



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 582 of 2003**

**NAPHATALI PAUL RADIER.....  
PLAINTIFF**

**VERSUS**

**DAVID NJOGU GACHANJA CARRYING ON BUSINESS AS  
D. NJOGU & COMPANY ADVOCATES.....  
.....DEFENDANT**

**J U D G E M E N T**

Delay in the preparation and delivery of this judgment has been occasioned by my recent illness and hospitalization. The delay is regretted.

In this originating summons dated 18<sup>th</sup> September, 2002 the Plaintiff, NAPHATALI PAUL RADIER, sought the following orders:-

1. That the Defendant, DAVID NJOGU GACHANJA, carrying on business as D. Njogu and Company, Advocates do honour his irrevocable and unconditional undertaking dated 2<sup>nd</sup> August, 2002 and pay the Defendant the sum of KShs.13,050,000/00.
2. That the Defendant do refund to the Plaintiff monthly rent of KShs.40,000/00, which the Defendant has been receiving from the premises sold, from 30<sup>th</sup> August, 2002 until payment in full.
3. That the Plaintiff is entitled to interest on the outstanding sums at 18% per annum until payment in full.
4. That in default of payment as above, an order be granted for the cancellation of the transfer of Land Reference Number 1160/694 (original number 1160/54/3) under section 65 (1) (I) of the Registration of Titles Act, Cap. 281.
5. That the Respondent do bear the costs and interest of this application.

The originating summons is stated to be brought under Order 36, rules 3 and 7, and also of the Order 52, rule 7 of the Civil Procedure Rules. From the way the issues to be determined were framed by consent, as shall be seen shortly, it is common ground that the originating summons is essentially brought under rule 7 of Order 52 aforesaid for enforcement of an advocate's professional undertaking. I shall proceed upon

that basis.

By consent order recorded on 27<sup>th</sup> October, 2004 the documents annexed to the affidavit sworn in support of the originating summons, and one document annexed to the replying affidavit, were admitted in evidence without the need to call the makers thereof. These documents are:-

- (i) *Exhibit P1: Agreement for sale dated 10<sup>th</sup> April, 2002.*
- (ii) *Exhibit P2: Letter dated 10<sup>th</sup> April, 2002 from Defendant's firm to Plaintiff's advocates.*
- (iii) *Exhibit P3: Letter dated 5<sup>th</sup> July, 2002 from Plaintiff's advocates to Defendant's firm.*
- (iv) *Exhibit P4: Letter dated 8<sup>th</sup> July, 2002 from Defendant's firm to Plaintiff's advocates.*
- (v) *Exhibit P5: Letter dated 31<sup>st</sup> July, 2002 from Plaintiff's advocates to Defendant's firm.*
- (vi) *Exhibit P6: Letter dated 2<sup>nd</sup> August, 2002 from Defendant's firm to Plaintiff's advocates.*
- (vii) *Exhibit P7: Transfer of land dated 22<sup>nd</sup> July, 2002.*
- (viii) *Exhibit P8: Letter dated 3<sup>rd</sup> April, 2003 from Plaintiff's advocates to Defendant's firm.*
- (ix) *Exhibit P9: Letter dated 4<sup>th</sup> April, 2003 from Defendant's firm to Plaintiff's advocates.*
- (x) *Exhibit DN1: Letter dated 6<sup>th</sup> August, 2002 from Plaintiff's advocates to Defendant's firm.*

It was also directed by consent that one Miss LYNETT OKIRO, an advocate, and the Defendant, do give oral evidence at the hearing.

When the suit came up for hearing on 3<sup>rd</sup> March, 2005 prayers Nos. 2 and 4 of the originating summons were by consent marked withdrawn with costs to the Defendant. That left only prayers 1, 3 and 5 for determination. The following were agreed to be the issues to be determined.

1. Whether there was a professional undertaking capable of being enforced.
2. If so, whether the Defendant should honour the undertaking.
3. Whether interest should be payable upon the sum of the undertaking.

