



Francis Omondi p/a Omondi & Company Advocates v Ogutu & 2 others (Miscellaneous Civil Application E025, E026 & E027 of 2021 (Consolidated)) [2024] KEHC 6652 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6652 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS CIVIL APPLICATION E025, E026 & E027 OF 2021 (CONSOLIDATED)**

WM MUSYOKA, J

JUNE 6, 2024

BETWEEN

FRANCIS OMONDI P/A OMONDI & COMPANY ADVOCATES ... APPELLANT

AND

ELIZABETH OTUKA OGUTU 1ST RESPONDENT

REGINALD OMBITA DIMO 2ND RESPONDENT

DOROTHY OUMA OGUTU 3RD RESPONDENT

(An appeal arising from orders made in the ruling of Hon. T Madowo, Deputy Registrar/Taxing Officer, made herein on 5th October 2023)

JUDGMENT

1. The appeal herein arises from a decision of the taxing officer, made herein on 5th October 2023. The grounds of appeal revolve around the taxing officer not escalating the application to the Judge, upon finding that she had no jurisdiction over it; the taxing officer purporting to discharge Ibrahim Dayib & Company, Advocates, and Diana Njambi Waititu from the professional undertaking dated 15th November 2021, when she had no jurisdiction; the taxing officer predicating the claim by the appellant against Ibrahim Dayib & Company, Advocates and Diana Njambi Waititu on the relationship between the said Advocates and the respondents herein; the taxing officer made orders which rendered her orders of 1st November 2022 otiose and sterile; and that the order by the taxing officer would render professional undertakings by Advocates worthless, thus promoting impunity.
2. The impugned orders, of 5th October 2023, which form the basis of the appeal, were made on an application dated 20th January 2023, for 3 principal orders: leave for the firm of Ibrahim Dayib & Company, Advocates to cease acting for the respondents herein, unconditional discharge of the



said firm from the professional undertaking dated 15th November 2021 and an order directing and compelling the appellant to recover his fees directly from the respondents herein.

3. The background is that the appellant previously acted for the respondents herein, in 3 separate suits that had been filed at the Busia Chief Magistrate's Court, being Busia CMCCC Nos. 410, 412 and 413 of 2015. The relationship between the Advocate and his clients soured, and the clients engaged another firm of Advocates to take over the matters. That is how Ibrahim Dayib & Company, Advocates, came into the picture. The appellant then filed proceedings to recover his fees, from his former clients, being Busia HC Miscellaneous Causes Nos. E025, E026 and E027 of 2021. The Advocate-client bills of costs were taxed, against the clients, the respondents herein, at Kshs. 79,315.00, Kshs. 63,380.00 and Kshs. 63,915.00, respectively, making a total of Kshs. 206,610.00. The 3 taxation causes were handled together, under Busia HC Miscellaneous Cause No. E025 of 2021, although no consolidation order was made. An application was filed, dated 4th April 2021, for enforcement or recovery of the taxed amounts. That application was disposed of vide a consent that was recorded in open court on 27th October 2021. The handwritten record of the terms of that consent are not clear, but the written consent order, purportedly extracted from that record, indicates that the taxed Advocate-client costs were to be paid in monthly instalments, and the Advocates for the respondents herein were to give a professional undertaking, that the sums due would be paid in full. Diana Njambi Waititu, of Michael Daud & Associates/Ibrahim Dayib & Company, Advocates, then gave that professional undertaking, by a letter, undated, exchanged between the parties. It was an irrevocable professional undertaking that the respondents would pay the total taxed costs in full, and that the professional undertaking was to remain in force until the said amounts were fully settled. The professional undertaking was given personally by Diana Njambi Waititu, Advocate.
4. Thereafter, the taxing officer, by an order made on 1st November 2022, on applications dated 4th April 2022 and 8th July 2022, directed Diana Njambi Waititu to honour her professional undertaking, by paying the amounts due within 60 days. Subsequently, the application dated 20th January 2023 was filed, and the court allowed it, by permitting the firm of Ibrahim Dayib & Company, Advocates, to cease acting for the respondents, and thereby releasing them from the professional undertaking, on the basis that the Advocate-client relationship had broken down, hence the foundation for the professional undertaking had been lost. The appellant was directed to recover his dues from his former clients, the respondents herein. The ruling of 5th October 2023 also dismissed an application, dated 7th February 2023, which had sought that the order of 1st November 2022 be enforced.
5. Directions were given, on 31st January 2024, at the prompting of the parties, for canvassing of the appeal by way of written submissions.
6. In his written submissions, the appellant argues that the dismissal of the application, dated 7th February 2023, was contradictory, in the sense that the taxing officer said she could not grant orders to enforce orders she had made earlier. He submits that when the taxing officer came to the conclusion that she had no jurisdiction over that application, then she should have referred it to a Judge, instead of dismissing it. On the professional undertaking, the appellant argues that the point for determination is whether a court can release an Advocate from his professional undertaking. He cites *Warubiu K'Owade & Ng'ang'a Advocates vs. Mutune Investment Limited* [2018] eKLR (Visram, Warsame & Mohammed, JJA), to submit that professional undertakings are enforced to preserve the honour of the Advocate, regardless of how painful it is. He submits that the instant professional undertaking was irrevocable, and it was unequivocal that it was to subsist until the outgoing Advocate was paid in full, and it was not dependent on the incoming Advocates continuing to represent the clients. He cites *Alex Karanja Ndung'u p/a Alex Karanja & Company, Advocates vs. Benjamin Mwikya Musyoki p/a Musyoki & Company, Advocates* [2012] eKLR (Odunga, J), to argue that by giving the professional



