



**Britannia Sacco v Jambo Biscuits Limited & another (Commercial Case 310 of 2013)
[2023] KEHC 22236 (KLR) (Commercial and Tax) (5 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 310 OF 2013
DAS MAJANJA, J
SEPTEMBER 5, 2023**

BETWEEN

BRITANNIA SACCO PLAINTIFF

AND

JAMBO BISCUITS LIMITED 1ST RESPONDENT

HARIT SHETH T/A HARIT SHETH ADVOCATES 2ND RESPONDENT

RULING

1. On December 9, 2016, the 2nd Respondent (“the Advocates”) issued a professional undertaking (“the Undertaking”) to the advocates representing the Plaintiff (“Britannia”) that they would pay them such decretal amount as may be awarded in any judgment ordered in this suit up to a maximum of Kshs 37,707,107.40 plus agreed and or taxed costs which sums were to be paid from an escrow fund account held jointly by the Advocates and the firm of Coulson Harney Advocates. The said escrow account was opened pursuant to a business transfer agreement in which the Defendant (“Jambo”) was transferring its entire business to Jambo Africa Limited (Mauritius) and the said account was meant to cater for any contingent claims and liabilities of Jambo. The Undertaking also provided that in the event Britannia’s suit was dismissed or judgment of the court in Britannia’s favour was reversed on appeal, then the Advocates would stand automatically discharged from the Undertaking.
2. On February 22, 2021, the court delivered judgment where Britannia’s suit was allowed as prayed and judgment was entered for it and against Jambo for the sum of Kshs 37,707,107.40 together with interest and costs of the suit which were taxed and certified as Kshs 1,030,242.00.
3. Britannia has now filed an Originating Summons dated July 1, 2022 and made under Order 52 Rule 7(1)(a) and Order 52 Rule (7)(2) of the *Civil Procedure Rules* seeking to enforce the Undertaking by having the Advocates pay it the sum of Kshs 38,737,349.46 comprising of the decretal sum of Kshs



37,707,107.46 and taxed costs at Kshs 1,030,242.00. The application is supported by the affidavits of Britannia's Secretary, Daniel Kaliku, sworn on July 1, 2022 and February 23, 2023. It is opposed by the Advocates through the affidavits of one of its advocates, Richard Munda Kariuki sworn on December 6, 2022 and May 4, 2023. The parties have also filed written submissions in support of their respective positions.

4. Britannia avers that despite their advocates serving Jambo and the Advocates with the judgment and decree, the Advocates have refused to pay the sum of Kshs. 38,737,349.46 and that this has caused Britannia to suffer loss and grave prejudice as a result. The Advocates, while acknowledging the Undertaking and its contents, aver that there arose a serious dispute between the parties in the business transfer agreement which was referred to arbitration and an award was published against Jambo as the vendor in the transaction. That both parties filed applications to the court to set aside and enforce the award but that the court dismissed both applications and thus it was not clear whether the award was set aside or enforced.
5. Jambo then filed an interpleader application for determination of which party was the rightful beneficiary of the said escrow funds following the said dispute and arbitral award. By a ruling delivered on December 8, 2021, the court ordered that the funds be released to Jambo but that the purchasers therein were dissatisfied with this ruling. They lodged an appeal to the Court of Appeal. They also sought and were granted an order of stay pending the hearing and determination of the appeal which is yet to be heard. Jambo avers that the practical effect of stay order is that the escrow funds continue to be held in the joint account between Advocates and Coulson Harney Advocates pending resolution by the Court of Appeal. They therefore state that they do not have access to the said funds there being opposing claims by the two sets of parties to the business transfer agreement which necessitated the Advocates' filing of the said interpleader application which is now awaiting determination by the Court of Appeal.
6. The Advocates contend that Britannia did not inform them of the judgment in its favour in this matter and that upon learning of the judgment herein from Jambo, they informed Britannia of the existence of the arbitration proceedings and court cases and that it was then the obligation of Britannia to pursue its interests in the said matters and in particular the interpleader application which it was made aware of. That Britannia's failure to join in those matters has the effect of discharging Advocates from any obligations under the Undertaking and that the same is clear that payment was conditional upon the release to the Advocates of the escrow funds on behalf of Jambo which has not occurred due to the aforesaid disputes and court determinations.
7. The Advocates contend that the Undertaking is not enforceable as they have not received the escrow funds being the funds into the escrow account from which they were to honour the same. The Advocates further depone that this suit has been appealed against and as per the last paragraph of the Undertaking, the Advocates will stand automatically discharged if the court's judgment is reversed on appeal which appeal is now pending before the Court of Appeal. Thus, they assert their obligation to honour the Undertaking has therefore not arisen as the Court of Appeal may reverse the said judgment.

