



**David Mwangi Wahome & Atkins Jusa Ambani t/a Mwangi Wahome & Co Advocates
v Wari Charles Kamau t/a Wari & Associates Advocates (Civil Case E087 of 2022)
[2023] KEHC 26425 (KLR) (Commercial and Tax) (24 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 26425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E087 OF 2022
DO CHEPKWONY, J
AUGUST 24, 2023
IN THE MATTER OF ENFORCEMENT OF PROFESSIONAL UNDERTAKING**

BETWEEN

**DAVID MWANGI WAHOME & ATKINS JUSA AMBANI T/A MWANGI
WAHOME & CO ADVOCATES APPLICANT**

AND

**WARI CHARLES KAMAU T/A WARI & ASSOCIATES
ADVOCATES RESPONDENT**

RULING

1. The Applicant moved the court by way of Originating Summons dated 18th March, 2022 pursuant to Order 52 Rule 7 (1) b) of the [Civil Procedure Rules](#) 2010 seeking the following orders:
 - a. The Respondent herein be ordered to pay the Applicant the sum of Kshs. 1,400,000/= in accordance to the professional undertaking given on 25th August, 2021.
 - b. The Respondent herein be ordered to pay the undertaking amount of Kshs. 1,400,000/= together with interest at court rates from the 15th September, 2021 until payment in full.
 - c. This Honourable court be pleased to grant such further or other relief as may be just in the circumstances.
 - d. The Respondent do bear the costs of this application.
2. The Application is supported by the Affidavit of David Mwangi Wahome sworn on 18th March, 2022. According to the Applicant the Respondent was acting on behalf of the Vendor, Jemi Group of



Companies, the Purchaser John Migwi Miano and the financier Equity Bank Limited in a conveyance transaction of property known as Kajiado/Kitengela/105387 whose title deed was held as lien by the Applicant's client, Gypsyan Holdings Limited.

3. The Applicant holds that one of the conditions for his client releasing the security documents to the Respondent was for the Respondent to issue a professional undertaking for payment of the sum of Kshs. 1,400,000/=. The Applicant contends that the Respondent then issued them with the professional undertaking dated 25th August, 2021 for the payment to be made within thirty (30) days from the date of receipt of the security documents.
4. The Applicant holds that it subsequently released the security documents to the Respondent on 27th August, 2021 and on 15th September, 2021, the Respondent forwarded the security documents to the financier, Equity Bank Ltd with instructions on how the amount of Kshs. 1,400,000/= was to be paid.
5. The Applicant argues that the Respondent dishonoured the professional undertaking and failed to pay the amount of Kshs. 1,400,000/= despite demand letter dated 14th October, 2021 and email reminder issued on 15th December, 2021. The Applicant avers that the Respondent responded on 16th December, 2021 and promised the Applicant that the matter was being finalised but completely dishonoured the professional undertaking which necessitated the filing of the present Summons which it seeks to be allowed by the court.
6. The application is opposed by the Respondent who filed a Replying Affidavit sworn by Charles Wari on 21st, April, 2022 wherein he acknowledged the facts of the case and the existence of the professional undertaking dated 25th August, 2021 which he admits issuing. The Respondent states that once it received the security documents from the Applicant it forwarded them to the Financier Equity Bank to facilitate the payment that the financier disbursed the loan amount of Kshs,1,400,000/= to the Purchaser's account and thereafter, the Purchaser remitted the amount of Kshs. 1,400,000/= directly to the Vendor's account on 1st October, 2021 in compliance with the professional undertaking. The Respondent contends that the professional undertaking did not contain any clause that required the amount to be paid directly to the applicant or any party besides the Vendor. Therefore, according to the Respondent it complied with the terms of the professional undertaking and as such the Respondent is discharged from the same.
7. The Respondent further contends that since the balance was rightly paid to the Vendor, in the event the purchaser or the financier had breached the terms of the agreement then the Vendor would have issued express authority to the Applicant to recover the amount. But, since there was no such express authority, then the Applicant lacks locus standi to bring the suit against the Respondent.
8. The Respondent further argues that the Applicant is an agent of a disclosed principal who admitted receiving the payment, thus it cannot have a cause of action of its own and therefore the orders sought would lead to unjust enrichment if granted. In view of the above, the Respondent urges the court to dismiss the application for not disclosing any reasonable cause of action against the Respondent.
9. The Applicant filed a Supplementary Affidavit sworn on 4th May, 2022 and holds that it did not act for the Purchaser, the Vendor or the financier in the transaction but Gypsyan Holdings Limited which was holding the original title deed for the subject property as lien over a debt of Kshs. 1,400,000/= which the Vendor owed it.
10. The Applicant argues that the Respondent's client instructed the Respondent to issue an undertaking for the release of the said title Deed in exchange of the payment of Kshs. 1,400,000/= to settle the debt owed to the Applicant's client.



11. The Applicant holds that the Respondent was therefore aware of the purpose of the professional undertaking and the bank account which the amount was to be paid to. According to the Applicant, the professional undertaking was between it and the Respondent, but the Respondent maliciously dishonoured it. It argues that though the Vendor was paid the balance the amount was to be paid to his client Gypian Holdings Limited who has still not been paid hence the present application to enforce the professional undertaking which the Applicant urges the court to allow.
12. The court directed that the application be disposed of by way of written submissions. The Applicant dated 26th September, 2022 wherein it raised three issues for determination namely:-
 - a. Whether there was a Professional Undertaking capable of being enforced?
 - b. Whether the Professional Undertaking was breached?
 - c. Whether this Honourable Court can grant the Orders sought?
13. The Respondent in its submissions dated 21st October, 2022 raised three issues to wit,
 - a. Whether the respondent issued a professional undertaking.
 - b. Whether the conditions required for the undertaking have been met.
 - c. Whether the respondent is discharged from the professional undertaking.

Analysis and Determination.

14. Having read through and considered the application and response by the Respondent and submissions by both parties, the two sets of issues can be reduced to the following issues:-
 - a. Whether there is valid professional undertaking.
 - b. If the answer is in the affirmative, can the court enforce the said professional undertaking.

a. Whether there is a valid professional undertaking

15. The description of a professional undertaking was given by the Court of Appeal in the case of [Harit Sheth T/A Harit Sheth Advocate –vs- K. Osmond Advocates \(NRB CACA NO. 276 OF 2001\) \[2011\]](#) eKLR which stated as follows:-

“A professional undertaking is a bond by an advocate on the authority of his client. It is based on the relationship which exists between the advocate and his client. An advocate who gives such a professional undertaking takes a risk. The risk is his own and he should not be heard to complain that it is too burdensome and that someone else should shoulder the responsibility of recovering the debt from his own client. A professional undertaking is a bond by an advocate to conduct himself as expected of him by the Court to which he is an officer. No matter how painful it might be to honour it, the advocate is obliged to honour the same if only to protect his own reputation as an officer of the Court.”

16. The Court of Appeal also gave another description in the case of [Waruhiu K'Owade & Ng'ang'a Advocates –vs- Mutune Investments Ltd \(2016\)](#) eKLR as follows: -

“A professional undertaking is an unequivocal promise made by a party to another either to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party, to which liability may attach. See Equip Agencies Limited v Credit



Bank Limited [2008] 2 EA 115 (HCK). Generally speaking, professional undertakings are given by advocates in order to make transactions easier, faster and more convenient. Where an advocate breaches a professional undertaking, the court has jurisdiction to order the enforcement of that undertaking.”

17. Having given the description, it is prudent to reproduce the terms of the professional undertaking herein so as to ascertain whether it fits the description of a professional undertaking.

“Date August, 25 2021

Mwangi Wahome & Advocates

Centre 2nd floor,

Namanga Road

Box 16574-00100

Nairobi

Re: Sale and Purchase of Land Title No.Kajiado/Kitengela/ 105387 JEMI Group of Companies Ltd (the Vendor) and John Migwi Miano (the Purchaser”

Purchaser’s Financier: Equity Bank (K) Ltd

...Kindly furnish us with the Original Title Deed for the aforementioned property against our professional undertaking in the following terms:

- i. That we shall hold the Documents in trust and to your order returnable on demand pending the payment of the sum of Kenya Shillings One Million Four Hundred Thousand (Kshs. 1,400,000/= (the undertaking amount)
- ii. We shall not release or cause or allow to be released the documents to any advocate or any other person whomsoever without first obtaining your written authority which will only be granted upon such other person giving an undertaking in similar terms acceptable to yourselves and on the understanding and whether such other person complies with the undertaking or not, you will continue to hold us responsible on our undertaking or not you will continue to hold us responsible on our undertaking and further that we shall use the documents solely for purposes of stamping and registration of the transfer in favour of the Purchaser (our client) and any other relevant documents to this transaction.
- iii. That the undertaking amount shall be paid within Fourteen (14) days upon receipt by us from Lands Office of the duly registered transfers in favour of the purchaser and charge in favour of the Financier but in any event within Thirty 30 (days) from the date we receive of this completion documents.
- iv. That time in respect of this transaction shall be of essence.
- v. That by accepting, retaining or utilizing the documents that shall be sent by you to us, we shall be deemed to not only have accepted and confirmed the foregoing undertaking, terms and conditions as set forth herein above but also to have acknowledged and confirmed that we are solely liable and responsible for full compliance with said undertaking, terms and conditions.



