



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Civil Suit 483 of 2010**

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

**BETWEEN**

**ALEX KARANJA NDUNGU**

**(Practicing as Alex Karanja & Co. Advocates)..... PLAINTIFF**

**VERSUS**

**BENJAMIN MWIKYA MUSYOKI**

**(Practicing as B M Musyoki & Co. Advocates)..... DEFENDANT**

**JUDGEMENT**

These proceedings were instituted by way of an Originating Summons. However, before delving into the matter, the plaintiff is advised to in future comply with the provisions of **Order 37 rule 15** of the *Civil Procedure Rules* which provides that the originating summons when filed shall be filed and entered in the register of suits, but after the serial number the letters "O.S." shall be placed to distinguish it from plaints filed in ordinary suits. There must have been a good reason why the Rules Committee deemed it fit in their wisdom to make that provision.

Having said that the Summons are dated 20<sup>th</sup> April 2010 and the Plaintiff herein seeks the following orders:

- 1. An order that the defendant do Honour his professional undertaking to the plaintiff as clearly stated in his letter to the plaintiff dated 6<sup>th</sup> October 2009 and 16<sup>th</sup> December 2009 which undertaking was to the effect that the defendant would pay to the plaintiff Kshs. 150,000.00 by 30<sup>th</sup> November 2009. The defendant paid Kshs. 75,000.00 on 16<sup>th</sup> December 2009 and the balance of Kshs. 75,000/- is still outstanding. The plaintiff prays for this amount.**

**2. An order that the undertaking by the defendant to the plaintiff as set out in the defendant's letter dated 6<sup>th</sup> October be honoured within such a period as this Honourable Court shall fix and in default thereof an Order for enforcement do issue against the defendant.**

**3. An Order that the Defendant do pay the costs of this suit.**

The said summons are supported by an affidavit sworn by **Alex Karanja Ndungu**, an advocate of the High Court practicing as Alex Karanja & Co. Advocates. He further deposes that his client was holding registration documents for motor vehicle KBH 766M as lien for money owed to him which documents the client instructed him to release to the defendant upon being given a suitable undertaking. On 6<sup>th</sup> October 2009, the defendant undertook to pay the deponent Kshs. 150,000.00 which was due to his client by 30<sup>th</sup> November 2009. By the said letter the defendant further undertook to give a cheque from his client's account for Kshs. 150,000.00 dated 1<sup>st</sup> December 2009. However on banking the said cheque on 2<sup>nd</sup> December 2009 the same was dishonoured after being countermanded by the defendant.

The defendant opposed the Summons by way of a replying affidavit sworn on 4<sup>th</sup> March 2011 in which he states that the plaintiff, not being the party to receive the money has no right to enforce the undertaking and the summons are simply meant to intimidate him. He, however, admits issuing a cheque number 000152 in favour of the plaintiff in the sum of Kshs. 150,000.00 which he says was not banked and therefore denies the allegation that he countermanded the same. He states that the plaintiff called him in the first week of December 2009 and requested for replacement of the same but did not return the previous cheque. On mutual understanding, he states, he agreed to pay the plaintiff half the amount contained in the undertaking on the understanding that the cheque would be returned which the plaintiff failed to do. He further deposes that he had drawn the cheque based on the arrangement with his client that he would be reimbursed later but since he had no proof that the plaintiff had acknowledged receipt thereof nor availed the cheque he could not pay until he was sure the cheque had not been banked. It is only in July 2010 that he realised that the cheque had been paid and was slapped with the summons herein. Despite that he paid the plaintiff Kshs. 20,000.00 and agreed with the plaintiff orally to pay Kshs. 55,000.00 plus court filing fees and the plaintiff would forego the costs an agreement which, according to him, the plaintiff reneged upon. Therefore, it is his belief that these proceedings are simply meant to intimidate him and are actuated by malice. He is still willing to pay the said sum of Kshs. 55,000.00 but the plaintiff should bear the costs since these proceedings were brought in bad faith and are an abuse of the process of the court

In his submissions, the plaintiff admits having received Kshs. 75,000.00 prior to the filing of the suit and another Kshs. 20,000.00 a month after filing this claim thus reducing the plaintiff's claim herein to Kshs. 55,000.00. It is submitted that the undertaking was unconditional and that a professional undertaking is given to the person to whom it is given and reliance is placed on **Harith Seth vs. K H Osmond Civil Appeal No. 276 of 2001** for the contention that a professional undertaking is given to an advocate on the authority of his client and that an advocate who gives a professional undertaking takes a risk which risk is his own and no matter how painful it might be to honour it the advocate is obliged to honour it.

