



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL DIVISION & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 480 OF 2016**

**IN THE MATTER OF AN ENFORCEMENT OF**

**PROFESSIONAL UNDERTAKING BY AN ADVOCATE**

**SPEED CAPITAL LIMITED.....PLAINTIFF/APPLICANT**

**Versus**

**SAMUEL O. AUNGA**

**DAVID M. MUSANGO**

**T/A AUNGA OMWENGA &**

**COMPANY ADVOCATES.....DEFENDANT**

**JUDGEMENT**

1. The Dispute herein is in respect to a Professional Undertaking dated 3<sup>rd</sup> August 2015 which Speed Capital Limited (**the Applicant**) seeks to enforce. That enforcement is sought in the Originating Summons dated 23<sup>rd</sup> November 2016, in which the Court is asked to grant the following Orders;-

**1. A declaration that the Plaintiff is immediately and unconditionally entitled to the sum stated in the undertaking being the total sum Khs.2,990,000 PLUS interests at 10% per month with effect from 3<sup>rd</sup> November, 2015 until full payment.**

**2. The Defendants do forthwith specifically perform the said undertaking by paying the said sum of Khs. 2,990.000 PLUS interests at 10% per month with effect from 3<sup>rd</sup> November, 2015 until full payment to the Plaintiff.**

**3. The Defendants do bear the costs of this suit.**

2. The letter of undertaking of 3<sup>rd</sup> August 2015 reads as follows:-

**Muma & Kanjama Advocates**

**3<sup>rd</sup> August, 2015**

**I & M Bank House, 4<sup>th</sup> FLR,**

**2<sup>nd</sup> Ngong Avenue**

**P.O. Box 528-00100**

**NAIROBI**

Dear Sir/Madam

**RE: LOAN FACILITY TO KEREMPE OLE SARONI**

**FROM SPEED CAPITAL.**

The above captioned matter refers.

We act for KEREMPE OLE SARONI.

He has provided us with the same information about the loan facility of Kenya Shillings Two Million, three hundred thousand (Kshs.2,300,000) only at Speed Capital

We thus confirm that we are acting for Kerempe Ole Saroni on a land transaction where he is selling his parcel of land reference as LR.NO.KAJIADO/MAILUA/4574 at a purchase price of Kenya Shillings Twenty One Million (Kshs.21,000,000) only. The deposit payable is Kenya Shillings Five Million (Kshs.5,000,000) only which is to be paid by the end of August.

We further confirm that your client Speed Capital can proceed to advance the loan facility less all interests and costs payable.

a) We hereby give our firm irrevocable professional undertaking that we shall pay you, or as you may direct, the sum of Kenya Shillings Two Million, Nine Hundred and Ninety Thousand (Kshs.2,990,000) only within ninety (90) days of Speed Capital advancing Kenya shillings two million, three hundred thousand (Kshs.2,300,000) only less interests and costs to my client.

b) We confirm that failure by our firm to remit the above sum within the agreed period, the loan amount will continue to accrue interest at the rate of 10% per month which will be payable by us to you.

c) We confirm that we have irrevocable authority from our client to give this professional undertaking and should the above mentioned transaction fail, we confirm that we will secure the original title deed together with a charge in favour of Speed Capital Limited, failure to which our firm will be responsible to make good the above professional undertaking in total.

Yours faithfully,

*Signed*

AUNGA OMWENGA

For: AUNGA OMWENGA & CO.ADVOCATES

3. The position of the firm of Aunga Omwenga & Co. Advocates (**the Firm**) is that the letter was a forgery in which both the letterhead and the signature alleged to be of Aunga Omwenga Advocate are forged. In the course of the hearing the said firm had requested that the document be subjected to Document Examination so as to test its authenticity. The Applicant took the position that the Examination was unnecessary as it was happy to proceed on the assumption that the letter was indeed a forgery. This decision proceeds on that assumption.

4. The Firm is unwilling to accept that it is bound by the letter on the basis of two broad reasons. First, that the letter is a forgery and did not emanate from the offices of the Firm. That in any event the undertaking was to back a facility in favour of one Kerempe Ole Saroni (**Saroni**) yet the facility was granted to David Mutunga Musango (**the 2<sup>nd</sup> Defendant**).

