



**Kiamah Kibathi & Co. Advocates LLP & another v Olubayi  
Mwashimba Advocates LLP (Commercial Case E362 of 2024)  
[2025] KEHC 13125 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13125 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E362 OF 2024**

**MN MWANGI, J**

**SEPTEMBER 18, 2025**

**IN THE MATTER OF AN APPLICATION BY KIAMA  
H KIBATHI & CO. ADVOCATES LLP & ESK ADVOCATES LLP**

**-FOR-**

**AN ORDER OF AN ENFORCEMENT OF AN UNDERTAKING GIVEN BY AN ADVOCATE**

**-AND-**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**KIAMA H KIBATHI & CO. ADVOCATES LLP ..... 1<sup>ST</sup> PLAINTIFF**

**ESK ADVOCATES LLP ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**OLUBAYI MWASHIMBA ADVOCATES LLP ..... DEFENDANT**

**RULING**

1. Before me is an Originating Summons application dated 8<sup>th</sup> July 2024 filed by the plaintiffs/applicants pursuant to the provisions of Order 52 Rules 7(1)(b), (2) & 10 of the Civil Procedure Rules, 2010, and all enabling provisions of the law. The plaintiffs pray for an order that the defendant be compelled to comply with their written undertaking dated 21<sup>st</sup> June 2024 by remitting Kshs. 8,577,133.74 to the plaintiffs.



2. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Ms Enner Okinyi, an Advocate of the High Court of Kenya and the 2<sup>nd</sup> plaintiff's Managing Partner. Ms Okinyi averred that the plaintiffs were instructed by their clients (now decree holders) to initiate proceedings against insured parties of the defendant's client, resulting in favourable judgments. Subsequently, the plaintiffs successfully filed declaratory suits and obtained judgments against the defendant's client, who failed to settle the decretal sums, after which the plaintiffs commenced garnishee proceedings due to non-payment of the various decretal sums.
3. She deposed that in a bid to avoid further litigation and expenses, the defendant engaged the plaintiffs and agreed to settle the decretal sums amicably, and a written Settlement Agreement and an irrevocable professional undertaking both dated 21<sup>st</sup> June 2024, were executed to ensure payment of the aforesaid decretal sums within two working days from the date of signing the consents in the various matters. Ms Okinyi contended that said documents were executed on 20<sup>th</sup> June 2024, marking the garnishee matters as settled. She stated that the defendant has since failed to honour both the Settlement Agreement and the undertaking. She further stated that the plaintiffs acted in good faith and relied on the defendant's commitment, but the defendant defaulted, causing them to suffer prejudice.
4. The instant application was also supported by an affidavit sworn on 8<sup>th</sup> July 2024 by Mr. Elias Kibathi, an Advocate of the High Court of Kenya and the 1<sup>st</sup> plaintiff's Managing Partner. Mr. Kibathi confirmed that the averments contained in the supporting affidavit sworn by Ms Enner Okinyi are true. He urged this Court to enforce the subject professional undertaking in the interest of justice.
5. In opposition to the application, the defendant filed a replying affidavit sworn on 2<sup>nd</sup> September 2024 by Mr. Mtalaki Mwashimba, an Advocate of the High Court of Kenya and a partner in the defendant law firm. Mr. Mwashimba averred that the instant application is improperly before the Court as a professional undertaking must be enforced against an individual Advocate, not a law firm. He denied breaching the professional undertaking prepared by the plaintiffs and averred that the undertaking required the defendant to ensure payment by the client within two days of the signing of the consent, and for them to make payment directly from the firm or its partners. Mr. Mwashimba deposed that the defendant has complied with the terms of the subject undertaking and acted in good faith, but acknowledged that payment to the plaintiffs' clients is still pending.
6. Mr. Mwashimba stated that it is unfortunate that the released garnisheed accounts did not contain the expected sums. He averred that the Kenya Commercial Bank failed to act on the consent orders despite the defendant's efforts, thus the defendant cannot be blamed for that failure. He further stated that the plaintiffs are not prejudiced in any way as they still have legal recourse against the defendant's clients and their insured. Mr. Mwashimba deposed that the defendant had pursued garnishee nisi orders where applicable, and funds had been remitted accordingly. He contended that the professional undertaking was conditional upon the availability of funds in the garnisheed accounts, which were ultimately insufficient.
7. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed on 18<sup>th</sup> October 2024 by the law firm of Kiamah Kibathi & Company Advocates LLP, while the defendant's submissions were filed by the law firm of Salim Kariuki Nzuli Advocates on 9<sup>th</sup> December 2024.
8. Ms Nambali, learned Counsel for the plaintiffs relied on the case of Harit Sheth t/a Harit Sheth Advocate v K. Osmond Advocates [2011] eKLR, and submitted that the defendant should be held accountable for issuing a professional undertaking without confirming the availability of funds from its client. She contended that doing so amounts to professional misconduct as provided for under



