



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

NO. 499 OF 2008

**MBUGWA ATUDO & MACHARIA
ADVOCATES.....PLAINTIFF**

VERSUS

**BEN NJAU KAYAI, carrying on business as NJAU KAYAI & CO.
ADVOCATES.....DEFENDANT**

JUDGEMENT

An originating summons (O.S.) filed here on 2.9.08 by the plaintiff/applicant firm of lawyers was brought under section 57 of the Advocates Act and the now repealed Order L II rule 7, IV of the Civil Procedure Rules. The questions for determination were in the main:

- i) whether the defendant (another firm of lawyers) could be compelled within 14 days to honour his irrevocable and unconditional professional undertaking of 28/7/07 to pay a sum of ksh. 1,050,000/= to the plaintiff (on behalf of CMC Holdings Ltd; and
- ii) whether in default of (i) above there would be enforcement of the undertaking,

Tom Macharia, a lawyer in the applicant firm swore a supporting affidavit, being conversant with the subject matter. All this arose from HCCC 4803/00, a negligence claim that followed a road accident on 7.10.99. Two plaintiffs sued seeking special and general damages. Judgement was delivered in their favour on 22.6.04 against the defendant, Aberdare Creameries Ltd. A decree issued and warrants of attachment and sale followed. Ms Melody Traders (Auctioneers) proclaimed motor vehicle reg. no. KAR 086 H in execution but this motor vehicle turned out later to be the property of CMC Holdings Ltd, on hire purchase to the defendant. M/s CMC got orders following objector proceedings to have the attachment raised.

On 12.6.07 the defendant/respondent informed CMC Holdings Ltd that he acted for the defendant in **HCCC 4803/00**, who had instructed him to give an undertaking to pay sh. 1,050,000/= on or before 12.9.07. Apparently this sum represented the amount due from Aberdare Creameries Ltd to CMC Holdings

in respect of 2 motor vehicles KAR 086 H and KAR 088 H, under the hire – purchase agreements plus the auctioners charges. [The letter of undertaking was exhibited]. That CMC Holdings instructed Falcon Talons to stop repossession of the motor vehicle, subject of attachment and execution in **HCCC 4803/00**.

That on 12/9/07 the defendant wrote to the applicant that he was unable to satisfy the undertaking and so requested for 30 more days to do so. The plaintiff acknowledged that (see TM 5, 6). This was after the defendant had earlier on 28/7/07 written to the plaintiff reiterating the unequivocal declaration of intention to pay CMC Holdings Ltd sh. 1.05m. (above) (see TM 3).

Then on 8/1/08 the defendant wrote to the plaintiff yet another letter expressing inability to satisfy the undertaking – an obligation which as an officer of the court should not arise. It attaches to him personally. He had put forth the undertaking initially directly to CMC Holdings who acted on it and stopped repossession of the motor vehicle from Aberdare Creameries. Despite demands the defendant has failed to honour his professional undertaking. Even later instructions by the plaintiff's client, CMC Holdings, that further delay in paying up would be considered if the defendant paid sh. 525,000/= of the sum due, came to nothing. So all the defendant's acts were seen to have been meant to delay due payments hence this Originating Summons.

The defendant filed a replying affidavit terming this Originating Summons bad in fact and law and denying ever having given any professional undertaking to pay to the plaintiff. If anything he gave the undertaking to M/s CMC Holdings directly – not the plaintiff. But he admitted having intimated to the plaintiff about the inability to pay up on 8/1/08. That undertaking the defendant gave was conditional on the success of a transaction he had with Aberdare Creameries. It was repeated that the defendant gave no unconditional and an irrevocable undertaking to the plaintiff to pay the sum in issue. But when such a letter was written on 25/7/08 to the plaintiff to pay the sum in 60 days there was no acceptance and so the undertaking was withdrawn.

On 2/02/11 the Originating Summons came before court from Milimani Commercial Courts and Mr Mbugwa was told to appear on 15/2/11 for directions regarding the way to try the matter.

On 15/02/11 Mr. Mwangi for Mr. Mbugwa showed the court evidence of service on the defendant. He had not shown up and counsel was directed that written submissions would be filed on 1/03/11 on the Originating Summons.

On 1.3.11 Mr. Mbugwa told the court that he had filed his script of submission and served the same on the respondent. It transpired that counsel had filed some papers at Milimani courts where the cause started. He got leave to retrieve and have them placed in this file. That was done. Further to the orders of 15/2/11 Mr. Mbugwa had filed submission on 28/2/11. The defendant did not do likewise and the court proceeded to pen this decision.

From all the foregoing the question is whether the defendant gave an irrevocable undertaking to pay and he failed to honor it. There are 2 letters in contention. While the plaintiff maintains that the professional undertaking was conveyed by the defendant's letter of 28/7/07, the defendant claims that he intended to do so by his letter dated 25/7/08 but the plaintiff did not acknowledge or accept that.

On 28.07.07 the defendant addressed a letter to the plaintiff in the following terms:

“ Re: ABERDARE CREAMERIES LTD – KSH. 1,050,000/=
We act for our above named client and refer to our letter dated 12th June 2007 and the reply by M/s CMC Holdings Ltd dated 22nd June 2007.

We reiterate our earlier undertaking to pay an amount of Ksh. 1,050,000.00 to your client M/s CMC Holdings Ltd on or before 12th September 2007 being part of proceeds of a sale agreement transaction we are handling on our client's behalf.

Yours faithfully

Signed

.....”

And the letter of 25.7.08 from the defendant to the plaintiff read:

“ Re: Nairobi HCCC No. 48 of 2000

MARY WAIRIMU & OTHERS VS CMC HOLDINGS LTD & ABERDARE CREMERIES

We refer to the above mentioned matter and our earlier letter in the day and to the discussion between your Mr. Mbugwa, Advocate and our Mr. Kayai, Advocate in your offices.

We have since confirmed the rightful figure payable to be Ksh. 1,050,000.00 only (Kenya Shillings One Million and Fifty Thousands (sic). We regret the error in our earlier letter that indicated an amount Ksh. 850,000.00 only (Kenya Shillings Eight Hundred and Fifty Thousand only).

We therefore reiterate our irrevocable undertaking to pay ksh. 1,050,000.00 only (Kenya Shillings one million and fifty thousand) within sixty (60) days of today's date i.e. on or before 25th September 2008.

As earlier indicated in our letter, kindly confirm acceptance of this undertaking by the close of the day (today) as time is of essence in this transaction. In light of this undertaking please advise your client to release the motor vehicles and the log books.

**Yours faithfully,
(signed) “**

Of the two letters and without more, this court is of the mind that the professional and irrevocable undertaking given by the defendant to the plaintiff was contained in the letter of 25/7/08 not that of 28/7/07. The letter was clear, direct and with no condition. What the plaintiff had to do, and this was no condition on the undertaking, was to confirm acceptance, and then ask his client to release the motor vehicles with the log books.

It is claimed by the defendant, and the plaintiff has not refuted or proved otherwise that he did not accept the undertaking conveyed on 28/7/08. So it can be taken that the undertaking was refused. Accordingly, the defendant, even if that letter had been the one in issue now, could not be compelled to honour it.

In sum this Originating Summons is dismissed with costs.

Judgement delivered on 31.3.11.

**J. W. MWERA
JUDGE**

Coram : Mwera J.
Mbugwa for Applicant
N/A for Respondent
Njoroge court clerk