REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS CIVIL APPLICATION 41 OF 2009

IN THE MATTER OF SECTION 50(1) OF THE ADVOCATES ACT

ORIARO & COMPANY ADVOCATES……..……..…APPLICANT

VERSUS

MURIU MUNGAI & CO. ADVOCATES…….……RESPONDENT

RULING

The facts of this case are more or less not in dispute. One Peter Hannington Kataka (*hereinafter referred to as Kataka*) charged his property, being LR. No 18111/257(*IR. No. 81045*), Baraka Estate Nairobi to Barclays Bank of Kenya (*hereinafter referred to as the bank*) to secure a loan. The said Kataka defaulted in repaying the said loan. The bank sought to exercise its statutory power of sale and duly advertised the suit property for sale. Kataka instructed the applicant to act on his behalf. The applicant wrote to the respondent, the advocates for the bank, requesting the bank to refrain from exercising its statutory power of sale since Kataka had secured a buyer for the charged property. The applicant informed the respondent that one Joseph Onyango Dimber was willing to purchase the suit property. Pursuant to the request made by the applicant, the bank, through the respondent, suspended the sale of the charged property by public auction.

Thereafter, the applicant and the respondent entered into negotiations on the terms of sale of the charged property. The applicant, on behalf of the proposed purchaser, paid a deposit of Kshs.300,000/= to the bank. It appears that the purchaser had approached a financial institution to secure the balance of the purchase consideration of Kshs.2.7 million. For that purpose, it was essential that the charged property be discharged by the bank and the same be transferred to the proposed purchaser before the financial institution could release the balance of the purchase consideration. The applicant initially gave an undertaking to the respondent that was not in terms that was acceptable to the respondent. After exchange of correspondence, the terms of the professional undertaking was settled. On 15th August 2008, the applicant gave the following professional undertaking to the respondent:

"*We are hereby giving you our professional undertaking:*

(i)Not to utilize the documents, i.e. Original Title for Land Reference Number 18111/257 and executed Discharge of Charge, for any purpose other than registration of the Discharge of Charge and Transfer in favour of the purchaser, Joseph Onyango Dimber;

(ii) To pay Barclays Bank of Kenya Limited the balance of the purchase price of Kenya Shillings Two Million Seven Hundred Thousand (Kshs.2,7000,000.00) within Fourteen (14) days of registration of the Discharge of Charge and Transfer in favour of the purchaser, Joseph Onyango Dimber;

(iii)To pay the firm of Muriu, Mungai & Co. Advocates the sum of Kenya Shillings Four Hundred and Fifty thousand (Kshs.450,000.00) within Fourteen (14) days of registration of the Discharge of Charge and Transfer in favour of the purchaser, Joseph Onyango Dimber;

(iv)To pay Garam Investments the sum of Kenya Shillings Eighty five Thousand Nine Hundred and Seventy (Kshs.85,970.00) within fourteen (14) days of registration of the Discharge of Charge and Transfer in favour of the purchaser, Joseph Onyango Dimber;

(v) If the aforesaid sums set out in clause (ii), (iii) and (iv) above are not paid within Thirty (30) days from the date when the Original Title document and the executed Discharge of Charge are received in our offices, we shall upon demand return the documents to you in the condition in which they were when delivered to us."

Although the proposed purchaser, Joseph Onyango Dimber later withdrew from the transaction, the applicant was able to secure a substitute purchaser of the charged property by the name Arnet Wanjiku Mwangi. Pursuant to the professional undertaking given by the applicant, the respondent released the duly discharged title in respect of the charged property to the applicant. The said property was duly transferred to Arnet Wanjiku Mwangi. The property was subsequently charged to National Bank of Kenya Ltd to secure a loan that had been advanced to Arnet Wanjiku Mwangi to purchase the suit property. National Bank of Kenya Ltd, through their advocates, Mssrs Moronge & Co. Advocates paid to the applicant the purchase consideration of Kshs.4.5 million.

On 13th November 2008, the applicant released to the respondent two cheques for the sum of Kshs.2.7 million payable to Barclays Bank of Kenya Ltd and for the sum of Kshs.85,970/= payable to Garam Investments, a firm of auctioneers. In breach of the professional undertaking, the applicant refused to pay the sum of Kshs.450,000/= to the respondent. The applicant declined to pay the said sum to the respondent on the ground that, the said amount constituting legal charges payable to the respondent, was exorbitant and not in accordance with the scale provided under the **Advocates Remuneration Order**. The applicant proposed to pay to the respondent the sum of Kshs.74,733/= instead. The respondent was not amused by the turn of events. They insisted that the applicant honours his professional undertaking by paying the said sum of Ksh.450,000/=.

It provoked the applicant to file the current suit purportedly pursuant to the provisions of **Section 50(1)** of the **Advocates Act** seeking orders of this court to compel the respondent to file their bill of costs in respect of the said conveyance for taxation. It is this suit that the respondent sought to strike out on the grounds that the same was incompetent. An issue that arose during the hearing of the application to strike out the suit was whether the applicant had *locus standi* to agitate on the costs that the respondent had charged in respect of the conveyance transaction. Another issue that arose for determination is whether the applicant can resile from the professional undertaking that he had given on the ground that part of the terms of the professional undertaking that he had given was disagreeable to him. It is imperative that the court sets out the definition of what constitutes a professional undertaking. **Halsbury's Laws of England, 4th edition re-issue, volume 44 (1)** at page 223 note 1 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."*

There is another 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."

