



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MILIMANI COMMERCIAL COURTS  
Civil Case 116 of 2010**

**SHYONI LIMITED.....PLAINTIFF  
VERSUS**

**MUTINDA KIVUVA t/a  
SARAH MBITHE  
S. MUTINDA &  
CO. ADVOCATES a.k.a  
S.M. KIVUVA & CO. ADVOCATES.....DEFENDANT**

**JUDGMENT**

This application is brought by an Originating Summons dated 25<sup>th</sup> February, 2010, and taken out under Order LII Rule 7 of the Civil Procedure Rules and all other enabling provisions of the law. The Applicant thereby seeks the following orders against the Respondent –

1. *That the Respondent be compelled to honour her professional undertaking given on 2<sup>nd</sup> March, 2009, to refund the Applicant Kshs.2,200,000/= being 20% deposit of the purchase price held by her pursuant to a sale agreement dated 15<sup>th</sup> December,2008, which sum she owes as a stakeholder.*
2. *That the Respondent be compelled to pay the Applicant interest accruing from the said sum at market rates from the date of receipt of the said amount.*
3. *That the Respondent be condemned to pay the costs of this Summons.*
4. *That the Court do make such other orders and issue such relief as it may deem just.*

The application is supported by the affidavit of Patrick Muchemi

Gitonga, the Director of the Applicant, and and is premised on the grounds that –

- (a) *The Applicant remitted to the Respondent the sum of Kshs.2,200,000/= as 20% deposit of the purchase price for the purported sale of Nairobi/Block 94/182 by virtue of the sale agreement dated 15<sup>th</sup> December,2008 drawn by the Respondent.*
- (b) *It is now evident that the said sale cannot be completed for the reason that the Respondent does not have and has never had instructions to act as an Advocate in the purported sale.*
- (c) *The Respondent gave a professional undertaking to release the said sum one week from 2<sup>nd</sup> March, 2009.*
- (d) *The said sum was to be held by the Respondent as a stakeholder pending registration of the Transfer in the Applicant's name.*
- (e) *Todate the Respondent has failed and/or neglected to repay the Applicant the said sum.*
- (f) *The Applicant is apprehensive that the Respondent is out to defraud it of the said sum as a result of her failure to honour her undertaking dated 2<sup>nd</sup> March, 2009 and that she may have appropriated it for her own personal use.*

*(g) It has come to the Applicant's knowledge that the name and firm under which she purported to practise is non existent.*

*(h) It has also come to the Applicant's knowledge that she has no instructions to facilitate the transactions in question or receive the said amount on behalf of the clients she was purportedly acting for.*

An affidavit of service on record shows that the Respondent was served on 11<sup>th</sup> March, 2010. Despite that service, she did not enter appearance, and neither did she file a replying affidavit nor grounds of opposition. On the hearing date she also did not attend Court. This application is therefore unopposed. On the hearing date, Mr. Gitonga for the Applicant relied on the Applicant's supporting affidavit and argued that on 2<sup>nd</sup> March, 2009 the Respondent wrote to the Applicant's Advocate on record giving her professional undertaking that she was going to forward the cheque for the refund of the deposit amount the following week. To date, the amount is still outstanding and has never been refunded.

A professional undertaking given by an Advocate should be honoured in observance. It is a serious breach of professional ethics for an Advocate to breach such an undertaking. On the facts of this case, the Respondent does appear to have had no defence whatsoever by which to resist the Applicant's claim. If she had any such defence, she would at least have made an effort to enter appearance and file the appropriate pleadings which she didn't do. I therefore find that she has no such defence and that is why this application is not opposed and therefore the Applicant is entitled to the orders sought.

By reason thereof, I make the following orders –

- (a) Prayer 1 of the application is granted as prayed and the Respondent is directed to refund to the Applicant Kshs.2,200,000/= within 14 days from today's date.*
- (b) As the Applicant has not given an indication of the market interest rates, I order that the Respondent will also pay interest accruing from the above sum at Court rates from the date of receipt of the said amount.*
- (c) The Respondent will also pay the costs of this application.*

Dated and delivered at Nairobi this 13<sup>th</sup> day of May, 2010.

**L. NJAGI**  
**JUDGE**