REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 209 of 2012

FIDELITY COMMERCIAL BANK LIMITED……..…. APPLICANT

VERSUS

ONESMUS GITHINJI & CO. ADVOCATES …… RESPONDENT

J U D G E M E N T

1. On 12 April 2012, the Applicant herein filed an Originating Summons dated 3 April 2012. The same was brought under the provisions of **Order 52 Rule 7**, **Order 37 Rule 14** of the *Civil Procedure Rules*, as well as under **section 3A** of the *Civil Procedure Act*. The Summons brought by the Applicant details that it claims to have advanced a credit facility to a company known as Northline Ltd (hereinafter "Northline") which was secured by a Charge and protected by a professional undertaking. The Summons posed the following questions of this court:

"1. WHETHER the Respondents issued a professional undertaking on 28th June 2010 to the Applicant regarding the payment of a sum of Kshs.3,036,380.85 plus accrued interest of 16.5% per annum from 30th April 2010 and on what grounds this sum was to be paid to the Applicant.

2. WHETHER the conditions required to have this sum paid to the Applicant have been met.

3. WHETHER the Respondent has failed to discharge their professional undertaking as per the agreed terms.

4. WHETHER this Honourable Court should enforce the said professional undertaking by ordering the Respondent to immediately pay the Applicant the sum of Kshs.3,036,380.85 plus accrued interest of 16.5% per annum from 30th April 2010.

5. WHETHER the applicant is entitled to costs and interest on the said sum".

2. The Originating Summons was supported by the Affidavit of **Philip Muoka** sworn on 3rd April 2012. The deponent stated therein that he was the Legal Officer of the Applicant, duly authorised to make the Affidavit. He deponed to the fact that in August 2006 the said company Northline obtained an overdraft facility from the Applicant in the amount of Kenya Shs. 3 million which would attract and accrue interest at 16.50 percent per annum. Those facilities were to be secured by a first Charge over L. R. No. 12715/201 Machakos. The deponent attached copies of the Applicant's letter of offer to Northline dated 24 August 2006, the Charge document, as well as copies of correspondence that took place between the Applicant's advocates and the Respondent herein. The deponent noted that the said correspondence culminated in an undertaking dated 28 of June 2010 wherein the Respondent stated that they would pay

the Applicant the undertaking amount of Kenyan shillings 3,036,380.85 to include interest accrued as at 30 April 2010, within 7 days of registration of the Discharge of the Charge that had been created. Mr. Muoka attached to his said Affidavit a copy of the letter of undertaking dated 28 June 2010. He went on to say that on the basis of the undertaking, the Applicant forwarded the Security documents in relation to the Machakos property via its advocates to the Respondent. He noted that on the 16 August 2010, the Applicant's advocates forwarded the Discharge of Charge to the Respondent.

3. However, there was no response to that letter, which prompted the Applicant's advocates to write to the Respondent enquiring as to progress of the registration of the Discharge. There was still no response forthcoming to this communication and as a result, the Applicant instructed its advocates to recall the Security documents in terms of the undertaking given by letter dated 16 February 2011. The Respondent finally responded by letter dated 24 February 2011 detailing that the firm had made payments to the Applicant bank by way of three cheques totalling Shs. 2,450,000 plus a final cheque for Shs. 586,380.85. Mr. Muoka went on to say that this caused the Applicant to carry out an investigation in which it found that two of the said cheques dated 11 and 25 May 2010 had even been paid way before the date of the professional undertaking. In the deponent's opinion the execution of the undertaking by the Respondent and the delivery by the Applicant of the Security documentation were both futile as the monies had already been paid to Northline. The deponent noted that all the cheques had been made payable to Northline who had deposited the same in its account together with other cheques and had continued to utilise the facility. None of the cheques had been made payable to the Bank in honour of the undertaking. Mr. Muoka further noted that a cheque in the amount of Shs. 506,380.85 had not been deposited in Northline's account which he felt was the indication that indeed the Respondent had paid out all monies to Northline to apply such as it pleased. Finally, the deponent noted that the Applicant bank had not entered into any other agreement or financing arrangement with Northline other than that detailed in the said letter of offer dated 24 August 2006, contrary to the assertion by the Respondent. As far as he was concerned, the Respondent had neither paid the Applicant nor requested for a discharge as it was well aware that it was still bound to its undertaking.

