



Stephen Kipkenda & Dorothy Kiprono t/a Kipkenda & Co Advocates v Jackson Ikua Wanjiru & Sharon Barongo Nyambane t/a Ikua & Partners Advocates LLP (Civil Case E237 of 2024) [2025] KEHC 9702 (KLR) (Civ) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E237 OF 2024

JN MULWA, J

JULY 3, 2025

IN THE MATTER OF KIPKENDA & CO. ADVOCATES

AND

IN THE MATTER OF THE ADVOCATES ACT

AND

IN THE MATTER OF ENFORCEMENT OF A PROFESSIONAL UNDERTAKING

BETWEEN

**STEPHEN KIPKENDA & DOROTHY KIPRONO T/A KIPKENDA & CO
ADVOCATES PLAINTIFF**

AND

**JACKSON IKUA WANJIRU & SHARON BARONGO NYAMBANE T/A IKUA &
PARTNERS ADVOCATES LLP DEFENDANT**

JUDGMENT

1. By way of suit commenced by Originating Summons dated 04/11/2024, Stephen Kipkenda & Dorothy Kiprono t/a Kipkenda & Co. Advocates (hereafter the Plaintiff) seeks the following orders against Jackson Ikua Wanjiru & Sharon Barongo Nyambane t/a Ikua & Partners Advocates LLP (hereafter the Defendant) :-
 - a. That the honorable Court be pleased to order the Defendant to honor its written undertaking dated 04/10/2023 and surrender the original Certificate of Title to property LR. No. 209/17158 (I.R. 112982) to the Land Registry and or Ministry of Lands, Public Works,



Housing and Urban Development for conversion and complete the sale to the Plaintiff's client, Bridgid Jepkemboi Kong'a, pursuant to the agreement of sale dated 15/04/2023;

- b. That the Defendant bears the cost of the suit.
2. The summons is premised on the provisions of Order 37 Rule 14 and Order 52 Rule 7 of the Civil Procedure Rules (CPR) with the grounds thereto being amplified by the supporting affidavit of even date sworn by Dorothy Kiprono. The gist of her deposition is that in April 2023, the client, Bridgid Jepkemboi Kong'a, entered into an agreement for sale of LR. No. 209/17158 (I.R. 112982) (hereafter suit property) to purchase the Property from one Daniel Kuria Ngariu, who was represented by the Defendant in the said transaction. That the purchase was subject to financing by KCB Bank Kenya Ltd, on condition that the financier advocates registering a legal charge of the suit property. She goes on to depose that on 04/10/2023, the Defendant gave the Plaintiff an irrevocable professional undertaking binding itself to hold the original title to the suit property before and after conversion on a stakeholder basis solely for the purposes of converting the title to a new parcel number and completing the transfer as per the agreement of sale.
3. That it was an express term of the agreement that the Defendant would promptly facilitate the conversion of the suit property title by surrendering the current title to allow for the registration of a new title to the property and manual registration of the intended transaction involving her client. She further states that despite the Defendant receiving letters from the Chief Land Registrar directing them to surrender the title to the suit property, the Defendant has failed or neglected to do the despite the client relying on the Defendant's undertaking in expectation to receive a mortgage facility from KCB Bank Kenya Ltd, in order to cover costs towards purchase of the property.
4. The Plaintiff states that despite requests to the Defendant to honor the professional undertaking, it has failed and refused to do so, causing the transaction in question to have stall despite its client receiving a deposit of Kshs. 5,000,000/-. For the forestated the Plaintiff has urged the Court to allow the summons as lodged.
5. The Defendant opposes the summons through a replying affidavit dated 21/03/2025 sworn by Jackson Ikua Advocate. At the outset, the Advocate confirms that indeed there was an agreement of sale between the respective parties' clients and that the charge could not be registered in favor of KCB Bank Kenya Ltd prior to conversion of title to the suit property in line with guidelines from the Ministry of Lands. The Advocate further confirms having issued a professional undertaking that is unequivocal and unambiguous and a reading of the same is to the effect that the Defendant was only to hold the title deed for purposes of handling the conversion and the title was to be released to the Plaintiff only upon completion of the conversion process and not to Land Registrar or any other third party.
6. The Defendant further states that in any event, the undertaking to release the title to the Plaintiff was to be triggered upon occurrence of certain events, in this case, conversion of the title in question. He states that it was agreed that the Plaintiff's client was to cater for the costs of conversion, which process the Defendant began in earnest, however upon raising a fee note with the Plaintiff's client, she indicated having found someone else to carry out the conversion which compounded the issue given that the agreement was outside of the initially agreed upon agreement, being that the undertaking was issued on the premise that the Plaintiff was to carry out the conversion process.
7. In summation the deposes that, even if the Court were to order the surrender of the title documents to the land registry, the same would be premature as the Land Registrar advised that there were some prerequisites to be effected at the office of the Director of Survey before his office could process surrender of the current title therefore the suit ought and thereby has urged the court to dismiss the suit with costs.



