



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 17 OF 2017 (O.S)**

**CONRAD MASINDE NYUKURI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ALPHONCE MWAMBO SANGA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**ROBSON HARRIS & CO. ADVOCATES.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SAMMY NYAMAWI RUWA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**CORAM: Hon. Justice Reuben Nyakundi**

**Gicharu Kimani & Associates for the 1<sup>st</sup> Applicant**

**Richard O & Co. Advocates for the 2<sup>nd</sup> Applicant**

**Robson Harris & Co. Advocates for the 1<sup>st</sup> Respondent**

**S Ruwa & Co. Advocates for the 2<sup>nd</sup> Respondent**

**JUDGEMENT**

**Introduction**

This suit was commenced by an Originating Summons dated and filed on 8<sup>th</sup> June 2017 and accompanied by an affidavit sworn on even date by the 1<sup>st</sup> Plaintiff/Applicant herein, Conrad Masinde Nyukuri. It was premised on the provisions of **Order 52 Rule 7 of the Civil Procedure Rules** and other enabling laws. However, the 2<sup>nd</sup> Plaintiff/Applicant later sought and was granted leave to be enjoined in the suit necessitating the filing of an amended Originating Summons dated 24<sup>th</sup> September 2019. The Summons sought for Orders:

- 1. THAT the Respondents to honour the professional undertaking dated 25/04/2012 and be compelled to pay the balance of the purchase price jointly and severally being Kenya shillings 7,197,000 plus interest at commercial rates from the year 2012.**
- 2. THAT costs be in cause.**

The 1<sup>st</sup> Applicant filed a witness statement dated 6<sup>th</sup> May 2019 while the 2<sup>nd</sup> Applicant, Alphonse Mwambo Sanga, swore an affidavit dated 8<sup>th</sup> October 2019 that was filed contemporaneously with the amended Originating Summons on 8<sup>th</sup> October 2019. On 17<sup>th</sup> August 2017, the 1<sup>st</sup> Applicant filed an affidavit sworn by himself on the 10<sup>th</sup> August 2017. Later, the 2<sup>nd</sup> Applicant filed a further affidavit dated 16<sup>th</sup> and filed on 18<sup>th</sup> September 2020.

In response to the suit, on 11<sup>th</sup> March 2020, the 1<sup>st</sup> Respondent filed an affidavit sworn by Chepchirchir Segoo on 10<sup>th</sup> March 2020. The 2<sup>nd</sup> Respondent on his part put in an affidavit in reply to the suit. This was sworn by Sammy Nyamwai Ruwa on 7<sup>th</sup> August 2017. Thereafter, the 2<sup>nd</sup> Respondent filed two witness statements made by Sammy Nyamwai Ruwa and Mwarandu Kitsao Kombe on 10<sup>th</sup> March and filed 11<sup>th</sup> March 2020.

At the conclusion of the hearing and with parties having had their day in court, they retired to file submissions with the 1<sup>st</sup> Applicant filing submissions dated 9<sup>th</sup> February on 16<sup>th</sup> February 2021. The 2<sup>nd</sup> Respondent filed submissions dated 4<sup>th</sup> on the 8<sup>th</sup> March 2021; while the 1<sup>st</sup> Respondent filed submissions dated 14<sup>th</sup> March on 15<sup>th</sup> March 2021.

### **Summary of the case**

The gist of the Applicants' case is that the Respondents issued a professional undertaking dated 25<sup>th</sup> April 2012 in respect of a sale agreement dated 27<sup>th</sup> March 2012 entered into between the 1<sup>st</sup> Applicant as a vendor and Mwarandu Kitsao Kombe and Silas Mwatela Mazera as purchasers. It is contended that the conditions upon which the professional undertaking was predicated had all been met yet despite this compliance, the Respondents had failed to release to the 1<sup>st</sup> Applicant the balance of the purchase price. The Applicants have therefore approached the court to enforce compliance of the said professional undertaking.

The 1<sup>st</sup> Applicant contended that they entered into a sale agreement dated 27<sup>th</sup> March 2012 between himself and Messers Mwarandu Kitsao Kombe and Silas Mwatela Mazera. The 2<sup>nd</sup> Applicant was a witness to the agreement given that he had an interest in the land. He had also consented to the sale.

