



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 156 OF 2015

ABRAHAM KIBET CHEPKONGA

T/A A. K. CHEPKONGA & COMPANY ADVOCATES....APPLICANT

-VERSUS-

PAUL GICHERU

T/A GICHERU & COMPANY ADVOCATES.....RESPONDENT

JUDGMENT

Abraham Kibet Chepkonga trading as A.K Chepkonga & Company Advocates (*herein after referred to as the plaintiff*) has come to court by way of Originating Summons against Paul Gicheru trading as Gicheru & Company Advocates (*hereinafter referred to as the defendant*) seeking to enforce a professional undertaking for the determination of the following issues;

- 1. Whether the Plaintiff was issued with a professional undertaking by the defendant's firm of advocates binding itself to pay Kshs. 3,325,000/= to the Plaintiff?**
- 2. Whether the Plaintiff pursuant to the undertaking did deliver to the defendant the original title of the land parcel known as ELDORET MUNICIPALITY/BLOCK 14/731?**
- 3. Whether the defendant has complied with the terms of the professional undertaking?**
- 4. Whether if the defendant having not complied with the terms of the professional undertaking he should be compelled to honor the same by paying Kshs 3,325,000 together with interests to the plaintiff?**
- 5. Whether the plaintiff in the alternative the defendants should deliver the original title in respect of the land parcel known as ELDORET MUNICIPALITY/BLOCK 14/731 to the plaintiff?**

In the affidavit of Abraham Kibet Chepkonga Supporting the Originating Summons, it is stated that he is a male adult individual of sound mind, an advocate of the High Court of Kenya trading under the name and style of A.K Chepkonga & Company Advocates and the plaintiff herein hence competent and duly authorized to swear this affidavit. He further states that the defendant via a professional undertaking issued on 18th November, 2014 by his firm bound himself to pay Kshs.3,325,000/= to the plaintiff. Upon the said professional undertaking, the original title deed of the land parcel known as ELDORET MUNICIPALITY/BLOCK 14/731 was handed over to the respondent.

According to the plaintiff, despite several notifications and reminders, the respondent has failed to honour his undertaking to date. A demand for compliance has been made. It is imperative in the interests of justice that this Honourable Court enforces the professional undertaking by issuing an order for payment of the sum indicated in the undertaking being Kshs. 3,325,000/= or in the alternative to have the original title deed to the land parcel returned.

In the replying affidavit, the defendant states that the said Originating Summons is incompetent on the face of it for the reasons that he is the sole proprietor of the Respondent firm as per the annexed certificate of registration. At no given time did he as the proprietor of the said firm issue any undertaking to the applicant. The person sued for the purposes of enforcement of a professional undertaking must be the same person who issues the undertaking.

Mr. Gicheru has looked at what is alleged to be the professional undertaking and the alleged undertaking and the other documents related thereto and believes that the alleged undertaking was not given for the benefit of the plaintiff but for the benefit of one Evan Kiprop Tum. He has made inquiries relating to the circumstances under which the alleged undertaking was given from Mr. Omollo H. Aseso who is an advocate employed in his firm and the events that took place thereafter. He is informed by Mr. Aseso Advocate which information he verily believes to be true that upon the giving of the alleged undertaking the parties who were the beneficiaries of the alleged undertaking namely Mike Kipyego Kipkorir and Evan Kiprop Tum entered into an agreement dated 23rd January 2015 settling the outstanding issues between them and that It is clear from the said agreement which was witnessed by Silas K. Kibii Advocate that: -

(i) The sum outstanding to the Applicant's client was agreed at Kshs.700,000/- which was to be paid to him by Mike Kipyego Kipkorir on or before 1/8/2015.

(ii) The Applicant's client bound himself to seek legal redress if Mike Kipyego Kikoi; defaulted in paying the said sum of Kshs.700, 000/-.

(iii) That the Applicant's client confirmed that he had no other claim against Mike Kipyego Korir over and above the sum of Kshs.700, 000/-.

Mr Gicheru further contends that this agreement was entered into on 23/1/2015 long after the purported undertaking was given on 18/11/2014. By the time this suit was filed, the agreement dated 23/1/2015 had been entered into by the contesting parties and the amount due from one to the other had already been agreed upon. The Applicant's claim of Kshs.3, 325, 000/- therefore lacks basis in view of the parties' own agreement that the only sum due between them was Kshs.700,000/-. This suit has therefore been superseded and the repayment date of the sum of Kshs.700,000/- under the agreement dated 23/1/2015 has not even reached. The Applicant's Originating Summons dated 23rd June 2015 should therefore be dismissed with costs.

