



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 155 OF 2012

**IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR THE ENFORCEMENT OF A
PROFESSIONAL UNDERTAKING**

BETWEEN

**MBOYA WANGONG’U & WAIYAKI ADVOCATES PLAINTIFF
AND**

HAMILTON HARRISON & MATHEWSDEFENDANT

J U D G M E N T

By an Originating Summons dated 20th March, 2012 the Plaintiff, a firm of Advocates sought as against the Defendants, another firm of Advocates two orders. Namely:-

“1) That the Defendant do within such a time to be fixed by this court honour its irrevocable professional undertaking dated 7th January, 2010 to pay to the Plaintiff the sum of Kshs.17,636,494/- (less the sum of USD 8,712.15)

2) In case of default thereof, the court do issue an order for the enforcement of the Defendant’s professional undertaking to pay to the Plaintiff the sum of Ksh.17,636,494/- (less the sum of USD 8,712.15) together with interest thereon at court rates from the 31st March 2011 until payment in full”.

The Plaintiff also sought the costs of the Originating Summons. Directions were given on 16th April, 2012 that the Originating Summons be tried by way of Affidavit evidence. It was also directed that the parties file their respective written submissions to be hi-lighted by Counsels. The submissions were filed and the same were hi-lighted on 5th June, 2012.

The Plaintiff’s case was that by an Agreement for Sale and Purchase of Shares made in or about August, 2007, Henry Njoroge and Lucy Njoroge (hereinafter “the Vendors”) the shareholders and directors of Open-view Business Systems Ltd, agreed to sell their shares to Access Kenya Group Ltd at an agreed consideration. That sale was concluded but a dispute arose about the purchase price and offset of amounts claimed under warranties in the said Agreement. The parties negotiated a settlement vide a Deed of Settlement dated 15th December, 2009 (hereinafter “the Deed”) between themselves. The Plaintiffs contended that under the said Deed, a sum of Kshs.17,636,494/- was to be paid to the Defendant firm to hold in an escrow interest bearing account and to be released in terms of Clause 8 of the Deed, that in pursuance of that provision of the Deed the Defendants issued an undertaking to the Plaintiffs dated 7th January, 2010 undertaking to release the said sum of Kshs.17,636,494/- in a certain way as set out in that undertaking within one year, that the claims by IBM World Trade Corporation (“IBM”) had been

confirmed to be US\$8,712.5 by 30th March, 2011, that the Plaintiffs had instructed the Defendants to pay the said sum of US\$8,712.15 to IBM and release the balance to the Plaintiffs but the Defendants had failed to either pay the said sum of US\$8,712.15 to IBM or to release the balance to the Plaintiffs, that the undertaking was now enforceable and that the undertaking was restricted to Clause 8 of the Deed whose conditions had been met thereby making the undertaking enforceable.

Mr. Mwaura, learned Counsel for the Plaintiff submitted that the Defendant had acknowledged receiving the amount in Escrow, which was being held in a fixed Account at NIC Bank, that the said amount does not belong to the Defendants and therefore they are not entitled to keep the same. That the Defendants have resorted to introducing unrelated and extraneous matters to avoid the clear and unequivocal undertaking given by them.

Counsel referred to the cases of James **Murimi Githinji –vs- John Ngure Mbugua (2008) e KLR 1** and **Harit Sheth –vs- K.H. Osmond (2011) e KLR 1** on the nature of a professional undertaking by an Advocate. Counsel therefore urged that the suit be allowed as prayed.

On the part of the Defendants, Mr. Paras V. Shah swore a Replying Affidavit on 17th May, 2012. The Defendants gave the background to the dispute, that the basis of the purchase of the shares in Open-view Business Systems Ltd by Access Kenya Group Ltd was the accounts of 2005, 2006 and August 2007 which showed profits totaling Kshs.41million, that the dispute that arose between the parties to that sale of shares agreement was because of the mis-statements of accounts by the Vendors to the purchasers which led to the execution of the Deed, that the sum of Kshs.17,636,494/- held in escrow was a claim by IBM against the business that had been sold to Access Kenya Group Ltd. That the professional undertaking made to the Plaintiff was on condition that payment to IBM of the outstanding amount is made to the satisfaction of the purchaser, that the purchaser had not yet confirmed its satisfaction, that release of the escrow amount as sought by the Plaintiff would be in breach of the undertaking given by the defendant, that the amount due to IBM was US\$85,962.74 and not US\$8,712.15 as contended by the Plaintiffs, that the Plaintiff had suppressed certain material facts relevant to this matter yet it was seeking discretionary orders.

