



**Kimeto & Associates Advocates v Mungai & another (Miscellaneous Application E094 of 2024)
[2024] KEHC 11115 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E094 OF 2024
PM MULWA, J
SEPTEMBER 19, 2024**

BETWEEN

KIMETO & ASSOCIATES ADVOCATES APPLICANT

AND

KIBE MUNGAI 1ST RESPONDENT

KINOTI & KIBE COMPANY ADVOCATES 2ND RESPONDENT

RULING

Originating Summons

1. The applicant instituted this matter through an Originating Summons (OS) dated 27th February 2024 under Sections 51(1), 55 of the *Advocates Act*, Order 37 Rule 1 of the *Civil Procedure Rules* and Sections 1, 1A and 3A of the *Civil Procedure Act*, seeking:-
 - A. An Order for the enforcement of an irrevocable professional undertaking against KIBE Mungai And Kinoti Mbobua advocates of the High Court of Kenya and the firm of Kinoti & Kibe Co. Advocates given on the 31st of August 2023 to the Applicant, in the following terms:-
 1. That the respondents jointly and severally do pay the sum of Kshs. Sixty Million Shilling (Kshs. 60,000,000/-) to the Applicant settlement against Mumias Sugar Company Limited in consideration of the withdrawal of *Insolvency Petitions No. E004 and E007 of 2019* aforementioned.
 2. That the respondents jointly and severally do pay on behalf of the applicant Advocates M/s Kimeto & Associates Advocates any taxed costs concerning the insolvency petitions aforementioned and any appeal arising therefrom.



3. That the respondents jointly and severally shall transfer by RTGS the sum of Kshs. Sixty Million Shilling (Kshs. 60,000,000/-) to the applicant Advocates M/s Kimeto & Associates Advocates within one hour upon confirmation that the Notices of Withdrawal of *Insolvency Petitions No. E004 of 2019 and E007 of 2019* have been fully filed.
 4. That the respondents jointly and severally shall maintain absolute confidentiality in respect of the discussions aforementioned and the terms upon which the insolvency petitions aforementioned shall be withdrawn.
 5. That the respondents jointly and severally shall observe and maintain good faith and bona fides concerning any outstanding issues arising from the settlement and withdrawal of the insolvency petitions aforementioned,
- B. Any other Orders that this court may deem fit and just to grant.
- C. The costs of this suit.

Application

2. The respondents filed a Chamber Summons dated 16th April 2024, made under Order 37 Rule 18 and 19 of the *Civil Procedure Rules*, seeking that the proceedings be continued as if the cause had commenced by filing a plaint and directions be given.
3. The application is premised on the grounds on its face, the supporting affidavit of Kibe Mungai. In summary, the grounds are that:-
 1. The application before this Court raises contentious issues that can only be determined through a trial so that all issues relevant to the matter can be properly tried.
 2. The respondents do not agree to the correctness and sufficiency of the facts set forth in the originating summons and affidavits filed by the Applicants.
 3. The nature of these issues is contentious and for trial:-Whether the respondent fulfilled his obligation under the Professional Undertaking dated 31st August 2023 Whether the respondent was subsequently discharged from any further obligations owing to the applicant's repudiation of the Professional Undertaking and Whether the applicants having refused what they called 'dirty money' and having stated that they were no longer interested in pursuing any further negotiations can apply to enforce an undertaking they repudiated.

Preliminary Objection

4. In response, the applicant filed a notice of preliminary objection (PO) dated 16th April 2024 on the grounds that:
 1. The application is fatally and incurably defective for want of substance and compliance with the relevant rules of procedure and should therefore be dismissed in limine with costs.
 2. The application offends the mandatory provisions of Order 52 Rule 7(1) of the *Civil Procedure Rules* that establishes a mandatory procedure for enforcement of professional undertakings.
 3. The application proceeds on an incurable misconception that the existence of a valid, unequivocal, irrevocable and unconditional professional undertaking issued by the



respondents to the applicant and which has not been disputed can be enforced by way of a Plaintiff.

4. By undertaking various stalling tactics, the respondents are intentionally delaying the hearing of the Originating Summons.
5. The application is otherwise an abuse of the Court process brought in bad faith to scuttle the completion of this summary process and is merely intended to vex the Court and to delay and clog the processes of this Court.

