



Boi & 2 others v Olewe t/a Victor Otieno & Associates Advocates & 2 others (Civil Suit 128 of 2019) [2024] KEHC 12998 (KLR) (Civ) (24 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12998 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT 128 OF 2019
JN NJAGI, J
OCTOBER 24, 2024**

BETWEEN

**JOEL OGUK BOI 1ST APPLICANT
BENARD NGALA CHWEYA 2ND APPLICANT
MAURICE ARIRO ORIMBO 3RD APPLICANT**

AND

**VICTOR OTIENO OLEWE T/A VICTOR OTIENO & ASSOCIATES
ADVOCATES 1ST RESPONDENT
ULTIMATE ENGINEERING 2ND RESPONDENT
EQUITY BANK LIMITED 3RD RESPONDENT**

RULING

1. The 1st Respondent has filed a Preliminary Objection dated March 6, 2023 based on the grounds that:
 1. The applicants seek to enforce a professional undertaking between an advocate and a party who is not an advocate which goes contrary to the law and established practice that professional undertakings are always between advocates.
 2. The applicants have deliberately concealed to the court in the present application the fact that the professional undertaking that they seek to enforce was contingent on the successful completion of a sale transaction, which transaction was cancelled and consequently the professional undertaking never crystallized.



2. The Preliminary Objection was opposed by applicants vide the written submissions of their advocates dated 20th May 2024 while the 1st respondent supported the Preliminary Objection vide the submissions of his advocates dated 14th December 2023.
3. The advocates for the respondents submitted that this court does not have jurisdiction to delve into matters of professional undertaking which was issued to a non-professional. According to the respondents the enforcement of a professional undertaking by its very nature and definition can only be issued to a fellow professional in the same profession and in the premises a non-professional cannot therefore purport to enforce a professional undertaking. That the applicants are not advocates and therefore are not professionals in the same field. That the application before the court is bad in law and the court lacks jurisdiction to entertain this kind of suit.
4. The advocates for the applicants on the other hand submitted that a Preliminary Objection ought to raise a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct and not contested and cannot be raised if any facts have to be ascertained by perusal of evidence. That the Preliminary Objection herein does not raise pure points of law as the same invites the court to delve into the determination of contested facts, i.e., whether sale transaction was completed or cancelled or crystalized, which is not the providence of a Preliminary Objection. Therefore, that the court should reject the Preliminary Objection. Reliance was placed on what amounts to a Preliminary Objection as stated in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.
5. It was submitted that the argument that a professional undertaking can only be made between advocates is unfounded and contrary to established legal principles. The applicants cited the case of *David Karanja Thuo t/a D.K. Thuo & Company Advocates v Ishvinder Kaur Kaisi Marwa t/a Kaisi & Company Advocates* (2019) eKLR where a professional undertaking was described as follows:

“An undertaking is 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”, but not in the course of his practice, under which the Solicitor...becomes personally bound. An undertaking is therefore a promise made by a solicitor... to do or refrain from doing something. In practice, undertakings are frequently by Solicitors in order to smooth the path of a transaction, or hasten its progress and are convenient methods by which some otherwise problematic areas of practice can be circumvented”.
6. The applicants urged the court to dismiss the Preliminary Objection with costs.

Analysis and Determination

7. I have considered the issues raised in the Preliminary Objection and the submissions by the respective counsels for the parties. The law as far as a Preliminary Objection is concerned is that a Preliminary Objection should only raise pure points of law. The Black’s Law Dictionary defines a Preliminary Objection as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”



8. In the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors* (1968) EA 696 Law JA stated as follows on the subject:

“....A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

9. Sir Charles Newbold P in the same case observed as follows:-

“..... The first matter related 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 facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

10. In the case of *Oraro v Mbaja* [2005] eKLR, Justice Prof J.B Ojwang J. (as he then was), succinctly addressed the issue of preliminary objection as follows:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

11. In the instant application, there are contested fact whether the transaction between the parties amounted to a professional undertaking or not. It is also contested whether there was successful completion of the sale transaction for the professional undertaking to be binding. In that case, the court will have to probe the facts and the evidence so as to make a determination on the two issues. In the circumstances. the application does not raise pure points of law. The arguments raised have to be proved through evidence, which removes the application from the providence of a Preliminary Objection. The argument by the Applicants that the application by the 1st respondent does not raise pure points of law is thereby upheld. Consequently, the application is dismissed with costs to the Applicants.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr Githinji for Applicants

Mr Osiemo for 1st Respondent

Court Assistant: Amina



30 days Right Appeal

