



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 187 OF 2015 (O.S.)
NZIOKA & CO. ADVOCATES.....PLAINTIFF
V E R S U S
HARIT SHETH ADVOCATES.....DEFENDANT
JUDGMENT

In this suit the Plaintiff, a firm of advocates, seeks to enforce a professional undertaking by the Defendant, also a firm of advocates. The amended Originating Summons dated 23rd June 2015 is brought under Order 52, rule 7 and rule 10 of the Civil Procedure Rules, 2010 (the Rules).

The background to this dispute is as follows. The Plaintiff was acting for a client(the plaintiff) in **Milimani HCCC No. 17 of 2012 Afrison Export Limited & Another vs Continental Credit Finance Limited & Others** at an agreed legal fees of Kshs. 200 Million buttressed by an agreement dated 24th January 2012 when the client instructed the Defendant to take over the matter. Judgement in favour of the client was delivered and an award of Kshs. 4,086,683,330/- granted against the 3rd Defendant in that matter (The Honourable Attorney General). Thereafter, the amount was reduced to Kshs. 2,400,000,000/- apparently after negotiations which were carried out after Judgement had already been entered.

The Plaintiff released the client's file to the Defendant who by a letter dated 29th March 2013 (in the operative parts) professionally undertook –

“to remit to you the sum of Kshs. 100,000,000/-(Kenya Shillings One hundred million) within 10 days of receipt by ourselves of cleared funds from the Government and upon being authorized to release the said funds to our clients in full and final settlement of your fees in respect of the claim against the occupation of the suit property by the Government.

In the event that payment is made to us by installments, we undertake to remit the said funds to you pro-rata in proportion of the payment received by us

Upon the finalization of the claim for rentals/mesne profits you shall be entitled to the balance of your fees amounting to Kshs. 100,000,000/- (Kenya Shillings One hundred million) from the funds received from the Government in respect of this claim...”

In a subsequent letter dated 5th April 2013 the Defendant while referring to the previous undertaking wrote –

‘We hereby undertake to remit to you a further sum of Kshs. 100,000,000/- (Kenya Shillings One hundred million) in addition to our undertaking of 29th March 2013’

A notice of preliminary objection filed by the Defendant on 10th July 2015 on the grounds that –

1. The purported Originating Summons is not in fact an originating summons in form or substance, and it is therefore incompetent and offends the mandatory provisions of the law upon which it purports to have been brought;
2. The purported amended Originating Summons is also incompetent for having been filed without leave of this Honourable Court as required under the law;
3. Both the purported Originating Summons and the Amended Originating Summons have been filed in breach of the mandatory provisions of the law and are incompetent;
4. The purported Amended Originating Summons is incompetent as it seeks orders which cannot be granted under the provisions of the law upon which it purports to have been brought.

On 14th July 2015, directions were given that the originating summons be heard together with the Preliminary Objection by way of submissions. Both Advocates filed written submissions and highlighted them in court as well.

On the objection raised against the Originating Summons on its want of form, I am of the view that the objection has not been justified both in law and substance. This is because whereas the form used is strictly not in accordance with the form provided under Order 37 of the Rules, the purport of the application is quite clear and has certainly not left the Defendant in any doubt as to the orders sought. In any event Rule 14 of Order 37 permits variations as circumstances may require.

Therefore, whereas no order granting leave to the Plaintiff to amend the Originating Summons was sought and granted litigants cannot be stopped from filing what they consider to be necessary to further their cause. Though Order 8 (4) of the rules provides that leave has to be sought before an Originating Summons can be amended, the Court has power to invoke Section 3A of the Civil Procedure Act and to give effect to the overriding objective in Section 1A and 1B of the Act. Further, it is empowered by Article 159 (2)(d) of the Constitution to overlook technicalities which could act as a bar to expeditious dispensation of justice as long as the other party has not been prejudiced which in this case has not been alleged.

In relation to the substantive motion, the law with regard to professional undertakings by advocates is as follows: -

1. The undertaking must be clear.
2. The undertaking must be unambiguous and unequivocal.
3. The professional undertaking must be certain and without any conditions precedent.
4. The plaintiff must have acted in reliance on the undertaking.

Order 52, rule 7(1) (b) and (2) of the Civil Procedure Rules (the Rules) provides: -

“7. (1) An application for an order for the enforcement of an undertaking given by an advocate shall be made –

- a. if the undertaking was given in a suit in the High court, by summons in chamber in that suit;
or**
- b. in any other case, by originating summons in the High Court.**

(2) Save for special reasons to be recorded by the judge, the orders shall in the first instance be that the advocate honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made.”

