



Kencom Sacco Society Ltd v Nick Ndeda & Associates Advocates (Civil Case 130 of 2018) [2023] KEHC 21917 (KLR) (18 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 130 OF 2018
AN ONGERI, J
AUGUST 18, 2023**

BETWEEN

KENCOM SACCO SOCIETY LTD PLAINTIFF

AND

NICK NDEDA & ASSOCIATES ADVOCATES DEFENDANT

JUDGMENT

1. The plaintiff filed the Originating Summons (OS) dated May 31, 2018 seeking to enforce a professional undertaking against the respondent in the sum of USD 35,000 together with interest from July 13, 2017 to date.
2. The said undertaking was in the following terms;

“We shall immediately and in any event not later than 24 hours, upon receipt of your first notification that our client has executed the Term sheet/Letter of interest, and without any cavil, pay you or as directed by yourself USD 35,000 (Thirty Five Thousand United States Dollars) in free and clear funds without any deductions or withholdings whatsoever such that the said sum shall be available for your client for further processing of the loan application- within 48 hours of our receipt of your notification.”
3. The Originating Summons is supported by the affidavit of Moses Sande Makhandia in which he deposed that Kencom Sacco society was to obtain loan facilities and therefore made an application to the defendant’s client Infracapital Investment Group Limited a company incorporated in the United Kingdom. It was a requirement of the letter of offer that prior to due diligence being done the plaintiff would pay due diligence fees to the defendant of USD 35,000 or the equivalent in Kenya Shillings.
4. The payment was secured by a professional undertaking that was given by the Plaintiff’s Advocates (Makhandia & Makhandia Advocates) to the defendant.



5. The defendants by a letter dated March 6, 2017 advised that the plaintiff had successfully executed his client's term sheet and called for the payment of USD 35,000. On March 8, 2017 the firm of Makhandia & Makhandia Advocates made payment of Kshs 3,500,000 to the defendant.
6. On 28th March the plaintiff received a letter from the defendant acknowledging receipt of the amounts paid on March 8, 2017 which also indicated that there was a deficit of Kshs 88,238.50. On May 3, 2017 under the instructions of the plaintiff they wrote to the defendant to inquire on the current position of the loan application. The defendant wrote back and alleged that his client was in direct contact with the plaintiff which fact was not true.
7. It is further deponed that he has been under instructions of the plaintiff to get back monies paid to the defendant and on July 13, 2017 he wrote to the defendant indicating to them, that the plaintiff did not wish to proceed with the transaction because of the delay on the defendant's part and his lack of communication/information.
8. He once again wrote to the defendant on September 5, 2017 and February 20, 2018 and to date the defendant has not responded to any of their letters. In terms of the professional undertaking the funds were only available for transfer to the defendant's client for further processing of the loan application within 48 hours of their receipt of the defendant's notification.
9. The plaintiff further said they have not received any such notification from the defendant and therefore the funds are still with the defendant. The undertaking was clear, unequivocal and enforceable and in spite of the various requests to the defendant, the said advocates are silent and are unwilling to observe it.
10. He deponed that they asked for a refund on July 13, 2018 but to date the defendant is still holding on to the funds and therefore is liable to pay interest on the sum held from July 13, 2017.
11. In response to the originating summons the defendant filed a Notice of preliminary objection and averred that the Plaintiff's Application was incompetent in law, vexatious therefore null and void as the Defendant did not at any time of the contract, give any undertaking as alleged by the Plaintiff.
12. The parties filed submission in the originating summons as follows; the plaintiff submitted that the defendant who is an advocate was required to observe the terms of the professional undertaking of February 28, 2017 and it mattered not that he is not the one who gave it.
13. Further, that the terms for the release of the funds to the defendant were clear and as a professional the defendant was required to observe the terms of his professional undertaking.
14. In support of their case, the plaintiff cited the case of Waruhiu K'owade & Ng'ang'a Advocates and Mutune Investments Limited, Civil Appeal No 156 of 2009 where the Court while discussing professional undertaking held as follows;

“Our answer is that 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 v Credit Bank Limited [2008]2EA 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.



