



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO.77 OF 2020

SUZANNE OSMOND, GERALD OSMOND, PATRICIA HEATHER HAYES

(Suing as the Executors of the Estate of Keith Howard Osmond).....PLAINTIFFS

VERSUS

BANITA SISAL ESTATES LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiffs who are the children and administrators of the estate of Keith Howard Osmond filed a plaint dated 3rd June 2020 against Banita Sisal Estate Limited (defendant) seeking the following prayers:

a) An order directing the defendants to pay the plaintiffs the sum of Kshs.15,512,829.06

b) Interest on the sum at prayer (i) above at the rate of 36% per annum from 8th April 2011 and further penalty interest at the rate of 24% per annum from 1st July 1998, both until payment in full.

c) Costs of this suit

d) Any other relief as the Court would deem just and expedient to grant.

2. The plaintiff's claim against the defendant arises from a professional and irrevocable undertaking dated 21st May 1998 by Keith Howard Osmond an advocate practicing as K.H. Osmond Advocates on behalf of Banita Sisal Estates Ltd to Harit Sheth Advocate acting for Victoria Commercial Bank Limited. It is pleaded that the defendant wrote to the general manager of Victoria Commercial Bank Limited applying for a loan facility of 15 million for a period of one month upto 30th June 1998.

3. Further that the defendant indicated that the loan facility was to be secured by a guarantee to be issued by the late Mr. Keith Howard Osmond for the sum of Kshs.25 million. On 27th May 1998 the bank approved the loan facility for the sum of Kshs.15 million and the terms of facility were secured by a letter of professional undertaking and a guarantee from the deceased as well as a personal guarantee from the defendant's director.

4. The defendant failed to perform its repayment and as a result the bank's advocate Mr. Harit Sheth demanded the outstanding amount from the deceased pursuant to the said professional undertaking issued on behalf of the defendant. He instituted a suit seeking to enforce the professional undertaking in Civil Case No. 311 of 1998 (O.S) **Harit Sheth Advocate v Keith H Osmond t/a K.H Osmond Advocates**, which was dismissed on 16th October 1998.

5. Being dissatisfied by the dismissal he lodged an appeal in the Court of Appeal being Civil Appeal No.276 of 2001 **Harit Sheth Advocate v Keith H Osmond t/a K.H Osmond Advocates**. On 8th April 2011 the Court of Appeal allowed the appeal and set aside the ruling and substituted it with an order allowing the Originating Summons and awarding the appellant Kshs. 15,512,829 together with interest rates of 36% per annum and a further penalty interest at the rate of 24 % per annum from 1st July 1998.

6. Keith Howard Osmond (the deceased) died on 25th May 2015. Succession proceedings in respect of his estate were taken out vide Nairobi Succession Cause No.1701 of 2015. Mr. Harit Amrital Sheth (advocate for the bank) filed a protest to the confirmation of grant of probate vide an affidavit sworn on 27th February 2017.

7. The plaintiffs and the protestor entered into discussions over his demand against the estate. They agreed on a sum of Kshs. 46,000,000/= to be paid in three instalments. They have pleaded that the defendant was under an obligation to settle the sums due to the bank or alternatively furnish the deceased with funds to enable him honour the professional undertaking issued by him on the defendant's behalf.

8. The defendant filed a defence on 17th July 2020 and stated that the plaintiffs did not disclose particulars of the sale/conveyance transaction forming the basis of the issuance of the professional undertaking by the deceased. It denies any obligation to pay the amount of Kshs.15,512,829/= demanded by Victoria Commercial Bank's Advocate. It's plea is that it is the deceased who was obligated under the professional undertaking dated 21st May 1998 to pay the money from the proceeds of the sale of the defendant's property which was conducted by the deceased on its behalf.

9. The defendant states that if the deceased had any claim or genuine cause of action against it then he would have enjoined it as a third party in the proceedings in the High Court for indemnity or contribution and the failure to do so and the subsequent claim are res-judicata. Further that any indemnity against the defendant which it denies should have been brought within six years from 8th April 2011 which could only be before 7th April 2017. That the claims are statute barred under the Limitation of Actions Act.