4. In response, the Respondent filed a Replying Affidavit sworn by its managing partner, **Onesmus Githinji**, on 7 June 2012. The first point that the deponent made was that it was common ground that his firm's professional undertaking had been given to Messrs. Daly & Figgis and it was his contention that that firm should be the proper applicant herein, not the Bank. The deponent then went on to relate the events surrounding the issue of the professional undertaking by his firm. He maintained that by a letter dated 29 April 2010, the Applicant herein confirmed that the outstanding balance as regards Northline's account was Shs. 3,036,380.85 together with interest accruing at the rate of 16.5% on the sum of up to Shs. 3 million and 26% on any sums in excess of Shs. 3 million. The letter received by his firm from Daly & Figgis, Advocates enclosing the form of professional undertaking which they intended that the Respondent do give to them was dated 4 May 2010. However, the letter of undertaking was issued by his firm on the 28 June 2010. The deponent confirmed receiving part payments of the purchase price from some of the purchasers to the conveyancing transactions. He had agreed with his client Northline to commence making payments into Northline's account with the Applicant to reduce the overdraft. He stated that his intention was to reduce the borrower's indebtedness and at the same time avoid the punitive interest of 26%. All in all, during May 2010, his firm deposited Shs. 2,450,000/-by way of cheques into Northline's said account. Further, Northline had advised the Respondent that it had made separate payments into the account during May and June 2010 totalling Shs. 3,234,601/-. The total amount therefore paid into the said account after 30 April 2010 was Shs. 5,684,600/-.

5. Mr. Githinji then noted that his firm had received a letter from Daly & Figgis advocates dated 22 February 2011 in which they asked the Respondent to settle an outstanding facility of Shs. 3,105,799.65 as at 31 January 2011. The deponent went on to say that it was clear from the statement in relation to the Northline account that the Applicant inexplicably and without the Respondent's consent or approval and while knowing that the Charge was in the process of being discharged, allowed further withdrawals from the Northline account. The deponent clarified his firm's position at paragraphs 17 and 18 of the Replying Affidavit as follows:

"17. THAT our position is that we cannot be held liable to pay any amount advanced to our client

or which our client was allowed to overdraw from the account after the effective date, as our undertaking was limited to Kshs. 3,036,881/85 due and owing as at 30th April 2010 and the interest thereon, and not any further borrowing after the effective date.

18. THAT if the amount paid into the account after the effective date is taken into account it is quite clear that the amount in respect of which we gave a professional undertaking has been fully paid, in fact, overpaid by Kshs 2,647,719/20."

Mr. Githinji then proceeded to criticise the Applicant as regards the monies that have been paid into the Northline account with the Applicant bank. The Applicant could not say that payments had been made to Northline and not to the Applicant and then, in the very same affidavit, detail that the Respondent could not rely on such payments as the same were made before 28 June 2010. He noted that in the letter of undertaking by his firm, such did not suggest or detail any other account with the Applicant to which payment should have been made.

6. The Applicant filed its written submissions herein on 18 October 2012. After setting out the background to the matter, the Applicant quoted from **The Encyclopaedia of Forms and Precedents 5th Edition, Volume 39** as to the definition of a professional undertaking:

"An undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it…….an undertaking is therefore a promise made by a solicitor, or on his behalf by a member of his staff to do or to refrain from doing something."

The Applicant went on to say that the issue of the undertaking by the Respondent firm was not in dispute. The fact was that the advocates for the Applicant, Daly & Figgis had relied upon the same and had forwarded the security documents in respect of L. R. No. 12715/201 Machakos to the Respondent. The Applicant maintained that these documents would not have been handed over to the Respondent had it not been fully undertaken by the Respondent to pay the sums owed by Northline to the Applicant as at 30 April 2010. It appeared to the Applicant that the Defendant was arguing that firstly, there was no unequivocal declaration of intention addressed to the Applicant's advocates and secondly, that the said advocates could not and did not reasonably place reliance upon the undertaking. In this regard the Applicant referred to the case of **Radier versus David N. Gachanja (2006) eKLR** in which my learned brother **Waweru J.**with reference to the definition of professional undertaking as per **The Encyclopaedia of Forms and Precedents** (supra) found that:

"Although consideration for the promise will often be present, an undertaking is enforceable even if it does not constitute a legal contract."

7. The next point that the Applicant dwelt upon was whether it had *locus standi* to institute this suit as the Respondent had maintained that it should have been brought in the name of the advocates. However, the Respondent had conceded that the Applicant had *locus* presumably after acquainting itself with the decision in **Civil Appeal No. 135 of 1999 – <u>Patel versus Peter Kimani Kairu</u>** as cited by the Applicant's advocates. The main question asked in the Applicant's submissions was whether the Respondent had failed to discharge the professional undertaking as per the agreed terms? The undertaking had mentioned the date 30 April 2010 and evidence was put before this court that a number of cheques had been credited to the account of Northline by the Respondent subsequent to that date and before the date of the undertaking being 28 June 2010. In the Applicant's opinion, that fact had nothing to do with the professional undertaking. In the Applicant's further opinion, there seemed to be a suggestion from the Respondent that it had paid the Applicant in view of the fact that it claimed to be surprised when receiving the demand letter asking for Shs. 3,105,779/65 being payment for the undertaking sum with accrued interest as at 31 January 2011. The Applicant maintained that the Respondent had not proved that that it had paid the Applicant for there was neither a cheque nor cash payment received by it from the Respondent to honour the undertaking.