On his part the defendant submits that the failure by the plaintiff to amend his pleadings to reflect the actual sum due disentitles him to the orders sought. It is further submitted that once the plaintiff accepted part payment of the amount of the professional undertaking, he cannot seek to enforce the undertaking and his recourse now only lies in a suit to recover the balance thereof. It is further contended that there is no evidence that the cheque was countermanded and that despite the request by the defendant to the plaintiff to return the cheque the plaintiff failed, refused and/or declined to do so. It is further submitted that the plaintiff's intention is to unjustly enrich himself.

I have now considered the affidavits filed and the submissions made. The law relating to enforcement of undertaking is clear. It is not contractual in nature but it is a power bestowed upon the Court to ensure that its officers comply with undertakings they give in the course of their dealings as such officers to third parties. Accordingly, the courts have held that an undertaking is a solemn thing and in enforcing an undertaking the Court is not guided by considerations of contract but the Court aims at securing the

honesty of its officers. See **Peter Ng'ang'a Muiruri vs. Credit Bank and Another Civil Appeal No. 263 of 1998.**

However, the court has discretion whether to exercise its summary jurisdiction, and will do so only in clear cases. Whether an undertaking given by the advocate to the court, his client or third party may be enforced against him personally will depend upon the facts of each case, but the undertaking must be a personal undertaking and given by the advocate. It must be clear in its terms; the whole of the undertaking must be before the court; and the undertaking must be one which is capable of being performed *ab initio*. The procedure also has been laid down that save for special reasons to be recorded by the Judge, the procedure for enforcement of undertakings is first to order that the advocate to honour his undertaking within a time fixed by the order and only thereafter may an order in enforcement be made. See **Oraro and Rachier Advocates vs. Co-Operative Bank of Kenya Ltd Civil Application No. Nai. 358 of 1999 [1999] 1 EA 236; Cordery on Solicitors (8<sup>th</sup> Edn) At 110**

Warsame, J in **Equip Agencies Limited vs. Credit Bank Limited Nairobi HCCC No. 773 Of 2004** dealt extensively with the issue when he stated inter alia as follows:

**“An undertaking is usually given to ease and smoothen the path of transactions carried out by advocates. It is a convenient method or tool to circumvent the delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between advocates. It is a contract between Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another...An undertaking is a promise to do or refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an advocate either personally or through the name of the firm he usually practices under...The breach of professional undertaking can result in lack of mutual or cordial trust between Advocates and invariably puts the administration of justice into disrepute. The advocates by relating together through a professional undertaking are officers of the court; therefore as far as possible it is mandatory for them to respect their words for the benefit of mutual continuity of their respective relationship...The courts have inherent power to commit an advocate for breach of an undertaking. The court has jurisdiction over an advocate for breach of undertaking on the basis that the court seeks to exercise its punitive and disciplinary power to prevent a breach of duty by an officer of the court, which is quite distinct and separate from the client's right. Therefore the court even if it has no right, it has jurisdiction to make an order in exercise of its disciplinary jurisdiction. The purpose of the punitive and disciplinary powers of the court's jurisdiction over advocate is not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Chapter 16 Laws of Kenya...It is not the business of the court to oppress an advocate for no reasonable cause. The court is always reluctant to degrade an advocate unless the circumstances show that his conduct is dishonourable as an officer of the court and it is for that reason that the court would exercise its punitive and disciplinary powers to ensure that advocates conduct themselves in a manner that pleases the eyes of justice. It is within the powers of the court to prevent a breach of duty by an advocate, especially when he has given an unequivocal undertaking to another advocate. As a matter of good practice, disputes in relationship between advocates must be resolved between themselves without recourse to the courts. However, when the dispute lands before the court, the court would enforce that which is honourable among the officers of the court and would not shy away from exercising its punitive and disciplinary jurisdiction to ensure compliance of the promise given by an advocate and acted upon by another advocate...The position of the law is that an advocate has a professional duty and or obligation to honour his undertaking unless the circumstances dictate otherwise. In order to ensure smooth and reliable relation between advocates, it is the fundamental and the cardinal obligation of advocates to stand by their words given as an undertaking. It can be disastrous for the administration of justice if advocates failed to honour their undertaking. The foundation and fabric of good advocacy is that there must be mutual trust between advocates and the undertaking between advocates must be honoured. The trust of an undertaking given by an advocate is what forms the fabric of good professional practice. It would be difficult if not impossible for advocates to carry out their duty to**