10. The defendant pleads that the deceased had an opportunity to file an indemnity claim against it in HCCC No. 311 of 1998 or institute a recovery claim against it after the judgment of the Court of Appeal in Civil Appeal No. 276 of 2001. The same was not done.

11. The parties complied with the pre-trial requirements under Order 11 of the Civil Procedure Rules and filed issues, statements of witnesses, and pre-trial questionnaires.

12. The plaintiff called one witness (Suzanne Ger Osmond) who testified as PW1. She is the 1st plaintiff and one of the executors of her father's estate (Keith Howard Osmond). She adopted her witness statement dated 3rd June 2020 and filed on 9th June 2020 as her evidence in chief. She filed a bundle of documents dated 3/06/2020 on 9/06/2020. The same were adopted as her exhibits and marked as P EXB 1-15.

13. The following is the list of her exhibits:

§ Certificate of confirmation of grant of probate with will dated 29th November 2017 P EXB 1

§ Affidavit of protest to confirmation of grant dated 27th February 2017. P EXB 2

§ Banita Sisal Estates Ltd letter of application for loan facility dated 21st May 1998. P EXB 3

§ Letter of professional and irrevocable undertaking issued by Keith H Osmond dated 21st May 1998. P EXB 4

§ Deed of guarantee and indemnity between Keith H. Osmond and Victoria Commercial Bank Ltd. P EXB 5

§ Letter of offer of loan facility from Victoria Commercial Bank Ltd to Banita Sisal Estates Ltd dated 27th May 1998. P EXB 6

§ Personal guarantee and indemnity of Mr. Harry Horn Jr and Mr. Harry Horn Snr issued to Victoria Commercial Bank Limited dated 27th May 1998. P EXB 7

§ Victoria Commercial Bank Ltd letter to Keith H Osmond dated 29th June 1998. P EXB 8

§ Victoria Commercial Bank Ltd demand letter to Keith H Osmond dated 1st July 1998. P EXB 9

§ Court of Appeal judgment in Civil Appeal No. 267 of 2001 Harit Sheth t/a Harit Sheth Advocate v Keith H Osmond t/a K.J Osmond Advocate dated 8th April 2011. P EXB 10

§ Payment advice slip dated 30th November 2017 for Kshs 16,000,000/=paid to Harit Sheth Advocates. P EXB 11

§ Payment advice slip dated 7th December 2018 for Kshs.15,000,000/= paid to Harit Sheth Advocates. P EXB 12

§ Payment advice slip dated 6th December 209 for Kshs.15,000,000/= to paid Harit Sheth Advocates. P EXB 13

§ I & M Bank letter to Suzzanne Osmond and Gerald Osmond confirming settlement of payment to Harith Sheth Advocates dated 29th May 2020. P EXB 14

§ Demand letter to Banita Sisal Estates Ltd dated 23rd April 2020. P EXB 15

14. She testified that as they proceeded to finalise probate in High Court Succession Cause No.1701 of 2015 in February 2017 they received an affidavit of protest from Mr. Harit Sheth who told them that their father owed his client Victoria Commercial Bank money. Their father had done a professional undertaking for Banita Sisal Estate (defendant) for a loan of Kshs. 15,000,000/=which the bank gave it in 1998. It failed to pay and so he wanted their father's estate to honour the professional undertaking and repay the loan.

15. They got into discussions with the said bank in 2017 to know why the loan had not been repaid and as the executors they were held liable for the said undertaking. They settled the debt with Kshs. 46,000,000/= from the estate which was paid in three instalments as per P EXB 11,12,13 and 14 and that the last payment was done on 6/12/2019.They therefore seek to be paid 15,512,829/06 with interest, penalty until payment in full plus costs.

