REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 609 OF 2008

NATIONAL HOUSING CORPORATION. …….. PLAINTIFF

VERSUS

MUTULI PATRICK ERICK LUBANGA. …… DEFENDANT

R U L I N G

This is an Originating Summons dated 8th December, 2008 filed by M/s Nderitu & Partners Advocates for the plaintiff **NATIONAL HOUSING CORPORATION**. The defendant is named as **MUTULI PATRICK ERICK LUBANGA**, advocate.

The application was filed under section 3 of the Civil Procedure Act (**Cap 21 Laws of Kenya**), section 55 and 56 of the Advocates Act (**Cap 16 Laws of Kenya**), and Order 52 rule 7 of the Civil Procedure Rules. The prayers sought in the application are as follows: -

1. THAT the defendant be ordered to honour his professional undertaking to pay the sum of Kenya shillings 300,000/- plus interest at court rates from 11th day of September, 1997.

2. THAT this Honourable court do order the defendant to pay the sum of Kenya shillings 300,000/- plus interest at court rates from 11th day of September, 1997.

3. THAT the Honourable court be pleased in its unfettered supervisory jurisdictions to discipline and penalize the defendant, as an officer of this Honourable Court, for unethical and unprofessional behaviour.

4. THAT the costs of this application be borne by the defendant.

The application has grounds on the face of the Originating Summons. It is also supported by an affidavit sworn on 8th December, 2008 by **WILLIAM K. B. KEITANY**, described as a Senior Legal Officer of the plaintiff. It was deponed in the said affidavit, inter alia, that in 1996 the plaintiff entered into to an agreement for sale of property known and Block C3 – Nyayo Highrise Estate Kibera wherein the defendant was the advocate for the purchaser; that on 25th February 1997 the defendant undertook to pay to the plaintiff the balance of the purchase price of Kshs.27,000,000/- upon completion; that by a letter dated 9th June 1997 the defendant withheld Kshs.300,000/- of the purchase price and undertook to pay the same or the balance to the plaintiff after the expiry of the 3 months maintenance period from completion;

that no part of the said money was used for repair of structural defects and therefore it became payable to the plaintiff on 11th September, 1997; that the defendant failed to honour his professional undertaking to pay the amount and the plaintiff reported the matter to the Advocates Complaints Commission, and that the Disciplinary Committee of the Law Society found him guilty and admonished him; that the plaintiff had been wrongfully deprived of its monies as a result of the unprofessional conduct of the defendant; and that the defendant be condemned to pay the withheld monies to the plaintiff with interest at court rates (12%) from 11th September, 1997 until payment in full.

The plaintiff, through their advocates filed written submissions on 7th May, 2010. In the submissions, a summary of the circumstances and facts of the case are given. It was contended that the defendant failed to fulfill the conditions of the undertaking to pay the plaintiff Kshs.300,000/- as undertaken, and was therefore liable to the plaintiff. Reliance was placed on the case of **NAPHTALI PAUL RADIER Vs DAVID NJOGU KARANJA** t/a **D Njogu & Company Advocates** – HCCC NO. 582 of 2003 (unreported), wherein Ibrahim J. described an undertaking as being personally binding on the advocate as follows: -

"Failing to honour an undertaking is prima facie evidence of professional misconduct. It is enforceable even if it does not constitute a legal contract. In general no terms will be implied to a professional undertaking and extraneous evidence will not be considered. An undertaking is binding because it has been given; it therefore remains enforceable even if the promise is to do something which is outside the control of the person giving it."

It was also contended that the release of the money to the purchaser contrary to the terms of the undertaking, did not release the advocate (defendant) from the undertaking. Reliance was placed on the case of **UDALL VS CAPRI LIGHTING LTD [1987] 3 ALL ER 262,** wherein it was held that it was a serious dereliction of duty for the defendant to release the money in breach of his undertaking.

It was further contended by counsel for the plaintiff, that an undertaking cannot be released by mere conduct of the parties, but only through express terms. Reliance was placed on the case of **KENYA REINSURANCE CORPORATION Vs MURIU** [1995-1998] IEA 107 (CAK), wherein it was held that an advocate could not qualify an undertaking on account of accounting disputes between the parties. Reliance was also placed on the case of **IBRAHIM ISSACK Vs WAMBUGU & CO. ADVOCATES & HFCK** (3rd Party) - Milimani Commercial Court HCCC NO. 38 OF 2001 – wherein Mwera J, held inter alia that: -

"It was no good for the applicant (advocate) to bring the 3rd party putting HFCK (CLIENT) as a party who delayed in paying over the sum. It has nothing to do with the solemn undertaking between the two legal firms- the litigants herein."