8. In rejoinder by way of a further affidavit dated 14/04/2025 deposited by Dorothy Kiprono Advocate, it is asserted that the import of the professional undertaking on its face binds the issuer on the conversion as well as the transfer process, and that there is nothing in the said undertaking to the effect that the same was issued on the premises that the Defendant was to carry out the conversion and construing such an interpretation would be nothing short of inviting the Court to re write the contract.

Issues for termination.

- a. Whether the Defendant breached the professional undertaking dated 4/10/2023 and whether the same is capable of enforcement by this Court?
- b. Who bears the costs of the suit.

Whether there was breach of the professional undertaking and whether the same is capable of enforcement by this Court?

9. Concerning enforcement of a professional undertaking, the same is specifically provided for in Order 52 Rule 7 of the CPR, upon which the Applicant’s Summons is anchored. It provides that-;

- “(1) An application for an order for the enforcement of an undertaking given by an advocate shall be made —
- (a) if the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or
 - (b) in any other case, by originating summons in the High Court.
- (2) 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.”

10. In urging the Court to allow the summons, the Plaintiff commenced by submitting that contracts are supposed to be interpreted holistically and not selectively, adding that with the conversion proceedings having commenced, the purchaser opted to carry out the conversion process through another person. However, the professional undertaking by the Defendant Advocates does not speak of who was to perform the conversion. It was further submitted that conversion cannot commence without release of the old title as such by failing to surrender the said title to either the Plaintiff/purchaser or Land Registrar, the Defendant is clearly in breach of the professional undertaking.
11. The decisions in the cases : Waruhiu K’Owade & Ng’ang’a Advocates v Mutune Investments Ltd [2016] eKLR, Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogolla Okello & Co. Advocates [2019] KECA 504 (KLR), Euromec International Limited v Shandong Taikai Power engineering Company Limited [2021] KEHC 93 KLR and Mwangi Ngumo v Kenya Institute of Management [2012] eKLR were called to aid and all speak to the proposition.
12. It was further submitted that pursuant to the Contra-Proferentum Rule, any ambiguity in respect of an undertaking ought to be interpreted in favour of the Plaintiff given that it was the Defendant who drafted the undertaking, and by its reading did not specify who had the duty to perform the conversion of the Title but what it did specify was that upon commencement of the conversion the Defendant was to surrender the said title for the conversion exercise.
13. Additionally, while placing reliance on the decisions in Harit Sheth t/a Harit Sheth Advocates c K. Osmound Advocates [2011] eKLR and Arthur Igeria t/a Igeria & Co. Advocates v Michael Ndaiga



[2017] eKLR, counsel for the Plaintiff submitted that this Court cannot re-write contracts on behalf of parties therefore it ought to proceed to exercise its discretion by finding that the Defendant was in breach of its professional undertaking and allow the summons as prayed with costs.

