



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E169 OF 2019**

**OJIAMBO & COMPANY ADVOCATES.....PLAINTIFF**

**-VERSUS-**

**WAMAE & ALLEN ADVOCATES.....RESPONDENT**

**RULING**

1. This ruling is in respect to the following two applications: -

a) The Originating Summons (OS) dated 10<sup>th</sup> June 2019 wherein the applicant seeks orders for the for the payment of Kshs 10,980,375 with interest at 6% per annum from 31<sup>st</sup> January 2019 until full payment being the balance of the purchase price in the sale of LR No. DAGORETTI/RIRUTA/S.282 made on 14<sup>th</sup> August 2018. The applicant also seeks the costs of the application.

b) The application dated 16<sup>th</sup> November 2019 wherein respondent counters the OS and seeks orders that; the applicant to provides a concise account of all monies received by its client, Samuel Njau Wangunyu; that leave be granted to enjoin the Cresta Investment Limited and Samuel Njau Wangunyu being the purchaser and vendor respectively as parties in the intended mediation proceedings and as interested parties to this suit; and that the court be pleased to direct that the matter be referred to Court Annexed Mediation.

2. The OS is brought under Order 52 Rule 7 of the Civil Procedure Rules, Rule 9 of the Code of Standards of Professional and Ethical Conduct. The Originating Summon is supported by the affidavit of **Mr. Aldrin Ojiambo** and is premised on the grounds that: -

*a) That Ojiambo & Company Advocates are the advocates acting on behalf of Samuel Njau Wangunyu (the vendor) in the sale transaction of Land Reference Number DAGORETTI/RIRUTA/S.282.*

*b) That Wamae & Allen Advocates are the advocates acting on behalf of Cresta Investments Limited (the purchaser) and Gulf African Bank Limited (the purchaser's financier) in the sale transaction of Land Reference Number DAGORETTI/RIRUTA/S.282.*

*c) That through a professional undertaking dated 23<sup>rd</sup> January 2019 the respondent undertook to pay the balance of the purchase price being the sum of Kenya Shillings Fifteen Million Seven Hundred and Fifty Thousand only (Kshs 15,750,000/=) in consideration of the release of the completion documents by 31<sup>st</sup> January 2019.*

*d) That after receiving the completion documents, the respondent went ahead and transferred the property in favour of the purchaser and registered a charge in favour of Gulf African Bank Limited.*

*e) That Wamae & Allen Advocates subsequently paid a total sum of Kenya Shillings Four Million Seven Hundred and Sixty-Nine Thousand Six Hundred and Twenty-Five (4,769,625/=) therefore leaving a balance of Kenya Shillings Ten Million Nine Hundred and Eighty Thousand Three Hundred and Seventy-Five Shillings (10,980,375/=) unpaid.*

*f) That Wamae & Allen Advocates did not and has not paid the balance of the purchase price as agreed despite the applicant's indulgence.*

*g) The said non-payment was in breach of the professional undertaking and in bad faith.*

3. The respondent opposed the Originating Summons through the replying affidavit of **Mr. Charles Wambugu Wamae Advocate** who states that respondent acted for Cresta Investments Limited (the purchaser) and Gulf African Bank Limited (the purchaser's Financier) in the

purchase of property known as LR. No. Dagoretti/Riruta/S. 282 while the applicant's firm acted for Samuel Njau Wanguyu, the vendor. He confirms that the respondent issued the professional undertaking in which it undertook to "ensure payment by the purchaser's financier of the balance of the purchase price in the sum of Kenya Shillings Fifteen Million Seven Hundred and Fifty Thousand only (Kshs 15,750,000.00)."

