



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

Civil Case 411 of 2009

**PHILIP S. KISAKA *t/a*
P.S. KISAKA & CO. ADVOCATES PLAINTIFF**

VERSUS

**THOMAS AGIMBA *t/a*
AGIMBA & ASSOCIATES DEFENDANT**

RULING

This application is brought by way of an Originating Summons dated 8th June, 2009 and taken out under **Order XXXVI Rule 7; Order LII Rule 7 (2) of the Civil Procedure Rules; and Section 3A of the Civil Procedure Act**. It seeks from the Court the following orders –

1. *That the Defendant/Respondent be ordered to honour his irrevocable professional undertaking to pay the balance of the purchase price in respect of L.R. No.4242/41 given to the Plaintiff/Applicant on July 23, 2008 within 7 days from the date of making this order*
2. *That in default thereof execution for the enforcement of the undertaking by way of committal to civil jail to issue*
3. *That the Defendan/Respondent bears the cost of this application.*

The application is supported by the annexed affidavit of Philip S.

Kisaka, Advocate, and is based on the grounds that –

- (a) *The Defendant/Respondent has failed, refused or declined to honour his professional undertaking to pay the balance of the purchase price within the agreed period of time*
- (b) *The undertaking being irrevocable in nature, the Defendant/Respondent is bound by the terms thereof*
- (c) *It will be against public policy if the Defendant/Respondent was to be allowed to unilaterally revoke the binding undertaking*
- (d) *The undertaking was for the payment of money on account of a client and the*

Plaintiff/Applicant now faces an imminent claim from his own client on perceived professional misconduct or negligence in failing to protect and secure the client's interests.

The application is opposed by the replying affidavit of the Defendant/Respondent sworn on 22nd June, 2009 in which, after explaining his version of the matter, he urges the Court to dismiss the application with costs. Each of the parties filed written submissions in which many authorities were cited and also highlighted those submissions orally.

After considering the pleadings, the written and oral submissions, I find that the main issues to be determined are

–

- 1. Whether the Defendant/Respondent gave a professional undertaking as alleged.***
- 2. If so, whether he gave it in his professional capacity as an Advocate.***
- 3. Whether such an undertaking can be watered down on account of some alleged dispute between the Defendant/Respondent and the party to whom it is given and whether the Defendant should honour the undertaking.***

The short history of this matter is that the Plaintiff/Applicant was the Advocate for the vendor whereas the Defendant/Respondent acted for the purchasers for the same transaction in respect of L.R. No. 4242/41. By the time the Plaintiff received instructions to complete the transaction, there had been some delay in the finalization of the matter due to a caveat which had been launched by a Third Party. This led to the filing of **HCCC No 349 of 2007 at Milimani** against vendor claiming specific performance and enjoining the caveator. Meanwhile the purchasers obtained an injunction restraining the vendor and all the caveator from dealing with the property pending the hearing and determination of the suit.

After negotiations between the parties, it was agreed that the vendor would apply for the removal of the caveat and thereafter complete the transaction. It was also expressly agreed that the Defendant/Respondent would give his irrevocable professional undertaking to pay the balance of the purchase price upon expiry of 90 days, which was later reduced to 60 days, from the date of transfer and in turn the vendor would execute a Deed undertaking to indemnify the purchasers against any successful claims by the caveator. Pursuant to that agreement, the vendor successfully applied for the removal of the caveat and the Plaintiff/Applicant informed the Defendant/Respondent who undertook to verify the removal by an official search. The Defendant/Respondent also confirmed that his client had put him in funds and that he would shortly give the requisite professional undertaking subject to vendor executing the Deed of indemnity. On July 23, 2008, the Defendant/Respondent gave his professional undertaking binding himself to pay Kshs.1.1 million being the balance of the purchase price within a re-negotiated period of 60 days after registration of the transfer in favour of the purchasers. Similarly, the vendor executed the Deed of indemnity on August 28, 2008, and the same was forwarded to the Defendant/Respondent.

