IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL 253 OF 2013

(CORAM: WAKI, WARSAME & GATEMBU, JJ.A

BETWEEN

ONESMUS GITHINJI & COMPANY ADVOCATES .....APPELLANT

AND

FIDELITY BANK LIMITED.....RESPONDENT

(Being an appeal against the Judgment (Havelock, J) delivered on 28th

January, 2013

in

HC.C.C. NO. 209 OF 2012*)*

****

JUDGMENT OF THE COURT

1. In this appeal, the appellant, a firm of advocates, complains that the High Court (Havelock, J) erred in its judgment delivered on 28th January, 2013 ordering the appellant to honour its professional undertaking for the payment of money to the respondent.

Background

2. By an instrument of Legal Charge dated 29th September 2006, (the charge) Joel Nyoike Mugo and Njeri Nyoike Mugo (the proprietors) charged their property known as Land Reference Number 12715/201 Machakos (the property) to the respondent, Fidelity Bank Limited, (the bank) to secure banking facilities granted to Northline Limited (the borrower) by way of overdraft facility and other banking facilities.

3. Subsequently, by a letter dated 27th April 2010, the proprietors informed the bank that they were in the process of subdividing the property into 18 plots with a view to selling the same and wished to redeem the charge. They accordingly requested the bank to release the title documents in respect of the property with a view to discharging the charge.

4. In order for the bank to release the title documents relating to the property as well as an executed discharge of the charge, the appellant, as the advocates for the proprietors and the borrower, furnished the bank's said advocates with a professional undertaking, by a letter dated 28th June 2010, to pay to the bank the outstanding sum of Kshs. 3,036,380.85 (as at 30th April 2010). It is necessary to reproduce the contents of that letter:

> ***"Daly & Figgis,***
>
> ***Advocates,***
>
> ***Lornho House, Standard Street,***
>
> ***P.O. Box 40034-00100***

NAIROBI

Dear Sirs,

RE: DISCHARGE OF CHARGE IN RESPECT OF L.R. NO. 12715/201, MACHAKOS CHARGOR: JOEL NYOIKE MUGO & NJERI NYOIKE MUGO (T/A NORTHLINE. LTD) CHARGEE: FIDELITY BANK LTD.

Refer to the above and your letter dated 4th May 2010.

We apologise for the delay in replying.

Furnish us with the original title documents held by yourselves on the terms of the professional undertaking set out hereunder:-

1. THAT we will hold the Original Grant registered as Number LR. 44387/1 (the "Title") in respect of L.R. No. 12715/201, Machakos (the "property") and the discharge of the charge to be executed by Fidelity Commercial Bank Limited (the "Discharge") (all the foregoing documents together referred to as the "Documents") to your order, returnable upon demand upon the terms of this letter pending discharge of the monies specified in paragraphs 2, 3 and 4 below and that we will not release the documents to any other person for any purpose whatsoever without first obtaining your written authority, EXCEPT to the Land Titles Registry for purposes of registration of the Discharge upon terms that:-

i. If the Land Titles Registry declines to register the Discharge over the property then we shall immediately return to you the unregistered Documents.

AND THAT

ii if registration is not complete within sixty (60) days of your delivering the documents to us, we shall immediately re-deliver the documents to yourselves.

2. THAT we will pay to Fidelity Commercial Bank Limited (the"bank"), net of all bank charges and without any deductions or withholding whatsoever the Undertaking Amount (as hereinafter defined) the outstanding sum (as at 30th April, 2010) of Kenya Shillings Three Million, Thirty Six Thousand, Three Hundred & Eighty and Eighty Five Cents (Kshs. 3,036,380.85) (the "amount") which amount accrues interest until payment if full [that is to say, when the Bank shall be in cleared funds in the amount of the Undertaking amount) at the rate of 16.50% per annum on the sums up to Kenya Shillings Three Million as more particularly specified in the charge (the amount and the aforesaid interest together being the "Undertaking Amount") within seven (7) days of the registering of the discharge, time being of the essence.

3. THAT we will pay to yourselves the net of all bank charges and without any deductions or withholding whatsoever any interest or monies (if any) payable to the Bank in accordance with the applicable terms of the current facility letter relating to the bank facilities provided to Northline Limited by the Bank and for which the charge stands as security and in particular any early redemption interest as more particularly specified in the current facility letter within seven (7) days of the date of the registration of the Discharge, time being of the essence.