4. The respondent's deponent avers that in the course of the transaction, the purchaser opted to pay part of the purchase price to the vendor directly and that he has ensured the payments of the balance of the purchase price according to the professional undertaking. He listed the particulars of the payments as follows:

*a) By an email dated 4<sup>th</sup> July 2019, the vendor informed the applicant that he had received Kshs 2,000,000.00 from the purchaser.*

*b) By an email dated 18<sup>th</sup> September 2019 from the respondent to the applicant, the respondent sought for an account of all payments made directly to the vendor by the purchaser noting that a substantial amount had been paid to the vendor. The applicant did not provide an account of the said payments.*

*c) By an email dated 31<sup>st</sup> dated October 2019, the applicant wrote to the respondent indicating that it had received the basic statement on payments made but need to calculate interest payable. The firm undertook to send the full statement once ready.*

*d) By an email dated 11<sup>th</sup> dated November 2019, the vendor forwarded an account statement and stated that as at 30<sup>th</sup> October 2019, he had received a total of Kshs 12,609,625.00 of the purchase price of Kshs 15,750,000.00 leaving a balance of Kshs 3,140,375.00.*

*e) By an email dated 13<sup>th</sup> November 2019, the purchaser forwarded a letter dated 13<sup>th</sup> November 2019 to the vendor and post-dated cheques of the balance of purchase price of Kshs 3,140,375.00 payable on 5<sup>th</sup> December 2019. The said cheques when cleared, will settle the balance of the purchase price of Kshs 3,140,375.00.*

5. According to the respondent, the totality of the foregoing correspondence indicates that they have been following up with the purchaser on the settlement of the balance of the purchase price. The respondent concedes that the delay in settling the balance is unfortunate but observes that since the purchaser has already issued the post-dated cheques, they believe that the entire purchase price will be settled on 5<sup>th</sup> December 2019.

6. It is the respondent's position that the purchaser and vendor are in good terms as the vendor is the current tenant of the purchaser at the Mirage Towers 2, Pent Floor Office and that as a result of that relationship, the vendor has been receiving payments directly from the purchaser.

7. The respondent contends that it is hopeful that this is a matter that can be settled out-of-court pursuant to the provisions of Article 159(2) of the Constitution and adds that it will be interest of justice that the purchaser be enjoined in the suit as an Indemnifier to the respondent.

8. The respondent maintains that that it acted in good faith by ensuring that payments are sent to the vendor by the purchaser and adds that it believes that the balance of purchase price of Kshs 3,140,375.00 will be settled.

9. Ojiambo & Company Advocates opposed the respondent's application through the replying affidavit of the vendor, **Mr. Samuel Njau Wangunyu**, who avers that he agreed to sell LR No. DAGORETTI/RIRUTA/S. 282, to Alfred Mwansa Momanyi and Cresta Investments Limited at a consideration of Kshs 17,500,000/= out of which the purchaser paid a deposit of Kshs 1,750,000/= being 10% of the purchase price thereby leaving a balance of Kshs 15,750,000/= to be paid on completion as set out in the Sale Agreement.

10. The vendor states that the balance of Kshs 15,750,000/= was to be financed by Gulf African Bank Ltd by registering a charge over the property and that the respondent advocate acted for both the purchasers and the said financier. He adds that the respondent gave an irrevocable professional undertaking on behalf of the bank in which it undertook to pay the sum of Kshs 15,750,000/= upon transfer to the purchaser and perfection of the charge in favour of the bank, and that if the said sum was not paid by 31<sup>st</sup> January 2019, it undertook to pay interest on the said sum at 6% per annum above the bank's lending rate.

11. It is the applicant's case that it authorized the vendor to release the completion documents to the respondent so as to transfer and register the charge to the bank solely upon the strength of the respondent's irrevocable professional undertaking dated 23<sup>rd</sup> January 2019. The vendor adds that the transfer to the purchaser and charge to the Gulf Africa Bank Ltd were duly registered and upon release of the loan, the respondent only paid him Kshs 4,796, 625/= leaving the balance of Kshs 10,980,375/= with interest.

12. The applicant contends that the respondent has refused and/or failed to honour their undertaking to pay the remaining balance of Kshs 10,980,375/= despite several demands thus precipitating the filing of the OS and that it is only after the filing of this suit that the respondent paid another Kshs 8,040,000/= (in instalments) excluding interest agreed upon, thus leaving a balance of Kshs 3,140,375/= excluding agreed interest. It is averred that the last payment was made more than a year ago on 7<sup>th</sup> October 2019.

13. The vendor states that on 29<sup>th</sup> July 2020, he received a transfer application drawn by the purchaser to his account for Kshs 500,000/= but that on calling the bank, he was informed that the purchaser had cancelled the transfer. He further states that on 17<sup>th</sup> August 2020, the purchaser issued him with a post-dated cheque of Kshs 800,000/= payable by 21<sup>st</sup> August 2020 towards the settlement of the balance of the purchase price which, on presentation to the bank, was dishonored.

