



**Mousley v Onchuru t/a RA Onchuru & Company Advocates (Enviromental and Land Originating Summons E002 of 2025) [2025] KEELC 3447 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3447 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2025**

**MD MWANGI, J**

**APRIL 25, 2025**

**IN THE MATTER OF: AN APPLICATION BY CHARLES EDWARD  
MOUSLEY FOR AN ORDER FOR THE ENFORCEMENT OF AN  
UNDERTAKING GIVEN BY RICHARD A. ONCHURU ADVOCATE**

**AND**

**IN THE MATTER OF: THE ADVOCATES ACT CAP 16**

**AND**

**IN THE MATTER OF: RULE 6 OF THE CODE OF STANDARDS  
OF PROFESSIONAL PRACTICE AND ETHICAL CONDUCT**

**BETWEEN**

**CHARLES EDWARD MOUSLEY ..... APPLICANT**

**AND**

**RICHARD A ONCHURU T/A RA ONCHURU & COMPANY  
ADVOCATES ..... RESPONDENT**

**JUDGMENT**

**Background**

1. This matter was initiated by way of an Originating Summons (OS) dated 10<sup>th</sup> January 2025. The Applicant avers that he was at all material times the registered proprietor of the parcels of land known as KJD/NTASHART/23797 & 23798. He entered into an agreement for sale of the two parcels dated 26<sup>th</sup> September 2024, with one David Komo Matindi for the sum Kshs. 12,800,000/-.
2. The Respondent, an advocate of the High Court of Kenya, Richard A. Onchuru t/a R.A. Onchuru & Company Advocates acted for both the Applicant (who was the vendor) and the purchaser in the sale transaction. The terms of the sale were that the deposit of Kshs. 4,400, 000/- was to be paid to the



Respondent to hold as stakeholder pending completion of the transaction. The balance of the purchase price was to be paid before the completion date; being 90 days from the date of the agreement. Again, the Respondent being the advocate for the vendor was to hold the balance of the purchase price once paid as stakeholder pending successful registration of the transfer.

3. The Applicant avers that the Respondent was to be paid 3% commission and 1% as legal fees which were to be deducted from the purchase price.
4. The Applicant asserts that the purchaser duly paid to the Respondent the purchase price in full via RTGS on 3<sup>rd</sup> October 2024 and 15<sup>th</sup> October 2024 paying Kshs. 8,000,000/- and Kshs. 4,400,000/- respectively which the Respondent duly acknowledged. The Respondent expressly acknowledged the payments and undertook to transfer the funds to the Applicant in line with the terms of the agreement dated 26<sup>th</sup> September 2024.
5. Upon confirmation of payment of the full purchase price to the Respondent, the Applicant released the completion documents to the purchaser as obligated under the sale agreement. A transfer was subsequently, successfully registered in favour of the purchaser on 5<sup>th</sup> November 2024, effectively completing the land purchase transaction.
6. However, and despite the completion of the sale transaction, the Respondent has failed, refused and neglected to remit the funds paid to him (on behalf of the Applicant), to the Applicant contrary to his own express undertaking and in breach of his fiduciary duty. The professional undertaking according to the Applicant is dated 26<sup>th</sup> September 2024. It was subsequently reiterated in the letters dated 3<sup>rd</sup> October 2024 and 15<sup>th</sup> October 2024.
7. The actions of the Respondent amount to a breach of the terms of his professional undertaking to the extent that the funds were to be released to the vendor after the completion of the agreement and the successful registration of the transfer. The Respondent's conduct further violates the rules of the Code of Standards of Professional Practice and Ethical Conduct as well as statutory edicts governing fiduciary duties and the integrity of professional undertakings.
8. The Applicant prays for judgment against the Respondent for orders;
  - a. That the Respondent be and is hereby ordered to honor the professional undertaking contained in the sale agreement dated 26<sup>th</sup> September 2024 reiterated in the letters dated 3<sup>rd</sup> October and 15<sup>th</sup> October 2024 and remit the purchase price of Kshs. 12,800,000/- to the Applicant with interest at the rate of 14% per annum from 15<sup>th</sup> October 2024 until payment in full.
  - b. That the Respondent be and is hereby ordered to comply with the terms of the said professional undertaking within seven (7) days from the date of this court's order, failing which the Applicant be at liberty to enforce the same as a judgment of this Honourable Court.
  - c. That the costs of this suit be borne by the Respondent.

#### **Directions by the court.**

9. The Respondent in spite of service did not enter appearance, and or file a response to the Originating Summons. The court directed that the originating summons be heard by way of affidavit evidence and canvassed by way of written submissions. The Applicant complied and filed the submissions dated 7<sup>th</sup> February 2025 which I have had the opportunity to read and consider in writing this judgement.



### **Issues for determination.**

10. Having considered the Originating Summons herein as well as the submissions by the Applicant, the issues for determination herein are;
  - a. Whether there exists a valid professional undertaking enforceable against the Respondent.
  - b. Whether the Applicant is entitled to the orders sought including an order of costs.

