



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.14 OF 2018

LAWRENCE MURIITHI MBABU

T/A LAWRENCE M. MBABU & ASSOCIATES ADVOCATES

(Suing on behalf of John Kioi Karanja, a Client).....APPLICANT

VERSUS

MWANGI VIVIENNE WANJIRU.....RESPONDENT

RULING

Through an application of Originating Summons dated 15th January 2018 (“**the Application**”) the Applicant sought the following orders:

- a) THAT**, Messers Mwangi Vivienne Wanjiru, an Advocate of the High Court of Kenya, honors her irrevocable and unconditional professional undertaking given to the Applicant through the **Chief Magistrate in CMCC No. 6091 of 2010** on 6th October 2017, within 14 days from the date of the Application;
- b) THAT**, Messers Mwangi Vivienne Wanjiru, complies with the terms of the consent orders recorded in **CMCC No. 6091 of 2010 on 6th October 2017** and issued on 21st November 2017, within 14 days of the order;
- c) THAT**, in default thereof an order be issued for warrant of arrest and committal to civil jail of the Respondent for such a period as may be necessary for the Respondent to comply with the order and/or pending orders of this Court;
- d) THAT**, the Applicant be awarded costs of the Application.

2. The application is premised on grounds that:

- a) The Respondent through a consent order recorded in **CMCC No. 6091 of 2010 on 6th October 2017**, gave an unconditional and irrevocable professional undertaking, in her capacity as an Advocate to the Applicant to pay a sum of Kshs. 1,200,000/- , on behalf of the Judgment debtor within 30 days of the making of the consent order;
- b) The Respondent failed to pay the Applicant the decretal amount of Kshs. 1,200,000/- and despite several court appearances, the Respondent refuses to honor her professional undertaking;
- c) This Court is mandated by law to compel by the Respondent to honor the professional undertaking made by herself to the Applicant.

In response to the application, the Respondent filed a Replying Affidavit dated 24th July 2018 wherein the Respondent contended that while the suit herein stems from a consent judgment recorded on 6th October, 2017 in **CMCC No. 6091 of 2010 John Kioi Karanja vs. Hudson Mwangi T/A Hudson Drilling Services**, the consent recorded provided that the Defendant Mr. Hudson Mwangi Thuku would pay the Plaintiff Mr. John Kioi Karanja Kshs. 675,000 in instalments.

According to the Respondent the Defendant had been paying the Plaintiff the decretal sum in instalments from the date of judgment being 24th September 2012 up to and until October 2017. The Defendant paid the Plaintiff a total of Kshs. 645,500 which is substantiated by an affidavit dated 3rd November 2017 filed in the lower court indicating all the monies paid to the decree holder together with attached receipts

and M-pesa statements.

The Respondent further contended that when the parties appeared in the lower court on 6th October 2017, they were yet to reconcile their accounts but had agreed to record an undertaking for Kshs. 1,200,000 that was claimed by the Defendant subject to the parties agreeing on the actual figure and in default of agreement for the amount due under the decree to be ascertained by the court.

On the said date the Respondent paid the Applicant/Plaintiff Kshs.30,000 as a sign of good faith and this amount was recorded in court. The Respondent maintained that the Applicant herein misrepresented to the lower court and to the Respondent that the amount owing to the Plaintiff was Kshs.1,200,000 and it was on this basis that the consent was recorded.

The Respondent also maintained that the consent was recorded in her capacity as the daughter of the Defendant as she was not the advocate on record for the Defendant in the lower court. As such in the Respondents view it would be oppressive for the Applicant to enforce the undertaking in its present terms and the same would amount to unjust enrichment. In the Respondents view the amount owed to the Plaintiff can only be ascertained once the lower court has delivered its judgment after hearing the matter.

DETERMINATION

The parties filed pleadings and submissions and the issues for determination are as follows;

- a) Is there a valid Consent between the Applicant and Respondent?
- b) Is there a valid professional undertaking by the Respondent to the Applicant?
- c) Should execution ensue.

ANALYSIS

The Court during the highlights of written submissions by parties through Counsel, the Court sought, the original record of **Magistrate's Court Civil Suit 6091 of 2010**, the parties were to reconcile accounts and present any reconciliation of accounts either in the Lower Court or in a meeting between parties and/or Counsel. The Court file was availed to Court but the reconciled accounts were never referred to/mentioned nor the decree from the Magistrate's Court as to the amount due and owing placed in the court file.

On whether there was/is a valid Consent on record to be enforced, the Respondent disclosed the following facts that culminated to the Consent of 6th October 2016.

The Respondent is the daughter of the debtor and an advocate of High Court of Kenya.

The genesis of the matter was in 2010 when **Magistrate's Court Civil Suit 6091 of 2010** was instituted, the defendant owed the Plaintiff money. By Consent entered on 24th September 2012, the Defendant undertook to pay Ksh 675,000/- in final settlement of the suit. In October 2017, the Defendant had paid Ksh 645,500/- with a balance of Ksh 29,500/- with accrued interest.

On 6th October 2017, the Respondent's father was brought to Court under warrant of arrest, the parties could not agree on the amount due and owing. The Respondent and Plaintiff's Counsel agreed that the balance due and owing would be from reconciling accounts and if they did not agree then the Trial Court would hear and determine the matter.

In the meantime, the Plaintiff through the advocate intimated that the Respondent would only be released and/or warrant of arrest lifted if the Respondent recorded a professional undertaking agreeing to pay the decretal sum on behalf of her father at a figure of Ksh 1,2million.

