



**Okatch t/a Okatch & Partners Advocates v Mutea t/a HKM Associates
Advocates (Commercial Miscellaneous Application E535 of 2024)
[2025] KEHC 12287 (KLR) (Commercial and Tax) (29 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E535 OF 2024**

H NAMISI, J

AUGUST 29, 2025

**IN THE MATTER OF THE ADVOCATES ACT, CAP 16 OF THE LAWS OF KENYA
AND**

**IN THE MATTER OF SUMMONS FOR AN ORDER TO ENFORCE AN
UNDERTAKING GIVEN BY AN ADVOCATE OF THE HIGH COURT OF KENYA**

BETWEEN

DUNCAN OKATCH T/A OKATCH & PARTNERS ADVOCATES .. APPLICANT

AND

HENRY K MUTEA T/A HKM ASSOCIATES ADVOCATES RESPONDENT

RULING

1. The Applicant herein represents Boniface Nyagute Odhiambo Ndagwa, who is the Claimant in ELRCC E089 of 20233. The Respondent is counsel for Kalita Systems – Debt Holding Kenya Ltd, which is the Respondent in the aforementioned matter, which is ongoing before the Employment and Labor Relations Court (ELRC).
2. On 10 July 2023, the Respondent herein wrote to the Applicant herein expressing their client’s desire to settle the ELRC matter amicably. The Applicant’s client agreed to the said proposal and accordingly, a Deed of Settlement and Release was executed by the parties. Clause 10 of the Deed provided that the Applicant’s client would provide the following documents and information to the Respondent:
 - a. Form CR-9- Notice of Cessation from Directorship;
 - b. Resignation letter;



- c. Affidavit of Resignation; and
 - d. The Company's log-in credentials for the e-citizen and i-tax platforms.
3. In return, Respondent's client would pay a settlement sum of USD 7000/-, being the remuneration, benefits and legal fees. Such payment would be within 48 hours after the documents and information are provided by the Applicant's client.
 4. Clause 12 of the Deed provided that the terms of the agreement would be solidified by a professional undertaking from the Respondent herein to the Applicant in the agreed terms. It is the Applicant's case that the as at 25 August 2023, the Applicant's client had complied with all its obligations, yet the Respondent failed to release the settlement sum to the Applicant. Conversely, it is the Respondent's case that the Applicant's client failed to comply with all the obligations.
 5. In its Originating Summons dated 26 June 2024, the Applicant seeks the following:
 - i. An order directing the Respondent to honour the professional undertaking dated 9 August 2023 and be compelled to pay the Applicant the sum of USD 7000/= plus interest at commercial rates from the date of default until payment in full;
 - ii. An order that the said Respondent do pay the Applicant costs of and occasioned by this Application.
 6. The Respondent opposed the Application through its Replying Affidavit and raised a preliminary objection on the following grounds:
 - i. That this Honourable Court lacks jurisdiction to hear and determine the instant Application dated 26 June 2024 filed against the Respondent herein;
 - ii. That the instant Application herein offends the rule against res judicata as the matter was heard and determined and a ruling delivered in HCOMMISC E1063 of 2023;
 - iii. That the subject matter and the issue in the instant Application are the same as that in HCCOMMISC E1063 of 2023;
 - iv. That the instant Application as filed and pleaded is scandalous, frivolous, vexatious, prejudicial and is otherwise an abuse of the process of the Court;
 - v. That in totality, the instant Application amounts to an abuse of the court process and ought to be dismissed in limine.
 7. As directed by the Court, the Application and Preliminary Objection were canvassed by way of written submissions.

Preliminary Objection

8. In light of the Preliminary Objection, this Court will first consider and determine the objection before proceeding, if at all, to the merits of the Application.
9. In its submissions, the Respondent argued that the present application is res judicata, since the Applicant had previously filed HCCOMMISC No. E1063 of 2023. The matter involved the same parties and the same subject matter. A ruling was delivered therein on 19 June 2024. The Respondent anchored his argument on Section 7 of the *Civil Procedure Act*, which proscribes a court from trying any suit or issue that has been directly and substantially in issue in a former suit between the same parties and has been heard and finally decided. To buttress this statutory provision, the Respondent cited the



Court of Appeal decision in *Uhuru Highway Development Ltd -vs- Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) & Kamlesh M. Pattni* eKLR. The Respondent contended that the Applicant's proper recourse, if any, was to amend the pleading in the former suit rather than instituting a fresh action. The Respondent further cited the case of *Institute for Social Accountability & Anor -vs- Parliament of Kenya & 3 others* [2014] eKLR on the utility of amendments to avoid a multiplicity of suits.

