



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT (OS) 84 OF 2005**

**DANIEL MUEMA KIVUVA:::APPLICANT**

**VERSUS**

**VICTOR VINYA MULE:::RESPONDENT**

***IN THE MATTER OF AN APPLICATION TO ENFORCE AN UNDETKING BY AN ADVOCATE***

**(UNDER O.LII RULE 1(b) & 2 CPR, S 3 & 3A. S 63 (b) & (e) C.P.A.)**

**RULING**

This Originating Summons dated 14/9/2005 was taken out against an advocate of the High Court, Mr. Victor Vinya Mule, to enforce a professional undertaking which he is alleged to have given but did not honour.

The relief's sought were:-

- a) That this Honourable Court do enforce the Respondent's undertaking dated 23/1/2003 to pay the costs of the applicant in Machakos Senior Principal Magistrate Civil Case Nos. 1010, 1011 and 1012 of 2002 which were all against one Daniel Muema Kivuva, within such a reasonable time as the court would grant.
- b) That without prejudice to the foregoing, the court to direct the Respondent to pay all relevant costs arising at all relevant occasions.
- c) That in default by the Respondent to obey the orders of this court, the court to issue/orders or warrants of arrest and committal to civil jail of Respondent, for a period not exceeding six months.

The facts behind this application are that the applicant was erroneously sued by three different plaintiffs in Machakos Principal Magistrate Civil Cases No. 1010, 1011 and 1012 of 2002 through the Respondent as the advocate for those plaintiffs. The applicant after some struggle, finally successfully obtained court orders in each of the cases, discharging him from and joining in one Nason Ndangili as the defendant in

the place of the applicant who had all along protested that he was erroneously sued. The lower court after making the above orders, in its wisdom also ordered the Respondent not to serve fresh summons to enter appearance in the three cases until the defendants had paid to the applicant, his costs in the cases, assessed at Kshs. 10,000/= in each case, totalling Kshs. 30,000/=. Thereafter the applicant appears to have in default of settlement, applied for execution to recover the said sum of Kshs. 30,000/=. The respondent herein, Mr Victor Vinya Mule Advocate who was behind the filing of the three cases and who despite protests by the applicant, had persistently fixed the cases for hearing even after a consent order to discharge and replace the applicant had been made, stepped in to slow down the execution proceedings. He wrote and gave to the applicant's advocates Muema Kitulu and Company Advocates, a professional undertaking in the following terms:-

**“ Kindly do withhold execution proceedings against the plaintiffs, upon our unrevocable professional undertaking to pay all the costs and agreed taxed/or reasonable auctioneers charges on or before 28/2/2003...” (Annexure “DMK9”)**

It would appear that the Respondent issued its Barclays Bank cheque No. 000095 dated 28/2/2003 for Kshs. 30,000/= to strengthen his professional undertaking.

Undenied facts shows that the applicant through Muema Kitulu & Company Advocates, called off the execution after accepting the professional undertaking. When he however, presented the cheque on 28/2/2003, it was dishonoured on the basis that the Respondent's bank accounts had been closed. The respondent was accordingly informed of the dishonour of the cheque on 3/3/2003 but every effort thereafter to recover the sum of Kshs. 30,000/= failed to materialise, both from the original plaintiff and from the Respondent's Advocate. This then is what led to the filing of this Originating Summons. These are the facts summarised in the supporting affidavit to this application.

Mr. Victor Vinya Mule, the respondent herein, filed his replying affidavit sworn on 4/10/2005. Stating that he is an advocate of this court and the respondent herein, he opined that the orders sought in this application, cannot be availed because they are unlawful and are a contravention of the Civil Procedure Rules. He argued that this application is frivolous, vexatious and completely incompetent. While not denying issuing the relevant unrevocable professional undertaking and the dishonoured cheque for Kshs. 30,000/=:, he expressed the view that it was his client, the plaintiff, who should be answerable and not himself. Then he added that he did not know that the cheque had been dishonoured by his bankers. He concluded by saying that the applicant had rightly applied for execution to recover the money from the original plaintiff although he added that he was aware that such execution was still pending.

The Respondent did not attend court to personally defend this application but there is evidence that he was properly served and that a valid return appears in the file.

