



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)**

**CIVIL APPEAL NO. 199 OF 2015**

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**CIVIL APPEAL NO. 199 OF 2015**

**EVANS THIGA GATURU.....1ST APPELLANT**

**CAROLYNE WANJIHIA.....2ND APPELLANT**

**AND**

**NAIPOSHA COMPANY LTD.....1ST RESPONDENT**

**FUBECO CHINA FUSHUN.....2ND RESPONDENT**

**MILESTONE COMPANY LTD.....3RD RESPONDENT**

**STEPHEN SIMIYU T/A DESIGN**

**ARCHITECTS & INTERIOR DESIGNERS.....4TH RESPONDENT**

**PINNACLE PROJECT LTD.....5TH RESPONDENT**

**NUKSTIBE ESTATE & CONSTRUCTION LTD.....6TH RESPONDENT**

**CATHERINE NGUGI NJERI.....7TH RESPONDENT**

**HIGHFLYERS SISTERS INVESTMENTS.....8TH RESPONDENT**

**JOYCE MURUGI MUIGA.....9TH RESPONDENT**

**THIRIKA TEA FARM LTD.....10TH RESPONDENT**

**NELLIE GECAU.....11TH RESPONDENT**

**RUTH WAMUCHA NJUGUNA.....12TH RESPONDENT**

JOHN NDEITHI GATHERU.....13TH RESPONDENT

MAGARITA VILLAS.....14TH RESPONDENT

*(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Gikonyo, J.) dated 10th June 2015*

in

HC MISC. APP. NO. 222 OF 2012)

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**JUDGMENT OF THE COURT**

*Evans Thiga Gaturu* (1st appellant) and *Carolyn Wanjihia* (2nd appellant), who are advocates of the High Court of Kenya, are aggrieved by the order of the High Court (*Gikonyo, J.*) dated 10th June 2015 in which the learned judge ordered them to deposit in court within 7 days some sums of money that they were paid to or held by them pursuant to professional undertakings. They contend that the order was in violation of the rules of natural justice, in particular the right to be heard, and that it constituted enforcement of an advocate's professional undertaking in utter violation of the prescribed procedure. *Catherine Ngigu Njeri, (7th respondent), Highflyers Sisters Investments (8th respondent), John Nderitu Gatheru (13th respondent) and Magarita Villas (14th respondent)*, the only respondents who turned up to oppose the appeal, urged that the order was properly made and in any event, the appellants have fully complied with it.

The background to the order is by no means straightforward. From the record the primary facts are as follows. The 2nd appellant is one of the six directors and the majority shareholder, of the 1st respondent, *Naiposha Co. Ltd.* The 1st respondent was incorporated primarily to acquire property and to develop and sell holiday homes. At all material times the 1st respondent was the registered owner of the property known as *LR No. 398/15, Naivasha (the suit property)*, on which it was desirous of building holiday homes for sale. For that purpose, on 1st March 2010, the 1st respondent entered into an agreement with *Fubeco China Fushun* (2nd respondent) to undertake construction of holiday homes on the suit property. The project did not proceed as scheduled because a dispute arose between the 1st and 2nd respondent, which pursuant to the agreement, was referred to a single arbitrator, *P. Mwaniki Gachoka*. By an award dated 3rd April 2012, the arbitrator found in favour of the 2nd respondent and awarded it *Kshs 64,651,817.10* together with accrued interest at the rate of 17.5% per annum from 15th September 2010 and costs of *Kshs 382,000.00*. The arbitral award was adopted as a decree of the High Court vide an order dated 3rd May 2012 in *High Court Miscellaneous Civil Application No. 222 of 2012*.

After futile attempts to sell the suit property to settle the decree, by an order dated 27th February 2014, the High Court ordered the suit property to be sold by public auction to settle the decree in favour of the 2nd respondent as well as other claims by interested parties, such as shareholders of the 1st respondent and members of the public who had purchased interests in the project. By an agreement dated 31st December 2014, the 1st respondent sold the suit property to *Superiorfone Communications Ltd* (the purchaser) for *Kshs 250 million*. In the transaction, *Messrs. Mbichire & Company Advocates* acted for the 1st respondent as the seller whilst *Messrs. Kimani Kahiro & Associates Advocates* acted for the purchaser. It would appear that the 2nd appellant was also involved in the transaction through her law firm, *C.W. Wanjihia & Company Advocates*.

