



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CAUSE NO. 479 OF 2016 (O.S.)

IN THE MATTER OF ENFORCEMENT OF PROFESSIONAL UNDERTAKING BY AN ADVOCATE

SPEED CAPITAL LIMITEDPLAINTIFF

VERSUS

KENNETH KIPLAGAT

J. A. ORIEMA OKOTH

T/A OKOTH & KIPLAGAT CO. ADVOCATE.....1ST DEFENDANT

GEORGE OGEMBO.....2ND DEFENDANT

J U D G M E N T

1. This is an action where Speed Capital Limited (Speed Capital) seek the enforcement of the Professional undertaken given by Kenneth Kiplagat, J. A. Oriema Okoth and George Ogembo all trading as Okoth & Kiplagat Advocates (hereinafter the Advocates).

PRELIMINARY

2. Speed Capital took out this Originating Summons which was filed on 25th November 2018. On leave being granted by the Court on 7th December 2017 Speed Capital field an Amended Originating Summons. There is evidence on record that the Advocates were served with both the original and amended Originating Summons. To date the Advocates have not filed Affidavit in reply to the Originating Summons.

3. On 2nd October 2018, in the presence of both Counsels directions were given, by the Court, for the hearing of this cause by Affidavit evidence. On that day the hearing was fixed on 11th February 2019.

4. On 11th February 2019 the Counsel appearing for the Advocates made reference to a Preliminary Objection filed by the Advocates, dated 20th January 2017. Counsel for Speed Capital stated that he had not been served with that Preliminary Objection, despite it being filed in January 2017. It was at that point that Counsel for the Advocated stated that Mr. Okeyo, for whom he was holding brief was unwell. There being no evidence of Mr. Okeyo being unwell an adjournment was declined by the Court and the hearing proceeded.

BRIEF BACKGROUND

5. The background of this matter is captured in the Affidavit of James Ouma the Chief Executive Officer (CEO) of Speed Capital.

6. It is that, Faith Koki Muia approached Speed Capital, on 1st July 2016, and sought to borrow from Speed Capital Kshs. 3.2 million.

7. That loan was secured by the Advocates' Professional Undertaking which was contained in the Advocates letter date 4th July 2016.

8. The CEO of Speed Capital deponed that in full reliance of the Professional Undertaking Speed Capital advance the full loan amount. The loan statement attached to the application, and as deponed by CEO of Speed Capital, shows that the loaned amount had not been repaid at any one time from the date of disbursement.

9. Speed Capital through its Counsel Muma and Kanjama, by letter dated 27th September 2016, gave the Advocates notice of 45 days to call up the Professional Undertaking.

10. The Advocates, as stated before, have not filed a Replying Affidavit. They however filed a Memorandum of Appearance on 7th December 2016.

DISCUSSION AND DETERMINATION

11. The Court's power to order for enforcement of an Undertaking is found under Order 52 Rule 7 of the Civil Procedure Rules (hereinafter the Rules). The Undertaking which is the subject of this cause was in the Advocates' letter dated 4th July 2016 which reads:

“OKOTH & KIPLAGAT

ADVOCATES

Your Ref: 1/157/125

Our Ref: 13.13.077.001

4th July, 2016

Muma & Kanjama Advocates

I & M Bank House, 4th Floor

2nd Ngong Avenue

Nairobi

Dear Sirs

RE: LOAN FACILITY TO MS. KOKI MUIA FORM SPEED CAPITAL LIMITED

I refer to the above matter.

We confirm that we are holding Kenya Shillings Kshs. 4,705,847.35 on behalf of Ms. Koki Muia being decretal in Employment and Labour Relations Court Cause No. 1583 of 2013 Koki Muia vs Samsung Electronics East Africa Limited held on account. I further confirm that your client Speed Capital can proceed and advance Kshs. 3,200,000.00.

a. We hereby give our unconditional, unequivocal, irrevocable Professional Undertaking that we shall pay you, or as you may direct the sum of Kenya Shillings Three Million Two Hundred Thousand (Kshs. 3,200,000) together with accrued interest at the rate of ten per cent (10%) per month until settlement in full within Forty Five (45) days of SPEED CAPITAL LIMITED advancing the loan amount to my client.

b. We confirm that failure by our firm to remit the sum of Kenya Shillings Three Million Two Hundred Thousand (Kshs. 3,200,000) together with accrued interest at the rate of ten per centum per month (10%p.m.) until settlement in full within Forty Five (45) days of SPEED CAPITAL LIMITED advancing the loan amount to our client, the loan amount will continue to accrue interest at the rate of 10% per month which entire amount due will be payable by our firm.

c. To pay Muma & Kanjama Advocates their legal fees of Kshs. 18,052.50 in respect of instructions received from Speed Capital Limited to drafting the requisite terms of the Undertaking, to receiving the Undertaking from Okoth & Kiplagat Advocates all care and attention.

d. We confirm we have irrevocable authority from our client to give this Professional Undertaking and should the above mentioned transaction fail, we confirm that our firm and the undersigned will be personally liable for the loan amount together wit interest accrued at 10% per month and all costs and charges relating to any recovery may be necessary.