The plaintiff submits that a professional undertaking by an Advocate binds the advocate and refers to **the encyclopedia of Forms and Precedents** 5th Edition at page 581 which defines an undertaking as:

"An equivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor or member of the solicitor's staff in the course of practice. An undertaking is therefore a promise made by a solicitor or on his behalf by a member of his staff, to do or refrain from doing something"

The applicant further submits that the practice, undertakings are usually given by Advocates or other professionals in order to smoothen the path of transactions, or to hasten its progress and are a convenient method by which some otherwise problematic areas of practice can be circumvented. Based on the definition it is clear that the respondent cannot be allowed to argue that he is not the one who issued the professional undertaking as the same is untenable at law. The undertaking in this case is made under the defendant/ respondent's letter head. The person signing the same appears as one of the Advocates in the said law firm at the top of the letter head. The respondent has established that the person was not his

employee.

He refers to the case of Peter Ng'ang'a Muiruri —V- Credit Bank and Charles Ayaku Nyachae T/ A. Nyachae And Company Advocates, Civil Appeal No. 263 of 1998, the Court of Appeal held as follows:

"An undertaking is a solemn thing. In enforcing undertakings, the court is not guided by considerations of contract, but the court aims at securing the honesty of its officials".

In the case of Harith Sheith —V- K. H. Osmond (2011) EKL.R, the court stated:-

"An Advocate who gives an undertaking takes a risk. The risk is his own and he should not be heard to complain that it is too burdensome that someone else should shoulder the debt no matter how painful it might be to honor the advocate is obliged to honor it"

The plaintiff further argues that the respondent in the present case cannot complain that it is unjust that the burden should not be borne by him, as the undertaking was issued well with the knowledge of such risk. He cites the case of S.T.G Muhia T/ A. S. Thuo Muhia & Company Advocates —V- J. M. Chege T la. J. M. Chege & Company Advocates Nairobi HCCC no. 651 of 2004 (OS), where the court stated that the issue of determination was whether the plaintiff therein had established his case to entitle the court to compel the defendant to honor the professional undertaking that she gave to the plaintiff vide her letter of 14th January, 2004. The court pointed out that in their closing submissions, both counsel had appreciated the import of a professional undertaking.

The court further noted in the cited case that the plaintiff's counsel had urged the court to adopt the definition of professional undertaking as set out in Halsbury's Laws of England, 4th Edition re-issue, volume 44(1) at page 223 note 1 which defined a professional undertaking as, an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor or a member of staff in the course of practice or a solicitor as 'solicitor' but not in the course of practice whereby the solicitor becomes personally bound.

The court in its determination of the matter found for the plaintiff and held; ***therefore hold that the plaintiff has established, to the required standard of proof on a balance of probabilities, that the defendant is entitled to honour her professional undertaking to pay the plaintiff the sum of Kshs. 515,149/=. I therefore enter judgment in favour of the plaintiff as against the defendant for the said sum of kshs. 515,149/=. The said amount shall be paid with interest at a court rates from the date of filing suit to the date of payment. The plaintiff shall have the costs of the suit. It is so ordered."***

The plaintiff contends that honorable professional conduct is required of officers of the court and refers to the case of Together Investment Limited —V- Evans A. Angicho TIA. Ongicho — Ongicho & Company Advocates Nairobi Civil Application no. 168 of 2012 (OS), where the court found and held that the respondent in that particular case was accountable to his undertaking and that he was liable to pay the money at the interest rate of 14% on the deposit of Kshs.1,200,000 from the date he made the undertaking to the date he fully paid the whole amount of interest. The court thereby ordered the same together with costs to be paid to the applicant therein. In arriving at it determination, the court stated;

"Having given a solemn undertaking to pay a certain amount of money and given a date within which to pay the money an advocate is bound by the same and he cannot therefore negate. It is unfortunate that the respondent even after giving the undertaking to pay the deposit it took him almost 9 months to actually pay the stated amount. This is conduct unbecoming of an officer of this court".

In the case of Kenya Commercial Bank -V- Adala (1983) KLR 467, the Court of Appeal held:

"1. The courts have an inherent power to commit advocates for breach of an undertaking. The court has jurisdiction over an Advocate for breach of an undertaking on the basis that the order sought seeks the court to exercise its punitive and disciplinary power to prevent a breach of duty

by an Officer of the court which is quite distinct and separate from the client's legal right

2. The purpose of the punitive and disciplinary powers of the courts' jurisdiction over advocates is (to enforce) honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Cap. 16"

It is the applicant's contention that the professional undertaking is enforceable independent of the underlying transaction and finds basis *In STG Muhia TIA. Muhia -V- J. M. Chege TIA. J.M. Chege & Company Advocates (Supra)*, where the court stated:

"A professional undertaking by an advocate constitutes a separate agreement independent of the transaction that resulted in such an advocate being required to give a professional undertaking can therefore be enforced against an Advocate independent of the transaction in which the transaction in which the professional undertaking was given."

