



**Cheruiyot t/a Kipkorir Cheruiyot & Company Advocates v Gichana t/a Ben K Gichana & Company Advocates (Civil Suit E001 of 2020) [2025] KEHC 8328 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E001 OF 2020  
E OMINDE, J  
JUNE 12, 2025**

**BETWEEN**

**RICHARD KIPKORIR CHERUIYOT T/A KIPKORIR CHERUIYOT & COMPANY ADVOCATES ..... PLAINTIFF**

**AND**

**BENARD K GICHANA T/A BEN K GICHANA & COMPANY ADVOCATES ..... DEFENDANT**

**RULING**

1. By Originating Summons dated 24/09/2024 and expressed to be brought under Section 3A of the [Civil Procedure Act](#) and Order 55 Rule 7(1)(b) and (2) and Rule 10 the Civil Procedure Rules, the Plaintiff sought for orders that:
  - i. The Honourable Court be pleased to order the Defendant to honour their Professional Undertaking of 2/11/2016 and remit to the Plaintiff the sum of Kshs. 5,115,006.00 with interest at Court rates from 3/11/2016.
  - ii. The Defendant to bear costs of the Application.
2. The Originating Summons is supported by the Affidavit sworn by the Richard Kipkorir Cheruiyot. He deposed that the Plaintiff and the Defendant are Advocates of the High Court of Kenya, that the Plaintiff acted for Mediheal Hospital and Fertility Centre while the Defendant acted for the family of the late Joyce Nyareso Mose in respect to the release of the body of the late Joyce Nyareso Mose.
3. He further deposed that on 1/11/2016, the Defendant wrote a letter to the in-charge, Mediheal Hospital & Fertility Centre informing the hospital that he had instructions to pursue accident compensation on behalf of the deceased's father, that he will undertake to remit the proceeds from the court's judgement in respect of the bill and therefore was requesting for the release of the body for



burial, that the release of the said body required an undertaking to be provided which the Defendant furnished to the Plaintiff in a letter dated 2/11/2016 in the following terms:-

- (a) We shall commence compensation proceedings within thirty (30) days from the date of this letter.
- (b) We shall keep you updated on all proceedings in Court up to the conclusion of the matter
- (c) We shall pay the sum of Kenya Shillings Five Million One Hundred and Fifteen Thousand and Sixty-Six only (Kshs. 5,115,006.00) from the proceeds of the Judgement and in the event that the decretal sum is insufficient and or the suit is dismissed to pay the sum of Kenya Shillings Five Million One Hundred and Fifteen Thousand and Sixty-Six Only (Kshs. 5,115,006.00) from other sources.
- (d) That by accepting to give the undertaking, we shall be deemed not only to have accepted and confirmed the foregoing undertaking terms and conditions as set herein above but also to have acknowledged and confirmed that we are solely liable and responsible for full compliance this undertakings terms and conditions and that we shall indemnify you fully in all respects on account of any and all claims, loss and damage which we may suffer by reason of any breach and conditions aforesaid.
- (e) That we shall not release nor cause or allow to be released the claim file lodged in court compensation to any advocate or the estate of the late Joyce Nyareso Mose or any other person whatsoever without first obtaining our written authority which shall only be granted upon such other person giving undertaking (s) in similar terms acceptable to ourselves and on the undertaking that such other person complies with the undertaking (s) or nor we shall be held fully responsible on our undertaking and further that we shall prosecute the compensation claim expeditiously.
- (f) That we shall maintain a professional indemnity cover of at least Kenya Shillings Six Million only (Kshs. 6,000,000.00) during pendency of this claim.

4. He further deposed that on 3/11/2016, he wrote a letter to Mediheal Group Limited advising them that the letter from the Defendant was sufficient to enable them release the body if the family are in no position to furnish any security, that on 27/06/2017, they wrote a letter to the defendant requesting for all the documents in respect to the compensation claim, that on 11/01/2018, the Defendant responded to their letter dated 27/06/2017 informing them that the compensation suit had been filed, that on 7/11/2017, they wrote a letter to the Defendant in response to their letter dated 1/11/2017 enclosing copies of invoices that they had requested for, that on 10/05/2018 the Defendant wrote a letter in response to their letter dated 07/11/2017 requesting for receipts of the total bills to be able to lodge a successful medical expenses claim, that on 21/05/2018, they wrote a letter to the Defendant informing him that our Client could not issue receipt in the absence of payments being made but would avail payments being made but would avail their client's representative to lead evidence and produce invoice, that on 12/03/2020, they requested for an update of the status of the Court case, that on 01/07/2020, they wrote a letter requesting for an update with respect to our Client's claim and that the Defendant vide their letter dated 27/07/2020 and in response to their letter dated 01/07/2020 confirmed that the appeal had been determined.