I have carefully considered the material before me. I accept the facts as deponed and recorded by the applicant. That is to say, the Respondent gave unrevocable professional undertaking backed by his firms cheque –No.000095 to be cashed on 28/2/2003. I accept that when the cheque was presented for payment, it was dishonoured because the Respondent's account had been already closed. This default in my view, dishonoured and broke the professional undertaking given by Mr. Victor Vinya Mule, who is an advocate of the High Court of Kenya. I am as well satisfied that when he gave the cheque knowing that he had closed the bank account, he knew the cheque would be dishonoured and his professional undertaking to pay the sum of Kshs. 30,000/=:, would be dishonoured and broken. I am finally satisfied that Mr. Mule was aware from the beginning or became aware soon after, that the cheque was dishonoured. His attempt to deny this knowledge or awareness is futile and is unbelievable. It is rejected with the contempt it deserves.

Having come to the above conclusion the next issue is to determine the consequences of the Respondent's breach of his professional undertaking.

In this case there is evidence that the applicant who is entitled to the sum of Kshs. 30,000/=:, is still owed the money despite the attempts to recover same through executions. This much the Respondent himself

admitted. It is also clear from the reliefs sought herein that the applicant is trying to recover the outstanding amount. The question that arises immediately is whether this court can be used to recover money. The second issue is whether this court has jurisdiction to punish the Respondent for failing to pay the sum aforementioned after professionally undertaking to do so.

**In Kenya Commercial Bank vs Adala [1983] K.L.R, 467, Hancox**, J faced a similar situation. In that case the advocate actually received the amount of money in respect of which he had given a professional undertaking but failed to pay it to the firm it was intended to be paid. In this case before me it is not clear whether Mr. Mule received the sum of Kshs. 30,000/= from his clients.

There is not doubt in my mind however, that this court has power to enforce disciplinary power to prevent advocates who are its officers from breaking their professional disciplinary code of ethics. Such power or jurisdiction in my opinion would be both supervisory where its exercise prevents breach of professional discipline. It would on the other hand be punitive where breach of such discipline leads to a jail sentence or a fine ordered by this court. It seems from the legal authorities also that the jurisdiction of this court to discipline its professional officer for breach of ethics, is a discretionary and unlimited within the known principles of exercising courts discretion.

Like in the **Adala** case, cited above, the applicant in this case has not recovered the sum of money the subject of this suit. However, I have the view that the court has power and discretion, to order the respondent as a disciplinary measure to fulfil his professional undertaking within the powers derived under Section 57 of the Advocates Act, even if such order would in addition, assist the applicant in pursuance of his separate legal right to recover his debt. The court can then be said to be performing two separate duties – the first one of disciplining its errant officer; and the second, of assisting a party to recover his debt. It seems however, that the main purpose of this court's discretion is for the purpose of disciplining its officers so that the second purpose, which assists a party to recover, is merely ancillary to the first one.

In this case before me, Mr. Mule is in breach of his professional duty for failing and/or refusing to honour his professional undertaking. This court has inherent power to commit or punish him for the said breach. The order sought seeks the court to exercise such punitive and disciplinary power to enforce an honourable conduct among advocates as officers of this court. The fact that the applicant herein may also recover his money by execution or through other means of proceeding will not bar this court from exercising the court's power. Nor will the fact that the party or the applicant has already recovered his decree. But as in the **Adala** (supra) the court, before granting an order against the errant advocate, will need to see that the advocate will not be oppressed. It will also probably be influenced in favour of the advocate if the advocate has already cleared the debt.

Taking into account the above factors I have come to the conclusion that the respondent Victor Vinya Mule Advocate, will be given a little breathing space to enable him honour his breach.

## **ORDERS**

1. The respondent to pay the sum of Kshs. 30,000/= with interest and arising taxed costs within a period of 30 days from the date of this order.
2. In default of such settlement the respondent to serve jail sentence of six months after a certificate of default by this court is issued.
3. Costs of this application to the applicant, the same to be agreed upon or taxed.

Dated and delivered at Machakos this 30<sup>th</sup> day of **January, 2007**.

**D.A. ONYANCHA**

**JUDGE**