



**Biwott trading in the name and Style of Biwott Korir & Co Advocates v  
Maosa t/a Maosa & Company Advocates (Civil Miscellaneous Application  
E338 of 2022) [2024] KEHC 6146 (KLR) (Civ) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6146 (KLR)

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

**CIVIL**

**CIVIL MISCELLANEOUS APPLICATION E338 OF 2022**

**AN ONGERI, J**

**MAY 24, 2024**

**BETWEEN**

**JOSEPH KORIR BIWOTT TRADING IN THE NAME AND STYLE OF BIWOTT  
KORIR & CO ADVOCATES ..... PLAINTIFF**

**AND**

**THOMAS MAOSA T/A MAOSA & COMPANY ADVOCATES ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed the originating summons (OS) dated 8/4/2022 seeking to enforce a professional undertaking issued by the defendant and sought the following prayers;
  - i. That this honourable court be pleased to order Thomas Maosa T/a Maosa & Company Advocates to pay to the plaintiff the sum of ksh. Four million three hundred thousand (ksh.4,300,000.00) within seven (7) days of the order of the court being the balance of the amount given in the irrevocable professional undertaking.
  - ii. That the defendant do pay interest at 12% per annum on such sums as are found due in (i) above from the date of receipt thereof until payment in full.
  - iii. That this honourable court be pleased to make any other or further orders as may be necessary to ensure enforcement of the irrevocable professional undertaking given by the defendant.
  - iv. That in any event the defendant do pay the costs of this application.
2. The OS is supported the supporting affidavit sworn by the applicant in which he stated that it is within his knowledge that almost 10 years ago, he did act for Simpson Senda Kwayera T/a Tele-news Africa And Atlantic Region, Together With M/s E. Wafula and Associates, in Civil Suit number 148 of 2012,



- to compel the Ministry of Trade to pay their mutual client outstanding amount pursuant to a contract executed in 2004.
3. That it was within his knowledge and the claimant was assisted also in the payment of Ksh.72,000/= as filing fees that the plaintiff/petitioner was unable to raise.
  4. That it is within his knowledge and the claimant that his fees for the case would be Kshs.3,000,000/=.
  5. That it is within his knowledge, that around April 2021, he met the claimant Simpson Senda Kwayera over the outstanding fee and he advised him that the balance of the amount from the Ministry was due but subject to Fy2020/21 Supplementary Estimates No. 2 which was to be tabled before parliament and they further mutually agreed that since his payments was long overdue, he will instruct his current advocates M/s Maosa & Company Advocates to issue an unequivocal and professional undertaking for the sum of ksh.6,000,000/=
  6. That pursuant to the said instructions, M/s Maosa & Company Advocates issued two undertakings the same day, one in favour of Kings Marosi for the amount of Ksh.8,500,000/= for services rendered to Tele-news Africa And Atlantic Region And Ksh.6,000,000/= in favour of M/s BiwOtt Korir & Company Advocates.
  7. That it is within his own knowledge that upon the defendant receiving the said amount on his account they had a meeting at Sidian Bank Kenyatta Avenue, together with Maosa Advocate, Simpson Senda Kwayera And Michael Rotich in which he fully honoured the undertaking in favour of King Marosi and partially honoured his undertaking to the applicant in the sum of Ksh.1,700,000/= and has failed, refused and/or neglected to pay to me the balance of ksh.4,300,000/= necessitating the filing of this application.
  8. That it is within his own knowledge that in the said meeting, Mr Maosa Advocate confirmed to the applicant through a message to wit;
  9. Remind them an undertaking is unequivocal and Must be honored. They also need to pay now that I have been working for them' in reference to the mutual clients earlier instructions to me and King Marosi.
  10. That when Maosa Advocate declined to fully honour his undertaking to the applicant and he instructed the firm of Odero-olonde And Company Advocates to demand for the full payment, but to date he has failed, neglected and/or refused to honour necessitating the filing of this application.
  11. That it is within his own knowledge that they have had subsequent meetings, calls and text messages with M/s Maosa Advocate And Simpson Senda Kwayera, in which it transpired that the client too still has not been paid his full dues and out of that meeting, the advocate was instructed to pay the applicant, a further sum of Ksh.1,300,000/=, among other parties and the client.
  12. The applicant filed a further supporting affidavit in which he stated that he represented the said client together with his colleagues from M/S Wafula & Associates.
  13. That the said suit sought to compel the Kenyan Ministry of Tourism to pay Mr. Simpson and his business for the amounts outstanding pursuant to a contract executed in the year 2004.
  14. That to facilitate the filing of the said suit, the applicant's firm paid filing fees in the sum of Kshs.72,000.00 since their mutual client was unable to raise the said fee.
  15. That at that point they negotiated for a fee of Kshs.3,000000.00.



