



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

Miscellaneous Application 1100 of 2003

CHRISTOPHER MUSYOKA MUSAU..... PLAINTIFF

VERSUS

**N. P. G WARREN
D. J. G MC VICKER
L. W. MURIUKI
K. H. W. KEITH
Z. H. A. ALIBHAI
RUBINA DAR
A. BHANDARI
S. RAVAL**

T/A DALY & FIGGIS ADVOCATES..... DEFENDANTS

JUDGEMENT

By an amended originating summons dated 11th March 2011 filed on 14th March 2011 expressed to be brought under Order LII Rule 7(i)(b) and 7(2) of the Civil Procedure Rules, the plaintiff herein is seeking the following orders:

- 1. That Messrs N.P.G Warren, D.J.C. McVicker, L. W. Muriuki, K. H.W. Keith, Z.H.A Alibhai, Rubina Dar, A. Bhandari and S. Raval Advocates of the High Court of Kenya practicing as such in the name and style of Daly & Figgis Advocates do honour their irrevocable and unconditional professional undertakings given to the applicant herein.**
- 2. That M/s N.P.G. Warren, D.J.C McVicker, L. W. Muriuki, K. H.W. Keith, Z.H.A Alibhai, Rubina Dar, A. Bhandari and S. Raval do pay the applicant herein the sum of Kshs. 11,568,790 due to the applicant as at 28/01/98 together with interest at commercial rates till payment in full being the balance of the purchase price of that parcel of land initially known as L.R. No. 11066 situate within Machakos Township and comprised in a Grant registered at the Land Titles Registry at Nairobi as Number I.R. 20136 and popularly known as Maanzoni Estate.**
- 3. That in the alternative the Respondents be ordered to surrender back to the Applicant all the title documents that are issued after the sub division the aforesaid parcel of land is L.R. No. 11066 within Machakos Township and to obtain all the necessary transfer documents duly executed in favour of the Applicant.**
- 4. That in any event, the plaintiff be awarded the costs hereof.**

Originating summons under the Civil Procedure Rules is a suit and parties thereto are plaintiff and defendant. An originating summons, properly speaking, should not be instituted by way of a miscellaneous application as was done in this case. It being a suit, the decision therefrom results into a judgement. The distinction between an Originating Summons and a Plaint is that whereas in the later summons to enter appearance must accompany the plaint, the Originating Summons, on the other hand acts as a pleading and summons at the same time. In the case of Harit Sheth T/A Harit Sheth Advocate vs. K H Osmond T/A K H Osmond Advocate Civil Appeal No. 276 of 2001 [2011] eKLR the Court of Appeal stated as follows:

“Order 5 rule 1(2) has no application to proceedings brought by Originating Summons. Order 37 of the Civil Procedure Rules sets out the procedure for bringing suit by Originating Summons. The Rules Committee has in form 26 provided standard forms to guide litigants on how to draw an originating summons and such summons is generally drawn as a chamber summons. Although it is a suit by definition, no separate summons to enter appearance is needed. The originating summons originates the suit and is at the same time a summons to enter appearance. True, the appellant did not, in the originating summons invite the respondent to enter appearance in terms of the standard form but that, is not a fundamental omission, the respondent having responded to the originating summons by timeously filing grounds of opposition to it. Besides, under order 52 rule 10, no appearance needed to be entered by the defendant on service upon him of the originating summons filed under Order 52 rule 7”.

See also **In The Matter of Mwariki Farmers Company Limited vs. Companies Act Section 339 and Others [2007] 2 EA 185.**