14. It is the applicant's case that the purchaser has not made any direct payment to the vendor as alleged and neither has there been any settlement between vendor and the purchaser by way of set-off as alleged. The applicant maintains that the balance of Kshs 3,140,375/=, excluding interest remains unsettled to date despite several negotiation/mediation meetings. The applicant states that in view of the fact that the outstanding sum is admitted, there is no disputed issue for mediation as the only issue for determination is the payment of the admitted sum of Kshs 3,140,375/= plus interest which the respondent is liable to settle by reason of the professional undertaking.

15. The Originating Summons and the application were canvassed together by way of written submissions which I have considered. The main issues for determination are: -

**a. Whether the applicant has made out a case for the enforcement of the professional undertaking dated 23<sup>rd</sup> January 2019 and depending on the outcome of this first issue;**

**b. Whether the respondent has made out a case for the granting of orders for referral of this matter to mediation; to enjoin the purchaser and the vendor in the transaction to the intended mediation; and further, whether the court should order the applicant to provide a concise account of all monies received by its client, Mr. Samuel Njau Wangunyu, the vendor in the transaction.**

### **Professional Undertaking**

16. The Black's Law dictionary (9<sup>th</sup> Edition) defines an undertaking as "**a promise, engagement, or stipulation**". It states that an "**undertaking**" is frequently used in special sense of a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtain some concession from the Court or opposing party.

17. The US Legal Definitions.com states that:

**"Undertaking in general means, an agreement to be responsible for something. In Legal context, it typically refers to a party agreeing to a surety arrangement, under which they will pay a debt or perform, a duty if the other person who is bound to pay the debt or perform the duty fails to do so".**

18. The Encyclopedia of Forms and Precedents, 5<sup>th</sup> Edition by Hon. Sir Peter Millet, M.A. Vol. 39 pages 859, 860 a professional undertaking is described as follows:

**"An unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor in the course of his practice, either personally or by a member of his staff, or a solicitor as 'solicitor' (or in case of a member of his staff, his employer) becomes personally bound.**

***It's a promise 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 convenient method by which some otherwise problematic areas of practice can be circumvented. [Emphasis added].**

19. The Halsbury's Laws of England, 4<sup>th</sup> 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."***

20. The principles guiding Professional undertaking were dealt with in the case of **Equip Agencies Limited vs. Credit Bank Ltd. Nairobi HCCC No. 773 of 2003**, where the Court stated:

**"An undertaking is usually given to ease and smoothen the path of transactions carried out by advocates. It is convenient method or tool to circumvent delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly (sic) 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.**

***It 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”.*

21. The procedural provisions of Order 52 Rule 7 of Civil Procedure Rules gives the court the power to order for enforcement of the professional undertaking after giving an opportunity to the advocate to be heard; and honour the undertaking. It provides that;

***(a) An application for an order for the enforcement of an undertaking given by an Advocate shall be made:***

***(i) If the undertaking was given in a suit in the High Court, by summons in chambers in that suit; o***

***(ii) In any other case, by Originating Summons in the High Court.***

***(b) Save for special reasons to be recorded by the Judge, the order shall in the first instance be that the Advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made”.***

22. With the above legal principles in mind, I will turn to consider if indeed the respondent’s letter to the applicant dated constitutes to a Professional undertaking, or a Promise or an Indemnity. It reads as follows:

***“We hereby give you our irrevocable professional undertaking in consideration of your release to us of the Completion Documents listed under Clause 7.2.1 TO 7.2.8 of the Agreement for Sale dated 14<sup>th</sup> August 2018 together with the following...”***

***“ That we shall ensure payments by the Purchaser’s Financier of the balance of the purchase price in the sum of Kenya Shillings Fifteen Million Seven Hundred and Fifty Thousand only( Kshs 15,750,000/=) only (the undertaking amount) net all bank charges and without deductions whatsoever within 14 days of registration of the transfer in favour of the purchaser and charge in favour of the Purchaser’s Financier at the Lands and Companies Registry as applicable and in any case not later than the completion date”***

***“That if the undertaking amount is not paid by 31<sup>st</sup> January 2019, we shall ensure payment by the purchaser of interest on balance of the purchase price at the rate of 6% per annum as provided in the Agreement of Sale”.***

23. From the above extract of the respondent’s said letter, it is clear that the respondent undertook to ensure payment, by the purchaser’s financier, of the balance of the purchase price in the sum of Kshs 15,750,000.

