



**Biofarms Limited v Maruja & another t/a Maruja & Amunga
Advocates (Commercial Miscellaneous Application E070 of 2023)
[2025] KEHC 2134 (KLR) (Commercial and Tax) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2134 (KLR)

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

COMMERCIAL MISCELLANEOUS APPLICATION E070 OF 2023

MN MWANGI, J

FEBRUARY 7, 2025

**IN THE MATTER OF AN UNDERTAKING BY
THE FIRM MARUJA & AMUNGA ADVOCATES**

-AND-

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

BETWEEN

BIOFARMS LIMITED APPLICANT

AND

**JULIUS KIBOEN MARUJA & JOSHUA AMUNGA JEVUNGWE T/A MARUJA &
AMUNGA ADVOCATES RESPONDENT**

JUDGMENT

1. Before me is an Originating Summons dated 1st February 2023, filed by the applicant pursuant to the provisions of Section 55 of the *Advocates Act* and Order 52 Rules 7(1)(b) & (2) and 10 of the Civil Procedure Rules, 2010. The applicant prays for orders that the respondents jointly and/or severally honour the professional undertaking dated 12th January 2022, by paying the applicant €30,000.00 plus interest thereon at the rate of 12% per annum within 7 days from the date of the order, failure to which the applicant may move the Court appropriately for an enforcement order.
2. The application is premised on the grounds on the face of the Summons, and it is supported by an affidavit sworn on 2nd February 2023 by Daniel Nzyuko, the applicant's Managing Director. He averred that the applicant paid €30,000.00 to the respondents to facilitate a Business Loan Agreement between KW Infrastructure Consulting PTE Limited and the applicant. He deposed that on 12th



- January 2022, the respondents acting as Advocates for KW Infrastructure Consulting PTE Limited, issued the applicant with a professional undertaking acknowledging receipt of the €30,000.00 in their client's account, and undertook to refund the said sum within seven (7) days in the event that KW Infrastructure Consulting PTE Limited failed to disburse €3 Million to the applicant within 120 days.
3. Mr. Nzyuko contended that KW Infrastructure Consulting PTE Limited did not disburse the €3 Million as per the Agreement, thus the applicant demanded for the refund of the €30,000.00 vide a letter dated 20th May 2022. He asserted that the respondents dishonored their professional undertaking and are therefore personally liable for the €30,000.00, with interest at Court rates.
 4. In response to the application, the respondent filed a replying affidavit sworn on 14th July 2023 by Julius K. Maruja, the Managing Partner in the law firm of Maruja & Amunga Advocates. He averred that sometime in the year 2021, he was approached by KW Infrastructure Consulting PTE Limited to execute and attest loan contracts at a fee referred to as administrative costs and facilitation fees for loan processing. He was then handed a duly executed Monetization and Loan Agreement for distribution to various entities, including the applicant herein.
 5. Mr. Maruja stated that the respondents acting on the instructions of KW Infrastructure Consulting PTE Limited issued a professional undertaking on the basis that funds from the lender would be advanced, but the client failed to advance the loan as promised, prompting complaints and measures to address the matter including filing police reports. He contended that the respondents also personally sought a loan from its client, which remains unfulfilled. Mr. Maruja asserted that the enforcement of the professional undertaking is premature, since the recovery process is ongoing and a resolution is expected soon.
 6. The Summons herein were canvassed by way of written submissions, highlighted on 23rd September 2024. The applicant's submissions were filed on 23rd May 2024 by the law firm of Echessa & Bwire Advocates LLP, whereas the respondent's submissions were filed on 5th August 2024 by the law firm of Kiskan Law Africa LLP Advocates.
 7. Mr. Echessa, learned Counsel for the applicant referred to the provisions of Order 52 Rule 7 of the Civil Procedure Rules, 2010 and the case of *Aminga, Opiyo, Masese & Co. Advocate v A.N. Kirika & Company Advocate* [2022] eKLR, and urged this Court to compel the respondents to honour the professional undertaking they issued to the applicant, since they do not deny having issued the same, and that they do not confirm that the applicant fulfilled its obligations under the Agreement. Counsel relied on the case of *Harit Sheth t/a Harit Sheth Advocate v K. Osmond Advocates* [2011] eKLR, and argued that the extenuating circumstances affecting the fulfillment of the undertaking referred to by the respondents in their replying affidavit do not discharge the undertaking given, since the obligation to fulfill the undertaking remains a personal one and cannot be transferred.
 8. Mr. Kanyonge, learned Counsel for the respondent cited the provisions of Order 52 Rule 7 of the Civil Procedure Rules, 2010 and submitted that the said provisions do not confer the exclusive jurisdiction of dealing with issues relating to breach of professional undertakings to the High Court. He argued that before this Court can find in favour of the applicant, it must first determine whether the respondents' actions constitute professional misconduct under the *Advocates Act*. Counsel referred to the provisions of Section 60(1) of the *Advocates Act* as read with Rule 46 of the Law Society of Kenya Digest of Professional Conduct and Etiquette and asserted that the applicant failed to exhaust alternative dispute resolution mechanisms, such as the Advocates Complaints Commission and the Advocates Disciplinary Tribunal, before seeking reliefs from the High Court.



9. Mr. Kanyonge cited the case of *R v The Disciplinary Tribunal of the Law Society of Kenya ex parte John Wacira Wambugu Nairobi JR Misc. Application No. 445 of 2013* and the provisions of Section 90 of the *Advocates Act*, to support his position that the Advocates Disciplinary Tribunal has the authority to handle the aforesaid complaints and enforce professional undertakings. He urged this Court to refer this matter to the said Tribunal to assess the facts and determine whether the respondents acted unprofessionally. Additionally, Mr. Kanyonge claimed that the respondents did not receive the funds as alleged but issued the professional undertaking based on their client's instructions, without any intent to deceive the applicant.

ANALYSIS AND DETERMINATION.

10. I have considered the Originating Summons, the affidavit filed in support thereof, the replying affidavit by the respondent and the written submissions filed by Counsel for the parties. The issue that arises for determination is whether the applicant has made out a case to warrant being granted an order compelling the respondents to honour their professional undertaking.
11. It is not contested that the respondents gave the applicant an irrevocable professional undertaking dated 12th January 2022 to unconditionally return to the applicant the entire processing fees paid of €30,000.00 within seven (7) days of demand of the same, in the event that KW Infrastructure Consulting PTE Limited was unable to disburse the €3 Million within 120 days from the date of the professional undertaking. The applicant's case is that the said Company was unable to disburse the said €3 Million within 120 days from the date of the professional undertaking, hence it demanded for the refund of the €30,000.00 vide a letter dated 20th May 2022 as provided for in the aforesaid professional undertaking, but to date, the respondents have not honoured the said professional undertaking.
12. In opposition to the application, the respondents confirmed issuing a professional undertaking to the applicant on the basis that funds from KW Infrastructure Consulting PTE Limited would be advanced, but the said company failed to advance the loan as promised, prompting complaints and measures to address the matter including filing of police reports. The respondents contended that the enforcement of the professional undertaking is premature since the recovery process is ongoing, and a resolution is expected soon.
13. This Court notes that in the submissions filed on behalf of the respondent, Counsel submitted that the respondents did not receive the funds as alleged but issued the professional undertaking based on their client's instructions, without any intent to deceive the applicant. It is however trite law that parties are bound by their pleadings, see the Court of Appeal case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] KECA 489 (KLR). It is also well settled that submissions should not be used to introduce new facts and/or prayers to the case, as they do not constitute evidence. Submissions are generally a parties' marketing language, with each side endeavouring to convince the Court that its case is the better one. In view of the foregoing, the respondents' submissions that they never received the funds as alleged but issued the professional undertaking based on their client's instructions has no probative value to this case and the same are hereby disregarded by this Court.
14. Contrary to the respondents' assertions that the dispute herein ought to first be determined by the Advocates' Disciplinary Tribunal before this Court's jurisdiction can be invoked, I disagree with that proposition. This Court has the requisite jurisdiction to enforce a professional undertaking pursuant to the provisions of Order 52 Rule 7 of the Civil Procedure Rules, 2010 which is couched in mandatory terms. The said provisions state as hereunder-
 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. (Emphasis added).
15. A professional undertaking was defined by the Court in the case of David Karanja Thuo T/a D.K Thuo & Company Advocates v Ishvinder Kaur Kalsi Marwa t/a Kaisi & 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.

16. On perusal of the professional undertaking dated 12th January 2022, in the second paragraph, the respondents indicated the following –

“We will confirm receipt of the following amounts deposited in/transferred to our below indicated account by your client Biofarms Limited.”

17. It is however not indicated whether the confirmation would be done expressly, orally or by implied conduct. The respondents however went ahead in paragraph 3 Clause 2 of the undertaking to state that –

In the event that KW is unable to disburse the Three Million Euros (€3,000,000.00) One Hundred and Twenty days from the date hereof, then upon receiving your written demand, we will unconditionally return the entire processing fee paid of €30,000.00 (Euro Thirty Thousand) to an account nominated by you in Seven (7) days from receipt of your communication for return of this amount. (Emphasis added).

18. On perusal of the email correspondence between the applicant and the respondents’ client KW Infrastructure Consulting PTE Limited, annexed to the applicant’s affidavit in support of the instant Summons, it is evident that at no point did either the respondents or their client deny or contest receipt of the processing fees of €30,000.00. Instead, they at all times intimated their willingness and intention to refund the applicant’s application/processing fees and expressed their regret for being unable to meet the applicant’s expectations.

19. In the premise, I am persuaded that the applicant paid to the respondent processing fees of €30,000.00 as captured in the professional undertaking dated 12th January 2022. On further perusal of the annexures exhibited in the applicant’s affidavit in support of the instant application, it is clear that KW Infrastructure Consulting PTE Limited was unable to disburse the €3 Million within the agreed timeline. As a result, the applicant through its Advocates on record vide a letter dated 20th May 2022



demanded for a refund of the said funds as per the terms provided for in the professional undertaking, which could only be discharged by disbursement of €3 Million to the applicant.

20. It is not disputed that the respondents have never complied by honouring the terms of the professional undertaking dated 12th January 2022. They have also not ensured that €3 Million has been disbursed to the applicant, so that they can be discharged from the professional undertaking. Instead, they have been seeking time to comply with the said undertaking. From the contents of the professional undertaking, the refund of the application/processing fees is only pegged on failure by KW Infrastructure Consulting PTE Limited to disburse the €3 Million within the agreed timeline. It is not hinged on any other condition. For that reason, I agree with Counsel for the applicant that the extenuating circumstances affecting the fulfillment of the professional undertaking referred to by the respondents in their replying affidavit do not discharge them from the undertaking given.
21. Based on the foregoing, it is this Court's finding that the respondents are in breach of the irrevocable professional undertaking dated 12th January 2022. Consequently, I find that the sum claimed of €30,000.00 is due and owing to the applicant from the respondents who have no legal justification to continue withholding the said amount from the applicant.
22. The question of whether or not amounts due from a professional undertaking should earn interest was discussed by the Court 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 as follows –
- It may be said that, conduct such as being complicit in or deliberately withholding Plaintiff's money would earn the advocate penalty in form of interest for having denied the Plaintiff his money. See the case of Naphatali Paul Radier v David Njogu Gachanja HCCC No.582 of 2003 (OS) where Justice H.P.G Waweru held as follows:-
- “The Defendant has withheld the Plaintiff's money from August 2002. Justice demands that he pays it with interest. As no particular rate of interest was contracted, I shall award at court rates”.
23. Similarly, in the case of Nderi & Kiingati Advocates v Kiruti & Company Advocates [2021] eKLR, Muchemi J., when dealing with a similar issue stated as follows -
- It is trite law that so long as monies that was undertaken to be paid remains unpaid, interest on it for the unpaid period provided.
24. It is my finding that the applicant is entitled to interest on the €30,000.00 at Court's rates from 20th May 2022 when a demand for refund of the same was made, until payment in full.
25. The upshot is that the Originating Summons dated 1st February 2023 is merited. It is hereby allowed as prayed. The sum of €30,000.00 shall be paid to the applicant within seven (7) days as per the terms of the professional undertaking given by the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:



Mr. Otieno h/b for Echesa for the applicant

Mr. Kanyonge for the respondents

Ms B. Wokabi – Court Assistant.

