

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
COMMERCIAL & ADMIRALTY DIVISION
ORIGINATING SUMMONS NO. E047 OF 2024

SAID MGUPU & COMPANY ADVOCATES.....APPLICANT
-VERSUS-
MUTHEE & PARTNERS.....RESPONDENT

JUDGMENT

1. Before court is an originating summons dated 21 August 2024. It seeks, in the main, the following order:

“1. The Honourable Court be pleased to order the Respondent to honour their written undertaking of 11th May, 2021 and remit to the applicant the sum of Kenya Shillings Three Million Five Hundred Thousand (KShs. 3,500,000/=) with interest calculated at court rates from 11th May, 2021.”

2. The application is expressed to be brought under Order 57 rule 7 of the Civil Procedure Rules and is supported by the affidavit of Mr. Said Hamisi Mgupu who has sworn that he is the proprietor of the applicant firm of advocates.

3. Mr. Mgupu has also sworn that by a Deed of Settlement dated 11 May 2021, the Respondent's client, Koifan Developers Ltd agreed to settle all claims made by the applicant's client, **Salim Ali Kinyezi in Mombasa ELC (OS) Number 110 of 2020: Mwinyihamisi Mwakinyezi & Another VS.**

Patricia Mekio. According to the deed of settlement, the respondent was to make the payment of Kenya Shillings Seven Million Five Hundred Thousand (KShs. 7,500,000/=) only, in full and final settlement of the claimant's claim.

4. By a Professional Undertaking of 11 May 2021, the Respondents, then practising in the name and style of Muthee Kihiko Soni and Associates LLP, undertook to release the above stated sum within Seven (7) days of the release of the first instalment by the National Lands Commission. The amount was for compensation for the compulsory acquisition of the claimant's plot numbers Mombasa/MS/Block I/1815 and Mombasa/MS/Block I/1816.
5. It was a term of the undertaking that should the Respondent fail to fully pay the above sum within the stated period, the Deed of Settlement would be declared null and void. The applicants would then be at liberty to seek legal redress, and; to sue for the sum stated under the Deed of Settlement and, particular, enforce the Professional Undertaking.
6. The Respondents are said to have paid Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) on 5 May 2021 and Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/=) on 2 June, 2021, all amounting to Kenya Shillings Four Million (Kshs. 4,000,000/=) in partial settlement of the total sum due.

7. It is sworn that the applicants accepted Kshs. 4,000,000/= despite the respondents reneging on their undertaking. Despite making several promises to pay, the respondents have, to date, failed to honour the undertaking. The applicants seek that the undertaking be enforced.
8. Ms. Sheila Nkatha Muthee swore a replying affidavit opposing the application. She has introduced herself as an advocate practising in that capacity in the respondents firm of advocates.
9. According to Ms. Muthee, the applicants have no standing to institute this suit since there were mere agents. To be precise, the applicants were not privy to the deed of settlement dated 11 May 2021 which provided that any legal redress was to be addressed by the applicants' client.
10. That notwithstanding, Ms. Muthee has sworn and admitted that her firm represented Koifan Developers Limited in a transaction in which her client was to settle the Applicants' client's claim amounting to Kshs. 7,500,000. The payment was to be made in full settlement of a pending case in the Environment and Land Court registered as ELC OS NO.110/2020 in which the applicants' client had claimed compensation as a result of a compulsory acquisition of the applicants' client's parcels of land, more particularly referred to as Land Title Numbers MOMBASA/MS/BLOCK 1/1815 and MOMBASA/MS/BLOCK 1/ 1816.
11. Ms. Muthee has also admitted that her firm of advocates gave a professional undertaking and undertook to release the sum of Kshs. 7,000,000/=. The

sum of Kshs. 7,000,000/= was to be released to the Applicant's Counsel within 7 days after the first instalment had been remitted by the National Land Commission. The professional undertaking was, however, conditional upon the National Land commission releasing the said funds.

12. But the National Land Commission only made part settlement of Kshs. 4,000,000.00 which the Respondents remitted to the Applicants. The National Land Commission never released the balance of Kshs. 3,500,000.00 to the Respondents for onward transmission to the Applicant. In the circumstances, the Respondents have asked to be discharged *from “the conditional professional undertaking”* because it has become impossible to perform it.

13. In the submissions filed on behalf of the applicants, it has been urged that the Applicants are not concerned about the rights and liabilities of the contract between the respondent and the National Land Commission. According to the applicants, it is trite that in enforcing undertakings, the court is guided not by the considerations of the contract, or of securing the legal rights of parties, but mainly by ensuring the honesty of advocates. In this submission, counsel for the applicants has relied on **Muiruri v Credit Bank & Another (Civil Appeal No 263 of 1998) LLR No. 5676 (CAK)**. It is urged that where an advocate breaches a professional undertaking, the court has jurisdiction to order the enforcement of that undertaking.

14. The respondents have, on their part, submitted that the Applicants lack the requisite *locus* to institute these proceedings in their own capacity as they were not beneficiaries to the deed of settlement dated 11 May 2021. The Applicants, it is urged, were not the appointed Agents acting on any instructions and, at any rate, the Court has not approved such agency. The respondents submit that the Applicants were not privy to the deed of settlement.

15. On the professional undertaking, it was submitted that it was conditional upon the Respondents receiving the funds from the National Lands Commission for onward transmission to the Applicants within the stipulated timelines. However, the National Land Commission only made part settlement of Kshs. 4,000,000 which the Respondents remitted to the Applicants.

16. The respondents cited **Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga NRB CA Civil Appeal No. 51 of 2008 (2017) Eklr** where the Court of Appeal held that an enforceable professional undertaking is one which is clear in its terms and is capable of being performed. The court also held where there is a condition precedent to the performance of the undertaking, it must be demonstrated that condition precedent has been performed.

