Appeal No. 154 of 2000 (unreported)** the Court delivered itself as follows –

**“Order LII, rule 7(2) (now Order 52, Rule 7(2)) sets out the procedure for the enforcement of a professional undertaking by an advocate. That procedure is...mandatory and unless it is strictly followed any order made in contravention thereof becomes a nullity....”**

14. The Plaintiff’s suit against the 2<sup>nd</sup> Defendant is not, as urged, a liquidated demand, though there is some attempt in the plaint to disguise it as such. It is, as already seen, for enforcement of the 2<sup>nd</sup> Defendant’s advocate’s professional undertaking. The Plaintiff has simply not followed the right procedure. It has not complied with the mandatory requirements of Order 52, Rule 7 of the Rules. The interlocutory judgment entered against the 2<sup>nd</sup> Defendant on 30<sup>th</sup> November 2011 was so entered in contravention of mandatory legal provisions. It is a nullity in law.

15. By his notice of preliminary objection dated 21<sup>st</sup> October 2011 the 2<sup>nd</sup> Defendant in effect challenged the Court’s jurisdiction to hear and determine the suit against him. That preliminary objection ought to have been disposed of first before interlocutory judgment could be entered.

16. In the circumstances I have no hesitation in setting aside the interlocutory judgment entered against the 2<sup>nd</sup> Defendant on 30<sup>th</sup> November 2011. It is hereby set aside. Let the 2<sup>nd</sup> Defendant’s preliminary objection by notice dated 21<sup>st</sup> October 2011 be disposed of first. It is so ordered.

17. Costs of the application shall be in the cause between the Plaintiff and the 2<sup>nd</sup> Defendant.

**DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF AUGUST 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF AUGUST 2013**