The Court of Appeal in the case of Karsam Lalii Patel —V- Peter Kimani Kairu practicing as Kimani Kairu & Company Advocates Nairobi Civil Appeal No. 135 of 1999 laid out the legal position to the effect that there would be nothing illegal if the enforcement of a professional undertaking achieved the unintended result of enforcing the aggrieved party's legal rights under an agreement for sale or other arrangement. It cannot be argued that the court ought not to commit an Advocate for breach of an undertaking or to compel him to honour it because in doing so it would enforce the grievant's legal rights.

The professional undertaking made by the respondent's firm in the present case is binding upon him and he is therefore obliged as an officer of the court to honour it. The failure by the respondent to honour the undertaking in this case is unacceptable and a clear breach of the professional conduct of an Advocate.

In the case of Naphatali Paul Radier —V- David Njogu Gachanja carrying on business as D. Njogu & Company Advocates Nairobi (Milimani Commercial Court) Civil Case no. 582 of 2003, the court pointed out that the defendant David Njogu Gachanja's law firm being M/s. D. Njogu & Company Advocates acted for him in the transaction and all relevant correspondence was being carried out by the firm acting on his behalf, but given that the firm was the defendant's trade name, it found that in essence he was acting himself. The court quoted the definition of a professional undertaking from the Encyclopedia of Forms and Precedents, 5th Edition Volume 30 to the effect that an undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor in the course of his practice, either personally or by a member of his staff under which the solicitor (or in the case of a member of his staff, his employer) becomes personally bound. The Court remarked,

"I hold that the defendant is indeed obliged in law as an officer of the court to honour that professional undertaking, an undertaking given by an advocate is personally binding upon him and must be honoured. Failure to honour an undertaking is prima-facie evidence of professional misconduct. This court has the power to enforce the professional undertakings of Advocates, a power that the court will not hesitate to exercise in appropriate cases. This is such an appropriate case".

On the question of whether interest should be payable upon the sum of the undertaking, the court held that given that the defendant had withheld the plaintiff's money for period of time, justice demanded that he then pay it with interest at court rates.

In light of the foregoing, the applicant hereby prays that this Honourable Court be pleased to issue an order directing the respondent to honour the undertaking of 18th November, 2014 and pay the sum of Kshs. 3,325,000/- together with interests and costs.

The respondent submits that before the determination of the issue of the existence of a professional undertaking between the applicant and the Respondent, arising herein is a question of the jurisdiction of this Honorable Court with respect to enforcement of the alleged professional undertaking. The issue of

jurisdiction is key in this matter seeing as the Applicant's suit is bad in law since the Applicant purports to force jurisdiction where it does not exist in the first place.

He argues that this Honorable Court is a creature of statute and derives its existence from **Article 162(2) of the Constitution of Kenya 2010** as well as Sections 12 and 13 of the Environment and Land Court Act and particularly Section 13 of the Environment and Land Court Act which clearly spells out the jurisdiction of this Honourable Court and among them, does not lie the enforcement of a professional undertaking. He cites the celebrated case of **Mukisa Biscuit Manufacturing Company Ltd -vs - West End Distributors Ltd [19601 EA 986**, where it was stated that; "A point of law which has been raised, or which answers by clear implication out of pleadings and which is argued as a preliminary point may dispose of the suit. He further cites the celebrated case of **The Owners of Motor Vessels 'Lilian S' -vs- Clatex Oil Ltd [1989] KLR where Nyarangi J.** stated that;

"...Jurisdiction is everything without it, a court has no power to make one more step for continuation of proceedings pending other evidence..."

The same position was also landed in the case of the owners and master of motor vessel Joey -vs - the owners and Masters of the motor tugs "Barbara" and "Steve B" Civil Appeal No.286 of 2000 and further **Samuel Kamau Macharia & Another -vs Kenya Commercial Bank & 2 others [2012] eKLR** where the court held that;

" A court of law can only exercise jurisdiction where it has been confined to it either by the Constitution, statute or both... "

On the issue, as to whether there existed a professional undertaking between the applicant and the respondent herein; the respondent argues that he is a sole proprietor of the Defendant firm herein and that at no time did the respondent as the proprietor of the Defendant firm issue a professional undertaking to the Applicant. It is trite law that the person who issues a professional undertaking must be the person to be held accountable for the professional undertaking. Therefore, the defendant herein should not be held liable for matters which he was not party to. In that the alleged professional undertaking was between the Applicant and another party and not between the Applicant and the Defendant.

