



**Christine Githii t/a Kiarie Kariuki & Githii Advocates v Wesley M.R.
Gichaba t/a Gichaba & Company Advocates (Commercial Case E386 of 2020)
[2023] KEHC 23535 (KLR) (Commercial and Tax) (13 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E386 OF 2020
FG MUGAMBI, J
OCTOBER 13, 2023**

BETWEEN

**CHRISTINE GITHII T/A KIARIE KARIUKI & GITHII
ADVOCATES PLAINTIFF**

AND

**WESLEY M.R. GICHABA T/A GICHABA & COMPANY
ADVOCATES DEFENDANT**

JUDGMENT

Brief Facts

1. The plaintiff moved the court by way of an Originating summons dated 25th September 2020 brought under Order 52 rule 7 of the [Civil Procedure Rules 2010](#). It sought to compel the defendant firm to honour their professional undertaking by paying the sum of Kshs 2,700,000/= to the plaintiff firm together with interest on the same amount from the date of default. By a ruling dated 29th September 2023, this Court determined that this issue would proceed by way of written submissions, thereby paving way for the determination of the present suit.
2. The origin of the dispute between the parties is a Sale Agreement relating to the sale and purchase of Plot No 70 on Land Reference No 7969 Safari Park Oakwood. The plaintiff's firm represented the vendor while the defendant's firm represented the purchaser in the transaction. Pursuant to the terms of the agreement, the defendant issued an irrevocable professional undertaking to the plaintiff undertaking to pay the sum of Kshs 12,000,000/= within 7 working days from the date of the receipt of the Share Certificate in the defendant's client's name, from the land buying company.



3. The original Share Certificate in the defendant's client's name was forwarded to the defendant on 15th July 2020. The plaintiff takes issue with the fact that the defendant failed to pay the amount undertaken within the set timelines, only paying Kshs 9,300,000/= on 31st August 2020. The balance of Kshs 2,700,000/= still remained outstanding, leading to the suit now before the Court.
4. The defendant filed an affidavit dated 26th November 2020 sworn by Wesley Gichaba in response to the Originating Summons. They confirmed having paid the amount of Kshs 9,300,000/= on 29th August 2020 and averred that the balance of Kshs 2,700,000/= was paid directly by the defendant's client into the Barclays Bank account of the plaintiff.

Analysis

5. I have carefully considered the pleadings, evidence and the parties' submissions. The only issue for determination is whether the court should grant orders to the plaintiff as sought, to compel the defendant to honour their professional undertaking dated 10th April 2020.
6. In *Arthur K. Igeria T/A Igeria & Co Advocates v Michael Ndaiga*, [2017] eKLR the Court of Appeal observed 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.”

7. The significance of professional undertakings was emphasized by the Court of Appeal in *Warubiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited*, [2016] eKLR. The Court stated as follows:

“The professional undertaking is a smooth and binding contract between the donor and the donee who are the advocates. It should be adhered to with a standard of ethics higher than that of the market place. Professional undertakings to lawyers by colleagues are like a religion and are the underpinning of the relationship that governs the activities, transactions and actions between them. A professional undertaking embodies and manifests the practice of the legal profession in a characteristically methodical, courteous and ethical manner.

That is why the immediate offer and acceptance of a professional undertaking triggers a monumental transaction and huge financial relationship which must be observed by both sides. In our view, that is the basis of professional undertakings in the legal profession. In fact, the conditions, terms and implications must be strictly adhered to for the legal profession to thrive, and for advocates to deal with each other freely and openly.”

8. I have perused the professional undertaking dated 10th April 2020, addressed to the plaintiff from the defendant on behalf of his client. The undertaking was unequivocal in its terms that:

“We offer our undertaking as follows:- We hereby give you our irrevocable professional undertaking that we shall pay to you the balance of the purchase price in the sum of Kshs 12,000,000/= (Kenya shillings twelve million only) within (7) working days of receipt by us of the share certificate in the names of our client from Kimuri Housing Company Limited for the share held by your client.”



9. It is not controverted that the plaintiff forwarded the original Share Certificate to the defendant. The fact that the defendant paid a sum of Kshs 9,300,000/= to the plaintiff is also not controverted. In fact, the only issue between the parties is whether the defendant paid a balance of Kshs 2,700,000/= due to the plaintiff.
10. Section 107(1) of the *Evidence Act* provides that:
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
11. Section 108 further provides that:
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
12. On the basis of section 107 and 108 of the *Evidence Act*, it was up to the defendant to prove that the balance was paid to the plaintiff as alleged. Having not discharged this burden, I have no difficulty finding that the defendant did not honour the professional undertaking and the plaintiff is justified in demanding the payments. The defendant is obliged to honour the undertaking so as to protect his own reputation as an officer of the Court

Determination

13. I allow the Originating Summons dated 25th September 2020 as prayed and consequently order that the defendant pays the amount of Kshs 2,700,000/= with interest at court rates from the date of default until payment in full. The plaintiff shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 13TH DAY OF OCTOBER 2023.

F. MUGAMBI

JUDGE