5. David Mutunga Musango (**Musango**) is at the heart of this matter. The evidence by the Applicant which is contained in the Supporting Affidavit of James Ouma (**the Chief Executive Officer of the Applicant**), is that on or about 21<sup>st</sup> June 2015 Musango approached it with a request to borrow the sum of Kshs. 2,330,000. The facility was to be guaranteed by one Kerempe Ole Saroni (Saroni). It is on this basis that the letter of 3<sup>rd</sup> August 2015 was written. The Applicant avers that on 6<sup>th</sup> August 2015 and in full reliance of the undertaking, it advanced Musango the full amount. That there has been default and in breach of the undertaking, the Defendants have failed to pay the sum of Kshs. 2,990,000 within the 90 days of the undertaking.

6. Samuel Aunga swore a Replying Affidavit on 22<sup>nd</sup> March 2017. Although it is a lengthy affidavit consisting of 73 paragraphs it is necessary only to highlight what is at core in resolving the matter before Court. First, it is asserted that the letter is a forgery and this, as stated earlier, the Applicant does not dispute.

7. Counsel states that he opened a Law Office in Kitengela within Kajiando County in January 2015. A month later Mr. Musango joined the firm as a Graduate trainee. Counsel asserts that he instructed Mr. Musango not to transact in any contentious business, something Musango would have been fully aware, as he had not attended Law School. Sometime in September 2015 or thereabout it came to his Notice that Musango, masquerading as an advocate was involved in various illegal transactions. A man who had intentions of becoming an Advocate was acting dishonorably and dishonestly! When Mr. Aunga received a Demand in respect to the Professional undertaking he quickly informed the Advocates for the Applicant that his Firm was not aware of the undertaking. That letter is dated 17<sup>th</sup> May 2016 and reads as follows:-

**Muma & Kanjama Advocates**

**I & M Bank Hse, 4<sup>th</sup> Floor**

**2<sup>nd</sup> Ngong Avenue**

**P.O Box 528-00100**

**NAIROBI**

**Dear Sir/Madam**

**RE: LOAN FACILITY ISSUED TO DAVID MUTUNGA AND KEREMPI OLE SARONI FROM SPEED CAPITAL.**

**The above matter and your letter dated 3<sup>rd</sup> May 2016 refer.**

**I am a sole proprietor of the firm and at no given point have I contacted your firm in regard to any professional undertaking or for any other purposes.**

**I am equally stranger to the said Kerempi Ole Saroni as I have never met him or transacted with him either formally or informally.**

**Kindly forward a true copy of the original undertaking allegedly issued by my firm(in hard copy) along with the alleged loan facility for my further response.**

**Yours faithfully**

***Signed***

**Omwega & Co. Advocates**

8. Although Counsel Aunga argued that the Applicant shouldered the burden of proving that the letter originated from his Law Firm, his own evidence suggested that Musango was using the office to transact illegal business. When Counsel first learnt of Mr. Musango's activities, he inspected Musango's desk drawer. He then states,

***“THAT this incident made me suspicious and I decided to persue his desk's drawer. I discovered that he had illegally been transacting in the office while illegally masquerading as an Advocate to unsuspecting clients”.***

In the circumstances I would hold that although a work of forgery, the letter emanated from the firm of Aunga Omwega & Co. Advocates. In addition, the letter was purportedly issued under the hand of Counsel Aunga and the recipient of the undertaking had not way of telling that the letter was fraudulent.

9. What the Court must now decide is whether the said Firm should be forced to honour what is admittedly a forged Professional undertaking. There is nothing novel about this question. For a start the nature of a Professional undertaking need to be understood. Counsel for the Applicant cited the following definition of a Professional undertaking from The Encyclopedia of Forms and Precedents, 5<sup>th</sup> Edition, Volume 39,-

***“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”.***

10. From that definition it is clear that a Professional undertaking can be made by a member of staff of a firm of Advocates and the undertaking will bind the Firm. The importance of a Professional undertaking in facilitating transactions is undisputed. An undertaking is a promise to do or to refrain from doing something or acting in a particular manner and addressed to a third party who relies on it. Because of its central role in smoothening certain transactions, the Courts have over time insisted that, save for vitiating factors, Advocates should be bound by Professional undertakings given by their firms. And it does not matter that an Officer in a Firm gives an undertaking without express Authority or is out rightly fraudulent as long as it appears to a third party it is a kind of undertaking within the ordinary authority of the Officer. Of course, some third parties, like Advocates or Banks are required to be more circumspect!

