



**Christine Gathii t/a Kiarie Kariuki & Githii Advocates v Omuga John Otieno
Morris t/a Otieno-Omuga & Ouma Advocates (Civil Suit E215 of 2019)
[2023] KEHC 24653 (KLR) (Commercial & Admiralty) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 24653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL SUIT E215 OF 2019
MN MWANGI, J
JUNE 16, 2023**

BETWEEN

**CHRISTINE GATHII T/A KIARIE KARIUKI & GITHII
ADVOCATES PLAINTIFF**

AND

**OMUGA JOHN OTIENO MORRIS T/A OTIENO-OMUGA & OUMA
ADVOCATES DEFENDANT**

JUDGMENT

1. The plaintiff herein filed an Originating Summons dated 24th May, 2019 brought under the provisions of Order 52 Rule 7 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law seeking the following orders-
 - i. That the defendant be compelled to honour their professional undertaking by paying the sum of Kshs.1,500,000/= to the plaintiff;
 - ii. That the defendant be compelled to pay interest on the same amount from the date of default; and
 - iii. That costs be provided for.
2. The Originating Summons was brought on the grounds on the face of it and a supporting affidavit sworn by Christine Githii, an Advocate of the High Court of Kenya and the plaintiff herein on 24th May, 2016. In response thereto, the defendant filed replying and supplementary affidavits sworn by John Maurice Otieno Omuga, an Advocate of the High Court of Kenya on 27th July, 2020 and 6th October, 2020, respectively.



3. On 7th December, 2021 when this matter came up for mention, the Court directed that the Originating Summons shall be treated as a plaint and the replying affidavit as a defence. Parties were directed to comply with the provisions of Order 11 of the Civil Procedure Rules, 2010. Later, the defendant filed a witness statement and list of documents both dated 7th January, 2022.
4. On 14th July, 2022, directions were given for the parties to file written submissions, which were highlighted on 18th April, 2023. The plaintiff's submissions were filed by the law firm of Kiarie Kariuki & Githii Advocates on 8th September, 2022, whereas the defendant's submissions were filed on 21st September, 2022 by the law firm of Otieno-Omuga & Ouma Advocates.
5. Ms. Githii, learned Counsel and the plaintiff herein submitted that her firm acted for a tenant by the name Qantas Limited in the Business Premises Rent Tribunal (BPRT) Case No. 866 of 2017 in Nairobi in regard to a property known as Nairobi LR No. 1870/11/351, whereas the defendant acted for the landlady by the name Kalpana Shashikant Jai, who was an interested party in the said case. She also submitted that the said case was settled by a consent of the parties dated 27th September, 2018 filed at the BPRT on 28th September, 2018. She stated that in compliance with the terms of the said consent, the defendant herein on 28th September, 2018 issued her with an irrevocable professional undertaking to pay to her firm the sum of Kshs.1,800,000/= within sixty (60) days from 28th September, 2018.
6. She contended that the defendant failed to make the aforesaid payment within the prescribed timelines despite reminders to do so and that on 14th December, 2018, the defendant paid her firm Kshs.300,000/= but failed to pay the balance of Kshs.1,500,000/=, thus prompting the instant suit. It was stated by Ms Githii that there were funds held in the Tribunal pursuant to the consent filed in the BPRT and that on 9th June, 2021, a consent dated 3rd June, 2021 was adopted by Hon. Lady Justice Ngenye providing that the money held by the BPRT in the sum of Kshs.1,500,000/= and previously payable to the defendant and a third-party firm, be released to the plaintiff's firm (bank) account.
7. It was submitted that the BPRT deducted its fees from the said sum of Kshs. 1,500,000/= and released to the plaintiff the sum of Kshs.1,355,580.00. For this reason, the plaintiff's claim is that the deficit of Kshs.144,420.00 retained by the BPRT as Court collection charges ought to be paid by the defendant, who ought to be compelled to pay interest and costs of the suit. Ms Githii posited that the professional undertaking given by the defendant on 28th September, 2018 did not make any reference to the defendant receiving the monies held at the BPRT before he could honour his undertaking.
8. It was stated by Ms Githii that the defendant's argument that the consent dated 3rd June, 2021 altered the terms of the undertaking is not true as the said consent altered only the consent that was filed before the BPRT to the effect that the funds that would have been paid to the defendant were payable to her. She submitted that an undertaking is personal and is an agreement given by a party to be responsible for something, and as such, the defendant herein is not only responsible for the balance of the sum he undertook to pay but also for interest for the delayed payment from the date the said sum fell due until payment. She pointed out that pursuant to the undertaking dated 28th September, 2018, the entire sum of Kshs. 1,800,000/= ought to have been paid on or before 27th November, 2018.
9. She referred to the decisions in *Diamond Star General Trading LLC v Ambrose D.O. Rachier* carrying on business as Rachier & Amollo Advocates [2017] eKLR and *Nelson Andayi Havi & Company v Jane Muthoni Njage t/a J.M. Njage & Company Advocates* [2015] eKLR and submitted that a professional undertaking given by an Advocate is a separate and distinct contract which is enforceable between the parties, and in enforcing the undertaking, the Court is not guided by the considerations of the contract but aims at securing the honesty of its officers.



