



**Patrick Lutta t/a Lutta & Company Advocates v Ishvinder Kaur Kasi  
Marwa t/a Ishi Kalsi & Company Advocates (Civil Suit E025 of 2018)  
[2021] KEHC 169 (KLR) (Commercial and Tax) (15 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 169 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E025 OF 2018  
MW MUIGAI, J  
OCTOBER 15, 2021**

**BETWEEN**

**PATRICK LUTTA T/A LUTTA & COMPANY ADVOCATES ..... PLAINTIFF**

**AND**

**ISHVINDER KAUR KASI MARWA T/A ISHI KALSI & COMPANY  
ADVOCATES ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed Originating Summons on 23<sup>rd</sup> May 2018 brought under Order 40 and Order 52 Rule 7 & 10 of the *Civil Procedure Rules, 2010*, Section 1A, 1B, 3A, 63 of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya and other enabling provisions of the law.
2. Whereas by a letter dated 12<sup>th</sup> April, 2018 and 26<sup>th</sup> April, 2018, the Defendant gave an unconditional and irrevocable Professional Undertaking to secure a Credit Facility of *Kshs.15,000,000/-* (Kenya Shilling Fifteen Million) to the Plaintiff.
3. Whereas the Plaintiff fully complied with the terms of the undertaking the defendant has failed and or neglected to honour the said undertaking.
4. The Plaintiff sought the following orders:
  1. That the defendant honors the terms of the professional undertaking issued to the Plaintiff dated 12<sup>th</sup> April, 2018 and reconfirmed on 26<sup>th</sup> April, 2018
  2. That further the defendant pays the Plaintiff sum of *Kshs.35,000,000/-* (Kenya Shilling Thirty- five Million) in terms of the professional undertaking.



3. That a temporary injunction issues restraining the defendant, by herself, her servants, agents, employees, assignees or any other person acting on her behalf from making withdrawals, drawings and or any manner of payments howsoever from her bank account held in any bank licensed to operate in Kenya particularly DIAMOND TRUST BANK, CAPITAL CENTRE BRANCH ACCOUNT NO. 0075071001 or in any of the banks' respective branches in Kenya pending the hearing and summons or until further orders of the Court.
4. That an order issued herein be served upon DIAMOND TRUST BANK, CAPITAL CENTRE BRANCH.
5. That the order issued herein be served upon the KENYA BANKERS ASSOCIATION for compliance by its members.
6. That in the alternative the defendant pays within seven (7) days deposit the sum of Kshs.35,000,000/- (Kenya Shillings Thirty Five Million) being the principal sum plus interest in court.
7. That further the Defendant pays the Plaintiff a penalty at the rate of 40% per month from 5<sup>th</sup> May, 2018 until payment in full in accordance with the terms of the said Professional undertaking.
8. That the costs of this suit be borne by the Defendant.

SUPPORTING AFFIDAVIT:

5. That the Defendant's client approached Trinity Prime Investments Ltd requesting for a Credit Facility amounting to Kshs.15,000,000/- (Kenya Shilling Fifteen Million).
6. That Trinity Prime Investment Ltd instructed the Plaintiff to act on their behalf in the said transaction.
7. That on the 12<sup>th</sup> April, 2018, the Plaintiff received a letter of Professional undertaking from the Defendant requesting that they remit the Credit Facility to the Defendant's account and issued inter – alia on the following terms:
  - a. The Defendant shall repay the full sum of kshs.35,000,000/- (Thirty Five Million) on behalf of her client by 5<sup>th</sup> May, 2018.
  - b. Failure thereof shall attract a monthly penalty at the rate of 40% until payment in full.
8. That as part of assurance for payment, the Defendant issued the Plaintiff with an application form dated 5<sup>th</sup> May, 2018 from her Diamond Trust Bank Account No. 0075071001, Capital Centre Branch, Nairobi which was delivered alongside the Professional Undertaking.
9. That vide the Plaintiff's letter of 13<sup>th</sup> April, 2018 they sought minor amendments to the undertaking and the same was adopted by the Defendant's letter dated 26<sup>th</sup> April, 2018.
10. That they duly complied with the conditions of the Professional Undertaking and remitted the monies in three separate transactions of Kshs. 9,000,000/- on 13<sup>th</sup> April, 2018, Kshs. 3,600,000/- and Kshs.2,400,000/- on 14<sup>th</sup> April, 2018 totalling to Kshs.15,000,000/- to the Defendant's Diamond



