



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
MISC. APPLICATION CAUSE NO. 451 OF 2015

DIAMOND STAR GENERAL TRADING LLC PLAINTIFF

VERSUS

AMBROSE D.O. RACHIER carrying on business as

RACHIER & AMOLLO ADVOCATES DEFENDANT

JUDGEMENT

1. This Judgment relates to an Originating Summons dated 9th October 2015, and filed in Court on 12th October 2015. The Plaintiff is seeking that the Defendant honour the Professional undertaking given vide letters dated 14th, and 16th June 2013, and 12th July 2013, for payment to the Plaintiff's Advocate, of a total sum of Kshs.80,000,000 together with interest of Kshs. 24,000,000.

2. The brief facts of the case are that, the Plaintiff entered into an Agreement, with the Defendant's client, one Friends That Care Holding Company LLC, whereby the Plaintiff agreed to advance a loan of Kshs.80,000,000, in two separate amounts of Kshs.50,000,000 and Kshs.30,000,000 to the said Company. In consideration of the said advance, the Defendants by a letter dated 14th June 2013, gave a Professional undertaking to pay the law firm of Messrs, Hamilton Harrison and Mathews, the Plaintiffs' Advocates, Kshs.50,000,000 on or before 31st October 2013. By the same letter, the Defendant gave an undertaking to Indemnify and hold the Plaintiff and its Advocate harmless of any loss or expense, that either the Plaintiff or its Advocate would incur as a result of non-payment of the Loan advanced. The Defendant wrote to the Plaintiff's Advocate vide a letter dated 16th June 2013,, indicating that upon written instructions by the Plaintiffs' Advocate, it would convert the advanced loan sum of Kshs.50,000,000 to USD and credit to the Plaintiffs Account when due.

3. By a further letter dated 12th July 2013, the Defendant gave another Professional undertaking to pay Kshs.30,000,000 to the Plaintiffs' Advocates on or before the 31st October 2013, in consideration of the Plaintiff advancing a further loan of Kshs.30,000,000 to the Defendant's said client. On the same date, the Defendant also undertook to convert the said sum of Kshs.30,000,000 into the USD and pay into the Plaintiffs' Account. Similarly, the Defendant, vide the said letter gave an undertaking to Indemnify the Plaintiff and its Advocate against any harm or loss or expenses incurred as a result of non-payment.

4. Subsequently, the Defendant's client failed to pay the sum of Kshs.80,000,000 advanced by the Plaintiff and remains in default. By a letter dated 30th October, 2013, the Plaintiff's Advocate instructed the Defendant to convert the outstanding amount to USD at the prevailing Central Bank of Kenya mean rate, and remit the outstanding amount to the Plaintiff's Account. Despite demand to the Defendant, he

has neglected or refused to honour the Professional undertaking. Hence, the suit and the prayers herein that, the Defendant do honour the Professional undertaking given in relation to the sum advanced of Kshs.80,000,000.

5. The Defendant opposed the claims vide an Affidavit sworn on 13th January 2016, by Ambrose Rachier, a Lead Partner in the Defendant's Law firm. He averred that, indeed a loan of Kshs.50,000,000 and Kshs.30,000,000 was advanced to his clients, Friends That Care Holdings Ltd. The interest thereon was chargeable on the client in advance. That, he wrote letters dated 14th June, 2013 to the Plaintiff's Advocate, Messrs Hamilton Harrison & Mathews Advocates, promising to pay the Advocates an amount of Kshs.50,000,000 and Kshs.30,000,000 on or before 31st October 2013, upon receipt of instructions from the Plaintiffs Advocates, indicating the Account where the amount would be paid to.

6. He argued that the letters he wrote were ***not a Professional undertaking***, not titled as such and did not contain any statement to the effect that he was giving a Professional undertaking. That, they were promises given between himself and the Plaintiff's Advocate in an ordinary understanding far apart from circumstances necessitating a Professional undertaking. That he was not conducting any transaction between the Plaintiff and his client, as to be facilitated by a Professional undertaking. The promises were ordinary in the nature and did not constitute Professional undertaking. The wording of the letter show clearly that, the Promises were directed to the Plaintiffs Advocate as opposed to the Plaintiff, hence the latter has no basis to claim against him. He argued that, the Plaintiff's claim for payment lies only against his client and any attempt to recover it from him is an outright violation of the doctrine of privity of contract.

