



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 271 OF 2018(O.S)**

**LALY SUKHDEV SINGH.....PLAINTIFF**

**VERSUS**

**ONESMUS MWANGI MURAGURI..... DEFENDANT**

**JUDGMENT**

1. The Respondent **ONESMUS MWANGI MURAGURI** is an advocate of the High Court of Kenya. He is sued in this case by **LALY SUKHDEV SINGH**, the Applicant. The plaintiff filed this Originating Summon seeking the determination of the following prayers:

***“Whether the respondent who is an advocate of the High Court of Kenya gave un-equivocal professional undertaking to the Applicant on 5<sup>th</sup> July 2017 to pay the Applicant on behalf one peter Wambugu.***

***Whether the Respondent has reneged on the professional undertaking made in his capacity as an advocate and neglected, refuse and/or rejected to honour the same in spite of being served with a reminder and/or Notice of intention to sue from the Applicant’s advocates.***

***Is the Applicant entitled to enforcement of the professional undertaking against the Respondent.***

***Who is to bear the costs of this suit.”***

2. The above are the prayers for determination in the Originating Summon. Before commencing determination of those prayers, I shall consider a preliminary objection raised by the Respondent which I ordered it be considered together with the main prayers.

3. The Respondent sought for the striking of the Originating Summon on the ground that the applicant did not pay the correct court fees when filing this action. The Respondent, by his affidavit dated 8<sup>th</sup> August 2018, deposed that the applicant’s claim was initially assessed for court fees at Ksh.70,145 but that the Applicant only paid Ksh.4,595.

4. By his affidavit dated 24<sup>th</sup> October 2018, the Applicant tacitly acknowledged that indeed the initial assessment of fees for his Originating summon was Ksh.70,145. His explanation for the difference between the amount assessed and the amount he paid (Ksh.4,595) as court fees was that his advocated on getting assessment of Ksh.70,145 proceeded to amend the prayer of the Originating Summon by deleting the mention of Ksh.8million. The following is how the prayer initially appeared and how it was subsequently amended.

***“Whether the respondent who is an advocate of the High Court of Kenya gave un-equivocal professional undertaking to the Applicant on 5<sup>th</sup> July 2017 to pay the Applicant the sum of Ksh.8,000,000.00 on behalf one peter Wambugu.***

***“Whether the respondent who is an advocate of the High Court of Kenya gave un-equivocal professional undertaking to the Applicant on 5<sup>th</sup> July 2017 to pay the Applicant on behalf one peter Wambugu.”*** [the underlined is what was amended by deletion].

5. What is clear from that explanation is the Applicant, in amending the prayer, concealed the actual amount being claimed by him with a view of paying less court fees than was due. I have had opportunity to consider the fate of pleadings whose correct fees are not paid for in the case **REPUBLIC v LAND ADJUDICATION COMMITTEE GIITHU ADJUDICATION SECTION & 2 others EX-PARTE PETER ETHARIA** [2011] eKLR and I had this to say:

“Section 71 of the Interpretation and General Provisions Act Cap 2 provides as follows:-

**“71. (1) Where a person, public officer or local authority is required to do anything for which a fee is to be paid or a charge made under a written law, that person, public officer or local authority may decline to do that thing until the fee is paid or until payment of the charge is made, or, where the precise amount of the payment to be made cannot be ascertained until the thing has been done, until there is paid such an amount as may be estimated to be the correct amount by the person or public officer, or the responsible officer of the local authority, required to do the thing.”**

6. It is clear from that section that the court cannot consider the Notice of Motion because the correct fee has not been paid. The Court of Appeal in the case **South Nyanza Sugar Company Limited vs. Samwel Osewe Ochillo P/A Ochillo & Co. Advocates** Civil Appeal No. 127 of 2003 stated that a plaint was invalid if the fee was not paid for it. The court stated as follows:-

*“The Deputy Registrar, however, had no power to exempt the respondent from paying the requisite fee with the result that the plaint was not properly filed and that being so, there was no valid plaint upon which the learned Judge of the superior court could proceed to deliver his judgment. The judgment was based on no valid plaint.*

*Dealing with a similar situation in the Ugandan case of Unta Exports Ltd Vs Customs [1971] EA 648, Goudie, J. stated as follows at page 649 letters E to F:-*

***I have no doubt whatsoever that both as a matter of practice and also as a matter of law documents cannot validly be filed in the civil registry until fees have either been paid or provided for by a general deposit from the filing advocate form which authority has been given to deduct court fees.....”***

*With respect, we agree and would adopt that principle as being aptly applicable to the issue we are dealing with.”*

7. The correct court fees were not paid in this case by the Applicant. This is because the actual claim of the Applicant, and what he seeks from this court, is for judgment for Ksh.8 million. That is what he claims from the Respondent. The assessed fees for that claim is Ksh.70,145. The applicant in order to invade paying the correct fee for that claim amended his Originating Summons and in so doing omitted to mention, in the prayer the claim of Ksh.8 millin. He however mentioned that amount in his affidavit. Whether concealed or not what the Applicant seeks is for an order for the Respondent to pay him Ksh.8 million which amount was stated in the professional undertaking the Respondent gave. The failure to pay the correct court fees contravenes a statutory requirement as set out in the above case. The sum effect of not paying the correct court fee is that there is no valid claim before me. There being no valid claim before me the Originating Summon must and does fail. It is dismissed with costs to the Respondent.

8. Even though I do dismiss the claim I will proceed to consider the substantive claim.

9. The applicant’s claim is based on the letter written by the Respondent, to the Applicant, dated 5<sup>th</sup> July 2017, whose content is as follows:

**“RE DEBT TO PETER WAMBUGU**

***I hereby undertake to pay to you a sum of shillings Eight Million once and subject to the purchase price of Mombasa road plot is paid to us.”***

10. The Applicant deposed in support of his claim that the Respondent represented himself as the advocate of Peter Wambugu. That the said Peter Wambugu was/is indebted to the Applicant. The letter reproduced above, as it is noted, is in reference to Peter Wambugu. According to the Applicant the Respondent “gave un-equivocal professional undertaking to pay Ksh. 8,000,00.00” which amount he was owed by Peter Wambugu. The Applicant deposed:

***“THAT the Respondent has since refused and/or neglected to honour his professional undertaking he gave to me on the 5<sup>th</sup> July 2017 and all efforts to have him honour the same has been fruitless.”***

11. I may start by considering what a professional undertaking is. In the website <https://legalconsultantsafrica.wordpress.com/2016/04/14/professional-undertakings> there is a definition of the term as follows:

***“The Encyclopedia of Forms and Precedents defines it as “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 under which the solicitor becomes personally bound.”***

***An Advocate’s undertaking is a personal promise as well as a professional and legal obligation. It is based on the concept of the legal profession as an honorable profession and the expectation that an honorable person will keep (honor) his/her word.”***

12. Justice A. Mboghli Msangah in the case **Nzioka & Co. Advocates v Harit Sheth Advocates [2015] eKLR** stated the qualities that a professional undertaking should have as follows:

***“The undertaking must be clear. The undertaking must be unambiguous and unequivocal. The professional undertaking must be certain and without any conditions precedent.”***

13. A close look at the letter date 5<sup>th</sup> July 2017 will show that the same does not qualify as a professional undertaking. Not at all.

14. Although that undertaking is addressed to the Applicant the rest of the body of the letter shows that the Respondent gave a conditional undertaking. It does not qualify for an enforceable professional undertaking. It was conditional and subject “to the purchase price of Mombasa road plot” being paid. To dissect that condition, one would need to confirm that the purchase price was paid and perhaps most importantly a confirmation should be made of which property of Mombasa road the letter referred to. It is only after those questions are in the positive that the letter can be said to be a professional undertaking.

15. It is inconceivable that the learned advocate who now represents the Applicant is the same advocate who wrote a letter to the Respondent poking holes at the very letter he relies on in this case. This he did by his letter addressed to the Respondent dated 10<sup>th</sup> July 2017 as follows:

**“RE DEBT TO PETER WAMBUGU**

***We have instructions to represent Mr. Laly Sukhdev Singh in this matter. We have had the benefit to peruse your “professional undertaking” signed of as Muraguri & Muraguri Advocates dated 5<sup>th</sup> July 2017.....we are however concerned that the same does not sound unequivocal and specific in its terms.....”***

16. The learned advocate for the applicant proceeded in that letter to set out the short comings of the letter. I have asked myself above, how then does the same advocate file this claim which relies on the very letter he found wanting. The only answer I can give myself is that the filing of this case by that advocate was not right and was unprofessional. This is a case that should not have seen the day of light. It is even more unfortunate that the case is against a practising advocate whose effect can be far reaching.

17. This claim for the reasons set out above is dismissed with costs being awarded to the Respondent. Those costs shall be taxed on the basis that the instruction fees are ksh.8 million.

**Orders Accordingly**

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>th</sup> day of MAY, 2020.**

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **5<sup>th</sup>** day of **May, 2020**.

**MARY KASANGO**

**JUDGE**