



**Ndung'u v Koskei Joel Kipkurui Monda Ombori Rogers & E.J Ruto t/
a Koskei Monda & Company Advocates (Civil Appeal 221 of 2018)
[2023] KECA 1381 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1381 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 221 OF 2018
DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA
NOVEMBER 24, 2023**

BETWEEN

JOSEPH KING'ORI NDUNG'U APPELLANT

AND

**KOSKEI JOEL KIPKURUI MONDA OMBORI ROGERS & E.J RUTO T/A
KOSKEI MONDA & COMPANY ADVOCATES RESPONDENT**

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi
(F. Amin, J.) delivered on 3rd March 2017 in H.C.C.C. No. 307 of 2015 (OS))*

JUDGMENT

1. Before this Court is an appeal from the ruling and order of the High Court at Nairobi (F. Amin, J.) delivered on 3rd March 2017 in HCCC No 307 of 2015 (OS).
2. The background to this appeal can be traced to a letter of undertaking dated 23rd October 2013 that was given by the respondents, a firm of advocates, to the appellant. The respondents were representing its client, one Bernard Kairu Kihara, in a sale transaction of his two parcels of land known as LR No Ngong/Ngong/50092 and LR. No Ngong/Ngong/50093. The respondents through the said letter undertook to pay the appellant a sum of Kshs. 4,000,000 from the sale proceeds. The purpose of the payment was to clear an outstanding debt owed to the appellant by the said Bernard Kairu Kihara. As per the letter of undertaking, the completion date for the transaction was 23rd December 2013. The letter in reference read in part as follows:

“re: sale of LR No ngong/ngong/50092 and ngong/ngong/50093

we act for Bernard Kairu Kihara the registered proprietor of the above captioned properties,
which are on sale.



We wish to confirm that a sale agreement dated 23rd July 2013 was signed and it was agreed that our firm would hold the sale proceeds payable in two tranches, as stakeholders pending completion. The first tranche has already been paid and is being held in our account.

The transaction is expected to be completed by the 23rd day of December 2013 or earlier.

We further confirm that we have instructions from Bernard to remit to you the sum of Kenya Shillings Four Million (Kshs. 4,000,000.00) from the sale proceeds.

We undertake to remit the said sum to you or to your order on successful completion of the agreement and we shall keep you posted on any developments in the matter.

In the meantime, please furnish us with your account details.

Yours faithfully,

for: koskei monda & co. advocates

r.o. monda”

3. In his suit before the trial court, the appellant contended that the completion date had passed, yet the respondents had Not honoured their undertaking to pay the sum of Kshs. 4,000,000, Nor had they communicated with him on whether the completion of the said transaction had failed to take place and/or stalled altogether. The appellant prayed that the respondents be ordered to honour their personal undertaking issued to them on 22nd October 2013, for the payment of Kshs. 4,000,000 and that the respondents be ordered to pay the appellant interest on the sum of Kshs. 4,000,000 at the rate of 24% p.a from 22nd October 2013, until payment in full.
4. The respondents opposed the application through a lengthy replying affidavit sworn by Rogers Monda on 6th July 2015. The gist of the respondents’ response was that the sale transaction was frustrated from time to time by the third-party purchasers of the two properties, and that the appellant was from time kept aware of the developments relating to the sale transaction. They contended that the completion date was changed from time to time, but the said purchasers did Not fully live up to their commitments.
5. The trial court rendered itself vide a ruling delivered on 3rd March 2017. The salient findings of the court were that:
 - a) The undertaking given by the respondents makes it clear that the Advocates are acting under instructions from their Client, Bernard. There can be No confusion as to that. Secondly, it makes clear that any payment is dependant “on successful completion”. Thirdly the payment was to emanate from the proceeds of sale.
 - b. The application is premised on an interpretation that the undertaking was, in effect, ironclad. In other words, it would endure in time regardless of whether or Not there was a successful completion. The application (sic) has put forward No evidence whatsoever of a successful completion demonstrating his case that it is Not relevant. Further, the applicant’s interpretation seeks to remove primary liability for the debt from the main debtor (the Vendor) and place it on his Advocates. This is further demonstrated by the fact that the applicant has Not joined the Debtor as a Party to these proceedings. If his sole intention was to be paid, he would have said both promised to repay me, if Not one then the other. He has Not done that. Therefore, his bona fides are questionable. Thirdly, the applicant seeks to impose principal liability upon



an agent of a disclosed principle. The applicant's submissions do Not address that point.