10. Ms Githii cited Rule 9 of the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016 and stated that the defendant should not have given a professional undertaking if it did not have the means of satisfying it. She prayed for judgment against the defendant for the sum of Kshs.144,420.00 plus interest from 27th November, 2018 until payment in full, interest on Kshs.1,500,000/= from 27th November, 2018 to 26th November, 2021 when the last instalment from the BPRT was released to the plaintiff, and costs of the suit.
11. Mr. Omuga, learned Counsel and the defendant herein submitted that he issued an irrevocable professional undertaking to the plaintiff pursuant to clause 2 of the consent order dated 27th September, 2018 but the said undertaking was conditional upon release of the money deposited by the plaintiff at the BPRT. He further submitted that there was no breach of the undertaking since clause 2 of the consent letter provided a formula for distribution of the money which the plaintiff had deposited at the BPRT, which money could only be released upon presentation of the original receipts which were held by the plaintiff.
12. It was stated by Counsel that in contravention of the provisions of clause 2 of the consent dated 27th September, 2018, the plaintiff proceeded to secure release of an undetermined amount to herself before the release of Kshs. 1,500,000/= being the determined amount, jointly to Lubulellah & Company and Otieno-Omuga & Ouma Advocates. He contended that her actions were irregular since the determined amount ought to have been released first, and the balance to be released to the plaintiff. He stated that he paid the plaintiff Kshs.300,000/= being the difference between the undertaking amount of Kshs.1,800,000/= and the determined amount of Kshs.1,500,000/= and he authorized the plaintiff to collect the balance of the money then lying at the BPRT. Mr. Omuga submitted that on his part, there was no breach of the undertaking he gave to the plaintiff.
13. He submitted that the payment of Kshs.300,000/= made by the defendant to the plaintiff and Kshs.1,500,000/= that the plaintiff received from the BPRT make up the undertaking amount which the defendant was liable to pay to the plaintiff under clause 3 of the consent letter dated 27th September, 2018. He indicated that the amount in respect of which the undertaking was issued was a refund of the rental deposit paid by the plaintiff's client to the defendant's client under a lease, and that the plaintiff is the one who deposited the rent arrears at the BPRT, the plaintiff was the one in possession of the original deposit receipts issued by the BPRT, which receipts had to be returned to BPRT when making an application for release of the deposits. Mr. Omuga stated that the plaintiff secured the release of part of the amount she had deposited at the BPRT leaving a balance of Kshs.1,500,000/=: but she still held on to the original receipts for the said amount. That following a Court order by the High Court, the said balance was released to the plaintiff less Court collection charges of Kshs.144,420.00, which should have come from the total amount so deposited after payment of Kshs.1,500,000/= to the defendant.
14. Mr. Omuga relied on the cases of *Alghussein Establishment v Eton College* [1991] 1 ALL ER 267 and *Dynamic Institute of Management and Accountancy (DIMA) Limited v Apollo Insurance Company Limited* HCCCA No. 18 of 2000 and contended that the circumstances which led to the delay in paying the amount in the undertaking in issue were caused by the plaintiff since she refused to release the original deposit receipts to the defendant to enable him to secure timeous release of the deposit of Kshs.1,500,000/= and prompt payment of the same to the plaintiff. He further submitted that the plaintiff now seeks to benefit from her wrongs, a situation which is not permissible in law, and she is not entitled to any of the prayers sought herein.
15. It was stated by Mr. Omuga that every case is determined on the basis of its own unique facts and circumstances and the circumstances of this case do not permit application of the general principles



