



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, WARSAME & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 156 OF 2009

BETWEEN

WARUHIU K'OWADE & NG'ANG'A ADVOCATES.....APPELLANT

AND

MUTUNE INVESTMENT LIMITED.....RESPONDENT

*(an appeal from the judgment and decree of the High Court of Kenya at Nairobi
(Azangalala, J.) made on 25th April 2008 in H.C.C.C No 552 of 2004)*

JUDGMENT OF THE COURT

This is an appeal from the order of the High Court requiring the appellant to honour a professional undertaking given to the respondent's advocate and refund the sum of Kshs 2,000,000.00 within 60 days of 25th April 2008.

On 16th November 2001, the respondent entered into an agreement to purchase the property known as LR Nyeri Municipality Block 111/20 which was registered in the name of Isaac Samson Githuthu. The firm of Sichangi & Company Advocates was acting for both the parties to the transaction. However, the vendor had charged the property to Trust Finance Bank Limited, and in order for the proposed transaction to proceed, it was necessary to first procure a discharge of charge, as well as the title document to the property. The bank's advocates M/s Okoth & Kiplagat

Advocates sought an appropriate undertaking from the appellant as a prerequisite to the release of the title documents. In order to facilitate the release of the documents, the respondent instructed its advocates, the firm of Sichangi & Co Advocates, to release the sum of Kshs 2,000,000.00 to the appellant in a letter that reads in part as follows:

“ ...

Isaac Samson Githuthu has agreed to sell the above title to Mutune Investments Limited at a consideration of Kshs 2,000,000.00. We act for both the purchaser and the seller.

We have however been advised that Trust Finance Limited holds a 1st charge over the above title. We understand that you are in a position to obtain the documents of title.

In order to now facilitate the said sale transaction, we kindly request that you release to us the security documents, and particularly the title deed and the discharge of charge against our professional undertaking which we hereby give, to redeem the debt standing with Trust Finance Limited subject to a maximum of Kshs 2,000,000.00 within fourteen (14) days of the successful registration of the transfer in favour of the purchaser herein. We further undertake to hold the said documents to your order returnable on demand and to be used solely for the purposes of the said transaction.

...”

This letter was followed by one written on 15th January 2001 through which Sichangi & Co. Advocates forwarded to the appellant three cheques for the total sum of Kshs 2,000,000.00, and asked the appellant to confirm their undertaking to release the title documents for the property as well as secure the discharge of charge by Trust Bank Limited.

The appellant then wrote to the bank’s advocates confirming that the respondent had deposited the sum of Kshs 2,000,000.00 being the entire balance of the sale price, and asked for the original title documents as well as the executed discharge in respect of the property. It then appears that the transaction did not proceed as planned. The reasons behind the failure of the transaction are not issues for determination in this appeal. It suffices to say that on 16th September 2002, the firm of Sichangi & Company wrote to the appellant demanding the refund of the purchase price. This letter was followed by several other demands for a refund of the money which elicited a response from the appellant to the effect that it had established a lien over the funds, since the money had been paid on Mr. Githuthu’s account, until their outstanding fees were settled. This response introduced a new condition for the release or refund of the money deposited as a conditional undertaking for a specific transaction. With no where to go, having exhausted the professional respect and courtesy expected of a reasonable advocate and as a consequence of the appellant’s failure to honour its professional undertaking, the respondent’s advocates moved to court by way of an originating summons in the High Court seeking an order: ***“that the defendant do honour their professional undertaking to refund the plaintiffs Kshs 2,000,000.00 together with interest thereon at 25% pa from 1st January 2002 until payment in full.”***

The appellant opposed this application claiming that it had a right of lien and set off for the sum of Kshs 2,938,069.68 which were taxed costs owed to it from Isaac Samson Githuthu. The appellant contended that no undertaking existed between it and counsel for the respondent to refund the money, and that it would not refund the money as non-performance of the sale agreement was a matter to be resolved between the respondent and the vendor, and did not impose any obligation on it. The appellant further contended that since Isaac Samson Githuthu was a principal shareholder of the respondent, the money paid by the respondent was on the account of Isaac Githuthu; that it could create a lien over the money and that it would retain the money in order to offset the debt owed.

The application was allowed by Azangalala, J. (as he then was), who found that even in the absence of a written professional undertaking from the appellant, it had no right whatsoever to retain the funds. The learned judge therefore ordered the appellant to refund the sum of Kshs 2,000,000.00, within sixty days.