Counsel further contended that the proceedings in the Disciplinary Committee of the Law Society of Kenya, did not create the defence of double jeopardy as that defence as envisaged under section 75(5) of the Constitution, only applied to criminal trials. The administrative proceedings before the Advocates Disciplinary Committee were not criminal in nature. Therefore, the doctrine of double jeopardy did not apply. Counsel further contended that the doctrine of res judicata did not apply, as the two jurisdictions were mutually exclusive. The orders sought in the High Court could not be granted by the Advocates Disciplinary Committee.

On whether the application herein is barred by limitation of actions, counsel contended that limitation did not apply. Reliance was placed on the case of **NAPHTALI PAUL RADIER** (supra), where in it was held that an undertaking is enforceable because it is given and will only be discharged upon performance.

On interest, reliance was placed on the cases of **IBRAHIM ISSACK ADVOCATES (Supra**), and **NAPHTALI PAUL RADIER (supra**) wherein interest was granted by court.

The application was opposed. The defendant filed a replying affidavit sworn by himself on 20th May 2009. In the replying affidavit, it was deponed, inter alia, that he was the advocate of the buyers M/s Pile Investments Ltd; that of the purchase price of Ksh. 27,000,000.00 he retained Kshs.300,000/- for a period of three months pending repairs, replacements and completion of the property in terms of his letter dated 9th June 1997, which superceded previous undertakings; that the plaintiff thereafter started dealing directly with M/s Pile Investments Ltd on the issue of repairs; that the plaintiff failed to carry out the repairs within 3 months; that by a letter dated 12th June, 1998 addressed to the plaintiff, Pile Investments Ltd confirmed withholding the sum of Kshs.300,000/-; that the plaintiff by letters dated 24th March 1999 and 19th May 1999 addressed to Pile Investments Ltd claimed the payment of the said sum directly from Pile Investments Ltd; that for a period of 2 years and 3 months, the plaintiff never sought to honour the undertaking; that by a letter dated 27th October 1999 the plaintiff wrote a letter to the defendant not seeking to enforce the undertaking but complaining that Pile Investments Ltd had not paid to them the balance sum of Ksh.300,000/-; that having failed to obtain payment from Pile Investments Ltd the plaintiff in a move which was an afterthought by letter dated 14th September 2000, turned to threatening the defendant for enforcement of the undertaking and copied the letter to the Advocates Complaints Commission; that the Law Society's Disciplinary Committee reprimanded the defendant for having released the funds prematurely, but did not order him to pay back the sum of Kshs.300,000/-; that the defendant was not holding any funds due to the plaintiff, as he had returned the same to Pile Investments Ltd; that therefore the defendant was not liable to honour the undertaking; and that the plaintiff was guilty of laches and the suit was caught up by limitation, as the plaintiff's claim was based on contract.

The defendant also, through his counsel Akoto and Akoto Advocates, filed written submissions on 7th October, 2010. In the said submissions, a summary of the facts was given. It was stated in particular that the subject undertaking was given on 9th June 1997, and the money was released by the defendant on 25th July 1997 and communication made to the plaintiff on the said release. It was also submitted that from that point, the plaintiff communicated directly with Pile Investments Ltd and that it was only when he was not able to recover that money, and more than 10 years later that he sought to enforce the undertaking by, inter alia, filing the present proceedings.

Counsel contended that, indeed this court has jurisdiction to order enforcement of professional undertakings given by advocates to third parties and to discipline its offers, but that such jurisdiction is exercisable only in plain and clear circumstances of breach or professional misconduct. It was contended that the plaintiff had not discharged their burden of proof under section 107 and 109 of the Evidence Act (Cap 80) in that they have failed to show that they completed the repairs within three months. It was also contended that the plaintiff was estopped from bringing these proceedings, because they were aware that M/s Pile Investments Ltd were holding the funds, and dealt directly with them and even made demands from them. On the contention that the plaintiff had not proved their case, the defendant also relied on section 120 of the Evidence Act which provides: -

"***120. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."***

Counsel also contended that the plaintiff had waived his rights against the defendant by pursuing the purchaser directly.

Counsel for the defendant further submitted that limitation of actions applied in these proceedings. It was the contention that the undertaking was in the form of a contract made between the plaintiff and the defendant; that if the plaintiff would not complete repairs within 3 months, the defendant would pay the sum of Kshs.300,000/-. It was contended therefore, that section 4(1) (a) of the Limitation of Actions Act (Cap 22) applied. It was the argument that the suit herein should have been filed within a period of six years from the date the cause of action accrued, not after more than 10 years as happened in this case.