17. The respondents' case is that the undertaking in issue was contingent upon the National Land Commission releasing the funds which, as noted, the

Commission released only part thereof. Thus, the condition precedent had not been satisfied.

18. It is common ground that indeed the respondents gave the applicants a professional undertaking but the point of departure is whether the undertaking is enforceable by this Honourable Court. In order to answer this question, it is necessary to consider the undertaking itself. It reads as follows:

“Said Mgupu & Co. Advocates

11th May, 2021

Wakf Commissioners of Kenya Building

Behind Central Bank of Kenya

P.O.Box 41689-80100

MOMBASA

Dear sirs,

RE: PROFESSIONAL UNDERTAKING
REGARDING MOMBASA/MS/BLOCK1/815&MOMBASA/MS/
BLOCK1/1816.

The subject matter refers.

We act for KOIFAN DEVELOPERS LTD with instructions to
address you as hereunder;

As a follow up to the execution of the Deed of Settlement between our client and your client with regards to the above captioned properties, we hereby have instructions to undertake as follows: -

That we shall release the Kenya Shillings Seven Million to an account that you shall provide us within SEVEN (7) days of release of the first installment (lump-sum) by the National Lands Commission in the compensation regarding the compulsory acquisition of the suit properties.

That if we do not comply with any of the terms of this undertaking and/or if the said amount will not be fully within the stated period, the deed of settlement shall be declared null and void and you shall be at liberty to seek legal redress in court in relation to this matter.

We look forward to your confirmation of our professional undertaking in the terms aforesaid.

Yours faithfully

Muthee Kihiko Soni & Associates

Signed

Sheila N. Muthee.”

19.A professional undertaking ought to speak for itself; it ought to be, as it were, self-explanatory and, most importantly, it must be unambiguous, leaving no doubt as to the advocate’s obligations under it. In **Patel v Kairu**

(1999) 2 EA 297, the Court of Appeal held that the jurisdiction of the Court in an application for enforcement of a professional undertaking was a summary jurisdiction over advocates and, for that reason, it should be exercised in the clearest of cases. And in **Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga NRB CA Civil Appeal No. 51 of 2008** (2017) Eklr the same court held that:

“For the court to enforce a professional undertaking, it must be satisfied that the undertaking is clear in its terms and that there is no dubiety or ambiguity as to what the advocate has professionally undertaken. Secondly, that what is undertaken is capable of being performed. Thirdly, that if the undertaking is contingent on the happening or occurrence of an event, such event has occurred or happened.”

20. Turning back to the undertaking in issue, reference is made to a “*deed of settlement*” that apparently is the foundation upon which the undertaking is built. And, perhaps, to emphasise how central the deed of settlement is to the undertaking, there is what, for all intents and purposes, a default clause to the effect that the deed of settlement would be of no consequence if the terms of the undertaking are not complied with. The default clause is couched, thus:

“That if we do not comply with any of the terms of this undertaking and/or if the said amount will not be fully within the

stated period, the deed of settlement shall be declared null and void and you shall be at liberty to seek legal redress in court in relation to this matter.”

21. Thus, the performance of the undertaking is somewhat intricately intertwined with the terms under the deed of settlement to such an extent that if parties do not discharge their obligations under the deed, then the professional undertaking is rendered superfluous. On the other hand, if the undertaking is not performed, the deed of settlement is rendered futile. In this scheme of things, the undertaking cannot stand on its own without reference to the deed of settlement.

22. In its pertinent part, relevant to the undertaking in question, the deed of settlement reads as follows:

“2. The Respondent shall deposit with the Claimants advocates the sum of K.shs.500,000/= on or before the close of business of the 12th of May, 2021.

3. The balance thereof shall be paid within Seven (7) days immediately upon the National Lands Commission compensating the Respondent on the compulsory acquisition of the subject properties.

4. This Deed of settlement fully, unconditionally and unequivocally settles the current suit/claim and all other future

suits/cases/matters/claims that may arise between the parties herein and any other persons claiming at their behest; in respect of the subject properties herein above mentioned and each party hereby covenants that it has no claim and shall not have any claim in future of whatsoever nature, civil, criminal or otherwise, arising therefrom.

5. That upon execution of this deed of settlement, the Claimants shall forthwith withdraw the subject suit and execute a No Objection letter addressed to the National Lands Commission.

6. In consideration of the afore-stated final settlement, this matter shall be marked as fully settled and the Claimant shall have no further claims as against the Respondent.

8. In the event that the conditions of settlement are not fulfilled for any reason whatsoever, this Settlement Agreement shall be considered a nullity and shall subsequently be set aside and either party shall be at liberty to apply to court.

23.If, as stated in clause 8 of the deed of settlement, the deed would be rendered a nullity if the terms thereof were not complied with, the validity of any action taken on the deed, including the applicants' efforts to enforce the professional undertaking would be in question.

24. Would that then mean that without the professional undertaking the applicants would be without a remedy? Of course, not. The deed of settlement appeals to me to be self-executing, with the most obvious result for non-compliance being that parties would revert to their former positions prior to the execution of the deed and, to that end, any aggrieved party would be entitled to move the court accordingly.

25. Bearing this background in mind, I find the professional undertaking equivocal and incapable of inviting a summary jurisdiction against the respondents. Looking at the terms of the professional undertaking, it would appear that the applicant has an alternative course for remedy arising from the alleged breach of the terms of the deed of settlement.

26. In the final analysis, I do not find any merit in the applicants' suit. It is hereby dismissed with costs to the respondent. It is so ordered.

Signed, dated and delivered on 16 December 2025

Ngaah Jairus
JUDGE