8. The Applicant then dwelt for some time upon the definition of "will" as detailed in the said undertaking but I do not attach much importance to such. However the Applicant went on to draw the

court's attention to clause 10 of the Respondent's Replying Affidavit where it had acknowledged receiving part payments of the purchase price of the suit property and that it had agreed with its clients to start making payments thereof into the overdraft account. It went without saying that the agreement between the Respondent and its client was not contained in the undertaking and nor was the Applicant ever aware of what had been agreed. The Applicant then referred this court to the 2 cases involving what it termed the "watering down" of the undertaking. These were **Kenya Reinsurance Corporation versus Muguku (1996)eKLR** and **H. K. Advocate versus M. Mbaka (2004)eKLR**. Certainly in the latter case the learned judge **Emukule J** had found:

"His undertaking stands as a separate contract between the advocates and is not contingent upon any terms of contract between his clients and any other party."

Further the court in that case made reference to **sections 97** and **98** of the *Evidence Act* as to where the terms of a contract had been reduced to the form of a document, no evidence should be accepted in proof of the terms of such contract except the document itself. The Applicant then touched on the question of interest on the undertaking amount citing the case of **David K. Thuo versus Njagi Waweru Civil Case No. 209 of 2008**.Finally in its conclusion, the Applicant maintained that the payments made contrary to the undertaking to the third-party totalling Kenya Shs. 2,450,000 /-was before the date of the undertaking. The same could not be taken into account as having been in honour of the undertaking which, the Applicant noted, had expressly stipulated that the Respondent was to pay Shs. 3,036,380.85 plus interest of 16.5% per annum until payment in full.

9. The Respondent in its submissions also summed up the facts surrounding the giving of the professional undertaking, emphasising the payments it had made in May 2010 totalling Shs. 2,450,000/-. It noted that it was common ground that other payments had been made by Northline into its account with the Applicant bank. Those cheques had totalled Shs. 3,234,601/-. It commented that the amount given in the undertaking was Shs. 3,036,880.85 as at 30 April 2010, while the amount demanded of the Respondent by Daly & Figgis, advocates in their letter of 31 January 2010 was Shs. 3,105,799.65. In its reply to that letter, the Respondent had asked for statements of Northline's account and it stated that it had made substantial payments thereto. With regard to the statements provided by the Applicant, the Respondent noted that the Applicant had allowed Northline to withdraw a whopping amount of Shs. 6,468,640.75 after 30 April 2010 which date, it maintained, was the effective date of the undertaking. Simply put, the Respondent submitted that the Applicant had taken the undertaking letter dated 28 June 2010 out of context in a vain but calculated attempt to demand the monies which had already been paid to it by the Respondent. It continued by saying that as long as payments were made to the Northline overdraft account, this was payment to the Applicant bank. To put it in a nutshell, the Respondent explained its position thus:

"It is our humble view that all payments made after 30th April 2010, after Daly & Figgis Advocates gave the form of undertaking and specified the amount payable, should be taken into account while deciding whether the advocate has discharged its undertaking. The advocate had no other reason to make the payments other than towards clearing the sum of Kshs 3,036,881.85 outstanding as at 30th April 2010 and the interest thereon. The advocate has not asked that any payment made before 30th April be considered."

And later:

"The Advocate exercising due diligence insured that the amount owing as of 30th April 2010 had been fully paid to the bank."

10. Continuing further with its submissions, the Respondent maintained that if the Applicant bank had not allowed Northline to further borrow after 30 **A**pril 2010, this matter would not be in court today as the account would have a credit balance. In its further submission it was the Respondent's duty to ensure that the amount outstanding as at 30 April 2010 was paid. Thereafter, the Respondent stood fully discharged from its professional undertaking. It maintained that the Applicant bank should not have allowed Northline to overdraw further from the account after the 29 April 2010 when it is released the security

documents to its advocates for onward transmission to the Respondent upon giving his undertaking to pay the balance owing as the process of having the security discharge continued. The Respondent said that it was not a party to those advances and had not given its professional undertaking against them. There was no privity of contract between the Respondent and the Applicant in regard to those advances. There would be no basis for requiring the Respondent to pay for those advances. The Respondent should only pay for what was outstanding as at 30 April 2010 plus the interest thereon. It maintained that the said amount had been paid and that its undertaking did not and could not cover further advances to Northline. In its opinion, the date of the professional undertaking being the 28 of June 2010 did not change anything. The document spoke for itself. The clear wording of the undertaking as demanded by the Respondent through its advocates was to pay what was owed as at 30 April 2010. The fact that the Respondent gave the undertaking on 28 June 2010 did not change the operative date or the meaning of the undertaking. The answer to the question as to whether the amount was paid, according to the Respondent was "Yes".

