



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 3665 of 1991

PETER NGANGA MUIRURI.....PLAINTIFF

VERSUS

CREDIT (K) LIMITED..... DEFENDANT

RULING

In an application filed in this court on 9th March, 1998, the applicant Peter Ng'ang'a Muiruri, under, Order LIII rule 6(a) Civil Procedure Rules and section 3 of the Civil Procedure Act chapter 21 Laws of Kenya, sought the court's order to compel the firm of M/s Nyachae and company advocates to:

“forthwith honour their undertaking herein on 22nd July, 1997 to F.N. Wamalwa & Co Advocates for payment of Kshs 1,373,832.40 with interest thereon at 32% per annum from 20.12.96 until receipt of the said sum from M/s Wambugu & Co Advocates and henceforth interest thereon at 27% such interest to be based on 90 day treasury bills until discharge of the said undertaking.

There was also a prayer for the court to make such other or further order as the court may deem necessary to make in its inherent jurisdiction, plus costs of the application.

The application was supported by an affidavit of Fredrick N. Wamalwa, counsel for the applicant herein, in which he referred to negotiation which commenced in this matter by and between the parties after consent order had been recorded and interpreted by honourable Mr Justice Hayanga, regarding payment or otherwise of a sum of Kshs 1,373,832.40 which had been disputed and which was to be deposited in an interest earning account pending the outcome of the intended appeal by the defendant against the said Justice Hayanga's order.

According to this affidavit, consequent upon and in compliance with the said agreement the first defendant's advocates gave to the deponent's firm a professional undertaking for the sum payment of Kshs 1,373,832.40 together with interest and were in turn given an undertaking by M/s Wambugu and Co Advocates which the latter fulfilled by releasing the sum covered by their undertaking to the 1st defendant.

The deponent stated further that although the defendant lodged an appeal to the court of appeal against the interpretation given by Judge Hayanga to the consent order, such appeal was dismissed with costs but that counsel for the defendant had failed to honour their undertaking, hence a prayer that this court orders them to do so.

There was a replying affidavit and grounds of opposition filed by the firm of messrs Nyachae and the contents of the supporting affidavit.

From the contents of the replying affidavit, no professional undertaking was ever given by the firm of messrs Nyachae & Co Advocates as the plaintiff did not fulfil the conditions under which such an undertaking would have been given – hence there was no undertaking capable of enforcement.

Grounds of opposition similarly denied the existence of the undertaking capable of being enforced, since the plaintiff did not make a deposit of Kshs 1,373,832.40 as per the terms of the letter dated 22nd July, 1997 nor confirm the contents of that letter, and so forth.

The dispute herein involved two suits, namely HCCC No 160 of 1995 and 3665 of 1995. The plaintiff was the same one in both suits while the defendants were slightly different in both.

The plaintiff had borrowed money from Credit Kenya Limited, the first defendant in both suits on the strength of his property which he had mortgaged to the later. He seems to have run into problems in his repayment of the loan hence the security was in danger of being sold.

Parties entered into negotiations and the firm of Wambugu & Company Advocates released a sum of Kshs 7,543,467.65 in terms of the professional undertaking given by the said advocates. This was either the total amount owed or a big portion thereof.

There was, however, a dispute between the parties over the figure owed and the disputed figure was Kshs 1,373,832.40.

In a meeting held on 21.7.97 it was agreed that this disputed figure be deposited in an interest earning joint account in the names of both counsel for the plaintiff and the defendants pending a decision on an appeal which the defendants file in the Court of Appeal against the interpretation placed on the consent order by Judge Hayanga.

The defendants' appeal was dismissed on 6th February 1998. In the meantime the parties had on 21st July 1997 tried to resolve this dispute. As a result of that meeting, counsel for the defendant/respondents wrote a letter to counsel for the plaintiff/applicant laying down the terms of what appears to have been the resolutions arrived at in that meeting.

Part of the resolution was that the plaintiff/applicant was to deposit a sum of Kshs 1,373,832/40 with interest thereon at 32% per annum from 20/12/96 till all the monies representing that indebtedness, then Kshs 6,830,690/-, were paid by messrs Wambugu & Company Advocates who had given a professional undertaking in respect of payment thereof, in a joint interest earning account in the names of counsel for the plaintiff/applicant and that for the defendant/respondents,

This money was to remain in this account until the finalization of the appeal; whereof if the decision in the appeal was in favour of the plaintiff/applicant then the same would be refunded to him with interest calculated at ninety days treasury bills rates then.

From the submissions advanced, Messrs Wambugu & Company advocates honoured their professional undertaking and released sum of Kshs 7,543,467.65 towards the redemption of the mortgaged property.

Counsel for the respondent had said in the letter dated 22/7/97 that,

2. We shall give our professional undertaking that upon receipt of the redemption monies from M/s Wambugu & Company advocates, we shall release the sum of Kshs 1,373,832.40 together with interest at the same rate of 32% p.a. from 20/12/97 until receipt of the monies ...

Kindly let us have your confirmation of the foregoing”.

The applicant/plaintiff did not deposit Kshs 1,373,832/40 as required nor did his counsel confirm the contents of paragraphs 1 and 2 of the letter dated 22nd July 1997.

To my mind, paragraph 3 of the said letter was not in itself a professional undertaking as required by law. What I can envisage through that paragraph is that the defendants counsel was prepared to give an undertaking to release Kshs 1,373,832/40 on 2nd conditions, namely if the plaintiff and/or counsel deposited this money in an interest bearing account in the joint names of both counsel and if counsel for the plaintiff/applicant confirmed the contents of paragraph 1, 2 and 3 of the letter of 22/7/97.

In fact it was this money to be refunded to the plaintiff and not money paid by M/s Wambugu & Co advocates released for the redemption of the mortgage property or other money at all.

Now if the plaintiff/applicant did not deposit the sum of Kshs 1,373,832/40 as agreed in the meeting held on 21st July 1997 as confirmed in a letter addressed to his counsel on 22.7.97 or even confirm these proposals as required in that letter, then what amount did he want refunded to him.

The amount of Kshs 7,543,467/65 the firm of Wambugu & Co Advocates was the principle amount of the debt, namely, Kshs 6,8320,690 plus interest at the rate of 32% calculated daily from 20th July 1997 till payment thereof in full.

The money was released to the banker's lawyers by letter dated 10th November, 1997. The letter of the same date addressed to counsel for the 1st defendant is self explanatory and has no provision for Kshs 1,373,832/40 which was in dispute, nor does the letter say that out of the amount released, the plaintiff is to be refunded the disputed amount.

To my mind, there was no firm or any professional undertaking by counsel for the 1st respondent to refund to the plaintiff Kshs 1,373,832/40. The undertaking was to be given upon the plaintiff/applicant depositing into an interest bearing account this very money and on counsel for the plaintiff/applicant confirming the contents of the letter dated 22nd July 1997. The plaintiff/applicant and/or counsel did not do either of the two, yet these were conditional precedents before he could come to this court for the enforcement of the undertaking, if any.

As matters stand herein, there is no professional undertaking for which this court should make an order to enforce.

I dismiss this application with costs.

Delivered this 26th day of March 1998.

D.K.S. AGANYANYA

JUDGE