- undertaking, the Advocate takes a risk, and that no matter how onerous it becomes, the obligation to honour it remains.
7. He submits that the enforcement procedure is for the court to order the Advocate to honour the professional undertaking within a specified period of time, failing which an enforcement order would be made. He submits that that was done, vide the order of 1st November 2022, and what remained was the order of enforcement. He relies on *Musti Investment Limited vs. Moses Kibathi t/a Osoro Chege Kibathi & Company, Advocates* [2019] eKLR (Tuiyott, J), to make the point that once a professional undertaking is given, the giver must discharge it, or make an enforcement order. He submits that the taxing officer did not base herself on any law, when she discharged the Advocate from her obligations, and argues that the discharge of an Advocate, from his professional undertaking, on the basis that they had ceased to act, defeats the essence or concept of professional undertaking. He submits that the undertaking was independent of the relationship between the Advocate and the client, for it is between the Advocates. He cites *Nelson Andayi Havi t/a Havi & Company, Advocates vs. Jane Muthoni Njage t/a JM Njage & Company, Advocates* [2015] eKLR (Gikonyo, J) and *Daniel Ochieng Ogola t/a Ogola Okello & Company, Advocates vs. Joel Kyatha Mbaluka t/a Mbaluka & Associates, Advocates* [2020] eKLR (Muigai, J), to argue that the professional undertaking is enforced as a contract on its own, between the Advocates, and separate from the contracts with their clients. He submits that the professional undertaking was not predicated on the contract between him and the respondents, nor between Ibrahim Dayib & Company, Advocates, and the respondents.
 8. The respondents were not party to the professional undertaking, and, therefore, to the applications which led up to the impugned orders, neither are they parties to the instant appeal. The written submissions in response were, therefore, filed by the other party to the dispute around the professional undertaking, Ibrahim Dayib & Company, Advocates, and Diana Njambi Waititu. They submit that the context of the professional undertaking was litigation, and not a conveyancing or commercial transaction. It is argued that by giving the professional undertaking, the firm or the Advocate in question did not take over the debt of the respondents, and did not seek to indemnify the respondents, in the event of a breach. They argue that the appellant did not appeal the ruling of 1st November 2022, and, therefore, he had submitted to the jurisdiction of the taxing officer. It is submitted that the taxing officer had jurisdiction to make the orders that she made on 5th October 2023, and section 63(e) of the *Civil Procedure Act*, Cap 21, Laws of Kenya, Order 49 of the *Civil Procedure Rules, Global Multimedia International Ltd vs. Ara Media Services and others* [2006] EIZT-IC 3612 (*The Chancellor*) and *Njoroge & another vs. Njoroge & another* [2021] KECA 258 (KLR)(Nambuye, JA) are cited.
 9. I believe that there is only one issue for determination. The rest are secondary. The one issue is whether a professional undertaking, made by an Advocate, can be terminated by the said Advocate merely ceasing to act for the client, in respect of whom he gave the professional undertaking. There is ample caselaw on what constitutes a professional undertaking by an Advocate. It binds the Advocate, and not the client. It is a matter between the 2 Advocates, or sets of them, involved, and it has nothing to do with the relationship between the Advocates and their clients. The courts have been clear, that at the time the professional undertaking is given, there must be an Advocate client relationship. Secondly, the Advocate or Advocates giving the professional undertaking would be exposing themselves to a risk, which they cannot wriggle out of when the professional undertaking becomes onerous or burdensome. See *Harit Sbeth t/a Harit Sbeth, Advocate vs. KH Osmond t/a KH Osmond, Advocate* [2011] eKLR (Omolo, Bosire & Waki, JJA), *Waruhiu K'Owade & Ng'ang'a Advocates vs. Mutune Investment Limited* [2018] eKLR (Visram, Warsame & Mohammed, JJA), *Mohammed Muigai, Advocates vs. Daniel Orange & Company, Advocates* [2020] eKLR (Okwany, J),



