REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, BOSIRE & WAKI, JJ.A)

CIVIL APPEAL NO. 276 OF 2001

BETWEEN

HARIT SHETH T/A HARIT SHETH ADVOCATE....................................APPELLANT

AND

K. H. OSMOND T/A K. H. OSMOND ADVOCATE.............................RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Milimani Commercial Court, Nairobi. (Keiwua, J) dated 16th October, 1998

In

H.C.C.C. No. 311 of 1998 (OS)
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JUDGMENT OF THE COURT

Following the letter dated ***21st May, 1998***, addressed by K. N. Osmond, hereinafter referred to as the respondent, to Harit Sheth, hereinafter referred to as the appellant, Victoria Commercial Bank Ltd., lent some money to Banita Sisal Estate Ltd. Victoria Commercial Bank Ltd, was the appellant's client while Banita Sisal Estate was the respondent's Client. The appellant and the respondent are both advocates of the High Court of Kenya practicing in Nairobi.

By an Originating Summons dated 10th July, 1998 and filed in the High Court, at Nairobi on 13th July, 1998, the appellant prayed for orders that:-

"The Defendant do honour his professional undertaking and pay to the plaintiff the sum of K.shs.15,512, 829.05 together with interest thereon at the rate of 36% p.a. and further penalty interest at the rate of 24% p.a. from the 1st day of July, 1998, until payment in full.

In support of the Originating Summons the appellant swore an affidavit in which he has deponed, inter alia, that Victoria Commercial Bank Ltd., by its letter to the respondent, dated 26th June, 1998, notified him that Kshs.15 Million had been lent to Banita Sisal Estates Limited, and that the entire sum had been utilized but had not been repaid. The bank was unwilling to advance any further sums to that company. It would appear that the respondent and his client had erroneously believed that Banita Sisal

Estate Ltd. had been lent or, would be lent Kshs.25 million, the maximum the respondent had given an irrevocable professional undertaking to pay on behalf of his aforesaid client. The bank was of a different view as is clear from its letter of 26th July, 1998, aforesaid.

Be that as it may, by his letter dated 29th June, 1998, the appellant demanded payment of Kshs.15,512,829.05 "*before close of banking hours tomorrow*." There was no payment within the time given, and on 1st July, 1998, the appellant addressed another letter to the respondent complaining about the default, and at the same time threatened legal action to enforce: ***"your undertaking at your risk as to costs and all other consequences ensuing therefrom."*** The letter also made reference to a deed of "*Guarantee & Indemnity*" which the respondent executed relating to normal interest and penalty interest in the event of default in honouring his professional undertaking. The respondent was asked to make payment by 2.30 p.m., Thursday 2nd July, 1998, but which he did not do, and as a result of that default the aforesaid Originating Summons was filed.

One of the issues the respondent raised against the Originating Summons is that it was defective to the extent that it sought to enforce the professional undertaking instead of first seeking an order of compliance, and to apply for enforcement only if there was default. The issue, in a way being jurisdictional, we will deal with it first.

O. 52 rule 7, of the Civil Procedure Rules under which the Originating Summons was filed, provides, as material, thus:-

"52: 7 (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 an order in enforcement be made."

We earlier reproduced the main prayer in the Originating Summons. The question we pose is: how does one enforce an order? We think that enforcement in the ordinary sense of the word must mean execution of the order as one would enforce a decree. **O. 52 rule 7 (2)** presupposes that an advocate would have funds to meet his professional undertaking as not to require the coercive power of the court through execution. The order requiring an advocate to honour his professional undertaking is like an **order nisi** which is made absolute when one becomes sure that the person to comply with it is not able to do so, or that he does not want to comply with the said order. That is why in our view the court is required to fix a time frame within which payment is to be made, failing which the plaintiff is given a final order, which order he is at liberty to enforce by way of execution proceedings.

The prayer in the Originating Summons does not in our view seek a final order. The appellant has merely adopted the language of ***O. 52 rule 7 (2)***, above, and we find nothing objectionable to such wording. Besides, the rule merely directs the court on how it should deal with an Originating Summons under that rule. The respondent's aforesaid objection to the Originating Summons is without any basis.

