



REPUBLIC OF KENYA



KENYA LAW
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Bindo v Stephen Kipkenda & Dorothy Kiprono t/a Kipkenda & Co. Advocates; Runo (Interested Party) (Civil Case E228 of 2021) [2025] KEHC 8987 (KLR) (Civ) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E228 OF 2021

JN MULWA, J

JUNE 26, 2025

BETWEEN

RAMA HAMISI BINDO PLAINTIFF

AND

**STEPHEN KIPKENDA & DOROTHY KIPRONO T/A KIPKENDA & CO.
ADVOCATES DEFENDANT**

AND

DAVID K. RUNO INTERESTED PARTY

JUDGMENT

1. By an Amended Originating Summons dated 15/12/2021, Rama Hamisi Bindo (hereafter the Plaintiff) seeks the following orders against Stephen Kipkenda & Dorothy Kiprono t/a Kipkenda & Co. Advocates (hereafter the Defendant):-
 - a. That the Defendant Stephen Kipkenda & Dorothy Kiprono T/A Kipkenda & Company Advocates do fulfill their professional undertaking dated 16/09/2016 and pay the Plaintiff Kshs. 40,000,000/- forthwith with interest thereon until payment in full;
 - b. That judgment be entered against the Defendant in the sum Kshs. 40,000,000/- upon their undertaking; and
 - c. That the Defendant bear the costs of the suit.
2. The summons is premised on the provisions of Order 37 Rule 3 and Order 52 Rule 7 of the Civil Procedure Rules (CPR) with the grounds thereto being amplified by the supporting affidavit dated 17/09/2021 and supplementary affidavit dated 08/11/2021 all sworn by Rama Hamisi Bindo. The



gist of his deposition is that on or about 16/09/2016 the Defendant issued a professional undertaking to pay the sum of Kshs. 50,000,000/- upon the sale of property L.R No. 21935. Upon issuing the professional undertaking the Defendant settled a sum of Kshs. 10,000,000/- however the balance of Kshs. 40,000,000/- has not been paid whereas the Defendant has no intention to clear the said amount despite making numerous verbal promises. He goes on to depose that despite a number of requests and or demands to the Defendant to make good on the balance they have failed to do so thus necessitating the instant suit. He concludes by deposing that this Court has the requisite power and discretion to grant the orders sought in the interest of justice.

3. The Defendant opposes the summons through a replying affidavit dated 22/03/2022 and sworn by Stephen Kipkenda. At the outset he takes issue with the summons by stating that the same is incompetent, frivolous, vexatious and unwarranted. He confirms that on 16/09/2016, that the Plaintiff and one David K. Runo (hereafter the Interested Party) signed a Deed of Settlement to the effect that the proceeds of sale in respect of L.R No. 21935 to the tune of Kshs. 50,000,000/- would be applied to settle a debt owed to the Plaintiff. That on 17/09/2019 both the Plaintiff and Interested Party voluntarily entered into a Variation of Deed of Settlement, which inter alia captured that the letter dated 16/09/2016 issued by the Defendant to pay a sum of Kshs. 50,000,000/- would fully release and discharge the Defendant from the undertaking.
4. He goes on to state that following the execution of the Variation on settlement, which superseded the letter dated 16/09/2016, any dispute arising from the said letter would be directed to the Interested Party and not the Defendant. That the Variation of Deed of Settlement that was voluntarily executed by the parties thereto had a dispute clause whereas a Professional Undertaking to be efficacious is only maintainable between two (2) advocates which constitutes a separate agreement independent of the transaction resulting to an advocate being required to give a professional undertaking. He surmises by deposing that it is in the interest of justice that the Amended Originating Summons be dismissed with costs.
5. By way of a ruling delivered on 10/11/2022 by this court, David K. Runo (the Interested Party) was enjoined to the instant proceedings.
6. Directions were taken on canvassing the summons by way of written submission. Only the Plaintiff and Defendant complied. That said, the Court has considered the rival affidavit material and submissions filed by the respective parties and thus postulates that the issue for determination concerns -:
 - a. Whether there exists a professional undertaking between the Plaintiff and Defendant capable of enforcement by this Court?

Whether there exists a professional undertaking between the Plaintiff and Defendant capable of enforcement by this Court?