J.A. Oriema Okoth|Kenneth Kiplagat|George Ogembo”

12. The Advocates, as stated before, filed a Preliminary Objection dated 20th January 2017 which I wish to discuss even though Speed Capital had not been served when this matter was heard.

13. In the first Limb of that objection the Advocates stated thus:

“The application is fatally defective, as it has been lodged by a party to whom a Professional Undertaking cannot issue and a

party who is not a Professional for purposes of the Advocates Act.”

14. In my view that objection is misplaced. If I may be allowed to place reliance to quotations made by Justice G. L. Nzioka in the case DIAMOND STAR GENERAL TRADING LLC V AMBROSE D.O. RACHIER CARRYING ON BUSINESS AS RACHIER & AMOLLO ADVOCATES [2017] eKLR where the learned judge stated:

“The Halsbury’s Laws of England, 4th Edition by Lord Hailsham of St. Marylebone, Vol.44(1), pages 222, 2224 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 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.”

15. The above clearly demolishes the Advocates’ objection. Professional Undertaking, just to repeat the above, can be given to the client or third party. Speed Capital are therefore rightly in this cause.

16. The second limb of the objection stated:

“The principal borrower has not been joined in the proceedings.”

17. Order 52 Rule 7 (1) of the rules provides in part:

“An application for an order for the enforcement of an Undertaking given by an Advocate...”

18. There is no requirement under the rules for the principal debtor, or anyone on whose behalf the Professional Undertaking was given, to be joined in an action for enforcement of Professional Undertaking. Professional Undertaking is a stand alone which is enforceable when there is either default or when the occurrence contemplated in that Undertaking occurs. The third limb of the objection provided:

“The Undertaking being a guarantee extended in favour of a principal borrowing cannot in law be triggered without first establishing and proving that demand has been made against the principal borrower and that there has been default.”

19. This objection is responded to by what I stated in respect to the second limb of the objection. All the Applicant needs to show, which Speed Capital has done hereof, is that there is default, the default which is covered under the Professional Undertaking. Speed Capital attached loan statement which shows that the debt, for which the Advocates gave their Professional Undertaking, has not been paid.

20. The fourth objection reads:

“The application is premature.”

21. This is an objection, in my view that invites the Court to consider facts. That is contrary to the holding in MUKHISA BISCUIT MANUFACTURERS LTD V WEST END DISTRIBUTORS LTD [1969] EA696. An objection can only be mounted on pure point of law, and not facts requiring the Courts to consider the merits of the case.

22. The objections raised by the Advocates, are for the reasons set out above rejected.

23. Again to rely on another decision of Justice G. L. Nzioka which is useful to consider at this point in the case SAMUEL KARANJA V J.K.KOSKEI.E.J. RUTO & MONDA T/A KOSKEI MONDA & CO. ADVOCATES {2017} eKLR where the Judge stated:

“In conclusion the Applicant invited the Court to adopt the findings in the case of Re A Solicitor where it was held:

“Where in the course of proceedings, a solicitor undertake to pay money to a person not a client out of sums received by him for that purpose from his client, and on the faith of that statement the person to whom it was made alters his position, the Court will enforce the fulfillment of the Undertaking by the exercise of its disciplinary jurisdiction over solicitors as officers of the Court.”

24. The Speed Capital has proved on a balance of probability its claim. The Advocates have failed to make payment according to their Undertaking since September 2016. On that day they were given notice to honour their Undertaking. It is for the reason of that delay I shall not first give the Advocates a period to honour the undertaking as required under Order 52 Rule 7(2) of the Rules, I shall proceed to enter judgment as sought. The Advocate shall pay the costs of the suit.

25. In the end there shall be Judgment for the Plaintiff Applicant against the Defendants Respondents for Kshs. 3,200,000 with interest at 10% per month from 5th July 2016 until payment in full. The Defendants shall pay the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 16TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1ST DEFENDANT

..... FOR THE 2ND DEFENDANT