



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 773 of 2003

EQUIP AGENCIES LIMITED PLAINTIFF

VERSUS

CREDIT BANK LIMITEDDEFENDANT

RULING

This is a Chamber Summons application dated 11th December, 2006 by **M/S Nyachae & co. Advocates** for the Defendant/Applicant. The application is brought under Order 52 rules 7 (1)(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application seeks that:-

(1) That M/S Gichuki King'ara & Co. Advocates, do honour their professional undertaking of 5th October to M/S Nyachae & Co. Advocates and do forthwith pay to the Applicant the outstanding balance in the sum of Kshs.993,545.00 being party and party costs as taxed in the bills of costs on the following suits

(a) HCCC No.1265/2002 and

(b) HCCC No.773/2003 of the same parties

(2) That upon being so ordered, a decree for the costs do issue against the firm of M/S Gichuki King'ara & Co. Advocates and in favour of M/S Nyachae & Co. Advocates.

The thrust of the application is based on an undertaking dated 5th October, 2005, which was addressed to the firm of **Nyachae & Co. Advocates** by **M/S Gichuki King'ara & Co. Advocates**. The letter of undertaking referred to two matters, which involved the same parties. The letter of undertaking stated;

“We humbly give our undertaking to pay the taxed costs in the above matters which shall be over and above the sum of Kshs.1,646,503/80 already paid to the defendant’s counsel.

The said costs shall be paid within 60 days of taxation and/or reference on the said taxation. This undertaking is given as a condition for the discharge and release of titles to L.R. No.Eldoret Municipality Block 10/34 to our firm”.

It is the contention of the Applicant that the costs of the two suits were taxed and the 60 days for payment is over. The cumulative costs of the two matters was Kshs.2,924,383.60 and after certain payments the balance outstanding is Kshs.993,545/=. The applicant annexed the two certificate of taxation as evidence of taxation. It is also alleged that the respondent has despite demand failed, refused and/or neglected to honour the undertaking to pay the costs. In paragraph 11 of the supporting affidavit **Mr. Charles Nyachae Advocate** states;

“That the Plaintiff has already benefited from the terms of the undertaking by M/S Gichuki King’ara Advocates, which was intended to be and has been relied upon by inter alia having the relative charge discharged and title released”.

Mr. Ashitiva Advocate submitted that the application is well merited and should be allowed with costs. He stated that there is no replying affidavit and no grounds of opposition to the application, therefore he urged me to allow the application.

The application was opposed by **Mr. Simiyu** learned counsel for the Respondent, who relied on a preliminary objection dated 27th February, 2007. He submitted that the application offends the provisions as it is purportedly brought under provisions of Order 52 Rule 7 which deals with personal undertaking from an Advocate as opposed to an undertaking from a firm of Advocates. The Respondent contended that they are not a party to this suit, therefore no order can be issued against it without them being joined as a party to this proceedings. And the costs were awarded as against the Plaintiff not against its Advocates, hence the said costs can only be claimed from the said Plaintiff.

Mr. Simiyu Advocate further submitted that the kind of undertaking contemplated is personal and that Order 52 does not contemplate an undertaking by a firm of Advocates. He also pointed that the undertaking was made in other suits i.e. HCCC No.1256/2002 and 173/2003, which are different from the present suit.

In reply **Mr. Ashitiva** Advocate submitted that the dispute revolves around HCCC No.1265/2002 and 773/2003. and that there was an accidental error or omission in the way the said cases were typed in the undertaking letter.

The question for me to determine is whether there is a professional undertaking capable of being enforced against the Respondent. In my understanding an undertaking is usually given to ease and smoothen the path of transactions carried out by Advocates. It is a convenient method or tool to circumvent delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between Advocates. It is a contract between Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another.

In my humble view an undertaking is a promise to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an Advocate either personally or through the name of the firm he usually practices under.

It is my position that breach of professional undertaking can result in lack of mutual or cordial trust between Advocates. And invariably puts the administration of justice into disrepute. The Advocates by relating together through a professional undertaking are officers of the court, therefore as far possible it is mandatory for them to respect their words for the benefit of mutual continuity of their respective relationship.

In **HCCC 2721/1976 Kenya Commercial Bank v Adala**, Hancox J held

“1) The courts have 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 right. Therefore the court even if it has no right, it has jurisdiction to make an order in exercise of its disciplinary jurisdiction.

2) The purpose of the punitive and disciplinary powers of the court’s jurisdiction over Advocate is not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the court by virtue of Section 57 of the Advocates Act Cap 16 Laws of Kenya”.

It is not the business of the court to oppress an Advocate for no reasonable cause. The court is always reluctant to degrade an Advocate unless the circumstances shows that his conduct is dishonourable as an officer of the court. It is for that reason that the court would exercise its punitive and disciplinary powers to ensure that Advocates conduct themselves in a manner that pleases the eyes of justice. It is within the powers of the court to prevent a breach of duty by an Advocate, especially when he has given an unequivocal undertaking to another Advocate. As a matter of good practice relationship between Advocates must be resolved between themselves without recourse to the courts. However, when the dispute lands before court, the court would enforce that which is honourable among the officers of the court. The court would not shy away from exercising its punitive and disciplinary jurisdiction to ensure compliance of the promise given by an Advocate and acted upon by another Advocate.

