



**Juliet Theuri t/a J.M Theuri Associates v Susan Kahoya t/a Susan  
Kahoya & Company Advocates (Commercial Civil Suit E483 of 2020)  
[2025] KEHC 6194 (KLR) (Commercial and Tax) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL SUIT E483 OF 2020**

**NW SIFUNA, J**

**MAY 15, 2025**

**BETWEEN**

**JULIET THEURI T/A J.M THEURI ASSOCIATES ..... PLAINTIFF**

**AND**

**SUSAN KAHOYA T/A SUSAN KAHOYA & COMPANY  
ADVOCATES ..... DEFENDANT**

**RULING**

1. This ruling is on the Defendant's Application dated 4<sup>th</sup> February 2022. By which she has sought the following orders:
  - a. An order striking out the suit, for failure to disclose a cause of action and for having invoked the Court's jurisdiction prematurely.
  - b. Costs of this Application.
2. The Application was filed pursuant to order 2 rule 15(1) (a) of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act*. The Applicant a long-standing advocate in Kenya, sought to defend herself against claims related to a legal undertaking. She asserted that in March 2016, Kenneth Boit a decree-holder, engaged her services regarding a land case where he was awarded Ksh 208,500,000-.
3. That the said Mr Boit entered into an agreement with Anthony Gichuru, who agreed to pay Ksh 21,000,000 upfront in exchange of a stake in the decree. The money was to be deposited into the Defendant's client's Account and disbursed accordingly. Gichuru also agreed to help other decree-holders in related cases secure their payments, with a 7.5% commission as compensation for his efforts.



4. The Defendant gave a conditional professional undertaking stating that she would pay Mr Gichuru's share only upon receiving the decretal sum. In March 2020, a joint payment of Ksh 100,000,000= was secured. With her client receiving Ksh 25,300,000=. She paid Ksh 20,000,000= to Mr Gichuru. However, Mr Gichuru had given Mr Boit several loan advancements, and after negotiations, it was agreed he would receive Ksh 64,000,000= bringing his total payments to Ksh 84,000,000=.
5. Mr Gichuru failed to secure the funds for the other three decree holders, leading them to sever ties with him. As a result, his agreement to receive a 7.5% commission was voided. The Defendant has argued that she could not be held liable for money she had not received, as that her obligation only arose upon receipt of the funds.
6. She contended that the Plaintiff misrepresented facts by falsely claiming that she had received funds meant for other decree holders, who were still pursuing their payments through legal channels. She asserted that the case against her lacked a cause of action because she had honored her professional undertaking, and no additional funds had been received. Further that the undertaking was conditional, and its terms were frustrated when each Advocate separately pursued their decrees.
7. She maintained that this suit was premature, and the Plaintiff had prematurely sought court intervention; as that the condition for the undertaking had not been met. She has further argued that legal precedent supported the dismissal of the case since an unfulfilled conditional undertaking could not be enforced.
8. She has then in this Application consequently urged this Court to strike out this suit. She further claims the suit is therefore baseless and a waste of judicial time. The Plaintiff opposed the Application through her Replying Affidavit sworn on 24<sup>th</sup> March 2022. In which she has stated that the Application lacks merit and was intended to mislead the Court. That courts need to exercise their striking out power, cautiously, especially where there exist triable issues.
9. She has further stated that the dispute stemmed from a personal loan granted to the said Kenneth Boit by Anthony Gichuru in July 2017; with repayment tied to compensation from properties in Kilifi. Further that the Defendant as Mr Boit's Advocate, issued a professional undertaking regarding the payment, and is now seeking to strike out a suit meant to enforce this undertaking. That multiple undertakings totaling Ksh 300,718,000= had been issued, and demand letters for payment had been ignored.
10. She has in her response maintained that the Defendant as an Advocate, had a duty to honor professional undertakings and could not evade responsibility. She has further argued that the Defendant had received government funds to settle outstanding decrees but failed to disclose this, necessitating the summons.
11. She has maintained that the originating summons raised a valid cause of action and should not be summarily dismissed. Further that the Defendant had not demonstrated that the claim was bound to fail, and that the law presumed that an advocate issuing a professional undertaking was in possession of the necessary funds. She has further maintained that the right to a fair hearing was absolute under the Kenya Constitution, and she was entitled to pursue the claim in this suit.

### **Analysis and Determination.**

12. The Application was canvassed by way of written submissions. The Defendant's submissions are dated 4<sup>th</sup> April 2022. While the Plaintiff's are dated 26<sup>th</sup> April 2022.



13. I have considered the parties' submissions, together with the Application and the Plaintiff's response. I note that this suit was instituted by way of an Originating Summons dated 19<sup>th</sup> November 2020. In which the Plaintiff claimed that the Defendant had breached the professional undertaking that she (the Defendant) had issued to her (the Plaintiff); and prayed for judgement to be entered against the applicant if she fails to honour the said professional undertaking that was for payment of the sum of Ksh 216,718,000=.
14. The Defendant has in this Application on her part contended that the suit did not disclose a cause of action against her as she had duly honoured the undertaking but she could not be ordered to perform the other obligations, while the conditions to them remained unfulfilled.
15. On the Court's power to strike out pleadings, Order 2 Rule 15 of the Civil Procedure Rules which this Application has invoked, provides as follows:
- “At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- a. it discloses no reasonable cause of action or defence in law; or
  - b. it is scandalous, frivolous or vexatious; or
  - c. it may prejudice, embarrass or delay the fair trial of the action; or
  - d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
16. In this case, the Defendant has sought to strike out this suit for failure to disclose a cause of action against her. The question that ought to be answered is whether this suit discloses a reasonable cause of action. In DT Dobie & Co (IQ) Ltd v. Ila'uchirial [E9821KLR the Court of Appeal when interpreting Order VI Rule 13 (I) of the repealed Civil Procedure Rules which is the equivalent of the current Order 2 Rule 15 defined the term "reasonable cause of action" to mean "an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer".
17. That court in that decision further observed as follows:
- “Let's understand the principles upon which the court acts when dealing with an application under O.VI Rule 13." No exact paraphrase can be given but I think reasonable cause of action means a cause of action with some chance of success when (as required by paragraph (2) of the rule) only the allegations in the plaint are considered.”
18. From that holding, a reasonable cause of action is one with some chance of success when only the allegations in the plaint (in this case an originating summons) are considered.
19. Upon reading through the Originating Summons instituting this suit, I find that it raises pertinent issues for consideration at trial. These include: (a) The contents of the professional undertaking issued by the Defendant; (b) The question whether the Defendant breached the terms of that undertaking; and (c) Whether this Court should enforce the said professional undertaking.
20. I find that the Summons discloses a reasonable cause of action, and that the Defendant has in its defence responded to the issues raised in the Summons. The power to strike out is so draconian, that it should be exercised only in the most hopeless. Although I do not agree with the Defendant that the court's striking out power violates the right to be heard as enshrined in Article 50 of the Kenya Constitution,



the wanton striking out of a party's pleadings may in some instances deny the party a chance to argue its case and get a merit determination.

21. It is important for courts ought to lean towards deciding matters on their substantive merits, rather than striking them out unless they are outrightly hopeless, or irredeemably defective, or in blatant abuse of the court process. From the pleadings and documents so far on record, that cannot be said of this suit. These parties should have their day in court.
22. Consequently, this Application has failed to meet the legal threshold for the exercise of the court's striking out power. Hence, I decline to strike out this suit, and instead dismiss costs, the Defendant's Application dated 4<sup>th</sup> February 2022.

**DATED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MAY 2025.**

**PROF (DR) NIXON SIFUNA**

**JUDGE**