To effectualise the transaction, the purchaser paid a deposit of *Kshs 125 million*, which was utilised in partly paying the 2nd respondent and other creditors of the 1st respondent. The purchaser subsequently sought release of the documents of title to the suit property from *Messrs. Mbichire & Co. Advocates* to enable it obtain financing for the balance of the purchase price from *Equity Bank Ltd*. On 21st January 2015, *Messrs. Kimani Kahiro & Associates* gave their professional undertaking to *Messrs. Mbichire & Co. Advocates* that in consideration of the latter giving them the original title documents to the suit

property, they would hold the same to their order returnable on demand pending the payment of the balance of the purchase price of Kshs 125 million to Mbchire & Company Advocates.

On 26th January 2015, Messrs. C.W. Wanjihia & Co. Advocates forwarded the documents of title of the suit property to Messrs. Kimani Kahiro & Associates against their undertaking, among others, to release the balance of the purchase price as follows:

**1. Kshs. 100 million to Messrs. C. W. Wanjihia & Co. Advocates, to be utilised as follows:**

**i. Kshs. 50 million to reimburse person who had purchased plots in the suit property and to cater for related claims.**

**ii. Kshs. 50 million to recoup expenses of C. W. Wanjihia & Co. Advocates on account of the 1st respondent and to settle debts and legal fees as follows:**

<b>a. Crystal Valuers</b>	<b>Kshs. 712,000</b>
<b>b. Messrs Gekera &amp; Co. Advocates</b>	<b>Kshs. 300,000</b>
<b>c. Messrs. M. M. Kimuli &amp; Co.</b>	<b>Kshs. 500,000</b>
<b>d. Mbichire &amp; Co. Advocates</b>	<b>Kshs. 1,500,000</b>
<b>e. C. W. Wanjihia &amp; Co. Advocates</b>	<b>Kshs. 9,708,170</b>
<b>f. Arimi Kimathi &amp; Co. Advocates</b>	<b>Kshs 1,500,000</b>

**2. Kshs 25 million to P. M. G. Kamau and Bosco Nga'ng'a on behalf of the other directors of the 1st respondent.**

That letter of undertaking by Messrs. C. W. Wanjihia & Co. Advocates was countersigned by Messrs. Mbichire & Co. Advocates, apparently because they were required to give a collateral undertaking to Messrs. Arimi Kimathi & Co. Advocates, who were the advocates for the 2nd respondent, to pay their fees of Kshs 1,500,000. In addition, since Messrs Mbichire & Co. Advocates were acting for the 1st respondent, presumably the intention was also to secure payment of the other shareholders. Be that as it may, Messrs. Mbichire & Co. Advocates duly gave their undertaking to Messrs. Arimi Kimathi & Co. Advocates on 31st January 2015. Two days earlier, on 29th January 2015, C. W. Wanjihia & Co. Advocates had given an undertaking to Mbichire & Co. Advocates to pay them Kshs 3 million upon receipt of the balance of the purchase price. That amount comprised the Kshs 1.5 million payable to Arimi Co. Advocates and Kshs 1.5 million payable to Mbichire & Co. Advocates for their legal fees.

What precipitated the suit culminating in this appeal is the events that took place after the undertakings were given. It appears that soon thereafter misunderstandings cropped up between the shareholders of the 1st respondent and by a letter dated 5th March 2015 the 2nd appellant advised Messrs Mbichire & Co. Advocates that the 1st appellant had been appointed to act in his place for the 1st respondent and would be issuing fresh undertakings to among others, Arimi Kimathi & Co. Advocates. For their part Kimani Kahiro & Associates confirmed that they would release payments to the 1st appellant as a neutral agent to disburse the agreed payments. That, they did after the 1st appellant gave an undertaking dated 31st March 2015, to among others, pay all the interested parties. Thereafter the 2nd appellant, alleging professional misconduct on the part of Mbichire & Co. Advocates, instructed the 1st appellant to withhold payment of the Kshs. 1.5 million due to them as well as the Kshs. 500,000 due to Messrs. M. M. Kimuli & Co. Advocates.