In **Naphatali Paul Radier v David Njogu Gachanja t/a D. Njogu & Company Advocates [2006] eKLR** Waweru J held that a professional undertaking was enforceable even if it did not constitute a legal contract. At page 6 of his ruling, Waweru J emphasized the importance of an advocate, as an officer of the court, to honour a professional undertaking that he has given. He had this to say:

"*I hold that the defendant is indeed obliged in law as an officer of the court to honour that professional undertaking. An undertaking given by an advocate is personally binding upon him and must be honoured. Failure to honour an undertaking is prima facie evidence of professional misconduct. This court has the power to enforce the professional undertakings of advocates, a power that the court will not hesitate to exercise in appropriate cases. This is such appropriate case. In the case of* ***KENYA COMMERCIAL BANK vs ADALA [1983] KLR 467****, the Court of Appeal held:*

1. The courts have an inherent power to commit an advocate for breach of an undertaking. The court has jurisdiction over an advocate for breach of an undertaking on the basis that the order sought seeks the court to exercise its punitive and disciplinary power to prevent a breach of duty by an officer of the court, which is quite distinct and separate from the client's legal right…

2. The purpose of the punitive and disciplinary powers of the courts' jurisdiction over advocates is not (to enforce) legal rights, but (to enforce) honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Cap.16."

The Court of Appeal **in Kenya Reinsurance Corporation vs V. E. Muguku Muriu t/a V. E. Muguku Muriu & Co. Advocates CA Civil Appeal No.48 of 1994** (*unreported*) deprecated the conduct of an advocate who had given an undertaking but later chose to give another interpretation to the terms of the undertaking with a view to avoiding being held liable to honour the undertaking. At page 4 of its judgment, the Court of Appeal observed as follows:

"*What the respondent advocate did was to bring in the issue of alleged disputes between his client and the appellant corporation to qualify his undertaking. But we do think that is right. Having given a solemn professional undertaking to pay a certain sum of money an advocate is bound by the same and he cannot resile therefrom. We hold that the undertaking given by the respondent advocate was unambiguous, unequivocal and binding on him. An advocate cannot, after giving such an undertaking, qualify the same on account of accounting disputes between the parties."*

It is therefore evident that once an advocate gives a professional undertaking that is on terms that are unambiguous and unequivocal, he has no choice but to honour it. Such an advocate cannot give an excuse regarding a pre-existing dispute of his client to avoid being held liable on the professional undertaking that he has given. It is trite that a professional undertaking is a separate contract between the advocate giving the undertaking and the person to whom the undertaking is given. It is not dependent on the performance of the contract or agreement that necessitated the giving of the undertaking. The underlying agreement may be frustrated, but if it is established that consideration passed pursuant to the professional undertaking given, then the advocate giving the undertaking has no option but to honour the undertaking. He is bound by it and cannot resile from it, whatever the merit of the dispute between such an advocate and the person to whom he gave the undertaking to.

In the present suit, it is evident that the applicant is out of order in seeking to avoid liability in respect of the professional undertaking that he gave. The terms of the professional undertaking were unambiguous and unequivocal. The professional undertaking was not dependent on the subsequent quantification of the legal fees that ought or should be paid to the respondent. Whether the respondent had overcharged the applicant's client is not an issue here. The issue is whether the applicant gave a

professional undertaking which should be honoured. **Section 50(1)** of the **Advocates Act** is of no assistance to the applicant in his quest to avoid being held liable on the professional undertaking that he had given. The applicant entered into an agreement with the respondent, independent of the underlying contract between the bank and Kataka. The issue as to whether the respondent overcharged Kataka is an issue that can only be litigated by Kataka himself.

The applicant lacks the requisite *locus standi* to challenge the amount demanded by the respondent as their legal fees that was the subject of the professional undertaking. The applicant admitted that there exists no advocate-client relationship between himself and the respondent. The applicant's position in the present suit is no better than that of a busybody. It is trite that for any litigant to file suit in court, he must establish or satisfy the court that he has suffered an injury or he has a grievance which ought, either to be compensated or remedied by an order of the court. In the present suit, the applicant did not place any evidence before this court that he suffered any injury pursuant to the professional undertaking that he had given. He could not have filed this suit on behalf of his client. He cannot say that he would suffer any loss if he honours the professional undertaking that he gave to the respondents. The said sum of Kshs.450,000/= is in his custody. It is not his money

There is no legal reason why the applicant should retain possession of the same under the frivolous pretext that he had subsequently discovered, after the sum was paid to him by the purchaser's advocate, that the respondent had overcharged his client. The applicant's conduct can only be described as dishonest. If the court were to accept the premise of the applicant's suit, then it would mean that professional undertakings given by advocates would not be worth the paper they are written on. This is due to the fact that there would be possibility that such advocates may choose not to honour the undertaking given on frivolous and spurious grounds, yet the other party had acted to his detriment pursuant to such an undertaking. I think an advocate is estopped from denying liability on the terms of a professional undertaking upon it being established that the terms of the same were clear. The applicant lacked *locus standi* to mount this suit.

The respondent's application to strike out the suit has merit and is hereby allowed. The applicant's suit, having been filed without jurisdiction, is frivolous, vexatious and an abuse of the due process of the court. The applicant's suit is hereby struck out with costs to the respondent.

DATED AT NAIROBI THIS 29TH DAY OF JULY 2009

L. KIMARU

JUDGE