The aforesaid Miss Lynett Okiro testified for the Plaintiff as PW1. The Defendant never testified, his application for adjournment having been refused for reasons recorded. I have considered the testimony of PW1. I have also read all the documents produced in evidence. Finally, I have considered the written submissions filed on behalf of the parties. The main issue in this suit is whether or not there was a professional undertaking by the Defendant capable of being enforced. It is to be noted that the Defendant purchased the property in question in his personal capacity as **DAVID NJOGU GACHANJA**. It was not his firm, **M/s D. NJOGU & COMPANY, ADVOCATES**, which was purchasing the property. This is clear from the agreement of sale Exhibit P1. But his firm acted for him in the transaction, and all relevant correspondence is by the firm acting on his behalf as purchaser. But since the firm was the Defendant's trade name, in essence he was acting for himself.

What is a professional undertaking? "**The Encyclopedia of Forms and Precedents**", 5<sup>th</sup> Edition, Volume 39, defines it as follows:-

***"An undertaking is any unequivocal declaration of intention addressed to someone who reasonably***

*places reliance on it and made by:*

- o *a solicitor in the course of his practice, either personally or by a member of his staff; or*
- o *a solicitor as “solicitor”, but not in the course of his practice,*

*under which the solicitor (or in the case of a member of his staff, his employer) becomes personally bound. An undertaking is therefore a promise made by a solicitor, or on his behalf by a member of his staff, to do or to refrain from doing, something. In practice undertakings are frequently given by solicitors in order to smooth the path of a transaction, or to hasten its progress and are a convenient method by which some otherwise problematical areas of practice can be circumvented.”*

The same definition is to be found in “**The Guide to the Professional Conduct of Solicitors**”, 7<sup>th</sup> Edition.

From the above definition it can be seen that the Defendant could give a professional undertaking as an advocate, notwithstanding that he was purchasing the property in his personal capacity. It is the Plaintiff’s case that the Defendant’s professional undertaking is contained in his letter dated 2<sup>nd</sup> August, 2002 (Exhibit P6) which is in the following words:-

*“We refer to your letter of 31<sup>st</sup> July, 2002 and note what you say.*

*The funds to complete this transaction is (sic) invested on 14 days notice and request you to allow that period.*

*We therefore hereby give you our professional undertaking to pay to you or in the manner in which you shall direct, the sum of KShs. Thirteen Million and Fifty Thousand (KShs.13,050,000/00) within fifteen (15) days of receipt from you of confirmation that the property has been transferred to our client.*

*Please proceed to complete registration and revert to us.”*

Exhibit P6 was written in response to the letter dated 31<sup>st</sup> July, 2002 (Exhibit P5) addressed to the Defendant’s firm, which stated:-

“.....

*We confirm that we have had the Transfer executed by the vendor and that we have also stamped it. We have now renewed the rates clearance certificate and are lodging the transfer for registration.*

*To enable us forward to you the registered transfer and original title document please give us your professional undertaking to pay to us, or in the manner in which we shall direct, the sum of Kenya Shillings Thirteen Million and Fifty Thousand (13,050,000/00), which sum shall be payable within seven (7) days of receipt by you of our confirmation that the transfer has been registered.”*

However, the Defendant contends that there was no professional undertaking capable of being enforced for the following reasons:-

1. That there was no unequivocal declaration of intention addressed to the Plaintiff’s advocates.
2. That the Plaintiff’s advocates could not and did not reasonably place reliance upon the letter Exhibit P6.

In his submissions, learned counsel for the Defendant placed reliance upon the Plaintiff’s advocates’ letter dated 6<sup>th</sup> August, 2002 (Exhibit DN1) written in response to Exhibit P6. That letter is in the following

words:-

***“We refer to your letter of 2<sup>nd</sup> August, 2002 and to the subsequent telephone conversation held this morning between your Mr. Njogu and the writer.***

***As we informed you, we have now completed the registration of the transfer of the above property into your name. With regard to your request that we allow you a 14-day period of notice in which to settle the outstanding balance of the purchase price, we regret that our client is unable to grant you indulgence as, relying on the agreed completion date of 10<sup>th</sup> August, 2002, he had made a firm commitment to make a payment on another property next week.***

***We explained the situation to you and you agreed to immediately institute action to obtain the balance of the purchase price.***

***We have sought our client’s instructions with regard to the payee of the cheque and will revert to you shortly.”***

Learned counsel also relied upon the testimony of PW1 in cross-examination. That testimony was, in the material part:-

***“The Defendant in his letter of undertaking (Exhibit P6) undertook to pay the balance within 15 days of receipt of my confirmation of registration of the transfer.***

.....