Yours Faithfully

Wari Associates Advocates...”

18. Going by the terms of the aforesaid undertaking it is clear that it was a promise by one advocate, the Respondent, to another Advocate, the Applicant herein, that the undertaking amount would be paid thirty (30) days after the security documents have been released by the Applicant. Further, the Applicant and the Respondent have confirmed the contents and the validity of the professional undertaking which was clear as to what was to be done and by which party. It is therefore this court’s view that there was a valid and binding professional undertaking which has not been disputed.

b. Whether the court can enforce the said professional undertaking

19. Having found that there was a valid professional undertaking as between the parties, the next question to address is whether the same can be enforced. It is trite law that the enforcement of undertakings is enshrined under Order 52 Rule 7 of the *Civil Procedure Rules* 2010 which states that:-

- a) “An application for an order for the enforcement of an undertaking given by an Advocate shall be made:
- (i) If the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or
 - (ii) In any other case, by Originating Summons in the High Court.
- (b) 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”.

20. The Court of Appeal in the case of *Arthur K. Igeria T/A Igeria & Co. Advocates -vs- Michael Ndaiga (NRB CACA No. 51 of 2008) [2017]* eKLR gave the conditions to be satisfied for enforcement of a professional undertaking. It observed that: -

“For the court to enforce a professional undertaking, it must be satisfied that the undertaking is clear in its terms and that there is no dubiety or ambiguity as to what the advocate has professionally undertaken. Secondly, that what is undertaken is capable of being performed. Thirdly, that if the undertaking is contingent on the happening or occurrence of an event, such event has occurred or happened.”

21. In this case, the terms of the professional undertaking were clear that the Applicant was to release the security documents held by its client over a debt owed by the Vendor. The professional undertaking was capable of being performed and it was dependant on the release of the title documents for registration which was already done.
22. The professional undertaking was addressed to the Applicant and therefore, could only be enforced by the Applicant. It was a common ground that the undertaking amount ought to have been paid by the Applicant upon the release of the title documents.
23. It is the court’s view that the Respondent was also aware of the account in which the undertaking amount was to be paid. In a letter dated 27th August, 2021, the Applicant wrote to the Respondent informing it of his bank account details and consequently forwarded the original title deed to the Respondent. In turn, the Respondent wrote a letter dated 15th September, 2021 to the financier and forwarded all duly registered security documents and advised the financier to remit the amount of



Kshs. 1,400,000/= to the Applicant through the same bank account that has been given to him by the Applicant.

24. It is therefore the court's opinion that the payment made by the financier directly to the Purchaser and then to the Vendor, was in breach of the terms in the professional undertaking. The allegation by the Respondent that the undertaking did not expressly state that the amount was to be paid to the Applicant and therefore the Vendor was at liberty to be paid, does not hold water for the reasons that it was not an express term of the professional undertaking and neither was the Vendor a party to the undertaking which was only between the two advocates.
25. Being an Advocate representing the Purchaser, Vendor and the Financier, the Respondent had a duty to inform his clients on the terms of the professional undertaking to ensure full compliance.
26. In the circumstances, the court finds that since the professional undertaking was clear and that it was capable of being performed, and since the professional undertaking was dependent on the release of the title documents for payment to be made, the same ought to have been made to the Applicant as per the terms of the professional undertaking.
27. In the resultant, the court allows the Originating Summons dated 18th March, 2022 with the following orders:-
 - a. The Respondent is hereby ordered to pay the undertaking amount of Kshs. 1,400,000/= in accordance to the professional undertaking given on 25th August, 2021 together with interest which shall be calculated from 15th September, 2021 until payment in full.
 - b. The Applicant is hereby awarded costs of this application.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24TH DAY OF AUGUST, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of :

Mr. Kimathi holding brief for Mr. Wahome for Applicant

M/S Wamuyu counsel for Defendant

Court Assistant - Nancy