10. In opposition, the Applicant submitted that the doctrine of *res judicata* is inapplicable to the present circumstances. The Applicant argued that the former suit, HCCOMMISC E1063 of 2023 was dismissed on a mere technicality and was not determined on its merits. The technicality identified by the Application is that the previous suit was improperly instituted against a law firm, which is not a legal person capable of being sued, thus prompting the court to dismiss it without considering the substantive question of whether the professional undertaking had been breached. The Applicant argued that for the plea of *res judicata* to be sustained, the previous matter must have been concluded on merit. Citing the case of *Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991* (unreported), the Appellant submitted that the present matter is a fresh suit with the correct parties and has not been adjudicated upon.
11. In considering the preliminary objection, this Court relies on the *locus classicus* decision in *Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd EA 696*, where it was stated:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. “
12. *Res judicata* is undoubtedly a point of law. However, its determination requires the Court to ascertain certain foundational facts: the parties in the former suit, the issues raised therein, and the basis of the court's final decision. These facts are ascertainable from the undisputed court record of the previous matter. The dispute between the parties is not over the existence or outcome of the former suit, but rather the legal effect of that outcome. Therefore, the preliminary objection herein can be determined as a pure point of law without delving into the contested evidence regarding the professional undertaking itself.
13. The doctrine of *res judicata* is codified in section 7 of the *Civil Procedure Act*. For this plea to succeed, the Respondent must demonstrate:
 - i. The matter directly and substantially in issue in the present suit was also directly and substantially in issue in the former suit;
 - ii. The former suit was between the same parties or parties under whom they claim, litigating under the same title;
 - iii. The court which determined the former suit was competent to try it;
 - iv. The issue in the former suit was heard and finally determined
14. The Respondent's reliance on the *Uhuru Highway Devt Case* (supra) is noted. However, that case concerned the impropriety of filing successive interlocutory applications within the same suit. The Court of Appeal's reasoning on finality was aimed at preventing a litigant from taking multiple bites at the cherry by re-agitating the same application. The matter before this Court is different. It concerns the filing of a new suit after the former suit was dismissed. While the general principle of finality in litigation is paramount, the specific application of *res judicata* to a new suit is governed by the strict



requirements of section 7, particularly the condition that the matter must have been heard and finally determined.

15. The Supreme Court in *Communications Commission of Kenya & 5 others - v- Royal Media Services Limited & 5 others* [2014] eKLR expressed itself as follows on the issue of res judicata:

“(317) The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....

(319) There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia and Another v. The Attorney General and Others*, [2005] 1 EA 83, 89.”

16. A decision on the merits is one that addresses the substantive rights and obligations of the parties in the dispute. A dismissal based on a procedural defect such as lack of jurisdiction or improper constitution of the suit, is not a determination of the substantive issues. In *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] KEHC 6100 (KLR), the Court opined that:

“The requirements for res judicata are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the ‘determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.’”

17. Similarly, in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] KECA 477 (KLR), the Court of Appeal affirmed that the doctrine applies where a matter has been directly and substantially dealt with on its merits.

18. The dismissal of a suit because it was brought against a law firm, which has no legal personality, is analogous to a dismissal for want of jurisdiction. The Court, in such an instance, makes a finding that the suit as framed is incompetent and cannot be entertained, as was the case in the previous matter. Such a finding does not, and cannot, determine the substantive question at the heart of the dispute.

19. In view of the foregoing, this Court finds that the matter was not heard and finally determined, within the meaning of section 7 of the *Civil Procedure Act*. The plea of res judicata is, therefore, not sustainable

Originating Summons

20. This Court exercises a summary and inherent jurisdiction over Advocates, who are its officers. This jurisdiction is invoked not merely to enforce legal rights, but to uphold the honor and integrity of the legal profession. A professional undertaking is the bedrock upon which trust and efficiency in legal practice, particularly in conveyancing and commercial transactions, are built. It is a solemn bond, and its breach is a matter of professional misconduct.