14. The defendant while calling to aid the decisions in *Ragui v Barclays Bank of Kenya Ltd* [2002] eKLR, *Gitonga v Muriuki & 2 Others* [2012] eKLR and Rule 7 of the Advocate (Practice) Rules, counsel argued that enforceability of an undertaking is strictly bound by its precise terms, therefore in the instant matter the title was expressly to be released “upon conclusion of the conversion process” which event is yet to occur. That the Plaintiff’s insistence for release the title without satisfying the preconditions therein is legally untenable and is an invitation for the Court to rewrite the undertaking.
15. On whether there was breach of the undertaking, counsel for the Defendant reiterated that the Defendant cannot be said to be in breach of an undertaking whose conditions have not been fulfilled. That by the purchaser’s actions, the Plaintiff cannot claim breach where the purchaser contributed to the impossibility or impracticability of performance, relying on decisions in *Machira t/a Machira & Co. Advocates v East Africa Standard (No. 2)* [2002] 2 KLR 63 and *Muthithi v City Finance Bank Ltd* [2015] eKLR, and finally positing that this Court lacks jurisdiction to compel it to act outside the express terms of the undertaking and urging that the summons be dismissed with costs.

Analysis and determination

16. Having set out the rival arguments, Black’s Law dictionary, 10th Edition defines an “undertaking” as “a promise, pledge or engagement”. In the case of *Waruhiu K’Owade & Ng’ang’a Advocates v Mutune Investments Ltd* [2016] eKLR, the Court of Appeal defined a professional undertaking as follows:-

“A professional undertaking 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 v 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. Where an advocate breaches a professional undertaking, the court has jurisdiction to order the enforcement of that undertaking.”

17. It is undisputed that the parties hereto were acting as respective counsel for purchaser and vendor in respect of an agreement of sale of LR. No. 209/17158 (I.R. 112982). It is further not in dispute that in order to facilitate the said transaction, the Defendant issued to the Plaintiff a professional undertaking dated 04/10/2023. (Annexure DK-3). I find it useful at this juncture to capture verbatim the contents of the aforementioned letter of undertaking in order to contextualize the dispute between the parties. Vide the letter dated 04/10/2023, the Defendant Advocates wrote as follows:-

“Re: Sale of and Charge over Land Reference Number L.R. No. 209/17158, Nairobi

Vendor: Daniel Kuria Ngariu

Purchaser: Brigid Jepkemboi Kong’a

We refer to the above matter in which we act for Daniel Kuria Ngariu (the “vendor”) whereas you act for the purchaser in the transaction.

The title to the property herein is yet to be converted as per the guidelines issued by the Ministry of Lands and Physical Planning and therefore, the transfer in favour of the purchaser cannot be effected.



To this end, parties have agreed that upon payment of the outstanding loan amount to the vendor's financiers by the purchaser, the title to the property shall be released to the vendor's Advocates for purposes of effecting conversion of the title to the new parcel number and we undertake that upon commencement of the conversion process we shall submit the title to the Ministry of Lands to facilitate the process of conversion.

Accordingly, we hereby give you our unconditional, unequivocal and irrevocable undertaking that we shall hold the title to the property before and after conversion on stakeholder basis solely for purpose of conducting conversion of the title to the new parcel number as well as completion of the sale to the purchaser and the same shall be released to you upon conclusion of the conversion process and as per the agreement of sale.”

18. What I gather to be the Plaintiff's contestation is that the Defendant has failed to promptly facilitate the conversion of the suit property title by surrendering the current title to the Ministry of Lands to allow for the conversion to a new title to the property despite a request to honor the professional undertaking, hence stalling the transaction.
19. Here it must be stated that the professional undertaking that is the subject of this suit was issued on the backdrop of an agreement for sale dated 15/04/2023 in respect of the suit property. (Annexure DK-1). To the foregoing end, it is trite that a professional undertaking is a separate and distinct contract from the underlying transaction pursuant to which it was given, here the Sale and purchase agreement. The Court finds guidance on the issue from the decision in STG Muhia TIA. Muhia v J. M. Chege TIA. J.M. Chege & Company Advocates [2009] eKLR, wherein the Court pithily observed 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.”
20. What this means is that upon the respective clients of the disputing advocates executing the sale agreement (Annexure DK-1), there succeeded a professional undertaking issued by the Defendant in favour of the Plaintiff, to aid the underlying sale transaction. As earlier noted, the sale agreement was executed 15/04/2023 and going by the undertaking issued on 04/10/2023, the Ministry of Lands appears to have issued guidelines with respect to conversion of the title to the property. The nature of the said guideline was not evinced by either of the parties hereto for the benefit of the Court.
21. Ex facie, a reading of the letter of undertaking dated 04/10/2023 alongside the sale agreement, it is the Court's understanding that the Defendant's letter of undertaking issued therein is that firstly -;
 - a. going by the fact that a discharge of charge formed part of the completion documents);
 - b. title to the suit property to the Ministry of Lands to facilitate the process of conversion. The resultant undertaking thereafter it seems that the suit property was already charged (gwas that the Defendant was to hold the title to the property before and after conversion, and upon completion, the new title would be secondly upon payment of the outstanding loan amount to the vendor's financier by the purchaser, the title to the property was to be released to the Defendant for purposes of effecting conversion; and
 - c. thirdly and at the risk of repetition, it seems that the Defendant was to effect the conversion of the title where after upon commencement of the conversion process the Defendant was to further submit the released and converted title to the Plaintiff upon conclusion of the conversion process.



