



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 166 OF 2010 (O.S.)**

**MUTHAURA MUGAMBI AYUGI & NJONJO, ADVOCATES....PLAINTIFF**

**V E R S U S**

**JANE NYAMBOKE NJAGE.....DEFENDANT**

**J U D G M E N T**

In this suit the Plaintiff, a firm of advocates, seeks to enforce a professional undertaking by the Defendant, an advocate of this court. The suit was brought under the old **Order LII** (now **Order 52**), **rule 7(1) (b)** and (2) of the **Civil Procedure Rules** (the **Rules**). That rule provides: -

**“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 chamber in that suit; or**

**(b) in any other case, by originating summons in the High Court.**

**(2) Save for special reasons to be recorded by the judge, the orders shall in the first instance be that the advocate honour his undertaking within a time fixed by the orders, and only thereafter may an order in enforcement be made.”**

The Plaintiff thus applied by originating summons dated 19<sup>th</sup> March 2010. The main orders sought are: -

**“1. That the Defendant do forthwith or within a reasonable time as this ...court may direct honour her professional undertaking dated 13<sup>th</sup> March 2008 to the Plaintiff by payment ... of the sum of KShs 500,000/00.**

**2. ...**

**3 That in default ... the court do issue orders and/or warrants of arrest to commit the Defendant**

**to civil jail for a period not exceeding six (6) months.**

4. ...

5. **That costs of this suit be borne by the Defendant.”**

The grounds for the originating summons appearing on the face thereof are: -

1. That at all material times, there existed an advocate and client relationship between the Plaintiff and the **Water Services Regulatory Board (WASREB)** of which the Defendant was then the chairperson.
2. That by a **letter of engagement dated 12<sup>th</sup> March 2008** the Defendant, on behalf of WASREB, duly instructed the Plaintiff to act for WASREB.
3. That in addition, the Defendant gave her “personal, irrevocable professional undertaking” to pay on demand the legal fees due to the Plaintiff, but to the extent of KShs 500,000/00 only.
4. That upon the basis of this undertaking the Plaintiff filed court action on behalf of WASREB without taking a deposit.
5. That the court action was subsequently amicably settled.
6. That despite demand, WASREB did not pay the Plaintiff’s legal fees.
7. That the Plaintiff then called upon the Defendant to honour her professional undertaking, which she failed to do.

There is a supporting affidavit sworn by one **SUSANNE MUTHAURA**, the managing partner of the Plaintiff. A number of documents are annexed to it.

In a **replying affidavit sworn on 6<sup>th</sup> and filed on 7<sup>th</sup> October 2010**, the Defendant stated, *inter alia*:-

**“...in any event the purported undertaking is not given by (me) but (by) a person known as Judy Njogu alias Jane Njogi and is ambiguous and incapable of being enforced against me in my personal capacity.”**

The Defendant admitted that in her capacity as chairperson of the Board of WASREB, and upon instruction by that Board, she instructed the Plaintiffs to act for the Board in its dispute with the parent Ministry, consequent upon which the Plaintiffs commenced legal proceedings as pleaded.

In a supplementary affidavit sworn in response to the replying affidavit by one MURIUKI MUGAMBI, a partner in the Plaintiff firm, it was asserted that the professional undertaking was given by the Defendant; that in subsequent correspondence the Defendant never denied giving it; that the signature in the professional undertaking is identical to the Defendants signatures in other correspondences and documents; that the Defendant has never complained to the police of any forgery of her signature in the undertaking; and that the name JANE NJOGU appearing in the undertaking was a mere typographical error.

On 26<sup>th</sup> October 2010 directions were given that the originating summons be heard by way of submissions on the affidavits on record subject to cross-examination of the deponents upon their various affidavits.

On 27<sup>th</sup> September 2011 the Defendant was cross-examined upon her replying affidavit. She confirmed that the Plaintiffs were instructed by WASREB through her (as chair of the Board) to act for the Board, as a result of which instructions the Plaintiffs filed legal proceedings. But she denied ever before seeing or

signing the engagement letter dated 12<sup>th</sup> March 2008 addressed by the Plaintiffs to the board of directors of WASREB through one **Judy Njogu** as Chairperson.