Pushed to a corner in a bid to save her father going to jail, the Respondent agreed to the Consent and the undertaking which was dictated by the Applicant and the Respondent believed that they would later reconcile the accounts as agreed.

The Consent was recorded as follows; as per the decree attached to Applicant's OS;

- 1. That Mwangi Vivienne Wanjiru Advocate of High Court of Kenya Admission Number P105/13797/2017 cell phone Number 0727-819221 has given a professional undertaking as an Advocate to the firm of Lawrence & Mbaabu Advocates Associates a decree holder to pay a sum of Ksh 1,200,000/- on behalf of the Judgment debtor who is her father within 30 days of making this order.***
- 2. That in default the decree holder to ensure [enforce] the Professional undertaking within the law.***
- 3. That mention on 9th November 2017 to confirm compliance and further orders.***

After recording the Consent, the issue of reconciling accounts or any negotiations was refused and the Respondent filed an application in the Magistrate's Court for the amount due and owing to the Plaintiff from the Defendant (her Father) was to be due and ascertained. The parties are awaiting Ruling/judgment.

These facts were not contested and/or controverted by the Plaintiff.

A valid consent is defined in the case of C.A. 81 OF 1984 Flora N. Wasike vs Destimo Wamboko which held as follows;

“It is settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside.....”

Prima facie , any order made in the presence and with consent of Counsel is binding on all parties to the proceedings or action and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court... or if consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside the Agreement.”

The consent of 6th October 2017, is vitiated by coercion and/or undue influence which vitiates a valid contract. The circumstances described by the Respondent as outlined above, seem to strongly suggest that she was involved at the tail end of the dispute which commenced in 2010. She appeared in Court as an officer of the Court an advocate without any/full instructions of the matter. This Court visualizes an eager but worried daughter watching her father brought in Court under warrant of arrest and about to be committed to Civil jail and therefore she was desperate to salvage the situation but in the process was intimidated to enter into a Consent to get her father off the hook first then resolve the matter amicably later. Clearly, the Respondent lacked sufficient information of the matter and sought reconciliation of accounts as to how much was due and owing after part payment of the debt. These circumstances do not depict free will for a party to enter into a contract/consent. The Court is of the view, that in the absence of the fact that the Respondent was her father’s advocate on record and/or had dealt with the matter as his advocate before the fateful day, the Respondent could not have possibly been aware or well versed with the debt due and owing. It would not be the Court’s policy to enforce Consents and contracts that are not freely entered into by parties. I find a consent to draw the Respondent into a Professional undertaking to settle unverified sum of Ksh 1.2million in 30 days highly prejudicial and cannot possibly be the policy of the Court to enforce such Consent or contract.

As to Professional undertaking in Havi & Co Advocates vs Jane Muthoni Njage t/a JM Njage & Co Advocates HCCC 59 of 2009 it was held;

“The law is that , the jurisdiction of the Court in enforcing an undertaking by an advocate is not exercised for purposes of enforcing legal rights or obligations of the client, but for purposes of enforcing honorable conduct on the part of the advocate as an officer of the Court.....”

The advocate must ensure he is in funds before giving an undertaking.....”

The scenario depicted by the circumstances surrounding entry of the Consent of 6th October, 2017 does not adhere to a professional undertaking freely given on the instruction of the client and/or funds availed in advance instead it was a process to ensure payment of the debt by the Defendant to the Plaintiff, and the Defendant’s daughter who happened to be an advocate was coerced to give a professional undertaking. This is not the right and legal purpose for an undertaking.

In the case of David Karanja Thuo t/a D.K.Thuo & Co Advocates vs Njage Wanjeru T/a Njage Wanjeru Advocates [2010]eKLR held with reference to the Encyclopedia of Forms & precedents, 5th Ed Vol 39 which define Professional undertaking as

“An undertaking is any 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, but not in the course of his practice, under which the Solicitor.....becomes personally bound. An undertaking is therefore a promise made by a Solicitor....to do or refrain from doing something. In practice, undertakings are frequently 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.

See Also Harit Sheth T/A Harit Sheth Advocate vs Osmond Advocates [2011] eKLR & Waruhiu Kówade & Nganga Advocates vs Mutune Investment Ltd [2016] Again, the professional undertaking definition does not encompass the circumstances pertaining to the Consent of 6th October 2017. The Respondent may have offered to stand in and settle the amount of debt outstanding after reconciling accounts and felt she had to do anything to avert the Defendant’s arrest, thereby she gave her promise to settle the same after reconciliation. The Respondent did not default to settle the debt; she was not the advocate on record as she was recently admitted as an advocate of the High Court. Although the Plaintiff’s claim as per suit remains a valid claim and ought to be settled, the forced consent and the undertaking was/is not a legally sound process and therefore cannot be sanctioned by the Court. Therefore in the absence of valid and legal consent and undertaking the court cannot grant the prayer to allow warrant of arrest to issue to the Respondent.

DISPOSITION

- 1. For the reasons above, this Court finds that the Consent of 6th October 2017 invalid as it is vitiated by coercion and was entered into without sufficient facts.**
- 2. The Professional undertaking is not used to enforce clients rights and obligations but to enforce obligations between advocates**
- 3. The matter is hereby remitted to the Trial Court to hear and determine the amount due and owing and execution in default of payment or settlement of the decree.**

4. Each party to bear own costs

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH APRIL 2020

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

L.M.MBAABU & ASSOCIATES FOR APPLICANT

KIRIMI MBOBUA & CO ADVOCATES FOR RESPONDENT