



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO. 740 OF 2014**

**GARO CO-OPERATIVE SAVINGS CREDIT SOCIETY LTD.....PLAINTIFF**

**VERSUS**

**J.D. MURIMI T/A MURIMI & CO. ADVOCATES.....DEFENDANT**

**RULING**

There are two applications before the Court for determination. The first is an application dated **21<sup>st</sup> November 2014** by an interested party **M/s. Mastermind Tobacco (K) Limited** (hereinafter “the Applicant”) seeking joinder to the suit and the other is a **Preliminary Objection**, filed by the Plaintiff to the said application. The Applicant sought an order of joinder to the suit. The application is based on grounds that the Applicant instructed the Defendant herein to represent it in a sale, subject matter of the suit and furnished it with funds to enable it to honour its professional undertaking. However, that the Plaintiff failed to meet all the outgoings leaving a water bill of **Kshs. 3,190,602/-** which was settled by the Applicant. Therefore, it is in the interest of justice that the Applicant be joined to the proceedings so that all the issues in controversy would be placed before the Court for determination at once.

The application was supported by an affidavit sworn by **R.M. Mutuma**, the Applicant’s Company Secretary. It was deposed that the Defendant was instructed to issue a professional undertaking for **Ksh. 17,550,000/-**. Before completion, the Plaintiff was obligated to clear all outgoings but failed to meet an outstanding water bill of **Kshs. 3,190,602/-** which the interested party was forced to settle. Therefore, that the Plaintiff failed to properly complete the transaction, and should first settle the outgoing before lodging any claims in respect of the sale transaction. The deponent opined that no prejudice would be occasioned to either party if the application was allowed.

In opposing the application, the Plaintiff filed a Preliminary Objection dated **27<sup>th</sup> February 2015**, wherein the Plaintiff averred that:

1. ***The application is bad in law for misjoinder of causes of action and parties as provided for under Order 1 of the Civil Procedure Rules, as whereas the Plaintiff’s claim is for the enforcement of an Advocate’s Professional Undertaking, the interested party’s claim is for a sum of money not provided for in the undertaking and in respect of which a separate procedure for redress exists.***
2. ***The application is bad in law as it offends the provisions of the Advocates Act on undertakings and Order 52 of the Civil Procedure Rules.***

3. ***Under the law, the Plaintiff's claim being enforcement of an Advocate's professional undertaking cannot be defeated or challenged or diluted by extraneous claims which claims have in any event not been pleaded by the Advocate.***
4. ***The joinder of the interested party will prejudice and delay the prosecution of the Plaintiff's claim as against the Defendant who has not denied the Plaintiff's claim.***

Both applications were canvassed by way of written submissions. On behalf of the Applicant, it was submitted that the contract between the Plaintiff and Applicant is ***prima facie*** and that the Plaintiff had an obligation of settling all outgoing, which it failed to do. Further that the Plaintiff claims the sum of **Kshs. 2,575,000/-** at an interest rate of **28% p.a.** and a penalty of **24% from January 2012** whereas it has failed to disclose that it left an outstanding water bill of **Kshs. 3,190,602/-** which surpasses its claim. Thus, that since the Plaintiff did not render the premises free from all encumbrances, the Defendant was justified in applying the set off in releasing the balance of the purchase price.

Counsel relied on the provision of **Order 1 Rule 3 of the Civil Procedure Rules**, stating that the transaction and series of events were co-related, the Applicant being the purchaser in the sale transaction. It was submitted that, in the circumstances, failure to join the Applicant to the proceedings would be prejudicial and a miscarriage of justice. Further, that it would be a waste of judicial time for the Applicant to institute a new claim whereas the Court has an opportunity to address this claim.

On behalf of the Defendant, it was submitted that the jurisdiction of the Court to join a party to a suit flows from **Order 1 Rule 10(2) of the Civil Procedure Rules**. Counsel submitted that the presence and testimony of the Applicant is necessary for the effectual and complete adjudication of all questions involved in the suit. It was further submitted that the Plaintiff could not enforce a Professional Undertaking unless it performed the conditions of the Undertaking.

For the Plaintiff, counsel submitted that a professional undertaking is a separate contract between advocates and is not contingent upon any terms of contract between his client and any other party. Therefore that an advocate's undertaking cannot be watered down by extraneous issues that were not subjected to the undertaking. On the issue of joinder, counsel submitted that the Applicant had failed to show the nexus between the orders they seek from the Court to the performance of the Professional Undertaking and therefore the application should be dismissed.

There is an allegation by the Applicant that the Plaintiff failed to complete the sale as agreed by leaving an outstanding water bill which it was forced to pay. Consequently, that its advocate was right in withholding the balance, subject matter of the suit. The Applicant seeks joinder to the suit so as to establish its claim. In opposing the application, the Plaintiff contends that the two are separate claims with different procedures for redress.

The Plaintiff herein availed to this court authorities to the effect that an undertaking cannot be watered down based on accounting disputes between parties. I am also guided by other decisions made by learned Judges and their Lordships of the Court of Appeal that an undertaking is a separate agreement independent of the transaction that resulted in such an advocate being required to give a professional undertaking. **Refer to the cases of S. T. G. Muhia t/a S. Thuo Muhia & Co. Advocates v J. M. Chege t/a J. M. Chege & Co. Advocates [2009] eKLR and Christopher Musyoka Musau v N. P. G Warren & 7 Others [2012] eKLR.** These authorities are good law, persuasive and even binding to this Court.

However, in my view, an undertaking is given upon an intention. Mabeya J. in the case of **Mboya Wangong'u & Waiyaki Advocates v Hamilton Harrison & Mathews Miscellaneous Civil Application 155 of 2012 [2012] eKLR** elaborated it better in observing that:

***“The intention 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.”***

We must therefore refer to the undertaking given to ascertain its intention. The letter dated **28<sup>th</sup> March 2011**, reads as follows:

*Dear Sirs,*

**RE: PURCHASE OF NAIROBI BLOCK 209/7141/4 – GAILEY & ROBERTS CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD & OFAFA HOUSING CO-OPERATIVE SOCIETY LTD**

*We refer to the above matter. We have received an undertaking from Messrs. Ndungu, Njoroge & Kwach Advocates for Kenya Commercial Bank Ltd, to pay to us Kshs. 273,750,000/- as per the enclosed copy of the letter. Our client have deposited Kshs. 54,750,000/- with us.*

*We hereby give you our professional undertaking to pay to you:-*

- 1. Kosgey & Masese Advocates – Kshs. 310,950,000/- and*
- 2. Onsando, Ogonji & Tiego, Advocates – Kshs. 17,550,000/-*

*being the balance of the purchase price on the registration of the Transfer of Lease to our client and charge in favour of Kenya Commercial Bank Ltd within 14 days of the receipt of these registered documents. Vacant Possession will have to be given.*

*Yours faithfully,*

*Murimi & Company*

The question, therefore, is whether vacant possession constitutes free from all encumbrances. I have perused the Sale Agreement entered into between the parties which at **Clauses 7 and 8** make provision for **Vacant Possession** and No **Encumbrances**, respectively. **Clause 8(a)** reads:

*The Property is sold subject to the Acts, Covenants, Conditions and Stipulations affecting the property but otherwise **free from all encumbrances.***

From the foregoing, it is my finding that vacant possession includes payment of all encumbrances saves as what is provided for in the agreement. Clause 7 and 14 thereof provided that rates and rents will be apportioned between the parties and that the purchaser would be required to pay the vendor the amount apportioned to him. Thus, save for rates and rents, the vendor was supposed to settle out the outgoing.

In that regard, therefore, whether or not there was a breach of the undertaking by the Defendant, in my view, will be determined on the success or otherwise of the Applicant's claim of the outstanding outgoing.

The upshot is that the Applicant's application is allowed and the Plaintiff's preliminary objection fails. Consequently, the Court makes the following orders:-

- 1. The Applicant herein is joined to the proceedings as an interested party.*
- 2. The Plaintiff is at liberty to amend its pleadings accordingly, if need be, within 14 days from the date hereof.*
- 3. The Defendant and Interested Party to file responses within 14 days from the date of receipt of service.*
- 4. Costs of the application be in the cause.*

Dated, Signed and Delivered this **31<sup>st</sup>** day of **July, 2015**

**L.GACHERU**

**JUDGE**

In the Presence of:-

M/s Gitau for the Plaintiff/Respondent

None attendance for the Defendant/Respondent

None attendance for Interested Party/Applicant

Nyangweso: Court Clerk

**Court:**

Ruling read in open Court in the presence of **M/s Gitau** for the Plaintiff and absence of the other parties.

**L.GACHERU**

**JUDGE**

**31/7/2015**