**each other and to the public, if an undertaking by advocates becomes unreliable and unenforceable. Failure to honour professional consideration, in the court's view, amounts to misrepresentation or fraud. The purpose of an undertaking is to achieve a desired goal of mutual trust. In the premises it is incumbent upon advocates to always honour their undertaking unless there is a vitiating factor which the court is bound to consider...Failure to honour an undertaking is not only a professional misconduct but a criminal conduct with intent to defraud. A honourable member must not first give an undertaking but when he gives it, he must at all times endeavour to honour the same especially when it is given to a professional colleague”.**

The case that I have to decide is whether the undertaking herein was an unequivocal and whether there exists any vitiating factors that may dictate against the enforcement of the undertaking in issue taking into account that the powers of the court to enforce undertakings is a summary and drastic power and must, as is usual in the exercise of such powers, be invoked with caution and in clear cases. However, the Court is not enjoined to undertake a detailed inquiry into the legality or otherwise of the original cause in which the undertaking was given.

In determining whether or not an undertaking is unequivocal the court must not be narrow minded but must take into account all the circumstances, so that where an undertaking is given on such terms as to make the said undertaking worthless, the court will not refrain from making sure that the undertaking is duly performed on the pain of punishment. A solemn undertaking cannot, for example, be watered down by reference to specific figures and similarly an advocate having given a solemn professional an unambiguous, unequivocal undertaking to pay a certain sum of money is bound by the same and he cannot resile therefrom by qualifying the same on account of accounting disputes between the parties. See Walker Kontos Advocates vs. S. Mwirigi M'noti & Company Advocates Civil Appeal No. 20 of 1997 and Kenya Reinsurance Corporation vs. V E Muguku T/A M/S V E Muguku Muriu & Company Civil Appeal No. 48 of 1994 [1995-1998] 1 EA 107.

In this case it is not disputed that the undertaking was given. In the letter dated 6<sup>th</sup> October 2009, the defendant stated that “upon your releasing the documents above we hereby and professionally undertake to pay you Kshs. 150,000.00 on or before the 30<sup>th</sup> November 2009”. To this the defendant added that “we shall pay you this amount without any protestations whatsoever”. The defendant now contends that the plaintiff is not entitled to claim the sum due since he was not the party entitled to receive the money. As the undertaking was given by one advocate to his colleague, both being officers of the court, I do not see the reason why the officer to whom the undertaking was given cannot seek from the court an order compelling his fellow officer of the court to perform his obligation as such officer. The defendant has in fact remitted part payment of the sum forming part of the said undertaking without demur.

The other issue raised is that since part payment has been made the plaintiff is now precluded from enforcing the undertaking and must proceed by way of a suit. To accede to such argument would open a safe passage for advocates to escape from their obligations as officers of the court. Enforcement of a professional undertaking is not a contractual matter but a matter of enforcing honour and discipline amongst the members of the legal profession. If advocates were allowed to escape from their obligation as such officers by simply making part payments it would render the whole idea behind professional undertaking an illusion. The same position applies to the argument that the undertaking was premised upon receipt of money from the client or an acknowledgement or return of the cheque. An advocate's undertaking cannot be watered down on the ground that his client has not paid him or by some other extraneous issues that were not subjected to the undertaking. Before advocates give professional undertakings, they must be double sure that their backs are covered so that they do not turn round and rue the day they gave the undertaking.

The other issue raised is that the plaintiff's claim as it stands is incompetent without an amendment since part of the original claim has now been paid. In my view the mere fact that the amount claimed is not the correct amount due does not bar the court from ordering the payment of the correct amount as long as the correct amount is not more than the sum claimed, especially where, as in this case, part of the said payment was made after the suit was filed.

The issue of the failure to return the cheque cannot a reason to resile from the obligations the defendant imposed upon himself when he gave the undertaking. Immediately the period within which the validity of the cheque ran out the defendant must have known that there was no way that cheque was going to be presented and honoured and he cannot argue that he was still waiting for the cheque to be returned. As if that is not enough the defendant has todate not paid the full sum undertaken by him. He has not even deposited the same in court as a mark of good faith.

It is therefore my view that there is no reason why the defendant cannot be compelled to honour his professional undertaking. Accordingly the defendant is granted 15 days from the date of this judgement to honour his professional undertaking to the appellatant by paying the outstanding sum of Kshs. 55,000.00 to the plaintiff, failing which the plaintiff shall be at liberty to enforce the same. The defendant will also pay the plaintiff the costs of this suit to be taxed if not agreed.

**Judgement read, signed and delivered in court this 11th day of May 2012**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

N/A for the Plaintiff

N/A for Defendant