The respondent argues that the said professional undertaking was superceded by the disputing parties' agreement which was entered into after the purported professional undertaking and therefore the applicant herein cannot purported to have a higher standing with respect to the said professional undertaking when in the first instance, the purported undertaking was for the benefit of his client; Evans Tum. Further, that his client, Evans Tum has not suffered loss in any manner with respect to the alleged professional undertaking and that that the disputing parties herein entered into an agreement after the said professional undertaking thus the parties involved were no longer in dispute and had in fact arrived at a settlement hence the agreement dated 23rd January 2015 superceded the alleged professional undertaking. In other words, the prayers being sought by the Applicant have been largely overtaken by events and therefore the suit is bad in law frivolous vexatious and abuse of court process. The respondent prays that the suit be dismissed wit costs.

In this matter, Mr. Gicheru's client was indebted to Mr. Chepkonga's client to the sum of Kshs. 3,325,000 and that Chepkonga was holding Gicheru's client's title deed in lieu of the debt. Mr. Gicheru's client was securing certain Banking facilities from K.C.B Iten Branch and the title deed was required for purposes of registration of the charge. The firm of Gicheru undertook to pay the firm of Chepkonga Kshs.3,325,000/= within 14 days after successful registration of the charge documents on condition that the firm of Chepkonga retain the original title deed.

All this are in the letter dated 18.11.2014 addressed to M.s A. K Chepkonga & Company by O.N Aseo of Gicheru & Company advocates. The firm of Chepkonga & Co. Advocates released the original title upon the preferred undertaking.

On the 15.12.2014, the firm of A.K Chepkonga & Company Advocates wrote to defendant requesting for

an update on the issue of payment and did a reminder on 10.01.2015 but there was no response. Another letter dated 19.01.2015 was addressed to Gicheru & Company Advocates requesting for the title document and threatening to take action for breach of professional undertaking and for specific performance but there was no response. This was followed by another letter by Anassi Momanyi & Company Advocates dated 26.1.2015 and a final letter from Chepkonga Advocate on 11.4.2015 and finally a demand letter on 7.5.2015. The firm of Gicheru & Company did not respond to a single letter therefore, the Plaintiff filed the Originating Summons.

I have perused the letter dated 18.11.2014 and do find that it was an undertaking by the firm of Gicheru and Company Advocate to pay the firm of A.K Chepkonga & Co. Advocates Kshs. 3 million on the expiry of 14 days after successful registration of the charge this never happened. The letter dated 18.11.2014 amounts to a professional undertaking and therefore to said letter bound the defendant.

On jurisdiction, I do find that the dispute herein revolves on the title to the property Eldoret Municipality/Block 14/73. The Plaintiff was holding the title to the property because the defendant's client was indebted to his client and therefore the title was being held as security for the debt.

The court has considered the submissions made by the counsels for the respective parties on the issue of jurisdiction. The Environment and Land Court is established under Article 162 (2) (b) of the constitution which provides that: -

(2) Parliament shall establish courts with status of the High Court to hear and determine disputes relating to: -

(b) The environment and the use and occupation of, and title to land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Pursuant to the clause (3) above, parliament enacted Environment and Land Court Act. No. 19 of 2011. Section 13(2) of the said Act, sets out the jurisdiction of the ELC and it provides as follows: -

(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (d) of the constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the constitution, the court shall have power to hear and determine disputes”-

(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents valuations, mining, minerals and other natural resources;

(b) Relating to compulsory acquisition of land;

(c) Relating to land administration and management

(d) Relating to public, private and community land and contracts choses in action or other instruments granting any enforceable interest in land; and

(e) Any other dispute relating to environment and land.

Under part 1- (preliminary to the Act), court is defined to mean the Environment and Land Court established under section 4 pursuant to Article 162 (2) (b) of the constitution. I do find that the court has jurisdiction to entertain the dispute as the title under dispute was being held as security to a debt and the whole suit revolves on both the undertaking by the defendant and the issue of title.

In the case of Kenya Commercial Bank -V- Adala (1983) KLR 467, the Court of Appeal held:

" 1. The courts have an inherent power to commit advocates for breach of an undertaking. The court has jurisdiction over an Advocate for breach of an undertaking on the basis that the order sought seeks the court to exercise its punitive and disciplinary power to prevent a breach of duty by an Officer of the court which is quite distinct and separate from the client's legal right

2. The purpose of the punitive and disciplinary powers of the courts' jurisdiction over advocates is (to enforce) honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Cap. 16"

The court finds further that the respondent in the present case must be compelled to honor the professional undertaking issued on 18th. November, 2014 in the interests of justice. The Plaintiff has established on a balance of probabilities that the defendant has a duty to honor his preferred undertaking to pay to plaintiff Kshs.3 million or return the title deed for property No. ELDORET MUNICIPALITY BLOCK 13/543. I do hereby make orders that the defendant do pay the plaintiff Kshs.3,325,000/=. In alternative, the defendant to deliver original title in respect of land No. ELDORET MUNICIPALITY BLOCK 13/543. Orders accordingly.

Dated and delivered on this 24th day of November, 2017.

A. OMBWAYO

JUDGE