16. In cross examination by Mr. K'Opere counsel for the defendant, she stated that her father's Will is dated 16/9/2014 and that the undertaking was dated 21/5/1998 with a maximum limit of Kshs. 25,000,000/= which was to be enforced on 30/06/98. She confirmed that Mr. Harit took their father to court over the said matter but their father did not enjoin the defendant as a party to the civil proceedings. The dispute went upto the Court of Appeal which set aside the High Court Ruling and her father was directed to pay the first loan and make a claim against the client.

17. She said she was not aware if their father made any claims against the defendant and that they never received any evidence that the defendant ever paid any part of the debt. It was the protest by Mr. Harit which made them aware of the debt on 28/2/2017 as the process for confirmation of the grant was on. A settlement was arrived at and the protest withdrawn before the grant was confirmed on 29th November 2017. All payments were done after the confirmation of the grant. She said if their claim succeeds the defendant would pay them Kshs 200,000,000/=.

18. In re-examination by Mr. Deya, she stated that the Court Appeal decision held that her father was to honour the said undertaking first. She said the undertaking was clear on the terms on which they paid the money.

19. The defendant testified through Harry Horn Junior who gave evidence as DW1. He adopted his witness statement dated 17th August 2020 as his evidence in chief. He testified that he is the director of the defendant company in which him and his late father were directors as at 1998.He produced by consent documents listed in the defendant's list of documents dated 20th July 2020 and the same were marked as D EXB 1-30.

20. The following is the list of the defence exhibits:

§ Pleadings and documents by the plaintiff D EXB 1

§ Sale Agreement for L.R Nos 1077,9977 & 8933/2 Nakuru (undated). D EXB 2

§ Letters dated 22/11/17 by B.M Quadros Advocate,30/11/17 by T.O K'opere & Co. and 07/02/18 by T.O K'Opere & Co. D EXB 3

§ Letter dated 08/05/18 by B.M Quadros Advocate. D EXB 4

§ Letter dated 23/04/20 by Coulson Harney LLP (Bowmans). D EXB 5

§ Instruction Letter dated 01/07/20 by defendant. D EXB 6

§ Originating Summons –HCCC 311 OF 1998. D EXB 7

§ Grounds of Opposition –HCCC 311 OF 1998. D EXB 8

§ Ruling in HCCC 311/98 (Justice M Ole Keiwa-16/10/98. D EXB 9

§ Judgment in Civil Appeal No. 276 of 2001 (08/04/11). D EXB 10

21. He stated that the deceased acted as their advocate and they took a loan from the bank which was to be repaid after part of their farm had been sold. That their advocate had the money which was in the kitty of the sale of the farm which they sold for Kshs.230 million. He stated that the plaintiffs called him in March 2017 before the demand was served and he informed them that the deceased used to deal with his father. That he could not deal with something he was not aware of.

22. On being cross examined by Mr. Deya, the plaintiff's counsel, DW1 said he knew the deceased who had handled several cases for them. That he read and signed the letter of offer dated 27th May 1998. He further stated that after signing the sale document, Kshs.100 million was paid to the deceased. By then the Kshs. 15,000,000/= had not been paid. He stated that he could not confirm if the deceased received the sale money but he had made some payments to the defendant. He was however not aware as to how much it was in respect to the sale of land.

23. In re-examination by Mr. K'Opere, he stated that before his death the deceased never informed them of any payments he had not made on behalf of the defendant.

24. Both counsel filed written submissions in support of their cases.

25. Mr. Deya for the plaintiffs gave a brief background of the matter and identified four issues for determination to be as follows:

1) *Whether the suit is time barred*

2) *Whether the suit is res judicata in relation to Nairobi High Court Civil Case No.311 of 1998- Harit Sheth t/a Harit Sheth Advocate v Keith H Osmond t/a K.H Osmond Advocates and whether Mr. Keith Howard Osmond (deceased) should have joined the defendant in those proceedings as a third party for indemnity or contribution*

3) *Whether the plaintiffs are entitled to the reliefs sought in the plaint; and*

