



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 400 OF 2017 (OS)

MUSTI INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

MOSES KIBATHI t/a

OSORO CHEGE KIBATHI & CO. ADVOCATES.....DEFENDANT

RULING

1. Although the parties herein invited the Court to render a Judgment in this matter, the Court has instead prepared a Ruling. The reasons become apparent shortly.

2. Before Court is an Originating Summons of 28th September 2017 pegged on the provisions of order 52 Rule 7(6) of The Civil Procedure Rules in which the Plaintiff, in the main, seeks the following order:-

2. THAT the Respondent to honour the professional undertaking given by him to the Applicant on diverse dates between the 15th May 2015 and 4th June 2015. The Respondent issued to the Applicant his professional undertakings to pay it as the full agreed consideration upon the transfer from the Applicant's name and the registration of titles number Kajiado/Kaputiei-North/83159, Kajiado/Kitengela/79865, 81696, 81687, 81708, 81659, 81712, 81679, 81714, 81657, 81654, 81656, 81664, 79868, 81680, 816666 & 81658 in favour of the borrowers/purchasers namely Benson Mbivu Mutumbai, Anthony Kamau Waithaka, Louise Kemunto Araka, Daniel Kisemei Kirrinkol, Misheck Ngunjiri Gathiti, Moses Mwaniki Waweru, Charles Mugecha Maina, Wycliff Cheruiyot Langat, George Mutiso Mutua, Michael Brian Njenga, Samuel Thiongo Kamau, Adan Adou Kinyua, Doreen Nyambura Nganga, Kipkirui Bosuben Dixon, Charity Nyambura Ngubiru, Rose Nanjala Wekesa and Peter Muhia Macharia on behalf of his client Equity Bank Limited.

3. The claim by the Plaintiff is premised on 17 professional undertakings issued by Moses Kibathi t/a Chege Kibathi & Co. Advocates (the Defendant) on various dates between 15th May 2015 and 4th June 2015. The professional undertakings were to pay various sums of money whose aggregate was Kshs.26,100,000/=.

4. The Plaintiff's case is that it fulfilled its part of the bargain but the Defendant has failed to honour its side.

5. The response to the Originating Summons came through a Replying Affidavit sworn by Kariuki Kingori on behalf of Equity Bank. That it is Equity Bank and not the Defendant who have responded has been identified as an issue in contest which Court shall return to shortly! Anyhow, the backbone to the Defence is that, following an internal audit at the Bank, it was discovered that members of staff of the Bank were conniving with the sellers of property to overstate the value of properties sold. Thereafter, the Bank would advance facilities on the basis of the overstated amounts after which its employees and sellers would share the difference between the overstated price and the actual price of the properties. Equity Bank sought to implicate the Plaintiff. Equity Bank asserts that the Defendant's promise to pay the purchase price made in the undertakings was therefore vitiated by fraud.

6. Counsel for the parties herein argued the matter through written submissions and this Court has identified three issues that require resolution as preliminary matters:-

(i) Is the Response made by Equity Bank on behalf of the Defendant proper?

(ii) Whether the Respondent issued a professional undertaking to the Applicant and whether it is enforceable.

(iii) Whether this matter can be resolved on affidavit evidence given that a defence of fraud has been raised.

7. It is not in dispute that in all the 17 undertakings issued by the Defendant to the Plaintiff, he does so on behalf of Equity Bank (Kenya) Limited as a disclosed principal. Just as an example, in the undertaking of 4th June, 2015 reproduced below:-

Our Ref: OCK/CON/EBLK/18/2015

YOUR REF:

The Managing Director

Musti Investments Limited

P.O. Box 156-00242

KITENGELA

Dear sir,

RE: BANKING FACILITY FOR KSHS. 1,200,000/= TO CHARITY NYAMBURA NGUBIRU (THE BORROWER)

The above matter refers.

We act for Equity Bank (Kenya) Limited and are informed that you are the vendor of the parcel of land known as Kajiado/Kitengela/81680 which the Borrower is using to secure the loan facility.

We have instructions to issue an undertaking on behalf of Equity Bank (Kenya) Limited for payment of Kenya Shilling One Million Two Hundred Thousand (Kshs.1,200,000=), upon registration of the transfer in favour of the borrower and a legal charge in favour of the Bank.

Kindly release the original title deed, consent to transfer, transfer in triplicate with the affixed photos, copies of PIN and ID, certificate of incorporation and any other document the borrower may need to register the transfer in her favour and the legal charge in favour of the bank.

Yours faithfully

OSORI CHEGE KIBATHI & CO. ADVOCATES

Signed

MOSES KIBATHI (*my emphasis*)

8. There can be no contention that the Defendant acts on behalf of a disclosed principal who may bear the ultimate responsibility of discharging the undertaking. In the circumstances, would it be improper for the Defendant to resist the claim through a response by Equity Bank? On the part of this Court, it is unable to fault that approach and wishes to find support in the Court of Appeal decision in Onesmus Githinji & Company Advocates vs. Fidelity Bank Limited [2016] eKLR, cited to the Court by Counsel for the Defendant. There, the Court of Appeal held:-

“That argument is based on a misapprehension of the latter decision. The decision of this Court in Karsam Lalji Patel stands for the proposition that a suit for enforcement of a professional undertaking given by an advocate can be maintained at the instance of the client on whose behalf it was given. The rationale being that the advocate giving the undertaking does so as the agent of the client, a disclosed principal’.