The other technical objection the respondent raised is that the Originating summons was drawn *"…. like an ordinary chamber summons under **Order 50 rule 7**."* We take cognizance of the fact that following amendments to the Civil Procedure Act and Rules made thereunder, what used to be ***O. 50 rule 7***, is now ***O. 51 rule 7***. That rule provides that:-

"7. A plaintiff may, without leave, cause to be served any application or notice of any petition or summons upon any defendant who, having been duly served with a summons to enter an appearance, has failed to appear within the time limited for that purpose."

Although that issue was raised in the respondent's grounds of objection to the Originating Summons, it was not canvassed by counsel nor did M. Ole Keiwua, J (as he then was) who heard the originating summons deal with it. However, before us, Mrs. B. Rashid for the respondent submitted that the appellant treated the matter as a chamber summons, when in fact it should have been drawn as provided under ***O.IV rule 3 (2)*** of the Civil Procedure Rules, and served in the ordinary manner. ***Order IV rule 3 (2)***, is now ***Order V rule 1 (2).*** It provides that:-

“1. (2). Every summons shall be signed by the judge and shall be sealed with the seal of the court without delay and in any event not more than thirty days from the date of filing suit.”

With due respect to the respondent and his counsel, ***O. V rule 1 (2)***, above, has no application to proceedings brought by Originating Summons. ***Order 37*** (formerly ***Order 36***) of the Civil Procedure Rules, sets out the procedure for bringing suits by Originating Summons. The Rules Committee has prepared standard Forms to guide litigants on how to draw an Originating Summons. (see standard Form No. 26). According to that form the plaintiff or his advocate, and not a judge, is mandated to sign the Originating Summons. Such summons is generally drawn as a chamber summons. Although it is a suit by definition, no separate summons to enter appearance is needed. The Originating Summons originates the suit and is at the same time a summons to enter appearance. True, the appellant did not, in the originating summons, invite the respondent to enter appearance in terms of the standard form. That, we think is not a fundamental omission, the respondent having responded to the originating summons by filing timeously grounds of opposition to it. Besides, under ***O. 52 rule 10***, no appearance needed to be entered by the defendant on service upon him of the Originating Summons filed under ***O. 52 rule 7***.

The main thrust of the respondent’s case against the Originating Summons as contained in the grounds of opposition the respondent filed on 28th July, 1998, was that the professional undertaking was conditional on Victoria Commercial Bank Ltd., lending Banita Sisal Estate Ltd., Kshs.25,000,000. As stated earlier only Kshs.15 million was lent, which according to the company was insufficient to meet its obligations in a deal it had entered into with third parties.

In his judgment, Keiwua, J agreed with the respondent that the originating summons was not properly drawn regarding the prayers. In his view the applicant should have, in the first instance, sought an order requiring the respondent to honour the undertaking within a given time and upon default then the order of enforcement be made. We have already dealt with this point, and we need not say more.

The learned Judge on the main issue, raised in the preceding paragraph held that the appellant was obliged, in view of the wording of the professional undertaking, to notify the respondent that the loan facility had been diminished to Kshs.15,000,000/-. For those two reasons, the learned Judge dismissed the Originating Summons and thus provoked this appeal.

The crux of this appeal is whether or not the respondent’s undertaking was conditional on the appellant’s client granting the respondent’s client financial accommodation to the tune of Kshs.25 million. The respondent’s professional undertaking was, in pertinent part, worded as follows:-

“ I confirm that it is at my request Your client has agreed to make available credit facilities to Banita Sisal Estate Ltd. up to a maximum limit of Kshs.25 million

I hereby give you my professional and irrevocable undertaking to pay to you all such sums as shall be due to your client from Banita Sisal Estate Ltd. against the loan account with your client on or before 30.6.98.

I have also agreed to execute a Deed of Guarantee & Indemnify in the format required by your client in respect of the said borrowing by Banita Sisal Estates Ltd.

I enclose herewith the duly executed Deed of Guarantee & Indemnify in duplicate for your further action.”