That letter is annexed to the affidavit sworn in support of the originating summons. It sets out the scope of work the Plaintiffs were to perform, their legal fees (given as KShs 2 million) and other matters. At page 3 of that letter is the professional undertaking upon which the Plaintiff's action is founded. The same is in the following words: -

**"I Jane Njogu, an advocate of the High Court of Kenya, whose address is care of P. O. Box 41621-00100 Nairobi confirm that this is the understanding between the firm and myself, in my personal capacity and on behalf of the Board, and confirm my personal irrevocable professional undertaking that I shall, upon demand, settle the legal fees as set out in clause 3 above to the extent of Kenya Shillings Five Hundred Thousand only (KShs 500,000/00); and that the above represent the understanding between myself and the firm.**

**Terms agreed: .....**

**Signed by the said Jane Njogu: .....**

**Date: ....."**

There is an attempt to alter by hand the name **Njogu** to read **Njagi** in the undertaking.

In the body of the letter itself, there is reference to **Jane (not Judy) Njogu!** There is no attempt to alter this name in the body of the letter.

The undertaking shows that it was signed by the said **Jane Njogu** on 13<sup>th</sup> March 2008.

The Defendant denied signing this undertaking. She said she could not have signed a document that clearly did not bear her name.

The Plaintiffs do not deny that the undertaking is in the name of **Jane Njogu** and not in the Defendant's name, which is **Jane Nyamboke Njagi**. They say this is a typographical error. But these are totally different names. It cannot have been a typographical error. The Plaintiffs probably simply got the Defendant's name wrong altogether. But when the error became apparent, there ought to have been an attempt to correct the same by correspondence so that there would be no doubt in the future that the undertaking was given and signed by the Defendant.

The law with regard to professional undertakings by advocates is as follows: -

1. The undertaking must be clear.
2. The undertaking must be unambiguous and unequivocal.
3. The professional undertaking must be certain and without any conditions precedent.
4. The plaintiff must have acted in reliance on the undertaking.

See the following cases:-

- **Geoffrey Silver & Drake – v – Thomas Anthony Baines (1971) 1 All ER 473.**

- **Karsam Lalji Patel – v – Peter Kimani Kairu (Practising as Kimani Kairu & Company, Advocates), Court of Appeal, Civil Appeal NO. 135 of 1999 (Unreported).**

- **Kenya Reinsurance Corporation – v – V. E. Muguku Muriu (T/a Ms V. E. Muguku Muriu & Company), Court of Appeal, Civil Appeal No. 48 of 1994 (Unreported).**

**- Naphatali Paul Radier – v – David Njogu Gachanja (Carrying on business as D. Njogu & Company Advocates), Court of Appeal, Civil Appeal No. 582 of 2003 (Unreported).**

In our context, a professional undertaking is an unequivocal declaration of intention made by an advocate in the cause of his practice either personally or by a member of his staff, or made by an advocate as such advocate but not in the cause of his practice, addressed to someone who reasonably places reliance on it. It is a solemn declaration by a member of that noble profession which must be honoured.

And that is why the undertaking must be clear, unambiguous, unequivocal, without any conditions precedent, and upon which reliance is placed by the person to whom it is given.

The immediate question that arises then is this. Where the undertaking bears the name of the giver which is different from the person against whom it is sought to be enforced, can it be said that the undertaking is clear, unambiguous and unequivocal?

As a starting point, the name of the giver of the undertaking must be clear and beyond controversy. There should be no argument at all as to who gave the undertaking in question. The name of the giver must be clear and beyond argument.

An undertaking which lends itself to argument and inference as to who might have given it, and which requires contested evidence in that regard, cannot be said to be clear, unambiguous and unequivocal. If the first hurdle towards enforcement of such undertaking is the very basic issue as to who gave the undertaking in the first place, then it cannot be a clear undertaking. Nor can it be unambiguous or unequivocal. I so hold.

The Defendant may well have signed the undertaking, seeing that the signatures on it are similar to her signatures in other documents. But it is not necessary to decide that particular issue, whether or not she signed the undertaking in question. The main thing is that the undertaking bears a name that is clearly not the Defendant's name. As already pointed out, there was no attempt to correct this error as early as possible so that there may not be any controversy in the future as to who gave the undertaking.

As the undertaking in issue is not in the Defendant's name, the same cannot be enforced against her. I so hold.

This originating summons is therefore dismissed with costs to the Defendant. It is so ordered.

**DATED, SIGNED AND PRONOUNCED IN OPEN COURT AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2011**

**H.P.G. WAWERU**  
**JUDGE**