In January, 2009 the Plaintiff/Applicant conducted a search in which it was discovered that the transfer was registered on December 18, 2008. He then wrote to the Respondent asking the latter to pay the balance to which the Respondent said that he had commissioned an official search to confirm the status of the registration exercise which was somewhat strange since he was the one charged with the responsibility of registering the transfer. Finally, he forwarded the cheque for Kshs. 1.1 million being the balance of the purchase price and indicated that his clients had authorized him to waive the 60 days' waiting period. The cheque was banked on 6th February, 2009 and on 10th February, 2009 the Applicant's bank informed him that the cheque had been stopped by the Defendant. According to the Plaintiff, on February 12, 2009, the Defendant informed the Plaintiff that he had stopped the cheque because the vendor had failed to produce a receipt for payment of stamp duty and his clients had also received anonymous telephone calls from the Lands Office that there was a problem with the transfer. It had been alleged that the caveat had been irregularly removed from the Register. After several meetings between the parties, it is alleged that the Defendant/Respondent maintained that he would only honour the undertaking if and when the dispute was cleared.

Starting from the first issue, the Encyclopedia of Forms and Precedents, 5th Edition, Volume 39 defines a professional undertaking as, **“any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a Solicitor in the course of his practice, either personally or by a member of his staff; or a Solicitor as ‘Solicitor’, but in the course of his practice, under which the Solicitor (or in the case of a member of his staff, his employer) becomes personally bound. An undertaking is therefore a promise made by a Solicitor or on his behalf by a member of his staff, to do or refrain from doing something. In practice undertakings are frequently given by Solicitors in order to smooth the path of a transaction or to hasten its progress and are a convenient method by which some otherwise problematical areas of practice can be circumvented.”**

Against the background of that definition, the Defendant wrote to the Plaintiff a letter dated July 23, 2008 which was couched in the following words –

“... We hereby give to yourselves our irrevocable professional undertaking that the balance of the purchase price in the sum Kshs.1.1 million (Kshs.1,100,000/=) shall be released to your clients within 60 days of the registration of the Transfer.

Further, we shall shortly forward to yourselves a copy of the duly registered Transfer and look forward to your urgent release to us of the executed Deed of indemnity.”

From this wording, all that was necessary for the undertaking to take effect was the Transfer being registered, expiration of 60 days from registration and execution of the Deed of indemnity.

Upon compliance with these conditions, and I find that they were duly complied with, the undertaking became enforceable and from all the accounts on the record, those conditions were duly satisfied. I therefore find that the

Defendant/Respondent gave a professional undertaking in his capacity as an Advocate and that he was bound to honour that undertaking. In the case of **RADIER v. NJOGU & CO. ADVOCATES [2006] eKLR**, the Court observed that an undertaking given by an Advocate is personally binding on him and failure to honour such an undertaking is evidence of professional misconduct. It is incumbent upon the Defendant/Respondent herein to honour the undertaking if he is to be exonerated from some punitive disciplinary action.

Regarding the third issue, it is noteworthy that the Defendant/Respondent alleges some irregularities in the Lands Office pertaining to the registration of the documents and even suggests that there might have been some fraud. Such issues are irrelevant to the professional undertaking given by the Respondent to a professional colleague. His undertaking stands as a separate contract between the Advocates and is not contingent upon any terms of contract between his client and any other parties, nor can it be vitiated by alleged irregularities in the Lands Office. Any such perceived irregularities would only raise matters to be addressed some other day at some other forum. While on that issue, I find it strange for the Respondent to allege that he was summoned to the Lands Office in connection with the alleged irregularities while neither the Plaintiff nor the Plaintiff's client were equally summoned. That casts a very serious doubt on the allegations raised by the Defendant/Respondent.

In sum, I find that there was a proper, valid, binding, and irrevocable undertaking by the Respondent given to the Plaintiff/Applicant and dated 23rd July, 2008, which the Defendant/Respondent ought to honour in obedience and not in breach. I accordingly direct that the Defendant/Respondent do honour that undertaking within 7 days from today.

Orders accordingly.

Dated and delivered at Nairobi this 29th day of April, 2010.

**L. NJAGI
JUDGE**