



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

Civil Case 651 of 2004 (OS)

1. **S. T. G. MUHIA T/A**

S. THUO MUHIA & CO. ADVOCATESPLAINTIFF

VERSUS

J. M. CHEGE T/A

J. M. CHEGE & CO. ADVOCATES DEFENDANT

JUDGMENT

By an amended originating summons made under **order LII rule 7 (1), Order XXXVI rule 1** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act**, the plaintiff seeks orders of this court to compel the defendant to honour her irrevocable professional undertaking and to pay forthwith the sum of Kshs.7.3 million to the plaintiff. The plaintiff further sought a declaration of the court that the defendant was in breach of her irrevocable professional undertaking to the plaintiff. The originating motion is supported by the annexed affidavit of S. T. G. Muhia. The motion was opposed. The defendant, Jane M. Chege swore a replying affidavit in opposition to the application. Mwangi Gachoka, the managing director of Chihi Holdings (K) Ltd swore a further affidavit in opposition to the originating summons.

The parties to this suit took directions and agreed that the suit herein be disposed off by the parties adducing *viva voce* evidence. The plaintiff adduced evidence on his own behalf while the defendant offered evidence in response thereto. She called DW2, Wilfred Mwangi Gachoka, the managing director of Chihi Holdings (K) Ltd, to testify on her behalf. After the close of both the plaintiff's and the defendant's cases, the parties herein agreed by consent to file written closing submissions. They duly complied and filed the said written closing submissions. I have carefully considered the evidence adduced by the parties in support of their respective opposing positions. I have also evaluated the facts of this case, including the written closing submissions filed herein.

The facts of this case are more or less not in dispute. Chihi Holdings (K) Ltd. (*hereinafter referred to as the vendor*) was the client of the plaintiff in a conveyancing transaction. The vendor had instructed the plaintiff to act on its behalf in the sale of a parcel of land known as LR. No.209/12363 to a company referred to as Pipe Manufacturers Ltd. The purchaser was represented in the transaction by the defendant. The purchase consideration for the said property was Kshs.15 million. It was a condition of the agreement that on the date the agreement was executed, the said purchaser was required to pay the sum of Kshs.7.5 million. The balance of the purchase consideration, according to clause 3.2 of the agreement, would "*be secured by an irrevocable professional undertaking by the purchaser's advocate which shall be delivered to the vendor's advocate on completion date and which shall be in form and substance*

satisfactory to the vendor's advocate, securing payment of the purchaser's price within seven (7) days of the registration of the transfer instrument." The defendant, as the purchaser's advocate, on 14th January 2004 wrote the following letter to the plaintiff:

"We hereby give our irrevocable professional undertaking to pay to you the sum of Kshs.7,300,000/= within seven days of successful registration of the transfer. Do therefore forward all the completion documents."

From the evidence adduced, the purchaser (through the defendant) paid the initial sum of Kshs.7.5 million to the plaintiff on behalf of the vendor, Chihi Holdings (K) Ltd. A substantial part of the said purchase consideration paid to the plaintiff, was applied by the plaintiff to pay off some of the debts owed by the vendor. The vendor was paid the balance of the said purchase consideration. It was apparent that upto that point, the relationship between the vendor and the plaintiff was good.

The plaintiff in accordance with the agreement, prepared the transfer and handed over the conveyancing documents to the defendant for the purposes of registration of the transfer. According to the defendant, she was not able to register the transfer of the said property to the purchaser due to several hitches. She testified that the transfer that was prepared by the plaintiff did not contain the correct name of the vendor. Instead of the vendor's name appearing as Chihi Holdings (K) Ltd., it appeared as Chihi Holdings Ltd. As the instrument of transfer had already been stamped, it presented a problem to the defendant when she sought to register the transfer. The instrument of transfer was rejected by the Land Registrar due to the fact that it failed to accord with the particulars in the title. This hitch resulted in a delay of a period of over six (6) months before the same was resolved and the transfer registered.