16. That in April 2021 the applicant met Mr. Simpson Senda Kwayera over the outstanding fees and he advised that the balance of contract amount was due but subject to FY2020/ 21 supplementary Estimates No. 2 tabled before parliament.
17. That at the said meeting, it was agreed that since the payment was long overdue, he had instructed the firm of Maosa to issue me with an professional undertaking to pay the applicant the sum of ksh.6,000,000 instead of the earlier agreed sum of Kshs.3,000,000.00
18. That the revised fee was to compensate the applicant for the delayed payment whereby the client agreed to pay double the amount initially agreed upon.
19. That on the strength of the said instructions he ceded the brief to Mr. Maosa who gave two professional undertakings to pay Kings Marasi the sum of Kshs.8, 500,000 for services rendered to Tele-News and Atlantic Region and another undertaking for the sum of Kshs.6,000,000.00 in favor of the applicant's firm.
20. That in July 2021 they had a meeting at the Sidian Bank Kenyatta Avenue Branch and the Defendant paid the applicant Kshs.1,000,000.00 cash and then another Kshs.700,000.00 on a different date of the same month and cheque of Kshs.700,000.00 making in total the sum of Kshs.1,700,000.00.
21. That present at the meeting were Mr. Thomas Maosa Advocate, Mr. Simpson Senda Kwayera and Mr. Michael Rotich.
22. That at the said meeting Mr. Thomas Maosa confirmed receiving full payment of the contract sum in the sum of Kshs.85,000,000.00 and fully settled the professional undertaking given to Kings Marosi but he only paid the applicant the sum of Kshs.1,700, 000.00 aforesaid as partial payment of the undertaking given to the applicant.
23. That thereafter, Mr. Maosa for reasons only known to him has failed/refused and or neglected to pay the balance in the sum of Kshs.4,300,000.00.
24. That the applicant has severally demanded payment of the Sum of Kshs.4,300,000.00 from the respondent but he has offered no explanation or given any reason for his refusal to settle the outstanding amount.
25. That the respondent, Mr. Thomas Maosa, as Counsel who gave an unequivocal and irrevocable professional undertaking is personally bound to pay the balance of the amount he committed to pay in the said undertaking.
26. The parties filed written submissions as follows;
27. The Applicant submitted that the Respondent gave an Irrevocable Professional Undertaking committing to pay a sum of Kshs. 6,000,000 within two days of settlement of the outstanding dues to Telenews Africa. In July of 2021, the Respondent acknowledged receipt of the entire contract amount od Kshs. 85 million, but only remitted 1.7 million to the applicant, with no explanation on why the 4.3 million, which remains outstanding to date, was not settled.
28. The Applicant further submitted that the professional undertaking is binding on the Respondent despite the Applicant's standing with the Law Society of Kenya.
29. He urged the Court to allow the application and costs.
30. The Respondent submitted that the Applicant had instituted the current proceedings in his capacity as an Advocate of the High Court of Kenya yet he had not proven that he was acting as an Advocate



in the matter, as there has not been any evidence of appointment of the Defendant to act for him. The application also fails to disclose the nature of services rendered to warrant payment of Kshs. 6,000,000 as Legal fees.

31. The Respondent further submitted that the Applicant invoked provisions of Sections 55 and 56 of the *Advocate's Act*, relating to the Discipline of Advocates, which provisions can only be invoked by an Advocate who is licensed to practice as such. He contended that the Applicant is not licensed to practice as an Advocate as he lacks a Practicing Certificate, and is therefore in Contempt of Court.
32. The Respondent further asserted that the letter dated 12/11/2021, signed by four persons including the Applicant, had instructions to pay him Kshs. 1.3 million. There were no instructions to make the payment to the Applicant's firm.
33. The Respondent contended that Professional Undertakings are only enforceable between Advocates and not across professions.
34. The only issue for determination is whether the defendant is bound to honour the undertaking.
35. A professional undertaking is a serious engagement from which a party cannot escape.
36. A professional undertaking was described in the case of *David Karanja Thuo T/a D.K Thuo & Company Advocates v Ishvinder Kaur Kalsi Marwa t/a Kalsi & Company Advocates* [2019] eKLR as follows:-