Analysis and Determination

8. From the parties' pleadings and submissions, the main issue for determination is whether the Advocates should be ordered to honour the terms of the Undertaking and pay the sum of Kshs 38,737,349.46 to Britannia. The Court of Appeal, in *Harit Sheth T/A Harit Sheth Advocate v K. H.*



Osmond T/A K. H. Osmond Advocate [2011] eKLR set out the nature of an Advocate’s undertaking and its consequences as follows:

One last point we need to comment on is the submission by Mrs. Rashid, that the appellant and his client should have followed the debtor, [...], to recover the money it owes. In her view this case is peculiar and the Court should depart from the usual practice of enforcing professional undertakings. With due respect to the learned counsel, a professional undertaking is given to 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 it if only to protect his own reputation as an officer of the court. The law gives him the right to sue his client to recover whatever sums of money he has incurred in honouring a professional undertaking. He cannot however sue to recover that amount unless he has first honoured his professional undertaking. [Emphasis mine]

9. The appellate court further held in Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga [2017] eKLR that, “For the court to enforce a professional undertaking, it must be satisfied that the undertaking is clear in its terms and that there is no dubiety or ambiguity as to what the advocate has professionally undertaken. Secondly, that what is undertaken is capable of being performed. Thirdly, that if the undertaking is contingent on the happening or occurrence of an event, such event has occurred or happened”.
10. For clarity and ease of reference, the Undertaking subject to this matter stated as follows:

We act for the Defendant herein Jambo Biscuits Limited in the Business Transfer transaction between Jambo Biscuits (K) Limited and Jambo Africa Limited(Mauritius)

By a Business Transfer Agreement dated 24th June 2016, Jambo Biscuits(K) Limited will transfer its entire business to the said Jambo Africa Limited(Mauritius). Completion is projected for October 2016.

Pursuant to the said Agreement, our firm and the firm of Coulson Harney Advocates representing the Purchaser will jointly open and hold an escrow account before completion to cater for any contingent claims and liabilities of Jambo Biscuits(K) Limited, the Defendant herein

We are informed by our said client that the subject suit herein, whereby you act for the Plaintiff whose claim on the Plaintiff Company is Shs. 37,707,107.40 plus costs is pending hearing and determination

On the instructions of our said client, we now hereby give you our professional undertaking to pay you such decretal amount as may be awarded in any judgment ordered in the suit herein up to a maximum of Shs. 37,707,107.40 in your client’s favour plus agreed and or taxed costs, which monies are to be paid out of the escrow fund

For the avoidance of doubt, in the event that the Plaintiff’s suit is dismissed or any judgment of the High Court in your client’s favour is reversed on appeal, we shall stand automatically discharged from this our undertaking



