



Mokoosio v Angela Mulwa t/a Mulwa & Partners Advocates & another (Miscellaneous Application E250 of 2023) [2024] KEHC 7241 (KLR) (Commercial and Tax) (14 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E250 OF 2023

FG MUGAMBI, J

JUNE 14, 2024

BETWEEN

MARTIN LEMAIYAN MOKOOSIO APPLICANT

AND

**ANGELA MULWA T/A MULWA & PARTNERS ADVOCATES 1ST
RESPONDENT**

HIMS HOMES LIMITED 2ND RESPONDENT

RULING

1. The application dated 7th June 2023 seeks the joinder of Hims Homes Limited (hereinafter HHL) as a 2nd respondent to these proceedings. The application is supported by the affidavit of Angela Mulwa, a director of HHL, sworn on 7th June 2023. The respondent argues that HHL is a crucial party to these proceedings and that the orders made by this court will affect HHL directly, as the issues in dispute relate to a Joint Venture Agreement (hereinafter the JV Agreement) to which HHL is a party.
2. The application is opposed by the applicant to the Originating Summons, Martin Lemaiyan Mokoosio on the grounds that the cause of action in this OS is a professional undertaking given by the respondent in her capacity as an advocate of the High Court of Kenya and has nothing to do with HHL or the JV Agreement. The respondent further argues that there is no cause of action against HHL and no relief is sought from them.

Analysis and determination

3. I have carefully considered the pleadings, submissions and evidence presented by the parties.



4. It is a fact that the applicant entered into a JV Agreement as a land proprietor with HHL as a developer to develop and sell houses. The sharing of sale proceeds was well stipulated in the JV Agreement. In addition to the applicant's share of proceeds, HHL through its director, the respondent, was advanced some monies by the applicant which was to be refunded using the proceeds from the sale of 2 of the houses.
5. The applicant's claim is based on professional undertakings issued by the respondent on diverse dates trading in the name of Mulwa and Partners Advocates. The dispute arises from the fact that despite having received the proceeds from the sale of the 2 houses, the respondent is yet to pay to the applicant's share of profit from the sales according to the JV Agreement and also to refund the monies lent to the respondent or return the completion documents.
6. The question as to whether HHL should be enjoined in these proceedings, lies in understanding the nature of a professional undertaking. The *Halsbury's Laws of England*, 4th Edition by Lord Hailsham of St. Marylebone, Vol. 44(1), pages 222, 223, 224, states as follows:

“Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the Court in the course of proceedings, that undertaking may be enforced summarily upon application to the Court.

It must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client.

It must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.

The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the Court, and the undertaking must be one which is not impossible ab initio for the solicitor to perform.

If the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced.”

7. The Court of Appeal in the case of *Harit Sheth T/A Harit Sheth Advocate V K. Osmond Advocates*, [2011] eKLR also stated as follows:

“professional undertaking is a bond by an advocate on the authority of his client. It is based on the relationship which exists between the advocate and his client. An advocate who gives such a professional undertaking takes a risk. The risk is his own and he should not be heard to complain that it is too burdensome and that someone else should shoulder the responsibility of recovering the debt from his own client. A professional undertaking is a bond by an advocate to conduct himself as expected of him by the court to which he is an officer. No matter how painful it might be to honour it, the advocate is obliged to honour if only to protect his own reputation as an officer of the court.” (emphasis mine)

8. Without belaboring on the numerous judicial pronouncements on the subject, it is clearly settled that in a professional undertaking, the advocate being the person who gave the undertaking should honour the same.
9. In saying so, I am fully aware that the claim by the applicant is not a suit about the JV Agreement or the rights and obligations thereunder. I align myself with the sentiments by the applicant that the claim is



one for enforcement of an undertaking issued by an advocate, the respondent, to the applicant. The 3 undertakings drawn by the advocate are unambiguous and unconditional. They do not mention HHL at all. They are all drawn in the respondent's letter head and signed by the respondent leaving no doubt that the undertakings were issued by the respondent in her capacity as counsel.

10. I reiterate the finding in caselaw that a professional undertaking only binds the advocate who issues it personally. The enforcement of such an undertaking is therefore between the advocate as the doner and the applicant as the donee. This is consistent with the court's obligation to enforce the highest standards of conduct by advocates as officers of the court.
11. In other words, the nature of a professional undertaking is such that it imposes a personal and enforceable obligation on the advocate, independent of the client's actions. An advocate cannot use their client as an excuse for failing to fulfill an undertaking.
12. As was stated in the case of *Conrad Masinde Nyukuri & Another v Robson Harris & Another*, [2021] eKLR:

“The law gives the advocate the right to sue his client to recover whatever sums of money he has incurred in honouring a professional undertaking but they cannot however sue to recover that amount unless he has first honoured his professional undertaking.”
13. This finding aligns with the fact that even though it may be tempting to argue that the respondent issued the undertaking on behalf of HHL and as its director, since it is HHL that was a party to the JV, that is not a relevant factor in the OS proceedings before this court. The respondent is the person required to honour the undertaking and if need be, she would be at liberty to sue HHL so as to recover the amount once she has made good her promise to the applicant.

Disposition

14. For these reasons I find and hold that the joinder of HHL is not necessary in this case and will serve no useful purpose. As such the application dated 7th June 2023 is dismissed with costs to the applicant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF JUN 2024.

F. MUGAMBI

JUDGE