### **Analysis and determination.**

#### **A. Whether there exists a valid professional undertaking enforceable against the Respondent.**

11. As already explained earlier on, the Applicant's suit is undefended. Nonetheless, the Applicant has the legal burden to prove his case on a balance of probabilities. As elaborated in the case of *Gichinga Kibutha –vs- Caroline Nduku* (2018) eKLR,

“It is not automatic that instances where the evidence is not controverted the claimant shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

12. The Applicant in his supporting affidavit produced as an exhibit, the agreement for sale of land dated 26<sup>th</sup> September 2024 between him and one David Komu Matindi. The purchase price was Kshs. 12,800,000/-. The terms of the said agreement are as pleaded in the Originating Summons by the Applicant. The Respondent herein was the advocate for both parties. The purchase price was to be paid to the Respondent (as the vendor's advocate to hold as stakeholder pending completion of the agreement and successful registration of the transfer.
13. The two letters referred to in the Originating Summons dated 3<sup>rd</sup> October 2024 and 15<sup>th</sup> October 2024 have been exhibited. In the letter of 3<sup>rd</sup> October 2024, the Respondent acknowledges receipt of Kshs. 8,000,000/- being part of the purchase price. The Respondent in the letter further states that the balance then is Kshs. 4,400,000/-.
14. The Respondent at paragraph 2 of the letter categorically states that he shall hold the funds as stakeholder and for purposes of transfer to the vendor in line with the sale agreement dated 26<sup>th</sup> September 2024.
15. In the letter of 15<sup>th</sup> October 2024, the Respondent acknowledges receipt of the sum of Kshs. 4, 400, 000/- being the balance of the purchase price. again, the advocate confirms that he shall hold the funds as stakeholder and for purposes of transfer to the vendor in line with the agreement dated 26<sup>th</sup> September 2024.
16. I do note that the two letters are addressed to David Komo Matindi. They are not addressed to the Applicant herein.
17. A professional undertaking as defined by the Court of Appeal in the case of *Waruhiu, K'owade and Ng'ang'a Advocates –vs- Mutune Investments Limited* (2016) eKLR,

“...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 –vs- 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. The professional undertaking is a smooth and binding contract between the donor and the donee who are the advocates.”

18. From the above definition, it is quite clear that there was no professional undertaking given by the Respondent to the Applicant. The Applicant in his pleadings disclosed that the Respondent was acting for both him as the vendor and the purchaser of the land.
19. It is worth noting that the Applicant was a client of the Respondent. Their relationship is that of an advocate and a client.
20. The Court of Appeal in the case of Kinluc Holdings Limited –vs- Mint Holdings Limited & Another (1998) eKLR, had raised an alarm on the potential risks in the practice of one advocate acting for two parties in a land transaction. It had stated that;

“It is an unfortunate aspect of legal practice in Kenya that an advocate can act for both parties in a transaction for sale of land. This does create problems and having seen the problems, we understand why the Law Society in England agitated successfully, to bar such a practice.”

21. The Court of Appeal recommended that the Law Society of Kenya brings to an end such practice in Kenya. That was not to be. This case is a clear demonstration of the kind of problems that arise in a scenario where one advocate represents the vendor and the purchaser in a transaction.
22. A professional undertaking would ordinarily originate from the vendor’s advocate to the purchaser’s advocate undertaking to hold the purchase price or part of it until the successful registration of the transfer in favour of the vendor. An advocate would not give such an undertaking to his own client rather would only do so on behalf of the client.
23. Interestingly, the Applicant pleads that the undertaking was contained in the sale agreement. His prayer as framed actually is for an order that the Respondent be ordered to honor the professional undertaking contained in the sale agreement dated 26<sup>th</sup> September 2024. I need to state it clearly that a contract affects only the parties to it and cannot be enforced by or against a person who is not a party to it even where it purports to make such a person liable upon it. The advocate was not a party to the agreement for sale of land.
24. The doctrine of privity of contract as rightly held in the case of Bharminder Singh Osahan –vs- Helicopters International Limited (2021) KEHC 5025 (KLR), postulates that a contract cannot confer rights or impose obligations on any other person other than the parties to the contract. A contract cannot therefore be enforced either by or against a third party. The court cited with approval the decision in AFC -vs- Lengetia, 1982 – 88 I KAR 722 which stated that;

“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”



25. The Respondent is a third party in as far as the contract of sale of land dated 26<sup>th</sup> September 2024 is concerned.
26. A professional undertaking cannot be contained in an agreement in which the advocate was not a party anyway.
27. The upshot is that the court disagrees with the submissions by the Applicant and finds that there was no professional undertaking issued by the Respondent to the Applicant. Consequently, the orders sought herein cannot issue.
28. The Applicant's remedy is to file a suit against the Respondent as his advocate for the monies withheld. It must be understood that the edifice of justice is not merely premised on the substance of the law but also on the process through which the court arrives at the ultimate end goal.
29. I therefore strike out the Originating Summons by the Applicant herein but with no orders as to costs considering that the Respondent did not participate in these proceedings.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 25<sup>TH</sup> DAY OF APRIL 2025.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Mudiri for the Applicant

N/A by the Respondent

Court Assistant: Mpoye

**M.D. MWANGI**

**JUDGE**