Lastly, it was contended that this suit was mala fides, and that it is brought to court in bad faith

merely to punish the defendant. It was the contention that bad faith was evidenced by the fact that the plaintiff first filed disciplinary proceedings through the Law Society of Kenya Disciplinary Committee, and then followed it up with these proceedings. In addition, notwithstanding that the funds were released by the defendant to the purchaser prematurely, there was no evidence that the plaintiff had completed the repairs within the stipulated time of three months.

On the hearing dated, Mr. Mwenda for the plaintiff and Mr. Akoto for the defendant relied on documents and submissions filed, and asked the court to give a decision on the same.

I have considered the application, documents filed, the submissions on both sides and the law.

There is no dispute that there was a professional undertaking by the defendant, an advocate to hold Kshs.300,000/-. The undertaking is in terms of a letter to the plaintiff dated 9th June, 1997 signed by the defendant. The relevant paragraphs of that letter are as follows: -

"***As you may have been advised by now certain repairs are on the premises still wanting and it was mutually agreed after long debate that we should withhold the sum of Ksh.300,000/- for three months pending the completion of the repair works.***

Enclosed please find our cheque in the sum of Kshs.26,700,000/- being the balance of the purchase monies herein less the sum of Kshs.300,000/- which was agreed should be held for three months pending finalization of the repairs by the contractor.

Please note that if the contractor fails to complete the works within the said period our client shall utilize the said amount in carrying out the repairs and the balance if any shall be transmitted to you. However, our client shall give prior notice to you before commencing the repairs.

Please also note that this latter mutual arrangement supercedes any previous agreement and/or undertaking given."

Having considered the above undertaking, it is quite clear to me that the defendant had undertaken to withhold the amount; that within 3 months the plaintiff was to carry out certain repairs (***which were not identified in the undertaking);*** that if those repairs were not undertaken then the client of the advocate (defendant) would give notice to commence repairs; and that it was after that notice that the money could be utilized by the said client of the defendant for carrying out the repairs. It is admitted that the defendant released the money to his client before the lapse of three months, and apparently without the notice to commence repairs.

I will observe here that the defendant on 15th of March 2007, when mitigating before the Disciplinary Committee of the Law Society of Kenya, is said to have stated as follows: -

"I acknowledge that I made a mistake by releasing funds to my client before the undertaking period had lapsed. The complainant was not ready with repairs. He was not ready until two years later. I am remorseful. I am a first offender. I ask for a lenient sentence."

It follows from the above statement of the defendant, which is not disputed, that the defendant admitted having acted wrongly.

The first issue relates to the burden of proof. It is contended by the defendant that the plaintiff has not proved that they completed the repairs within three months. The plaintiff relied on section 107 and 109 of the Evidence Act (Cap 80). In my view, this defence could only arise if there was a dispute between the plaintiff and the client of the defendant as to whether the said repairs were done, and on time. The defendant as an advocate had no personal benefit or loss in the carrying out of the repairs. He is not a party to the contract of sale. He cannot pretend to assign to himself the contractual rights or burdens of his client. The defence must fail. I find and hold that the plaintiff has no burden to prove completion of repairs within 3 months to the defendant, as the two had no contractual relationship on those repairs, if

any.

The second issue is the defence of estoppel. It was contended that since the plaintiff dealt directly with the purchaser and was aware that the purchaser (***client of the defendant***) was withholding the funds, then they were estopped from pursuing the defendant in this suit. In my view, this contention is misplaced. It is clear from the undisputed facts that the defendant paid the moneys to his client without being authorized to do so by the plaintiff and in contravention of the terms of the undertaking. He released the money before the lapse of three months, and without prior notification by the purchaser to the plaintiff contrary to the specific provisions of the undertaking. The plaintiff later communicated to the purchaser, simply because the defendant had already sent the money there. The plaintiff really did not have a choice. The plaintiff was merely trying to recover the money. I hold that one cannot create a problematic situation, like the defendant herein did, and then seek to benefit from that same situation. The defendant having been the cause of this unfortunate situation, cannot be heard to plead estoppel. I find and hold that the plaintiff is not estopped from pursuing this matter.

