



**Advocate v Advocate (Civil Case E744 of 2021) [2022] KEHC 24 (KLR)  
(Commercial and Tax) (27 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 24 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E744 OF 2021  
WA OKWANY, J  
JANUARY 27, 2022**

**IN THE MATTER OF AN APPLICATION BY AMINGA,  
OPIYO, MASESE & CO. ADVOCATES FOR AN ORDER OF AN  
ENFORCEMENT OF AN UNDER TAKING GIVEN BY AN ADVOCATE**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**AMINGA, OPIYO, MASESE & CO. ADVOCATE ..... APPLICANT**

**AND**

**A.N. KIRIKA & COMPANY ADVOCATE ..... RESPONDENT**

**RULING**

1. The applicant herein filed the Originating Motion dated 11<sup>th</sup> August 2021 seeking the following orders:
  - a. The Honorable Court be pleased to order the Respondent to honor their terms of professional undertaking dated 4<sup>th</sup> June, 2021 and pay the Applicant the lump sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/=).
  - b. The Honorable Court be pleased to order the Respondent to pay the Applicant interest at a commercial rate of 18% compounded monthly from the 24<sup>th</sup> June, 2021 until payment in full.
  - c. The Honorable Court be pleased to order the respondent to bear the costs of this application.



2. The application is supported by the affidavit of Mr. Owino Opiyo and is premised on the grounds that: -
- a. MANEN ENE LETAMEREI PURKEI (buyer) entered into an agreement for sale of land known as KAJIADO/KAPUTEI-NORTH/71038 with FREDRICK LENKANONI NAMPASO (vendedor) at purchase price Kshs. 20,000,000/=.
  - b. The Applicant herein represents the FREDRICK LENKANONI NAMPASO (vendedor) while the Respondent represents MANEN ENE LETAMEREI PURKEI (buyer) in the transaction.
  - c. On the 4<sup>th</sup> June, 2021, the Respondent herein gave a professional undertaking to pay to the Applicant Kshs. 20,000,000/= as follows: -
    - i. Kshs. 2,000,000/= thereof within 7 days from the date of the lifting of the said restriction/caution.
    - ii. Kshs. 6,000,000/= thereof on or before 31<sup>st</sup> July, 2021
    - iii. Kshs. 12,000,000/= thereof on or before 30<sup>th</sup> September, 2021
  - d. Another term of the professional undertaking was that if the Respondent failed to remit any sums at the due date, the entire balance shall become due and recoverable summarily as a debt from them.
  - e. The Applicant's client lifted the restriction/caution but the Respondent has failed and/or ignored to honor the terms of the professional undertaking despite reminders by the Applicant.
3. The respondent opposed the application through the replying affidavit of Mr. Allan Ngure Kirika advocate who confirms that the respondent made the undertaking on behalf of its client, Manen Ene Letamerei Purkei. He states that under the undertaking, the respondent agreed to pay the applicant the sum of Kshs. 20,000,000 upon the applicant's withdrawal of his claim, as an interested party, in Succession cause no 53 of 2016 (Kajiado High Court). He avers that the withdrawal of the suit was to facilitate the lifting of caution against the property known as KAJIADO/KAPUTEI- NORTH/71038 (hereinafter "the Suit Property").
4. The respondent's case was that the professional undertaking was to guarantee the applicant the payment of Kshs 20,000,000 immediately the buyer released the sale proceeds. The respondent explains that it has however been unable to honor the terms of the undertaking because of circumstance beyond their control as they had not received the sale proceeds.
5. In response to the replying affidavit, the applicant filed a further affidavit sworn by Mr. Owino Opiyo Advocate who states that the terms of the professional undertaking were that the applicant would be paid Kshs 20,000,000 upon lifting the restrictions and not upon the respondent's client's realizing the sale proceeds. He states that counsel should have ensured that he had the money before issuing the professional undertaking.
6. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the Respondent should honor the terms of professional undertaking dated 4<sup>th</sup> June, 2021 and pay the Applicant the sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/=).



7. *Black's Law dictionary* defines an undertaking as, "a promise, pledge or engagement". The US Legal Definitions.com states that: -

"Undertaking in general means, an agreement to be responsible for something. In Legal context, it typically refers to a party agreeing to surety arrangements, under which they will pay a debt or perform, a duty if the other person who is bound to pay the debt or perform the duty fails to do so".

8. The principles governing professional undertakings were discussed in *Equip Agencies Limited vs. Credit Bank Ltd. Nairobi HCCC No. 773 of 2003*, where Warsame J. (as he then was) stated that: -

"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.

- 9.