5. He contended that the Defendant further alleged that the hospital had not honoured the undertaking and that pursuant to intervention of the Kenya National Commission on Human Rights (KNCHR) the hospital had released the body vide the letter dated 11/11/2016 indicating that the hospital bill had been cleared and that on 01/11/2016 the Defendant wrote a letter requesting for the release of the body on the promise that he was pursuing a compensation claim on behalf of the deceased's family and would remit to the hospital dues upon obtaining judgement and payment.
6. He maintained that the parties herein exchanged correspondences as aforementioned and illustrated and at no given time did the Defendant raise an issue that payment had been made to their Client until when their Client learned of the judgment and that the Defendant now wishes to jump ship.
7. He contended that the Defendant's allegations in his letter dated 27/07/2020 is an afterthought and intended to defeat the undertaking, that the Defendant's client have never paid any monies in respect of the outstanding medical bill of Kshs.5,115,006.00 or have they received any money from the Defendant to settle the claim, that the hospital wrote the letter to the Officer in charge of farewell home Moi Teaching and Referral Hospital requesting them to release the body of late Joyce Nyareso to the relatives for burial and indicated that the bill had been cleared as a matter of practice and understanding between the two hospitals and that, that was not for Defendant's Client's consumption since it was a confidential letter, that the hospital acted on his advice following the undertaking issued by the Defendant and not pursuant to any pressure from the Kenya national Commission on Human Rights Commission (KNCHR) and that the Defendant has defaulted on the undertaking, necessitating the filing of this suit.
8. He further deposed that on 31/07/2018, judgment was entered in favour of the Defendant's client in the following terms; pain and suffering Kshs.200,000/=, loss of expectation of life Kshs.100,000/=, loss of dependency Kshs.3,000,000, special damages Kshs.161,270 plus costs of the suit and that matter proceeded on appeal and the High Court delivered judgment as follows; "this appeal succeeds to the extent that the award for loss of dependency of Kshs.3,000,000.00 and is set aside and substituted with one for Kshs.1,600,000/=."
9. He contended that the Defendant has always kept the Plaintiff in the dark in respect of the Court proceedings until recently and that the Defendant has treated the whole matter casually and in an indifferent manner almost to a point that one would be forced to conclude that he was bent to defeat the undertaking and let his Client's not pay their dues by aiding them achieve that intention.
10. He maintained that the Defendant should provide prove of payments made in respect to their client's claim and further correspondences to that effect if any and added that their client still insists that the Defendant has not honoured the terms of the undertaking dated 2/11/2016. He further maintained that the terms of the undertaking dated 2/11/2016 were never revoked or reviewed and thus he holds the Defendant liable.

### **The Response**

11. The Defendant filed a Replying Affidavit sworn on 23/11/2020 in opposition to the application. He deposed that he is aware that he executed the conditional undertaking marked as RKC-2 attached to the Plaintiff's Supporting Affidavit, that the said undertaking was pegged on a condition precedent that the Plaintiff's client releases the body of the late Joyce Nyareso Mose forthwith, that the Plaintiff's clients refused and/or declined to release the body of the said deceased person thus breaching the condition precedent upon which the undertaking stood and that this forced the beneficiaries of the deceased to seek redress at the Kenya National Commission on Human Rights (KNCHR).