Mr. Oraro, learned Counsel for the Defendant submitted that a professional undertaking is a declaration to be personally bound to an Advocate or someone else which is enforceable only in clear cases. For this proposition he relied on the cases of **David Karanja Thuo –vs- Njagi Wanjeru NBI HCCC No.2091 of 2009** and **Kassam Lalji Patel –vs- Peter Kimani Kairu CA No.135 of 1999(UR)**, that the undertaking by the Defendant was predicated upon the Deed and its terms were clear, that firstly the Defendant was to release the escrow amounts to the purchaser on expiry of one year less amounts paid to the vendors in terms of Clause 8.1.2 of the Deed, that IBM had not withdrawn any part of its claims, that the one year had expired on 15th December, 2010 and that no suit had been filed by IBM. Mr. Oraro therefore submitted that the grounds or conditions upon which the undertaking was given had not been satisfied and the Plaintiff's claim was therefore misplaced. Counsel urged that the suit be dismissed with costs.

I have considered the Affidavits on record, written submissions, the oral hi-lights by learned Counsels and the authorities relied on.

This is a suit to enforce an Advocates professional undertaking under Order 52 of the Civil Procedure Rules. I accept the definition of undertaking given in the case relied on by the Plaintiff of **James Murimi Githinji –vs- John Ngure mbugua (Supra)** as being an unequivocal declaration of intention addressed to someone by an Advocate or member of his staff on which the person to whom it is addressed places reliance on it. It has a binding character which the giver cannot renege, rescile or in any way whatsoever escape from. The obligations set out in the undertaking, even if highly detrimental or disastrous to the Advocate, must be met and in default, the same would be vigorously enforced by courts against the Advocate. This is so because of the significance of undertakings in legal transactions. Courts have therefore boldly enforced undertakings given by Advocates to protect the chequered history of undertakings in the legal profession. Indeed in the case cited by the Plaintiff of **Harit Sheth –vs- K.H. Osmond (2011) e KLR**, the Court of Appeal demonstrated the seriousness with which courts should treat professional undertakings given by Advocates. At page 3 of the said decision, the court held:-

“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. No matter how painful it might be to honour it, the advocate is obliged to honour it if only to protect his own reputation as an officer of the Court.”

Since the liability of an Advocate on an undertaking arises whether or not his client has settled the subject liability, the undertaking **MUST** be construed strictly against both the Advocate giving the undertaking as well as the Advocate accepting the undertaking. The same is not to be construed liberally as to make it difficult for Advocates to give such undertakings thereby clog the very intention for which they were intended, smooth commercial transactions. They should never be construed so liberally and/or widely as to extend the liability of the Advocates giving the undertaking, or so restrictive as to restrict, affect or reduce the benefit and/or rights of the Advocate to whom the undertaking is given. The intention and of the undertaking must be sought and vigorously enforced. This can only be achieved if the plain and literal meaning of the undertaking is sought, ascertained and enforced accordingly. To achieve this, every single word in the undertaking **MUST** be considered and given the meaning it was meant for.

From the foregoing, the issues this Court need to answer in this suit are threefold. Firstly, was there any professional undertaking given by the Defendant to the Plaintiff, secondly, if so, have the Defendants breached the said undertaking and thirdly, should the undertaking given by the Defendant dated 7th January, 2010 be enforced?