Whilst in the case before Court the disclosed principal is on the side against whom the undertaking is sought to be enforced, the principle is the same.

9. Being the party that may have to meet the Decree passed against the Defendant and as well being the disclosed principal in the transactions, Equity Bank has a substantial interest in the matter. It therefore has a right to participate. It can do so robustly by answering issues on behalf of its agent, the Defendant.

10. No doubt the Plaintiff is not an Advocate firm. It is a limited liability Company. All the 17 professional undertakings are issued by the Defendant, a law firm, to non-advocate. It is suggested by Counsel for the Defendant that the undertakings given by the Defendant to the Plaintiff are not professional undertakings and can only be enforced under the Law of Contract. For this proposition the Defendant’s Counsel cites at least 3 decisions. In Waruhiu K’Owade & Ng’ang’a Advocates vs. Mutune Investment Limited [2016] eKLR, in which the Court of Appeal describes the nature of a professional undertaking 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”.

See also Warsame J. (*as he then was*) in Equip Agencies Limited vs. Credit Bank Limited [2007].

11. Lastly, would be the holding of the High Court in S.T.G Muhia t/a S. Thuo Muhia & Co. Advocates vs. J.M Chege t/a J.M Chege & Co. Advocates[2009] eKLR in which it was held;-

“The true position of the law is that when an advocate gives a professional undertaking, he gives it in his capacity as an advocate to another advocate. An advocate cannot give a professional undertaking to a layman. For such professional undertaking to be efficacious, it is only maintainable between two advocates”.

12. On the part of this Court, it needs to observe that the decisions of Waruhiu K’Owande & Ng’anga Advocates (*supra*) and Equip Agencies Limited (*supra*) simply discussed the nature of a professional undertaking given by an Advocate. The question as to whether or not an Advocate can give a professional undertaking to a layman was not squarely before the Courts. However in respect to Muhia (*supra*) the High Court made the unequivocal statement that *“An Advocate cannot give a professional undertaking to a layman”.*

13. What is my view?

14. In the Encyclopedia of forms and precedents, 5th Edition, volume 39, a professional undertaking by a solicitor is defined as follows:-

“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 problematical areas of practice can be circumvented”.

Similarly the Law Society of Kenya Code of Standards of Professional and Ethical Conduct describes a professional undertaking as follows:-

“134. An undertaking is a formal promise whose effect is to make the person giving it responsible for the fulfillment of the obligations in respect to which it is given. 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 professional as an honourable profession and the expectation that an honorable person will honour his/her word. In legal practice professional undertakings are a standard method of mediating transactions. Without such undertakings there would be much difficulty and inconvenience suffered by clients”.

15. The efficacy of professional undertakings in smoothening transactions can never be doubted. It cannot also be doubted that only an Advocate can give a professional undertaking. The giver of the undertaking makes a promise to another to do or refrain from doing something and in reliance of that promise the receiver acts. The high responsibility is on the giver of the undertaking and that is why it is only an Advocate who can give such an undertaking. The conduct of the Advocate is not only controlled by the provisions of the Advocates Act but also by the Law Society of Kenya to which s(he) must be a member. Given the important role that undertakings play in unlocking and smoothening transactions and the high premium that ought to be placed on an Advocate’s word, failure to honour a professional undertaking is deemed as professional misconduct. Indeed the importance attached to the giving of a professional undertaking by an advocate is such that where there is breach, the Law provides for its enforcement by way of summary procedure [order 52. Rule 7].

16. While more often than not, the receiver of a professional undertaking is an Advocate, this Court cannot think of any reason why the receiver who does not make a counter promise (or undertaking), need only be an Advocate. This is because the onus to discharge the promise in the professional undertaking is on the giver.

17. On this debate, I choose to be on the side of Justice D.G Thomas in Legal Services Commissioner vs. Consultancy Legal [2015] QCAT 174 in which he remarked,

“In the circumstances of this case, that response has no merit. The undertaking was clearly provided, and was referable to the settlement contemplated by the Federal Magistrates Court orders and the transfer documents provided in response to that undertaking. An undertaking can be given either to other lawyers or to non-lawyers direct. The duty on the practitioner is the same regardless of the person to whom it is given”. (my emphasis)

This Court takes the view that for as long as in the nature of a transaction, a non-advocate is not required also to give an undertaking in return, a professional undertaking can be given by an Advocate directly to a non-advocate.

18. I move on to consider the last preliminary issue. The Plaintiff has presented these proceedings by way of originating summons. The procedure is designed to resolve simple and uninvolved cases (see Official Receiver vs. Sukhdev [1970] E.A 243. However, the procedure is

not suitable where facts are seriously contested and need to be tested by way of cross-examination.

19. Here the Defendant avers that the professional undertaking is vitiated by fraud in which the Plaintiff is a party. The Plaintiff does not agree. The standard of proof of fraud is higher than the standard of proof in ordinary civil litigation. This is a question that requires a full blown Trial. The directions of this Court is that parties herein take a hearing date in which the only issues for determination will be:-

- (a) Whether the transactions upon which the professional undertakings were given were tainted by fraud.
- (b) If so, whether the Plaintiff was party to the fraud.
- (c) If so, whether the professional undertakings have been vitiated by fraud.
- (d) Costs of the suit.

Dated, Signed and Delivered in Court at Nairobi this 1st day of February, 2019.

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F. TUIYOTT

JUDGE

Present:-

Akongu for Onyango for Plaintiff

Opakas for Ohaga for Respondent

Nixon – Court Assistant