In the case of **Adala Vs. Anjere [1988] KLR 635** the same court held that there is no procedure whereby a claim of any sort can be commenced by Chamber Summons and as applications are for interlocutory matters in the suit, any claim has to be commenced by a plaint or where the rule provides, by an originating summons. The current position is that most applications under the Civil Procedure Act are to be made by way of Notice of Motion. Where there is no mode of instituting proceedings provided for, the procedure that has gained wide usage is what is known as “Originating Notice of Motion”. This is not a suit but a way of originating proceedings in simple and summary matters where it is unnecessary to either file a plaint or Originating Summons, such as in proceedings seeking taxation of costs as between an advocate and client, applications to transfer a suit from the subordinate court to the High Court and applications for leave to appeal where the appeal has not been filed. See **Ben Ochieng & Co Advocates vs. Loice Kache & Another Malindi HCMA No. 105 of 2006; Ben Ochieng & Co Advocates vs. Municipal Council of Malindi Malindi HCMS No. 101 of 2006; In The Matter of Messrs Shapley Barret Allin & Co. Advocates (1954) 27 LRK 48; In The Matter of An Application by Otieno Ragot & Company Advocates Kisumu HCMA No. 32 Of 2008.**

In my view, therefore, these proceedings were irregularly instituted. However, that irregularity is not fatal, in the circumstances of this case and in light of the provisions of Article 159(2)(d) of the Constitution, section 3(2) of the Judicature Act, Cap 8 Laws of Kenya as read together with sections 1A and 1B of the Civil Procedure Act, Cap. 21. As has been said time and again rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue. Accordingly, I will proceed as if what was instituted was a suit and not a miscellaneous application.

The said summons are supported by the affidavit sworn by the plaintiff, **Christopher Musyoka Musau**, on 23rd September 2003. According to the plaintiff, at all material times Messrs **Waki & Company Advocates** were acting for him in a Sale Transaction in respect of his land parcel no. LR No. 11066 comprised in the Grant registered at the Lands Registry at Nairobi as Number IR No. 20136 delineated on the survey No. 78284 also known as Maanzooni Estate. In the transaction, in which, according to him, the firm of **Daly & Figgis** (hereinafter referred to as the defendant firm) was acting for the purchasers, it was agreed that the plaintiff would sign informal transfers in favour of the purchasers and cause the grant to be issued directly to the purchasers. Pursuant to the foregoing, the defendant firm professionally

undertook to release 60% of the purchase price to the plaintiff's said advocates upon receipt of the duly executed transfers from the plaintiff duly consented to by the Commissioner for Lands. A further undertaking was given vide a letter dated 16th August 1994 by the defendant for release of the balance of 30% upon receipt from the Engineer a certificate confirming that the roads and water works were complete at the suit property. According to the plaintiff he proceeded to cause the property to be subdivided and separate grants were obtained and proceeded to issue the grants directly as agreed and the defendant firm duly paid the said 60% of the said purchase price, leaving the balance of 30% which, according to him, amounted to Kshs. 11,568,790.00. However, vide their letter dated 17th June 2003 the defendant informed the plaintiff's advocates that it would only release the said balance after issuance of a duly signed Certificate of Completion from the Engineer and further hinted that it would have to get the balance of the purchase price from the purchasers which, according to the plaintiff, was contrary to the agreement, belief and understanding of the parties that the defendant firm was holding the entire purchase price as stakeholders to release the same to the plaintiff on completion. This discomfort was duly communicated to the defendant by the plaintiff's advocates and, vide a letter dated 30th July 2003, the plaintiff through his advocates forwarded to the defendant the Completion Certificate and sought the aforesaid balance. The receipt of this Certificate was duly acknowledged by the defendant firm who sought a clarification whether the Engineer had been paid in full prior to issuing the Completion Certificate which clarification was confirmed. Despite this, the plaintiff contends that the defendant has refused and/or failed to release the said balance despite various demands. According to the plaintiff, the purchasers have been in possession for the last eight years making use of and enjoying the suit property while the defendant unjustly continues to use and enjoy the said sum of Kshs. 11,568,790.00 and seeks that the orders sought herein be granted.