22. To the fore stated it is well-trodden that a Court cannot re-write a contract between parties whereas its role is limited to interpretation of the contract because contracting parties are free to specify the terms and conditions of their agreement. See *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR.
23. Here, it appears that notwithstanding the Defendant's obligation espoused in the letter of undertaking dated 04/10/2023, there seems to have been an auxiliary agreement, outside of the undertaking, between the purchaser and the Defendant, wherein the purchaser had agreed to take up the cost for the conversion process, being undertaken by the Defendant. It would seem that these parties later disagreed on fees charged by the Defendant Advocates for the conversion process, whereupon the purchaser intentioned to engage another party to perform the conversion process (Annexure JK-1).
24. Further, the letter dated 05/07/2024 (Annexure DK-4) from the Chief Land Registrar, was merely an advisory letter and not a direction to surrender the title to the property in question to the Ministry of Lands. In any event, the undertaking did not capture an obligation upon the Defendant to surrender the title to the Land Registrar, it only required that it facilitates and or assumes the process of conversion.
25. While the Court appreciates the Contra-Proferentum Rule, it warrants mentioning that the undertaking was not unambiguous. It placed an obligation upon the Defendant and or the vendor to perform the conversion process therefore the rule is inapplicable to the instant matter. The agreement that came after, regarding conversion, wherein the Defendant and the purchaser purportedly agreed, then later disagreed, did not formulate and form part of the undertaking.
26. This Court equally does not agree with the Defendant that the professional undertaking in question was issued on the premise that the Plaintiff was to carry out the conversion process, given that, if the same was the position, it would have been expressly captured in the undertaking. Therefore, the Defendant's argument can fly in the face of the clear obligations placed upon it in the undertaking it voluntarily issued.
27. For all intents and purposes, there was an intention and or obligation created by the undertaking issued by the Defendant, specifically appertaining to the duty of conversion of the title in respect of LR. No. 209/17158 (I.R. 112982). However, the same did not encapsulate a surrender of the said title to the Ministry of Lands or Registrar of Lands for purposes of conversion. Therefore, the letter dated 05/07/2024 (Annexure DK-4) from the Chief Land Registrar was of no consequence to the undertaking, but for information.
28. Nevertheless, it seems that the transaction between the vendor and the purchaser has since stalled on accord of the respective parties misconstruing the Defendant's undertaking and obligations, and what may have been a misunderstanding between the Defendant and purchaser. That said, there still exists a live professional undertaking that has since not been fulfilled and or performed by the Defendant.
29. For the foregoing and in the interest of justice, the summons succeeds by way of the following commending orders in line with Order 52 Rule 7(2) of the CPR -;
 - a. That the Defendant Jackson Ikua Wanjiru & Sharon Barongo Nyambane T/A Ikua & Partners Advocates LLP shall honor its professional undertaking dated 04/10/2023 within sixty (60) days of this order to the extent of ensuring and or processing the conversion of the title to a new parcel number in respect of LR. No. 209/17158 (I.R. 112982) and completion of the transfer of the property to the purchaser Bridgid Chepkemboi Konga in terms of the Agreement for Sale between the Vendor and the Purchaser dated 15/4/2023.



- b. The costs of the summons are awarded to the Plaintiff.
30. The matter shall be listed for mention before the court on 15/10/2025.
- Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF JULY, 2025

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JANET MULWA.

JUDGE