4. THAT we will pay to yourselves net of all bank charges and without any deductions or withholding whatsoever, your handling charges of Kenya Shillings Forty Thousand (Kshs. 40,000/=) exclusive of Value Added Tax within seven (7) days of the date of the registration of the Discharge, time being of the essence.

We look forward to your confirmation of our professional undertaking in the terms aforesaid.

Kindly revert.

Yours faithfully,

Onesmus Githinji

FOR: ONESMUS GITHINJI & CO. ADVOCATES

Cc: Client"

5. Based on that undertaking, Daly & Figgis Advocates released the original grant over the property, the original charge, and the duly executed discharge of charge to the appellants under cover of letters dated 7th July 2010 and 16th August 2010. Daly & Figgis Advocates concluded their letter of 16th August 2010 forwarding the executed discharge of charge to the appellant thus: "*we look forward to hearing from you in accordance with the terms of your professional undertaking in due course*."

6. On 11th October 2010, Daly & Figgis Advocates inquired from the appellant what progress had been made in registration of the discharge

but there was no response. On 22nd February 2011, the said advocates wrote a letter to the appellant demanding payment of "*Kshs. 3,105,799.65 as at 31st January 2011*" in accordance with "*your undertaking*"

7. On 24th February 2011, the appellant wrote a letter to Daly & Figgis Advocates part of which stated that:

> ***"Pursuant to the undertaking, our records show that we made the following payments amounting to Kshs. 2,450,000/= to the bank.***
>
> ***CHEQUE NO. DATE AMOUNT***
>
> ***i. 000653 11/5/2010 750,000.00/=***
>
> ***ii. 000654 11/5/2010 750,000.00/=***
>
> ***iii. 000662 25/05/2010 950,000.00/=***
>
> ***TOTAL 2,450,000.00/=…"***
>
> ***At about the same time our client informed us that he had entered into a separate arrangement with the bank to continue with the facility. He informed us that the bank required him to clear the loan subject to our undertaking. We gave him a cheque for Kshs. 586,380.85/= to deposit with the bank.***
>
> ***Inadvertently and encouraged by the silence from the bank, we assumed that we had complied with our undertaking. This explains why we wrote our letter dated 18/11/2010 which did not elicit any response from your end."***

8. Thereafter, the parties were unable to resolve the matter between themselves. On 12th April 2012, the respondent filed suit by way an originating summons against the appellant seeking an order of enforcement of the professional undertaking under the provisions of Order 52 rule 7 of the Civil Procedure Rules. Rule 7 of Order 52 provides that:

> ***"7. (1) An Application for an order for the enforcement of an undertaking given by an advocate shall be made-***
>
> ***(a) if the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or***
>
> ***(b) in any other case, by originating summons in the High Court."***

9. In its supporting affidavit sworn by its Legal Officer, the bank asserted that it released the title documents in relation to the property and discharged its security on the strength of the appellant's professional undertaking to pay Kshs. 3,036,380.85 within 7 days of the registration of the discharge of charge; that the appellant had failed to honour the undertaking and was purporting to have done so on account of payments made to the respondent prior to the undertaking.

10. In response to the suit, the appellant filed a replying affidavit sworn by Onesmus Githinji, the managing partner of the appellant firm, in which he deposed that the bank confirmed by a letter dated 29th April 2010 "*that the outstanding balance as at 30th April 2010 was Kshs. 3,036,380.85 and interest accruing*"; that on 5th May 2010, his firm received the form of professional undertaking the advocates for the bank, Ms. Daly & Figgis advocates required in order to release the title documents; and that on 28th June 2010, the appellant furnished the undertaking in terms requested.

11. The appellant's managing partner further deposed that that in the meantime the appellant had agreed with its client, the chargor, to start making payments into the overdraft account with the intention of reducing the indebtedness and to avoid punitive interest; that between 11th May 2010 and 25th May 2010, an amount of Kshs. 2,450,000.00 was paid into the overdraft account; that further payments were made into the account and the total amount paid into the account after 30th April 2010 is Kshs. 5,684,601.00; that the bank had inexplicably and without seeking the appellant's consent or approval and while knowing that the charge was in the process of being discharged allowed withdrawals from the account for which the appellant should not be liable; that in the circumstances, the amount in respect of which the appellant gave a professional undertaking was fully paid and "*in fact, overpaid by Kshs. 2,647,719.20*".