- c. The claim for interest further demonstrates the applicant's motives. He seeks interest from the date of the undertaking. That means by Not joining the principal debtor he is willing to forego the interest between the date the debt arose and the "undertaking" was given?
 - d. It is clear to the Court that the "Undertaking" is Not the Advocates taking over the Debts of the Vendor. It is clear from the face of the undertaking that it was made on two conditions (1) the Advocate-Client relationship continuing and (2) there being successful completion. The applicant has Not put forward any evidence of either eventuality."
6. The trial court dismissed the application and ordered the appellant to pay costs to the respondents.
 7. The appellant was dissatisfied with the decision of the trial court and preferred this appeal. He contends that the learned judge misapprehended the nature and legal effect of a professional undertaking by an advocate, and thus erred in law by holding that by seeking to enforce the undertaking against the respondents, the appellant sought to remove primary liability from the main debtor, and that the appellant ought to have joined the client as a party to the suit; and that the appellant was actuated by ill motive by seeing interest in the application to enforce a professional undertaking against an Advocate.
 8. The learned judge was also faulted for holding that the undertaking issued by the respondents was on two conditions; one, being that the Advocate-Client relationship must be continuing, which was Not part and parcel of the undertaking, and in any event would have been of No consequence once a valid professional undertaking had been issued; holding that the professional undertaking was issued on condition that there would be a successful completion of the agreement for sale and No evidence was put forth by the appellant yet it was evident from the documents availed by the respondents that completion had taken place; and failing to set out the issue in dispute between the parties and proceeding to make a determination on each of the issues, thus occasioned a miscarriage of justice.
 9. At the hearing of this appeal, learned counsel Mr. Okemwa held brief for Mr. Monda for the respondents. There was No appearance on behalf of the appellant. However, both parties had filed their respective written submissions for this Court's consideration.
 10. The gist of the appellant's written submissions dated 29th January 2019 is that the learned judge misapprehended the nature and legal effect of the professional undertaking issued by the respondents. It was contended that the law on professional undertakings is well settled and that liability remains with the giver of the undertaking. The appellant relied on the decisions of the Court in David Karanja Thuo T/A (practising as D.K. Thuo & Co. Advocates) v Njagi Wanjeru (practising as Njagi Wanjeru & Co. Advocates) [2010] eKLR; Waruhii K'owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] eKLR; and Naphatali Paul Radier vs. David Njogu Gachania D. Njogu & Company Advocates [2006] eKLR, in support of his argument that an undertaking given by an advocate is personally binding upon him and must be hoNoured, and breach thereof may amount to professional misconduct. The appellant argued that by issuing the professional undertaking, the respondents became personally liable and therefore bound to pay the sum indicated in the said undertaking.
 11. On whether the undertaking was conditional upon successful completion of the sale transaction or a continuing advocate-client relationship, it was submitted that it was Not. In this connection, the appellant cited the case of Waruhii K'owade & Ng'ang'a Advocates vs. Mutune Investment Limited (*supra*), where this Court held that a professional undertaking protects all the parties to a transaction,



- and it is therefore Not open for one party to unilaterally and without knowledge and consent to refuse to comply with the terms of that undertaking. It is contended further that 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. See *Harit Sheth t/a Harit Sheth Advocate vs. K. H. Osmond t/a K. H. Osmond Advocate* [2011] eKLR. In sum, the submission by the appellant was that an Advocate-Client relationship still exists between the respondents and Benard Kairu Kihara, and since No evidence to the contrary was supplied before the trial court, the respondents were bound to honour their undertaking.
12. On his part, learned counsel Mr. Okemwa did Not make any oral highlights of the respondents' written submissions dated 4th July 2023. He instead challenged the competence of the appeal for what he termed as the appellant's failure to comply with the provisions of rules 82, 83, and 115 of the *Rules* of this Court. However, the issues touching on the competence of the appeal had Not been canvassed in the respondents' written submissions and therefore the Court declined the invitation by counsel to consider the said oral submission.
 13. Turning to the written submissions, the gravamen of the respondents' submissions is on the issue whether the professional undertaking was conditional on the successful completion of the sale between the respondents' client and third parties. It was submitted that the undertaking was dependent on the successful sale of the two portions of land; that the sale transaction was Not completed as anticipated; and that the sale agreement was amended severally at the instance of the third-party purchasers. The contention by the respondents was that the undertaking was conditional upon the agreement being successfully completed, and that the appellant had never tendered proof to show that the agreement was successfully completed.
 14. It was further submitted that if an undertaking is conditional, the condition must be fulfilled before the undertaking is enforced. See. *Halsbury's Laws of England* (4th Ed.) Vol. 44 (1), pages 222, 223, 224. The decision of this Court in *Arthur K. Igeria t/a Igeria & Co. Advocates vs. Michael Ndaiga* [2017] eKLR, was cited in support of the argument that for the court to enforce a professional undertaking, it must be satisfied, inter alia, that if the undertaking is contingent on the happening or occurrence of an event, such event has occurred or happened.
 15. In sum, we were urged to find that the learned judge did Not err in arriving at her decision, and therefore we should dismiss this appeal with cost.
 16. We have considered the appeal, the submissions, and the applicable law. Our mandate on a first appeal as set out in rule 31 (1) (a) of the *Rules* of this Court is to reappraise the evidence and to draw our own conclusions. In *Peters vs. Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is No evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will Not hesitate so to decide.”
 17. This appeal, in our view, turns on a singular issue, which is, whether the learned judge misapprehended the nature and legal effect of a professional undertaking given by an advocate and thus erred by discharging the respondents from any liability under the professional undertaking issued by them to the appellant.



18. The question of the legal effect of an undertaking by an advocate can be answered by firstly establishing the meaning of the word ‘undertaking’ and/or ‘professional undertaking.’ The *Black’s Law Dictionary* 11th Ed. at page 1837 defines an undertaking in the following terms:

“A promise, pledge, or engagement.

An undertaking is the entrance of two parties into such relationship as that one party, on account of the bare relationship unaided by any agreement, has a new duty to perform toward the other; he undertakes a new duty...”

19. The *Encyclopaedia of Forms and Precedents*, 5th Edition (1999 Reissue) Vol. 39(1) at page 581 describes an undertaking as follows:

“An unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor or a member of a solicitor’s staff in the course of practice; or a solicitor as ‘solicitor’, but Not in the course of his practice.

An undertaking is therefore a promise made by a solicitor, or on his behalf by a member of his staff, to do or to refrain from doing something. In practice undertakings are frequently given by solicitors in order to smooth the path of a transaction, or to hasten its progress, and are convenient method by which some otherwise problematic areas of practice can be circumvented.”

20. Although the *Halsbury’s Laws of England*, 4th Edition by Lord Hailsham of St. Marylebone, Vol. 44(1) does Not define the term undertaking in express terms, it makes reference (at para 354) to the definition provided by the Law Society of England and Wales in the Guide to the Professional Conduct of Solicitors (6th Edn, 1993) Ch 19). The term undertaking is defined therein as follows:

“An unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a solicitor or a member of staff in the course of practice; or a solicitor as “solicitor”, but Not in the course of practice, whereby the solicitor becomes personally bound.”

21. In our local spectrum, the Law Society of Kenya developed a Code of Standards of Professional Practice and Ethical Conduct (SOPPEC) which was published in the Kenya Gazette Notice No 5212 of 26th May 2017. SOPPEC - 9 speaks extensively as to professional undertakings. Under clause 131 which falls thereunder, the term undertaking is defined as follows:

“An undertaking is a formal promise whose effect is to make the person giving it responsible for the fulfillment 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.”

22. The above definitions make it clear that a professional undertaking is a bond by an advocate on the authority of his client. It is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. The question that follows, as of right, is the effect of an undertaking



given by an advocate. The Encyclopaedia of Forms and Precedents (*supra*), at pages 581 and 582 provides that:

“An undertaking given by a solicitor is personally binding on him and must be hoNoured. Failure to hoNour an undertaking is prima facie evidence of professional misconduct...

A solicitor is personally liable to hoNour an undertaking given by him on behalf of anyone unless such liability is expressly and clearly disclaimed in the undertaking itself. If the solicitor intends to exclude his personal liability on the undertaking, this should be manifestly clear in the terms of the undertaking.”

23. The *Halsbury’s Laws of England*, 4th Edition (*supra*) provides as follows at para 354:

“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.”

24. Under SOPPEC, Clause 133 is explicit that:

“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.”

25. It is evident from the paragraphs hereinabove that the obligation to honour a professional undertaking remains until the undertaking is performed, released, or excused. Turning to the matter at hand, it is an indisputable fact that the respondents, on behalf of their client, one Benard Kairu Kihara, gave an undertaking to the appellant to remit to the latter a sum of Kenya Shillings Four Million (Kshs. 4,000,000.00) from the sale proceeds involving two parcels of land said to belong to the said Benard Kairu Kihara. The respondents do not dispute their client’s authority to give the undertaking. A closer perusal of the undertaking reveals a clear representation by the respondents to the appellant that the former had the means to remit the sum of Kenya Shillings Four Million (Kshs. 4,000,000.00) to the appellant. The respondents, pursuant to their own undertaking, ought to have, at all times, reserved the sum Kshs.4,000,000.00 from the sale proceeds for remittance to the appellant. It matters not whether the sale proceeds were based on the initial or the subsequent sale agreements between the respondents’ client and the different third-party purchasers. This Court in Warubiu K’owade & Ng’ang’a Advocates vs. Mutune Investment Limited (*supra*) held:

“In our understanding, 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 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. To allow advocates to retain client funds for no reason at all would be a travesty of justice and would be an abuse of the fiduciary trust given and by extension would amount to conversion and criminal activity. It would amount to deceit and unjust enrichment and ultimately, would erode public confidence in the administration of justice.” [Emphasis added]

26. The sale proceeds held by the respondents on behalf of their client ought not to have been released and/or utilized for any other purposes before satisfying the undertaking in question. On the question of the respondents’ personal liability, it is our view that they did not expressly or in any other way give an indication of their intention to exclude their personal liability on the undertaking. They remained liable at all times to honour the undertaking given to the appellant. There is no evidence that they ever requested the appellant to discharge them from their obligation flowing from their undertaking. In the absence of a release, the respondents were obligated to honour the said undertaking, no matter how difficult or painful it was to honour it. In this connection, therefore, the alleged severance of the Advocate- Client relationship was an immaterial consideration, and there would have been no legal basis of joining the respondents’ client as a party to the suit before the trial court.

27. This Court in Harit Sheth t/a Harit Sheth Advocate vs. K. H. Osmond t/a K. H. Osmond Advocate (*supra*) stated thus:

“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 it if only to protect his 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. He cannot however sue to recover that amount unless he has first honoured his professional undertaking.” [Emphasis ours]

28. Similarly, in *Warubiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited* (*supra*), this Court expressed itself further thus:

“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 vs. 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).” [Emphasis added]

29. We think that we have said enough to demonstrate that the learned judge erred in law and in fact by holding that the respondents were not liable to honour the professional undertaking given to the appellant. The learned judge misapplied and/or misinterpreted the law relating to professional undertakings and thus arrived at an erroneous decision.

30. Consequently, we allow this appeal and set aside the trial court’s impugned decision in its entirety. We substitute therefor an order granting the appellant’s prayers as sought in the suit that he had filed before the trial court. We award the costs of the appeal to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

H. A OMONDI

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