The defendant firm opposed the summons through a replying affidavit sworn by **Linda Watiri Muriuki**, a partner in the said firm, on 31st October 2003. According to the deponent, the supporting affidavit to the said summons is undated hence defective and should be struck out. According to the deponent the defendant never gave any professional undertaking as alleged or at all and that the defendant firm acted for various purchases of the subdivisions of property LR No. 11066 belonging to the plaintiff which the plaintiff was selling during 1993 and 1994. According to the deponent at that time separate titles had not been issued but most of the purchasers paid 10% deposit directly to the Plaintiff's agent while the rest of the purchasers instructed the defendant firm to act for them and the 10% deposit was placed with the firm and paid to the said agents through the plaintiff's advocates, **Waki & Co**. This deposit, according to the deponent, was made on the basis that the subdivisions of the property LR No. 11066 would be serviced with road and water. After the registration of the grant in respect of the said property in the plaintiff's name a transfer in his favour was registered as Number IR 20136/18. While the plaintiff instructed **Waki & Co Advocates** to act on his behalf in the sale, **Bagaeine Karanja Mbuu** were instructed by the plaintiff as selling agents thereof. According to the defendant no letter of offer or acceptance or any other documents was signed by the purchasers and the selling agents. Although **Waki & Co Advocates** sent to the defendant firm a draft Agreement for Sale for consideration and approval the same never formalised the negotiations for the terms of the Agreement for Sale was carried on concurrently with the modus operandi for completion of the purchases whose terms were to be incorporated in the said Agreement for sale and by a meeting held on 2nd February 1994 roadworks and waterworks features to be provided in the subdivisions were discussed upon which a report was produced by the Scheme's Engineer outlining the specifications and timelines thereof. However upon requesting the plaintiff's said advocates to amend the provision for completion in the Draft Agreement for Sale to accommodate the said timelines, the plaintiff's advocate responded negatively prompting the defendant firm to seek further instructions. This state of affairs led to exchange of several correspondences culminating in the meeting of 28th April 1994 in which it was agreed that a clarification be sought from the Lands Department on how the transfers of the subdivisions would be effected. Upon receipt of the said advice the defendant firm proposed to the plaintiff's advocates that the transaction be completed on registration of the Transfers and after release to the defendant firm of the Grants in respect of each subdivision in exchange for which 70% of the purchase price be released to the plaintiff's advocates while the balance be retained pending receipt by the defendant firm of a Certificate from the Engineer confirming that the roads and water works were in place. In response to this proposal the plaintiff's advocates advised that the transactions be completed by the defendant firm's payment to the said advocates 70% of the purchase

price upon the defendant firm's receipt of the new Grants in respect of the subdivisions and before preparation of the Transfers and that the balance of 30% be paid upon the completion of the roads and water works. This led to a meeting in which the modus operandi for completion which was confirmed by the plaintiff's advocates with one proviso that the release of the 60% of the purchase price by the defendant firm would take place on receipt by the defendant firm of Informal Transfers with appropriate Deed annexed duly consented to by the Commissioner of Lands. In the event that the Grants in respect of the subdivisions were not released within 2 months of lodging the informal Transfers with appropriate Deed Plans annexed duly consented by the said Commissioner of Lands for registration at the Lands Titles Registry at Nairobi, the plaintiff's advocates gave their professional undertaking to refund the said 60%. Accordingly, on receipt of the Informal Transfers, the defendant proceeded to release the said 60% of the purchase price to the plaintiff's advocates on the understanding and agreement that the balance being 30% would be released on the firm's receipt of Certificate from the Engineer confirming that the roads and water works were in place. However, the said Engineer's Certificate has not been forthcoming despite a confirmation by the said Engineer of the receipt of the final payment in respect of the completed roads on the property. It is therefore the defendant firm's contention that the agreements to purchase the subdivisions were encapsulated in the correspondences between the parties which was essentially for payment of 70% for the land and 30% for the services namely provision for roads and water to serve the land and that the only undertaking that was given was by the plaintiff's advocates and not by the defendant firm which only negotiated terms on behalf of the purchasers. It is further contended that the plaintiff has not complied with the terms of payment of the 30% since neither the water has been supplied nor the Engineer's Certificate that the roads built have been built to a proper specifications issued, a scenario which has led to complaints by the purchasers who are threatening action for breach of contract. The defendant firm further contends that in view of the lapse of time the agreement to provide services is a separate contract from the purchase of land and hence is time barred. It is further contended that 5 of the purchases have not received their titles despite paying for the same and there is no undertaking to return the title for those who have paid 70% and the titles held by the firm are against the firm's fees due to the firm by the purchasers. Save for 2 purchasers, the defendant's firm avers that it is not holding any funds in respect of the 30% hence the Originating Summons ought to be dismissed.