In enforcing undertaking, the Court is guided not by the considerations of Contract, or of securing the legal rights of parties, but mainly by ensuring the honesty of advocates. See *Muiruri v Credit Bank & Another* (Civil Appeal No 263 of 1998) LLR No 5676 (CAK).

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To find that no undertaking existed between the parties would be a narrow application of the term. The term ‘undertaking’ must be subjected to a liberal interpretation to include situations where an advocate who receives money that is intended to be based on a professional undertaking should be required to perform the terms of the undertaking, and should he utilize the money for any other purposes, then he is obliged to refund it. In our understanding, any money or documents given and received on the strength of a professional undertaking cannot be utilized for any other purpose other than what they are intended for. It is outside the mandate of an advocate to purport to use it or convert an undertaking for an event other than what it was intended for and agreed between the parties. To allow advocates to retain client funds for no reason at all would be a travesty of justice and would be an abuse of the fiduciary trust given and by extension would amount to conversion and criminal activity..”

15. The plaintiff submitted that the release of funds to the Defendant was based on a clear professional undertaking. The Defendant was free to forward the money to his client on condition that he notified the Plaintiffs Advocates of a further processing of the Plaintiffs loan application with Defendant's client.
16. Further, that since the Defendant failed to notify the Plaintiffs Advocates of the loan being processed further and confirmed in his own letter of May 2017 that the parties were dealing directly, the Defendant had no basis to continue holding the Plaintiffs money. The Defendant should have refunded the Plaintiffs money when the demand was made to him on the July 13, 2017.
17. The defendants on the other hand submitted that it did not issue a professional undertaking and therefore the entire suit lacks a substratum. That by the plaintiff's own admission, it was the plaintiff's advocates who issued an undertaking to pay the plaintiff's loan processing fees to the defendant for onward transmission to the investors which was honored.
18. The defendant submitted that when payment was duly effected the undertaking by the Plaintiff's advocate to the defendant discharged but the plaintiff's advocated continued pursuing and engaging the defendant who was not privy and completely alien to the arrangements between the lender and the plaintiff.
19. The defendant submitted that SOPPEC 9 of the [Code Of Standards of Professional Practice and Ethical Conduct, 2017](#) provides that:
 - “ 131. 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.”



20. It was therefore the defendant's submission that the advocate who receives money that is intended to be based on a professional undertaking is required to perform the terms of the undertaking and should not utilize the money for any other purpose other than what they are intended for.
21. Further, that the sum of USD 35,000.00 received by the Defendant herein from the Plaintiff's Advocate pursuant to the Plaintiff's Advocate's professional undertaking dated February 28, 2017 was undisputedly meant for onward transmission by the Defendant to the Lender herein for further processing of the loan application due to the Plaintiff. The defendant subsequently discharged his end of the undertaking by transmitting the said money to the lender.
22. The defendant submitted that the agreement was exclusively between the plaintiff and the lender, the defendant was only required to receive the fee due to the agreement as a legal representative for onward transmission to the lender. If there was any breach of the terms of the letter of interest and term sheet, the plaintiff is entitled to refund claimed from the lender and not the defendant.
23. The issues for determination in the originating summon are as follows;
 - i. Whether the originating summon is competent.
 - ii. Whether the respondent is liable to pay the professional undertaking.
24. On the issue as to whether the originating summon is competent, the respondents submitted that the same does not contain a certificate of costs from the Taxing Deputy Registrar.
25. I find that the originating summon is seeking to enforce a professional undertaking and it does not require the certificate from the Deputy Registrar.
26. On the issue as to whether the respondent is liable for professional undertaking I find that the answer is in the affirmative.
27. Justice Nyakundi in the case of *Conrad Masinde Nyukuri & another v Robson Harris & another* [2021] eKLR relied on the case of *Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited* [2016] eKLR and had the following to say as regards the sanctity of Professional Undertakings in the legal profession;

“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.”
28. I find that the terms for the release of the funds to the defendant were clear and as a professional the defendant was required to observe the terms of his professional undertaking.
29. Judgment be and is hereby entered in favor of the applicant against the respondent in the sum of USD 35,000 or its equivalent in Kenya shillings together with costs and interest from the date of filing suit.



30. If the undertaking is not honored within 60 days execution to issue.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
18TH DAY OF AUGUST, 2023.**

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A. N. ONGERI

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**