***In response to the Defendant’s letter of undertaking (Exhibit P6) I wrote the letter dated 6<sup>th</sup> August, 2002 (Exhibit DN1). By that letter I rejected the request to settle the outstanding purchase price within 15 days as offered.***

***I do not recall receiving any other undertaking by Defendant. The undertaking contained in Exhibit P6 was unacceptable to our client.***

.....

***In the letter Exhibit DN1 I was in effect asking the Defendant to honour the terms of the contract (Exhibit P1) as the vendor had rejected the offer to pay the outstanding balance in 15 days contained in Exhibit P6.***

***I refer to Exhibit P8 and P9. In (Exhibit P8) I was demanding satisfaction of the contract.***

***Prayer No. 1 of the originating summons seeks to enforce the undertaking (Exhibit P6). This is the undertaking whose terms the vendor rejected.”***

It is the submission of the learned counsel for the Defendant that in view of the above testimony of PW1, together with the contents of the letter Exhibit DN1, there cannot be any enforceable undertaking as one of the terms of the letter Exhibit P6 was rejected by the Plaintiff.

The answer of the learned counsel for the Plaintiff to this submission is that, notwithstanding that the letter Exhibit P6 does not constitute an enforceable contract on account of one of the terms thereof having been rejected by the Plaintiff, nevertheless, there is an enforceable undertaking. He relied on a statement to that effect in **“The Encyclopaedia of Forms and Precedents”** already referred to. That statement is:-

***“Although consideration for the promise will often be present, an undertaking is enforceable even if it does not constitute a legal contract.”***

I respectfully agree with this statement of the law. There was a commitment by the Defendant to pay the balance of the purchase price. That commitment was also made orally as was stated in the letter dated 6<sup>th</sup> August, 2002 (Exhibit DN1). The Plaintiff relied upon that commitment and had the property transferred into the name of the Defendant. There may not have been agreement with regard to the time within which the balance of the purchase price had to be paid. The Defendant offered to pay it within 15 days. The Plaintiff wanted it paid within 7 days. I am sure that if the Defendant had tendered the money within the 15 days that he had offered, the Plaintiff would have gladly accepted it. As it happens, the Defendant has had more than three (3) years to pay the balance of the purchase price. He has not, yet the property was transferred to him. The main undertaking that the Defendant made in the letter Exhibit P6 was to pay the balance of the purchase price upon it being confirmed to him that the property had been transferred into his name. This confirmation was given to him. He was duty bound then to honour his undertaking as an advocate to pay the balance of the purchase price, even if outside the seven (7) days that the Plaintiff wanted it paid. The mere fact that the Plaintiff rejected the offer that the balance of the purchase price be paid within fifteen (15) days did not release the Defendant from his main undertaking to pay the balance of the purchase price. That is my finding.

It seems to me that by contesting this suit the Defendant is merely trying to delay or obstruct the course of justice. Justice demands that he pays to the Plaintiff, as he undertook, the balance of the purchase price for the property that the Plaintiff so graciously or foolishly agreed to transfer to him upon payment of only 10% of the purchase price. The Defendant's conduct, as an advocate, has been deplorable. This court will not countenance it.

I will now formally give my decisions on the issues as framed. The first issue was, whether there was a professional undertaking capable of being enforced. Yes, indeed there was such professional undertaking contained in the Defendant's letter dated 2<sup>nd</sup> August, 2002 (Exhibit P6). The second issue is, if there was such professional undertaking, whether the Defendant should honour the same. 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 third issue is, whether interest should be payable upon the sum of the undertaking. The Defendant has withheld the Plaintiff's money from August 2002. Justice demands that he now pays it with interest. As no particular rate of interest was contracted, I shall award interest at court rates.

In the result, I will give judgment to the Plaintiff in the following terms:-

1. The Defendant shall within thirty (30) days of delivery of this judgment honour his professional undertaking contained in his letter dated 2<sup>nd</sup> August, 2002 (Exhibit P6) by paying to the Plaintiff the balance of the purchase price, being KShs.13,050,000/00, together with interest thereon at court rates from the date of filing of this suit.
2. This case shall be mentioned on the.....day of March, 2006 for further orders as may be necessary.

3. The Plaintiff shall have the costs of this suit.

**Orders accordingly.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2006.**

**H.P.G. WAWERU**

**JUDGE**