The appellant is of course aggrieved with that order, and has therefore brought this first appeal seeking that the appeal be allowed and the originating summons be dismissed with costs. In its grounds of appeal, the appellant faults the decision of the learned judge on two main fronts: the first is that the learned judge failed to consider that it had a right of lien over the funds, and the second is that it had given no professional undertaking to refund the money.

Mr. Thangei, learned counsel for the appellant, submitted that the trial judge, having found that there was no professional undertaking between the parties, misdirected himself by issuing the orders that he did. Mr. Thangei contended that once the learned judge had made that finding, there was nothing capable of being enforced and thus the learned judge had no jurisdiction under Order LII of the Civil Procedure Rules to enforce any agreement between the parties.

Mr. Akhuia, learned counsel for the respondent opposed the appeal. Counsel argued that there was an undertaking in place because the money was being forwarded to the appellant for one clear purpose, and on the basis of the letter of undertaking sent from respondent's counsel to the appellant. He submitted that the learned judge had correctly found that the appellant had no right to retain the money, and asked this Court to broadly interpret Order LII of the retired Civil Procedure Rules.

We have considered the grounds of appeal and the submissions of the parties in order to determine whether or not this appeal has merit. The issue in dispute is fairly simple and straight forward. The matter involves the extent, intent, purpose and objective of a professional undertaking given by an advocate in satisfaction of a condition precedent for obtaining documents and permission from the bank, which was holding the titled documents needed for the conclusion of a sale transaction. We start by asking what constitutes a professional undertaking.

Our answer is that a professional undertaking is an unequivocal promise made by a party to another either to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party, to which liability may attach. See ***Equip Agencies Limited v Credit Bank Limited [2008] 2 EA 115 (HCK)***. Generally speaking, professional undertakings are given by advocates in order to make transactions easier, faster and more convenient. Where an advocate breaches a professional undertaking, the court has jurisdiction to order the enforcement of that undertaking.

In enforcing undertakings, the court is guided not by the considerations of contract, or of securing the legal rights of parties, but mainly by ensuring the honesty of advocates. See ***Muiruri v Credit Bank & Another (Civil Appeal No 263 of 1998) LLR No. 5676 (CAK)***. In the words of this Court in ***Harit Sheth t/a Harit Sheth Advocate v K. Osmond***

Advocates [2011] eKLR (Civil Appeal No 276 of 2001), "a professional undertaking is a bond by an advocate on the authority of his client. It is based on the relationship which exists between the advocate and his client. An advocate who gives such a professional undertaking takes a risk. The risk is his own and he should not be heard to complain that it is too burdensome and that someone else should shoulder the responsibility of recovering the debt from his own client. A professional undertaking is a bond by an advocate to conduct himself as expected of him by the court to which he is an officer. No matter how painful it might be to honour it, the advocate is obliged to honour if only to protect his own reputation as an officer of the court." (emphasis ours)

It has been argued by counsel for the appellant that no professional undertaking had been given by it to the respondent's advocate, and that as such, none could be enforced under Order LII of the Civil Procedure Rules. To determine this question, we shall refer to the authority of ***Patel v Kairu [1999] 2 EA 297 (CAK)*** whose facts were similar to the ones at hand. In that appeal, the appellant's advocates wrote a conditional letter to the respondent forwarding a cheque for KShs 4,875,000.00 on condition that the respondent undertook not to release the money to the vendor before the latter could deliver vacant possession of the whole property with all encroachments removed. The vendor did not deliver vacant possession as demanded by the purchaser and the purchaser sought to enforce the professional undertaking in the High Court after the respondents had failed to refund the money. On appeal, this Court held that first, the jurisdiction of the Court in an application for enforcement of a professional undertaking was a summary jurisdiction over advocates which should be exercised only in a clear case. It was an inherent jurisdiction which the Court had over advocates who were officials of the Court, not for the purposes of enforcing legal rights, but for purposes of enforcing honourable conduct on the part of the Court's own officials. The Court then held that there had been a breach of professional undertaking as the respondent did not accept payment under the terms stipulated in the appellant's letter. The respondent was therefore obliged to return the cheque or its proceeds.

In that appeal, just as in the present one, the professional undertaking was not worded in express terms. However, we entertain no doubt that the firm of Sichangi & Co. Advocates paid the amount of Kshs 2,000,000.00 being the entire purchase price in order to secure the title documents. This much was confirmed by the appellant in its letter to the bank's advocates when it requested confirmation that the title documents would be sent to it upon the forward of the money.