Analysis and determination

5. I have considered the respondents' application, the grounds, the PO and the submissions. The issues are whether the application offends Order 52 Rule 7(1) of the *Civil Procedure Rules* and whether the respondents have made a case for the proceedings be continued as if the cause had commenced by filing a plaintiff.
6. The applicant submitted that the OS had already been heard by Hon. Mong'are J. who directed that the respondents file their response within 7 days from 29th February 2024. She faulted the respondents for filing the instant application instead of filing their written submissions to the OS. She thus urged the Court to dismiss the respondents' application which she termed a ploy to delay the hearing and determination of the OS.
7. The respondents however blamed the applicant for being presumptuous and filing submissions on the OS without directions from the Court. They highlighted that their replying affidavit was filed in time and asserted that due process must be followed. They also denied that their application intended to delay the proceedings.
8. I note from the record that the applicant filed the OS on 27th February 2024 under certificate of urgency. On 29th February 2024, Hon. Mong'are J. directed that the OS be served upon the respondents within 7 days and be mentioned for directions before Hon. Mabeya J., the Presiding Judge of the Commercial and Tax Division on 11th March 2024. On 13th March 2024, Hon. Mabeya J. allocated the matter to this Court, and directed that the OS be responded to within 21 days or judgment be entered in default. The matter was slated for mention for directions on 18th April 2024.
9. On 18th April 2024, the applicant indicated that the respondents ignored the Court's earlier directions of 29th February 2024 requiring them to file a response to the OS in 7 days. However, she confirmed that the respondents filed a replying affidavit which was served upon her on the 21st day. She then filed a supplementary affidavit, written submissions and a list and bundle of authorities. On 18th April 2024, this Court directed that the application and the PO be heard together by way of written submissions.
10. From my assessment, although the respondents failed to comply with the Court's directions of 29th February 2024, they were afforded another opportunity to file their response within 21 days from 13th March 2023 or judgment entered upon default. It is not disputed that the respondents met the deadline by filing their replying affidavit on the 21st day. There was no substantive hearing of the OS nor directions for parties to file their submissions on the OS. Therefore, I am inclined to agree with the respondents that due process must be followed to safeguard their right to be heard.
11. The applicant contended that the application offends Order 52 Rule 7(1) of the *Civil Procedure Rules* which establishes a mandatory procedure for enforcement of professional undertakings.



12. Order 52 Rule 7(1) of the *Civil Procedure Rules* reads:

“7.

- (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.”

13. The respondents however argued that there is a misapprehension that Order 52 exists in isolation. They contended that like any other proceedings, enforcement of professional undertakings is subject to Order 37 Rule 19 of the *Civil Procedure Rules* which stipulates that no OS can be heard before directions are given.

14. Order 37 provides instances when the court may be moved through Originating Summons, returnable before a Judge sitting in chambers. Order 37 Rule 19 reads:

“19.

- (1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.
- (2) Where the court makes an order under sub-rule (1), Order 11 shall apply.
- (3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.
- (4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under sub-rule (1).”

15. Sir Charles Newbold in the East African Court of Appeal case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, observed that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing



but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

16. The respondents have sought that the OS proceedings be continued as if the cause had commenced by filing a plaint as allowed under Order 37 Rule 19. This is a matter of the Court’s discretion under Order 37 Rule 19 quoted above. Guided by the above case, I find that the applicant’s PO cannot stand as what is sought is the exercise of judicial discretion. Accordingly, the PO is dismissed.
17. I now move to the issue of whether the proceedings be continued as if the cause had commenced by filing a plaint and directions be given. The applicant contended that there are no issues that are disputed to warrant the proceedings to continue as the respondents suggest. She pointed out that in their replying affidavit, they have admitted that the professional undertaking was issued.
18. On the other hand, the respondents asserted that the OS is contested and that there are issues regarding whether the respondent fulfilled his obligation under the professional undertaking dated 31st August 2023, whether the respondent was subsequently discharged from any further obligations owing to the applicant’s repudiation of the professional undertaking and whether the applicant having refused what they called ‘dirty money’ and having stated that they were no longer interested in pursuing any further negotiations can apply to enforce an undertaking they repudiated.
19. As earlier mentioned, the Court’s power under Order 37 Rule 19 is discretionary and must be exercised judiciously. The Court must be satisfied that the matter is controverted. Taking the whole matter into consideration, I am persuaded that the respondents have made out a case for proceedings be continued as if the cause had commenced by filing a plaint.
20. In conclusion, the following orders are issued:
 - a. The preliminary objection is dismissed
 - b. Respondents’ application of 16th April 2024 is allowed.
 - c. Costs to be in the cause.
 - d. Parties to take directions on the hearing and disposal of the OS.

Orders accordingly

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2024.

P. MULWA

JUDGE

In the presence of:

Mrs. Kimetto for applicant

Mr. Gaita for 1st respondent

Court Assistant: Carlos