It was a term of the contract that the purchase price was to be Kshs.15 million, out of which the 1<sup>st</sup> Applicant contended he received the initial deposit and the balance of Kshs.7,197,000/= was to be paid upon the procurement of the completion documents. As per the practice in conveyancing, the 1<sup>st</sup> Applicant averred that he tendered the completion documents to their common advocates, Robson Harris & Company Advocates the 1<sup>st</sup> Respondent.

It was further averred that as is the practice, the advocates gave him a professional undertaking to release the balance upon successful registration and transfer. The property was successfully transferred to the purchaser's names and title was issued and he has learnt that the same had since been subdivided.

However, according to the Applicants, they waited patiently to be paid the balance of the purchase price but to date and despite numerous reminders, they have not received the balance. Upon realizing that the common advocate was not keen on releasing the balance as per the sale agreement, the 1<sup>st</sup> Applicant instructed his advocates then, Messers Katsoleh & Company Advocates, who informed him that the only option was to enforce the professional undertaking. As a matter of courtesy, the advocate wrote a letter to the Respondents on the 15<sup>th</sup> February 2017, beseeching them to honour the undertaking but to date the letter had not been Responded to.

The Applicants vehemently denied the assertions by the 2<sup>nd</sup> Respondent that they had at any time agreed that the sum of Ksh. 4,000,000/= would be withheld by the Purchaser as alleged. That neither the 2<sup>nd</sup> Respondent nor the Purchaser whom the 2<sup>nd</sup> Respondent had called as his witness were privy to whatever agreement the Applicants had entered into with their agent. It was however conceded by the Applicants that while at the time of filing suit, the outstanding balance owed to them was Ksh. 7,197,000/=, on 16<sup>th</sup> November 2017 the 2<sup>nd</sup> Respondent had called the Applicants into his office and paid them a sum of KSh. 2,697,000/= thus leaving a balance of Ksh. 4,500,000/= which had not been paid and remained due and owing.

According to the Applicants, at the time the transaction was completed, the 2<sup>nd</sup> Respondent was still an employee of the 1<sup>st</sup> Respondent and at that juncture the Professional undertaking had already crystallized. Further to the foregoing, it was averred that they were never served with any notice to inform them of the change of advocates. Those documents pertaining to their transactions should not have been released to another advocate without the written consent of the parties and therefore it was a breach of the professional duty of the 1<sup>st</sup> Respondent to have released the documents to the firm of S. Ruwa & Company Advocates and as such they were liable to honour the professional undertaking.

It was averred that the 2<sup>nd</sup> Respondent ought to have verified and confirmed the terms of the sale agreement before proceeding to issue the professional undertaking.

The Applicants admitted that they had entered into an agreement with other interested parties for the disbursement of part of the purchase price but denied the contention that at the time of the transfer, there existed on the property squatters as they had already vacated the property. In any case, it was averred, it was for this reason the sale agreement was clear in one of the clauses that the purchaser, having been afforded the opportunity of viewing and inspecting the property prior to the date of the agreement, shall purchase it as is. The Applicants maintained that they had delivered vacant possession.

In the Applicants' eyes, the 2<sup>nd</sup> Respondent was barred from claiming that he has been unable to discharge his obligation, because at the time he was issuing the undertaking he ought to have known he was in funds and capable of honouring the same. It was argued that in the event the purchaser was of the opinion that the sale agreement was breached, they had every right to seek legal redress as per the agreement and that action would have ultimately discharged the Respondent from the professional undertaking accordingly.

The case was made that the 2<sup>nd</sup> Respondent had failed to discharge his duty in accordance with the law on account of the following:

- a) Proceeding to transfer the property to purchasers' names without been paid the full purchase price.**
- b) Releasing the original title deed to the purchaser for subdivision without having been paid the full purchase price.**
- c) Failure to communicate with the vendor and appraise him of the transaction.**

- d) *As the advocate for both parties, failure to protect the interest of the vendors.*
- e) *Failure to seek their consent or approval before moving their file to his current firm.*
- f) *Failure to obtain written discharge from the firm of Robson Harris before proceeding with the Applicants' file.*
- g) *Failure to disclose whether all the interested parties had been paid or not and furnishing the vendors with any written acknowledgment of payments and;*
- h) *Failure to respond to correspondences from our current advocates on record.*

It was hence urged that in the view of the foregoing the 1<sup>st</sup> Respondent ought to be held liable jointly and severally with the 2<sup>nd</sup> respondent for not honouring the professional undertaking.