4) *Who should bear the costs of this suit*

26. On the first issue, counsel submitted that Mr. Osmond had a right to recovery proceedings against the defendant for not honouring the professional undertaking. He referred to the Court of Appeal in **Civil Appeal No.276 of 2001-Harit Sheth t/a Harit Sheth Advocates v Keith H. Osmond t/a K.H Osmond Advocates (2011) eKLR** where it was stated as follows;

"....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”

27. He submitted that the above judgment endorses the position that the cause of action in this case could only arise after the deceased or the plaintiffs had honoured the professional undertaking and not the default date of 1st July 1998 as advanced by the defendant. It is his submission that the cause of action in this suit arose on 6th December 2019 when the last tranche of the settlement amount was paid to Harit Sheth the bank’s advocate.

28. On this counsel relied on the case of **Christopher Musyoka Musau v N.P.G Warren & 7 others (2012) eKLR** where the court stated that:

“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 but he cannot however, sue to recover that amount unless he has first honoured his professional undertaking”

29. Counsel further, in support of the submission on this point relied on the following authorities:

a) *Civil Case No.187 of 2015 (O.S) Nzioka & Co.Advocates v Harit Sheth Advocates (2015) eKLR*

b) *Civil Case No.52 of 2013 Andrew Mukite Musangi t/a Mukite Musangi & Co.Advocates v Alphonse Mutinda t/a Alphonse Mutinda & Co. Advocates (2016)eKLR*

30. On the second issue, he submitted that this suit is not res-judicata and that the doctrine of res-judicata as outlined in Section 7 of the Civil Procedure Act is a bar to subsequent proceedings involving the same issues as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. Counsel in comparing the nature of HCCC No. 311 of 1998 with the present case invites the court to note that:

a) The parties in this suit are not the same as the parties in HCCC No.311 of 1998

b) That the cause of action is not the same. The cause of action in HCCC No. 311 of 1998 was to compel Mr. Osmond to honour the professional undertaking while the current suit relates to recovery of money incurred in honouring a professional undertaking.

c) The defendant was not a party to the undertaking between the deceased and Harit Sheth. There was no privity of contract between the defendant and the deceased relating to the professional undertaking.

d) A professional undertaking is purely between advocates and advocates and is enforceable between them as such. The defendant not being an advocate had no role to play in HCCC No.311 of 1998.

31. Counsel submitted that a case instituted by an advocate against another advocate to compel the former to honour the terms of a professional undertaking cannot involve the client in whose favour the professional undertaking is issued. This enables the court to determine how the issue of liability between the parties may be conclusively determined. He submitted that if the client is involved it would defeat the very purpose for which professional undertakings were created. On this counsel relied on the case of **Daniel Ochieng Ogola t/a Ogola Okello & Company Advocates v George Mougoye Mbeya t/a Mugoje & Associated Advocates & another (2016) eKLR** where the court held that:

“if an advocate chooses to give an undertaking before ensuring that he was in funds, he cannot thereafter seek to delay the enforcement of the undertaking by asking the court to enjoin his client to the proceedings for enforcement of the undertaking, so as to compel the client to pay the requisite funds in respect to which the advocate had given his undertaking”

32. Counsel further relied on the following authorities to buttress the same argument.

i. *Civil case 209 of 2008 David Karanja Thuo t/a D. K Thuo & Co. Advocates v Njagi Wanjeru t/a Njagi Wanjeru & Co. advocates*

(2010) eKLR

ii. *Civil Suit No.E025 of 2018 (O.S) Patrick Lutta t/a Lutta & Company Advocates v Ishvinder Kaur Kaisi Marwa t/a Ishi Kaisi & Company Advocates (2019) eKLR*

33. On the third issue he submitted that the plaintiffs have discharged their obligation under the professional undertaking to Harit Sheth Advocates. They are therefore within their legal rights to institute recovery proceedings against the defendant for the sums they incurred in honouring the said professional undertaking.