7. Enforcement of an Advocates professional undertaking is specifically provided for at Order 52 Rule 7 of the CPR, upon which the Applicant's Summons is anchored. It provides that-:
 - “(1) (1) An application for an order for the enforcement of an undertaking given by an advocate shall be made —
 - (a) if the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or
 - (b) in any other case, by originating summons in the High Court.



- (2) Save for special reasons to be recorded by the judge, the order shall in the first instance be that the advocate shall honour his undertaking within a time fixed by the order, and only thereafter may an order in enforcement be made.”
8. Meanwhile, Black’s Law dictionary, 10th Edition defines an “undertaking” as “a promise, pledge or engagement”. In *Waruhiu K’Owade & Ng’ang’a Advocates v Mutune Investments Ltd* [2016] eKLR, the Court of Appeal defined a professional undertaking as follows:-
- “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.”
9. In urging the Court to allow the summons, the Plaintiff has summarily submitted that the Defendant issued a professional undertaking vide the letter dated 16/09/2016 which constitutes a separate agreement independent of the Deed of Variation as such the same can be enforced against the Defendant independent of the terms of the Deed of Settlement. It was further submitted that the Plaintiff has since rescinded the purported Deed of Variation upon realizing that the same was a ploy by the Defendant and Interested Party to defeat the timeous settlement of the undisputed amounts owed to the Plaintiff therefore it is incumbent upon the Defendant to fulfill the professional undertaking. The Law Society of Kenya’s Guidance on Professional Undertakings and the decision in *Waruhiu K’Owade & Ng’ang’a Advocates* (supra) were called to aid. Submitting on whether the Court ought to enforce the professional undertaking, counsel relied on decision in *Harit Sheth t/a Harit Sheth Advocate v K. H. Osmond t/a K. H. Osmond Advocate* [2011] eKLR and *Naphatali Paul Radier v David Njogu Gachanja D. Njogu & Company Advocates* [2006] eKLR to summarily argue that the Court has inherent powers to enforce the professional undertaking issued by the Defendant on 16/09/2016.
10. In retort, while calling to aid the decision in *Nyagowa v Seth & Wathigo Advocates* [2023] KEELC 18530 (KLR), the Defendant submitted that once parties executed a Variation of the Deed of Settlement the same superseded the earlier Deed of Settlement and attendant letter of undertaking, to wit, the Plaintiff’s suit is hinged on. That the Variation of Deed of Settlement did not provide for a professional undertaking to secure the payments of the amounts claimed by the Plaintiff whereas no proof has been tendered that the Plaintiff was unlawfully induced to sign the said variation. Counsel went on to submit that in light of the express terms of the variation, it is unconscionable and unjustified for the Plaintiff to seek to enforce an undertaking that does not exist since the Defendant’s firm was fully discharged from any and all obligations and liabilities touching on the initial Deed of Settlement and Undertaking dated 16/09/2019.
11. The Defendant further submitted that parties voluntarily agreed on arbitration as a form of dispute resolution in the Deed of Variation therefore it is not for the Court to reconstruct, recreate or dictate the terms in order to defeat the intention of the parties. The decision in *Euromec International Limited v Shandong Taikai Power Engineering Co. Ltd* [2021] KEHC 93 (KLR) was cited in the latter regard. That despite having defended the instant matter the Defendant was not a party to the Deed of Variation adding that having been fully discharged from any liability touching on the professional undertaking; it



behooved the Plaintiff to refer any dispute it has with the Interested Party to Arbitration. In conclusion, the Court was urged to dismiss the summons with costs.

12. Having set out the above, it is undisputed that the Plaintiff and Interested Party executed a Deed of Settlement dated 16/09/2016. (Annexure RB-002). As a consequence of the said Deed, the Defendant issued an undertaking vide a letter of an even date, (Annexure RB-001) in which it intimated to the Plaintiff as follows;

“RE: Sale of LR. No. 21935 (IR. No. 159433) in the Name of David Rune Kamunya

We have been instructed by the above-named David Runo Kamunya to address you as follows.

That he is in the process of selling the above property and has instructed us to retain the sum of Kenya Shillings Fifty Million (Kshs. 50,000,000/-) from the sale proceeds and pay to you. We therefore hereby undertake to pay you as directed by our client the said sum of money from the sale proceeds upon receipt by us of the same and conclusion of the sale.”

13. It is further undisputed that on 17/09/2021 both the Plaintiff and Interested Party went on to execute a Variation of the aforesaid Deed of Settlement (Annexure RB-004) wherein the same saliently captured inter alia at Clause 4 therefore as follows:-

“ 4. On execution of this Deed:

- (a) The Deed of Settlement dated 16th September 2016 shall be deemed to have lapsed and replaced by this Deed of Variation.
- (b) The professional undertaking 16th September 2016 issued by the firm of Kipkenda & Co. Advocates to pay the sum of Kenya Shillings Fifty Million (Kshs. 50,000,000/-) to Rama Hamisi shall lapse on execution of this Deed and the Advocates are fully released and discharged from any liability and or obligation touching on the aforesaid professional undertaking”

5.

- (a) Should any dispute arise between the parties hereto with regard to the interpretation, rights, obligation and or implementation of any one or more of the provisions of this agreement, the parties to such dispute shall in the first instance attempt to resolve such dispute by amicable negotiation.
- (b) Such Arbitration shall be resolved under provisions of the Kenya *Arbitration Act* 1995 (as amended from time to time)
- (c) The tribunal shall consist of one arbitrator to be agreed upon between the parties failing which such arbitrator shall be appointed by the Chairman for the time being of the Law Society of Kenya upon the application of any party”

14. What I gather to be the Plaintiff’s contestation is that vide a recession notice dated 15/02/2021 (Annexure RB-005) the Variation of Deed of Settlement was rescinded, to wit, the Professional Undertaking issued by the Defendant vide the letter dated 16/09/2016 continues to subsist, a consequence of which the Defendant is still obligated to fulfil the undertaking issued therein. It is



trite that a professional undertaking is a separate and distinct contract from the underlying transaction pursuant to which it was given. The court finds guidance in the case of *STG Muhia v J. M. Chege TIA. J.M. Chege & Company Advocates* [2009] eKLR the court held—

“A professional undertaking by an advocate constitutes a separate agreement independent of the transaction that resulted in such an advocate being required to give a professional undertaking can therefore be enforced against an Advocate independent of the transaction in which the transaction in which the professional undertaking was given.”

15. What this means in my view is that upon parties executing the Deed of Settlement, there ensued a professional undertaking issued by the Defendant in favour of the Plaintiff. Subsequently, parties executed a Variation to the Deed of Settlement, in which it was mutually agreed in Clause 4 therein that the Defendant was fully released and discharged from any liability and or obligation touching on the aforesaid professional undertaking. It's equally well trodden that a Court cannot rewrite a contract between parties, its role is limited to interpretation of the same because contracting parties are free to specify the terms and conditions of their agreement. See *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR.
16. Here, it must be understood that the Variation of Deed of Settlement did not provide for any termination clause, in respect of the variation. It merely provided for a dispute resolution mechanism by way of Arbitration. Consequently, this Court conceives that by dint of the Deed of Variation should any dispute arise, the same was to be referred to Arbitration and not termination as unilaterally opted to by the Plaintiff vide the recession notice dated 15/02/2021.
17. The Plaintiff has argued that the Deed of Variation was used as a ploy by the Defendant and Interested Party to defeat the timeous settlement of the undisputed amounts owed him. The latter manifestly constituted a dispute, to wit, the contracting parties had voluntarily agreed to the manner and model in which a dispute between them would be resolved. To the foregoing end, this Court reasonably believes, in the absence of a clause, the termination notice (Annexure RB-005) was of no consequence to the Variation of Deed of Settlement, to wit, the Plaintiff can now argue and or contend that there exists a live Professional Undertaking on accord of the recession notice.
18. For all intents and purposes, by mutual agreement, the Variation of Deed of Settlement, extinguished the Professional Undertaking issued by the Defendant. The Plaintiff cannot now be heard to seek to enforce the same on the premise of its recession notice in respect of the Variation of Deed of Settlement. Whatever the intent was in respect of the Variation of Deed of Settlement by the respective parties, the same was duly executed by mutual consent. This Court agrees with the Defendant that the Plaintiff has not demonstrated that the Variation can be set aside on accord of vitiating factors such as misrepresentation, mistake, fraud, coercion and or undue influence. Despite the undertaking being a separate agreement to the Deed of Settlement, the obligation arising therefrom was doused by the Deed of Variation. This court therefore finds no existing Professional Undertaking between the Plaintiff and the Defendant capable of enforcement against the Defendant.
19. For the aforesaid reasons, the Court finds no merit in the Originating Summons, leading to the unenviable conclusion that it is dismissed with costs to the Defendant.

Orders accordingly.

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

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JANET MULWA.



JUDGE

