



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KISUMU

ELC CASE NO.687 OF 2015

MOHAMED ALI MOTHHA.....PLAINTIFF

VERSUS

IMPERIAL BANK LIMITED.....DEFENDANT

AND

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

**IN THE MATTER OF CIVIL PROCEDURE ACT, ORDER 51, RULE 1, ORDER 52 RULE 7(1)
(A) & (2)**

BETWEEN

IMPERIAL BANK LIMITED.....APPLICANT

VERSUS

MOSES WAWERU NDUNGU & JASPER ODUOR OMONDI

T/A OMONDI WAWERU & CO. ADVOCATES.....RESPONDENT

RULING

1. The Respondents, **Moses Waweru Ndungu** and **Jasper Oduor Omondi T/A Omondi Waweru & Company Advocates**, filed the notice of motion dated 20th April 2015 against the Applicant, Imperial Bank Limited, praying for stay of execution of the ruling and orders of 19th March 2015 and 25th March 2015 respectively, setting aside of the said ruling and order and leave to file their response and be heard in the application dated 8th May 2014. The application is based on the grounds on its face and supported by the affidavit of Moses Waweru Ndungu sworn on 20th April 2015 in which he deposes that they had instructed the firm of Mwamu & Co. Advocates to file the replying affidavit and attend the hearing of the 17th September 2014 and were surprised to learn from the Applicant's counsel that the orders subject matter of this ruling had been issued *ex parte*.

2. The application is opposed by the Applicant through the replying affidavit of Dennis Ngaira sworn on 27th April 2015 in which the deponent details the three occasions Mwamu Advocate applied for

adjournment to enable him file the responses and submissions for the Respondent but failed to do so and prays that the application should be dismissed with costs.

3. The counsel for the parties appeared before the court on 13th May 2015 when prayer 2 was granted. It was further agreed that Mwamu advocate who was in court and had been adversely mentioned in the application was at liberty to file his response. The parties counsel also agreed to file written submissions in respect of the application dated 20th April 2015. The Respondent's and Applicant's counsel filed their written submissions on 2nd December 2015 and 7th November 2015 respectively. The summary of the submissions are as follows;

A. RESPONDENT'S SUBMISSIONS:

That the Respondent had instructed Mwamu & Co Advocates to represent them in this matter as shown in annexure MMN 1 of the supporting affidavit. That after the orders were issued, the Respondent perused the court record and found that Mwamu Advocate had only been holding their brief and had not formally come on record for them. The Respondent have a good response on why the professional undertaking cannot be enforced as it was conditional to other transactions which did not materialize. That the Applicant will not suffer any prejudice by granting the prayer sought as compensation by way of thrown away costs would be adequate. The counsel referred the court to the case of **Maina -V- Mugiria Civil Appeal No.27 of 1982**, **Girado -V- Alam (V) Ltd (1971) E.A 448** and **Housing Finance Company of Kenya -V- Richard Ndere Johnson & 3 others Civil Appeal No.52 of 2003**. The counsel submitted that it has not been the intention of the Respondent to subvert or delay the course of justice in these proceedings and that the Respondent had moved timelessly in filing the application upon learning that *ex parte* orders had been issued.

B. APPLICANT'S SUBMISSIONS

That the Applicant filed their application dated 8th May 2014 and served the Respondent in May 2014. That the application came up for hearing on 14th May 2014, 4th November 2014, 9th December 2014 and 2nd February 2015 when a ruling date of 19th March 2015 was fixed. That the Respondent did not file any document in opposition to the application or written submission though opportunity to do so was granted by the court adjourning the matter as requested by Mr Mwamu advocate. The counsel submitted that the Respondent has been avoiding their responsibility under the professional undertaking and the application should not be allowed. The counsel referred the court to the decision in **Josphat Nderitu Kariuki -V- Pine Breeze Hospital Ltd [2006] eKLR**. The counsel pointed out that the draft replying affidavit annexed to the supporting affidavit and marked annexure MWN 4 is dated 2015 but there is no indication as to when it was forwarded to the firm of advocate who was to file it. That the Respondent is a firm of advocates and hence knowledgeable in court procedures yet there is no evidence that they were following up on the progress of their case other than the letter dated 22nd September 2014. The counsel referred to the case of **Bi-Mach Engineers Ltd -V- James Kahoro Mwangi [2011] EKLR** on their submission that the Respondent had a duty to follow up and pursue the matter and not necessarily wait until counsel briefed them on the progress. That a party has a remedy against a counsel who is guilty of inaction. The counsel also referred to the case of **Three ways Shipping Services (Group) Ltd -V- Mitchell Cotts Freighters (K) Ltd [2005] eKLR**. The counsel further submitted that though Mwamu Advocate, who had been adversely mentioned in these proceedings, had been granted leave to file his papers in response, the court was later informed on 28th September 2015 that he would not be filing any papers as they had reached a consent. However the details of the consent was not disclosed to the court. The counsel submitted that the Respondent would have recourse against the counsel they had instructed and their application should be rejected. The counsel referred to **Order 51 rule 14 of Civil Procedure Rules** and submitted that the Respondent did not file any of the listed papers to intimate that they wanted to oppose the application. The Applicant's counsel submitted that contrary to the Respondent's counsel's submissions, the professional undertaking was not conditional upon any other event occurring. The counsel referred to the case of **In the matter of Section 50 (1) of the Advocates Act -V- Muriu Mungai & Co. Advocates & Another [2009] eKLR** and the **Elcyclopaedia of Forms and Precedents 5th Edition Volume 39 at Page 581** on the definition of what constitutes a professional undertaking. The counsel submitted that the application by the Respondent is misplaced, an abuse of the court's process

