

No. 7

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IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: KWACH, AKIWUMI & SHAH J.J.A.)

CIVIL APPEAL NO. 48 OF 1994

BETWEEN

KENYA REINSURANCE CORPORATION.....APPELLANT

AND

V.E. MUGUKU MURIU t/a  
M/S V.E. MUGUKU MURIU & COMPANY.....RESPONDENT

(Appeal from the judgment and decree of the High Court  
at Nairobi (Mr. Justice J.W. Mwera) given on 16th day  
of July, 1991)

in

H.C.C.C. NO. 4060 OF 1987

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JUDGMENT OF THE COURT

Although the memorandum of appeal contains nine grounds of appeal, this appeal raises primarily four main points which are

- i. Can a professional undertaking given by an advocate be subject to watering down on account of a dispute between the advocate's client and the party to whom the undertaking is given?
- ii. Does it fall to the advocate to take up, on behalf of his client, defences which could be open to the client in a claim for enforcement of an undertaking?
- iii. If a cheque is sent for redemption of charge which cheque is not accepted, does payment of interest under the charge cease?
- iv. Can a court allow a counter-claim made by the advocate on behalf of his client when the

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client is not even a party to the suit?

The background to this appeal is simple. By a letter dated 22nd April, 1986 the respondent advocate sought to know from the appellant corporation the outstanding balance of loan under a charge on plot L.R. No. NAIROBI/BLOCK 93/736 (the property) to enable him to prepare the discharge of charge and transfer of the property from his client Harjit Singh Matharu to his other client James Muchiri Gathungu. This letter of 22nd April, 1986 was replied to by the appellant stating that the appellant's advocates will respond thereto. The appellant so wrote to the respondent advocate on 26th June, 1986. By another letter of the same date, in which the appellant corporation enclosed a copy of a letter from Harjit Singh Matharu and in which Matharu had set out what he thought he owed the appellant corporation, the appellant corporation nevertheless, reiterated in that letter to its advocates M/s. Oraro & Rachier what in its view Matharu owed it, as follows:

"....The redemption amount as at 30th June, 1986 is KShs. 499,023/95. Thereafter interest of Kshs.150.50 accrued daily and premiums of Kshs.201.00 and Kshs.111/= for Mortgage Protection Assurance and Houseowners Insurance policies respectively accrue monthly in advance. Please also note that the following are also payable as part of the redemption moneys:

1. KShs.3,382.35 being the apportionment of Rates and land as at the date of possession.
2. Legal costs incurred by ourselves to-date...."

This letter was copied by the appellant corporation to the  
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respondent advocate and also to his client. The respondent advocate wrote to M/s. Oraro & Rachier by his letter of 1st July, 1986 and gave the following undertaking:

"We refer to a letter ref. KR/LD/PE/736  
Reference: GOO/85 of 26th June, 1986  
addressed to you by M/s. Kenya Reinsurance  
Corporation and copied to us among others.

Please forward to us the title documents on  
our professional undertaking to redeem the  
mortgage indicated in the letter above-  
mentioned. (emphasis added)

Kindly treat this matter as urgent and oblige."

'It is clear that the respondent advocate was referring only to the letter of 26th June, 1986 addressed to M/s. Oraro & Rachier by the appellant Corporation and which set out the redemption amounts due. It is also clear that the undertaking given by the respondent advocate was unequivocal and unconditional and applied only to the redemption amounts set out as due in that letter. He was undertaking to pay to the appellant corporation a sum of Shs.499,023/95 plus interest thereon at the rate of Shs.150/50 daily until the date of payment plus the smaller amounts mentioned in that letter.

The respondent advocate was at pains to argue that his letter of undertaking (dated 1st July, 1986) must be read with his client's letter of 26th May, 1986 addressed to the Managing Director of the appellant corporation. By that letter the client of the respondent advocate had stated that according to him he ought to pay a sum of Shs.399,443/= including interest due up to 30th June, 1986. What the respondent advocate did was to bring

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in the issue of alleged disputes between his client and the appellant corporation to qualify his undertaking. But we do think that is right. Having given a solemn professional undertaking to pay a certain sum of money an advocate is bound by the same and he cannot resile therefrom.

We hold that the undertaking given by the respondent advocate was unambiguous, unequivocal and binding on him. An advocate cannot, after giving such an undertaking, qualify the same on account of accounting disputes between the parties.

In this case the matter went further. On 22nd July, 1986 M/s. Oraro & Rachier wrote a letter to the respondent advocate under cover of which letter they despatched the relevant documents upon "your professional undertaking to redeem Mr. Matharu's account with our client corporation and to pay our fees on the discharge. Details of outstandings are set out in a copy of our client's letter of 26th June, 1986 (enclosed)."

It is seen clearly that even on 22nd July, 1986 M/s. Oraro & Rachier are sending documents to the respondent advocate on his undertaking to pay the sums mentioned in the appellant corporation's letter of 26th June, 1986.

At this stage it was incumbent upon the respondent advocate to return the documents to Mr. Oraro & Rachier as his client was disputing the correctness of amount due under the charge. But the respondent advocate did not do so. He proceeded to register the discharge of charge and the transfer to Mr. James M. Gathungu. He did that after writing, on 28th July, 1986, to M/s.

Oraro & Rachier as follows:

"Your letter G00/85 dated 22nd July, 1986 refers.

We acknowledge receipt of your letter above-mentioned and the title documents enclosed.

We undertake to redeem the account with your client corporation."

Again, and it bears worthwhile repetition, the respondent advocate undertook to redeem his client's account with the appellant corporation, in terms of M/s. Oraro & Rachier's letter of 22nd July, 1986 to which was attached the appellant corporation's letter of 26th June, 1986 which contained the figure claimed for redemption of the charge.

The respondent advocate argued with some force, that as his client actually obtained the Certificate of Lease (transfer) from the appellant corporation as late as 31st December, 1985 his client was not bound to pay interest until after that date as he himself could not create a charge on the property until he was registered as proprietor. We say at once that that was a matter between the respondent advocate's client and the appellant corporation. It does not vitiate or vary the professional undertaking given by the respondent advocate. If the amount payable under the charge was disputed, the respondent advocate should not have given an undertaking: but having done so, he should have at once returned the documents to Oraro & Rachier if, for any reason, he did not intend to honour his undertaking. The date for commencement for repayment of mortgage had nothing to do with the unequivocal undertaking given by the respondent

advocate. 6

The learned judge in our view, with respect, quite clearly erred in placing the respondent advocate in the shoes of the client. He was only required to determine whether the respondent advocate had given an undertaking which was capable of being enforced.

The respondent's arguments before us, and also before the learned judge as regards section 65(1) of the Registered Land Act, regarding the powers of an absolute owner e.t.c. are of no avail. It does not lie in the respondent advocate's mouth to say that non-occupation of the property by his client entitles him to pay no interest for the period of non-occupation when it comes to enforcement of a clear undertaking. A careful advocate would obtain very clear instructions from his client before giving a professional undertaking on his behalf. If he does so without that elementary precaution then he must take the consequences.

We think, again with respect, the learned judge erred in treating Mr. Matharu's claims against the appellant corporation, as a defence by the respondent advocate, to the claim for the enforcement of an undertaking.

On 11th November, 1986 the respondent advocate forwarded to M/s Oraro Rachier a cheque for shs.426,839/75 for redemption of the charge. The letter of 11th November, 1986 followed the respondent advocate's letter of 4th November, 1986. In the letter of 4th November, 1986 the respondent advocates says as follows:

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"Despite our letter of undertaking, (emphasis supplied) our instructions are for only the amount legally due and owing to your client."

It becomes clear once again that the respondent advocate was fully aware of the fact that he was attempting to water down the undertaking by introducing what he called "the amount legally due and owing." That was not the sum (Shs.426,839/75) the respondent advocate undertook to pay by his letter of 1st July, 1986.

M/s Oraro & Rachier were therefore perfectly entitled to reject that sum because it was not the amount covered by the undertaking.

With respect the learned judge erred in saying that "the defendant did his best to honour his undertaking. He gave a cheque for shs.426,839/75 on 11th November, 1986 to the plaintiff's lawyers". Simply and plainly the respondent advocate was bringing in the dispute between his client and the appellant corporation to qualify his clear undertaking. This was quite wrong and if allowed to stand would encourage advocates to resile from their undertakings.

Interest was payable on the amount covered by the undertaking and there was no question of changing that date. The learned judge stated that the sum of Shs.426,839/75 should have been accepted without prejudice subject to ascertainment of balance. Oraro & Rachier were right in refusing to accept payment of a sum less than the amount covered by the undertaking because if they had done so they ran the risk of being told "you did accept my cheque; you banked it; you cannot now complain."

We now come to the issue of the respondent advocate's counter-claim in the superior court. That counter-claim is pleaded as follows:

"Counterclaim

1. The defendant on behalf of the 3rd parties, i.e. Harjit Singh Matharu and James Muchiri Gathungu claims as against the plaintiff general damages for selling to the said Harjit Singh Matharu a house Nairobi/Block 93/736 without clear title in breach of contract and in a dilapidated state which cost a fortune to carry out repairs and this amounted to a misrepresentation that the plaintiff was selling a new house to the said Harjit Singh Matharu".

Firstly, the respondent advocate had no locus stardi to sue in his own name claiming damages on behalf of his client Harjit Singh Matharu. Secondly, James Muchiri Gathungu really had nothing to do with the matters in question. Thirdly, damages in the nature of special damages must be pleaded and strictly proved. Fourthly, general damages cannot generally be claimed for breach of contract. With respect the learned judge erred in even considering such a counter-claim. He should have disallowed it.

As an afterthought the respondent advocate, for the first time in his written submissions handed over to the learned judge, raised the issue of a procedural irregularity namely that the appellant corporation should have moved the superior court by an originating summons rather than a plaint, for enforcing of the undertaking. It must be noted that the respondent advocate



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entered appearance, and filed a defence and counter-claim. He cannot be heard to say, at this late stage, that the procedure adopted was wrong.

This appeal is therefore allowed. The judgment and the decree of the superior court is set aside and substituted therefor with an order giving judgment for the appellant directing the respondent advocate to make good his professional undertaking by paying the following total sum and interest thereon as ordered hereunder to the appellant corporation within thirty days from to day and in default execution to issue.

Principal sum	Shs. 499,023.95
Interest thereon @	
Kshs.150/50 per day	

From 1/7/86 to 26/3/88	Shs. 95,417.00
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TOTAL	SHS. 594,440.95
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Less paid on 26/3/88	Shs. 356,837.75
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Net	Shs. 237,603.20
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Add total amounts referred to in the appellant's letter of 20th June, 1996	Shs. 3,694.35
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TOTAL	241,297.55
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The sum Shs.241,297/55 will carry interest at 13% per annum from 27th March, 1988 until date of payment. The counter-claim raised by the respondent advocate is dismissed with costs.

The respondent advocate will pay the appellant's costs in the superior court. The appellant will have the costs of this appeal.

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Dated and delivered at Nairobi this 29th day of October,  
1996.

R.O. KWACH

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B. SHAH

.....  
JUDGE OF APPEAL

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

DEPUTY REGISTRAR