upon which professional undertakings are enforced, thus the authorities relied on by the plaintiff are distinguishable from the unique facts and circumstances of this case. He further stated that they are not obligated to refund the plaintiff the said sum of Kshs.144,420.00 deducted by the BPRT as collection charges for reasons that the cash was deposited in Court because the plaintiff's client was in rent arrears.

Analysis And Determination.

16. On consideration of the Originating Summons filed herein, the affidavit filed in support thereof, the replying and supplementary affidavits by the defendant as well as the written submissions by Counsel for the parties, the issues that arise for determination are –
 - i. Whether the irrevocable professional undertaking dated 28th September, 2018 issued to the plaintiff by the defendant was conditional;
 - ii. Whether the consent dated 3rd June, 2021 altered the terms of the irrevocable professional undertaking dated 28th September, 2018;
 - iii. Whether the defendant is in breach of the irrevocable professional undertaking dated 28th September, 2018; and
 - iv. Whether the defendant should pay the plaintiff Kshs.144,420.00 plus interest from 27th November, 2018 until payment in full together with interest on Kshs.1,500,000/=, from 27th November, 2018 to 26th November, 2021 when the last instalment from the BPRT was released to the plaintiff.
17. In the affidavit filed by the plaintiff she deposed that the defendant issued her law firm with a professional undertaking dated 28th September, 2018 to pay the sum of Kshs.1,800,000.00 within sixty (60) days from the date of the undertaking but the defendant failed to make payment of the said amount within the accorded timelines.
18. She averred that the law provides that an Advocate shall not give an undertaking to another Advocate or any other person knowing that they have no means of satisfying the undertaking.
19. The defendant in its replying affidavit deposed that the plaintiff's client was a tenant of the defendant's client in a premise erected on LR. No. 1870/11/351. That it was agreed between the defendant's client and Ecobank Kenya Limited after several years in Court that the said property would be offered for sale by private treaty and the proceeds from the said sale would be used to settle their respective stakes to the said property. The defendant averred that the proposed purchaser wanted to have the suit property in vacant state. As a result, the plaintiff's client filed a suit at the BPRT and obtained ex parte orders injuncting the defendant's client from evicting the plaintiff's client from the suit property and for the plaintiff's client to be depositing monthly rent at the Tribunal.
20. It was stated that later, parties before the BPRT entered into a consent dated 29th September, 2018 which compromised the said suit and provided for a formula for sharing the money which had been deposited at the Tribunal. The defendant further averred that he gave the plaintiff a professional undertaking to pay her law firm Kshs.1,800,000/= being the deposit refundable to her client out of the rent amount the plaintiff's client had deposited at the Tribunal. The defendant stated that securing release of Kshs.1,500,000/= from the BPRT to the defendant's law firm and that of Lubulellah and Associates Advocates took more time than the defendant had anticipated.
21. Further, he was informed by the Court that for a refund to be made, he must submit the original deposit receipts as refunds are made strictly against deposit receipts and deduction of Court collection fees which is equivalent to 10% of the deposit. The defendant stated that he was also informed that



the plaintiff had collected all the money against which she had presented the original receipts. He contended that based on the forgoing, it is only the plaintiff who could have pursued a refund from the BPRT since she was the one in possession of the original deposit receipts.

22. The defendant contended that the plaintiff has so far received from the BPRT an amount in excess of Kshs.1,500,000/= which should have been paid to her out of the rent amount her client had deposited at the Tribunal, and that she has no further claim against him since the amount of Kshs.1,500,000/= received from the Tribunal settled part of what he had undertaken to pay her. He stated that the plaintiff has received a total of Kshs.1,800,000/= having received Kshs.300,000/= from the defendant on 14th December, 2018 and Kshs.1,500,000/= from the Tribunal.