Through the affidavit sworn by Chepchirchir Segoo on their behalf, the 1<sup>st</sup> Respondent contended that while the Applicants' sought to enforce a Professional Undertaking allegedly issued by the 2<sup>nd</sup> Respondent on behalf of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent had since left the employ of the 1<sup>st</sup> Respondent and had gone with all the material documentation in relation to the subject transaction that gave rise to the undertaking. It was thus posited that the 1<sup>st</sup> Respondent had been rendered incapable of preparing and filing a defence to the Applicants' claim as the relevant and material information and documentation were in possession of the 2<sup>nd</sup> Respondent.

According to the 1<sup>st</sup> Respondent, issuance of a professional undertaking was a serious business and the same would be impossible to transact without due to mistrust amongst parties and their advocates. That it was manifestly clear that the 2<sup>nd</sup> Respondent was aware of the effect of a professional undertaking and his *mala fides* was evident by the reluctance to furnish the 1<sup>st</sup> Respondent with the documents pertinent to the transaction

The 2<sup>nd</sup> Respondent on his part stated that he acted for both parties in the Sale Agreement outlining the intention of the respective parties. That he then wrote a letter of undertaking that now formed the basis of the present application. That the said letter of undertaking had 3 limbs which read in part as follows:

- i. *We hold the said title deed and other completion documents as stakeholders in trust of both the vendor and purchaser to your order, returnable on demand and will not release the documents to any advocate or person whatsoever for any purpose without first obtaining a written consent of both parties which is only granted on such other advocate giving a professional undertaking in terms similar to the present one and on the understanding that whether such an advocate complies with the undertaking or not, you will continue to hold us liable on our undertaking herein provided.*
- ii. *That we shall not use the title documents for any other purpose other than for the registration of the transfer in respect of the above-mentioned property in favour of the purchaser or his nominee(s) in terms of the documents of transfer executed by the parties herein.*
- iii. *Upon successful registration of the transfer in favour of the purchaser, we will collect the balance of the purchase price from the purchaser and release the same directly to you in the manner and timelines provided for in the sale agreement signed between yourselves and the purchaser.*

The 2<sup>nd</sup> Respondent's position was that the first 2 limbs of the undertaking were met. As regards to the 3<sup>rd</sup> limb, he confirmed that various payments were made to the Applicants by the Purchaser, either through his office or directly between the parties. He contended therefore that the Applicants had received an aggregate sum of Kshs. 11,000,000/= from the Purchaser, leaving a balance of Kshs. 4,000,000/=

It was further contended that the balance had not been remitted to the 2<sup>nd</sup> Respondent for onward transmission to the 1<sup>st</sup> Applicant because it emerged that a third party, one Giovanni Farino had an interest in the suit parcel as a purchaser having paid a deposit of kshs.1, 000,000/= and that this fact had come to the knowledge of the Purchaser when he attempted to fence off the suit parcel and he was prevented from so doing by the Interested Party. That the parties to the Agreement then further agreed that Kenya Shillings Four Million (Kshs.4, 000,000/=) would be withheld by the Purchaser until such a time when the interest of the interested Party would be ascertained whereupon the purchaser would release the money to him and the balance would be payable to the vendor. That it was estimated that this sum would be sufficient to cover the refund of the Deposit plus any accrued interest that was claimed by the interested party. He submitted that the onus of ascertaining the interest of the Interested Party was left on the 1<sup>st</sup> Applicant herein. He also added that up and till the time of filing this suit, the Applicants had not communicated to the Purchaser the extent of the interested party's interest. That it also emerged that after the transfer the vendor/applicant did not give vacant possession of the land as there were people living on a huge part of the land and that the applicant was aware that these were the only issues that caused the delay in the payment.

It was furthermore averred that the applicant and the purchaser had on many occasions bypassed him by going ahead and making payments directly to each other without his involvement only to notify him much later. The 2<sup>nd</sup> Respondent was of the view that this action was ill conceived and a way by the applicant to circumvent his contractual obligations and particularly being less candid on the adverse claim to the property in contravention of clause 11.5 and 11.7 of the contract of failure to disclose to the purchaser all material information relating to the property and failure to give vacant possession of the property.