12. He contended that it is pursuant to the later intervention of KNCHR that the Plaintiff's client released the body vide the letter dated 11/11/2016 whereby they indicated that the pending hospital bill had been cleared hence the release of the body.
13. He maintained that the Plaintiff's client's breach of the obligation to release the body pending the payment of the hospital bill released him from his obligations under the undertaking given on 2/11/2016.
14. According to the Defendant, the above sentiments render the instant suit frivolous, vexatious, bad in law and out rightly an abuse of this Court's process and that the failure by the Plaintiff to fully disclose the material facts of his client's failure to release the body of the late Joyce Nyareso Mose as envisioned by his undertaking renders the Plaintiff guilty of approaching this Court with unclean hands.
15. He added that the Plaintiff's client refused to cooperate in the prosecution of the compensation claim by declining to issue receipts despite request by the Plaintiff which would have been instrumental in proving special damages. The Defendant deposed that it is clear that the Plaintiff failed to honour the condition set by his undertaking hence the undertaking became voidable at his instance. That the Plaintiff's claim has been brought in bad faith in a ploy to unjustly enrich himself and his expense. In the end, the Defendant urged that this claim is thus ripe for dismissal with costs.
16. The Originating Summons were canvassed vide written submissions. The Plaintiff filed his submissions on 27/05/2024 while the Defendant filed on 15/07/2024.

### **The Plaintiff's Submissions**

17. The Plaintiff submitted that this is a dispute involving breach of Professional Undertaking by the Defendant, that The Code of Standards of Professional Practice and Ethical Conduct published vide Kenya Gazette Notice No. 5212 of 26<sup>th</sup> May 2017, at section 131 defines a Professional Undertaking in the following words:

“An undertaking is a formal promise whose effect is to make the person giving it responsible for the fulfilment of the obligations in respect to which it is given. An Advocate's undertaking is a personal promise as well as a professional and legal obligation. It is based on the concept of the legal professional as an honourable profession and the expectation that an honourable person will honour his/her word. In legal practice Professional Undertakings are a standard method of mediating transactions. Without such undertakings, there would be much difficulty and inconvenience suffered by clients.”

18. The Plaintiff added that the said Code at its section 133 provides how a Professional Undertaking is to be enforced. In particular, it provides as follows;

“A Professional Undertaking is enforceable against the Advocate personally and therefore the Advocate must exercise care when giving and accepting an undertaking.”

19. In regard to whether there was a Professional Undertaking between the Plaintiff and the Defendant, the Plaintiff cited Prof. Tom Ojienda & Katarina Juma in their book, “Professional Ethics: A Kenyan Perspective, 2011” at Page 62 define a Professional Undertaking as follows:

“A Professional Undertaking refers to any unequivocal declaration by a professional [an advocate or a member of the advocate's staff in the course of practice] to someone who reasonably places reliance on it. An undertaking need not be made in the course of practice



where it is made by an advocate himself. Besides, an undertaking may be made either orally or in writing provided it is unequivocal and unambiguous."

20. The Plaintiff also cited the case of *Diamond Star General Trading LLC vs Ambrose D.O Rachier* carrying on business as *Rachier & Amollo Advocates* [2017] eKLR the court held as follows with regards to Professional Undertaking:

"Blacks Law dictionary gives the definition of 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".

The Encyclopaedia of Forms and Precedents, 5th Edition by Hon. Sir Peter Millet, M.A. Vol. 39 pages 859, 860 describes a Professional Undertaking as follows:

"An unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor in the course of his practice, either personally or by a member of his staff, or a solicitor as 'solicitor' for in case of a member of his staff, his employer) becomes personally bound.

It's a promise to do or to refrain from doing something. In practice undertakings are frequently given by solicitors in order to smooth the path of transaction or to hasten its progress, and are convenient method by which some otherwise problematic areas of practice can be circumvented".

21. In regard to the elements if a Professional Undertaking, the Plaintiff relied on the *Halsbury's Laws of England*, 4<sup>th</sup> Edition by Lord Hailsham of St. Marylebone, Vol. 44(1), pages 222,223,224, which states as follows:

Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the Court in the course of proceedings, that undertaking may be enforced summarily upon application to the Court.

It must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client.

It must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.

The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the Court, and the undertaking must be one which is not impossible ab initio for the solicitor to perform.

If the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced."

22. Drawing from the above cited authorities, the Plaintiff submitted that for a Professional Undertaking to be enforceable, it must be made by an Advocate personally in the course of his/her professional duty, it must be clear in its terms and where there is a condition attached, the condition must be fulfilled before the undertaking can be enforced. Counsel added that in the present case, the Defendant furnished a Professional Undertaking to the Plaintiff in a letter dated 02/11/2016.