In the intervening period, a disagreement ensued between the plaintiff and the vendor. The vendor, whose managing director testified as DW2, was dissatisfied in the manner which the plaintiff had applied the purchase consideration that he had initially been paid on behalf of the vendor by the purchaser. It appears that the delay in the registration of the transfer exacerbated the difference between the plaintiff and the vendor. Instead of communicating to the purchaser's advocate through its advocate, the vendor's managing director decided to communicate directly with the purchaser's advocate. Naturally, the plaintiff was not amused by the turn of events. Correspondence was exchanged between the plaintiff on the one hand, and the defendant and the vendor on the other hand. The thrust of the said correspondence was the complaint by the plaintiff that the defendant had acted unethically by condoning direct communication with the vendor and thereby bypassing the plaintiff.

It was also apparent that, at the time, the vendor had refused to pay the plaintiff some outstanding legal fees. It was evident that the plaintiff was anticipating some of his outstanding legal fee to be settled by the vendor from the balance of the purchase consideration that was due to be paid by the defendant on behalf of the purchaser. The relationship between the plaintiff and the vendor deteriorated to the extent that on 17th August 2004, the vendor withdrew instructions from the plaintiff. In a letter addressed to the plaintiff, the vendor stated as follows:

"Due to the unfortunate misunderstanding that have arisen in our relationship we now inform you that we have duly appointed the firm of Messrs. Wahome & Gichohi, Advocates to act for us in this transaction. We have accordingly advised the law firm of J. N. Chege Advocates to address the requisite professional undertaking to the said law firm. Further kindly note that we have requested the said law firm to take up with yourselves with yourselves (sic) the matter of the fees for this transaction and give the necessary undertaking upon agreement on the same. We have been advised that the other matters have no relationship whatsoever with this transaction and we note you have already advised the other parties that you are no longer acting for us."

In a letter dated the same day, and addressed to the defendant, the vendor informed the defendant that it had instructed the firm of Wahome & Gichohi Advocates to act on its behalf in the transaction in place of the plaintiff. The vendor further stated as follows:

"We therefore request you to provide your professional undertaking to forward to them the amount of

Kshs.7,300,000.00 (Kenya Shillings Seven Million Three Hundred Thousand Only) being the balance of the Purchase Price upon successful registration of the Transfer into your clients name.”

When it appeared to the plaintiff that the vendor was in the process of withdrawing instructions from the firm, on 28th July 2004, the plaintiff presented a fee note to the vendor for settlement. The fee note was in respect of the conveyancing transaction that is the subject of this suit. In the said fee note, the plaintiff demanded to be paid the sum of Kshs.515,149/= being legal fees and disbursements in respect of the said transaction. The vendor’s managing director told the court that he had deposited the said sum with the firm of Wahome & Gichohi Advocates for onward transmission to the plaintiff.

However, it appears that the plaintiff changed his mind on the amount of legal fees that was to be paid to him by the vendor and instead demanded to be paid a higher sum of Kshs.1,281,111.50. This amount included outstanding legal fees in respect of other legal work that the vendor had instructed the plaintiff to undertake on its behalf. It was the plaintiff’s case that his firm was the only one which could release the defendant from professional undertaking given in respect of the said conveyancing transaction. On the other hand, it was the defendant’s case that upon her being made aware that the vendor had withdrawn instructions from the plaintiff, in order to safeguard the interests of the purchaser, she was forced to abide by the wishes of the vendor by seeking to change its advocate in the course of the transaction. If I understood the defendant correctly, there was nothing amiss in her giving another professional undertaking to the firm of Wahome & Gichohi Advocates before she was discharged from the professional undertaking that she had earlier on given to the plaintiff.

The issue for determination by this court, is therefore, whether the plaintiff established his case to entitle this court compel the defendant to honour the professional undertaking that she gave to the plaintiff vide her letter of 14th January 2004. In their closing submissions, both counsel appreciated the import of a professional undertaking. For instance, the plaintiff’s counsel urged the court to adopt the definition of professional undertaking as set out in **Halsbury’s Laws of England, 4th edition re-issue, volume 44 (1)** at page 223 note 1 which defines a professional undertaking as “*an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by (1) a solicitor or a member of staff in the course of practice; or (2) a solicitor as ‘solicitor’, but not in the course of practice, whereby the solicitor becomes personally bound.*” The defendant’s counsel quoted the definition in **Encyclopaedia of Forms and Precedents 5th Ed. Vol 39** at pg 581 which states as follows:

“31. General – An undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance of it and made by; 31:1 – A solicitor or member of solicitor’s staff in the course of practice; or 31:2 – A solicitor as ‘solicitor’ but not in the course of practice. 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 transactions, or to hasten its progress and are a convenient method by which some otherwise problematical areas of practice can be circumvented.”