and intended to delay and frustrate the course of justice and should be dismissed with costs.

4. The court has carefully considered the affidavit evidence presented, rival submissions by both counsel the court record and come to the following findings:

a) That the first time the application dated 8th May 2014 and filed on 12th May 2014 come up for hearing was on 17th September 2014. On that day Mwamu Advocate indicated to the court that he was going to come on record for the Respondent and requested for time. Mr Ngaira for the Applicant did not oppose and the next date was fixed on 4th November 2014 with directions that submissions be filed. The record shows that the court was not sitting on 4th November 2014. However the counsel for the Applicant, Plaintiff and Japheth for Mwamu Advocate for the Respondent fixed the matter for mention on 9th December 2014. The record further shows that on 9th December 2014, counsel for the Plaintiff indicated that they are not opposing the application. Then Mwamu advocate informed the court that Defendant had filed their submission and requested for more time to file submission. The court set the matter for mention on 2nd February 2015 to enable the Respondent (Third Party) file their submission. When the matter came up again on 2nd February 2015, only counsel holding brief for the Applicant's counsel was in court. The counsel informed the court that the Respondent had not filed any submissions and requested for a date for ruling. The court then fixed the matter for ruling on 19th March 2015..

b) That in the ruling of 19th March 2015 which the Respondent seeks to have set aside, the court observed as follows:

" 8. It appears clear that the Respondent was served. In spite of that however, the Respondent did not respond to the application. There was an attempt however at informal appearances. The court record show that when the matter came up in court, some counsels intimated that the Respondent had given them instructions to appear and that some response would be made.

9. Both the Applicant and the court were very patient with the Respondent. But the Respondent did not respond and as things stand, this application is not opposed."

c) That the finding in (a) and (b) above confirms that the Respondent had been served with the application dated 8th May 2014 and filed in court on 12th May 2014. The receipt of the application is also acknowledged by the Respondent through their averments in the application dated 20th April 2015 and the supporting affidavit of Moses Waweru Ngudgu sworn on 20th April 2015 where at paragraph 3 he deponed as follows;

" 3. That upon receipt of the Chamber Summons Application dated 08.05.2014, together with the hearing notice for hearing slated for 17th September 2015 (sic) the Respondent instructed the firm of Mwamu & Co Advocate to file the necessary documents and take over the conduct of this matter on their behalf."

The court has perused the court and noted that the firm of Mwamu & CO Advocates never filed documents to signal that they had taken the conduct of this matter on behalf of the Respondent or filed any documents for the Respondent. That position was earlier confirmed by the court in its ruling of 19th March 2015.

d. That the participation of Mwamu Advocate in these proceedings on 17th September 2014, 4th November 2014 and 9th December 2014 can at best only be taken to have been holding brief for the Respondent who is a firm of advocates. That though the Respondent has annexed to their supporting affidavit a copy of a correspondence dated 22nd marked MWN 1 which refers to a letter of instructions dated 15th September 2014 that was not annexed, the court is not in a position to know why Mwamu & Co Advocates did not file the documents the Respondent desired. The court also notes that Mwamu & CO Advocates did not file any documents in this matter despite initially indicating that they would file some response on discovering that they had been adversely mentioned in the Respondent's application. Mr Omondi holding, brief for the Respondent informed the court on 28th September 2015 that the parties

were negotiating, but as properly submitted by the Applicant's counsel, the details of the negotiations and consent if any, were not disclosed to the court. The issue between the Respondent and Mwamu & Co Advocate failure to act is however not for determination in this ruling.

e) That though the Respondent appear to blame the counsel they had instructed for failure to file a replying affidavit and deponed that they had sent a soft copy of the draft annexed as MWN 4, the court is in agreement with the Applicant's counsel's submission that annexure MWN 4 carries a date of 2015 and could not have been meant to guide Mwamu & Co Advocate to craft the replying affidavit to be filed in the year 2014. It is not therefore clear whether the Respondent had indeed given Mwamu & CO Advocates full instructions to enable them come on record formally and file a response on their behalf in the year 2014. The situation would have been clearer had Mwamu & CO Advocates filed their response as they had indicated that they would.

f) That any party who is desirous of filing a response to an application is required under **Order 51 Rule 14 of the Civil Procedure** to file a notice of preliminary objection, and or replying affidavit, and or statement of grounds of opposition. The Respondent herein did not file any such document though they had a counsel in court who was holding their brief. The Applicant did not need to serve the respondent's with any mention notice after 17th September 2014 as the counsel holding their brief was present when all the other dates and subsequent directions were given.

g) That court addressed itself to the professional undertaking given by the Respondent to the Applicant in its ruling dated 19th March 2015. The court referred to the document containing the professional undertakings which were annexures MW4, MW5, MW6 and MW7 and after considering the decided cases cited by the Applicant's counsel found as follows:

" 12. All things considered, it is clear that the Respondent made a professional undertaking to the applicant which it failed or refuse to honour. And instead of offering plausible explanations for not doing so it chose to go silent on the matter. This matter represents one of the rare instances in which the goings on in a case mutate to affect a counsel personally. A professional undertaking is not a contract, it is a promise. But the undertaker can only renege on it on pain of some nasty legal consequences.

13. The application herein is well merited. It is shown clearly that an undertaking was given, only for the giver to later resile from the obligations that would go with it. Such behavior is a blot on legal profession; it brings dishonour and when it comes to court, it comes across as sacrilege at the temple of justice. The application herein is allowed....."

The Respondent has not laid any reasonable grounds before this court to enable it exercise its unfettered discretion in their favour. The Respondent can only be taken to have had no reasonable response or submission to file in respect of the Applicant's application dated 8th May 2014. To ask the court to set aside the ruling of 19th March 2015 and order of 25th March 2015 in such circumstances would amount to further injustice on the part of the Applicant. As it was held in the cases of **Jasphat Nderitu Kariuki -V- Pine Breeze Hospital Ltd.** [2006] eKLR, the court declines to exercise its discretion in favour of the Respondent as there are no plausible reasons advanced by the Respondent to enable the court do so. If the counsel instructed by the Respondent failed to do as instructed then as held in the case of **Bi - Mach Engineers Ltd -V- James Kahoro Mwangi** [2011] eKLR, " **that is not an excusable mistake which the court may consider with some sympathy. The client has some remedy against such an advocate.**" As was held in the case of **Kenya Reinsurance Corporation -V- E. Muguku t/a E. Muguku Muriu & Co Advocates CACA NO.48 of 1994** (unreported), the Respondent's professional undertaking was unambiguous, unequivocal and binding on them. The court further held as follows in that case;

" An advocate cannot after giving such an undertaking qualify the same on account of some accounting dispute between the parties Such an advocate cannot give an excuse regarding a pre-existing dispute of his client to avoid being held liable, on the professional undertaking that he has given.

It is trite that a professional undertaking is a separate contract between the advocate giving the undertaking and the person to whom the undertaking is given. It is not dependent on the performance of the contract or agreement that necessitated the giving of the undertaking."

5. That having come to the above findings, the Respondent's notice of motion dated 20th April 2015 is without merit and is dismissed with costs to the Applicant. The interim order of 13th May 2015 is hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this 16th day of March 2016

In presence of;

Applicant/Respondent Absent

Respondent /Applicant Absent

Counsel Mr Omondi for Omondi Dalmas for Applicant and

M/S Langat for Waweru Nyuthe for Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/3/2016

Elc 687 of 2013

16/3/2016

S.M. Kibjuna J

Mr Oyugi court assistant

M/S Langat for Wangai for Respondent

Mr Omondi T. for Omondi Dalmas for Applicant.

Court: Ruling delivered in open court in the presence of Mr Omondi for Omondi Dalmas for Applicant and M/S Langat for Wangai Nyuthe for Respondent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/3/2016

Mr Omondi: We seek leave to appeal and pray 30 days stay to enable the Applicant move to the court of

Appeal.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/3/2016

M/S Langat: No objection

Court: B/C 30 (thirty) days stay granted. Leave to appeal also granted.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/3/2016