Messrs. Mbichire & Co. advocates were not amused by the turn of events and on 9th June 2015 took out a Notice of Motion purportedly on behalf of the 1st respondent in Misc. Civil App. No 222 of 2012 seeking a raft of orders, including inhibition on all dealings with the suit property until the hearing and

determination of the application; joinder of the purchaser as a party in the suit; setting aside of the sale and transfer of the suit property to the purchaser or an order attaching the suit property until all interested parties were paid in full; furnishing of accounts by Messrs. Kimani Kahiro & Associates regarding payments to interested parties; and an order directing the said advocates jointly with C. W. Wanjihia & Co. Advocates to deposit in court an amount that would satisfy payments to all interested parties. That application was principally taken out under sections 50, 51, 52 (1), (2), and (3) and 68(1) of the **Land Registration Act, 2012**.

The record shows that on 21st April 2015, the court had adjourned the matter for mention on 9th June 2015, meaning that the application by Mbichire & Co. Advocates was filed that same morning. There is no indication on record that it was certified urgent or that it was served on the other parties for hearing on 9th June 2015. Be that as it may, on that day, the learned judge made an order as follows:

***“Hearing on 10th June 2015. All parties including Evans Gaturu Advocate and Kahiro or Njenga Advocates to appear before me tomorrow without fail”.***

The next day the 1st appellant and Mr. Kimani Kahiro, advocate, among other parties appeared before the learned judge as directed. Mr. Kahiro explained that from the balance of the purchase price, he had remitted **Kshs.83,354,596** to the 1st appellant to pay the interested parties and that he had paid directly to the shareholders of the 1st respondent **Kshs 25 million** and a further **Kshs.11,543,404** to an advocate for one of the interested parties. On his part, the 1st appellant explained that he had paid all the interested parties save for **Kshs. 1.5 million** payable to Mbichire & Co. Advocates and **Kshs.500,000** payable to Messrs. M. M. Kimuli & Co. Advocates, which he had put in an escrow account on instructions from the 2nd appellant, who was filing a suit against them.

The learned judge, who was clearly not impressed by the explanations, issued an extempore ruling as follows:

***“The order of this court was clear that the property herein shall be sold by public auction under the supervision of the court. The property seems however to have been sold by private treaty without reference to court. That notwithstanding other arrangements and advocates were involved in the disbursements of the funds of Kshs 250,000,000 realised as proceeds of sale of the suit property.***

***Mr Evans Gaturu seems to have been given the responsibility to disburse part of the money under strict undertaking and instructions by the parties contained in the letter dated 31/3/2015 which superceded (sic) the earlier one by C. W. Wanjihia & Co***

***Advocates dated 26/1/2015. Mr. Gaturu chose to ignore the undertaking and agreement of parties dated 31/3/2015 and relied on the one dated 26/1/2015 and also on instructions by Mrs. Wanjihia.***

***The said Mrs. Wanjihia or C.W. Wanjihia & Co Advocates is not a party in this suit nor an advocate for any of the parties. It is strange Mr. Evans Gaturu relied on her instructions for reasons known to him. This case has been dogged by many ups and down (sic) which have in most times been occasioned by the said Mrs.***

***Wanjihia. Her demeanour and actions have been noted by the court even in the earlier applications the court concluded. Such is a matter of evidentiary value of the court. That notwithstanding, the interested parties have not been paid in full, at least from their submissions. Mrs Wanjihia has received over Kshs 50,000,000 despite the fact that the undertaking of 31/3/2015 stated she was to receive only Kshs 20,000,000. In any event, whether the property was sold by public auction or private treaty the disbursement of the sum realized was to be done under the supervision of the court. The omission to follow the right path has bred the issues we are now wasting court’s precious time on.***

***In the circumstances, the only fair path is to order and do hereby order (sic) that the said C.W. Wanjihia & Co. advocates together with Evans Gaturu to cause the sum in excess of the agreed 20,000,000 that was paid to C. W. Wanjihia to be deposited in court forthwith and not later than 7 days from today. Secondly I order Evans Gaturu to deposit the sum of Kshs 2,000,000 in the escrow account herein into account (sic) forthwith and not later than 7 days of today. Once these sums are in court all parties shall appear before me on the date appointed herein below for further directions.***

***It is so ordered. Mention on 24/6/2015.”***

In subsequent mentions of the matter it was confirmed to the Court that the 1st appellant had deposited Kshs. 2 million in court as ordered by the Court. The 2nd appellant did not attend court as she was said to have been taken ill and admitted at ***Agha Khan Hospital, Nairobi***. On 30th June 2015 the learned judge ordered both appellants to appear before him on 1st July 2015 at 3.00 pm to show cause why they should not be committed, after he found them to be in contempt of court. The 2nd appellant was to be brought to court under escort of the police and her doctors. In the event, none of the appellants attended court on the appointed date and the learned judge therefore issued warrants for their arrest.