12. The appellant also asserted that the proper person to initiate the proceedings for enforcement of the professional undertaking could only be the firm of Daly & Figgis advocates and that the bank had no *locus standi* to institute the action.

13. After hearing the parties, the High Court (Havelock, J as he then was) was satisfied that the appellant was in breach of its professional undertaking. Accordingly, the court ordered the appellant to honour its professional undertaking and to pay to the bank, within 30 days of delivery of the judgment, Kshs. 3,036,380.85 and interest thereon at the rate of 16.5% from the date upon which the undertaking was called upon, i.e. 22nd February 2011 until payment in full. Aggrieved, the appellant lodged this appeal.

The appeal and submissions

14. In its memorandum of appeal, the appellant faulted the Judge for failing to appreciate that the bank was the beneficiary of the payments

made into the overdraft account after 30th April 2010; that the Judge erred in holding that the amounts paid into the account after 30th April 2010 and prior to the date when the professional undertaking was furnished on 28th June 2010 were not to be taken into account in relation to the appellant's undertaking; that the Judge was wrong not to hold that the appellant's undertaking was to pay to the bank "Kshs. 3,036,380.85 outstanding in the account overdraft of Northline Limited as at 30th April 2010 and that, the amount of Kshs. 2,450,000.00 had been admittedly paid by the appellant to the said overdraft account after 30th April 2010"; and that the Judge should have held that any amount outstanding in the overdraft account after taking into account payments made into the account after 30th April 2010 was payable by the borrower and not by the appellant.

15. During the hearing of the appeal, learned counsel Mr. S. Masila teaming up with Mr. I. Mworia for the appellant began by urging that the bank did not have *locus standi* to institute proceedings for the enforcement of the professional undertaking since it was given to the firm of Daly & Figgis advocates; that the undertaking could only be enforced at the instance of that firm which should have been the proper party to take out the originating summons. In that regard, counsel argued that the decision of this Court in *Karsam Lalji Patel v Peter Kimani Kairu Practicing as Kimani Kairu & Company Advocates*, Civil Appeal No. 135 of 1999, in which a contrary decision was made has since been overturned by the subsequent decision of this Court in *Waruhiu K'Owade & Nganga Advocates vs. Mutune Investment Limited [2016] eKLR* upholding the doctrine of privity of contract. Although the appellant conceded before the lower court that the issue of *locus standi* had been settled by this Court in *Karsam Lalji Patel v Peter Kimani Kairu Practicing as Kimani Kairu & Company Advocates*, (above), he contended that it remained a live issue as it challenged the jurisdiction of the court.

16. Counsel submitted that the Judge erred in failing to find that the appellant discharged the undertaking; that the amount confirmed as outstanding as at 30th April 2010 in respect of which the appellant gave the professional undertaking was Kshs. 3,036,380.85; that after 30th April 2010, after notification of the outstanding amount, payments, by way of cheque deposits, well in excess of that amount were made into the account; that notwithstanding that those cheques were issued on 11th May 2010 prior to the letter of undertaking given on 28th June 2010, the Judge should nonetheless have appreciated that the appellant had thereby discharged the undertaking. In effect, counsel argued, payments made into the overdraft account between the effective date of 30th April 2010 and 28th June 2010 when the undertaking was given were payments pursuant to the undertaking.

17. According to the appellant, it cannot be responsible for any amount drawn from the overdraft account by the borrower subsequent to 30th April 2010 after the process of discharging the security had already began. Counsel urged that it is to the borrower that the bank must look for drawings from the account after 30th concluded by urging that the Judge erred the effective date the recovery of any April 2010. Counsel in his interpretation of the effective date.

18. Opposing the appeal, Mr. C. Kanjama, learned counsel for the appellant began by pointing out that having conceded before the lower court that the issue of locus standi had been settled by this Court in *Karsam Lalji Patel v Peter Kimani Kairu Practicing as Kimani Kairu & Company Advocates*, (above), it was not open to the appellant to raise the issue on appeal. In any case, counsel submitted, there is clear authority that a professional undertaking being a promise is tantamount to an unconditional guarantee and is enforceable even if it does not constitute a legal contract; that the decision of this Court in *Waruhiu K'Owade & Nganga Advocates vs. Mutune Investment Limited* (above) that stands for the proposition that the responsibility of a party issuing a professional undertaking cannot be diluted by introduction of collateral matters has not altered the position on *locus standi* as urged by counsel for the appellant.

19. On the question whether the appellant had discharged the undertaking, counsel cited numerous authorities on the nature and sanctity of a professional undertaking and submitted that by its undertaking given on 28th June 2010, the appellant was thereby promising to pay to the bank, on a future date, the amount of Kshs. 3,036,380.85 and interest; that the significance of 30th April 2010 is that that amount is what was outstanding on the borrower's overdraft or running account as at that date; that it is inconceivable that payments made prior to the furnishing of the undertaking would go towards discharging a subsequent undertaking. In effect, payments made prior to the date of the professional undertaking are irrelevant in relation to the question whether appellant performed its undertaking. Furthermore, the cheques for the amount of Kshs. 2,450,000.00 that the appellant claims should be taken as payments towards discharging the undertaking were issued by the appellant to the borrower and do not amount to payments by the appellant to the bank.

Analysis and determination

20. We have considered the appeal and the rival arguments. Although learned counsel addressed us at length on the nature of an advocates professional undertaking, the only question in this appeal is whether the learned Judge of the High Court was right in determining that the appellant had breached its professional undertaking and in ordering its enforcement.

21. The sequence of events leading to the institution of the suit for enforcement of the appellant's professional undertaking is not in dispute. As already noted, the borrower had obtained banking facilities from the bank secured by a legal charge over the property. Intending to have the property discharged in order to subdivide it, the borrower, by its letter to the bank dated 27th April 2010, requested the bank to "*advise our advocates the amounts outstanding and start the process so that the discharge of the charge on the property is effected immediately*."

22. On 29th April 2010, the bank then instructed its advocates, Daly & Figgis Advocates to "liase with" the advocates for the borrower in connection with the "redemption process" stating, in the same letter, that "the outstanding sums upto 30th April 2010 is Kshs. 3,036,380.85 and interest accrues at the rate of 16.50% pa on the sums upto Kshs. 3,000,000.00 and 26%pa on excess above Kshs. 3 million." Based on those instructions, Daly & Figgis Advocates requested the appellant to furnish a professional undertaking in specific terms. Daly & Figgis Advocates made the request for the professional undertaking from the appellant on 4th May 2010. On 28th June 2010, the appellant, whilst apologizing to Daly & Figgis Advocates for the delay in replying gave a professional undertaking in the terms we have reproduced above.

23. In the intervening period, that is, between 4th May 2010 and 28th June 2010, the borrower continued to transact with the overdraft account. In other words, the balance outstanding on the account did not after 4th May 2010 remain static at Kshs. 3,036,380.85. Based on the statement of account produced before the lower court, the account remained very active after that balance had been communicated as the

outstanding balance as at 30th April 2010. Some of the transactions reflected on the statement of account after 30th April 2010 include cheque deposits amounting to Kshs. 2,450,000.00 made up of two cheques of Kshs. 750,000.00 each deposited into the account on 11th May 2010 and one cheque of Kshs. 950,000.00 deposited into the account on 25th May 2010.

24. According to the appellant's counsel, those cheques (for a total of Kshs. 2,450,000.00) were issued by the appellant to the borrower and deposited into the account "pursuant to the undertaking" and the Judge ought to have appreciated that. That, in our view, is not a credible argument. It is, with respect, absurd to suggest that the appellant would have been undertaking to pay the said amount "within 7 days of the registration of the Discharge, time being of the essence" when in fact the appellant considered that it had already made the payments. If indeed the appellant considered that it had discharged its obligation to liquidate the debt the subject of the undertaking, in advance of giving the undertaking, it would have said so expressly in its letter of undertaking of 28th June 2010. It would have qualified the undertaking by stating that the amount had already been paid.

25. In our understanding, the appellant was modifying the terms and conditions of the professional undertaking by raising issues that predate the maturity and enforcement of its obligation towards the party that guaranteed to indeminify in the event of non-compliance. In essence it is not a prerogative of one party to interprete a clear provision or condition of the undertaking for his own benefit in order to avoid his promise or obligation. Such an action or omission is not only unacceptable but in violation of the professional undertaking given for the smooth, efficient and effective conclusion of transactions between Advocates. The undertaking was to cover payments made and personal liabilities incurred within the framework of the said document. For clarity a professional undertaking creates a right which can act as a shield or sword for both sides.