23. Counsel further submitted that the Professional Undertaking in the present case is contained in the Defendant's letter dated the 2/11/2016 and the same was signed by the said Ben K. Gichana, an Advocate of the High Court of Kenya. Additionally, the Plaintiff submitted that the same bears the letter head of Ben K. Gichana & Co. Advocates & Commissioner for Oaths and that this is a clear indication that the Undertaking was given by the Defendant Advocate in his personal capacity and in the course of his Professional duty.
24. As to the clarity of the terms of the said Professional Undertaking, Counsel submitted that the terms of the Undertaking were clear, unambiguous and unequivocal hence enforceable because of the reasons provided hereunder;
- a. The amount was stated i.e. Kenya Shillings Five Million One Hundred and Fifteen Thousand and Sixty Six only (Kshs. 5,115,006.00).
  - b. The source of the money was stated i.e. from the proceeds of the Judgement in the compensation proceeding the Defendant's firm was pursuing in the case of Stephen Onserio Monda & Another v Francis Mose Moturi (Suing as the legal administrator of the estate of Joyce Nyareso Mose (Deceased) (2019).
  - c. The condition attached to the Undertaking was fulfilled i.e. on 31/07/2018, judgement was entered in favour of the Defendant's Client as follows; pain and suffering Kshs. 200,000/=, loss of expectation of life Kshs. 100,000/=, loss of dependency Kshs. 3,000,000, special damages Kshs. 161,270 plus costs of the suit
  - d. The Defendant Advocate not only accepted and confirmed the undertaking terms and conditions but also to have acknowledged and confirmed that they would be solely liable and responsible for full compliance this undertakings terms and conditions and that they would indemnify the plaintiff Advocate fully in all respects on account of any and all claims, loss and damage which the Plaintiff may suffer by reason of any breach and conditions
  - e. Finally, the Defendant assured the Plaintiff Advocate that they would maintain a professional indemnity cover of at least Kenya Shillings Six Million only (Kshs. 6,000,000.00) during pendency of this claim.
25. Based on the above analysis, the Plaintiff submitted that there was an enforceable Professional Undertaking given by the Defendant Advocate personally in his professional capacity in clear, unequivocal and unambiguous terms in favour of the Plaintiff Advocate.
26. On whether there was a breach of the Professional Undertaking by the Defendant Advocate, the Plaintiff submitted that a breach of a Professional Undertaking occurs where the giver fails to fulfil his obligations under the Undertaking. The Plaintiff contended that the Defendant Advocate breached the Professional because of the following reasons;
- a. The Defendant Advocate failed to update the Plaintiff Advocate on the progress of the case. The Plaintiff wrote several letters addressed to the Defendant inquiring on the status of the case. The Defendant only responded very late, after approximately 4 months.
  - b. In their letter dated the 27/07/2020, the Defendant alleged that the hospital had not honoured the undertaking and that pursuant to intervention of the Kenya National Commission on Human Rights (KNCHR) the hospital had released the body vide the letter dated 11/11/2016 indicating that the hospital bill had been cleared. This was an afterthought after the Defendant had failed to meet his obligations under the Undertaking since the body was released in sole reliance on the terms of the Professional Undertaking.