34. The firm of T. O K'Opere & Co. Advocates appearing for the defendant filed submissions dated 12th August 2021 background to this case. He then submitted that the maximum limit of liability against the deceased was Kshs.25 million under the professional undertaking which ought to have been taken into consideration with any interest, charges, penalties or delays in repayment. On this counsel relied on the Court of Appeal case of **S. T. G Muhia & Co. Advocates v J.M Chege T/A J M Chege & Co. Advocates (2009) eKLR** where it was held that:

"A professional undertaking by an advocate constitutes a separate agreement independent of the transactions that resulted in such advocate being required to give. A professional undertaking can therefore be enforced against an advocate independent of the transaction in which the undertaking was given"

35. He contends that the only legitimate, reasonable, plausible and logical explanation and conclusion is that the deceased Advocate (K. H. Osmond) having received payments under the contract for sale of Banita Sisal Estate Ltd properties pursuant to the agreement of sale in the sum of Kshs.230 million, should have honoured the professional undertaking before giving final accounts to the client.

36. He submitted that in a letter by Harit Sheth Advocate to the deceased payments were to be done to the Victoria Commercial Bank but were done to I & M Bank Karen branch which have no connection at all and not even with Banita Sisal Estates Limited.He therefore contends that the defendant cannot be consequently called upon to shoulder liability for a third party payment which it was never party to.

37. Counsel therefore contends that the plaintiffs' suit falls into four categories namely: -

i. The cause of action being contractual claim under professional undertaking dated 21st May 1998 is statute barred under the Limitations of Actions Act.

ii. The deceased had an opportunity upon being sued in HCCC 311 of 1998 to enjoin the defendant as a third party for Indemnity or contribution but failed to do so and that the plaintiffs are barred by the doctrine of res-judicata.

iii. That the plaintiffs have not established a valid cause of action or proved the claim by documents under section 107 and 108 of the evidence Act. That the payments of Kshs.46 million made were to the defendant under the loan account at Victoria Commercial Bank Ltd to discharge the liabilities of the defendant under the loan agreement dated 27/05/98 and professional undertaking.

iv. The plaintiffs have not proved on a balance of probabilities that they should recover from the defendant the sum of Kshs.46 million allegedly paid to Harit Sheth Advocates through third party I & M Bank or the amounts allegedly prayed for in the plaint being Kshs.15,512,829/= together with interest and penalty interests which would translate to Kshs. 200 million.

38. He therefore prays for the suit to be dismissed with costs to the defendant.

Analysis and Determination

39. I have carefully considered the plaint, the defence, the evidence on record including the exhibits, submissions and authorities by both counsel. I find the following to be the main issues for determination:

i. *Whether the suit is time barred;*

ii. Whether the suit is res-judicata and whether Mr. Keith Howard Osmond (deceased) should have joined the defendant in the proceedings as a third party for indemnity or contribution;

iii. Whether the plaintiffs are entitled to the reliefs sought in the plaint.

Issue no (i) Whether the suit is time barred.

40. The defendant contends that the suit is time barred because the loan was advanced to them for 30 days as from the 27th May 1998 to 30th June 1998 when it was payable. That the cause of action should have been due on 1st July 1998. Further that the period started running from 8th April 2011 after the Court of Appeal Judgment for six (6) years which lapsed on 7th April 2017.

41. On the other hand the plaintiffs contend that an advocate's right to sue a client to recover money he has incurred in honouring a professional undertaking accrues when the advocate fulfills the terms of the professional undertaking. That the right to institute recovery proceedings accrues following the advocates payment of money in honouring the professional undertaking.

42. The plaintiffs in their submissions relied on the case of **Christopher Musyoka Musau** (supra) where the court emphasized that an advocate cannot sue to recover money incurred in honouring a professional undertaking unless he has first honoured his professional undertaking.

43. The law relating to enforcement of undertakings is clear. It is not contractual in nature but it is a power bestowed upon the court to ensure that its officers comply with undertakings they give in the course of their dealings as such officers to third parties. Accordingly, the courts have held that an undertaking is a solemn thing and in enforcing an undertaking the court is not guided by considerations of contract but the court aims at securing the honesty of its officers. See **Peter Ng'ang'a Muiruri vs Credit Bank and & another, Civil Appeal No. 263 of 1998.**

44. In my view the matter is not statute barred since the position adopted by our courts is that a professional undertaking is not guided by contract and that the main aim is to ensure that advocates who are court officers adhere to and fulfill the undertakings.

45. Further to that the courts have also affirmed the legal position that an advocate cannot sue to recover money incurred in honouring a professional undertaking unless he has first honoured his undertaking. In this case the plaintiffs sued soon after the payment of Kshs. 46 Million.

Issue no (ii) Whether the suit is res-judicata and whether Mr. Keith Howard Osmond (deceased) should have enjoined the defendant in the proceedings as a third party for indemnity or contribution;

46. According to the plaintiffs, the matter is not res-judicata since the cause of action and parties in this case and HCCC 311 of 1998 are not the same. The plaintiffs contend that the cause of action in HCCC No.311 of 1998 was to compel the deceased to honour his professional undertaking while the current suit's cause of action is recovery of money incurred in honouring the professional undertaking.

47. On the other hand, the defendants argued that this suit is res-judicata as the issue of professional undertaking was dealt with in HCCC No. 311 of 1998. Further, that if the deceased had a claim that was a genuine cause of action he would have enjoined the defendant as a third party in the said suit.

48. The plaintiffs have submitted that a case of professional undertaking should be between two advocates and does not involve the client who is not part of the undertaking. That the client only comes in if they have not done their part in fulfilling their obligation of contribution in the honouring of the professional undertaking.

49. Section 7 of the Civil Procedure Act on res-judicata applies to cases where the issue in dispute is similar to an issue that was previously in dispute between the same parties who litigated under the same title and the suit was conclusively determined on merit by a court of competent jurisdiction.

50. My finding on this issue is that the current suit is not res-judicata for the reason that the parties in the two suits are totally

different and that the causes of action are also different. The current suit is on recovery of money incurred in honouring a professional undertaking and the plaintiffs are the children of the deceased who are his executors while the defendant is Banita Sisal Limited. On the other hand, the cause of action in HCCC No. 311 of 1988 was for the deceased to honour his professional undertaking and was between the deceased and Mr. Harit Sheth.

51. The court in English case of **Henderson v Henderson (1843-60) ALL E.R.378**, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

52. On the issue as to why the defendant was not enjoined in the previous case, it is clear that the position has always been that clients are not third parties in proceedings for the enforcement of a professional undertaking. The reason is that a client is not party to the undertaking which is strictly between the advocates involved.

53. In the case of **David Karanja Thuo t/a D.K. Thuo & Co. Advocates** (supra) the court held thus:

“In the first instance, it should be noted that the professional undertaking was between the Advocates, and none of the clients was party to the undertaking. For want of a better language, there was no “privity of undertaking” between the plaintiff and the defendant. The Defendant cannot, therefore, purport to exercise a lien over the plaintiff’s property since the client was not privy to the undertaking. The undertaking was of a purely professional nature between the Advocates as Advocates, and is enforceable between them as such”.

54. Further in the case of **Patrick Lutta t/a Lutta**(supra) the court stated that:

“...the professional undertaking is between the law firms which are the parties herein. Thus it is enforceable as such, and the proposed interested parties have no role to play in the instant proceedings. Therefore, there is no issue to be determined between the Plaintiff and the Defendant, which cannot be conclusively determined with finality if the proposed interested parties are not enjoined to this suit. This is because, the suit before this court is one of enforcement of a Professional Undertaking which by law is between solicitors and not solicitors and clients.”

Issue no. (iii) Whether the plaintiffs are entitled to the reliefs sought in the plaint

55. The plaintiffs pursuant to the Will of the deceased dated 16th December 2014 were appointed as co-executors of the deceased’s estate P EXB 1 being a copy of the confirmation of the grant. The plaintiffs after applying for confirmation of grant were surprised to be served with an affidavit of protest (P EXB 2) dated 27th February 2017 and filed by Harit Sheth. He alleged that the deceased was debtor of the Victoria Commercial Bank to the tune of Kshs. 187,529,729/= pursuant to a professional undertaking dated 21st May 1998 (P EXB-4).

He explained that the professional undertaking was to take care of a loan taken by the defendant who was the client to the deceased. (PEXB-3).

56. The deceased did not honour the said undertaking leading to the current suit. The plaintiffs later negotiated with Mr. Harit Sheth for the bank to pay a sum of Kshs. 46,000,000/= in three instalments.

57. The plaintiffs claim is that the defendant did not give the deceased the said amount in order for him to pay the bank. They argue that there is no evidence to show that the defendant paid the same to the deceased to enable him honour the professional undertaking.

58. On the other hand the defendant claims that there was a conveyance transaction that was being conducted by the deceased on

their behalf and that the temporary loan was to cater for clearing arrears, valuers fees and lawyers' fees. They say the land sold was worth Kshs.230 million which was paid to the deceased. He was expected to pay the bank the Kshs. 15 million from the sale proceeds.

59. The plaintiffs contend that the defendant should refund them the money that they paid the bank's advocate after honouring the deceased's professional undertaking amounting to Kshs. 15,512,829/= plus costs and interests. The defendant believes that the deceased ought to have paid the loan after the sale of land as they had agreed.

60. It is important in my view to understand the principles guiding professional undertakings. Warsame, J (as he then was) in **Equip Agencies Limited vs. Credit Bank Limited Nairobi HCCC No. 773 of 2004** dealt extensively with the issue when he stated inter alia as follows:

"An undertaking is usually given to ease and smoothen the path of transactions carried out by advocates. It is a convenient method or tool to circumvent the delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between advocates. It is a contract between Advocates after an offer and acceptance, with a resulting consideration which follows from one advocate to another...An undertaking is a promise to do or refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. It can be made by an advocate either personally or through the name of the firm he usually practices under...The breach of professional undertaking can result in lack of mutual or cordial trust between Advocates and invariably puts the administration of justice into disrepute. The advocates by relating together through a professional undertaking are officers of the court; therefore, as far as possible it is mandatory for them to respect their words for the benefit of mutual continuity of their respective relationship...The courts have inherent power to commit an advocate for breach of an undertaking. The court has jurisdiction over an advocate for breach of undertaking on the basis that the court seeks to exercise its punitive and disciplinary power to prevent a breach of duty by an officer of the court, which is quite distinct and separate from the client's right. Therefore, the court even if it has no right, it has jurisdiction to make an order in exercise of its disciplinary jurisdiction. The purpose of the punitive and disciplinary powers of the court's jurisdiction over advocate is not for the purpose of enforcing legal rights but for enforcing honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Chapter 16 Laws of Kenya...It is not the business of the court to oppress an advocate for no reasonable cause. The court is always reluctant to degrade an advocate unless the circumstances show that his conduct is dishonorable as an officer of the court and it is for that reason that the court would exercise its punitive and disciplinary powers to ensure that advocates conduct themselves in a manner that pleases the eyes of justice...It would be difficult if not impossible for advocates to carry out their duty to each other and to the public, if an undertaking by advocates becomes unreliable and unenforceable. Failure to honour professional consideration, in the court's view, amounts to misrepresentation or fraud. The purpose of an undertaking is to achieve a desired goal of mutual trust. In the premises it is incumbent upon advocates to always honour their undertaking unless there is a vitiating factor which the court is bound to consider..."

61. In **Harit Sheth t/a Harit Sheth advocate** (supra) the Court of Appeal had this to say on this issue at page 11 of its judgment:

"With due respect to the learned counsel, a professional undertaking is given to an advocate on the authority of the 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 him the right to use 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"

62. Going by the above authorities the court has the power to enforce a professional undertaking by an advocate. An advocate as an officer of the court is held in high esteem. He/she is obliged to honour the professional undertaking he/she makes. Its purpose is not for enforcement of legal rights but for enforcement of honourable conduct among advocates in their standing as officers of the court by virtue of section 57 of the Advocates Act.

