



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Suit 83 of 2008

MARIAM MWENI MUSEMBI.....1ST PLAINTIFF

TIMOTHY MUCHINA CHEGE.....2ND PLAINTIFF

VERSUS

FERNANDO VISCHI.....1ST DEFENDANT

MASHURUBU SUPPLIERS LTD.....2ND DEFENDANT

COREMA LIMITED.....3RD DEFENDANT

RENZO QUACIARI.....4TH DEFENDANT

HOLBORN PROPERTIES LTD.....5TH DEFENDANT

RULING

The application dated 29-4-09 is a Notice of Motion made under section 3A of the Civil Procedure Act and Order L Rule 1 of the Civil Procedure Rules. It seeks that the “undertaking as to damages” dated 25th March 2009 and filed on 1st April 2009 by the 1st plaintiff be expunged from the record.

It is premised on grounds that the same are bad in law and incompetent

(II) That the two undertakings are incapable of enforcement by court and should therefore be expunged from the record.

In the supporting affidavit by Fernando Vischi it is deponed that the court in granting an order in favour of the plaintiffs on 19-3-09 gave a condition that the plaintiffs were to give to court in writing an

undertaking as to damages in the sum of Ksh 10,000,000/-. It is pointed out that there are two versions of the requisite undertaking filed in court on different times and signed by different people – the same are annexed and marked FV2 and 3. It is pointed out that the undertaking filed in court on 26-3-09 is signed by Marian Mueni Musembi and Timothy Muchina Chege yet the same is not attested to in any way.

Further, that the said undertaking purports to be pegged on the event of the suit being dismissed instead of it being pegged squarely on the plaintiff not succeeding at the trial in establishing her legal right.

The undertaking filed on 1-4-09 is only signed by Marian Mueni Musembi and not appropriately attested.

In response, the first respondent has filed a replying affidavit on her own behalf and on behalf of the second respondent in which she states that the undertaking as to damages in an injunction is given to the court and not to the defendants and as long as the court has not expressed dissatisfaction with it, then the defendant has no locus to impugn the same.

Secondly, that there is no statutory prescribed form as to the contents of undertaking nor is there any statutory provision for attestation.

Respondents see malice and abuse of the court process in the application and prays for its dismissal.

At the hearing of the application Mr Maosa, submitted on behalf of the 5th defendant/applicant that, although the undertaking was given to this court, the real beneficiary is the applicant and therefore have the right to question its validity.

He has referred this court to the case of **F. Hottman – La Riche and Co. and Attorney General and others v Secretary of State (1974) 2All CR 1128** to support his argument. He also takes issue with the existence of the two undertakings saying the order by the court referred to one undertaking and he wonders which one of the two filed, the court would choose to act on in the event of a breach. So Mr. Maosa urges the court to expunge both undertakings which have been filed herein.

While conceding that there is no statutory prescription of an undertaking, Mr. Maosa urges this court to consider the reasoning in Hottman's case to find that the emphasis is on what is a suitable undertaking. He urges this court to look at the interpretation of General Interpretation Act section 72 where the key words are that:-

“Such documents should conform with substance so that they do not become void.”

In defining what an undertaking is and the form it should be in, Mr. Maosa draws from Jowitts Dictionary of English Law at pg 1827 which says, “*it is a promise*”, then proceeds to dissect the meaning of a promise as an engagement for the performance or non-performance of some particular thing. He urges that to have a legal effect, a promise must be either under a seal where it forms a covenant or it must form part of a contract – he points out that the two undertakings filed herein bear no seal and that a firm of advocates cannot be witness to the undertaking.

Mr. Maosa's concern is that if today the witnesses deny having signed the undertaking, then all would be lost since the plaintiffs have not paid any money, title or guarantee. It is also the applicant's contention

that the undertakings were filed after the time given had lapsed.

In response, Mr. Wasunna on behalf of the respondents submits that the application is frivolous and ought to be dismissed with costs. He argues that it has not been pointed out what defects renders the two documents incompetent and that section 72 of the General Interpretations Act is very clear as it refers to a form of document that is prescribed by law and form of undertakings is not prescribed by any statute. He explains that undertakings in injunction applications are not statutory requirements but are simply given under the equitable jurisdiction of the court and it would be up to the court to direct that the undertaking be in a particular form and in this case, the court did not specify the format nor has it expressed dissatisfaction at what has been filed.

In response to equating an undertaking with a promise/contract and therefore requiring a seal, Mr. Wasunna submits that contracts made under seal are those where there is no consideration yet in this case there is consideration passing from the promisor (plaintiff) to the promisee (court and 5th defendant) and that the court is allowing the plaintiff's land not to be developed in consideration of the undertaking so there need not be a seal. Why the two undertakings? Mr. Wasunna states that was as a result of the manner in which the order was worded i.e it referred to "She loses the claim" – which reference was to first plaintiff but out of abundant caution, 2nd plaintiff too filed an undertaking – hence the other one which is a joint undertaking so 5th defendant has actually obtained more than he had even bargained for as he will have the option of enforcing either document. As for the undertakings not being attested, Mr. Wasunna submits that there is no such requirement in law that documents filed in court must be attested.

There is also the issue as to the reason for filing the undertaking, 5th defendant took issue with the phrase that it is so that in the event that plaintiff's claim is dismissed, saying it ought to be if she fails to prove his claim – on this Mr. Wasunna says it is a case of splitting hairs because if the plaintiff does not succeed to establish her legal rights, it will be dismissed – so the difference is the same.

The content of this court's order was to this effect

"...the construction work and all other activities undertaken by the respondents must stop until this suit is heard and determined BUT this is on condition that the applicant files an undertaking for damages in the sum of kshs. 10,000,000/- (TEN MILLION ONLY) within 21 days hereof in the event that she loses the claim"

The error in that order was the reference to the plaintiffs as she, yet there are three plaintiffs and the correct word ought to have been they. This was an accidental slip and really can be remedied under the slip rule as recognized by provisions of section 99 of the Civil Procedure Act. It is no wonder that plaintiffs decided to be cautious and filed a joint undertaking and then took another step, just in case the court did not err in its meaning by filing another undertaking by the only plaintiff who would have the gender description fall as SHE. The plaintiffs cannot be faulted for that – the buck stops with the court.

The content of the undertaking is to the extent that plaintiffs undertake to pay the defendants the amount of Kshs. 10,000,000/- in case the suit is dismissed, being compensation for the loss which the defendants do suffer because of injunction orders.

This appears to be offensive and unacceptable to the 5th defendant – let me make it clear, that the undertaking is made, at the instance of the court, ultimately if the matter was dismissed then the beneficiary would be the 5th defendant. The undertaking is not given to the defendant but the court itself – see **Hoffmann-La Ritche (1974) 2 All R pg 1150**. So is there a prescribed format for an undertaking? Both parties concede that there is no such statutory provision and in fact such order is purely made in exercise of the court’s equitable discretionary powers under section 3A Civil Procedure Act. However the applicant herein offers some guidance as to what this court ought to look out for in satisfying itself that the undertaking is acceptable – of course the question is – acceptable to who? In the ordinary parlance what is an undertaking? **Funk and Wagnalls Standard Desk Dictionary vol 2** defines the act to “undertake” as:

“To make oneself responsible or liable with

To take upon oneself, agree or attempt to do, to pledge oneself, to guarantee or promise...”

This definition is then given a further legal outlook in Jowitt’s Dictionary of English Law 2nd Edition Vol 2 (London, Sweet and Maxwell Ltd 1977) at pg 1827 as follows:

“Undertaking; a promise...undertaking is frequently used in the special sense of a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposite party. Thus where an interim or ex parte injunction is granted, the court generally requires the plaintiff to give an undertaking as to damages, that is, he must undertake that if it should subsequently turn out that he was not entitled to the injunction and that its operation has caused injury to the defendant, he will pay to the defendant damages for the injury so sustained...”

An undertaking may be enforced by attachment or otherwise in the same nature as an injunction.”

I think that fits in squarely with what the court anticipated and the action the two plaintiffs/respondents have taken in filing the said document. In fact section 72 of the Interpretation and General Provisions Act (Cap 2) supports the respondents position as:

(a) There is no prescribed form by any written law as to the nature or form of an undertaking.

(b) Even if it deviated from the norm e.g by not bearing a seal as would perhaps be in a contract – that omission does NOT affect the substance of the document, which is very clear in its terms and meaning that none can say it is calculated to mislead either the court or any of the parties.

In fact such commitment by defendant means that applicant would be at liberty to execute by attachment in the event of them not paying the liquid sum undertaken. The issue of requiring that the undertaking bear a seal is misplaced – that would only be if it formed a covenant or part of a contract involving consideration and I think this can easily be distinguished from the condition prevailing here because although the action taken would fit with the definition of a covenant – this covenant is not an agreement between the two parties to the suit, but a pledge to the court, for the benefit of the 5th defendant.

What about the case law referred to? Hoffmann’s case (which is only of persuasive value) – it in fact does not prescribe what the contents of an undertaking should be and gives a history of undertakings. What Hoffman’s case recognizes is that at (1974)2 ALLER g 1146 paragraph a-b

“since an injunction by its nature freezes the situation, it is necessary also to think of the other party’s position and rights, he too by being stopped in what may be some lawful action, may suffer serious

damage. So the procedure has been evolved, and it is over 100 hundred years old – of matching the injunction with an undertaking to pay any damage which it is just ...should it turn out that the injunction was unjustified...”

Hoffmann’s case addresses the practice and desirability and advantages of the practice of requiring a party to make an undertaking for the protection or enforcement of personal or proprietary rights.

In fact this is what Hoffman’s case states;

“The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant’s benefit...”

So that should put to rest the lament expressed by Mr. Maosa as to what would happen if the respondents turned around and denied the undertaking

What about local case law? The applicant’s counsel cited the decision in **Gati v Barclays Bank (K) Ltd (2001) KLR pg 525** which held that;

“An undertaking as to damages is one of the criteria for granting an injunction, and where none has been given an injunction cannot issue. No undertaking was given as to damages by the applicant-“

I think Gati’s case is easy to distinguish from the present one, as the applicant in that case did not come to court with clean hands and the bottom line is that even that case had no prescribed character or nature of what must constitute an undertaking. There is one more issue – that the undertaking was filed after the time prescribed had lapsed.

From the court records, the order is dated 19th March, the joint undertaking was filed on 26th March 2009 (from the file copy) and is dated 25th March 2009 – that is less than the 21st (twenty one days) specified in the order. There are two undertakings, purely fixed on a cautionary basis, through no fault of the respondents – the correction has been made under section 99 Civil Procedure Act to clarify that the order applies to both plaintiffs – and yes I agree with Mr. Wasunna that 5th respondent is splitting hairs – that undertaking was made in relation to issuance of the injunction, so if that application for injunction is eventually dismissed, then the respondent will have lost its case in that context and there is really nothing more to clarify.

The upshot is that the application has no merit and is dismissed with costs to be borne by 5th defendant/applicant in favour of the respondents.

Delivered and dated this 8th day of **October, 2009** at Malindi.

H. A. Omondi

JUDGE

Mr. Okuto holding brief for Mr. Wasunna for plaintiff

Mr. Maosa holding brief for Chacha Odera for 5th defendant

Miss Umara for Attorney General