11. The effect of an undertaking given under fraudulent circumstances was discussed in the English case of United Bank of Kuwait Ltd vs. Hammoud and Others (1988)3 All E.R 418, in which it was held:-

***“(1) where a Solicitor who had actual authority to represent himself as being a practicing solicitor with an established firm***

**gave an undertaking which the receiver of the undertaking was entitled to assume was given in the context of an underlying transaction which was part of the usual business or a Solicitor, the undertaking would be enforced against the firm as having being given with ostensible authority and therefore binding on the firm under S 5 of the 1890 Act it is subsequently turned out to be false and worthless”.**

12. Given that an Advocate is held responsible and accountable for actions of persons working for him/her, it is incumbent upon an Advocate to ensure that he employs persons of integrity and systems that eliminate or minimize the possibility of his Officers acting fraudulently or without authority. However, in the nature of things fraud can slip past even the best of systems and this must be the reason why Insurance Companies offer policies to indemnify Advocates against acts of fraud by their employees.

13. Obviously therefore the firm of Aunga Omwenga & Co. Advocates is bound by the Professional undertaking dated 3<sup>rd</sup> August 2015 notwithstanding that it was a forgery.

14. So what was the undertaking? It is necessary that the letter of 3<sup>rd</sup> August 2015 be reproduced again:-

**3<sup>rd</sup> August, 2015**

**I & M Bank House, 4<sup>th</sup> FLR,**

**2<sup>nd</sup> Ngong Avenue**

**P.O. Box 528-00100**

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**b) We confirm that failure by our firm to remit the above sum within the agreed period, the loan amount will continue to accrue interest at the rate of 10% per month which will be payable by us to you.**

**c) We confirm that we have irrevocable authority from our client to give this professional undertaking and should the above mentioned transaction fail, we confirm that we will secure the original title deed together with a charge in favour of Speed Capital Limited, failure to which our firm will be responsible to make good the above professional undertaking in total.**

**Yours faithfully,**

***Signed***

**AUNGA OMWENGA**

**For: AUNGA OMWENGA & CO.ADVOCATES**

15. The Court wishes to highlight some aspects of the undertaking;

(i) The undertaking was to Muma & Kanjama Advocates who were acting for Speed Capital.

(ii) The client for Aunga Omwenge was Saroni.

(iii) The undertaking was given on the basis that a loan facility of Kshs. 2, 300,000 would be granted by Speed Capital to Saroni.

(iv) The firm undertook to pay Kshs.2,990,000 within 90 days of the monies being advanced.

16. It is common ground that the loan facility was advanced to Musango and not Saroni. In the letter of offer of 31<sup>st</sup> July 2015, Saroni is named as the guarantor to that facility. In the circumstances can it be said that there was consideration for which the undertaking was given? It seems clear that the undertaking was given so that Saroni would be advanced the facility. But the evidence is that it was Musango and not Saroni who received the loan. Even on the face of the Originating Summons, it is clear that the Applicant is predicated its claim on the basis that in full reliance of the undertaking it advanced the money to Saroni (see Prayer 2).

17. While a Law firm must honour a Professional undertaking it gives, it cannot be forced to honour an undertaking when the event upon which the undertaking is premised has not happened. The promise given in the forged letter was a promise to pay if a loan of Kshs.2,300,000 was advanced to Saroni. As there is no prove that this happened, the firm of Aunga Omwenga & Co. Advocates cannot be compelled to keep the promise made in the letter of 3<sup>rd</sup> August 2015.

18. The upshot is that the request that the Defendants do specifically perform the terms of the undertaking is declined and the Orders sought in the Originating Summons of 23<sup>rd</sup> November 2016 is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 11<sup>th</sup> day of May,2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

N/A for Plaintiff/Applicant

Aunga for Defendant

Nixon - Court Assistant