- c. The Defendant Advocate failed to pay the amount promised in the Professional Undertaking. The Plaintiff was reliably informed by the Chief Finance Officer Mediheal Hospital, that Defendant's client have never paid any monies in respect of the outstanding medical bill of Kshs. 5,115,006.00 or have they received any money from the Defendant to settle the claim. This was despite the fact that the Defendant had won the case in *Stephen Onserio Monda & Another v Francis Mose Moturi* (Suing as the legal administrator of the estate of Joyce Nyareso Mose (Deceased) (2019).
- d. The Defendant Advocate lied. If the body could be released pursuant to intervention of the Kenya National Commission on Human Rights (KNCHR) the hospital had released the body vide the letter dated 11/11/2016 as alleged by the Defendant Advocate, there could be no reason for giving the Professional Undertaking. Additionally, the allegations of the intervention of the Kenya National Commission on Human Rights (KNCHR) by the Defendant Advocate only comes late after he has failed to fulfil his part of the bargain. The Defendant is estopped from denying his clear, unequivocal and unambiguous words expressed to the Plaintiff Advocate vide a letter upon which the Plaintiff Advocate placed full reliance to his utter detriment.
27. The Plaintiff maintained that Professional Undertakings are meant to be binding and enforceable. The Plaintiff submitted that the Defendant Advocate breached the Professional Undertaking he gave to the Plaintiff Advocate.
28. In regard to whether the Plaintiff Advocate is entitled to enforce the Professional Undertaking, the Plaintiff submitted that before giving a Professional Undertaking, the Advocate should obtain the client's express authority which should be in writing. The Plaintiff added that this is meant to avoid misunderstanding as regards the interpretation to be given to the undertaking and that most importantly, the Advocate giving the Professional Undertaking must have full control over the ability to fulfil it and where the Advocate does not intend to accept personal responsibility for the fulfilment of the undertaking, the same should be clearly stated in the undertaking. Counsel pointed out that these requirements are codified in the Code of Standards of Professional Practice and Ethical Conduct published vide Kenya Gazette Notice No. 5212 of 26<sup>th</sup> May 2017 (Supra).
29. Counsel further submitted that a Professional Undertaking is enforced against the Advocate personally and not the client. This is because a Professional Undertaking is a honourable conduct of the Advocate as an officer of the court. In the case of *Nelson Andayi Havi t/a Havi & Company Advocates v Jane Muthoni Njage t/a M Njage & Company Advocates* [2015] eKLR, the court held at paragraph 28 as follows regarding enforcement of a Professional Undertaking;
- “ Also, the law is that, the jurisdiction of the Court in enforcing an undertaking by an advocate is not exercised for purposes of enforcing legal rights or obligations of the client but for purposes of enforcing honourable conduct on the part of the advocate as an officer of the court. Thus, it enforces the undertaking strictly as a contract on its own separate from the primary contract between the parties. The honourable conduct of the advocate is embedded in the undertaking
30. Counsel added that the learned judge in the same case also cautioned that that "the advocate must ensure he is in funds before giving an undertaking."
31. With regard to whether the defendant Advocate is obligated to honour the Professional Undertaking, the Plaintiff in submitting that a Professional Undertaking is meant to be honoured cited the case of



Harit Sheth t/a Harit Sheth Advocate v K.Osmond Advocates [2011] eKLR (Civil Appeal No 276 of 2001), where the court 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 if only to protect his own reputation as an officer of the court.”(emphasis ours)”

32. Counsel urged that in present case, Defendant voluntarily gave a Professional Undertaking to the Plaintiff Advocate with clear knowledge of its legal consequence. Counsel contended that it is a risk he took and even though it may appear painful to honour the same, he has no option but to honour. Counsel submitted that the Defendant Advocate is obliged to honour the Professional Undertaking he freely gave. Counsel relied on the case of Nelson Andayi Havi t/a Havi &Company Advocates v Jane Muthoni Njage t/a J.M Njage & Company Advocates [2015] eKLR, (supra). Counsel thus urged the Court for an order compelling the Defendant Advocate to Honour the Professional Undertaking within a period of Thirty (30) days
33. On whether the Plaintiff is entitled to interests accruing as a result of delay in honouring the Professional Undertaking, Counsel submitted that the Plaintiff Advocate is entitled to the interests accruing as a result of the delay in honouring the Professional Undertaking. Counsel relied on the decision in the case of Naphtali Paul Radier vs. David Njogu Gachanja HCCC No. 582 of 2003 (OS) where Justice H.P.G Waweru held as follows: -

“ The Defendant has withheld the Plaintiff’s money from August 2002. Justice demands that he pays it with interest. As no particular rate of interest was contracted, I shall award at court rates”.
34. Counsel thus urged for the value of the undertaking being Kshs. 5,115,006/= plus interest at court rates from the date the payment became due i.e. the 19/12/2019 when the Judgment was delivered in Nyamira High Courts.
35. On the issue of the costs, Counsel submitted that the general rule is that costs of an action or proceeding shall follow the event in accordance with the provisions to Section 27 of the *Civil Procedure Act* (Cap 21) although they are paramount the discretion of the Court and as such, a successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. Counsel urged the Court to condemn the Defendant to bear costs if the suit.