In the prosecution of the Originating Summons written submissions were filed by both parties.

In his submissions the plaintiff reiterated the contents of his supporting affidavit and on the authority of **Naphtali Paul Radier vs. D Njogu & Co [2006] EKLR**, it is submitted that there is no stipulation as to how an undertaking should be worded. The defendant, it is submitted made an unequivocal declaration that the balance of 30% shall be released upon receipt from the Engineer a Certificate confirming that the roads and water works were in place. The plaintiff having forwarded the said certificate whose receipt was acknowledged by the defendant firm, it is submitted that to claim that the plaintiff has not complied with the terms for the payment of the 30% amounts to approbation and reprobation at the same time. In the plaintiff's view, the defendant having represented to the plaintiff that they held the said balance pending receipt of the completion certificate are estopped, debarred and precluded from denying that representation more so as the plaintiff has acted thereupon to his tremendous detriment by subdividing a vast estate and processing the titles in favour of the defendant's clients. Citing **Harit Seth vs. K H Osmond [2011] eKLR** and **Encyclopaedia of Forms and Precedents**, it is submitted that where a person gives a professional undertaking, it is not material that they are not in possession of the money; and on the authority of **Kenya Reinsurance Corporation vs. V E Muguku T/A M/S V E Muguku Muriu & Company Civil Appeal No. 48 of 1994**, it is contended that an advocate is not allowed to qualify his undertaking on account of disputes between the parties or with client or unavailability of funds. According to the plaintiff the law on professional undertaking is rather stringent and the standard placed on an advocate who gives a professional undertaking is high and he is obliged in law as an officer of the court to honour the same. Relying on **Kenya Commercial Bank vs. Adala [1983] KLR 467** and **Daniel M Kivuva vs. Victor Mule [2007] EKLR**, the plaintiff states that the courts have inherent power to order such Advocates as a disciplinary measure to fulfil their professional undertaking within the powers derived under section 57 of the Advocates Act and to assist aggrieved parties to recover their money which is what the plaintiff is seeking. Accordingly, the plaintiff prays that the Defendant be ordered to pay the Kshs. 11,568,790.00 due to the plaintiff as at 28/01/98 together with interest at commercial rates till payment in full and in the alternative and without prejudice thereto, an order for the

surrender to the plaintiff of all the title documents issued after the subdivision of the suit land as well as the costs of these proceedings.

In their response the defendants submit that the plaintiff's suit is defective since the amended Originating summons is not signed while the supporting affidavit is undated. The same according to the defendants ought to be struck out and several decisions are cited which decisions, for reasons which I will hereinafter give do not require my consideration. According to the defendants the terms of the supposed undertaking referred to in the supporting affidavit are materially different from the documents which are alleged to constitute the undertaking. Given such uncertain and contradictory positions, the defendants contend that it is not easy to make out what the Plaintiff's case is as regards the means by which the alleged professional undertaking was given as the plaintiff has presented various contradictory positions and left it to the defendants to disprove contrary to the provisions of sections 107 and 108 of the Evidence Act Cap 80. Since the letter dated 16th August 1994 does not contain the terms of the alleged undertaking, paragraph 7 of the supporting affidavit are untrue, completely unfounded and ought to be disregarded. With respect to the letter dated 25th May 1994, it is the defendants' position that as the said letter is not referred to in the supporting affidavit, the plaintiff's submissions based thereon are unfounded. In any case it is the defendants' view that the said letter does not contain the alleged professional undertaking. According to the defendants the letter simply constituted a proposal for amendment of the terms of the agreements for sale relating to the transaction but did not contain any undertaking on the part of the defendants. In the defendants' view, the said letter does not contain unequivocal declaration of the Defendant's intention or a promise by the Defendants to do or not do something but simply contains a proposal by the Defendants for amendment of the terms of the agreements for sale. It therefore follows in the opinion of the defendants that there is no reasonable cause of action disclosed against the defendants and the suit must fail. The only undertaking, according to the defendants was given by the plaintiff's advocates. The defendants further submit that it was a term of the transaction that the balance of the purchase price would only be payable upon receipt of a certificate from the Engineer confirming that the roads and water works within the property were complete and this Engineer was **Mr. S M Kamau of Sewco Engineering Services**. Accordingly, before making claim for the balance of the purchase price, it is submitted that the plaintiff must demonstrate that the road and water works within the property have been carried out and the Engineer has issued a certificate confirming that they are complete. Since the road works and water works have not been carried out and certified by the Engineer, the plaintiff is incapable of proving his entitlement to the balance of the purchase price. Accordingly, it is the defendants' case that the Originating Summons ought to be dismissed with costs to them.

