



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

**Civil Case 588 of 2006**

**JAMES MURIMI GITHINJI**

**(Practicing as GITHINJI KIMAMO & CO. ADVOCATES) ..... PLAINTIFF**

**VERSUS**

**JOHN NGURE MBUGUA**

**(Practicing as NGURE MBUGUA & CO. ADVOCATES) ..... DEFENDANT**

**JUDGMENT**

**1: Procedure**

1. The Civil Procedure Rules provides for procedures under the Advocates Act Cap.16 in which a party may come to court.
2. The rules are contained in Order LII with emphasis on rule 10 Civil Procedure Rules that requires an Originating Summons to be filed. Under this rule the Originating Summons shall be made returnable for a fixed date before a judge in chambers and; unless otherwise directed shall be served on all parties at least seven clear days before the return date.
3. Directions to this effect was issued on 24 January 2007 (Mutungi J). No hearing was held on the returnable date and or the matter was stood over generally.
4. When the matter was next to court on the 4 June 2008, the respondent sought leave to have his client served with the application. The direction were taken again directing that the clients of both advocates attend court on the 17 June 2008 being the new returnable date. They did not appear.
5. The rules provide further that:-  
  
“No appearances need be entered to the summons and no affidavit in reply need be filed and all parties may be heard without entering an appearance.”
6. The respondent filed a reply to the application under Order LII Civil Procedure Rules.

II: Background

7. The basis of this application is the failure of an advocate giving an undertaking.

8. The clients:-

Stanley Muhuhe Kamau the vendor, herein

represented by M/s Githinji Kimamo & Co. Advocates in the sale transaction

And

Isaac Kamau Guchayo the purchasers herein

represented by M/s Ngure Mbugua & Co. Advocates in the sale transaction

who entered into a sale agreement to sell/purchase land parcel known as Nairobi/Block 74/197 for a term of 98 years and 9 months from 1<sup>st</sup> day of April 1978 measuring 0.0147 hectares.

9. The agreed consideration was for a total sum of Ksh.3.7 million. It is not disputed between the parties that the purchaser paid Ksh.370,000/- on 19 November 2005, being 10% of the purchase price. It was agreed that Ksh.3.330.000 being the balance due would be paid as follows:-

a) Ksh.630,000 at the execution of the agreement.

b) The balance of Ksh.2.7 million to be paid before the expiry of 90 days from the date of execution [of the sale agreement] to the vendors advocate on fulfillment of the condition:"

i) The purchasers advocate

M/s Ngure Mbugua & Co. shall give to the vendors advocate M/s Githinji Kimamo & Co. Advocates a written undertaking to the effect that:-

9.1 The vendors advocates shall give to the purchasers advocate the title document namely, the original certificate of lease upon execution of [the agreement].

9.2. That purchaser shall deposit the balance of the purchase price in the sum of Ksh.2.7 m with his advocate.

8.3. The purchasers advocate shall release the balance of Ksh.2.7 million to the vendors advocate on or before expiry date of 90 days from the day of execution and upon receiving the following from the vendors:

a) \_\_\_\_\_

b) \_\_\_\_\_

c) \_\_\_\_\_

10. All the parties abided by the agreement entered except a sum of Ksh.200,000/- which was not paid to the advocate for the plaintiff/applicant.

## II: The Dispute

10. John Ngure Mbugua (Practicing as Ngure Mbugua & Co. Advocates) gave an professional undertaking to James Murimi Githinji (Practicing as Githinji Kimamo & Co. Advocates) in respect of the balance sum of Ksh.2.7 million that was out standing at the execution of the sale agreement.

11. The advocate admitted that the purchaser, his client had deposited with him a sum of Ksh.2.5 million in four post dated cheques payable. He promptly remitted cheques to the vendor personally. It was an understanding between the purchaser and himself that the balance of Ksh.200,000/- would be released to him.

12. The registration exercise was embarked on. The purchaser not only registered the documents himself but went further to register a change with Barclays Bank of Kenya. The purchaser Isaac Kamau Guchayo failed to commit the balance of Ksh.200,000/- due and owing to the vendor nor to his advocate.

13. The argument put forward by the advocate for the purchaser is that he correctly gave an undertaking to pay Ksh.2.7 million. An undertaking is a promise that the sum an advocate is required to be remitted would be so remitted at the time required.