SOPPEC 9 of the Code of Professional Conduct. Counsel argued that a professional undertaking is binding and must be made with proper client authority. She further contended the defendant's failure to honour its professional undertaking to the plaintiffs within the stipulated two working days breaches this duty. Counsel asserted that the defendant's claim that the undertaking was conditional on the availability of funds is misleading and unsupported.

9. Ms Nambali cited the case of Equip Agencies Limited v Credit Bank Limited [2008] 2 EA 115 (HCK), and submitted that this Court has the requisite jurisdiction to enforce a professional undertaking where it is breached by an Advocate such as is the case herein. She further submitted that the plaintiffs having relied on the undertaking to mark the garnishee applications as settled, now face potential legal consequences from their clients. She referred to the case of Kenya Reinsurance Corporation v V.E. Muguku Muriu T/A M/S V.E. Muguku Muriu & Company [1996] KECA 148 (KLR) and contended that an Advocate cannot excuse failure to honour a professional undertaking by citing lack of client funds. She asserted that in view of the above, the defendant should be compelled to honour its professional undertaking by remitting Kshs.8,577,133.74 to the plaintiffs.
10. Mr. Nzuli, learned Counsel for the defendant relied on the Court of Appeal's definition of the term "professional undertaking" in the case of Waruhiu K'Owade & Ng'ang'a Advocates v Mutune Investments Ltd [2016] eKLR, and submitted that a professional undertaking is only valid if made by an Advocate and relied upon by another party. He contended that in this case, the subject undertaking was issued by the firm of Olubayi Mwashimba LLP but executed by Mr. Mtalaki Mwashimba. Counsel referred to the provisions of Clause 113 of SOPPEC-9 and asserted that while an LLP has separate legal personality, a professional undertaking in Kenya is only enforceable against a natural person, specifically an Advocate and not the firm.
11. Mr. Nzuli submitted that since the defendant herein is a law firm, the subject undertaking cannot be enforced without violating Mr. Mwashimba's right to be heard. He further submitted that given how the subject undertaking was drafted, it merely required the defendant to compel its client to pay, not to personally settle the amount. The above notwithstanding, Counsel stated that the subject undertaking was conditional on the lifting of garnishee orders and availability of funds, which was not fulfilled due to logistical issues and insufficient account balances. He submitted that given the ambiguity in the undertaking and the circumstances of this case, no breach has occurred, and that the plaintiffs' remedy lies in contract law, not enforcement of a professional undertaking.

#### **Analysis And Determination.**

12. Upon consideration of the Originating Summons filed herein, the affidavit filed in support thereof, the replying by the defendant and the written submissions by Counsel for the parties, the issues that arise for determination are –
  - i. Whether the subject irrevocable professional undertaking dated 21<sup>st</sup> June 2024 was conditional; and
  - ii. Whether the defendant should be compelled to pay the plaintiffs Kshs. 8,577,133.74.