11. The Respondent, continuing with its submissions, then commented upon the various authorities cited to court by the Applicant. Attacking **Radier versus David Njogu Gachanja** (supra) the Respondent maintained that the court in that case had held that an undertaking was enforceable even if it did not constitute a legal contract. It did not see the relevance of this authority as the Respondent agreed that it had given an enforceable undertaking which it had performed and discharged. As regards the **Patel versus Kimani Kairu** case (supra), the Respondent commented that the facts of that authority had no relevance as to the holding thereof in that either the purchaser (principal) or his advocate could sue, which the Respondent agreed with. Turning to the **Kenya Reinsurance Corporation** case, the Respondent noted that the Court of Appeal was of the view in that matter that the advocate was trying to bring the issue of alleged dispute between his client and the Plaintiff to qualify his undertaking. He noted that the court had held that he could not do so as he had given a solemn undertaking to pay a certain sum of money. The court found that the advocate could not, after giving the undertaking, qualify the same on the fact that there were accounting disputes between the parties. In its opinion, the facts of that authority had no semblance whatsoever with the facts before this court. Finally as regards the **H. K. Advocates** case, the finding therein that the advocate's undertaking stood as a separate contract between the two advocates and was not contingent upon any terms of the contract between the client and the other party, was probably correct. However, the Respondent maintained that at no time in this matter had it tried to allege that there was a dispute between the Respondent's client and the Respondent bank. All that the Respondent was saying was that it had fully discharged its undertaking and any other claim that the Applicant had against it, was outside the undertaking.

12. This court was able to glean further assistance on the liability as regards undertakings from pages 379 of **The Encyclopaedia of Forms and Precedents paragraph 30** in relation to the English Law Society's Guide Principle as follows:

"An undertaking given by a solicitor is personally binding on him and must be honoured. Failure to honour an undertaking is prima facie evidence of professional misconduct and the Counsel of the Law Society will require the undertaking to be honoured as a matter of conduct. Although consideration for the promise will often be present, an undertaking is enforceable even if it does not constitute a legal contract……. Any ambiguity in the terms of an undertaking is generally construed against the party who gave the promise. In general, no terms will be implied into a professional undertaking and extraneous evidence will not be considered."

I believe that the principle as enunciated above applies in Kenya just as much as it does in England. What the Respondent is trying to get the court to do in this case, is to look at the extraneous evidence that the amount demanded as regards its professional undertaking has already been paid. In that regard, I cannot really see that amounts paid prior to the 28 June 2010 by the Respondent have any relevance in relation to its undertaking of that date. As the Applicant has pointed out, the amounts paid by the Respondent totalling Shs. 2,450,000/-were paid not to the Applicant but to Northline's account with the Applicant. There is a marked difference. By paying those sums into Northline's account they were, in my opinion, for Northline's benefit not the Applicant's.

13. I have taken cognizance of the various authorities cited to this court by the Applicant and commented

upon by the Respondent. However, to my mind, the definitive authority as regards professional undertakings is the Court of Appeal decision in **Harit Sheth, Advocate versus K. H. Osmond, Advocate (2011) eKLR**. Therein the Court had this to say:

"….. 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 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 it if only to protect his own reputation as an officer of the court. The law gives 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."

In this matter, the Respondent 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.

14. Further, there is the question of interest on the undertaking amount as above of Shs. 3,030,638.85. I would adopt the finding of **Njagi J** in the **Thuo v Njagi Wanjeru** case (supra). The learned Judge found that justice demands that interest be paid for as long as the undertaking amount is unpaid but as no particular rate was agreed upon in that case, the same should be at court rates. I would say that the same also covers the position in this suit save that an interest rate was agreed and detailed in the undertaking letter being 16.5% per annum.

15. **Order 52 rule 7** of the *Civil Procedure Rules* under which the Originating Summons was brought details 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 in enforcement be made".

16. In conclusion therefore, and in answer to the questions detailed in the Originating Summons, I enter judgement for the Applicant on the following terms:

(a) The Respondent shall within thirty (30) days of the delivery of this judgement honour its professional undertaking contained in its letter dated 28th of June 2010 by paying to the Applicant the sum of Shs. 3,036,380.85.

(b) The Respondent shall pay interest on the above sum at the rate of 16.5% per annum as from the date upon which the undertaking was called upon being 22 February 2011 until payment in full.

(c) The Applicant shall also have the costs of the Application.

DATED and delivered at Nairobi this 28th day of February 2013.

J. B.HAVELOCK
JUDGE