The enforcement of a professional undertaking is provided for under specific procedure of the Civil Procedure Rules. Order 52 Rule 7(1) states:

“An application for an order for the enforcement of an undertaking given by an Advocate shall be made-

- a) if the undertaking was given in a suit in the High Court, by summons in chambers in that suit or**
- b) In any other case, by Originating Summons in the High Court”.**

The present application is by Chamber Summons and it is made under the present suit. The undertaking was made by **M/S Gichuki King’ara & co. Advocates** and it was made to the present Applicant. The firm of **Gichuki King’ara & Co. Advocates** undertook to pay the taxed or agreed costs within 60 days either after taxation or agreement. It appears the Respondent had sufficient time within which to honour their undertaking. In my view an undertaking can either be given by an Advocate personally or by a firm of Advocates. In the instant case the undertaking was given by a firm practicing in the names and style of **Gichuki King’ara & Co. Advocates**. It was made out to **M/S Nyachae & Co. Advocates**. The consideration under condition was for the discharge and release of titles to L.R. No.Eldoret Municipality Block 10/34 to the Respondent.

I have no evidence to show that the said consideration was not fulfilled by **M/S Nyachae & co. Advocates**. It means the undertaking was based on the discharge and release of title No.10/34. The Respondent gave the undertaking on instructions of its clients who derived beneficial interest from that undertaking. The applicant released titles on consideration of its costs being paid by the Respondent. The agreement and or undertaking between the two firms of Advocates was specific and was based on known issues. The applicant played its role but the Respondent is reluctant to discharge its professional obligation towards the Applicant. It is sad that the court is made to decide such professional obligation between honourable members, who are officers of the court.

The Applicant in my view did reasonably place reliance upon the undertaking given by the Respondent. The undertaking made out by the Respondent is a legal contract and the consideration that passed therefrom was the release and discharge of a particular document. It is my position that there is an unequivocal declaration of intention addressed to the firm of **Nyachae & Co. Advocates** by the Respondent. It does not matter whether the undertaking was made by a firm of Advocates trading as **Gichuki King’ara & Co. Advocates**. It is enforceable against all persons trading under that name or in that firm. I think the Respondent as a firm of Advocates is duty bound to honour their professional undertaking. The Respondent undertook in their capacity as a firm of Advocates to pay the costs of the applicant upon taxation and after 60 days, which was not done.

In **HCCC No.582/2003 Naphatali Paul Radier vs David Njogu Gachanja t/a D. Njogu & Co. Advocates** Waweru J held:

“I hold that the defendant is indeed obliged in law as an officer of the court to honour the 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”.

The position of the law is that an Advocate has a professional duty and or obligation to honour his undertaking unless the circumstances dictates otherwise. In order to ensure smooth and reliable relation between Advocates, it is the fundamental and cardinal obligation of Advocates to stand by their words given as an undertaking. It can be disastrous for the administration of justice if Advocates failed to honour their undertaking. The foundation and fabric of good Advocacy is that there must be mutual trust between Advocates. And the undertaking given by an Advocate must always be honoured. The trust of an undertaking given by an Advocate is what forms the fabric of good professional practice. It would be difficult if not impossible for Advocate to carry out their duty to each other and to the public, if an undertaking by Advocates becomes unreliable and unenforceable. Failure to honour professional consideration in my view amounts misrepresentation or fraud. The purpose of an undertaking is to achieve a desired goal of mutual trust. In the premises it is incumbent upon Advocates to always honour their undertaking unless there is a vitiating factor which the court is bound to consider.

In my view failure to honour an undertaking is not only a professional misconduct but a criminal conduct with intent to defraud. A honourable member must not first give an undertaking but when he gives, he must at all times endeavour to honour the same especially when it is given to a professional colleague. In this case it is not disputed that the firm of **M/S Gichuki King’ara & Co. Advocates** gave out an undertaking to the Applicant. There is no vitiating factors that were brought to my attention to discharge the undertaking.

From my evaluation of the facts of this matter, it is clear the issues of the undertaking was well known to the parties. While it is not my business to discipline Advocates, I think this is an appropriate case that requires my intervention to use the punitive powers of this court. It is my decision that the firm of **M/S Gichuki King’ara & co. Advocates** is liable to the Applicant for the professional undertaking given on 5th October, 2005. There is evidence part compliance with that undertaking by the Respondent by making substantial payments to the applicant. There is no appeal against the taxation that were carried in respect of the two suits.

In a letter dated 10th February, 2006, the Respondent alleges, that it had passed the two files to another firm of Advocates. In paragraph (2) of the said letter, the Respondent states:-

“Kindly therefore let us have a copy of the said Bill of Costs as well as the certificate of taxation to enable us to deal with your claim”.

The information and documents requested was supplied through a letter dated 6th March, 2006 by the Applicant. It is therefore clear in my mind that the Respondent had ample opportunity to make good its professional undertaking. I am satisfied that there is uncontroverted evidence to demonstrate that the firm of **M/S Gichuki King’ara & Co. Advocates** gave out an undertaking to the Applicant. The offer was accepted and acted upon by the applicant. The Respondents and its clients derived some beneficial interest from that undertaking. The consideration was fulfilled and availed to the Respondent. The fees can be rightly recovered from the Respondent as they undertook to pay to the Applicant.

Order: The application dated 11th December, 2006 is allowed in terms of prayer 1 and 3 with costs.

Dated and delivered at Nairobi this 28th day of February, 2007.

M. A. WARSAME

JUDGE