#### **Whether the subject irrevocable professional undertaking dated 21<sup>st</sup> June 2024 was conditional.**

13. Upon reviewing the annexures attached to the plaintiffs' affidavit in support of the instant Summons, it is clear that the defendant acting in its capacity as a law firm, issued the plaintiffs with an irrevocable professional undertaking dated 21<sup>st</sup> June 2024, in which it undertook to ensure payment of Kshs.8,577,133.74 within two working days from the date of signing the consent in the matters referenced thereunder. Notably, the defendant has asserted that the undertaking was conditional



upon the availability of funds in the garnisheed accounts. However, a closer examination of the said undertaking reveals that it expressly provides–

1. That we hereby irrevocably undertake that we shall ensure the payment of Kshs.8,577,133.74 in the following matters ...
  2. That the said sum shall be paid to the following accounts(s) within two (2) working days from the date of signing the consents in the subject matter herein...
  3. That this professional undertaking will remain in force until full compliance and settlement of the above sum by the judgment debtor.
  4. That this undertaking shall be governed by the Laws of Kenya.
14. From the above terms, it is my finding that the professional undertaking dated 21<sup>st</sup> June 2024 as issued by the defendant was not anchored on any condition(s), thus based on its wording, it was unconditional.

**Whether the defendant is in breach of the irrevocable professional undertaking dated 28<sup>th</sup> September, 2018.**

15. This Court’s jurisdiction to enforce a professional undertaking is derived from the provisions of Order 52 Rule 7 of the Civil Procedure Rules, 2010 which states 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.
16. The Court of Appeal, in the case of Harit Sheth T/A Harit Sheth Advocate v KH Osmond T/A KH Osmond Advocate (supra) set out the nature of an Advocate’s Professional Undertaking and its consequences by stating as hereunder -

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.

17. The defendant opposed the Summons herein on grounds inter alia, that it is directed at the wrong party, arguing that a professional undertaking can only be enforced against an individual Advocate, not a law firm. The defendant cited Clause 113 of SOPPEC-9, and contended that enforcement of a professional undertaking must be against a natural person, and since the defendant herein is a law firm, the subject undertaking cannot be enforced without violating Mr. Mwashimba’s right to be heard.



18. It is clear from the consent of the subject professional undertaking that it was not issued by Mr. Mwashimba personally, but by the law firm of Olubayi Mwashimba Advocates LLP. The introductory paragraph of the subject undertaking reads as hereunder –

We hereby give our firm's irrevocable and unconditional undertaking in the following terms.  
(Emphasis added).

19. It is further worthy noting that the undertaking was executed on behalf of the law firm of Olubayi Mwashimba Advocates LLP, and it bears the firm's official stamp on its face. In the case of Fidelity Commercial Bank Limited v Onesmus Githinji & Company Advocates [2013] eKLR, the Court cited from The Encyclopaedia of Forms and Precedents at paragraph 30 which states as hereunder on the issues of liability and ambiguity of a professional undertaking-

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 Counsel 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. (Emphasis added).

20. Bearing in mind the terms of the undertaking given, I am not persuaded by the defendant's claim that the subject professional undertaking was drafted by the plaintiffs, particularly since it was executed by the defendant and not the plaintiffs. It is therefore my finding that having agreed to give an unconditional irrevocable professional undertaking in its own name, the defendant cannot now renege on the same and challenge that these proceedings by asserting that it lacked the capacity to issue the undertaking or to be sued for its enforcement.
21. I hold that it is improper for a party to knowingly engage in wrongful conduct and then attempt to evade liability by relying on that very wrongdoing. It is my finding that this suit has been properly brought against the correct party being the law firm of Olubayi Mwashimba Advocates LLP, which issued the plaintiffs with the unconditional irrevocable undertaking dated 21<sup>st</sup> June 2024. As such, the professional undertaking is enforceable against the defendant law firm.
22. The defendant in its attempt to challenge the proceedings herein argued that under the terms of the subject professional undertaking, its obligation was merely to facilitate payment by its client, not to make payment directly from the firm or its partners. It is however undisputed that the plaintiffs relied on both the unconditional irrevocable professional undertaking and the written Settlement Agreement both dated 21<sup>st</sup> June 2024 to mark the garnishee applications as settled.
23. It is indeed noteworthy that the professional undertaking in question clearly states that the defendant law firm irrevocably undertook to ensure the payment of Kshs.8,577,133.74. Furthermore, it specifies that the said amount was to be paid into designated account(s) within two (2) working days from the date the consent in the referenced matters were signed. Based on this, it is my finding that by unconditionally committing to ensure that payment was effected by its client, the defendant assumed responsibility for guaranteeing that the plaintiffs would receive the stated amount within the specified timeframe, failure to which, the defendant would be personally held liable for the debt. I do not agree with the defendant that the terms of the subject undertaking were unclear and/or ambiguous.