24. The following facts were not disputed: -

***i That the respondent issued a Professional Undertaking dated 23<sup>rd</sup> January 2019 in which it undertook to ensure payment of the balance of the purchase price being Kshs. 15,750,000/= by the purchaser’s financier (Gulf Bank) by 31<sup>st</sup> January 2019 and payment of interest accrued by the purchaser in case of any delay in consideration of the release of the completion documents, registration of the transfer and charge upon the bank.***

***ii That on the strength of the professional undertaking, the vendor authorized his Advocates, the Applicant, to release the completion documents to the Respondent so as to transfer and register the charge to the bank.***

***iii That The transfer to the purchaser and the charge to the bank (Gulf Bank) were duly registered.***

***iv That upon release of the loan by the bank, the Respondent only paid the vendor Kshs. 4,796,625, and another Kshs. 8,040,000/ in instalments and excluding the agreed interest, leaving a balance of Kshs. 3,140,375/= plus interest which the respondent has not paid to date.***

25. From the above highlight of the undisputed facts it is clear that the applicant promptly acted on the respondent’s undertaking by releasing all the completion documents, as stated in the undertaking, so as to facilitate the transfer of the purchased property to the respondent’s client who in turn charged it to the bank.

26. It however turns out that the vendor and applicant were left with the short end of the stick/bargain in when the full purchase price was not remitted to the applicant as agreed or at all. In other words, the respondent did not ensure payment, by the purchaser’s financier, of the balance of the purchase price.

27. I note that the respondent’s deponent stated as follows in the replying affidavit to the OS at paragraph 12 thereof:

***“The respondent states that it acted in good faith and has ensured payments by the purchaser to the vendor. With the receipt by the vendor of the post-dated cheques, the respondent verily believes that the balance of purchase price of Kshs 3,140,375.00 will be settled.”***

28. My finding is that owing to the respondent’s own admission that the sum of Kshs 3, 140,375/- still remains unpaid, it is not in doubt that the undertaking made by the respondent has not been honored. I therefore find that the applicant is justified in approaching this court for orders to compel the respondent to honour their undertaking to the applicants.

29. My finding is that a professional undertaking is a serious commitment by one advocate to the other to facilitate or ease their client's transaction and that an advocate cannot wriggle out of such an undertaking by shifting the blame to his client who was not a party or signatory to such an undertaking.

30. Turning to the respondent's prayers for provision of concise accounts, joinder of the vendor and the purchaser and referral of the matter to mediation. I find that the parties are in agreement on the outstanding balance which is Kshs 3,140,375 as can be seen in the respondents own replying affidavit at paragraph 12 which I have already highlighted in this ruling. I am therefore not persuaded that provision of the concise statement of account will serve any useful purpose considering that amount due is not disputed.

31. I similarly find the joinder of the vendor and purchaser to the case and the referral of the dispute to the mediation will not add any value to the case considering the finding that the amount in dispute is not disputed and the said parties (vendor and purchaser) are not signatories to the professional undertaking.

32. Having regard to the findings and observations that I have made in this ruling, I find that the respondents application dated 16<sup>th</sup> November 2020 is not merited and I therefore dismiss it with costs to the applicant.

33. In a nutshell I hold that the respondent is obliged in law as an officer of the court to honor the professional undertaking it made to the applicant and that an undertaking given by an Advocate is personally binding upon him and must be honored. Court have held that failure to honor 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. Consequently, I find that the Originating Summons is merited and I hereby allow it, but limited to the undisputed sum of Kshs 3,140,375 together with interest 6% per annum from 31<sup>st</sup> January 2019 until payment in full. I also award the costs of the application to the applicant.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Kigata for the Respondent/Applicant

Ms Achieng for Ojiambo for Plaintiff.

Court Assistant: Sylvia.