The final chapter in this saga is that the appellants moved to this Court and filed ***Civil Application No NAI. 171 of 2015*** under ***rule 5(2) (b)*** of the ***Court of Appeal Rules*** in which they obtained, on 2nd July 2015, an order staying execution of the orders of Gikonyo J. pending the hearing and determination of the application. On 19th May 2016, this Court further stayed execution of the orders of the High Court until the hearing and determination of this appeal.

On 4th October 2016 during the appeal case management conference, this Court directed the appeal to be heard through written submissions and limited oral highlights. As we adverted to earlier, when the appeal came up for oral highlights, only counsel for the appellants had complied with the order of the Court and filed written submissions. The other respondents did not and Mr. Wamae, learned counsel for the 13th and 14th respondents who also held brief for Mr Havi, learned counsel for the 7th and 8th respondents left the matter to the discretion of the Court, arguing that the appeal had been overtaken by events.

Although the appellants' memorandum of appeal listed 8 grounds of appeal, their learned counsel, ***Mr Otachi***, compressed them into two broad issues and submitted firstly that the learned judge erred by denying the appellants a fair hearing. Relying on ***Onyango Oloo v. Attorney General [1986-1989] EA 456***, ***Central Organisation of Trade Unions v. Benjamin K. Nzioka & Others, CA No. 166 of 1993***, and ***Prime Start Works Ltd v. Kenya Industrial Plastics Ltd [2001] EA 528***, counsel submitted that a judge who has to decide between two opposing parties is obliged to listen to both sides and to afford them equal opportunity to present their case. In this case, counsel submitted that the appellants were not afforded a fair opportunity to be heard because the application in which they were condemned was heard and determined before it was even served upon them. In particular as regards the 2nd appellant, it was contended that the learned judge declined to hear her on the basis that she was not party to the suit and yet proceeded to issue orders against her.

Secondly, the appellants submitted that to enforce a professional undertaking by an advocate as Mbichire & Co. Advocates was purporting to do, they were obliged to make an application under Order 52 of the Civil Procedure Rules. The appellants contended that the requirements of Order 52 were mandatory and could not be waived. It was also submitted, on the authority of ***Peter Ng'ang'a Muiruri v Credit Bank & Another, CA No. 263 of 1998*** that the primary consideration by the court in enforcing professional undertakings is not to enforce contractual rights but to ensure honourable conduct by its officers. Accordingly, it was urged, the court is first required to make an order for compliance and to set the time for compliance by the advocate before resorting to coercive means.

We have anxiously considered this appeal. At the heart of it are two important principles in the administration of justice. The first is that advocates, as officers of the court, must be honourable and must keep their promises. Their word must be their bond, otherwise judicial work would be rendered unduly complex and expensive. The second is that any person against whom an allegation is made as a result of

which he stands to suffer prejudice, including a blight on his character and reputation, must be given a fair opportunity to be heard before an adverse finding against him is made.

In this appeal, there is little doubt that although Mbichire & Co Advocates approached the matter in a mischievous and round-a-bout way purporting to seek the setting aside of the sale and transfer of the suit property and inhibiting all dealings therewith, their real intention was to enforce the undertakings given by the appellants to pay the balance of the purchase price to specified parties. As we have previously intimated, the Notice of Motion that they filed was purportedly taken out under sections 50, 51, 52 (1), (2), and (3) and 68(1) of the Land Registration Act, 2012. Those provisions deal with the powers of the court when there is a prejudicial disposition of private land, as for example a disposition that is intended to defeat the rights of creditors. In this case, there was no dispute at all that the purchaser had paid the balance of the purchase price to the 1st respondent's advocates and that the real issue was whether those advocates had disbursed the funds in accordance with their professional undertakings.