Yours faithfully

Signed

11. A reading of the Undertaking above leaves little or no doubt that it is clear and unequivocal that the Advocates will pay Britannia the decretal sum of Kshs 37,707,107.40 and taxed costs should the court issue judgment in Britannia's favour for the same. As I have already stated and as it is common ground, the court has since awarded the said decretal sum and certified Britannia's taxed costs as Kshs 1,030,242.00 bringing a total of Kshs 38,737,349.46 which is what Britannia now seeks. Upto this point, I find that the Undertaking has passed the first test of enforceability as it is clear in its terms and that there is no dubiety or ambiguity as to what the Advocates have professionally undertaken.
12. The Advocates assail the Undertaking based on the other two factors necessary to enforce it; that the same is incapable of being performed due to the pending court cases and the underlying dispute between Jambo and the third parties and that the Undertaking was conditional upon the Court of Appeal making a final determination on the matter. In *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) Mativo J, (as he was then) relied on what the court in *Bulkbuid Pty Ltd v Fortuna Well Pty Ltd & Ors* [2019] QSC 173 considered the meaning of the phrase 'incapable of being performed'. It was held that the expression would suggest, "something more than mere difficulty or inconvenience or delay in performing the contract and there has to be "some obstacle which cannot be overcome even if the parties are ready, able and willing to perform the contract."
13. The Advocates' claim that the Undertaking is incapable of being performed due to the court cases pending in respect of the third-party agreements and the escrow account and which have nothing to do with Britannia cannot help the Advocates avoid the Undertaking. There is nothing to show that the Undertaking is inoperative, null or void or that its contents are incapable of being performed. What the Advocates have cited are instances of mere difficulties, practical delays and inconveniences which do not make the Undertaking inoperative or incapable of being performed.
14. As I understand, the Advocates resist enforcement of the Undertaking on the basis of the status of the escrow account. The escrow account was the subject of interpleader proceedings in *Harit Sheth Advocates v Jambo East Africa Limited & 6 others; Coulson Harney LLP* (Interested Party) (Civil Suit E054 of 2020) [2021] KEHC 363 (KLR) (Commercial and Tax). By a ruling dated December 8 2021, the court allowed the interpleader proceedings and made several orders, *inter alia*, that Jambo together with the other respondents were the rightful beneficiaries of the retention amount held in the Escrow Account together with the interest accrued thereon and it was ordered that the said sums therein be deposited into, *inter alia*, Jambo's bank account. What is important to note is that at the time the Advocates lodged the said proceedings, the Undertaking was still in force and had not been discharged or otherwise varied. The Advocates did not disclose to the court that they were bound by a legal obligation to Britannia at the material time to ensure the judgment in favour Britannia against Jambo which was the basis of Undertaking was duly executed. The Advocates cannot be heard to argue that Britannia failed join the interpleader proceedings yet they are the ones who filed the proceedings against Jambo for whom it had acted in giving the Undertaking.
15. They Advocates cannot argue that they have not received the funds in escrow when in fact the escrow account was under their control as advocates of Jambo on whose behalf they gave an Undertaking. They commenced interpleader proceedings without disclosing their obligation under the Undertaking and in any case, the court ordered release of the funds to their client upon their own application. The only inference the court can draw from the Advocates conduct is that they were intent on allowing



Jambo to evade the consequences of the judgment against it. The Advocates must now bear the burden and consequences of the Undertaking as the Court of Appeal stated in Harit Sheth T/A Harit Sheth Advocate v K. H. Osmond T/A K. H. Osmond Advocate (*Supra*).

16. On the ground that the Undertaking has not yet accrued as the Court of Appeal is yet to make a decision on the appeal, I note that the last paragraph of the Undertaking provided that the Advocates would automatically be discharged if the Court of Appeal reverses the finding of the court. No such reversal or contrary finding has been issued by the Court of Appeal, therefore the Advocates have not yet been discharged from the Undertaking and are still bound by its terms. In any case, the Undertaking provided that the same would accrue once the court issued the judgment in favour of Britannia, which is the case herein thus the Undertaking has truly and actually accrued.
17. Since the Undertaking is clear and capable of being performed and the Court of Appeal has not issued any judgment reversing the decree and orders of this court, I do not see why the court should not enforce the Undertaking.

Disposition

18. I allow the Plaintiff/Applicant's Originating Summons dated June 1, 2022 and order that the 2nd Respondent shall honour the terms of the professional undertaking dated September 9, 2016 by paying the Plaintiff the sum of Kshs 38,737,349.46 within 30 days of the date of service of this court's ruling and order. The 2nd Respondent shall bear the costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Muoki instructed by Muoki and Company Advocates for the Plaintiff/Applicant

Mr Koech instructed by Harit Sheth t/a Harit Sheth Advocates for the 2nd Respondent.

