



**Okulo v Cedar Holdings Limited (Civil Suit E050 of 2020)
[2025] KEHC 13353 (KLR) (Commercial and Tax) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E050 OF 2020
PM MULWA, J
SEPTEMBER 25, 2025**

BETWEEN

ANTHONY AKELO OKULO APPLICANT

AND

CEDAR HOLDINGS LIMITED RESPONDENT

JUDGMENT

1. The Applicant instituted these proceedings by way of an Originating Summons dated 20th February 2020 seeking judgment against the Respondent for the sum of Kshs. 8,228,000/-. The claim is premised on a deed of indemnity executed by the Respondent on 14th December 2016, under which the Applicant contends that the Respondent undertook to indemnify it against the said sum.
2. The background to this dispute arises from a conveyancing transaction relating to land known as L.R. No. Nandi/Songhor/Songhor Block 2/42 (Nyaroche Farm), hereinafter referred to as “the suit property.” The Applicant acted for the Respondent in the transaction. By an agreement dated 6th August 2014, the Respondent agreed to purchase the suit property from one Stephen Were Omoro for the consideration of Kshs. 41,140,000/-.
3. The Respondent, being the beneficial owner, subsequently resold the suit property to a third party at the same consideration. A deposit equivalent to twenty percent (20%) of the purchase price, amounting to Kshs. 8,228,000/-, was paid into the Applicant’s account.
4. On 14th December 2016, the Respondent instructed the Applicant to remit the said deposit to its sister company, Ler Limited, and in that regard executed a deed of indemnity to secure the Applicant against any claim for refund of the deposit.



5. The Respondent, however, failed to complete the sale to the initial purchaser and, on 23rd April 2018, entered into another sale agreement with Upper Hill Holdings in respect of the suit property. The Applicant's case is that despite demand, the Respondent has failed and neglected to honour the indemnity and refund the sum of Kshs. 8,228,000/-, thereby giving rise to the present proceedings.
6. The Respondent opposed the application through the Replying Affidavit of Ishmael Opande Juma sworn on 6th March 2020. He avers that the monies in issue were not to be held by the Applicant as of right, but strictly in the capacity of a stakeholder for the parties and subject to their joint instructions. It is his contention that when the sale transaction between the Respondent and one Mr. Tevjeer aborted, the Respondent duly instructed the Applicant to terminate the transaction in accordance with the express terms of the agreement for sale. The Applicant, however, failed to implement the said instructions.
7. The Respondent further depones that, in the intervening period, it requested the Applicant to transfer the deposit of Kshs. 8,228,000/- to its sister company, Ler Limited, in order to redeem an outstanding financial facility owed to Shelter Afrique. In consideration thereof, the Respondent executed an indemnity in favour of the Applicant for the equivalent sum. It is the Respondent's case that the purpose of the indemnity was limited to shielding the Applicant from claims, expenses, or costs arising from the transfer of the deposit to Ler Limited. However, contrary to the indemnity, the Applicant failed to remit the entire sum and instead transferred Kshs. 5,228,000/-, while purportedly retaining Kshs. 3,000,000/- as legal fees without authority or justification.
8. The Respondent maintains that it was the sole beneficiary of the sums forming the subject of the indemnity, and that under the express terms of the sale agreement, it was entitled to retain the deposit as damages in the event of default by the purchaser. Accordingly, the Applicant, as advocate, held no independent right or interest in the deposit save for the discharge of his professional obligations.
9. By directions of the Court, the suit was canvassed by way of written submissions. The Applicant filed submissions dated 4th March 2025 while the Respondent filed submissions dated 12th March 2025.

Issues for Determination

10. Having considered the pleadings, affidavits, and submissions, the issues that arise for determination are:
 - i. Whether the deed of indemnity executed on 14th March 2016 is valid and enforceable in the circumstances of this case;
 - ii. Whether the Applicant has established entitlement to the sum of Kshs. 8,228,000/-;
 - iii. What orders should issue as to costs.

Analysis

11. On the first issue, the law on indemnity is settled. An indemnity is a contractual undertaking whereby one party promises to save another from loss caused by a specified event or transaction. The promise is enforceable provided that the indemnified party demonstrates a loss or liability within the terms of the indemnity.
12. The Applicant contends that the indemnity obligated the Respondent to refund Kshs. 8,228,000/- regardless of whether any third-party claim was made. The Respondent on the other hand argues that the indemnity was only intended to protect the Applicant against third-party claims arising from the transfer of the deposit to Ler Limited.



13. From the correspondence exhibited, and in particular the deed of indemnity, it is evident that the indemnity was tied to the transfer of the deposit to Ler Limited. No claim has been demonstrated by the Applicant to have been made against it in respect of that transfer. The Applicant's case rests on anticipated or speculative liability. Courts have consistently held that indemnity cannot be enforced in the absence of actual loss or liability. In *Total Kenya Ltd v Kenya Revenue Authority* [2013] eKLR, the Court of Appeal stated that indemnity is "a promise to reimburse in respect of loss or liability which has been incurred."
14. Secondly, the Applicant's standing to institute the present proceedings is doubtful. I am of the considered view, that the Respondent correctly relied on the decision of the Court of Appeal in *Agricultural Finance Corporation v Lengetia Ltd & Jack Mwangi* [1985] eKLR, where it was emphatically held that a party who is not privy to a contract cannot enforce it. The Applicant herein, being an advocate and stakeholder, held the deposit purely in a fiduciary capacity and without any beneficial or proprietary interest in the same. Its role was limited to the discharge of professional obligations in accordance with the parties' instructions. Significantly, the Applicant did not even transfer the entire sum of Kshs. 8,228,000/- as required, but instead retained Kshs. 3,000,000/- which it unilaterally claimed as legal fees. This conduct not only undermines the Applicant's assertion of entitlement but further reinforces the Respondent's contention that the claim is misconceived.
15. On the facts and evidence before this court, it is also clear that the indemnity was overtaken by events. The sale to Mr. Tevjeer was never completed. Subsequently, the property was sold to Upper Hill Holdings, and proceeds applied differently. By then, the indemnity served no practical purpose. As held in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, courts will not enforce contracts that have been frustrated or are incapable of performance.
16. The Applicant has not shown that it suffered any actual loss within the meaning of the indemnity. In the absence of proof of loss or liability, the Applicant cannot rely on the indemnity to recover Kshs. 8,228,000/-. To do so would amount to unjust enrichment. As was emphasized in *Kenya Breweries Ltd v Kiambu General Transport Agency Ltd* [2000] 2 EA 398, a party cannot benefit unjustly where no lawful entitlement exists.
17. In the result, I find that the deed of indemnity dated 14th March 2016 is not enforceable in the circumstances of this case. The Applicant has failed to demonstrate any actual liability or loss to trigger the indemnity. Consequently, the claim for Kshs. 8,228,000/- is without merit.
18. The Originating Summons dated 20th February 2020 is hereby dismissed with costs to the Respondent.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Mungasia h/b for Mr. Wandago for Applicant

Mr. Owuor for Respondent

Court Assistant: Carlos