In the replying affidavit filed on 23rd June 2015 and a further affidavit filed on 2nd July 2015 and sworn by Richard Kariuki, a partner in the Defendant firm, it was asserted that in the Judgement from which the professional undertaking emanated, the Judge awarded the claim for occupation and dismissed that for rental and mesne profits; the award of Kshs. 4.6 Billion was subsequently negotiated downwards to Kshs. 2.4 Billion thus when they received Kshs. 1.2 Billion (half of the amount) they paid the Plaintiff half of the sum owed; that in fact, the Plaintiff in its letter dated 8th April 2015 annexed to the Replying Affidavit demands Kshs. 50 Million from the Kshs. 600 Million disbursed later, thus admitting that the undertaking was for Kshs. 200 Million; that therefore, the Defendant has not refused to honour its said undertakings to the Plaintiff and has already confirmed to the Plaintiff that it will pay as soon as it receives payment of the balance of the Decretal Sum from the Government.

It is common ground that some time back, the Defendant recovered some KShs. 1,200,000,000/- towards the judgment sum and paid to the Plaintiff Kshs. 100,000,000/-. The Plaintiff alleges that its firm is now owed Kshs. 125,000,000/- as it has come to its knowledge that the Defendant has received a further Kshs. 600,000,000/- in clear funds from the Government.

The Defendant's argument is that it only undertook to pay Kshs. 200,000,000/- and has already paid half of the amount pro-rated as agreed. It admit that Kshs. 600,000,000/- has been received from the Government but that it has been paid towards interest (following a consent recorded between the Defendant and the Government after the Professional undertaking had been given) and therefore the plaintiff has no claim thereon based on the undertaking.. It argues that it must first recover the remainder of the decretal sum before it can pay the Plaintiff the balance.

The Defendant's interpretation of its professional undertaking seems unduly restrictive, narrow and self-serving. The undertaking does not state that the parties anticipated that the claim was to be negotiated further as Judgment had already been entered in favour of their mutual client for Kshs. 4,086,683,330/-. It also does not state that the Defendant needed to recover the principal amount of the judgment sum in order to pay the Plaintiff. It falls to reason that as soon as the Defendant recovered clear funds from the Government, it was required to remit to the Plaintiff fees pro-rated in proportion of the payment received in discharge of its professional undertaking.

In **Civil Appeal No. 276 of 2001 Harit Sheth T/A Harit Sheth Advocate vs K.H. Osmond T/A K.H Osmond Advocate** the Court of Appeal stated -

“A professional undertaking is given to an advocate on the authority of his client. It is based on the relationship which exists between the advocate and his client. An advocate who gives such a professional undertaking takes a risk. The risk is his own and he should not be heard to complain that it is too burdensome and that someone else should shoulder the responsibility of recovering the debt from his own client. A professional undertaking is a bond by an advocate to conduct himself as expected of him by the court to which he is an officer.....the law gives him the right to sue his client to recover whatever sums of money he had incurred in honouring a professional undertaking. He cannot however sue to recover that amount unless he has first honoured his professional undertaking.”

However, the fact that the Plaintiff did not raise any query when it received Kshs. 100,000,000/- out of Kshs. 1,200,000,000/- recovered by the Defendant puts to question its assertion that the undertaking was for a total of Kshs. 300,000,000/- and not Kshs. 200,000,000/-. In the letter dated 8th April 2015 the Plaintiff claims Kshs. 50,000,000/- instead of the Kshs. 125,000,000/- demanded in this suit. The inescapable conclusion is that, at this stage the plaintiff's claim is limited to Kshs. 50,000,000/-.

This matter would not have reached the court had parties herein engaged with a view to settling the same.

Be that as it may, with the material before me, I am persuaded that the plaintiff is entitled to Kshs. 50 Million on pro rata basis following the payment of Kshs. 600 Million to the Defendant.

Nowhere in the undertakings and correspondence between the parties was the issue of interest on the sum

due was discussed. I am unable to award the same.

The Defendant shall pay the plaintiff the sum of Kshs. 50 Million within 30 days of today and in default enforcement shall follow.

The plaintiff shall have the costs of these proceedings.

Orders accordingly.

Dated and delivered at Nairobi this 3rd Day of November, 2015.

A.MBOGHOLI MSAGHA

JUDGE