



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariuki v Bill Simbah & Associates Advocates (Civil Suit  
E203 of 2022) [2023] KEHC 4076 (KLR) (Civ) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4076 (KLR)

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

**CIVIL**

**CIVIL SUIT E203 OF 2022**

**AN ONGERI, J**

**MAY 2, 2023**

**BETWEEN**

**JUSTIN WANGUI KARIUKI ..... APPLICANT**

**AND**

**BILL SIMBAH & ASSOCIATES ADVOCATES ..... RESPONDENT**

**RULING**

1. The application coming up for consideration in this ruling is the Originating Summons dated October 12, 2022 seeking the following orders;
  - i. That this application be certified urgent and the same be heard on priority basis.
  - ii. That the honourable court be pleased to order the Respondent to honour their written professional undertaking dated September 13, 2021 and remit to the applicant, the sum of kshs 3,800,000/= within seven (7) days.
  - iii. That the Respondent be ordered to pay the applicant interest on the sum of kshs 3,800,000/= at the prevailing Commercial Bank lending rate from December 31, 2021 until payment in full.
  - iv. That in default of payment as per orders (ii) and (iii) above, execution do issue against the Respondent.
  - v. That the Respondent to bear the costs of this application.
2. It is based on the ground that the Respondent herein issued to the applicants a written professional undertaking through a letter dated September 13, 2012 to pay the applicants 3,800,000 owed to the



- applicant by the Respondent's client Black Forest House Ltd which debt was apportioned of a total debt of 4,725,000 which has been outstanding since April 2021 to date.
3. The application is supported by the affidavit of Justine Wangui Kariuki sworn on October 12, 2022 in which it is deposed that vide a lease agreement dated September 1, 2019 the late Amos Mwangi Kariuki leased the said property to Black Forest House Ltd who are the respondent's Client. The parties alongside Black Forest House Ltd held various meetings in a bid to have the rent arrears settled pursuant to which vide a letter dated February 8, 2021 the respondent herein guaranteed to settle the debt owed by their client.
  4. The respondent failed to pay the debt of Kshs 3,900,000 as per the Guarantee. She then followed up with the respondent client, Black Forest House Ltd which proposed vide letters dated March 30, 2021 and March 31, 2021 to settle the debt by the end of 2021. As of September 13, 2021 the debt remained unpaid and respondent issued a professional undertaking binding itself to pay the debt by December 31, 2021 on behalf of the client.
  5. Upon reliance on the said undertaking she did not terminate the existing lease agreement between the Late Amos Mwangi Kariuki and Black Forest House Limited and neither did she distress for rent. The respondent has however refused to pay the debt hence the debt accumulated to Kshs 4,725,000 as at March 1, 2022 and his previous counsels wrote several letters to the respondents seeking settlement which were ignored.
  6. The application was opposed by the replying affidavit of William Simba dated November 18, 2022 who indicated that he is also a director of Black Forest House which is a Bakery specializing in cakes and pastries. He indicated that it is not in dispute that the Black Forest House entered into a lease agreement with Amos Mwangi Kariuki. That the Black Forest House was a faithful tenant until March 2020 when business went down owing to the ravaging Covid 19 pandemic that greatly affected the hospitality industry as a result it failed to honor the terms of the lease.
  7. That proposals were made on several occasions in an effort to liquidate the outstanding rent by Black Forest House and the said proposals were pegged on the realization of sale of land proceeds from Malindi, completion of his business transactions and expected increased sales as a result of advertising the business. However, the proposals were not honored as business was also greatly affected in all sectors.
  8. He admitted that he was unable to pay as guaranteed but highlighted that he made the guarantee in his own personal capacity and therefore the firm of Bill Simbah was not involved in the process.
  9. The applicant filed a supplementary affidavit sworn on March 13, 2023 and deposed that a professional undertaking is an unequivocal promise made by a party to another either to do or refrain from doing something or acting in a manner which may prejudice the right of the opposite party, to which liability may attach.
  10. That the respondent in the letter dated October 12, 2022 indicated that he was acting in his capacity as Advocate for Black Forest Limited and undertook to settle their client's debt of Kshs 3.8 Million and the letter cannot be said to have been written by the director of Black Forest House Limited.
  11. It was averred 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 and can therefore be enforced against an advocate independent of the transaction in which the professional undertaking was given.



12. The parties filed written submissions as follows; the applicant in her submission argued that the respondent vide a letter dated September 13, 2021 issued the applicant with a professional undertaking to pay the applicant a sum of Kshs. 3.8 million by December 31, 2021. The subject of the letter constituted an unambiguous, unequivocal and binding promise by the respondent to pay to the applicant the aforementioned sum. The letter indicated that the respondent was acting in his capacity as Advocate of Black Forest House Ltd and therefore the respondent cannot contend that he wrote it in his capacity as a director of the company.
13. The applicant argued that this court has inherent power to enforce the respondent's professional undertaking by ordering the respondent to pay the applicant Kshs 3,800,00 together with interest at the prevailing commercial bank lending rate from December 31, 2021 until payment in full. That Order 52 Rule 7 of the *Civil Procedure Rules* gives the court power to order enforcement of the professional undertaking after giving an opportunity to the advocate to be heard as it provides;

7. Application for order for enforcement of an undertaking [Order 52, rule 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.
  - (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.
14. That The Code of Standard of Professional Practice and Ethical Conduct (SOPPEC) published vide Kenya Gazette Notice No 5212 of May 26, 2017 under clause 9 provides that an advocate has a duty to honor any professional undertaking given in the course of their practice in a timely manner. That further clause 130 to 133 of the SOPPEC provides 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 professional 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;

15. The respondent in the alternative argued in its submission that the letter dated September 13, 2021 is not an undertaking as the same was given in line with the letter dated February 8, 2021. The said letter was written by William Simbah Dhuri in his capacity as a director/ guarantor of Black Forest House Limited. In support it cited *Diamond Star General Trading LLC v Ambrose DO Rachier carrying out business as Rachier & Amollo Advocates [2017] eKLR* it was observed;

' that for a professional undertaking it must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client, it must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client, it must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor, the undertaking must be clear in its terms.'

16. Finally it was contended that the firm of Bill Simbah & Associates did not at any point handle any transaction relating to the lease or otherwise and further that it was not in possession of any fund due and owing to the applicant herein.

17. The sole issue for determination is whether the Respondent is liable to honour the undertaking.

18. I find that the letter dated September 13, 2021 amounts to a professional undertaking which is unequivocal.

19. The Court of Appeal in *Waruhii K'owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] eKLR* said the following as regards the sanctity of Professional Undertakings in the legal profession;

' 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.'

20. I allow the Originating summons dated October 12, 2022 is merited and direct that the Respondent honours the professional undertaking within 60 days of this date
21. Failure to honour the undertaking, the applicant shall be at liberty to enforce the same.
22. The Applicant is granted the costs of the Originating summons.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND DAY OF MAY, 2023.**

.....

**A. ONGERI**

**JUDGE**

**In the presence of:**

..... **for the Applicant**

..... **for the Respondent**