### **The Defendant’s Submissions**

36. In regard to whether the Defendant gave out a Professional Undertaking to the Plaintiff, Counsel began by outlining the wordings of the undertaking as already captured herein. He also relied of the definition of a Professional Undertaking as captured in the Encyclopaedia of Forms and Precedents, 5th Edition by Hon. Sir Peter Millet, M.A. Vol. 39 pages 859, 860 (supra). Counsel submitted that a Professional Undertaking is a promise to do or refrain from doing something, that in practice undertakings are frequently given by solicitors in or to smooth the path of transaction or hasten its progress and are



a convenient method by which some other wise problematic areas of practice can be circumvented. Counsel relied on the holding in *Diamond Star General Trading LLC vs Ambrose D.O Rachier* carrying on business as *Rachier & Amollo Advocates* [2017] eKLR (supra). Counsel also relied on The Code of Standards of Professional Practice and Ethical Conduct published vide Kenya Gazette Notice No. 5212 of 26<sup>th</sup> May 2017, (supra).

37. Counsel further submitted that Defendant does not deny that he issued the conditional undertaking, that he deposed in his Replying Affidavit that he issued it upon instructions from his client in order to secure release of the body of the Late Joyce Nyareso Mose by the Plaintiff's client Mediheal Hospital. Counsel maintained that it understood that the Undertaking was pegged on the Plaintiff's client releasing the body as such the obligation would only crystallize on release of the body and that it can therefore be agreed that there was a conditional undertaking issued by the Defendant to the Plaintiff.
38. In regard to whether the undertaking is enforceable, Counsel submitted that the undertaking was conditional and the parties understood it as such. Counsel cited the court in *Conrad Masinde Nyukuri & another v Robson Harris & another MLD HCCC No. 17 of 2017* (OS) [2021] eKLR where the following passage was from Halsbury's Laws of England (4th Ed.) Vol. 44(1); pages 222,223,224, that;

“If an undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced.”
39. Counsel also cited the Court of Appeal in relation to a conditional Undertaking in *Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga NRB CA Civil Appeal No.51 of 2008* [2017] eKLR as follows:

“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.”
40. Counsel contended that the Plaintiff cannot seek to enforce a conditional undertaking when they are fully aware that the underlying condition was not fulfilled in order to warrant enforcement of the undertaking. Counsel maintained that since the undertaking was conditional, the Plaintiff should have convinced their client Mediheal Hospital to honour their part and release the body of the late Joyce Nyareso Mose.
41. Counsel urged that the Defendant issued a conditional undertaking vide a letter dated 2/11/2016, that the he condition of this undertaking was that the Plaintiff's client has to release the body of the Late Joyce Nyareso Mose and that it was upon the fulfilment of the above condition that the undertaking was pegged on. However, Counsel contended that the Plaintiff's client failed to release the body hence not fulfilling the condition which the undertaking stood on.
42. Counsel added that after the Plaintiff's client refused to release the body of the deceased<sup>1</sup>, the deceased's family then sought redress at the Kenya National Commission on Human Rights (KNHCR). Pursuant to the intervention of KNHCR, the Plaintiff's client then released the body of the deceased. Counsel contended that the Plaintiff's client did not abide by the terms of the Professional Undertaking. Counsel reiterated that the Defendant issued the conditional Professional Undertaking on 2/11/2011, however, the hospital failed to release the body of the late Joyce Nyareso Mose and that is when the family reported the matter to Kenya National Commission on Human Rights (KNHCR) and it was after the hospital received a letter from KNCHR dated 7/11/2016 is when the Plaintiff's



client released the body of the deceased. Counsel urged that the undertaking was conditional and the condition was not fulfilled and therefore the undertaking cannot be enforced.