Trust Bank Account No.0075071001, Capital Centre Branch marked Annexure 'E' are remittance application forms for the same and letter confirming the same dated 26<sup>th</sup> April, 2018.

11. That the Defendant failed to honour the undertaking by failing to remit the sum of Kshs.35,000,000/- by 5<sup>th</sup> May, 2018 in contravention of the said undertaking.
12. That by the Plaintiff's letters dated 9<sup>th</sup> and 10<sup>th</sup> May, 2018, they demanded remittance of the same plus a penalty totalling to kshs.49,000,000/-.

### **REPLYING AFFIDAVIT**

13. That on or about 11<sup>th</sup> April, 2018, Ritu Magon came to the Respondent's chambers and requested for assistance of a loan of Kshs.15,000,000/- to pay one Rahim Mawji and informed the Respondent that she was unable to obtain the said money from a bank as she did not have any security to offer a bank.
14. That Ritu Magon informed the Respondent that she had been introduced to one Eric Ananda who ran a company called Trinity Prime Investments Ltd. They had entered into negotiations and the said Eric Ananda who was willing to give her the loan but he required a Professional Undertaking from an advocate to guarantee the refund of monies.
15. That the Respondent informed Ritu Magon that he was reluctant to issue a professional undertaking without any security from her and that she camped at the Respondent's Chambers in desperation and pleaded that the Respondent assist her and that she assured the Respondent that she would obtain the money to pay back Eric Ananda in time.
16. That having known and been close to Ritu Magon the Respondent was convinced that she would uphold her end of the bargain and wrote a letter dated 11<sup>th</sup> April, 2018 guaranteeing that Ritu Magon would pay Trinity Investment Limited the loan and was shocked that the Applicant is demanding payment of over Kshs.77 million as at July, 2018 from him.
17. That whereas it is true that the Respondent sent a letter dated 12<sup>th</sup> April, 2018 to the Applicant as set out, the Respondent had initially sent a letter dated 11<sup>th</sup> April, 2018 to the Applicant's client.
18. That the Respondent's client personally delivered the said letter to the Applicant's client and she returned the same day to the Respondent's chambers and instructed the Respondent to amend the letter as the Applicant's client was unhappy with it and therefore the respondent amended the letter and the client hand delivered the same to the Applicant's client.
19. That the following day the Respondent received instructions from his client to amend the letter dated 11<sup>th</sup> April, 2018 and address it to the Applicant which he did and also prepared the letter dated 12<sup>th</sup> April 2018 which his client delivered to the Applicant's client.
20. That on 13<sup>th</sup> April, 2018 the Respondent's client instructed the Respondent to forward copies of documents that she said showed the source of funds for paying the applicant's client. The documents attached were:
  - a. A proforma invoice from Invoke Solutions Limited to Adgeco Group.
  - b. A contract between Adgeco Group and Invoke Solutions Limited.
  - c. A letter from Adgeco Group to my client referencing the termination of agreement.
21. That on 13<sup>th</sup> April, 2018, the Respondent prepared a letter dated 13<sup>th</sup> April, 2018 and enclosed the aforesaid documents and that his client informed him that she would deliver the said letter.



22. That on the 13<sup>th</sup> April, 2018 the Respondent's client delivered a letter to the Respondent dated 13<sup>th</sup> April, 2018 from the Applicant that the letter sought further amendments to the Respondent's letter dated 11<sup>th</sup> April, 2018.
23. That on the 26<sup>th</sup> April, 2018, the Respondent drew up the letter dated 26<sup>th</sup> April, 2018 incorporating the proposed amendments and his client informed the Respondent that she will deliver the letter to the Applicant's client.
24. That the Respondent have made efforts to have his client pay the money owed and that she has been evasive and duplicitous in her responses.
25. That from the foregoing the Respondent verily believes that the applicant's application does not lie and is an abuse of process.

#### PLAINTIFF'S SUBMISSIONS:

##### BRIEF FACTS: \_

26. That the Defendant issued the Plaintiff with an unconditional and irrevocable professional undertaking vide letter dated 26<sup>th</sup> April, 2018 requesting the Plaintiff to remit credit facility of Kshs.15,000,000/- to the Defendant's account on behalf of her client.
27. The Defendant was to repay the full sum of kshs.35,000,000/- (Kshs. thirty five million) on behalf of her client by 5<sup>th</sup> May, 2018 failure of which the said Kshs.35,000,000/- shall attract a monthly penalty at the rate of 40% until payment in full.
28. It is on the said undertaking that the plaintiff remitted the monies in three separate transactions of Kshs.9,000,000/- on 13<sup>th</sup> April, 2018, Kshs.3,600,000 and Kshs.2,400,000/- on 14<sup>th</sup> April, 2018 totalling to Kshs.15,000,000/- to the Defendant's Diamond Trust Bank Account No. 0075071001, Capital Centre branch.
29. However, the defendant failed to honour the professional undertaking by 5<sup>th</sup> May, 2018 and despite the plaintiffs demand for the said Kshs. 35,000,000/ plus a monthly penalty at the rate of 40%, the defendant has to date refused or neglected to honour the said professional undertaking. (see paragraph 1 ANNEXURE "F" of the plaintiffs supporting sworn on 23<sup>rd</sup> May, 2018)
30. This prompted the Plaintiff to file this suit vide an Originating summons dated 23<sup>rd</sup> May, 2018 seeking enforcement of the terms of the professional undertaking issued vide letter dated 26<sup>th</sup> April, 2018.
31. As a matter of fact, the defendant in her reply at paragraphs 19 and 20 denies that the letter of 26<sup>th</sup> April amounts to a professional undertaking capable of being enforced.
32. Further the defendant avers that at paragraph 27 that she is not liable to honour the professional undertaking and shifts the said liability to her client.
33. From the foregoing the Plaintiff submits the following issues for determination:-
  - A. Whether the letter dated 26<sup>th</sup> April, 2018 amounts to an unconditional and irrevocable professional Undertaking.



34. The court in the case of *Diamond Star General Trading LLC –vs- Ambrose D. O. Rachier carrying on business as Rachier & Amollo advocates [2017] eKLR* cited the following definition of professional undertakings as stated in Black Laws Dictionary as follows:

14. The *Black Law Dictionary* defines an undertaking as a “promise, engagement, or stipulation.” It states that an “undertaking” is frequently used in special sense of a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtain some concession for the court or opposing party.

15. The US Legal Definition.Com states;

Undertaking in general means, an agreement to be responsible for something. In legal context, it typically refers to a party agreeing to a surety arrangement, under which they will pay a debt or perform, a duty if the other person who is bound to pay the debt or perform the duty fails to do so.”

16. Further the court in *Diamond Star General Trading LLC (supra)* cited the definition of “professional undertaking” as stated in the encyclopedia of forms and precedents, 5<sup>th</sup> Edition by Hon. Sir Peter Millet, M.A. Vol 39 pages 859,860 as follows:

“ 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’ (or in case of a member of his staff, his employer) becomes personally bound.

B Whether the terms of the letter dated 26<sup>th</sup> April, 2018 are enforceable against the defendant

17. The Plaintiff relied on the case of *Harit Sheth T/A Harit Sheth Advocate – vs- K. H. Osmond T/A K. H. Osmond Advocate, Civil Appeal no. 276 of 2001*

See Also *Equip Agencies Ltd vs Credit bank Ltd [2007] eKLR,*

*Peter Mathenge Gitonga T/A Mathenge Gitonga Advocates vs Njoroge Kibatia & Anor [2018] eKLR & C.A in Waruhiu Kowade & Co Advocates vs Mutune Investments Ltd [2016] eKLR* all on the legal basis of a professional undertaking.

18. The Plaintiff submitted that Professional Undertaking was issued unsolicited by the Defendant vide letters of 12<sup>th</sup> April 2018 & 26<sup>th</sup> April 2018. The Plaintiff’s Client remitted the funds total of Ksh 15,000,000/- to the Defendant’s client and the client utilized the funds. The client did not refund the funds received and did not deny having the transaction with the Plaintiff and thereafter received the funds. The defendant makes reference to professional undertaking and if it is not upheld it would lead to open fraud, the legal professional is noble your word is your bond.

DEFENDANT’S SUBMISSIONS:

BACKGROUND:

35. That on the 12<sup>th</sup> April, 2018 the Plaintiff received a letter of Professional Undertaking from the Defendant requesting that a credit facility of Kenya shillings Fifteen Million only (15,000,000/-) to be returned as Kshs.35,000,000/-) failure to which a penalty would accrue at a rate of 40%.



36. That the Plaintiff would later on request the Defendant to change the undertaking to include two additional clauses which they would rely on to remit the funds.
37. That on 13<sup>th</sup> April, 2018 and 14<sup>th</sup> April, 2018, the Plaintiff remitted money to the Defendant.
38. Points of law and issues for determination:  
Whether a professions undertaking was given by the defendant to the plaintiff:
39. The Court in the case of Diamond Star General Trading LLC-Vs- Ambrose D. O. Rachier on business as /Rachier & Amollo Advocates [2017] eKLR highlighted the following characteristics in defining a professional undertaking:
- a. It is an unequivocal declaration of intention
  - b. Addressed to someone
  - c. Whom places reliance on it
  - d. Made by a solicitor
  - e. In the course of his practice
- In light of the above definition, we can clearly see that for an undertaking one party has to place reliance on it. Otherwise, it will not have any impact as what the parties undelaying to do. One has to give an undertaking while the other places reliance on it.
40. The Defendant cited the case of Samuel Karanja –Vs- J.K. Koskei E.J. & Monda T/A Koskei Monda & Co. Advocates [2017] eKLR quoted the Encyclopedia of Forms and Precedents, 5<sup>th</sup> Edition by Hon. Sir Peter Millet, M.A. Vol. 39 pages 859, 860 on the meaning of professional undertaking.
41. The Defendant submitted that in the interest of justice, and in the courts overriding objective being fair and just as espoused in Section 1A and 1B of the *Civil Procedure Act* and in the case of *Adrian Kamotho Njenga –v – Cabinet Secretary, Ministry of information, Communication and Technology & 8 others [2017] eKLR* where the court stated that the purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionally in relation to size, importance and complexity of the claim and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules.”

#### DEFENDANTS FURTHERS SUBMISSIONS:

42. Whether the letter dated 12<sup>th</sup> April, 2018 and 26<sup>th</sup> April, 2018 amount to a professional undertaking
- a. The letter dated 12<sup>th</sup> April, 2018 was not accepted by the Plaintiff and so there was no reliance on it by the Plaintiff.
  - b. The letter dated 26<sup>th</sup> April, 2018 was issued long after the sums of money in contention had already been disbursed. Therefore, it is clear that the letter dated 26<sup>th</sup> April, 2018 could not be the basis upon which the Plaintiff placed reliance when disbursing the Ksh 15,000,000/- to the Defendant.



43. The letter of 12<sup>th</sup> April 2018 was ostensibly abandoned by the Plaintiff and relied on the letter of 26<sup>th</sup> April, 2018, yet funds had already been disbursed of Ksh 15,000,000/- which was to be repaid at Ksh 35,000,000/-
44. The Defendant submitted that the letter of 26<sup>th</sup> April, 2018 could not be relied on as a professional undertaking because the Defendant was not representing Ritu Magon in any Advocate-client relationship and was not holding any funds for Ritu Magon to secure repayment of the monies and the Plaintiff and his client were well aware that the terms of alleged professional undertaking were impossible for the advocate to perform due to escalating penalty interest rate.
45. The Defendant relied on the case of *Arthur K. Igeria T/A Igeria & Co Advocates vs Michael Ndaiga [2017] eKLR* held that the undertaking is clear in its terms and there is no doubt or ambiguity as to what the advocate has professionally undertaken. Secondly, that what is undertaken is capable of being performed.
46. The Defendant submitted that letters of 12<sup>th</sup> April 2018 & 26<sup>th</sup> April 2018 cannot be enforced as the plaintiff failed to advise his client that the transaction in question was extortionate, unconscionable and was designed to take advantage of a person in dire financial circumstances and contravenes the Constitution on consumer protection, law of contract and principles of equity.

#### DETERMINATION

47. After consideration of the pleadings and submissions, the issues to be determined are;
  - a. Is there a Professional Undertaking?
  - b. Should it /is it enforced?
  - c. What remedies are available?

#### PROFESSIONAL UNDERTAKING

48. Letter dated 11<sup>th</sup> April 2018 by the Defendant; Ishi Kalsi & Co Advocates to the plaintiff's client, Trinity Prime Investment Ltd on extension of facility of Ksh 15,000,000/- and gave an undertaking that the said Ritu Magon would repay and settle Ksh 30 million by 5<sup>th</sup> May 2018 and the same would be deposited in their Account.
49. Letter of 12<sup>th</sup> April 2018 by Ishi Kalsi & Co Advocates to Plaintiff Lutta & Company Advocates on Extension of facility of Ksh 15 million; which reads in part;

‘In consideration of extending the facility, we give our unconditional, irrevocable professional undertaking that we shall pay in full settlement of the sums agreed amounting to Ksh 35,000,000/- on behalf of our client by 5<sup>th</sup> May 2018 and the same shall be deposited in your Account below for the benefit of your client.’
50. The Defendant's letter dated 26<sup>th</sup> April 2018 which read:

“In consideration of extending this facility, we give our unconditional and irrevocable professional undertaking that we shall repay in full settlement of the sums agreed amounting to Kshs. 35,000,000.00.”
51. The Plaintiff's client remitted funds to Defendant's client as follows; Kshs.9,000,000/- on 13th April, 2018, Kshs.3,600,000 and Kshs.2,400,000/- on 14th April, 2018 and came to Kshs.15,000,000/- to



the Defendant's Diamond Trust Bank Account No. 0075071001, Capital Centre branch. The RTGS forms evidencing remittance of funds are attached to Plaintiff's earlier Application.

52. The remittance of Ksh 15,000,000/- is not denied or challenged save for the contention that the letter of 12<sup>th</sup> April 2018 was not the Professional undertaking but the letter of 26<sup>th</sup> April 2018 and by then the funds were disbursed before the undertaking.
53. The professional undertaking herein was/is an unequivocal declaration of intention addressed by the Defendant to the Plaintiff in the said letters outlined above. It is on the Professional undertaking that the Plaintiff relied on the undertaking by an advocate in the course of his practice and on that basis released and made payment of Ksh 15,000,000/- on behalf of his client to the Defendant for onward transmission to the client.
54. This Court finds that the letters of 11<sup>th</sup> April, 12<sup>th</sup> April & 26<sup>th</sup> April 2018 all allude to an undertaking save for amendment/correction or addition of certain parts but the substance of professional undertaking remained and contrary to the submissions by the Defendant, the Professional undertaking was/is clear and unambiguous and confirms what the Defendant undertook to do in the unlikely event of default of payment of Ksh 35,000,000/- on 5<sup>th</sup> May 2018, would pay 40% penalty on the owed amount.

#### ENFORCEMENT

55. The Defendant submitted that the professional undertaking was/is extortionate, unconscionable and contravenes the Constitution on consumer protection, law of contract and principles of equity. The court assumes the extortion is on lending money and to recoup double the amount in such a short time and if there is default 40% is visited on the due amount as penalty. The Court finds that the terms were contracted and agreed by the clients as confirmed letter of 11<sup>th</sup> April 2018 by Rita Magon to Trinity Prime Investments Ltd that confirmed various meetings and discussions with its Director Eric Ananda and agreement to accord her temporary financial accommodation of Ksh 15,000,000/- to be repaid by 5<sup>th</sup> May 2018 and her advocate would issue professional undertaking to repay the money advanced and additional sum of agreed interest.
56. Thereafter, the Defendant issued the professional undertaking to repay the amount in default alongside the same terms. Even if the interest and penalty is exorbitant no payment of any part of the disbursed funds has been refunded 3 years later so as to rely on any equitable remedy, thus parties are bound by terms of the contract.
57. This Court reiterates the Ruling of 12<sup>th</sup> April 2019 wherein reference was made to [Harit Sheth t/a Harit Sheth Advocate v. K. H. Osmond t/a K. H. Osmond Advocate \[2011\] eKLR](#)

“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 honor it, the advocate is obliged to honor it if only to protect his own reputation as an officer of the court.”



and *Daniel Ochieng Ogola t/a Ogola Okello & Co. Advocates v George Mugoye Mbeya t/a Mugoye & Associates Advocates & Another [2016] eKLR* where the Court held:

Therefore, the defendant herein cannot be heard to say that the issue of enforcement of his professional undertaking is pegged to the payment which his client should make. If the court were to accept that proposition, it would be akin to tying up the professional undertaking from one law firm to another, to the primary contract to which the advocates were not parties. Such a situation would defeat the very reason and purposes for which undertakings were created.”

The Court went further to say:

“If an advocate chooses to give an undertaking before ensuring that he was in funds, he cannot thereafter seek to delay the enforcement of the undertaking by asking the court to enjoin his client to the proceedings for enforcement of the undertaking, so as to compel the client to pay the requisite funds in respect to which the advocate had given his undertaking... Thereafter, if the defendant wished to pursue the client, to recover such sums as he may have paid, the dispute would only be between the advocate and his client. The plaintiff would not be a party to such a dispute. At most, the plaintiff could be a witness.”

58. Rule 9 of the Code of Ethics and Conduct for Advocates 2015 provides as follows;

“The Advocate is under a duty to honour any professional undertaking given in the course of his/her practice in a timely manner. The obligation to honour a professional undertaking remains until the undertaking is performed, released or excused. To fail to honour an undertaking is professional misconduct”

59. See also *David Karanja Thuo –vs- Njage Waweru HCCC No. 209 of 2008 (OS)*, *Christopher Musyoka Musau VNPG Warren & 7 others [2012] eKLR* held *Nelson Andayi havi T/A havi & Company Advocates –vs- Jane Muthoni Njage T/A J.M. Njage & Company Advocates [2015]eKLR* on the professional undertaking and its enforcement.

60. The Defendant sought to join the client and another to these proceedings and at the same time claimed that the Client committed fraud and false pretenses to procure professional undertaking and repayment of funds. If that be the case; the Defendant ought to employ Law Enforcement Agencies to pursue the client. Surely, even if the client were to hide, he/she cannot disappear from the face of the earth without trace. There is ample opportunity to relentlessly pursue the client and other(s) but for now the Professional undertaking should be enforced.

#### DISPOSITION

1. The O.S of 23<sup>rd</sup> May 2018 is upheld granted as follows;
2. That the defendant honors the terms of the professional undertaking issued to the Plaintiff dated 12th April, 2018 and reconfirmed on 26th April, 2018
3. That the defendant pays the Plaintiff sum of Kshs.35,000,000/- (Kenya Shilling Thirty- five Million) in terms of the professional undertaking as per Order 52, Rule 7 CPR 2010

**DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH OCTOBER 2021. (VIRTUAL CONFERENCE)**



**M.W. MUIGAI**

**JUDGE**

**MR LUTTA FOR PLAINTIFF**

**PROF MUMMA FOR DEFENDANT**