21. The Court of Appeal in *Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited* [2016] KECA 835 (KLR) eloquently described the sanctity of the instrument:

“The professional undertaking is a smooth and binding contract between the donor and the donee who are the advocates. It should be adhered to with a standard of ethics higher than that of the market place. Professional undertakings to lawyers by colleagues are like a religion and are the underpinning of the relationship that governs the activities, transactions and actions between them. A professional undertaking embodies and manifests the practice of the legal profession in a characteristically methodical, courteous and ethical manner. That is why the immediate offer and acceptance of a professional undertaking triggers a monumental transaction and huge financial relationship which must be observed by both sides. In our view, that is the basis of professional undertakings in the legal profession. In fact, the conditions, terms and implications must be strictly adhered to for the legal profession to thrive, and for advocates to deal with each other freely and openly.”

22. In his Replying Affidavit, the Respondent averred that he did not personally sign the undertaking and, thus, it cannot be enforced against him. This argument is untenable. The undertaking was issued on the official letterhead of the firm, HKM Associates, and it was signed by Cosmas Chahenza, an Advocate in the employ of the firm, in the course of the firm's business. It is a settled principle of law that an undertaking issued by an advocate in a firm, on the firm's letterhead and in the course of business, is binding on the firm and its proprietor(s). The Respondent cannot escape liability on this ground.

23. The Undertaking dated 9 August 2023 unequivocally promises payment of the settlement sum within 48 hours of the Applicant's client remitting specific documents and information. This created a conditional undertaking. The law on enforcement of such undertakings is clear. In *Arthur K. Igeria t/ a Igeria & Co. Advocates v Michael Ndaiga* [2017] KECA 709 (KLR), the Court of Appeal held thus:

“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 dubity 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.”

24. In his Affidavits, the Applicant averred that all the documents and information was provided. Conversely, the Respondent stated that the Applicant failed to supply the Company's e-citizen username and password. Instead, what was supplied was the Applicant's personal KRA i-tax login details, which were not useful for effecting a change of directorship.

25. A keen examination of the documentary evidence provided reveals the following sequence of events:

- i. On 9 August 2023 at 14:45 hours, an email is sent from the Applicant's firm stating, “Please see below our client's KRA i-tax login details. User: P05XXXXT Password UTXXX0d”
- ii. On 9 August 2023 at 15:08 hours, a response from the Respondent's firm stating, “The User and password details are well noted in your email below. We are proceeding to initiate the changes...”
- iii. On 9 August 2023 at 16:17 hours, an email from the Respondent's firm stating, “Just noted the credential sent are not Boniface Odhiambo's e-citizen login details but i-tax logins. Please send his e-citizen login details.”



26. From the above correspondence, and in the absence of any evidence to controvert the same, it is clear that the Applicant's assertion that they complied and that the compliance was acknowledged is a misrepresentation. The Applicant did not adduce any evidence to show that they subsequently provided the correct credentials as requested.
27. In view of the foregoing, it is evident that the Applicant failed to perform a material condition precedent of the undertaking. Since the event did not occur, the payment of the settlement sum did not crystallize, and this failure is attributable to the Applicant. The Applicant cannot seek to profit from their own failure to comply with a clear unambiguous term of the undertaking. Consequently, it is the finding of this Court that the professional undertaking, while validly issued, is not presently enforceable against the Respondent.
28. Accordingly, I make the following orders:
- i. The Preliminary Objection dated 3 October 2024 is hereby dismissed;
 - ii. The Originating Summons dated 26 June 2024 is hereby dismissed;
 - iii. Each party shall bear its own costs.
29. For the avoidance of doubt, the dismissal of the application does not extinguish the professional undertaking dated 9 August 2023. The undertaking remains capable of performance and enforcement if, and when, the Applicant furnishes the Respondent with the correct and complete documents and credentials as stipulated therein.

DATED AND DELIVERED AT NAIROBI THIS 29 DAY OF AUGUST 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Applicant: Ms. Ang'ielia h/b Okatch

Respondent: Eugene Akumu h/b Margaret Mwaniki

Court Assistant: Lucy Mwangi

