



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 82 OF 2018**

**SISULE MUSUNGU.....PLAINTIFF/APPLICANT**

**T/a SISULE & ASSOCIATES ADVOCATES**

**VERSUS**

**HOWARD OKIROR, NICK OMARIA &**

**KENNETH KAMAU T/a HOWARD,**

**NICK & KENNETH ADVOCATES.....DEFENDANT/RESPONDENT**

**RULING**

1. The originating summons dated 27<sup>th</sup> April, 2018 seeks order that:

**1. Spent**

**2. Spent.**

**3. That an order be and is hereby issued directing the Defendants, Howard Okiror, Nick Omari and Kenneth Kamau T/a Howard, Nick & Kenneth Advocates to, within 7 days refund the entire sum of Ksh.4,000,000/= in terms of clause 4 of their professional undertaking issued on February, 16, 2018.**

**4. That an order do hereby issue for the enforcement of the Professional Undertaking dated February 16, 2018 against the Defendants, Howard Okiror, Nick Omari and Kenneth Kamau T/a Howard, Nick & Kenneth Advocates as a Decree of this Court.**

**5. That this honourable court do and hereby order the Defendants, Howard Okiror, Nick Omari and Kenneth Kamau T/a Howard, Nick & Kenneth Advocates to pay the Plaintiff interest on the deposit sum of Ksh.4,000,000/= at Court rates from March 14, 2018 until payment in full.**

2. The application is predicated on the grounds stated therein and is supported by the affidavit sworn by Sisule Musungu. It is stated that all the parties herein are advocates. That sometimes in January, 2018 the Applicant and the Respondent were acting in their professional capacities as advocates for sands Investment Limited and landlord Holdings respectively in a transaction involving the lease of land reference LR No. 1/576 and 1/577 Kindaruma Road, Nairobi. That both advocates for the parties agreed to exchange professional undertakings. That the Respondent issued a professional undertaking that the head leases would be regularized within 21 days of receipt of a deposit of Ksh.4,000,000/=.

3. That following the receipt of the Respondent's professional undertaking on 24<sup>th</sup> February, 2018, the Applicant's paid to the Respondent's bank Account Ksh.4,000,000/=. That the Respondent's failed to regularize the lease within 21 days. That acting on their client's instructions, the Applicant aborted the transaction on 14<sup>th</sup> March, 2018 and called for the deposit. The Applicant's complaint is that the Respondent has failed to refund the Ksh.4,000,000/=.

4. In a replying affidavit sworn by Nick Omari, the professional undertaking between the Advocates is admitted. It is stated that Ksh.3,820,000/= out of the Ksh.4,000,000/= deposited was released for the registration/perfecting the leases. That, however, proof of registration of the lease was not forthcoming and the Applicant's demanded for a refund of the deposit. That the purported lease turned out

to be a fraud and a report was made to the police. That efforts to get a refund from their client have not yet born fruits. That the Respondent has now approached it's insurer for professional indemnity. It is further stated that the Respondent is doing everything in it's power to have the money in question released by it's client. The court was implored to indulge the Respondent to recover the money as the firm is not able to raise the same.

5. I have considered the application, the response to the same and the submissions made by the respective counsels for the parties herein.

6. The professional undertaking entered into is not denied. The breach of the undertaking is also not denied. As stated in the persuasive case of **Havi & Co Advocates v J. M. Njaga Advocates [2012] eKLR**

**“His (Advocates) undertaking stands as a separate contract between the Advocates, and is not contingent upon any terms of contract between his client and any other party.”**

7. The Respondent's released the deposit to their clients at their own risk as to consequences. Consequently, I allow the application with costs.

Date, signed and delivered at Nairobi this 13<sup>th</sup> day of Nov., 2018

**B. THURANIRA JADEN**

**JUDGE**