63. It is not in dispute that there was a professional undertaking made by the deceased which he had to honour and had a duty to pay the bank the loan of Kshs. 15,000,000/= on or before the 30th June 1998. This was not done as there is a case Nairobi HCCC No. 311 of 1998 which ended up in the Court of Appeal as Court of Appeal Civil Appeal No 267 of 2001. The Court of Appeal in its judgment entered Judgment for the bank which confirmed that the deceased had to fulfil the undertaking.

64. The deceased did not pay the money as directed by the Court of Appeal and that was in 2011. He did his Will dated 16th September 2014 and he passed on in 2015. The deceased did not at any time claim from the defendant the Kshs 15,000,000/= or raise any issue about non payment of the loan by the defendant. Even when sued by Mr. Harit Sheth counsel for the bank in 1998 and later on in 2001 in the Court of Appeal the deceased took no action as far as the defendant was concerned.

65. Upon being ordered by the Court of Appeal to pay the monies to the bank he did not look for the defendant to chip in or do anything as far as this loan was concerned. PW1 testified that the family was not aware of the said undertaking and only got to know about it during the succession matter.

66. DW1 and his late father were the defendant's directors. He told the court that his father was the one who mostly dealt with the deceased. He was however aware of the sale of land which would have catered for the said loan the subject of this suit. He said this was an understanding they had with the deceased.

67. It is therefore clear that the deceased did not honour his professional undertaking as decreed by the Court of Appeal. This led to the protest to the confirmation of grant of his estate so that the said estate could pay the amount due as result of the professional undertaking given by the deceased to the bank. Even though it would have helped if the bank advocate was part of this suit by testifying so as to enlighten the court on some issues.

68. One of the issues is how they had come to the figure of Kshs.46,000,000/= from hundreds of millions as money allegedly owed to the bank. Secondly why Mr. Harit Sheth had not executed the judgment from the Court of Appeal for 4 years before the demise of the deceased. The other issue being that the professional undertaking was between Harit Sheth being the advocate of Victoria Commercial Bank Limited (the lender) and the deceased (defendant's advocate) and not I & M bank to which the plaintiffs apparently made the payments of Kshs.46 million in honouring the professional undertaking.

69. There is no dispute that the deceased was the defendant's advocate and he undertook a number of professional assignments for it. One of them is the sale of several acres of their land for Kshs.230 million which was paid through him. For reasons unknown to the defendant this money (Kshs.15 million) was not repaid to the bank. Even with the court battle over this matter between 1998-2011 the deceased never mentioned anything about it to the defendant and/or his own family

70. This was not his own family debt and if indeed he had not been authorized by the defendant to pay the Kshs. 15 Million from the sale of proceeds and as an advocate who knew the law he would have acted accordingly to protect his name and the dignity of his office. He did not even indicate this in his written Will as his liability to the bank as a result of a professional undertaking or money due to him by the defendant.

71. Upon analyzing all the pleadings, evidence, documents and submissions I have come to the conclusion that the defendant cleared with the deceased through the sale of their land transactions in which the deceased represented it. He received money which he was expected to remit to the bank but he did not.

72. Instead of remitting the Kshs.15 million to the bank, he kept this matter to himself. That explains the reason why he never followed up with the defendant on this in anyway from 1998-2015 before his death. The plaintiffs have failed to show that failure to honour the professional undertaking by the deceased was because the defendant had failed to give him the money to pay.

73. Being in an advocate/client relationship the defendant and the deceased agreed on how the Kshs.15 Million would be realized. The defendant remained calm because it believed the deceased had acted accordingly and in good faith. On the other hand the deceased could not raise any issue against the defendant because the matter between them had been sorted out.

74. My final finding is that the plaintiffs have failed to prove their case on a balance of probabilities and their suit is dismissed with costs.

Orders accordingly

DELIVERED ONLINE, SIGNED AND DATED THIS 19TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE



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