7. However on a without prejudice basis, he averred that he could only pay the money upto the date of 31st October, 2013 as his obligation to fulfill the undertaking was clearly indicated to be outstanding only during that period, and that he would only be called upon to honour his obligation upon the Plaintiffs' Advocates;

- i. Giving a notification of the fact that the two amounts are still owed by his client.*
- ii. Giving him instructions detailing the particulars of the Account to which to remit the amounts.*
- iii. Giving him instructions as above, within a reasonable time necessary to enable him to effect the payment of Kshs. 80,000,000 on or before 31st October 2013.*

8. That these conditions were not complied with and it is absolutely untrue to allege as stated in the affidavit of Ahmed Laiwalla and a letter dated 30th October, 2013 that, there were instructions to convert the total sum amount of Kshs. 80,000,000 into USD and remit it to a certain account. He has not received such instructions, and therefore he has not been called upon to fulfill his promise according to the clear terms of their engagement. Even then, on without prejudice basis, if the amount was due and owing, it would have been impossible for him to pay the sum of Kshs.80,000,000 before or on 31st October 2013.

9. The Parties agreed to dispose of the matter by filing written submission and thereafter highlighting the same. The Plaintiffs invited the Court to determine the following issues:

- (i) Whether the Defendant gave a Professional undertaking to the Plaintiff's advocate.***
- (ii) Whether the Professional undertaking can be enforced by the Plaintiff.***
- (iii) Whether the Plaintiff is entitled to the prayers sought in the Originating Summons.***

10. The Defendant, raised the following issues for determination:

- (i) Whether the Defendant gave a Professional undertaking.***

(ii) Whether the promise in the letters can be enforced by the Plaintiff (or at all) against the Defendant.

(iii) Whether the Plaintiff can enforce the indemnity in these proceedings.

(iv) Whether interest is payable.

11. In my considered opinion, I have raised the following issues for determination:

(1) Whether the letters referred to herein dated 14th and 16th June 2013, and 12th July 2013, constitute a Professional undertaking or a promise and/or an indemnity.

(2) Whether, whatever, the case may be in (1) above, the letters are enforceable against the Defendant.

(3) Whether Interest is payable, and

(4) Whether, the Plaintiff is entitled to the prayers sought in the Originating Summons.

12. As regard the 1st issue, the Plaintiff submitted that there is no doubt that the Defendant made a promise to pay the sum advanced in his capacity as an Advocate and in the course of his business as an Advocate. That, in the letter dated 14th June 2013, the Defendant indicates that he acts for an entity called, Friends That Care Holding Company Ltd. The Professional undertaking was given in consideration of Kshs.80,000,000 advanced to the Defendants' client. The defendant has not denied that the loan was disbursed. That by a letter dated 10th January 2014, the Defendant makes reference to its "Professional undertaking" to which they are still committed. The Plaintiff maintained that the letters of 14th and 16th June 2013, and 12th July 2013, constitute a Professional undertaking which the Defendant must now honour.

13. In the response to the Plaintiffs above submissions, the Defendant reiterated that, he gave a promise not a Professional undertaking. He was not representing the client either in negotiating or drawing the loan and did not know about the terms of the Loan agreement, (a copy of which the plaintiff has not even bothered to produce). That there was no basis therefore, for giving a Professional undertaking. That the letters referred to do not constitute a Professional undertaking because there is no indication of exchange of security documents or any such particulars, as would necessitate an Advocates undertaking.

14. That a professional undertaking is not a Guarantee to repay a clients loan. Professional undertaking are given in two distinct circumstances, in litigation and in transaction (e.g. conveyancing). They are only given to facilitate transaction. Therefore there was no basis for a Professional undertaking to be given by the Defendant accordingly, the aforesaid letters did not constitute a Professional undertaking. The letters were merely ordinary promises to do something on behalf of a client. They were promises made as an agent of a client.

15. He emphasized that ***an advocate can give a promise on behalf of client which is not personally binding on him and is not a professional undertaking.*** That, at the time of exchanging the three letters, the Defendant was capable and in a position to personally pay the money to the Plaintiff. It's impossible for the Advocate to assume a clients debt using a Professional undertaking. That is why the Defendant went ahead and gave an indemnity.

16. I have considered the rival written submissions, on the 1st issue relating to the letters as to whether they constitute a Professional undertaking. 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 from the Court or opposing party.

17. The US Legal Definitions.com states that:

“Undertaking in general means, an agreement to be responsible for something. In Legal context, it typically refers to a party agreeing to a surety arrangements, 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”.

18. The Encyclopedia of Forms and Precedents, 5th Edition by Hon. Sir Peter Millet, M.A. Vol. 39 pages 859, 860 a professional undertaking is described 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.***
- ***It’s a promise to do or to refrain from doing something.***
- ***In practice undertakings are frequently given by solicitors in order to smooth the path of a transaction or to hasten its progress, and are convenient method by which some otherwise problematic areas of practice can be circumvented.***

19. The Halsbury’s Laws of England, 4th Edition by Lord Hailsham of St. Marylebone, Vol. 44(1), pages 222, 223, 224 states as follows:

- ***Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the Court in the course of proceedings, that undertaking may be enforced summarily upon application to the Court.***
- ***It must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client.***
- ***It must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client.***
- ***It must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.***
- ***The undertaking must be clear in it’s terms. The whole of the agreement to which it relates must be before the Court, and the undertaking must be one which is not impossible ab initio for the solicitor to perform.***
- ***If the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced.***

20. Similarly, the principles guiding Professional undertaking were dealt with in the case of **Equip Agencies Limited vs. Credit Bank Ltd. Nairobi HCCC No. 773 of 2003**, where Warsame J. stated:

“An undertaking is usually given to ease and smoothen the path of transactions carried out by advocates. It is convenient method or tool to circumvent delay and operational difficulties, so that transactions can be easily, properly, smoothly and fastly conducted between Advocates. It is a Contract between Advocates after an offer and acceptance, with a resulting consideration which follows from one Advocate to another.

It is a promise to do or to refrain from doing something or acting in a manner which may prejudice the right of the opposite party. It means it is an unequivocal declaration of intention

addressed to someone who reasonably places reliance on it. It can be made by an Advocate either personally or through the name of the firm he usually practices under”.

21. Finally, the procedural provisions of Order 52 Rule 7 of Civil Procedure Rules gives the court the power to order for enforcement of the professional undertaking after giving an opportunity to the advocate to be heard; and honour the undertaking. It provides that;

(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”.

22. Based on the above legal principles and authorities, the issue to determine is whether, the three letters referred herein constitute to a Professional undertaking, or a Promise or an Indemnity. I shall first analyse the letters. The first letter dated 14th June 2013 is written on the letterheads of Rachier Amolo Advocates, and signed by A.D.O Rachier.

It reads as follows:

“We act for Friends That Care Holdings Company Limited. At the request of our client, and in consideration of your client advancing to our client a loan of Kenya shillings Fifty Million (Kshs. 50,000,000) (from which your client will deduct interest in advance), we hereby irrevocably undertake to you that, on or before 31st October 2013, we shall pay to you in cleared funds RTGS transfer to such account as you will notify us of, the sum of Kenya shillings Fifty Million (Kshs. 50,000,000) free from any deduction and without any counter-claim or set off.

***In the event, that the above amount is not paid to you as stipulated above, we agree to indemnify you and your client and hold you and your client harmless for any loss or expense (including the payment of the above amount that you and you client may incur as a result of the non-payment of the above amounts”.* (Emphasis mine).**

23. The letter dated 12th July 2013, is in relation to the advance of Kshs.30,000,000 and in the same terms as the letter dated 4th June 2013, save for the fact that it relates to a sum of Kshs. 30,000,000 instead of Kshs.50,000,000. However, the letter dated 12th July 2013, goes further under paragraph 4, thereof to state that, upon receipt of written instruction to the Defendant, the amount to be advanced will be converted into USD and paid to the Plaintiff’s Account as per the Bank Account details given. But of significance again, is paragraph 5 thereof, where the Defendant states that, they will indemnify the Plaintiff in the event the money is not paid.

24. A critical analysis of these letters reveal that the Defendant;

(i) Stated that they “irrevocably undertake” to pay the sum of Kshs.50,000,000 (under the letter of 14th June 2013) and Kshs.30,000,000 (as per the letter of 12th July 2013) to the Plaintiff or its lawyers on or before 31st October 2013.

(ii) These sums of money was payable in cleared funds by RTGS transfer to such Account as the Defendants would be notified.

(iii) That in the event their client did not pay, the Defendant agreed to “indemnify” and hold Plaintiff and its Advocate harmless for any loss or expenses, that may be incurred as a result of non-payment of the advanced money.

The words used by the Defendants in these letters are “**irrevocably undertake**” and “**indemnify**”.

25. The Defendants submitted that there was no Professional undertaking. It was only “**a Promise**”. Is there a difference between a Professional undertaking and a Promise. I have already considered various definition of a professional undertaking. The Black law dictionary defines an undertaking as “**a promise**”.

26. Thus, if the Defendants gave a promise to repay the said sums of money, that promise still amount to an undertaking, and if as herein it was given by an Advocate personally and acting as an Advocate, addressed to another advocate, intended for the benefit of the recipient’s client, it is stated to be unequivocal, and it is intended to be relied on, then it amounts to a Professional undertaking. The reliance in this case is evidenced by the words that, “*in consideration of your client advancing to our client a loan of Kenya shillings Fifty Million (Kshs. 50,000,000) (from which your client will deduct interest in advance), we hereby irrevocably undertake to you that, on or before 31st October 2013*”. The Plaintiff was, thus, supposed to advance the money in return of the Promise and/or Guarantee of payment. All these elements present herein, brings this matter under the definition of a Professional undertaking as per the Halsbury J. Laws of England (supra).

27. The Defendants have argued that, the Agreement to which the alleged Professional undertaking was given has not been brought before the Court, and that they were not conducting any transaction on behalf of any of the two clients who entered into the loan agreement. That, if the Promise given, is construed as a Professional undertaking, it is incapable of being performed ab initio. The Plaintiff, however argued that the Defendant has admitted that there was a Loan Agreement between the Plaintiff and his client, where the Plaintiff agreed to advance to the Defendant’s client Kshs.80, 000,000 together with interest. That the Defendant has not denied the loan was disbursed, and neither did the Defendant rebut Loan advance and disbursement.

28. A further consideration of the matter, I find that by a letter dated 10th January 2014, the Defendant states that:

“We regret that this matter has taken the turn it has and we are not able up to now to honour our undertaking

Please confirm so that we may redefine our Professional undertaking which we are still committed”. (Emphasis mine)

29. In my considered opinion and based on the analysis above, the Defendant vide the letters dated 14th and 16th June 2013 and 12th July 2013, gave an “**irrevocable undertaking**” to the Plaintiffs to pay the Plaintiff a total sum of Kshs.80,000,000 on or before 31st October 2013, which sum of money was advanced to the Defendant’s client; Friends That Care Holding Company Limited. The irrevocable undertaking was made by the Defendant in his capacity as an Advocate and in the course of his business as an Advocate. For all intent purpose, I hold that the irrevocable undertaking and/or the promise, whatever the case may be, amounts to a “**Professional Undertaking**”.

30. The next issue is whether the undertaking is enforceable against the Defendant. The Plaintiff submitted that, based on extract from Cordery’s solicitors, 8th Edition page, and Halsbury’s Laws of England, enforceability of a Professional undertaking is not guided by consideration of contracts but aims at securing honesty of conduct of its officer’s to uphold high standard of conduct, and it is immaterial that no misconduct on the part of the Advocate is suggested and the Advocate cannot therefore defend himself on the ground that his undertaking is not enforceable as a contract against him. The Plaintiff refuted the Defendant’s claim that, the subject letters were addressed to the Plaintiff’s Advocates as opposed to the

Plaintiff. The Plaintiff relied on the case of **Karsan Lalji Patel vs. Peter Kimani Kairu, practicing as Kimani Kairu Co. Advocates (2000) eKLR** to submit that, a Plaintiff (client) can sue the Advocate who gave a professional undertaking (to the client's Advocate) in order to enforce it. The Plaintiff further submitted that, the Defendant's allegations that, the Plaintiff ought to sue his client as the loan was advanced to him, is misplaced. That the contract of loan agreement is distinct from the professional undertaking which undertaking can be enforced separately. Reliance was placed on the case of **S.T.G. Muhia T/a S. Thuo Muhia & Co. Advocates vs. J. Chege T/a J. M. Chege & Co. Advocates (2009)** and **Fidelity Commercial Bank vs. Onesmus Githinji & Co. Advocates** (supra).

31. The Plaintiff also refuted the Defendant's submissions to the effect that, he required to be notified that the debt was still owed by his client and that he was not given instructions by the Plaintiffs Advocate detailing the particulars of the account to which to remit the amounts, which was done. That he was to be given reasonable time to enable him effect the payment of Kshs. 80,000,000 before 31st October 2013. The Plaintiff submitted that the Defendant had ample time to effect the payment, and relied on the case of **Equip Agencies Ltd vs. Credit Bank Ltd** (supra). That the letter dated, 10th January 2014, where the respective clients discussed and agreed to enlarge the time to 10th April, 2014, when the amount payable would be Kshs.104,000,000 was written two months after the due date, so the Defendants cannot claim lack of reasonable time. The undertaking herein was not conditional; reference was made to **Harit Sheth T/a Harit Sheth Advocates** (supra).