I have now considered the affidavits filed and the submissions made. The first issue for determination is whether the Originating Summons is incompetent for failure to sign the same and to date the supporting affidavit. I have perused the record and according to the documents filed herein the supporting affidavit that was filed with the original originating summons on 24th September 2003 bears the date of 23rd September 2003. Similarly the original Originating Summons is dated and signed. The amended Originating Summons that was filed on 14th March 2011 bears 11th March 2011 as the date of amendment. It is similarly initialled, on behalf **Kyalo & Associates Advocates**. Accordingly the authorities cited in support of the issue though correct are not, in my view, relevant to the present case. Even if the amended Originating Summons was not signed, on the authority of Nairobi HCCC No. 367 of 2010 (Civil Division) between **Phoebe Wangui (Formerly Known as Phoebe Wangui Kamore) vs. James Kamore Njomo**, that would not have invalidated the suit in light of the fact that the original pleadings was signed. It may be that the copies of the documents served on the defendants were defective. That, according to the Court of Appeal decision in **VipinMaganlal Shah Vs. Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001 [2001] 1 EA 274; [2001] KLR 190**, is not fatal as long as the filed document is proper.

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 (8th 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. [Underlining mine]. 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...[Underlining mine] **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’inoti & 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.**

However, as was stated in **Kenya Commercial Bank vs. Adala [1983] KLR 467:**

“The court can make the order asked for on the ground that the power of the court which is invoked is punitive, disciplinary power to prevent breaches of their duty by its officers, quite distinct and separate from the client’s legal right, and therefore unaffected by any alteration of such right. It is doubtful whether the power of the court would be suspended, even if the judgement had been recovered, and it were not known whether it would be effective. Even in that case the court would, notwithstanding what had happened to the right of the client, have jurisdiction to make an order in the exercise of its disciplinary jurisdiction, and, if so, there is no limitation with regard to the manner in which it is to be exercised.”.

I agree that the terms of a written undertaking may be contained in or deduced from more than one document. I further agree that the undertaking must be in clear terms and that the whole agreement to which it relates must be before the court and if the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced.

According to the plaintiff the undertaking was contained in the letter dated 24th May 1994. The letter exhibited is, however, a letter dated 25th May 1994 and it states at the material part as follows:

“In the circumstances, it appears that the agreements for sale as they stand do not reflect the true position vis a vis completion. We suggest that the agreements be amended to provide that completion take place on registration of transfers after the release to us of the new grants and on registration of transfers we shall release to you sixty (60%) per centum of the purchase price, which together with the ten (10%) per centum held by the stakeholder, makes an aggregate of seventy (70%) per centum thereof. As agreed at the meeting held in our Chambers on the 28th April 1994, the balance thereof being thirty (30%) per centum to be released to you on our receipt from the Engineer, of a certificate confirming that the roads and water works are complete”.