In ***John Fox (a firm) v Bannister King & Rigbeys (a firm) [1987] 1 ALL ER 737*** the English Court of Appeal was determining a claim by John Fox who had been instructed by Mr. Watts and his companies to undertake some litigation on his behalf. John Fox taxed its fees and disbursements whereupon Mr Watts paid only about half of the amount that was found to be owed. Before these transactions took place, Mr. Watts had previously instructed Bannister to act for him in the sale of two of his properties, the proceeds of which they were holding. When Mr Watts failed to pay John Fox, the firm obtained written authority from him authorizing Bannister to give an undertaking that they would retain the money in their account for payment to John Fox. Bannister confirmed this position by writing to John Fox, stating that they would retain the money until Mr. Watts and John fox had sorted out the issue of the outstanding bill. However, on the instruction of Mr. Watts, Bannister paid the entire amount to him. John Fox therefore applied to the court for an order to enforce the undertaking given by Bannister. Bannister contended that there could be no undertaking since the words used in their letter were vague. On appeal, it was held that Bannister had made a clear and unequivocal statement to John Fox that they would retain the money, and that that statement constituted an undertaking given by Bannister as solicitors, and as officers of the Court, they were expected to abide by it. Similarly, it is clear here that the appellants had made a clear statement that they would apply the money obtained by the respondent towards securing free title to the property, and they were therefore expected to abide by that statement.

To find that no undertaking existed between the parties would be a narrow application of the term. The term ‘undertaking’ must be subjected to a liberal interpretation to include situations where an advocate who receives money that is intended to be based on a professional undertaking should be required to perform the terms of the undertaking, and should he utilize the money for any other purposes, then he is obliged to refund it. In our understanding, any money or documents given and received on the strength of a professional undertaking cannot be utilized for any other purpose other than what they are intended for. It is outside the mandate of an advocate to purport to use it or convert an undertaking for an event other than what it was intended for and agreed between the parties. To allow advocates to retain client funds for no reason at all would be a travesty of justice and would be an abuse of the fiduciary trust given and by extension would amount to conversion and criminal activity. It would amount to deceit and unjust enrichment and ultimately, would erode public confidence in the administration of justice. As we have stated, a professional undertaking protects all the parties to a transaction, and it is therefore not open for one party to unilaterally and without knowledge and consent to refuse to comply with the terms of that undertaking. Advocates should also note that failure to abide by the terms of a professional undertaking without lawful justification, amounts to professional misconduct. See ***Rooks Rider (a firm) v Steel and Others [1993] All ER 716***.

We are unable to understand the appellant’s argument that it could claim a right of lien over the sum of money for the sole reason that Isaac Samson Githuthu, who it is claimed is a director and principal shareholder of the respondent, owed the applicant outstanding legal fees.

Even if the said person is the principal shareholder of the respondent company, we are mindful of the fact that, and it is an elementary principle of law, a company is a separate and distinct entity from its shareholders. This was stated in the ancient case of ***Salmon vs Salmon [1895-9] All ER 33*** and has on numerous occasions been endorsed as the true position in law by this Court. See for example in ***M.S.K v S.N.K [2010] eKLR (Civil***

Appeal (Application) No. 277 of 2005). 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 proprietary 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 tendency 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 of 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. What 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 liability.

The professional undertaking is a smooth and binding contract between the donor and the donee who are the advocates. It should be adhered to with a standard of ethics higher than that of the market place. Professional undertakings to lawyers by colleagues are like a religion and are the underpinning of the relationship that governs the activities, transactions and actions between them. A professional undertaking embodies and manifests the practice of the legal profession in a characteristically methodical, courteous and ethical manner. That is why the immediate offer and acceptance of a professional undertaking triggers a monumental transaction and huge financial relationship which must be observed by both sides. In our view, that is the basis of professional undertakings in the legal profession. In fact, the conditions, terms and implications must be strictly adhered to for the legal profession to thrive, and for advocates to deal with each other freely and openly.

The law being what it is, it is manifestly clear to us that the appellant cannot claim a right of lien over the money entrusted to it after it gave an irrevocable and unconditional professional undertaking. Such a contention of a right of lien is legally unsustainable and unsupportable in law. It therefore follows that the trial judge was right in ordering that the appellant do refund the money to the respondent. The upshot of our findings is that this appeal has no merit, and we hereby order it dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 29th day of January, 2016

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR