



**CM Advocates LLP v Kariko, Abdullahi & Kaburu Trading as
Githinji & Associates Advocates (Commercial Case E203 of 2024)
[2025] KEHC 775 (KLR) (Commercial and Tax) (3 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E203 OF 2024
JWW MONG'ARE, J
FEBRUARY 3, 2025**

BETWEEN

CM ADVOCATES LLP PLAINTIFF

AND

**SAMUEL GITHINJI KARIKO, ABDULHAKIM ABDULLAHI; AND
MORRIS KABURU TRADING AS GITHINJI & ASSOCIATES
ADVOCATES DEFENDANT**

RULING

Introduction and Background

1. It is common ground that the Plaintiff Advocates represented Safwan Energy Limited (“the Purchaser”) whereas the Defendant Advocates represented Margaret Mwihaki Wanyoike (“the Vendor”) in a sale transaction in respect of the properties known as Ruiru/Ruiru East Block 2/4776 and 2/4777 (“the properties”). A Sale Agreement was executed on 18th September 2023 and pursuant to the said Agreement, an initial deposit of Kshs. 18,000,000.00/= was released to the Defendant Advocates’ client account and on the strength of a Professional Undertaking dated 8th November 2023 (“the Undertaking”) issued by the Defendant Advocates that the said deposit would be held by them on a stakeholder basis and that the Vendor would grant the purchaser vacant possession within 24 hours of release of the deposit.
2. The Undertaking further provided that in the event that vacant possession of the properties was not granted to the Purchaser, the Defendant Advocates would refund the deposit to the Plaintiff Advocates within 5 days of receipt of a written demand and the terms of the Undertaking were to remain binding upon the Defendant Advocates until such a time that the Plaintiff Advocates would expressly release them from the terms therein.



3. By the Chamber Summons dated 22nd April 2024, the Plaintiff Advocates now claim that the Vendor has to date never facilitated the vacant possession of the properties to the Purchaser and that they formally wrote to the Defendant Advocates on 23rd February 2024 demanding a refund of the deposit, which the Plaintiff Advocates claim the Defendant Advocates have neglected/ignored and/or declined to do. The Plaintiff Advocates thus seek a declaration that the Defendant Advocates have breached the terms of the Undertaking and that judgment be entered in the Plaintiff Advocates' favour for the sum of Kshs.18,000,000.00/= plus interest for the breach. The application is supported by grounds on its face and the affidavits of the Plaintiff Advocates' Managing Partner, CYRUS NDERITU MAINA, sworn on 22nd April 2024 and 1st July 2024. It is opposed by the Defendant Advocates through the replying affidavit sworn on 30th April 2024. The Defendant Advocates state that the Undertaking was re-negotiated and altered when the Plaintiff Advocates' consented to the release of part of the deposit held by the Defendant Advocates to the Vendor's representatives and that they are ready to refund the balance of the deposit being Kshs.12,000,000.00/= back to the Plaintiff Advocates and that the Vendor's representatives are ready to refund the Kshs.4,000,000.00/= already utilized.
4. The Chamber Summons was disposed by way of written submissions which are on record and are along the lines of the parties' positions I have already summarized above but I will make relevant references to them if need be.

Analysis and Determination:-

5. From the parties' pleadings and submissions, I find that the following are the issues for determination:-
 - i. Whether a Professional Undertaking can be renegotiated and/or amended .
 - ii. Whether a Professional Undertaking can be partially discharged/waived by the parties.
 - iii. Whether the Plaintiff Advocates' claim is vitiated by the doctrine of estoppel.
 - iv. Whether the Defendant Advocates breached the terms of the Undertaking.
 - v. Whether the court should enter judgment against the Defendant Advocates for Kshs. 18,000,000.00/= plus interest pursuant to the Undertaking.

Whether a Professional Undertaking can be renegotiated and/or amended

6. Whereas the Plaintiff Advocates deponed that the professional undertakings are solemn promises and oaths and not contracts, the Court of Appeal in Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] KECA 835 (KLR) stated otherwise that '[it] is a smooth and binding contract between the donor and the donee who are the advocates.' However, I am in agreement with the Plaintiff Advocates' averment that the Court of Appeal in the aforementioned case also stated that 'In enforcing undertakings, the court is guided not by the considerations of contract, or of securing the legal rights of parties, but mainly by ensuring the honesty of advocates.' In any event, I am persuaded that there is nothing in law to prevent the re-negotiation and alteration of a professional undertaking as was held by the court in J M Mwangi & Company Advocates, LLP v Conrad Maloba & Nick Ndeda (t/a Conrad Maloba & Associates, Advocates) [2022] KEHC 2789 (KLR).

Whether a Professional Undertaking can be partially discharged/waived by the parties

7. I am also in agreement with the Defendant Advocates' submission that an undertaking can be partially discharged or waived and that at this point, it ceases to be enforceable (See National Housing Corporation v Mutuli Patrick Erick Lubanga [2011] KEHC 3490 (KLR))



Whether the Plaintiff Advocates' claim is vitiated by the doctrine of estoppel

8. The Defendant Advocates submit that the Plaintiff Advocates are bound by the doctrine of estoppel because they approved withdrawals of the deposit pursuant to the correspondences exchanged between the parties. The said letters include that of 30th January 2024 where the Defendant Advocates sought *inter alia* a total sum of Kshs.4,000,000.00/= from the deposit, which request was granted by the Plaintiff Advocates in their letter of 1st February 2024. This letter was almost immediately followed up by a letter also dated 1st February 2024 where the Plaintiff Advocates rescinded their initial consent and demanded a refund of the deposit in whole. The Defendant Advocates, in their letter of 19th February 2024, while acknowledging the demand, agreed that the family of the Vendor was ready and willing to refund the Kshs.3,000,000.00/= released to them.
9. Going through the above correspondences, it is clear that the terms of the Undertaking were neither waived and/or discharged by the Plaintiff Advocates and it remained that the Defendant Advocates were to hold the deposit on a stakeholder basis until the Purchaser was granted vacant possession of the properties. There is no indication that this was done and as such, the Plaintiff Advocates had the right to demand for the deposit as indicated in the Undertaking. The sole reason the Defendant Advocates issued the Undertaking was to guarantee the Plaintiff Advocates that vacant possession would be granted and that the Defendant Advocates would not release the deposit to the Vendor until this happened. As the Plaintiff Advocates rescinded their initial consent to release part of the deposit, it follows that the terms of the Undertaking remained as it were and the Defendant Advocates impliedly and admittedly state so in their letter of 19th February 2024. It should also not be lost that as per the terms of the Undertaking, the Defendant Advocates could only be expressly and not impliedly released from the Undertaking by the Plaintiff Advocates. The correspondences demonstrate no such release.
10. It is for the above reason that I find that the Plaintiff Advocates were not estopped from demanding the deposit in full pursuant to the Undertaking as the correspondences between the parties demonstrate that the Undertaking was never waived nor discharged and the same was capable of being enforced. As the Court of Appeal held in *Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga* [2017] KECA 709 (KLR), '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'. The Undertaking was clear and unambiguous in respect of its terms, it was capable of being performed and that the same was predicated upon the Plaintiff Advocates paying the deposit of Kshs.18,000,000.00/= and the Vendor granting vacant possession to the Purchaser.
11. Since the Undertaking was clear and unequivocal and the underlying condition of granting vacant possession had not been fulfilled, I do not see why the court should not enforce the Undertaking. It is for these reasons that I find that the Defendant Advocates were bound by the Undertaking and had a duty to refund the total amount of the deposit paid by the Plaintiff Advocates on behalf of the Purchaser once the Vendor defaulted in her obligations of granting vacant possession. This default has not been disputed and has been admitted by the Defendant Advocates who stated that they were in the process of refunding the total deposit. The Defendant Advocates can only be discharged from the Undertaking once they refund the entire Kshs.18,000,000.00/=. As stated by the Court of Appeal in *Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga*(supra), the law gives them the right to sue the Vendor or her legal representatives to recover whatever sums were remitted to them and that have not been refunded. However, the Defendant Advocates cannot tell the Plaintiff Advocates to wait for the Vendor's representatives to look for that money so that it can be remitted to the Plaintiff



Advocates. The Defendant Advocates must first honor Undertaking before suing or taking any steps against the Vendor's representatives, if at all.

12. My finding above disposes the remaining issues in the affirmative and it is my finding that the Defendant Advocates breached the Undertaking and therefore the court enters judgement entered against the Defendant for the said Kshs.18,000,000.00/=

Conclusion and Disposition:-

13. In the upshot, I find that the Plaintiff Advocates' Originating Summons is merited and the issue the following orders:-
 1. A declaration be and is hereby made that the Defendant Advocates breached the terms of the Undertaking issued by it to the Plaintiff on 8th November 2023.
 2. Judgement be and is hereby entered in favour of the Plaintiff Advocates for the sum of Kshs.18,000,000.00/= plus interest at court rates from the date of this Judgment till payment in full.
 3. The Plaintiff Advocates are awarded costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF FEBRUARY 2025.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Miano for the Plaintiff/Applicant.

Mr. Obuli for the Defendan/Respondent.

Amos- Court Assistant