“An undertaking is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by a Solicitor in the course of his practice, either personally or by a member of his staff; or a Solicitor as “solicitor”. but not in the course of his practice, under which the Solicitor...becomes personally bound. An undertaking is therefore a promise made by a solicitor....to do or refrain from doing something. In practice, undertakings are frequently by Solicitors in order to smooth the path of a transaction, or hasten its progress and are convenient methods by which some otherwise problematic areas of practice can be circumvented”

37. I reject the argument by the Respondent that the Applicant could not invoke the provisions of the Advocate's act for lack of a Practicing Certificate. An Advocate does not cease being one for not taking a Practicing Certificate unless he had been struck out from the Roll of Advocates. Even in the event that the Professional Undertaking was only enforceable between Advocates, the Applicant would be entitled to enforcement, with or without a Practicing Certificate at the time of making the Application.
38. In the case of *Nelson Andayi Havi t/a Havi & Company Advocates v Jane Muthoni Njage t/a J.M Njage & Company Advocates* [2015] eKLR, the Court held that:

“Therefore, having failed to do as required by the undertaking, the Defendant was clearly in breach of the undertaking. In such circumstances where the advocate did not honour the undertaking until after a suit had been filed and did not seek the consensus of the other counsel to vary the terms of the undertaking constitute special reasons on which the court may issue a coercive order of enforcement especially given that the Defendant was in funds all this time but just did not honour the undertaking. To hold otherwise would encourage a practice where advocates will give undertaking without the intention of honouring them as stipulated.”



39. In the case of *Patrick Lutta T/a Lutta & Company Advocates –V- Ishvinder Kaur Kalsi Marwa T/a Kalsi & Company Advocates* [2019] eKLR the court relied on the holding in the case of Harit Shethi T/a Harit Sheth Advocate (2011)eKLR and held as follows;

“With due respect to the learned counsel, a professional undertaking is given to 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 and an officer of the court”.

40. In the case of *Fidelity commercial Bank Limited v Onesmus Gitinji & Company Advocates* (2013) eKLR where J.B Havelock held –

“An undertaking given by a solicitor is personally binding on him and must be honored. Failure to honour an undertaking is prima facie evidence of professional misconduct and the Council of the Law society will require the undertaking to be honoured as a matter of conduct. Although consideration for the promise will often be present, an undertaking is enforceable even if it does not constitute a legal contract.....Any ambiguity in the terms of undertaking is generally construed against the party who gave the promise. In general., no terms will be implied into a professional undertaking and extraneous evidence will not be considered”.

41. In the current case, I have perused the letter attached to the OS and it states that the defendant was to pay the plaintiff Ksh. 1,300,000.

42. In the case of *Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga* [2017] eKLR, the Court of Appeal observed 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.”

43. I find that the letter from Tele News attached to the OS states that the plaintiff be paid Kshs. 1,300,000.

44. The plaintiff said initially the client had agreed to pay 3,000,000 but subsequently it was agreed that since the payment was long overdue, the client had instructed the firm of Maosa to issue the plaintiff with professional undertaking to pay the plaintiff the sum of ksh.6,000,000 instead of the earlier agreed sum of Kshs.3,000,000.00

45. I find that there is no evidence that the defendant gave an undertaking to pay the plaintiff Kshs 6,000,000 as alleged.

46. The defendant gave an undertaking to pay Ksh.3,000,000 and only partially paid the same.



- 47. If the client agreed to double the fees to Ksh. 6,000,000, there is no evidence that the defendant was party to that agreement.
- 48. I find that the terms of the professional undertaking were for the payment of Kshs 3,000,000.
- 49. The plaintiff admitted that Kshs. 1,700,000 was paid by the defendant and the balance was Kshs. 1,300,000.
- 50. The letter from Tele News attached to the OS states that the plaintiff be paid Kshs. 1,300,000.
- 51. I enter judgment in favor of the plaintiff against the defendant in the sum of Kshs.1,300,000.
- 52. Since the OS partially succeeded, each party to bear its own costs of the same.
- 53. The defendant to pay the plaintiff the said sum within 60 days of this date in default execution to issue.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