10. I believe the words of the Court of Appeal, in *Harit Sheth t/a Harit Sheth, Advocate vs. KH Osmond t/a KH Osmond, Advocate* [2011] eKLR (Omolo, Bosire & Waki, JJA), best capture the essence and effect of a professional undertaking, where it was said:

“One last point we need to comment on is the submission by Mrs. Rashid, that the appellant and his client should have followed the debtor, meaning Banita Sisal Estate, to recover the money it owes. In her view this case is peculiar and the Court should depart from the usual practice of enforcing professional undertakings. With due respect to the learned counsel. A professional undertaking is given 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 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.”

11. Once a professional undertaking is given, particularly in such terms as the instant one, which was said to be irrevocable, the Advocate giving it cannot walk away from it. He must honour the same, by doing that which he undertook. He should not look up to his client. He should honour the professional undertaking first, and thereafter pursue his client. It is emphasised in the above decision, and the others, that an Advocate who gives a professional undertaking takes a risk, of his client defaulting, and thereby exposing himself to liability on the professional undertaking. That is what happened here. Diana Njambi Waititu, by giving the professional undertaking, with respect to her clients settling the taxed costs in instalments, until full settlement, took the risk that her clients would default, in which case she would be liable to pay whatever was due from them. It appears that they defaulted, and she became liable to pay, as per her professional undertaking, hence the orders that the taxing officer made on 1st November 2022.
12. I have read the impugned ruling, and the submissions by Ibrahim Dayib & Company, Advocates. With respect, there is misapprehension of how a professional undertaking works. It is argued that an Advocate, by giving the professional undertaking, does not takeover or inherit the debt of his client, and does not commit to pay that debt in the event of default. It is true, that by giving the professional undertaking the Advocate is not inheriting or taking over the debt of his client, or committing to indemnify the other party in the event the client defaults, but the effect is similar. The Advocate, by giving the professional undertaking, that his client would do a particular thing, puts himself in a position where he may be required to do that which his client is supposed to. He binds himself, to ensure that his client does what he is supposed to do. There are consequences to that bond. It is not an empty bond or undertaking or promise. The consequence would flow from the default, yet the default would not be by the Advocate, but his client. It is about the Advocate's honour. He gives a promise, upon which his colleague forebears from doing something. That promise is actionable upon. The action is not against the client, but against the maker of the promise, the Advocate. So, the argument that it was not his debt, he did not inherit it, and he should not be expected to pay it, is hollow. It is a risk the Advocate takes, and he must be prepared for the consequences.



