



**Mundui & Murai t/a Mundu Murai Advocates v Abdulrahman
& Saad & Associates Advocates (Civil Case E595 of 2023)
[2025] KEHC 13367 (KLR) (Commercial and Tax) (26 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13367 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E595 OF 2023
FG MUGAMBI, J
SEPTEMBER 26, 2025**

BETWEEN

**TITUS WANJOHI MUNDUI & DONALD GITAU MURAI T/A MUNDU
MURAI ADVOCATES PLAINTIFF**

AND

**DAWID ABDULRAHMAN & SAAD M. SAAD T/A ABDULRAHMAN SAAD &
ASSOCIATES ADVOCATES DEFENDANT**

RULING

Introduction and Background

1. The respondents (MMA) filed an Originating Summons dated 4th December 2023 seeking to enforce a professional undertaking dated 5th February 2020 issued by the applicants (ASA) for the sum of Kshs. 8,746,000/=.
2. Subsequently, by the Chamber Summons dated 24th October 2024, ASA seeks several orders. Chief among them is that the Originating Summons filed by MMA be converted into a Complaint so that the matter may proceed as though it had originally been commenced by way of a Complaint. They further pray for leave to issue and serve a third-party notice upon Gulf African Bank Limited, in terms of the draft annexed to the supporting affidavit. This is the application that is the subject of this ruling.
3. It is supported by an affidavit sworn by Saad Migdad Saad, who contends that any liability to MMA ought to be shifted to Gulf African Bank, on whose instructions the professional undertaking was allegedly issued. ASA argues that the Bank bore ultimate responsibility for remitting payment to MMA's client, and that its failure to perfect securities and release the funds, is what triggered the



dispute. Consequently, ASA seeks indemnity or contribution from the Bank should judgment be entered against it.

4. ASA further submits that the Originating Summons raises contentious issues unsuitable for determination in a summary manner and therefore ought to be converted into a Plaint.
5. In opposition to the application, MMA filed Grounds of Opposition dated 2nd November 2024. They argue that an advocate who issues a professional undertaking is personally bound by it and must honour it without shifting responsibility to others. They further contend that it would be wholly inappropriate for ASA to seek the joinder of Gulf African Bank, as the Bank is not a proper party to these proceedings.
6. In addition, MMA maintains that the issue of joinder is res judicata, the Court having already expressed itself in the ruling of 26th July 2024 that enforcement of a professional undertaking is strictly between advocates, independent of their clients, and that an advocate cannot rely on instructions from a client to avoid liability. It is further urged by MMA that ASA's right to recover any sums from its client, only arises after it has first honoured the undertaking. Finally, MMA argued that ASA has no right to amend or alter MMA's pleading by converting the Originating Summons into a Plaint or any other form of pleading.
7. The proposed Third Party (the Bank) similarly opposed the application by filing Grounds of Opposition dated 18th November 2024 and a Replying Affidavit sworn on 26th November 2024.
8. In its view, the application is fatally defective, amounted to an abuse of the Court process, and was nothing more than a fishing expedition. The Bank argues that a professional undertaking is a private contract strictly between Advocates, enforceable only against the Advocate who issues it, as provided under Order 52 Rule 7 of the Civil Procedure Rules and Sections 2, 9, and 10 of the Advocates Act.
9. The Bank, not being an Advocate and not privy to the undertaking, could not be brought into the proceedings without violating the doctrine of privity of contract. It further asserts that the firm of ASA issued the impugned undertaking independently and without any instructions, express or implied, from the Bank.

Issues for determination

10. Having considered the pleadings and submissions, the issues that arise for determination are:
 - i. Whether the application for joinder of the Bank is res judicata; and
 - ii. Whether the Court should convert the Originating Summons into a Plaint.

Analysis and determination

11. The doctrine of res judicata is codified in Section 7 of the Civil Procedure Act, which bars re-litigation of matters directly and substantially in issue in a former suit between the same parties, litigating under the same title, where the issue has been heard and finally determined by a competent court.
12. In IEBC v Maina Kiai & 5 Others [2017] eKLR, the Court of Appeal affirmed that for res judicata to apply, five elements must be met, which are that:
 - i. the matter was directly and substantially in issue in the former suit;
 - ii. the former suit was between the same parties or their privies;
 - iii. they were litigating under the same title;



- iv. the matter was heard and finally determined; and
 - v. the earlier court was competent.
13. In the instant matter, the Court in its earlier ruling made it abundantly clear that the enforcement of a professional undertaking is an obligation resting exclusively upon the Advocate who issued it, and that such liability cannot be shifted to or deflected upon the Advocate's client. The ruling emphatically underscored this position in the following terms:
- “(14) The common ground in the discourse above is that a professional undertaking issued by advocates is done so in their capacity as professionals and binds them personally. An advocate who issues an undertaking is obligated to honor it without reference to any other party.
- [15]. Juxtaposing the legal pronouncements against the claim before this court, it is undisputed that the claim by way of Originating Summons (OS) is for the enforcement of an undertaking issued by the applicant advocate to the respondent advocate. The letter of undertaking, dated 5/2/2020, is drawn on the applicant's letterhead and signed by the applicant. Therefore, the enforcement of the undertaking is between the advocates, independent of their clients' actions. An advocate cannot use their client as an excuse for failing to fulfill an undertaking”.
14. ASA's present attempt to rope in Gulf African Bank amounts to reopening an issue already settled. As the Court cautioned in *E.T V Attorney General & Another*, [2012] eKLR, litigants cannot evade the doctrine by cosmetic re-framing of issues or adding new parties. I therefore find that the prayer for joinder of Gulf African Bank is barred by the doctrine of res judicata.
15. To the second issue, ASA seeks conversion of the Originating Summons into a Complaint, ostensibly to facilitate third-party proceedings. I must emphasize again, for the avoidance of doubt, that it is settled law that a professional undertaking is a personal obligation of the Advocate who issues it, and enforcement thereof is summary in nature under Order 52 Rule 7 *CPR*.
16. I have already expressed myself in the ruling of 26th July 2024 on this matter as follows:
- “(16) As was stated in the case of *Conrad Masinde Nyukuri & Another V Robson Harris & Another*, [2021] eKLR:
- “The law gives the advocate 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.”
- (17) The above finding aligns with the fact that although the applicant issued the undertaking on behalf of the intended interested party as its client, this is not a relevant factor in the OS proceedings before this court. The applicant, being the person required to honor the undertaking, would be at liberty to sue the intended interested party to recover the amount of the undertaking once they have fulfilled their promise to the respondent.”



Disposition

17. Accordingly, I find that the application dated 24th October 2024 is barred by the doctrine of res judicata. It is accordingly dismissed, with costs awarded to the respondents and the Proposed Third Party.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2025.

F. MUGAMBI

JUDGE