The above definition of what constitutes a professional undertaking in the context where an advocate gives professional undertaking has been given judicial approval by the Court of Appeal in **C.A Civil Appeal No.48 of 1994, Kenya Re-insurance Corporation vs. V. E. Muguku Muriu t/a M/s V. E. Muguku & Company** (unreported) and by the High Court in the case of **H. K. Advocate vs. Muciimi Mbaka, Nairobi HCCC No.485 of 2004** (unreported).

In the present case, it was established by the plaintiff that the defendant had given an irrevocable professional undertaking to pay to the plaintiff the sum of Kshs.7.3 million upon successful registration of the transfer. It was apparent that the defendant misapprehended the import of the said professional undertaking. From her evidence, it appeared that the plaintiff made the wrong assumption that the professional undertaking was in actual fact given to the vendor and not to the plaintiff as the advocate of the vendor. The true position of the law is that when an advocate gives a professional undertaking, he gives it in his capacity as an advocate to another advocate. An advocate cannot give a professional undertaking to a layman. For such professional undertaking to be efficacious, it is only maintainable

between two advocates. A professional undertaking by an advocate constitutes a separate agreement independent of the transaction that resulted in such an advocate being required to give a professional undertaking. A professional undertaking can therefore be enforced against an advocate independent of the transaction in which the professional undertaking was given. In the present suit, it was evident that the defendant could not have purported that she had been discharged from the professional undertaking that she gave to the plaintiff when the vendor withdrew instructions from the plaintiff. The defendant was still bound to honour the professional undertaking given to the plaintiff irrespective of whether the vendor had withdrawn instructions in respect of the conveyancing transaction from the plaintiff. It is only the plaintiff who could have discharged her from her the professional undertaking.

In the present case therefore, this court finds and hold that in so far as the plaintiff had not discharged the defendant from her professional undertaking, she was bound to honour it. However, it was apparent that the plaintiff, by his letter dated the 28th July 2004, addressed to the defendant, had partially discharged the defendant from her undertaking. In the said letter (*which enclosed the fee note for the sum of Kshs.515,149/=*), the plaintiff stated as follows:

“We refer to your letter Ref: JMC/75/12 03 dated 28th July 2004 and subsequent telephone discussion in which you advised that Chihi Holdings (K) Limited chairman will attend to rectification of the Transfer once he is advised of our professional charges relative to this transaction. Consequently, we forward our fees and disbursements note for the information of ALL.”

It is the considered view of this court that by demanding settlement of his legal fees in respect of the said transaction from the defendant, the plaintiff was acknowledging the fact that he no longer had instructions from the vendor to act on its behalf in the transaction. The managing director of the vendor told the court that the defendant paid to its new advocates, Messrs Wahome & Gichohi Advocates the said sum of Kshs.7.3 million. In the circumstances therefore, the only part of the professional undertaking that the defendant shall be compelled by this court to honour is the settlement of the plaintiff’s legal fees.

I therefore hold that the plaintiff has established, to the required standard of proof on a balance of probabilities, that the defendant is entitled to honour her professional undertaking to pay to the plaintiff his legals which is the sum of Kshs.515,149/=. The other amounts demanded by the plaintiff are not recoverable from the defendant as they related to transactions other than the one that is the subject of this suit. The plaintiff can seek enforcement of the same as against the vendor in the normal manner. I therefore enter judgment in favour of the plaintiff as against the defendant for the said sum of Kshs.515,149/=. The said amount shall be paid with interest at court rates from the date of filing suit to the date of payment. The plaintiff shall have the costs of the suit.

It is so ordered.

DATED at NAIROBI this 27th day of MAY, 2009

L. KIMARU

JUDGE