On the first issue, this court need to revert to the letter relied on by the Plaintiff. Exhibit “GW3” is the letter dated January 7, 2010 that is the basis of this suit. The said letter reads:-

“January 7, 2010

Mr. Godwin Wangong’u
Mboya & Wangong’u
Advocates
7th floor, Lonrho House
Standard Street
NAIROBI E-mail.godwin@mboyawangongu.com

Dear Sir,

RE: OPENVIEW BUSINESS SYSTEMS LTD

We refer to the Settlement Deed dated 15th December, 2009 (the “Deed”) between Henry Njoroge, Lucy Muthoni (the “Vendors”), Accesskenya Group Limited (the “Purchaser”) and Openview Business Systems Ltd (the “Company”), and in particular to Clause 8 of that Deed.

In terms of that deed, we hereby give you our professional undertaking that subject to and upon payment to us of Kshs.17,636,494/- (the “IBM Claims Amount”) by our client (from the proceeds of the sale of the Consideration Shares (defined in the deed); we shall hold such amounts in an interest bearing client account and only release such amounts as follows:

- a) On the expiry of one year from the date of this Deed, or upon notification by the Vendors in writing of an amount that they agree is payable to IBM, whichever is earlier, we will release absolutely to the Purchaser the entire IBM Claims Amounts (less any amounts paid to the Vendors under Clause 8.1.2 of the Deed or less any amounts paid to the Vendors in writing as still being under dispute), if IBM has not withdrawn all or any part of its claims against the Company;**
- b) If IBM has withdrawn or abandoned (to the satisfaction of the Purchaser) any part of the IBM Claims against the Company prior to the expiry of one year from the date of the Deed, then within one week of the Purchaser notifying us of such withdrawal of claim by IBM, we shall pay the amount of such claim so withdrawn to the Vendors; and**
- c) If IBM files suit against the Company for the IBM Claims amount, then we will pay the IBM**

claims amount to the purchaser to enable it to pay this to IBM to settle any claims it may have against the company.

We will account for interest on the IBM claims amount accrued in our account (less any withholding tax) and pay this to the Vendors and the Purchases pro rata on the basis of the final apportionment of the IBM claims Amount between the Purchaser and the Vendors, after the IBM Claims Account is fully paid out in accordance with Clause 8 of the Deed.

Yours faithfully

HAMILTON HARRISON & MATHEWS

SIGNED

ANDREW MUGAMBI

Cc Mr. Jonathan Somen

E-mail.Jsomen@accesskenya.com

Cc Mr. David Somen

E-mail.david@virtualis.biz

/jm

From the said letter, it is clear that it was written by the Defendants and was addressed to the Plaintiff. In it, the Defendants wrote:-

“....., we hereby give you our professional undertaking.....”

then they proceeded to give the various undertakings therein. In my view, I am satisfied that the Defendant did give to the Plaintiff an undertaking that was unequivocal in nature which is enforceable in law. The parties to this suit are reputable firms of Advocates in the City of Nairobi and the undertaking being unequivocal as it was, is enforceable on proof of its breach.

Having held that there was clearly an undertaking that had been given and which is legally enforceable, the next issue to consider is if it has been breached. It should be noted that the undertaking was predicated upon the Defendants receiving from their client a sum of Kshs.17,636,494/-. It is not denied that the Defendant indeed received the said sum and that the same is being held at a fixed deposit account with NIC Bank, Head Office Nairobi.

The said undertaking has three limbs. The court proposes to examine each limb to ascertain whether there was breach. These limbs are that, the Defendant was to ***“... hold such amounts in an interest bearing client account and only release such amount*”** on the following:-

***“a) the expiry of one year from the date of this Deed, or upon notification by the Vendors in writing of an amount that they agree is payable to IBM, whichever is earlier, we will release absolutely to the Purchaser the entire IBM Claims Amounts (less any amounts paid to the Vendors under Clause 8.1.2 of the Deed or less any amounts paid to the Vendors in writing as still being under dispute), if IBM has not withdrawn all or any part of its claims against the Company;*”**

Under this limb the Defendant was to release the monies to the purchaser on the occurrence of two things; firstly, after one year of the date of the deed or two upon notification by the vendors – i.e. the Plaintiff’s clients, of the amount agreed upon to be paid to IBM, whichever was earlier.