26. We are therefore fully in agreement with the Judge when he stated in his judgment that:

> ***"In this matter, the Respondent [appellant] has given as his excuse for not honouring his professional undertaking, the fact that the monies by way of overdraft amounting to Shs.3,030,638.85 owing to the Applicant by Northline had been repaid. I do not accept this contention. What the Respondent has done is to pay the sum of Shs. 2,450,000/= to the account of Northline with the Applicant.. It has not paid the Applicant. I consider it immaterial to the undertaking that such monies were paid and more by Northline itself. The fact of the matter is that the monies are still owed and, in my opinion, the professional undertaking given by the Respondent still stands.***

In our judgment therefore, the learned Judge correctly ordered the appellant to honour its professional undertaking.

27. What remains is the question whether the respondent had *locus standi* to enforce the undertaking. To start with, we note that in the replying affidavit in opposition to the originating summons, the appellant contended that Daly & Figgis Advocates, as opposed to the bank, was the proper applicant as the professional undertaking was given to that firm and that the bank "has no *locus standi*." However, when confronted with the decision of this Court in *Karsam Lalji Patel v Peter Kimani Kairu Practicing as Kimani Kairu & Company Advocates* (above), the appellant abandoned that complaint and conceded in its written submissions before the lower court that "the bank, which is the principal, has locus standi to sue the advocate. We therefore abandon our preliminary objection on this issue." In light of that concession, the learned Judge did not, correctly in our view, address that issue. Little wonder therefore that the appellant did not in its memorandum of appeal raise the matter.

28. However, during the hearing of the appeal, perhaps to add an arrow in its quiver, the appellant again raised the issue of the bank's *locus standi* to institute the action arguing that the decision of this Court in *Karsam Lalji Patel v Peter Kimani Kairu Practicing as Kimani Kairu & Company Advocates* (above) had subsequently been overruled by this Court in its decision in *Waruhiu K.'owade & Co. Advocates* (above). That argument is based on a misapprehension of the latter decision. The decision of this Court in *Karsam Lalji Patel* stands for the proposition that a suit for enforcement of a professional undertaking given by an advocate can be maintained at the instance of the client on whose behalf it was given. The rationale being that the advocate giving the undertaking does so as the agent of the client, a disclosed principal.

29. The decision of the Court in *Waruhiu K.'owade & Co. Advocates* did not change that position. The Court in that case was dealing with a situation where an advocate was refusing to honour an undertaking and purported to exercise a right of lien over a sum of money that was the subject of a professional undertaking. The Court expressed the view that contractual rights and obligations between a client and advocate cannot affect the advocates obligation to honour its professional undertaking. That is to say, a professional undertaking given by advocates is separate and distinct from the underlying contract and that "*in enforcing undertakings, the court is guided not by considerations of contract, or of securing the legal rights of parties, but mainly by ensuring the honesty of advocates*." In the words of the Court:

> ***"In any event, the doctrine of privity demands that only parties to a contract may be affected by the rights and duties that arise out of a contract. As we know true propriety rights are binding on the world. However, contractual rights are only binding on, and enforceable by, the parties to the contract. We think what the appellant has done and continues to do is a tendancy which is unfounded in contractual rights which are restrictive in nature to be extended in its scope so as to affect parties who cannot in law be regarded as parties to the transaction.***
>
> ***To the point of sounding simplistic, we think that the doctrine or privity means and has been interpreted to mean that a person cannot acquire rights or be subject to liabilities arising under a contract to which he or she is not a party. <u>What</u> <u>we are saying is that the money received on the strength of a professional undertaking by the appellant cannot be used to cover a debt or liability between parties who are not privy to the said transaction. Even if the respondent owed money to the appellant, the money deposited by M/s Sichangi & Co. Advocates cannot be used to cover or offset such a</u> <u>liability."</u>*** (Emphasis)

We respectfully agree.

30. The result of the foregoing is that the appeal is devoid of any merit. It is accordingly dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of April, 2018.

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

……

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

…….

JUDGE OFAPPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR