



Njoroge Kibatia & Moses Maina Karuga t/a Kibatia & Company Advocates v Wafula Jimmy Simiyu t/a Wafula Simiyu & Company Advocates (Commercial Case E136 of 2019) [2023] KEHC 19860 (KLR) (Commercial and Tax) (27 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E136 OF 2019
DO CHEPKWONY, J
JUNE 27, 2023**

BETWEEN

**NJOROGE KIBATIA & MOSES MAINA KARUGA T/A KIBATIA & COMPANY
ADVOCATES PLAINTIFF**

AND

**WAFULA JIMMY SIMIYU T/A WAFULA SIMIYU & COMPANY
ADVOCATES DEFENDANT**

JUDGMENT

1. The Plaintiff has filed Originating Summons Application dated 9th May, 2019 seeking the following orders:
 - a. That Wafula Jimmy Simiyu an Advocate of the High Court of Kenya practicing such as in the name and style of Wafula Simiyu & Company Advocates do honour their irrevocable and unconditional professional undertaking given to the Plaintiffs herein on behalf of their clients.
 - b. That Wafula Jimmy Simiyu do pay the Applicants herein the sum of Kshs.18,000,000/= together with interest at the rate set out in the undertaking dated 1st March, 2019 till payment in full being the amount advanced to his client on the strength of the said undertaking.
 - c. That the Honourable Court be pleased to grant such further or other relief as may be just in the circumstances and incidental thereto, costs be costs in the cause.
2. The Originating Summons is supported by the grounds on the face of the application and the Supporting Affidavit of Moses Maina Karuga sworn on 9th May, 2019.



3. It is the Plaintiff's case that its Firm M/S Kibatia & Company Advocates was acting for John Kabuba Njoroge, Ernest Gichuki Githinji & Joseph Mwangi Mburu who agreed to facilitate a loan facility of Kshs.18,000,000.00 to Mr. Lawrence Njogu Mungai which loan was guaranteed by Horizon Hills Limited who were both being represented by the Defendant.
4. The Plaintiff contends that the parties entered into a lending agreement dated 23rd January, 2019 and corporate guarantee dated 1st March 2019. The Plaintiff then holds that its clients then sourced for funds from various institutions. The Plaintiff avers that the Defendant then issued an irrevocable professional undertaking in the following terms:-

“The sum of Kenya Shillings Eighteen Million
(Kshs.18,000,000/=) will be repaid to our client on or
before 31st March 2019.

It further went ahead to provide that the said Defendants will keep our firm of Advocates/
clients fully indemnified from any loss and/or damage which we/our client may suffer by
reason of any breach by the Defendant or their clients.”
5. The Plaintiff holds that its clients incurred other subsequent costs which gave rise to a tripartite agreement whereupon the Defendant's client would pay Kshs.12,770,000/= to John Kabuba Njoroge and Kshs.6,200,000/= to both Ernest Gichuki Githinji & Joseph Mwangi Mburu. According to the Plaintiff, based on the professional undertaking and Clause 2.2 of the Lending Agreement, its clients advanced a sum of Kshs.18,000,000.00 to the Defendant's client which was payable within 30 days from the date of advancement.
6. The Plaintiff claims that under Clause 5 of the professional undertaking it was provided that the Defendant would be solely liable and responsible for full compliance with the payment obligations. The Plaintiff holds that the Defendant's client breached the agreement by failing to repay the amount by 31st March, 2019 as required and it wrote to the Defendant a letter dated 30th April, 2019 demanding the payments.
7. The Plaintiff argues that the failure to honour the professional undertaking is a professional misconduct. The Plaintiff therefore seeks the Defendant to honour the professional undertaking and pay the loan together with interest until payment in full since its clients are suffering losses in terms of interest since they had sourced the funds from other institutions. The Plaintiff therefore seeks to have the Originating Summons allowed as prayed.

The Response

8. The Defendant opposed the Originating Summons vide a Replying Affidavit of Johny Wafula sworn on 13th November, 2020 whereby it denied owing the Plaintiff the sum of Kshs.18,000,000.00 from the Professional Undertaking. It admits that it was acting for its client's Company Horizon Hills Limited in a conveyance of L.R 1870/11/200. The Defendant stated that the Plaintiff offered to type out the professional undertaking and sent it to its firm for proofreading and to print in the Defendant's letterhead which was then executed.
9. The Defendant argues that the Professional Undertaking was conditional sale of the property being L.R 1870/11/200 as the payment was to come from the proceeds of sale. The Defendant states that it even surrendered the original title to the Plaintiff on the 1st March, 2019 as a condition for the release of the monies but the said sale did not materialize.



10. The Defendant states that in a letter dated 24th June, 2019, the Plaintiff informed it that the original title had been confiscated at the Lands Office and that he was also summoned to DCI headquarters in the case where the Plaintiff's clients had lodged a complaint against its client for obtaining money by false pretense whereby his client was charged and he was made a state witness.
11. The Defendant holds that he consequently wrote a letter dated 2nd July, 2019 to the Plaintiff and stated that on account of the discovery of fraud, it could not continue with the conveyance transaction and it immediately discharged itself from the professional undertaking as it was no longer enforceable. The Defendant states that it informed the Plaintiff and their clients to pursue the claim directly from its clients. The Defendant urged the court to dismiss the Originating Summons with costs to the Defendant.
12. The Originating Summons was disposed off by way of written submissions. The Plaintiff in the Submissions dated 22nd June, 2022 raised five issues for determination;
 - a. Whether the condition required for the professional undertaking have been met.
 - b. Whether the Defendant has issued the Plaintiff with a professional undertaking.
 - c. Whether the Defendant failed to discharge its professional undertaking as per the agreed terms.
 - d. Whether this court can enforce the said professional undertaking by ordering payment of Kshs.18,000,000/=.
 - e. Costs.
13. The Defendant on its part in the submissions dated 5th September, 2022 raised three issues for determination;-
 - a. Whether the Defendant was legally justified in discharging themselves from the professional undertaking dated 1st March 2019 by its letter dated 2nd July 2019.
 - b. Was the professional undertaking conditional?
 - c. Who bears the costs of the suit?

Analysis and Determination

14. I have read through the grounds upon which the Originating Summons is premised, the Replying Affidavit and submissions filed by the parties herein and the relevant law. It is denied that the main issue for consideration is whether the professional undertaking in this case is enforceable or not.
15. The starting point would be to understand the meaning of a professional undertaking. The Court of Appeal in the case *Warubiu K'Owade & Ng'ang'a Advocates -vs- Mutune Investments Ltd* [2016] eKLR explained what amounts to 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 -vs- 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.”



16. The Application herein is seeking enforcement of the professional undertaking as enshrined under order 52 rule 7 of the Civil Procedure Rules 2010 which states:-
- a) “An application for an order for the enforcement of an undertaking given by an Advocate shall be made:
 - (i) If the undertaking was given in a suit in the High Court, by summons in chambers in that suit; or
 - (ii) In any other case, by Originating Summons in the High Court.
 - (b) 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”.
17. The Court of Appeal in the case of Arthur K. Igeria T/A Igeria & Co. Advocates -vs- Michael Ndaiga (NRB CACA No.51 of 2008) [2017]eKLR gave the conditions to be satisfied for enforcement of professional undertaking. It 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.”
18. From the decision in Arthur K. Igeria case supra, it is evident that enforcement of undertakings is not done automatically but upon fulfillment of three conditions:-
- i. That the undertaking is clear in the terms without any ambiguity.
 - ii. Whatever is being undertaken is capable of being performed.
 - iii. That if the undertaking was dependent on occurrence of a certain event, that event has occurred.
19. In this case, it is evident that the Defendant issued a professional undertaking. And whether or not it was typed by the Plaintiff, it is immaterial as it was issued on the letter head and signature of the Defendant. Looking at the contents of the said professional undertaking which for context purposes is reproduced herein as follows:-

Re: Money Advancement to Lawrence Njogu Mungai By John Kabuba Njoroge, Ernest Gichuki Githinji & Joseph Mwangi Mburu

We refer to the above matter and all previous correspondence relating thereto.

We confirm that the above named Lawrence Njogu

Mungai is our client and a director of Horizon Hills Limited (The Company). The said Company is the registered proprietor of All That Land suing Nought Decimal Three Three One Four (0.3314) HECTARES or thereabouts and being Land Reference NO. 1870/1/200. The said Company is in the process of disposing said Land and we have instructions to act for the Company in the transaction.



In consideration of your clients, Mr. John Kabuba Njoroge, Mr. Ernest Gichuki Githinji & Mr. Joseph Mwangi Mburu, advancing to our client the sum of Kenya Shillings Eighteen Million (kshs. 18,000,000/=) We hereby give our irrevocable and unequivocal undertaking:-

1. That the sum of Kenya Shillings Eighteen Million (KSHS. 18.000,000=) will be paid on or before 31 March, 2019 into your clients account as shall be advised by yourselves on condition that the same shall have been disbursed forthwith upon receipt of the title documents or within one business day from the day hereof and which amount shall be disbursed as follows:
 - i. Kenya Shillings Twelve Million, Five Hundred Thousand (Kshs.12,500,000/=)- to Mr. John Kabuba Njoroge; and
 - ii. Kenya Shillings Five Million, Five Hundred Thousand (Kshs.5,500,000/=)-to Mr. Ernest Gichuki Githinji ID NO. 22191454 & Mr. Joseph Mwangi Mburu ID NO. 22846726.
2. That we shall keep your firm of Advocates/clients fully indemnified from any loss and/or damage which you may suffer by reason of any breach by us or our clients of the aforesaid undertakings and/or terms and conditions of this letter that may arise from the transaction herein;
3. That we hereby agree that any late payment of the advanced amount will attract a monthly penalty of 20% of the advanced amount;
4. That we have the full authority of the Directors of Horizon Hills Limited to release the Grant over Land Reference No. 1870/11/200 to you to be held on simple deposit by yourselves until full payment of the above amount.
5. That we are solely liable and responsible for full compliance with the payment obligations and undertakings and agreements given in this matter and that time shall be of essence;
6. That this undertaking supersedes any other agreement/document that is contrary to this undertaking.

We are agreeable to the above terms kindly proceed cause your clients to release the above sum to our client.

20. A reading of the said professional undertaking, it is not clear whether the payment of the loan was to be upon the successful sale of the property or not. Given the fact that the title deed for property was confiscated by the Lands office as admitted by the Plaintiff, then it is clear that the sale could not be completed.
21. In this Court's considered view, the professional undertaking was ambiguous, as it was not clear as to what the Defendant was undertaking to do. If at all the professional undertaking was dependent on the sale of the property, the fact that the sale was not completed then the professional undertaking cannot be enforced.
22. Further, it is evident that through the letter dated 2nd July, 2019, the Defendant discharged the professional undertaking following the discovery of fraud on the property which forms the basis of the professional undertaking.



23. In that line, this Court finds that the Originating Summons dated 9th May, 2019 lacks merits and the same is hereby dismissed with costs to the Defendant.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27TH DAY OF JUNE , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Simiyu counsel for Defendant

Court Assistant - Martin