43. On whether the Court should grant the orders sought, Counsel submitted that this honourable court ought not to grant the orders sought as we have demonstrated that even though the Defendant issued a Professional Undertaking to the Plaintiff, the undertaking was conditional. Counsel contended that the undertaking was pegged on the condition the Plaintiff's client releases the body of the late Joyce Nyareso Mose, a condition which Mediheal Hospital did not fulfil. Counsel submitted that it will therefore be unjust if this Honourable court orders that the Defendant honours the undertaking when the Plaintiff did not fulfil the conditions which the undertaking stood on.
44. Counsel added that the scope of this issue should be limited to the question whether the Defendant, as advocate for the estate of the late Joyce Nyareso Mose is responsible to pay interest under a Professional Undertaking. Counsel submitted that the Defendant's undertaking did not make any provision on who is to pay interest for delay in completion. Counsel maintained that this does not automatically place this obligation on the Defendant. Therefore, Counsel urged that the question is whether the Defendant's Professional Undertaking issued to the Plaintiff in the capacity of an advocate obliged the Defendant to assume responsibility for, and to pay interest ordinarily payable by the Defendant's client.
45. Counsel submitted that the undertaking did not create an express obligation on the Defendant to pay interest for delayed completion. It is an obligation of the estate of the late Joyce Nyareso Mose. Counsel observed that although there is a duty on the advocate to act in the client's interest, this does not imply a duty to assume or underwrite the client's financial or other obligations under the contract. Counsel added that also, the law is that, the jurisdiction of the Court in enforcing an undertaking by an advocate is not exercised for purposes of enforcing legal rights or obligations of the client but for purposes of enforcing honourable conduct on the part of the advocate as an officer of the court and thus enforces the undertaking strictly as a contract on its own separate from the primary contract between the parties. Counsel urged that interests accruing as a result of the delay be paid out by the Defendant's client and not the Defendant as an advocate.
46. Regarding costs, Counsel submitted that it is a well settled principle of the law that costs follow an event. Counsel urged the Court that the costs of this suit be awarded to the Defendant.

### **Determination**

47. Having addressed my mind to the pleadings and submissions by the parties, what emerges is that it is not denied that the parties entered into a Professional undertaking. The purpose for the undertaking as well as the terms and conditions thereof are also not denied. From their submissions, it is also easily discernible in light of the fact that they have more or less cited similar authorities and writings each in support of their case that the parties are also in consensus on what amounts to and Professional Undertaking, why Advocates enter into them, the need to honour them and the consequences of breach undertaking, this being the case it is my considered opinion that the only issue for determination then is as hereunder;

Whether the Plaintiff failed to honour their part of the undertaking thus rendering the Professional Undertaking voidable at the instance of the Defendant

48. The relevant legal provision that guides the issue of Professional Undertakings is Order 52 rule 7 of the Civil Procedure Rules 2010 which states:-



- 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”.
49. The Court of Appeal, in *Harit Sheth T/A Harit Sheth Advocate v KH Osmond T/A KH Osmond Advocate* [2011] eKLR (Supra) set out the nature of an Advocate’s Professional Undertaking and its consequences. The court observed as follows:
- 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 it if only to protect his own reputation as an officer of the court. The law gives him the right to sue his client to recover whatever sums of money he has incurred in honouring a Professional Undertaking. He cannot however sue to recover that amount unless he has first honoured his Professional Undertaking.
50. Further, the appellate court further held in *Arthur K Igeria t/a Igeria & Co Advocates v Michael Ndaiga* [2017] eKLR 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.’
51. The Court of Appeal in *Waruhiu K’owade & Ng’ang’a Advocates v Mutune Investment Limited* [2016] eKLR (supra) as regards the sanctity of Professional Undertakings in the legal profession. The superior court had on that occasion stated:
- “The Professional Undertaking is a smooth and binding contract between the donor and the donee who are the advocates. It should be adhered to with a standard of ethics higher than that of the market place. Professional Undertakings to lawyers by colleagues are like a religion and are the underpinning of the relationship that governs the activities, transactions and actions between them. A Professional Undertaking embodies and manifests the practice of the legal profession in a characteristically methodical, courteous and ethical manner. That is why the immediate offer and acceptance of a Professional Undertaking triggers a monumental transaction and huge financial relationship which must be observed by both sides. In our view, that is the basis of Professional Undertakings in the legal profession. In fact, the conditions, terms and implications must be strictly adhered to for the legal profession to thrive, and for advocates to deal with each other freely and openly.”



52. In Fidelity commercial Bank Limited –vs- Onesmus Githinji & Company Advocates (2013) eKLR, J.B Havelock held thus: -

“An undertaking given by a solicitor is personally binding on him and must be honoured. Failure to honour an undertaking is prima facie evidence of professional misconduct and the Council of the Law society will require the undertaking to be honoured as a matter of conduct. Although consideration for the promise will often be present, an undertaking is enforceable even if it does not constitute a legal contract.... Any ambiguity in the terms of undertaking is generally construed against the party who gave the promise. In general, no terms will be implied into a Professional Undertaking and extraneous evidence will not be considered”.