In his submissions before us, Mr. O.P. Nagpal, who appeared with Mr. Ngunjiri for the appellant, took us through the Originating Summons and the correspondence exchanged between the parties and urged us to hold that the professional undertaking does not impose a condition precedent to its enforcement. In his view the respondent having not filed any affidavit in reply to the Originating Summons there was no basis upon which Keiwua, J would have held that the professional undertaking was conditional on Victoria Commercial Bank Ltd. advancing Kshs.25 million. It was his understanding that the Kshs.25 million to

which the professional undertaking relates is only the upper limit of the sums of money the respondent would be liable to pay if the indebtedness of Banita Sisal Estate Ltd., exceeded that figure.

Mrs. B. Rashid, for the respondent attacked the propriety of the Originating Summons on grounds which we earlier discussed and submitted that on the basis of those grounds it was a nullity. She cited various authorities, among them, In Re Pritchard, DCD; **Pritchard v. Deacon & Others – (1963) 2 WLR 686**; **Omega Enterprises (K) Ltd. v. Kenya Tourist Development Corporation & 2 Others**, Civil Appeal No. 59 of 1993, in support of the proposition that if an Originating Summon is not drawn as provided under the law it is a nullity. In view of the conclusions we have come to concerning the Originating Summons before us these authorities are unhelpful.

As regards the professional undertaking, Mrs. Rashid, like Keiwua, J was of the view that it was conditional on Victoria Commercial Bank Ltd., lending to Banita Sisal Estate Ltd. Kshs.25 million. In her view limiting the credit to Kshs.15 million, according to her had the effect of releasing the respondent from his professional undertaking.

A careful reading of the professional undertaking does not, prima facie, show that the respondent would only be held liable if Victoria Commercial Bank Ltd. advanced the Kshs.25 million stated in the aforesaid undertaking. By stating that the said undertaking was conditional, the respondent is in a way introducing an extraneous factor into the professional undertaking. We think that the respondent fixed an upper limit of his liability in the financial transaction between Victoria Commercial Bank Ltd. and Banita Sisal Estate Ltd. Suppose for instance Banita Sisal Estate Ltd., did not desire to utilize the whole of Kshs.25 million, would that excuse the respondent from honouring his professional undertaking merely because the whole of the Kshs.25 million had not been lent? The submission on behalf of the respondent, in absence of clear words in the professional undertaking, leads to an absurd conclusion. We agree with Mr. Nagpal and so hold, that the Kshs.25 million was stated in the professional undertaking to circumscribe the extent of the respondent's indebtedness on the basis of his professional undertaking subject only to proof that some money had been advanced to Banita Sisal Estate Ltd., by the appellant's client and that some of it, if not all of it, had not been repaid.

Before we conclude this judgment we make reference to the respondent's notice of grounds for affirming the decision of the superior court. The notice was filed on 21st July, 2006, pursuant to ***rule 91 (1)***, which is now ***rule 94 (1)*** of the Court of Appeal Rules. All the issues raised therein were part of the grounds of opposition the respondent filed in the High Court, which we have already fully dealt with in this judgment. Consequently there is no reason for rehashing what we said earlier about each of those grounds.

One last point we need to comment on is the submission by Mrs. Rashid, that the appellant and his client should have followed the debtor, meaning Banita Sisal Estate Ltd., to recover the money it owes. In her view this case is peculiar and the Court should depart from the usual practice of enforcing professional undertakings. With due respect to the learned counsel, a professional undertaking is given to 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 some one 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 it if only to protect his own reputation as an officer of the court. The law gives him the right to sue his client to recover whatever sums of money he has incurred in honouring a professional undertaking. He cannot however sue to recover that amount unless he has first honoured his professional undertaking.

We have said enough to show that there is merit in this appeal and accordingly, we allow it, set a side Ole Keiwua, J's order dismissing the appellant's Originating Summons dated 10th July, 1998, with costs, and substitute therefor an order allowing the Originating Summons with costs. The respondent is granted 30 days from the date of this judgment to honour his professional undertaking given on 21st May, 1998, to the appellant, failing which the appellant shall be at liberty to enforce the same. The costs of this appeal

shall be to the appellant, to be taxed if not agreed upon.

Dated and delivered at Nairobi this 8th day of April 2011.

R.S.C. OMOLO
....
JUDGE OF APPEAL

S.E.O. BOSIRE
....
JUDGE OF APPEAL

P.N. WAKI
....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR