



REPUBLIC OF KENYA



KENYA LAW

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Limo Auto Limited v Munikah t/a Munikah & Company Advocates (Commercial Case E282 of 2019) [2025] KEHC 9155 (KLR) (Commercial and Tax) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9155 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E282 OF 2019
JWW MONG'ARE, J
JUNE 26, 2025

BETWEEN

LIMO AUTO LIMITED PLAINTIFF

AND

**SAMSON MASABA MUNIKAH T/A MUNIKAH & COMPANY
ADVOCATES DEFENDANT**

JUDGMENT

Introduction and Background

1. The Defendant, an advocate since 1977, was owed over Ksh. 900 million in legal fees by the Nairobi County Government. On 7th August 2012, his bill of costs against the County in Misc. Application No. 247 of 2011 was taxed at Kshs. 498,757,315.00 which had grown to Kshs. 960,831,647.83 by 2018. In November 2018, the Defendant approached one Hassan Zubedi, the General Manager of the Plaintiff, for a business proposal, stating he needed Kshs. 2 million to facilitate payments from the county through “dependable networks within government circles”. Mr. Hassan lent the Defendant the said amount between 23rd November 2018 and 24th November 2018.
2. By an Originating Summons dated 16th August 2019, the Plaintiff approached the court claiming that in exchange of the Kshs. 2,000,000.00, the Defendant issued an irrevocable professional undertaking dated 22nd November 2018 (“the Undertaking”) corroborated by a Loan Agreement and a Letter of Guarantee and Indemnity, both dated 23rd November 2018. The Undertaking stipulated that the Defendant would pay Kshs. 2,000,000 to the Plaintiff by 31st December 2018, if his firm, Messrs. Munikah & Company Advocates defaulted. Furthermore, that from the legal fees owed by the Nairobi City County Government, the Defendant undertook to pay the Plaintiff Kshs. 30,000,000.00 of the realized net decretal amount after tax and expenses.



3. The Plaintiff claims that on 12th July 2019, the Defendant received Kshs. 250,000,000 from Nairobi County, however, the Defendant reneged on the Undertaking, paid only Kshs. 2 million and offered Kshs. 5 million in lieu of Kshs. 30 million, which the Plaintiff rejected. As such, the Plaintiff is seeking enforcement of the Undertaking issued by the Defendant as it states that the same is clear and unambiguous and that the Defendant is attempting to verbally vary the contents of the same, the Loan Agreement, and Letter of Guarantee and indemnity. The Plaintiff seeks the reliefs outlined in its Originating Summons that the Defendant remits the Kshs. 30,000,000.00 or in the alternative, that the court issues an order freezing the Defendant's bank accounts in the said sum.
4. The Defendant responded to the suit through his replying affidavit sworn on 4th November 2019. He depones that that the Plaintiff has wrongfully brought this suit and that there were no direct dealings between them and that this is a case of the Plaintiff attempting to benefit where they did not contribute, and that the Plaintiff has been unjustly sued by the Plaintiff without any direct transactions between them. The Defendant also asserts that Mr. Hassan, who initiated the suit, acted fraudulently and without proper authority to represent the Plaintiff and he contends that he entered into a loan agreement with Mr. Hassan and not the Plaintiff.
5. The Defendant argues that a professional undertaking is typically given on behalf of a client or a third party and since he was acting on his own behalf, as his law firm is a sole proprietorship, he claims he could not have issued a professional undertaking to himself. Therefore, the relationship, if any, would be an ordinary loan agreement, not a professional undertaking. The Defendant states he fully repaid the Kshs. 2,000,000.00 loan to Mr. Hassan as per their agreement and he alleges that clauses requiring an additional Kshs. 30,000,000.00 payment were fraudulently added to the Loan Agreement after he had signed it. That even if valid, he argues this claim is premature as it was conditional upon his professional fees being fully settled by Nairobi City County, which has not yet occurred. He also states that the Agreement is illegal as any agreement requiring an advocate to share profits with a non-advocate violates the Advocates Act, and therefore, the courts cannot assist a party whose case is based on an illegal act (Ex turpi causa non oritur actio).
6. The Defendant reiterates that there was no meeting of minds between the parties and that the purported contract is void ab initio and based on the argument that the parties are "strangers" to each other due to Mr. Hassan's unauthorized actions, the Defendant contends that no professional undertaking could have existed between them. He states that he refunded the Kshs. 2,000,000.00 owed to Mr. Hassan after receiving a partial payment of his fees from the Nairobi City County and out of goodwill, he offered Mr. Hassan an additional Kshs. 5,000,000.00 which Mr. Hassan declined, insisting on the Kshs. 30,000,000.00. For these reasons, the Defendant urges the court to dismiss the claim against him.
7. The matter was set down for hearing where Mr. Hassan testified on behalf of the Plaintiff (PW 1). He relied on his affidavits sworn on 16th August 2019, 26th November 2019 and 27th November 2019 which he adopted as his testimony. He also produced the List and Bundle of Documents dated 16th August 2019 which include the Letter dated 3rd April 2018 addressed to the Chairman Committee on the Finalization of Pending Bills and Audits Procurement Process, Certification of Taxation of in MISC. Application No. 247 of 2011 awarding the Defendant's firm costs of Ksh. 498,757,315.28 against the City County of Nairobi, Letter dated 11th January 2019 by the Defendant's firm to the committee on finalization of Pending Bills and Audit of procurement processes, Cheques of repayment of Kshs.616,000.00 and Kshs. 2,100,000.00, Demand letters dated 22nd July 2019 and 30th July 2019 respectively, the Loan Agreement, the Undertaking, and the Personal Guarantee.



8. On his part, the Defendant called Mohammed Hassan Ahmed(DW 1) and Ahmed Hassan Ahmed(DW 2) as witnesses. The Defendant also testified on his own behalf (DW 3) and he relied on his affidavit of 4th November 2019 as his evidence. After the hearing, the court directed the parties to file written submissions and since the same mirror the parties' positions highlighted above, I will not rehash the same but I will be making relevant references to the same together with the with the evidence in my analysis and determination below.

Analysis and Determination

9. As these are civil proceedings, it should not be lost that the court's determination is on a balance of probabilities and is guided by the principle that he who alleges must prove. Denning J., in *Miller v Minister Of Pensions* [1947]2 All ER 372 discussed the burden of proof and he stated as follows:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

10. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in sections 107 and 108 of the *Evidence Act*(Chapter 80 of the Laws of Kenya) which provide as follows:

107. Burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

(Also see *Ignatius Makau Mutisya v Reuben Musyoki Muli* [2015] KECA 612 (KLR).

11. From the submissions, the parties urge the court to determine the following abridged issues:
1. Whether it is mandatory to file a board resolution/authority when directors confirm authority to file suit.
 2. Whether the Defendant issued a professional undertaking and its effect.
 3. Whether the Defendant can vary the contents of the professional undertaking through parole evidence.
 4. Whether the Plaintiff is entitled to the reliefs sought and who should bear the cost of the suit



Authority to file the suit

12. As stated, the Defendant claimed that PW 1 had no authority from the Plaintiff to file this suit on its behalf and as such, the suit is wrongfully brought against him. In response, the Plaintiff submits that their directors (DW 1 and DW 2) confirmed under oath that they authorized the suit, and Mr. Hassan (PW 1) was duly authorized to carry out the day to day running of the Plaintiff. The Plaintiff asserts that it is sufficient for a deponent to state they are authorized, and the burden shifts to the defendant to prove otherwise. That the failure to file a resolution with the plaintiff does not invalidate the suit and the Defendant's attempts to distance himself from the transactions are futile, especially since he executed documents with the Plaintiff and issued postdated cheques to the Company.
13. The Plaintiff has relied on the case of *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* [2015] KECA 721 (KLR) where the Court of Appeal held as follows:

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized”.
14. I think the Defendant's objection has been answered by the aforementioned holding by the Court of Appeal that it is not mandatory to file a Board Resolution so that it can be demonstrated that the directors have authority to file suit on behalf of the Company. It is indeed correct that from the record, DW 1 and DW 2 confirmed that PW 1, who is their father and co-director in the Plaintiff, had authority to act on behalf of the Company and that they had given him authority to do so. This position is confirmed by PW 1 who stated in his affidavit of 16th August 2019 that he had authority from the Plaintiff's Board of Directors to swear the said affidavit in support of the suit. No evidence was presented by the Defendant to demonstrate otherwise and I am therefore satisfied that PW 1 had authority from its co-directors to file the present suit on behalf of the Plaintiff. The Defendant's objection that this suit was filed without authority therefore fails.

Whether the Defendant issued the Undertaking and the effect of the same

15. The Plaintiff stated that the Defendant issued a Professional Undertaking on 22nd November 2018 but the Defendant insists that no such Undertaking was issued between the parties and that if indeed one was issued, then the same was to PW 1 and not the Plaintiff. Further, that if he indeed gave out an undertaking, then the same was in his personal and not in his professional capacity as an advocate and that an undertaking can only be issued on behalf of a client or a third party and not the issuer themselves.
16. The Court of Appeal, in *Ndung'u v Koskei Joel Kipkurui Monda Ombori Rogers & E.J Ruto t/ a Koskei Monda & Company Advocates* accepted the meaning of the word 'undertaking' and/or 'professional undertaking' as follows:

“...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.”

17. From the above definitions, it be deduced that an undertaking is an agreement made by an advocate, on behalf of a client, to another party with a promise to do or refrain from doing something. Such an agreement is personal to the advocate and the advocate is personally liable if the undertaking is not performed. In his testimony, the Defendant did not deny that he authored the impugned undertaking of 22nd November 2018 and for an understanding of what he stated, I will reproduce the letter below:

.....

Limo Auto Limited

O. Box 12634-00400

Nairobi

Dear Sir

RE: Financial Accommodation To Munikah & Company Advocates

In consideration of your having lent to Munikah & Company Advocates a sum of Kenya Shillings two million (Kshs 2,000,000/=) I Samson Masaba Munikah an Advocate of the High Court of Kenya, in private practice under the name and style of Munikah & Company Advocates, do hereby furnish an irrevocable professional undertaking in terms as follows:

1. That I shall pay to you on or before 31st December 2018 a sum of Kenya Shillings two million (Kshs 2,000,000/=) in the event that the law firm of Munikah & Company Advocates defaults to pay.
2. That in connection with the monies owed to Munikah & Company Advocates by the Nairobi City County Government in HC Misc. Application No. 247 of 2011, as evidenced by the Decree given and issued on 30th October 2017 and 14th November 2017, respectively; and



contents of the letter dated 13th November 2016 from the Pending Bills Committee on Finalisation of Pending Bills and Audit of Procurement Process of the Nairobi City County to Munikah & Company Advocates, I shall pay to you Kshs 30,000,000/= (thirty million) of the realised net decretal amount after tax and expenses.

Yours faithfully

Munikah & Company

Sign

S. M. Munikah

Samson M. Munikah

18. From the above letter, the Defendant expressly states that he is issuing a professional undertaking that he will among other things, pay Kshs. 30,000,000.00 to the Plaintiff. It also appears that he is issuing the undertaking on behalf of his law firm, Messrs. Munikah & Company Advocates and that the same was being issued in his professional capacity as an advocate and not as an individual as he claims. In my view, had it been issued as an individual, he would not have expressly stated that the same was an “irrevocable professional undertaking” and that he was an advocate of the High Court of Kenya. Whereas the Defendant states that he cannot issue an undertaking on behalf of himself, I take the view that an advocate can issue an undertaking on behalf of themselves, provided it is within their professional capacity and complies with relevant legal and ethical standards. In any case, the Undertaking was issued on behalf of his law firm and I note that the Defendant, in his testimony, implicitly admitted to issuing the Undertaking but that the same was premature and had not accrued.
19. In the foregoing, I find that the letter of 22nd November 2018 was indeed a professional undertaking issued by the Defendant on behalf of his law firm to the Plaintiff and that the same was issued in the Defendant’s professional capacity as an advocate. The terms therein appear clear to me and they are capable of being performed by the Defendant.

Whether the Defendant can vary the contents of the professional undertaking through parol evidence.

20. From the record, it is indeed correct that the Defendant attempted to vary the terms of the Undertaking by testifying that he had offered the Plaintiff Kshs.5,000,000.00 because he was being “generous” and that he was to consider paying the Kshs. 30,000,000.00 if his entire claim against Nairobi County was settled. The Defendant also stated that the Undertaking had been forged or doctored to introduce terms that he never acceded to. I agree with the Plaintiff that the Defendant cannot lawfully adduce any extrinsic evidence whether oral or written to contradict and vary the terms of the Undertaking. In any case, his assertions of forgery were not proven and as stated, he admitted to signing the Undertaking. Therefore, the Defendant cannot vary the contents of the Undertaking through parol evidence.

Whether the Plaintiff is entitled to the reliefs sought and who should bear the cost of the suit

21. I have already found that the Defendant issued the Undertaking which was clear and unambiguous and that the same is capable of being performed and thus enforceable. This Undertaking was corroborated by the Guarantee and the Loan Agreement signed by the Defendant where he binds himself to repay the Kshs. 2,000,000.00 advanced to him by the Plaintiff and the Kshs. 30,000,000.00. However, I note that the Kshs. 30,000,000.00 payable to the Plaintiff is “..of the realized net decretal amount after tax and expenses”. The parties do not dispute that the Defendant is yet to be paid the entire decretal sum as the Defendant has only been paid part of the decretal sum being Kshs. 250,000,000.00 out of the



promised Kshs. 450,000,000.00 as stated by the Committee of Finalization of Pending Bills and Audit of Procurement Process.

22. It therefore follows that the Undertaking, though valid and binding upon the Defendant, was conditional upon the payment of the realized net decretal amount after tax and expenses and the Undertaking has not actually accrued as the decree is yet to be fully settled. I therefore find merit in the Defendant's argument that enforcing the Undertaking at this point would be premature. In *Conrad Masinde Nyukuri & another v Robson Harris & another* [2021] KEHC 6246 (KLR) the court accepted the passage in Halsbury's Laws of England (4th Ed.) Vol. 44(1), pages 222, 223, 224, that, "If an undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced." I find that the entire decretal sum as certified as payable to the Defendant by Nairobi County's Committee of Finalization of Pending Bills and Audit of Procurement Process has to be paid before the Undertaking is enforced. I therefore find that the Defendant cannot be compelled to honour the Undertaking and the Plaintiff is not be entitled to the prayers sought in its suit at this time.

Conclusion and Disposition

23. In the upshot, I now issue the following final orders:
- a. The Originating Summons dated 16th August 2019 for the immediate enforcement of the professional undertaking dated 22nd November 2018 by way of an order for payment of the sum of Kshs. 30,000,000.00 is hereby dismissed for being premature.
 - b. The Plaintiff shall be at liberty to file a fresh suit for the full enforcement of the Professional Undertaking, including an order for payment, only upon proof to the satisfaction of the Court that the entire decretal sum has been paid to the Defendant as stipulated in the Professional Undertaking
 - c. There is no order as to costs

DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JUNE 2025

.....
J.W.W. MONGARE

JUDGE

In The Presence Of

Mr. Ometo for the Plaintiff.

Mr. Kirima for the Defendant.

Amos- Court Assistant