53. The Defendant herein states that contrary to the undertaking the Plaintiff’s client releases the body of the deceased upon the undertaking being entered into, the body was actually released at the intervention of the KNHCR and so the Plaintiff was in breach of the undertaking and the same being the case, the Defendant is not bound to honour the same.

54. In consideration of this issue, the court will simply state that the record of pleadings by the Defendant has not at all demonstrated the manner in which the KNCHR intervened and how that intervention led to the release of the deceased body. All that is annexed to the Defendant’s pleadings and which the Defendants are relying upon presumably to be construed to be evidence of the intervention of the KNCHR is an undated letter stated to be from the Desk of one Okongo Omogeni addressed to the Commission and signed on behalf of the said Okongo Omogeni.

55. There is no endorsement on the letter that it was received by the KNCHR on what date and by whom. There is also nothing annexed to the Defendant’s Replying Affidavit as being communication from the KNCHR in response to the letter and how it purposes to act to assist in light of the request. It is also noted that there is no explanation at all by the Defendant detailing what action the said Commission took that led to the release of the deceased body. Further it is also not indicated in the letter from the Plaintiff’s client Mediheal Hospital dated 11<sup>th</sup> November 2016, that the body was to be released for reasons that they had been directed to do so by the KNCHR.

56. The Court further notes that this letter from Mediheal Hospital is also not copied to either Okongo Omogeni or the KNCHR to be informed that their instruction to the Hospital if any, had been duly effected. In this regard I am satisfied that this letter was written by the hospital at the instance of the Plaintiff as per the undertaking. I am also satisfied by the explanation given by the Plaintiff on the manner in which the information was relayed to the recipient by the Hospital to enable the release of the deceased body.

57. Further to the above, from the pleadings, the court notes that subsequent to the release of the body, there was not only no communication from Counsel for the Defendant to the Plaintiff that the Plaintiff had failed to honour his undertaking such that instead, the deceased body was released at the instance of the KNCHR. If anything the court notes that the subsequent communication between the Advocates continued in line with the terms and conditions of the undertaking.

58. Of particular significance, the court notes that in its communication to the Plaintiff vide the Defendant’s own annexure BKG-3 a) which is a letter dated 10<sup>th</sup> May 2018, written close to one and a half years after the release of the deceased body, is inter alia requesting that the Defendants be supplied with the necessary documentation to enable them file for the recovery of medical expenses in the suit already filed as per the Undertaking. This communication also annexed copies of the following; The



Plaint; Memorandum of Appearance; Statement of Defence as evidence of the fact that the suit had already been filed.

59. All the above considered, I am satisfied that indeed the Professional Undertaking was conditional as all undertakings ought to be. However, it is my finding that contrary to the assertions by the Defendant, the Plaintiff did fulfil his part of the undertaking and got his client Mediheal Hospital to release the body of the deceased pending the payment of the entire hospital bill upon the filing, hearing and determination of the suit in a claim for damages following the death of the deceased in a road traffic accident. In this regard then, the issue of the Professional Undertaking being voidable at the instance of the Defendant does not arise at all.
60. In light of the above, I am very well satisfied that the Plaintiff has sufficiently demonstrated that the Defendant is indebted to him to the amount the subject matter of the undertaking and that the same is due and owing to the Plaintiff. However, on the issue of interest on the said amount being due and owing to the Plaintiff from the date of the undertaking, it is my finding that because payment of interest was not therein factored by the parties themselves, if they had intended that interest be paid on the amount in the event of default, they would have expressly stated so.
61. Now that they did not, the presumption is that this was not intended to be the case and it is not for the court to add a new clause into the undertaking in favour of the parties. For this reason, the prayer for interest on the amount is denied. I therefore find that the Application has merit and the same is allowed as follows;
- a. That the Defendant is now hereby directed to honour their Professional Undertaking dated 2<sup>nd</sup> November 2016 entered into as between themselves and the Plaintiff and is to remit the sum of Ks. 5,115,006.00 to the Plaintiff forthwith
  - b. The Defendant to bear costs of the Application.

**READ DATED AND SIGNED AT ELDORET ON 12<sup>TH</sup> JUNE 2025**

**E. OMINDE**

**JUDGE**