14. It is therefore prudent that before an undertaking is given by the other party, the advocate giving such undertaking must ensure that the client has paid him the full sum that the undertaking is required.

15. In this situation the purchaser remitted all the sum except Ksh.200,000/-. The advocate state he only received Ksh.2.5 million and although his undertaking was for Ksh.2.7 million he should not be made to pay the Ksh.200,000/-, to the applicant, but the law should hold the purchaser Isaac Kamau Guchayo responsible and liable for failure to pay the said sum. He cannot hide behind the law firm of M/s Ngure Mbugua & Co. Advocates, that originally gave the undertaking.

16. The advocate further argued that this application ought to have gone for direction under Order XXXII rule 8a, 12 Civil Procedure Rules where the court can direct the suit be heard by way of a plaint or viva voce evidence. If it did, then the advocate would have had time to enjoin the said purchaser Isaac Kamau Guchayo in order that judgment may be entered against him. As it stands, the moment the advocate ought not be held liable for the failure of his client from paying Ksh.200,000/-.

17. In the advocate for the applicants' submission, a person who gives professional undertaking should have been in funds.

18. The respondent advocate states he cannot remit what he does not have?

## II: Opinion

19. The definition of an undertaking has been described from the Guide to the Professional Conduct Of Solicitors 7<sup>th</sup> edition (1996) as follows:-

“An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by:

- a) A solicitor or a member of a solicitors' staff in the course of practice or
- b) A solicitor as solicitor, but not in the course of practice”.

20. “An undertaking is personally binding on a solicitor. It may be given orally or in writing and need not necessarily include the word “undertake.”.

21. “There is no obligation on a solicitor to either give or accept an undertaking” “although there is a duty to act in a clients interest this does not imply a duty to assume or underwrite a clients financial or other obligations”.

22. Before a solicitor gives an undertaking he must consider whether he will be able to implement the undertaking before giving it. Regard to all eventualities must be taken into account which might effect the solicitors ability to perform the undertaking.

23. In Kenya the position of a solicitor has been fused with that of barrister and we have come up with the description of an Advocate.

24. I would therefore apply the same standard to an advocate in Kenya. This means that once an advocate gives an undertaking he is “bound” to it. The full sum of the undertaking, if it involves the payment of money, requires to be discharged by paying the sum due “out of the advocates own resources or the resources of their parties.” “Even if the client is declared bankrupt the undertaking would not be discharged”.

25. None of the parties referred to me any case law. I have nonetheless come across case law where the courts have granted the application of the enforcement of an undertaking.

26. The case law of

i) Kenya Commercial Bank

v

Adala

(1983) KLR 461

ii) N. Paul Radier

v

David Njogu Gachanja

t/a D. Njogu & Co. Advocates

iii) Oraro & Co. Advocates

v

S.M. Kivuva

Hccc 539/03 OS

26. My opinion and findings herein is that the respondent advocate on the issue of the Originating Summons is that this matter falls under order LII and not under Order XXXVI Civil Procedure Rules. Under Order LII Civil Procedure Rules you need not do the requirements as required such as entering appearance and filing a replying affidavit.

27. Order XXXVI Civil Procedure Rules provides for Originating Summons whilst Order LII provides for the procedure in which to come to court on issues arising under the Advocates Act, with exception.

28. I reject the argument put forward that this matter should have been brought by way of a plaint in order that the respondent may enjoin a third party. There is no provision in which the client would be compelled to be enjoined to the application.

29. The law in my mind is clear on the issue. You give an undertaking only when you are in funds. You then are bound by that undertaking personally. If perchance, as an advocate you have given an undertaking without being in funds, you must make good the sum due out of your own resources and or your partners' resources.

30. The respondent/advocate appear to be a sole practioner. He has to therefore make good the sum of Ksh.200,000/- from his own resources and thereafter sue his client in a court of law together with his costs, for the refund of the said sum.

31. I enter judgment for the applicant/advocate against the respondent advocate in the sum of Ksh.200,000/- together with interest from the date of filing this application. That a period of 90 days be provided in which to comply with my orders.

32. I award costs to the applicant/advocate.

DATED THIS 24 DAY OF JUNE 2008 AT NAIROBI.

**M.A. ANG'AWA**

**JUDGE**

J.M. Githinji instructed by Githinji Kimamo & Co. Advocates for the plaintiff/applicant – present

A.J. Gatundu instructed by Ngure Mbugua & Co. Advocates for the defendant/respondent