Whether the irrevocable professional undertaking dated 28th September, 2018 issued to the plaintiff by the defendant was conditional.

23. It is not disputed that the defendant gave the plaintiff an irrevocable professional undertaking dated 28th September, 2018 to pay the plaintiff Kshs.1,800,000/= within sixty (60) days from the date of the undertaking, the same being a refund of the security deposit payable by the defendant's client, the landlady to the plaintiff's client, the outgoing tenant.
24. On perusal of the undertaking, it is noted that it was given pursuant to the provisions of clause 3 of the consent dated 27th September, 2018 which states that –
- “That the 1st interested party do refund the deposit of Kenya Shillings One Million Eight Hundred Thousand (Kshs. 1800,000/=) to the tenant through the tenant's Advocates account aforesaid within sixty (60) days from today, with an irrevocable undertaking to this effect being given to the tenant's Advocate by the 1st interested party's Advocates within seven (7) days of today.”
25. It is evident that the defendant misconstrued the terms of his own irrevocable professional undertaking that the undertaking, was conditional upon release of the money deposited at the BPRT to the plaintiff.
26. My finding is that from the wording of clause 3 of the consent dated 27th September, 2018, and the irrevocable undertaking dated 28th September, 2018 by the defendant to the plaintiff, the said undertaking was not hinged on any condition(s), therefore the professional undertaking dated 28th September, 2018 was not conditional.

Whether the consent dated 3rd June, 2021 altered the terms of the irrevocable professional undertaking dated 28th September, 2018.

27. The consent dated 3rd June, 2021 was worded as follows-
- “1) That the entire balance of the rental amount of Kshs. 1,500,000/= deposited by the tenant in Business Premises Rent Tribunal at Nairobi BPRT Case No. 866 of 2017 be released to the tenant's Advocates accounts whose details are...
 2. The consent order dated 27th September, 2018 filed in Nairobi BPRT Case No. 866 of 2017 on 28th September, 2020 (sic) be deemed as varied to the aforestated extent.”
 3. This matter be mentioned in forty-five (45) days for further directions.”



28. It is very clear that the consent dated 3rd June, 2021 varied and/or altered the consent dated 27th September, 2018 filed before the BPRT. The said consent did not however touch and/or allude to the provisions of clause 3 of the consent dated 27th September, 2018 which provided for the defendant to issue the plaintiff with an irrevocable undertaking. Had that been the intention of the Advocates, they would have expressly stated so in the consent dated 3rd June, 2021.
29. This Court therefore finds that the consent dated 3rd June, 2021 did not alter the terms of the professional undertaking dated 28th September, 2018.

Whether the defendant is in breach of the irrevocable professional undertaking dated 28th September, 2018.

30. As reproduced here before, the irrevocable professional undertaking dated 28th September, 2018 issued by the defendant to the plaintiff provided that the defendant shall pay the plaintiff Kshs.1,800,000/= within sixty (60) days from the date of the said undertaking being a refund of the security deposit payable by the defendant's client to the plaintiff's client. For this reason, the defendant ought to have paid the plaintiff the said Kshs.1,800,000/- on or before the 27th of November, 2018.
31. From the pleadings on record, and both oral and written submissions by Counsel for the parties, it is not disputed that as at 27th November, 2018, the defendant had not paid the plaintiff even a shilling towards settlement of the said Kshs.1,800,000/=. If anything, the first payment of Kshs.300,000/= was made on 14th December, 2018.
32. Based on the above analysis, it is this Court's finding that the defendant is in breach of the irrevocable professional undertaking dated 28th September, 2018.

Whether the defendant should pay the plaintiff Kshs.144,420.00 plus interest from 27th November, 2018 until payment in full, together with interest on Kshs.1,500,000/= from 27th November, 2018 to 26th November, 2021 when the last instalment from the BPRT was released to the plaintiff.

33. 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 state 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.”
34. A professional undertaking was defined by the Court in the case of David Karanja Thuo T/a D.K Thuo & Company Advocates v Ishvinder Kaur Kalsi Marwa t/a Kalsi & Company Advocates [2019] eKLR 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.”