The 2<sup>nd</sup> Respondent further charged that the 1<sup>st</sup> Applicant had falsified the amount that was owed and outstanding stating the claim for ksh.7, 197,000/= by the Applicant was misleading. That the amount owed is way less than Ksh.4, 000,000/= which the purchaser intimated his

readiness and willingness to pay once the issues in their contract of sale had been resolved.

### **The Submissions, Analysis and Determination**

As I have dutifully perused the respective advocates' submissions in this matter, I am confident that I am competent to find a resolution to the issues raised. I will advert to contributions made by Counsel as the need arises.

For the Applicants' three issues are formed: whether the Defendants gave out a Professional Undertaking to the 1<sup>st</sup> Applicant; whether the undertaking is valid and enforceable; and whether the Court ought to grant the orders sought. On the 1<sup>st</sup> Respondent's part, issues appurtenant to the resolution of this suit are: whether the 1<sup>st</sup> Respondent is a legal entity capable of suing and being sued on its own name and if not, whether the instant suit is incurably defective; whether the letter dated 25<sup>th</sup> April 2012 amounts to a Professional Undertaking and if it does, whom does it bind; whether by conduct of Applicant and the Purchaser the 1<sup>st</sup> Respondent is absolved of the obligations it had or could reasonably have had in the subject transaction; and who bears the costs. The 2<sup>nd</sup> Respondent on his part delineated three issues: whether the Court in enforcing a professional undertaking could issue an award for that which had not been pleaded; the nature and extent of the powers of the court in enforcing a professional undertaking; and whether there existed certain vitiating factors that rendered the professional undertaking unenforceable.

Distilling the issues raised above, I find that the following issues require the Court's attention:

- i. whether the 1<sup>st</sup> Respondent is a legal entity capable of suing and being sued on its own name and if not, whether the instant suit is incurably defective;*
- ii. whether there exists professional undertaking and if so, whether it was enforceable and against whom*

The 1<sup>st</sup> Respondent submitted that the name Robson Harris & Company Advocates was a business name registered under the **Registration of Business Names Act (Cap 499) Laws of Kenya** and was not a legal entity capable of suing and being sued and that the suit could only be brought on individual partners or proprietors. Thus, it was argued that the suit was not proper for the reason that it had no legal personality. They relied on the case of *Mary Ruguru Njoroge vs John Samuel Gachuma & 4 others (2014 )eKLR, Maurice Ooko Otieno vs Mater Misericordiae Hospital (2004)eKLR and Lakhman Ramji vs. Shivji Tessa & Sons [1965] EA*.

My answer to the first issue in short shrift is that parties are bound by their pleadings, this is trite. The 1<sup>st</sup> Respondent cannot be heard to raise the issue only in its submissions when the same was at no point pleaded in its responses to the suit. They had ample opportunity to raise the issue in their pleadings yet they did not. They cannot therefore raise the same in their submissions. The Court of Appeal in *Galaxy Paints Company Limited V. Falcon Guards Limited Court of Appeal Case Number 219 Of 1998* expressed itself as below:

***“Issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination.”***

A similar position is expressed in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR* which cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd Vs. Nyasulu [1998] MWSC 3*, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled ***“The Present Importance of Pleadings.”*** The same was published in *[1960] Current Legal problems, at P174* whereof the author had stated;

***“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....”***

***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”***

It was the 1<sup>st</sup> Respondent's submission that there were intervening factors which the applicant and the purchaser by conduct of changing their advocates upon the 2<sup>nd</sup> Respondent leaving the employment of the 1<sup>st</sup> Respondent and choosing to deal directly without engaging the firm in the course of the transaction.

As to whether there exists a valid professional undertaking given to the Applicants, the relevant bit of the impugned professional undertaking was, in pertinent part, worded as follows:-

- i. We hold the said title deed and other completion documents as stakeholders in trust of both the vendor and purchaser to your*

order, returnable on demand and will not release the documents to any advocate or person whatsoever for any purpose without first obtaining a written consent of both parties which is only granted on such other advocate giving a professional undertaking in terms similar to the present one and on the understanding that whether such an advocate complies with the undertaking or not, you will continue to hold us liable on our undertaking herein provided.

ii. That we shall not use the title documents for any other purpose other than for the registration of the transfer in respect of the above-mentioned property in favour of the purchaser or his nominee(s) in terms of the documents of transfer executed by the parties herein.

iii. Upon successful registration of the transfer in favour of the purchaser, we will collect the balance of the purchase price from the purchaser and release the same directly to you in the manner and timelines provided for in the sale agreement signed between yourselves and the purchaser.'

