



**Jibril Noor t/a Bashir, Noor & Co. Advocates & another v Conrad
Anangwe Maloba t/a Conrad Maloba & Associates (Civil Case 264 of 2021)
[2023] KEHC 865 (KLR) (Civ) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 865 (KLR)

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

CIVIL

CIVIL CASE 264 OF 2021

JN MULWA, J

FEBRUARY 16, 2023

**IN THE MATTER OF ENFORCEMENT OF PROFESSIONAL
UNDERTAKING DATED THE 15TH OF JUNE 2021**

-AND-

**IN THE MATTER OF JOINT VENTURE AGREEMENT WITH RESPECT
TO CONSTRUCTION OF RESIDENTIAL BUILDING TO BE ERECTED ON
LAND PLOT NUMBER 209/4593/8 BETWEEN UGBAD CONSULT LIMITED
(THE DEVELOPER) AND CHRISTINE IMBOSA (THE PROPRIETOR)**

-AND-

IN THE MATTER OF SECTION 55 AND 56 OF THE ADVOCATES ACT

-AND-

IN THE MATTER OF ORDER 52 RULES 7 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

JIBRIL NOOR T/A BASHIR, NOOR & CO. ADVOCATES 1ST APPLICANT

YUSSUF BASHIR T/A BASHIR, NOOR & CO. ADVOCATES ... 2ND APPLICANT

AND

**CONRAD ANANGWE MALOBA T/A CONRAD MALOBA &
ASSOCIATES RESPONDENT**



JUDGMENT

1. By an Originating Summons dated 25th October 2021, the Applicants seek the following orders against the Respondent:
 1. The Honourable Court be pleased to issue a declaratory order that the Respondent breached the Professional Undertaking dated 15th June 2021 given by him;
 2. The Honourable Court do compel the Respondent to honour the Professional Undertaking and refund the advanced sum of Kshs. 20,000,000/- to the Applicants as undertaken; and
 3. Costs of this Application.
2. The Summons is premised on the provisions of Order 52 Rule 7(1) (b) & (2) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and is supported by and the supporting and further affidavits of Jibril Noor, the 1st Applicant herein.
3. The Respondent opposed the Summons through a Replying Affidavit sworn on 29th November 2021 by Conrad Maloba, an Advocate of the High Court of Kenya.
4. By consent, parties agreed to canvass the Summons by way of written submissions. However, only the Applicants filed their submissions as at 10th February 2023.

Background.

5. By a joint venture agreement (JVA) dated 18th June 2021, the Applicants' client, Ugbad Consult Limited, entered into an agreement with the Respondent's client, Christine Imbosa Mbogua, for construction of a residential building of about twenty (20) floors to be erected on plot number 209/4593/8. The Applicants client was the Developer while the Respondent's client was the Proprietor of the property. It was agreed that once the project is completed, the Proprietor would be allocated 30% of residential units while the Developer would have been allocated 70% of the units. Pursuant to clause 2.2.6 of the JVA, it was further agreed that upon execution, the Developer would pay the Proprietor a consideration of Kshs. 20,000,000/- to forfeit two three bedroom residential units in the project. The said amount was considered as the off-plan value of the two units. Further, parties agreed that upon execution, the Applicants would incorporate a Special Purpose Vehicle (SPV) to be known as "Sakina Real Estate Limited" for purposes of development of the project.
6. It is not disputed that in order to facilitate the release of the sum of Kshs. 20,000,000/- to the Proprietor, the Respondent issued a Professional Undertaking dated 15th June 2021 to the Applicants, promising to refund the money so advanced in the event of termination of the JVA, within seven (7) days of such termination. Acting on the promise thereof, the Applicants' deposited the agreed sum of Kshs. 20,000,000/- to the Respondent's account on 16th July 2021. Subsequently, the Developer terminated the JVA on 27th September 2021. However, to date, the Respondent has failed to honour the Professional Undertaking.
7. The Applicants contend that the JVA was terminated due to suspicious circumstances surrounding the Proprietor's ownership of the property which they discovered upon conducting due diligence pursuant to clause 11 of the Agreement, upon a claim that they found out that the Proprietor's



Title to the property was under investigation by the Office of Director of Criminal Investigation for acquisition, third parties claim to the Title to the suit property hence the Developer was not granted vacant possession of the same to enable the commencement of the project.