35. The defendant contended that pursuant to clause 2 of the consent order dated 27th September, 2018, the plaintiff ought to have waited for the defendant and the law firm of Lubulellah & Company Advocates to secure the release of Kshs.1,500,000/= from the monies deposited by the plaintiff’s client at the BPRT to themselves, before securing the release of the balance thereof to her, since the money to be released to the defendant and the law firm of Lubulellah & Company Advocates was a definite amount unlike the one that was to be released to the plaintiff. He further contended that the sum of Kshs.144,420.00 deducted by the Tribunal as its collection charges ought to have been deducted from the total amount so deposited after payment of Kshs.1,500,000/= to the defendant.
36. On perusal of the consent dated 27th September, 2018, it is evident that clause 2 only provided for release of Kshs.1,500,000/= to the defendant’s law firm and that of Lubulellah & Company Advocates from the monthly rent so far deposited by the plaintiff’s client and the balance thereof was to be released to the plaintiff’s client, through the plaintiff’s law firm. It did not provide for and/or factor in collection charges by the Tribunal and that the same was to be deducted from the Kshs.1,500,000/= or the balance that would be left after releasing Kshs.1,500,000/= to the defendant’s law firm and that of Lubulellah & Company Advocates.
37. I am of the finding that there was no error and/or illegality on the part of the plaintiff by virtue of the fact that she proceeded to secure the release of the balance that would be left after releasing Kshs.1,500,000/= to the defendant’s law firm and that of Lubulellah & Company Advocates, from the monthly rent so far deposited by the plaintiff’s client, before she could secure the release of Kshs.1,500,000/=.
38. Vide the irrevocable professional undertaking dated 28th September, 2018, the defendant undertook to pay the plaintiff Kshs.1,800,000/=. As explained here before, the defendant’s irrevocable professional undertaking was not conditional upon release of the money deposited at the BPRT by the plaintiff, to the defendant’s law firm. It is noted that the defendant has since paid the plaintiff Kshs.1,655,580.00. Kshs.300,000/= which was transferred to the plaintiff on 14th December, 2018 and Kshs.1,355,580.00 which was released to the plaintiff by the Tribunal. As a result, this Court finds that there is still a balance of Kshs.144,420.00 which is still due and owing to the plaintiff by the defendant.
39. On the issue of interest, the Court in the case of Nelson Andayi Havi t/a Havi & Company Advocates v Jane Muthoni Njage t/a J.M Njage & Company Advocates (supra) held that –

“It may be said that, conduct such as being complicit in or deliberately withholding Plaintiff’s money would earn the advocate penalty in form of interest for having denied the Plaintiff his money. See the case of Naphatali Paul Radier v David Njogu Gachanja HCCC No.582 of 2003 (OS) where Justice H.P.G Waweru held as follows:-

“The Defendant has withheld the Plaintiff’s money from August 2002. Justice demands that he pays it with interest. As no particular rate of interest was contracted, I shall award at court rates”.



40. Similarly, in the case of Nderi & Kiingati Advocates v Kiruti & Company Advocates [2021] eKLR Muchemi J. when dealing with a similar issue held as follows-

“It is trite law that so long as monies that was undertaken to be paid remains unpaid, interest on it for the unpaid period provided.”

41. Since the defendant in his irrevocable professional undertaking dated 28th September, 2018 undertook to pay the plaintiff Kshs.1,800,000/= on or before 27th November, 2018 and he failed to do so, the plaintiff is entitled to interest on Kshs.1,500,000/= from the date of default until 2nd June, 2021. I say so because on 3rd June, 2021, a consent was filed to the effect that the balance of Kshs.1,500,000/= deposited in Nairobi BPRT case No. 866 of 2017 was to be released to be tenant’s Advocates. By virtue of the said consent, the defendant could not be liable for not honouring the professional undertaking going forward.

42. The upshot is that the Originating Summons dated 24th May, 2019 is merited. It is hereby allowed. The defendant will pay the balance of Kshs.144,420.00 owed to the plaintiff, together with interest from 27th November, 2018 until payment in full. Interest on the sum of Kshs.1,500,000/= will be payable from 27th November, 2018 until 2nd June, 2021. Costs are awarded to plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Watiri h/b for Ms Githii for the plaintiff

Mr. Okuto h/b for Mr. Omuga for the defendant