The 1<sup>st</sup> Applicant's Counsel referred the Court to *Diamond Star General Trading LLC vs Ambrose D.O Rachier carrying on business as Rachier & Amollo Advocates [2017] eKLR* where it was held:

*"Black Law dictionary gives the definition of an undertaking as, "a promise, pledge or engagement". The US Legal Definitions.com states that "Undertaking in general means, an agreement to be responsible for something. In Legal context, it typically refers to a party agreeing to surety arrangements, under which they will pay a debt or perform, a duty if the other person who is bound to pay the debt or perform the duty fails to do so".*

*The Encyclopaedia of Forms and Precedents, 5th Edition by Hon. Sir Peter Millet, M.A. Vol. 39 pages 859, 860 describes a professional undertaking as follows:*

*"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' (or in case of a member of his staff, his employer) becomes personally bound.*

*It's a promise to do or to refrain from doing something. In practice undertakings are frequently given by solicitors in order to smooth the path of transaction or to hasten its progress, and are convenient method by which some otherwise problematic areas of practice can be circumvented".*

*The Halsbury's Laws of England, 4th Edition by Lord Hailsham of St. Marylebone, Vol. 44(1), pages 222, 223, 224, states as follows:*

- *Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the Court in the course of proceedings, that undertaking may be enforced summarily upon application to the Court.*
- *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. The whole of the agreement to which it relates must be before the Court, and the undertaking must be one which is not impossible ab initio for the solicitor to perform.*
- *If the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced."*

The 1<sup>st</sup> Respondent on their part referred the Court to the *Code of Standards of Professional Practice and Ethical Conduct published vide Kenya Gazette Notice No. 5212 of 26<sup>th</sup> May 2017* wherein under Clause 9 an advocate has a duty to honour any professional undertaking given in the course of their practice in a timely manner. The obligation to honour a Professional undertaking remains until the undertaking is performed, released or excused

Further reference is made to Part IV of the said Rules, dealing with interpretation guidelines. Clause 130 to 133 defines and discusses the question of Professional Undertakings 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;*
- f) *Exercise diligence when accepting an undertaking from an Advocate."*

Additional reliance was placed on the writings of *Prof. Tom Ojienda & Katarina Juma in their book Professional Ethics: A Kenyan Perspective, 2011; Law Africa where at Page 62* define a professional undertaking as follows

*"A professional undertaking refers to any unequivocal declaration by a professional [an advocate or a member of the advocate's staff in the course of practice to someone who reasonably places reliance on it. An undertaking need not be made in the course of practice where it is made by an advocate himself. Besides, an undertaking may be made either orally or in writing provided it is unequivocal and unambiguous."*

The 1<sup>st</sup> Respondent buttressed its arguments with reference to *Kenya Reinsurance Corporation Ltd -vs Muriu [1995-1998] 1 EA 107* where it was held that the undertaking must be unambiguous, unequivocal and binding on the advocate and that it must be capable of being enforced.

I can do no better than reproduce the Court of Appeal's ruminations, which I am in full congruence with my position, regarding what constitutes a professional undertaking in *Civil Appeal 165 of 2009 Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] eKLR* where it stated:

*"Our answer is that a professional undertaking is an unequivocal promise made by a party to another either to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party, to which liability may attach. See Equip Agencies Limited v Credit Bank Limited [2008] 2 EA 115 (HCK). Generally speaking, professional undertakings are given by advocates in order to make transactions easier, faster and more convenient. Where an advocate breaches a professional undertaking, the court has jurisdiction to order the enforcement of that undertaking.*

*In enforcing undertakings, the court is guided not by the considerations of contract, or of securing the legal rights of parties, but mainly by ensuring the honesty of advocates. See Muiruri v Credit Bank & Another (Civil Appeal No 263 of 1998) LLR No. 5676 (CAK).*