The Civil Procedure Rules provide a specific procedure for enforcement advocates' professional undertakings. **Order 52 Rule 7** provides as follows:

***“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.***

***(2) Save for special reasons to be recorded by the judge, the order shall in the first instance be that the advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order for enforcement be made.”***

Instead of invoking the above specific procedure, Mbichire & Co. Advocates opted for provisions of the Land Registration Act that in the circumstances of this appeal clearly had no application. In ***Oraro & Rachier Advocates v. Co-operative Bank of Kenya Ltd, CA No. 154 of 2000***, this Court held that in enforcement of professional undertakings, the procedure prescribed by **order 52 rule 7** is mandatory. The Court expressed itself thus:

***“Order LII rule 7 (2) sets out the procedure for the enforcement of a professional undertaking by an advocate. That procedure...is mandatory and unless it is strictly followed any order made in contravention thereof becomes a nullity.”***

But what is more horrifying to us is the rather summary manner in which the application against the appellants was handled. The record shows that prior to the Notice on Motion that led to this appeal; the matter was last in court on 21st April 2015, when the learned judge set it down for mention on 9th June 2015. The Notice of Motion was filed that same day when the matter was coming up for mention. It is common ground that when the learned judge entertained the Motion, it had neither been certified urgent, nor served on the appellants who Mbichire & Co. Advocates were complaining against. On 9th June 2015, the learned judge adjourned the Motion to the next day when he directed that the appellants must be in court.

It was on 10th June that the learned judge made the orders that ultimately led to his finding that the applicants were in contempt of court. Order 51 rule 3 provides that no motion shall be made without notice to the parties affected by it, save in circumstance where the court is justified in making ex parte orders. Indeed that is precisely the reason why that type of application is called a Motion of Notice. Further, Order 51 rule 13 (3) specifically requires an application to be served on the respondent, if any, not less than ***seven clear days*** before the date of the hearing. In this case, the record is quite clear that the Motion was served upon the 1st appellant on 15th June 2015, a whole 5 days *after* the learned judge issued the order requiring the appellants to deposit sums of money within seven days. We have noted that

under the rules the learned judge was obliged, after a proper hearing of the parties preceded by adequate notice, required to direct the appellants to comply with their professional undertaking within specified time before considering enforcement measures. This was not done.

We have no doubt in our minds that the provisions of Order 51 that we have adverted to above are informed by the demands of the rules of natural justice that before an adverse finding can be made against a person, he or she is entitled to be notified of the allegations against him or her and afforded a reasonable opportunity to be heard in response. It cannot be overemphasized that **Article 50** of the **Constitution** guarantees every party to a dispute that can be resolved by the application of law a **fair** and public hearing by a court or other independent and impartial tribunal or body. Implicit in the fair hearing guaranteed by the Constitution is the right of a party to know in advance the allegations against him and a reasonable opportunity for rebuttal.

In this case, the appellants turned up in court in response to the orders of the court that compelled them to appear. The court did not advert to their right to adequate time to respond to the application by Mbichire & Company Advocates, including by filing replying affidavits if they deemed it necessary. That they turned up in court as and when required by the court did not make these semblance of the hearing that they were afforded fair. It must not be forgotten that the main order, which aggrieved them, was made on 10th June 2015 even before the application was served upon them.

A decision arrived at without affording a party a fair opportunity to be heard cannot be allowed to stand and it matters not that the court or tribunal would have come to the same conclusion had it afforded the party a fair hearing. In ***General Medical Council v. Spackman* [1943] 2 All E.R. 337** the position was articulated thus:

***“If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.”***

See also, ***Onyango Oloo v. Attorney General (supra), Pashito Holdings Ltd. & Another v. Paul Nderitu Ndun’gu & Others* [1997] 1 KLR (E & L)** and ***Mbaki & Others v. Macharia & Another* (2005) 2 EA 206**.

The appellants as officers of the court no doubt had a heavy responsibility to ensure that they conducted themselves in a honourable manner by keeping their professional undertakings, without which the transactions between advocates and conduct of judicial work would be rendered more complex, time-consuming, expensive and well nigh impossible. That however, was the more reason why, when they were accused of behaving in a dishonourable manner and violating their undertakings that they had to be afforded a fair hearing to determine whether indeed they had so behaved.

We are satisfied that this appeal has considerable merit. We accordingly allow the same and set aside the orders of 10th June 2015 and all consequential orders. The appellants shall have costs of this appeal. It is so ordered.

**Dated and delivered at Nairobi this 24th day of March, 2017**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**