



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D.K. Kemei – J

CIVIL CASE NO. 12 OF 2019 (ORIGINATING SUMMONS)

Formerly ELC 133 OF 2018

LEONARD CHERUIYOT SONOIYA.....APPLICANT

VERSUS

EVANS A. ONGICHO

T/A ONGICHO ONGICHO & CO ADVOCATES.....RESPONDENT

RULING

1. This matter is brought by way of Originating Summons dated 4.7.2018 under Order 52 Rules 7 and 10 of the Civil Procedure Rules. The following orders are sought;

a) That the respondent be ordered to honor their professional undertaking dated 26.6.2016 and do forthwith pay to the applicant the outstanding balance in the sum of Kshs 700,000/- being the balance of the purchase price in respect of sale of Land Reference No 12715/3174 Mavoko together with interest at court rates until payment in full;

b) That the respondent bears the costs of this suit.

2. The respondent is stated to be an advocate of the High Court of Kenya and had acted for the purchaser in respect of sale of Land Reference Number 12715/3174 Mavoko for a sum of Kshs 1,700,000/- and that a memorandum of understanding was executed between the parties where a deposit of Kshs 900,000/- was paid by the purchaser and the respondent undertook to pay Kshs 800,000/- on behalf of his client. It was stated that the respondent in pursuance of the undertaking paid Kshs 100,000/- as part fulfillment of his obligations and is in default of the balance of Kshs 700,000/- hence ought to be directed to honor his terms of the professional undertaking dated 26.6.2016.

3. The applicant in support of the application deponed an affidavit dated 4.8.2018 to which is annexed the memorandum of understanding dated 24.1.2012, the copy of the undertaking dated 26.6.2016, notice of intention to sue dated 9.7.2012, 27.6.2018 and 2.7.2018. The court was urged to allow the application.

4. The application was strenuously opposed vide replying affidavit deponed on 24.7.2018 by the respondent. It was averred that the applicant was not privy to the undertaking issued on 26.6.2012; that this suit is time barred; that the undertaking was addressed to Dr. Bosek on behalf of the deponent's then client Prof Aloys Gekonge Tumbo - Oeri (now deceased) and it was effected by the deceased through payments of Kshs 950,000/- on 26.6.2012 and 900,000/- on 27.6.2012 to the registered owner of the land, David Kimutai Ngetich. It was averred that the memorandum of understanding dated 24.1.2012 bore no relationship or bearing with the instant suit. The court was urged to dismiss the suit because the applicant was neither the vendor nor did he disclose the parties to the sale agreement or the equitable interest. The deponent averred that the purchaser in the said memorandum of understanding dated 24.1.2012 passed on on 12.3.2018. A copy of the bankers cheque and banking slip were annexed to the affidavit and it was averred that there was no amount due under the undertaking.

5. When the matter came up for hearing, the court directed that the same be canvassed vide written submissions. Learned counsel for the applicant vide submissions dated 16.6.2020 pointed out to the court that on 24.1.2020 the applicant entered into a memorandum of understanding with Aloys Gekonge Tumbo-Oeri for purchase of an equitable interest in Land Reference 12715/3174 and that on 26.6.2012 the respondent gave a professional undertaking on behalf of his client Aloys Gekonge Tumbo-Oeri for the payment of Kshs 800,000/- on or before the 5.7.2012. According to counsel, the 2 issues for determination are whether the defendant gave a professional undertaking to the applicants advocate and secondly whether the professional undertaking is enforceable.

6. In respect of the 1st issue, it was submitted that the 5-fold test to be met is whether there is a promissory statement whether in writing or orally; secondly that it was made by or on behalf of an individual advocate or firm; thirdly that it was made by someone acting in their

professional capacity; fourthly that it must be made to someone who reasonably places reliance on it and finally it must be to the effect that the individual or firm making it will do, cause to be done or refrain from doing something. Counsel reminded the court that there was a declaration issued vide email dated 26.6.2012 by the respondents to pay on behalf of Aloys Gekonge Tumbo-Oeri and the same was given to J.K. Bosek, an advocate practicing in the firm of J.K. Bosek & Co Advocates. In respect of the 3rd element, it was submitted that the respondent was acting in his professional capacity. In respect of the 4th element, counsel in placing reliance on the case of **Equip Agencies Ltd v Credit Bank Ltd (2007) eKLR** pointed out to court that on 9.7.2012 the applicant through their firm J.K. Bosek & Co Advocates issued a demand letter to the respondent demanding them to fulfil their professional undertaking. In respect of the 5th element, counsel while appreciating the case of **Nelson Andayi Havi & Co Advocates v Jane Muthoni Njage t/a J.M. Njage & CO Advocates (2015) eKLR** submitted that all the elements to prove the existence of a professional undertaking were established and that there was no doubt that the email dated 26.6.2012 was a professional undertaking.

7. On the 2nd issue, it was submitted in placing reliance on Order 52 Rule 7 of the Civil Procedure Rules that this court is given power to enforce professional undertakings. According to counsel the undertaking is enforceable even without constituting a legal contract since it creates both legal and ethical obligations. Counsel cited the case of **Peter Nganga Muiruri v Credit Bank & Charles Ayako Nyachae T/A Nyachae & Co. Advocates (2008) eKLR** and submitted that the undertaking is not dependent on any other transaction; that the parties to the agreement of sale are not crucial and that the fulfillment of his obligation does not depend on any other agreement. The court was urged to allow the application as prayed and award the applicant costs.

8. The respondent's submissions were filed on 22.9.2020. Learned counsel raised two issues namely whether the court has jurisdiction and whether there was a professional undertaking given to the applicant by the respondent. On the first issue, it was submitted that the court lacks jurisdiction to entertain the matter as the application offends section 4 of the Limitation of Actions Act as the same is based on contract which is brought after expiry of six years. Counsel urged the court to rely on the case of **Owners of Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd (1989) eKLR** where the Court of Appeal stated as follows:

"...it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

On the second issue, counsel submitted that the respondent had never given a professional undertaking to the applicant who is not an advocate and that he was not a party to the transaction as he was not the vendor of the land being sold. Reliance was placed in the case of **Equip Agencies Limited V Credit Bank Ltd Nairobi Hccc No. 773 of 2003** where Justice Warsame J as (he then was) held as follows:

"An undertaking is usually given to ease and smoothen the path of transaction carried out by advocates. It is a convenient method or tool to circumvent delay and operational difficulties so that transactions can easily be properly, smoothly and easily conducted between advocates. It is a contract between advocates after an offer and acceptance, with resulting consideration which follow from ne advocate to another."

It was finally submitted that the applicant is not a legal professional and cannot purport to enforce the undertaking as the same was given to J.K. Bosek t/a J.K. Bosek & Co. Advocates for a land transaction which was concluded amicably and that there is no nexus between Bosek and the applicant. Counsel sought for the dismissal of the application.

9. According to **Halsbury's Laws of England, 4th Edition** Vol. 44(1), at pages 222, 223, 224, it is stated 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."

10. In the case of **Diamond Star General Trading LLC v Ambrose D.O. Rachier carrying on business as Rachier & Amollo Advocates [2017] eKLR**, it was observed that for a professional undertaking, 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.

11. In the case of **Equip Agencies Limited vs. Credit Bank Ltd. Nairobi HCCC No. 773 of 2003 (2007) eKLR** that was cited by counsel for the applicant, Warsame J. 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 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".

12. Under Order 52 Rule 7 of Civil Procedure Rules, 2010 it is stated as follows:

(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; or*

(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”.*

13. In **Kulusumbai v Abdul Hussein (1975) EA 708**, it was held that the procedure by Originating Summons was intended to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to have Court determine matters which involve a serious question. Originating Summons are intended to enable simple matters without the expense of bringing an action in the usual way but are not meant to determine matters which involve a serious question. It is meant to be a simple and speedy procedure and its merits are based on the fact that there are no pleadings involved or in general no witnesses the questions for decision being raised directly by the summons itself and the evidence given by affidavit.

14. The question then is: Does the email dated 26.6.2012 amount to a Professional undertaking? I shall reproduce the relevant sections of the subject email. It states:

“we undertake on behalf of Prof Tumbo Oeri to pay the sum of Kshs 800,000/- on or before 5th July, 2012

Hard copy to follow

15. There is no evidence of such hard copy. It is clear from the email, that the Respondents gave an undertaking to Bosek on behalf of Prof Tumbo Oeri to pay Kshs 800,000/-.

16. The respondent’s case is that the undertaking is addressed to Bosek and not the applicant. They even point out that payments were made to David Kimutai Ngetich. A perusal of the memorandum of understanding that is an annexure of the applicant as I understand it is that David Kimutai Ngetich was the registered owner of **Land Reference 12715/3174** that is charged in favour of Cooperative Bank Limited and that the applicant has an equitable interest in the same. However, Aloys Gekonge Tumbo- Oeri wanted to purchase the same at a consideration of Kshs 1,700,000/-; and that a total of Kshs 1,850,000/- was paid to David Kimutai Ngetich.

17. The triable issues that arise are what is the equitable interest that the applicant has; has it been established? The “undertaking” does not mention the applicant but mentions Bosek, so what entitles the applicant to benefit from an agreement between the respondent and Bosek? It is clear that the undertaking was given by the respondent to a fellow advocate and not the applicant herein. Indeed, undertakings are conducted between advocates as they are professional colleagues. The applicant herein is not a legal professional and therefore cannot purport to enforce an undertaking that was not given to him but to J.K Bosek Advocate. The issue of a professional undertaking was stated by Warsame J (as he then was) in the case of **Equip Agencies Limited V Credit Bank Ltd Nairobi Hccc No. 773 of 2003** as follows:

“An undertaking is usually given to ease and smoothen the path of transactions carried out by advocates. It is a convenient method or tool to circumvent delay and operational difficulties so that transactions can be easily, properly, smoothly and quickly conducted between advocates. It is a contract between advocates after an offer and acceptance, with resulting consideration which follow from one advocate to another.”

18. I have perused the contents of the originating summons dated 4.7.2018 and note that the applicant alludes to a memorandum of understanding between the applicant and one Aloys Gekonge Tumbo Oeri which was witnessed by J.K Bosek Advocate. The respondent is not mentioned anywhere at all. The professional undertaking via e-mail dated 26.6.2012 is addressed to Bosek Advocate and not the applicant. Hence the applicant cannot enforce the same as he is not an advocate. He should have engaged the advocate to whom the undertaking was addressed to enforce it. The respondent in his replying affidavit sworn on 24.7 2018 paragraph 8 deponed that the registered owner of the land was duly paid the full purchase price and which was backed by bankers cheque and slip. The applicant did not put in a rejoinder to dispute those averments thereby leaving the impression that they are true. In the absence of a rebuttal, then the applicant’s claim founded on an undertaking that has been satisfied or overtaken by events must fail. The evidence presented by the respondent as well as the documents by the applicant leaves no doubt that the application is clearly made to vex the respondent for no apparent reason. If the registered owner of the property was paid the purchase price by the purchaser, then the applicant’s grievance might likely be out of being kept off from some commission or something like that because it has come out clearly that the applicant was not the real owner of the property. He might have been a commission agent who was to receive the purchase price consideration on behalf of the registered owner but it seems the owner pulled a fast one on him and received the money directly from the purchaser. This then would imply that the memorandum of understanding and the professional understanding had been overtaken by events and there would be no need to pursue the respondent over the same. He should have pursued the registered owner of the land and not the respondent whose client has already cleared the purchase consideration. The case depicts circumstances akin to sore grapes.

19. In the result, it is my finding that the applicant’s originating summons dated 4.7.2018 lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at **Machakos** this 7th day of **October, 2020**.

D.K. Kemei

Judge