13. There other issue that the taxing officer and Ibrahim Dayib & Company, Advocates, appear to latch on is the fact that there must exist an Advocate-client relationship. It is true, there must exist such a relationship. That is as at the time the professional undertaking is given. It does not matter that the relationship is subsequently terminated. The honouring of the professional undertaking is not contingent on the subsistence of the Advocate-client relationship. It is independent of it, and that is why the courts have said that it is a contract between the Advocates, which is separate from that between them and the client or clients. The termination of the Advocate-client relationship has no consequence on the professional undertaking. It does not release the Advocate from his bond. As a matter of public policy, if that were to be allowed, then the essence of the professional undertaking would be lost, for Advocates would terminate the professional relationship at will, as soon as it becomes clear that their clients would default, or as soon as the professional undertaking becomes onerous or burdensome.
14. Ibrahim Dayib & Company, Advocates, have sought to create a distinction between professional undertakings given in litigation, and those given in commercial and conveyancing transactions. They have cited no authority, whether statutory or caselaw. I am not aware of one myself. There is no such distinction. A professional undertaking is just that, a professional undertaking, whether made with respect to litigation, or in commercial and conveyancing transactions. It is about promises by one Advocate to another, concerning their clients performing some obligation. It matters not whether that obligation arises within the context of litigation, or commercial and conveyancing transactions.
15. The conclusion to draw from the above discussion is that the firm of Ibrahim Dayib & Company, Advocates, was at liberty to withdraw from acting for the respondents herein. That was within the rights of the law firm, and the taxing officer quite properly allowed the firm to cease acting. However, the act of its ceasing to act for the respondents did not release Diana Njambi Waititu from her professional undertaking. She remained bound by its terms. As the fact of the firm of Ibrahim Dayib & Company, Advocates, ceasing to act for the respondents, did not release Diana Njambi Waititu, from the professional undertaking, it was wrong for the taxing officer to purport to release her from it, for there was no jurisdiction for the taxing officer to do so, even in exercise of the inherent power of the court or the application of the oxygen rule, and it was equally erroneous of her to direct the appellant to pursue the respondents instead. Diana Njambi Waititu is bound by her professional undertaking, and going by the order of 1st November 2022, which is still subsisting, as the taxing officer did not fiddle with it, in her ruling of 5th October 2023, the appellant is entitled to an order for enforcement of the said professional undertaking against Diana Njambi Waititu.
16. There could be an inclination to think that the doctrine of impossibility or frustration could apply to the instant situation, on the basis that the Advocate-client relationship between Ibrahim Dayib & Company, Advocates, or Diana Njambi Waititu, had broken down, and was no longer existing, in view of the order of 5th October 2023, and going by the remark in *Harit Sheth t/a Harit Sheth, Advocate vs. KH Osmond t/a KH Osmond, Advocate* [2011] eKLR (Omolo, Bosire & Waki, JJA), that the professional undertaking is based on an Advocate-client relationship. It could be argued that the breakdown of the relationship between Advocate and client was a frustrating circumstance. See *Davis Contractors Ltd vs. Fareham UDC* [1956] AC 696 (Viscount Simonds, Lords Morton, Reid, Radcliffe & Somervell), *Gimalu Estates Limited & 4 others vs. International Finance Corporation & another* [2006] eKLR (Emukule, J), *Kenya Airways vs. Satwant Singh Flora* [2013] eKLR (Maraga, M’Inoti & Mohammed, JJA) and *Swing Limited vs. Housing Finance Company of Kenya Limited* [2018] eKLR (Aburili, J). The doctrine of frustration has no application to these set of circumstances. The arrangement, that is the professional undertaking, although founded on the Advocate-client relationship, is not an arrangement between the Advocate and his client, but between the Advocates involved in the matter or the transactions, a contract separate from that between Advocate and client.



Once the professional undertaking is given, whatever happens to the relationship, thereafter, would have no effect, whatsoever, on the obligation to honour the professional undertaking, hence the issue of frustration or impossibility, under those circumstances, would not arise.

17. In the end, I find merit in the appeal herein, and I allow it, in the terms proposed in the memorandum of appeal, dated 9th October 2023. The appellant shall have the costs of this appeal, to be paid by Diana Njambi Waititu. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 6TH DAY OF JUNE 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Omondi, Advocate, the appellant, in person.

Mr. Hosea, instructed by Ibrahim Dayib & Company, Advocates for Diana Njambi Waititu.