24. I am cognizant of the provisions of Clause 130 to 133 Code of Standards of Professional Practice and Ethical Conduct published under Kenya Gazette Notice No. 5212 dated 26<sup>th</sup> May 2017 which defines and discusses the question of professional undertaking as follows -

130. SOPPEC-9 The Advocate is under a duty to honour any professional undertaking given in the course of his/her practice in a timely manner. The obligation to honour a Professional undertaking remains until the undertaking is performed, released or excused. Failure to honour an undertaking is professional misconduct.

Professional undertakings:

131. 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 profession 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.

132. Rationale for the Standard: The effectiveness of undertakings given by the Advocates depends on the confidence and belief that a party has that reliance can be placed on the undertaking. The Advocate's failure to honour the undertaking undermines such confidence and is detrimental to the client's interests. Moreover, a breach of a professional undertaking adversely affects the Advocate's reputation as well as the reputation and trustworthiness of the legal profession as a whole and potentially can jeopardize legal transactions.

133. A professional undertaking is enforceable against the Advocate personally and therefore the Advocate must exercise care when giving and accepting an undertaking, Care requires that the Advocate observes the following principles in giving an undertaking:

- a. Obtain the client's express authority to give it;
- b. Give the undertaking in writing and, where given verbally, reduce it into writing as soon as reasonably practicable thereafter to avoid misunderstanding as regards the interpretation to be given to the undertaking,
- c. Only give an undertaking which the Advocate has full control over the ability to fulfil
- d. Neither give nor accept an undertaking which, to the Advocate's knowledge, the Advocate giving the undertaking has no means with which to fulfil it;
- e. Where the Advocate does not intend to accept personal responsibility for the fulfilment of the undertaking make this clear in the terms of the undertaking given;
- f. Exercise diligence when accepting an undertaking from an Advocate.

25. In light of the above, and as rightly noted by the plaintiffs, Advocates are obligated to fulfil any professional undertaking made in the course of their legal practice promptly. Further, this obligation remains in force until the undertaking is either fulfilled, formally withdrawn, or lawfully discharged. The Court of Appeal in the case of Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment



Limited (supra), addressed the issue of a sanctity of professional undertaking in the legal profession as follows -

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.

26. The defendant herein has neither claimed nor demonstrated that it lacked authority to issue the subject professional undertaking to the plaintiffs. Additionally, the undertaking does not contain any express disclaimer indicating that the defendant does not intend to assume personal responsibility for its fulfillment. The defendant has also failed to demonstrate that any part of the amount it committed to ensure payment of, has been paid to the plaintiffs. Furthermore, this Court notes that the subject professional undertaking has neither been fulfilled nor formally withdrawn, the defendant has not been legally released from it, and the time within which the defendant was to fulfill it has since lapsed, and it is not contingent upon the fulfillment of any conditions.
27. In the sum, it is my finding that the defendant is in breach of the unconditional irrevocable professional undertaking dated 21<sup>st</sup> June 2024.
28. The upshot is that the Originating Summons dated 8<sup>th</sup> July 2024 is merited and it is allowed as prayed. The defendant is hereby compelled to comply its written professional undertaking within twenty-one (21) days from today. Costs are awarded to the plaintiffs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:-

Mr. Chihilu holding brief for Mr. Kibathi for the plaintiffs/applicants

Mr. Nzioki for the respondent

Ms B. Wokabi - Court Assistant.