*In the words of this Court in Harit Sheth t/a Harit Sheth Advocate v K. Osmond Advocates [2011] eKLR (Civil Appeal No 276 of 2001),*

*"a professional undertaking is a bond 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 if only to protect his own reputation as an officer of the court." (emphasis ours)"*

The Court in *Civil Appeal 165 of 2009 [supra]* went on to hold:

*"To find that no undertaking existed between the parties would be a narrow application of the term. The term 'undertaking' must be subjected to a liberal interpretation to include situations where an advocate who receives money that is intended to be based on a professional undertaking should be required to perform the terms of the undertaking, and should he utilize the money for any other purposes, then he is obliged to refund it."*

There is therefore no doubt in my mind that the Professional Undertaking given by the 2<sup>nd</sup> Respondent was valid and enforceable upon the successful completion of the sale. The argument advanced by the 1<sup>st</sup> Respondent that by its wording the undertaking given on the 25<sup>th</sup> April 2012 was ambiguous is with respect shallow and restrictive. This finding is buttressed by the fact that it is on the strength of it that the Respondents completed the land sale transaction resulting in a transfer of ownership of the property of the 1<sup>st</sup> applicant to the purchasers. In any case, the 1<sup>st</sup> Respondent in its pleadings did not deny the validity of the undertaking. These questions were only raised in the pleadings; a matter which I have already expressed myself on.

In my understanding of the law, any money or documents given and received on the strength of a professional undertaking cannot be utilized for any other purpose other than what they are intended for. It is therefore, outside the mandate of an advocate to purport to use it or convert an undertaking for an event other than what it was intended for and agreed between the parties. See *Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] eKLR*. In the same breath, it can be said that an advocate, such as the 2<sup>nd</sup> Respondent herein, could not be released from his obligation under the undertaking on the basis that the balance of the purchase price was to be utilised for reasons other than those specified in the undertaking.

The law is that a professional undertaking protects all the parties to a transaction. It is therefore not open for one party to unilaterally and without sufficient reason refuse to comply with the terms of that undertaking which the 2<sup>nd</sup> Respondent blatantly did. Advocates should equally note that failure to abide by the terms of a professional undertaking without lawful justification, amounts to professional misconduct as was in the case of *Rooks Rider (a firm) v Steel and Others [1993] All ER 716*.

It therefore follows that the submissions raised by the 2<sup>nd</sup> Respondent with regards to the suit property of the applicant having entered into prior agreements with third parties who had interest in the property, there being squatters on the suit property and the 1<sup>st</sup> Applicant collecting monies directly from the purchasers is unhelpful in this particular case as the same could be canvassed and redress sought through the terms of the sale agreement or a different application to court.

With due respect to the arguments advanced by learned counsel, a professional undertaking is given to an advocate on the authority of his client and is based on the relationship which exists between the advocate and his client. It follows that an advocate who gives such a professional undertaking takes a risk. The risk is their own and they 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 in order to protect their 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 but they cannot however sue to recover that amount unless he has first honoured his professional undertaking.

Discerned in the preceding elucidation is the summation that a Professional undertaking only binds the advocate who issues it personally. On this basis, I am of the considered view that the firm of Robson Harris & Company Advocates ought to be absolved from having the undertaking enforced against them.

As a parting shot, I am obliged to reiterate the position taken by the Court of Appeal in *Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] eKLR* as regards the sanctity of Professional Undertakings in the legal profession. The superior court had on that occasion stated:

***“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.”***

I have said enough to show that there is merit in the Originating Summons application dated 8<sup>th</sup> June 2017 and accordingly, I will allow it. The 2<sup>nd</sup> Respondent is granted 60 days from the date of this judgment to honour his professional undertaking to the 1<sup>st</sup> Applicant given on 25<sup>th</sup> April, 2012, failure to which the applicant shall be at liberty to enforce the same.

Costs follow the event and are discretionary. Having succeeded in their claim, I hold that the Applicants are entitled to recover the costs of the suit from the 2<sup>nd</sup> Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 9<sup>TH</sup> DAY OF JUNE 2021**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

Mr Otuoma for the 2<sup>nd</sup> Respondent

Mr Gicharu for the 1<sup>st</sup> Respondent and holding brief for Mr Otara for the 2<sup>nd</sup> Applicant

Mr Mbogo for the 2<sup>nd</sup> Respondent

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