In simple terms what the above letter stated was that on registration of the transfers and release of the new grants to the defendant firm by the plaintiff’s advocates, the defendant firm would release to the plaintiff’s advocates 60% of the purchase price. There was a clear unequivocal understanding that the release of the 60% was to be done by the defendant firm. The balance of the 30% was to be released to the plaintiff’s advocates on receipt by the defendant firm of a certificate from the Engineer of a certificate confirming that the roads and water works were complete. Again one does not have to be a wordsmith to

decipher where the money was coming from. In my view the defendant firm was clearly giving an undertaking that on receipt of a certificate from the Engineer confirming that the roads and water works are complete the plaintiff's advocates would be released the balance being 30%. As was stated in **Harit Seth vs. K H Osmond** (supra), a professional undertaking is given to an advocate on the authority of his client and it is based on the relationship which exists between the advocate and his client. An advocate who gives such a professional undertaking takes the risk which risk is his own and he should not be heard to complain that it is too burdensome and that some one 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 but he cannot however, sue to recover that amount unless he has first honoured his professional undertaking. The mere fact that the affidavit referred to an erroneous date in my view is not material when the letter itself was exhibited and its terms clearly outlined in the letter itself. According to the defendants the said letter simply outlined the terms which they wanted incorporated in the Agreement for Sale and did not constitute an undertaking. If the matters were left to rest at that stage I would have had no difficulty in finding that the letter did not constitute an undertaking. However in the letter dated 16th August 1994, the defendant firm informed the plaintiff's advocates that "the sixty (60%) per centum shall be released to you on our receipt of the duly executed transfer by **Mr. C M Musau**, duly consented to by the Commissioner of Lands". Whereas it is true that the defendant sought an undertaking from the plaintiff's advocates, they by the same letter, in my view, gave an undertaking that once the executed transfers were received the 60% would be released. It is not disputed that the said 60% was actually released.

The next issue is whether the Certificate of the Engineer confirming that the roads and water works was issued and received by the defendants. In their letter dated 4th August 2003, the defendants acknowledged receipt of the plaintiff's advocates dated 30th July 2003n together with enclosures. According to the letter dated 30th July 2003 what was enclosed was the final certificate from the contractor who did the roads. In that letter it was clearly stated that the Engineer **Mr. Kamau** had relocated to South Africa. In the letter dated 4th August 2003, no issue was taken with respect to the author of the certificate. The only issue taken was, strangely, whether the full payment had been made. Accordingly the issue of the Engineer is a red herring and in my view does not avail the defendant at this stage. Similarly the issue that some purchasers have not received their titles does not hold much water in light of the fact that the stage for issuance of titles was passed when the 60% was released. The issue should have been raised at that stage. On the issue of limitation, even assuming that the same was applicable, in my view the cause of action against the defendant when the Completion Certificate was sent and received by the defendant which was in 2003 the same year this suit was instituted hence the issue of limitation does not arise.

With respect to the issues whether or not the road works and the water works were completed to the specifications, those were not issues contained in the undertaking. Whereas those issues may constitute a basis for a cause of action for breach of contract a professional undertaking is not dependent on the original contract since it is not affected by the existence of consideration in the main contract. It is a means of enforcing discipline among officers of the Court. Before an advocate gives a professional undertaking, it is always advisable to ensure that he has his client's money in his bank account. If he decides to gamble with the undertaking he will be doing so at his own risk.

It is therefore my view that there is no reason why the defendant firm cannot be compelled to honour its professional undertaking. Accordingly the defendant is granted 45 days from the date of this judgement to honour its professional undertaking to the appellant by paying the outstanding sum of Kshs. 11,568,790.00. As was stated by **Waweru, J** in **Naphtali Paul Radier vs. D Njogu & Co [2006] EKLR** since the defendant has withheld the plaintiff's money for a long time, justice demands that he now pays it with interest and as no particular rate of interest was contracted interest is awarded at court interest from the date of filing of the suit. In default of payment the plaintiff shall be at liberty to enforce the same. In the alternative the defendant to, within the said period of 45 days, surrender back to the Plaintiff all the title documents issued after the subdivision of the suit parcel of land being LR No. 1106 within

Machakos Township and to obtain all the necessary transfer documents duly executed in favour of them.

G.V. ODUNGA

JUDGE

Judgement read and delivered in court this 20th day of September 2012

G.K. KIMONDO

JUDGE

In the presence of:

Ms Kamende for the Plaintiff

Mr Wasonga for Omondi for the Defendant