32. However, the Defendant maintained that the subject letters were given on one part as promises and on the other as an Indemnity and the Indemnity was given in the event, the Defendant failed to fulfill the promises. That, the Defendant's obligation to fulfill the promises never arose. Therefore he did not fail to fulfill his promises and consequently the indemnity never arose. That even if any Indemnity arose; it cannot be enforced through a summary procedure of an originating summons, as the Plaintiff has not pleaded the issue of Indemnity or made a claim on that basis, the Court can only move and determination on issues specifically pleaded reference was made to **Nyamongo & Nyamongo Advocates vs. Barclays Bank of Kenya (2015) eKLR**.

33. I have considered the arguments advanced on the issue of enforcement of the Professional undertaking and/or Indemnity. I have already ruled that the subject letters herein amount to a Professional undertaking. The issue of Indemnity is a furtherance of performance of the obligation under a Professional undertaking. It is not distinct of the undertaking. It cannot therefore be distinct and independent of the Professional undertaking.

34. An Indemnity is an obligation by a person to provide compensation for a particular loss suffered by another, and a professional undertaking is a formal promise whose effect is to make the person, giving it responsible for fulfillment of the obligation in respect of which it is given. The bottom line is that, the fulfillment of an obligation herein is for the Defendant to Indemnify the Plaintiff for loss suffered.

35. The other issue is whether interest is payable on the amount claimed. The Defendant submitted it was payable by their client in advance, hence the promise relates to Kshs. 80,000,000 only, as such the Plaintiffs' claim in the sum of Kshs. 24,000,000 is unfounded, quite indecorous and in ignorance of the express circumstances under which payment was to be made. However, the Plaintiff submitted that the Defendants admitted vide a letter dated 10th January 2014, the interest of Kshs. 24,000,000 was payable and therefore the Plaintiff need not give particulars of an admitted claim.

36. I have considered the arguments on the issue of interest and the letter dated 10th January 2014, the Defendants clearly indicate their client agreed to pay 104,000,000. This is inclusive of Ksh.24,000,000 as interest. However, the Defendants requested for a confirmation that the Professional undertaking to pay may be redefined to reflect that interest and stated in the same letter that, they were still committed to payment their obligation. The said confirmation was not given and therefore the issue of the said interest remain as it were.

37. In that regard, the Defendant was not a party to the said discussion and agreements between the

“clients” relating to interest. I find that, Defendant is only bound by the terms of the letters of 14th and 16th June 2013, and 12th July 2013. The letters indicate interest would be deducted from the sum of Kshs.50,000,000 and Kshs.30,000,000 in advance. The undertaking or Indemnity was of Kshs.80,000,000 and the issue of interest in advance does not arise.

38. In conclusion, I find that, Letters dated 14th and 16th June 2013 and 12th July 2016 amounts to a “Professional undertaking” and indeed in the Defendant’s letter dated 10th January 2014, the Defendant refers to a “*Professional undertaking*”. The Defendant’s client did not repay the sum advanced thus calling in the enforcement of the professional undertaking. In my opinion Plaintiff has proved its case, and I therefore allow the Originating summons dated 9th October, 2015, and filed on 12th October 2015, in the following terms:

(i) Judgement be and is hereby entered in favour of the Plaintiff as against the Defendant’s in the sum of Kenya Shillings Eighty Million (Kshs.80,000.000).

(ii) Interest at Court Rates from date of filing of suit until payment in full.

(iii) Costs of the suit.

39. Orders accordingly.

Dated, signed and delivered on this 15th day of March, 2017 at Nairobi.

G. L. NZIOKA

JUDGE

In Open Court in the presence of:

Mr. Mwihuri for Kiragu Kimani for the Plaintiff.

Ms. Fundi for Arua for the Defendant.

Ms. Teresia Court Assistant.

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In relation to the 1st issue, the plaintiff made a reference to the Encyclopedia of Forms and Precedent 5th Edition Volume 39 on the definition of a professional undertaking. The same reference was acknowledged by the Defendants in their submissions.

(Quote the definition was adopted in the case of Naphtali Paul Rachier vs. David Njogu Gachanja t/a D. Njogu & Co. Advocates (2006) eKLR.

From the definition of professional undertaking given by the Halbury’s Laws of England (supra); the following characteristics stands out:

- It is an unequivocal declaration of intention;
- Addressed to someone;
- Who reasonably places reliance on it;
- Made by a solicitor;

- In the course of his practice;
- Either personally, or by a member of staff or a solicitor “as a solicitor”;
- But not in the course of his practice;
- Under which the solicitor becomes personally liable.