From the record, there was no evidence of any communication by the Plaintiff’s clients of the amounts agreed to be payable to IBM within one year of the date of the Deed. Accordingly, the condition of one year after the date of the Deed, i.e. 15th December, 2011 was earlier in time. Accordingly, under that limb my view is and I so hold that on the 15th December, 2011, the Defendant was under an obligation under

its undertaking to release to the purchaser the said sums less amounts paid to the Plaintiff's client under Clause 8:1:2. Under Clause 8:1:2, the amount payable to the vendors would have been the claim abandoned or withdrawn by IBM prior to expiry of one (1) year from the date of the Deed. There was no evidence on record to show that any claims had been withdrawn or abandoned by IBM within one year of the Deed or at all. Accordingly, there was no payment whatsoever to be made to the vendors under limb (a) of the Defendant's undertaking of 7th January, 2010. Therefore, no judgment can be made in favour of the Plaintiff or any other party under limb (a) of the said undertaking.

b) If IBM has withdrawn or abandoned (to the satisfaction of the Purchaser) any part of the IBM Claims against the Company prior to the expiry of one year from the date of the Deed, then within one week of the Purchaser notifying us of such withdrawal of claim by IBM, we shall pay the amount of such claim so withdrawn to the Vendors; and

Under this limb of the undertaking, the Defendants were bound absolutely to pay to the vendors any part of the IBM claims (this must be any part of the said sum of Kshs.17,636,494/-) which IBM may have withdrawn or abandoned prior to the 15th December, 2011 (the date expiry of one year of the date of the Deed). From pages 14 to 46 of the Exhibit "GW5", IBM was making claims of US\$85,962.74 as late as 11th July, 2011. The Plaintiff did not produce any evidence to show that before 15th December, 2011, IBM had withdrawn any part of its claims or had abandoned the same.

Under Section 108 of the Evidence Act, he who alleges must prove. Since, in my view, it is the Plaintiff who is alleging that the undertaking is due for enforcement, under limb 2 of the undertaking, it was incumbent upon the Plaintiff to show that as at 15th December, 2011, so much of the IBM claims had been withdrawn and/or abandoned so as to entitle the Plaintiff's clients to receive payment of the same from the Defendant. This not having been produced, the undertaking of 7th January, 2010 cannot be enforced against the Defendants under that limb.

iii) If IBM files suit against the Company for the IBM Claims amount, then we will pay the IBM claims amount to the purchaser to enable it to pay this to IBM to settle any claims it may have against the company.

Under this limb, the Defendant was duly bound to pay to the purchaser (who is their client, to refund so to say) the entire sum of Kshs.17,636,494/- if IBM filed suit against Openview Business Systems Ltd. There was no evidence that any suit had been filed. On this limb also, no judgment can be entered.

At this juncture, I should state that my view is that, the professional undertaking given by the Defendant was very specific, the Defendant did not give an undertaking to pay to the Plaintiff any monies whatsoever under the undertaking of 7th January, 2010. In my view, the undertaking given to the Plaintiff was to the effect that on the happening of certain events, which I have enumerated above, the Defendant was to release certain monies either to the purchaser (who is the Defendant's client) or the vendors who are the Plaintiff's clients.

Accordingly, having analysed the evidence presented to this court, I am of the view and so hold that the Originating Summons is for dismissal for two reasons:-

Firstly, the conditions for which the undertaking of 7th January, 2010 was given have not attached or occurred yet. If they had occurred, the same was not shown to this court. Secondly, the prayers sought in the summons are misplaced and cannot be granted. The liability of the Defendant was not to pay or release any of the sums of Kshs.17,636,494/- to the Plaintiff firm but to either the purchaser or the vendors. It should be noted that the summons prays that the amounts be paid to the Plaintiffs which the Defendants never bound themselves to in their undertaking of 7th January, 2010!

For the foregoing reasons, I believe and so hold that the Plaintiff has not proved its suit to the required standard whereby the suit is hereby dismissed with costs to the Defendants.

DATED and Delivered at Nairobi this 17th day of July, 2012.

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**A. MABEYA
JUDGE**