8. On his part, the Respondent attributes his failure to honour the undertaking to improper and premature termination of the JVA by the Developer. He argues that termination was not done in accordance with clause 23.1.2 of the JVA as the Developer did not give the Proprietor the thirty (30) days prior written notice envisaged therein. The Respondent also claims that the Applicants failed to incorporate the SPV as agreed under clause 2.3.1 of the JVA despite the fact that the Respondent duly performed his contractual obligations. He states that the Property is vacant but vacant possession was only to be granted upon incorporation of the SPV.
9. In a brief rejoinder, the Applicants averred that under clause 23.1.5, the Developer reserved the right to terminate the JVA at any time through a notice in writing and further that the termination was still proper under clause 23.1.2 as a prior notice was issued to the Proprietor on 16th August 2021 (Annexure “JN11”) before the actual termination on 27th September 2021.

Analysis and Determination

10. Order 52 Rule 7 (1) (b) & (2) of the Civil Procedure Rules upon which the Summons is anchored provides that;

“7. Application for order for enforcement of an undertaking [Order 52, rule 7.]

- (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.”

11. Black’s Law dictionary, 10th Edition defines an “undertaking” as “a promise, pledge or engagement”.
12. In *Waruhiu K’Owade & Ng’ang’a Advocates v Mutune Investments Ltd* (2016) eKLR, the Court of Appeal defined 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 v 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.”



13. The Professional Undertaking dated 15th June 2021 issued by the Respondent to the Applicants reads in part as follows:

“Pursuant to the Agreement, the Developer is required to pay to our client account, the Deposit of the Purchase Price to hold as stakeholders. In consideration of the Purchaser remitting the Deposit to our client account as per the Agreement, we hereby give you our irrevocable and unconditional undertaking that:

1. That we the firm of Conrad Maloba & Associates Advocates, Crawford Business Park, 4th Floor, State House Road, P.O Box 67 - 00606, hereby undertake to refund Ugbad Consult Limited the sum of Kshs. 20,000,000/- on termination of the Joint Venture Agreement with respect to the construction of residential building to be erected on Land Plot Number 209/4953/8 between Ugbad Consult Limited and Christine Imbosa Mbogua, on the grounds of default of Title in the property held by Ms. Chistine Imbosa Mbogua.
 2. That we the firm of Conrad Maloba & Associates Advocates, Crawford Business Park, 4th Floor, State House Road, P.O Box 67 - 00606, shall refund to Ugbad Consult Limited the said payment through its Advocates, that is the firm of Bashir & Noor Advocates Hughes Building, 4th Floor Kenyatta-Avenue Muindi Mbingu Street P.O Box 42122 - 00100 Nairobi within Seven (7) days from the date of termination of the Joint Venture Agreement with respect to the construction of residential building to be erected on Land plot number 209/4593/8 between Ugbad Consult Limited and Christine Imbosa.
 3. This Undertaking will remain in force until such time that you shall expressly release us from the same which shall be granted upon our full compliance with this Undertaking.
 4. ...”
14. As noted hereinabove, the Applicants’ client, relying on the promise in the Undertaking, met the condition set out for it therein by remitting the sum of Kshs. 20,000,000/- to the Respondent’s account on 16th July 2021. This is evidenced by the copy of the RTGS transfer exhibited by annexure “JN5” to the Applicants’ Supporting Affidavit and in any event, the Respondent has not denied receipt of the money.
15. The Respondent has purported to blame its noncompliance on the improper termination of the JVA. The professional undertaking simply says that the Respondent would refund the Applicants’ client the sum of Kshs. 20,000,000/-, which he held as a stakeholder, in the event of termination of the JVA. A perusal of the Clause 25 of the JVA reveals that indeed the Developer had a right to terminate the Agreement. However, the issue as to whether or not the termination was unprocedural or dependent on other events is irrelevant to this case as a Professional Undertaking is a separate and distinct contract from the underlying transaction pursuant to which it was given. The court finds guidance in the case of *STG Mubia TIA. Mubia v J. M. Chege TIA. J.M. Chege & Company Advocates* [2009] eKLR the court held—

“A professional undertaking by an advocate constitutes a separate agreement independent of the transaction that resulted in such an advocate being required to give a professional



undertaking can therefore be enforced against an Advocate independent of the transaction in which the transaction in which the professional undertaking was given."

16. What this means in my view is that once the JVA was terminated, the Respondent was under an obligation to honour the Professional Undertaking as promised. He cannot evade fulfilling the same by citing conditions that were not part of the Undertaking.
17. For the aforesaid, the Court finds that the Originating Summons dated 25th October 2021 is merited; and further that the Respondent breached the said professional undertaking dated 15th June 2021 by his law firm, and by extension by himself, to the Applicants.

Consequently:

1. The Respondent shall within 30 days from the date of this judgment honour the Professional Undertaking dated 15th June 2021 by refunding to the Applicants the sum of Kshs. 20,000,000/- together with interest at court rates from the date of filing this Summons.
2. The Applicants shall have costs of the application.

17 Orders Accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

J. N. MULWA

JUDGE