The third issue is the defence of waiver. It is the contention of the defendant that by pursuing the purchaser directly, the plaintiff waived his legal rights to enforce the undertaking against the defendant. In my view, that line of defence is also bound to fail. Waiver of a legal right has to be very specific. There is no time that the plaintiff formally communicated to the defendant that they had waived their rights in the undertaking. Merely dealing with the purchaser directly in a situation that was actually precipitated by the defendant cannot amount to waiver. I find and hold that the plaintiff did not waive his rights to enforce the undertaking.

The fourth issue is the defence of limitation of actions. The contention by the defendant is that the matter was contractual and that the suit should have been filed within six years from 1997, not more than 10 years later as happened herein. In my view, the undertaking herein was open ended. There were certain things that were to happen between the plaintiff and the purchaser, in determining whether there could be limitation period. Those matters were repairs, where found necessary, and in default a notice from the purchaser to the plaintiff that the purchaser was going to carry out the repairs using the withheld money. Unfortunately, instead of letting those things happen between the plaintiff and the purchaser, the defendant released the money, thus making it difficult to determine whether limitation could apply. In any case, according to the undertaking limitation could only arise between the plaintiff and the purchaser. The undertaking itself was open ended, until certain matters were fulfilled by discharge or performance. In this regard, I agree fully with what was stated by Ibrahim J in **NAPHTALI PAUL RADIER Vs DAVID NJOGU GACHANJA t/a NJOGU & CO. ADVOCATES** – Milimani Commercial Courts Civil Case No. 582 of 2003 (OS), wherein the learned Judge stated at page 11 of the ruling: -

"This shows the gravity of undertakings. Even where his client dies the solicitor is not discharged from his* liability under an undertaking. This is also so, where *there is a change of advocates. It follows that the only way an undertaking ceases to be enforceable is where it is discharged/performed or where the beneficiary waives it totally."

The terms of the undertaking were neither discharged nor performed nor waived. There being no issue or contention that the undertaking was either performed or discharged, limitation does not arise.

The last issue is whether the action herein is brought in bad faith to punish the defendant because the plaintiff had already filed disciplinary proceedings against the same defendant through the Law Society of Kenya Disciplinary Committee, before coming to this court.

Indeed, disciplinary proceedings were filed before the Law Society of Kenya Disciplinary Committee. As a consequence, the defendant was admonished for releasing the sums (Kshs. 300,000/-) to the purchaser before the lapse of 3 months. However, in my view, the functions and jurisdiction of the Disciplinary Committee of the Law Society are totally different from those of the court. They could be complimentary. However, the doctrine of res judicata does not apply. Nor can it be said that because of the disciplinary proceedings, this present case was brought in bad faith. Therefore the decision of the Disciplinary Committee cannot be used to defeat these proceedings unless of course in a case where the

plaintiff was paid their money following the disciplinary proceedings, which is not the case herein. I again fall back on what was stated by Ibrahim J in the **NAPHTALI PAUL RADIER** case (supra) at page 7 of the ruling, where the learned Judge stated: -

"From a reading of the features, nature and application of understakings, once comes to the understanding that: -

- ***An undertaking given by a solicitor or advocates in our case is personally binding on him and must be honoured.***

- ***Failing to honour an undertaking is prima facie evidence of professional misconduct.***

- ***It is enforceable even if it does not constitute a legal contract."***

The defendant has not stated that either before, during or after the Disciplinary Proceedings, he has honoured the terms of the undertaking. The fact that he was admonished by the Advocates Disciplinary Committee does not exonerate him from the obligations under the professional undertaking. In fact the proceedings before the Disciplinary Committee and the facts disclosed therein, strengthen the case of the plaintiff, that the defendant has indeed, not honoured the undertaking that he gave. Therefore, the defendant remains liable. I find and hold that the proceedings herein were not brought in bad faith. I also find that the doctrine of res judicata does not apply to this case.

In the result therefore, the plaintiff will succeed. The plaintiff has asked for four orders. Prayer (a) in my view is superfluous, as the undertaking relates to a specific amount of money which was withheld by the defendant. Prayer (c) has been dealt with by the Advocates Disciplinary Committee. I will not revisit the same. What remains is prayer (b). Also prayer (d) for costs is alive. I will grant prayer (b) and (d).

For the above reasons, I allow the application and order as follows: -

1. The defendant will pay the plaintiff the sum of Kshs.300,000/- plus interest at court rates from the date of filing this suit, till payment in full.

2. The defendant will pay the plaintiff's costs of these proceedings.

Dated and delivered at Nairobi this 7th day of February 2011.

…….
GEORGE DULU
JUDGE

In the presence of: -
Mr. Mwenda for plaintiff
No appearance for defendant
Catherine Muendo – court clerk