Similarly, in *STG Mubia TIA. Mubia vs J.M. Chege TIA. J.M. Chege & Company Advocates [2009] eKLR* the court stated that: -

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

10. In *Peter Ng'ang'a Muiruri vs Credit Bank and Charles Ayaku Nyachae T/ A. Nyachae & Company Advocates, Civil Appeal No. 263 of 1998*, the court held as follows: -

"An undertaking is a solemn thing. In enforcing undertakings, the court is not guided by considerations of contract, but the court aims at securing the honesty of its officials".

I therefore hold that the plaintiff has established, to the required standard of proof on a balance of probabilities, that the defendant is entitled to honour her professional undertaking to pay the plaintiff the sum of KShs. 515,149/=. I therefore enter judgment in favour of the plaintiff as against the defendant for the said sum of kshs. 515,149/=. The said amount shall be paid with interest at a court rates from the date of filing suit to the date of payment. The plaintiff shall have the costs of the suit. It is so ordered."



11. *In Kenya Commercial Bank vs Adala (1983) KLR 467*, the Court of Appeal held: -

- “ 1. The courts have an inherent power to commit advocates for breach of an undertaking. The court has jurisdiction over an Advocate for breach of an undertaking on the basis that the order sought seeks the court 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 legal right
2. The purpose of the punitive and disciplinary powers of the courts' jurisdiction over advocates is (to enforce) honourable conduct among them in their standing as officers of the court by virtue of section 57 of the Advocates Act, Cap. 16”

12. In *Naphatali Paul Radier vs David Njogu Gachanja carrying on business as D. Njogu & Company Advocates Nairobi (Milimani Commercial Court) Civil Case no. 582 of 2003*, the Court remarked: -

“I hold that the defendant is indeed obliged in law as an officer of the court to honour that professional undertaking, an undertaking given by an advocate is personally binding upon him and must be honoured. Failure to honour an undertaking is prima-facie evidence of professional misconduct. This court has the power to enforce the professional undertakings of Advocates, a power that the court will not hesitate to exercise in appropriate cases. This is such an appropriate case”.

13. The common thread that runs through the above cite cases is that a professional undertaking is a solemn and personally binding promise given by an advocate for the sole purpose of facilitating the transaction between them that has to be honored. This is to say that once an advocate gives his counterpart a professional undertaking, he is expected to honor it as soon as the other party fulfills its part of the bargain, in which case, he cannot wriggle out of it for whatever reason.

14. In the present case, it was not disputed that the respondents advocate gave an undertaking promising to pay the applicants client a sum of Kshs 20,000,000. The dispute however is with regard to the interpretation of the professional undertaking wherein the applicant respondent contends that the payment of the sums was subject to the sale of the property known as KAJIADO/KAPUTEI-NORTH/71038.

15. I have perused the documents filed before this court and I note that the professional undertaking is worded as follows: -

“We refer to our exchange of correspondence herein and confirm our agreement that in consideration of your client Fredrick Lenkanoni Nampaso lifting the Restrictions and/or Orders with respect to the above property at the Kajiado lands Registry, we shall pay the Kshs 20,000,000 due to him (which is inclusive of Kshs 1,000,000 being your costs as follows:

1. Kes 2,000,000/= thereof within 7 days from the date of lifting the said Restriction/caution.
2. Kes 6,000,000/= (30%) thereof on or before 31<sup>st</sup> July 2021
3. Kes 12,000,000/= (60%) thereof on or before 30<sup>th</sup> September 2021.

Please treat this as our professional Undertaking in this respect.



Failure to pay any of the sums stipulated on the above dates the entire balance shall be due for lump sum payment and may be recoverable summarily as a debt due from us.”

16. A simple reading of the professional undertaking shows that it was not dependent on the respondent’s sale of the subject property in question. The only condition was that the applicant would receive the Kshs 20,000,000 in three installments upon the lifting the restrictions. The professional undertaking is clear that the applicants were at liberty to recover the amount in question, as debt, in the event of failure to adhere to the terms specified in the undertaking.
17. My finding is that the applicant fulfilled his part of the bargain by lifting the restrictions on the suit land and the respondent is under an obligation to honour the undertaking as he was all along aware of the consequences of issuing such an undertaking.
18. In the upshot, I find that the application is merited and I therefore allow it in the following terms: -
  1. The respondent shall honor the professional undertaking contained in the letter dated 4<sup>th</sup> June 2021 and pay the applicant the sum of Kshs 20,000,000 together with interests at court rates from the date of filing this suit.
  2. The applicant shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY 2022 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Ms Wambua for Opiyo for Applicant.

Mr. Kirika for Respondent.

Court Assistant: Margaret

