

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 345 OF 2002

**KENYA MEDICAL ASSOCIATION HOUSING
CO-OPERATIVE SOCIETY
LIMITED.....PLAINTIFF**

VERSUS

**THE CO-OPERATIVE BANK OF KENYA
LIMITED.....
DEFENDANT**

JUDGMENT

A kind of a squirm

- 1.Vide a plaint dated 6.3.2002, the plaintiff is seeking damages of Kshs. 7,518,034 together with interest thereon at court rates from the date of filing suit until payment in full, and costs of the suit.
- 2.The plaintiff's case is that it entered into an agreement to purchase **Land Reference Number 18589** Nairobi from **Jackim Limited (vendor)** for Kshs. 37,500,000/-

3.The plaintiff sought financing from the defendant to cater for the balance of the purchase price. By a letter of offer dated 1.9.1998, the defendant offered the plaintiff bridging finance in the sum of Kshs. 18,750,000/-.

4.The facility was to be secured by a legal charge over the property, on the condition that there was to be no drawdown until the completion of the perfection of the security.

5.In the transaction, **Messrs Oraro & Rachier Advocates, Kibuchi & Company Advocates** and **Kimani Kairu & Company Advocates** represented the plaintiff, defendant and the vendor respectively.

6.The plaintiff indicated that at the time of applying for the bridging finance, the balance of the purchase price was

approximately Kshs. 18,750,000/-.
However, it made various outgoings of Kshs. 7,518,034/- on behalf of the vendor, on the understanding that they would be deducted from the balance of the purchase price.

7. However, on 12.5.1998 the defendant released the loan cheque directly to the vendor in the sum of Kshs. 18,750,000/- instead of Kshs. 11,232,216/- as requested.

8. Thereafter, the plaintiff sought but failed to obtain a refund from the vendor and filed this claim for negligence against the defendant.

9. The particulars of breach of duty of care set out by the plaintiff are: -

(1) Releasing the cheque directly to the vendor whilst having reason to know and believe that there were professional

undertakings concerning the said money.

- (2) Ignoring the advocates on record including its own advocates.
- (3) Having reason to believe that part of the purchase price would be required to refund some payments.
- (4) Releasing the cheque to a stranger over whom it had no control.
- (5) Despite the plaintiff's letter dated 12th May, 1998, the contents of which the defendant knew or had reason to know, the deductions were not made by the bank.
- (6) The same was contrary to known and set procedure.
- (7) The loan proceeds were not disbursed following the right procedure.
- (8) The defendant was or ought to have been aware that there was a sum

of Kshs. 7,518,034/- to be deducted from the balance of the purchase price before releasing the whole amount to the vendor.

(9) The defendant was aware and/ or ought to have been aware that from time to time various sums were disbursed by the plaintiff on behalf of the vendor and which sums were to be deducted from the balance of the purchase price.

Defence

10. The defendant filed a memorandum of appearance dated 25.4.2002 and a defence dated 10.5.2002. The defendant denied the claim arguing that the plaintiff's case lacks foundation as it acted within the terms and conditions of the letter offer.

11. According to the defendant, clause 3 of the letter of offer stipulated that the disbursement of the bridging finance was to be by way of a cheque for Kshs. 18,750,000/- directly to the vendor.

12. The defendant stated that it released the cheque number 005514 dated 12.05.1998 for Kshs. 18,750,000/- directly to the vendor on 12.05.1998 after confirmation by its advocates, **Kibuchi & Co. Advocates** that the charge had been duly registered in its favour.

13. The defendant stated that the vendor, **Jackim Limited** acknowledged receipt of the cheque through a letter dated 13.5.1998.

14. The defendant acknowledged that through a letter dated 12.5.1998, the plaintiff informed it had incurred certain expenses on behalf of the vendor and requesting it

to prepare a cheque for Kshs. 11,232,216 and not Kshs. 18,750,000/-. However, it claimed that it received the plaintiff's letter on 14.05.1998, after it had already released the cheque for Kshs. 18,750,000/- to the vendor.

15.The defendant asserted that the plaintiff did not notify it of the alleged expenses incurred on the vendor's behalf at the time of execution of the letter of offer or at all. It also asserted that clause 3 of the letter of offer was never varied by the parties.

16.It urged the court to dismiss the suit with costs.

Evidence

17.At the trial, the plaintiff called **Dr. Joseph Kariuki Mbutia** as **PW1**. He adopted the witness statement dated 12.9.2023, similar to the plaint. He also produced the

plaintiff's list and bundle of documents dated 15.9.2023.

18.**Mr. Mbuthia** stated that he is a member of the plaintiff and its former secretary. He reiterated that the plaintiff made payments on behalf of the vendor. That the plaintiff notified the defendant of the payments made and requested the defendant to issue a cheque for Kshs. 11,232,216/- instead of Kshs. 18,750,000/-. He also indicated that the defendant ignored its own advocates request that it issues the disbursement cheque in favour of the plaintiff's advocates for their onward transmission in fulfilment of their professional undertaking.

19.At cross-examination, **Mr. Mbuthia** admitted that the letter of offer dated 1.9.1997 stated the facility was to be disbursed directly to the vendor, **Jackim**

Ltd. He also acknowledged that at the time the plaintiff wrote to the defendant, they were not aware the entire sum had already been paid.

20. Mr. Mbutia admitted that the cheque for some of the outgoings issued to the vendor's advocate was not exhibited. He stated that there were professional undertakings alluded to in the letters exhibited but he admitted that he did not see the undertakings. He also confirmed that the plaintiff did not file a claim against the vendor.

21. During re-examination, **Mr. Mbutia** referred to payment receipts for land rent and rates dated 4.2.1998, totaling about 2.6 million, made after the execution of the letter of offer. He also pointed to the letters referring to the professional undertakings issued by the advocates.

22.The defendant called its legal manager, **Florence Wanja Njuguna (Ms. Njuguna)** as **DW1**. She testified that the defendant acted according to the letter of offer and that the plaintiff's direct payments to the vendor did not change the defendant's contractual obligations.

23.At cross-examination, **Ms. Njuguna** confirmed that all the parties including the defendant were represented by their respective advocates. She acknowledged that the defendant was notified that some money had already been paid by the plaintiff to the vendor.

Submissions

24.The plaintiff filed primary and supplementary written submissions dated 19.5.2025 and 26.9.2025 respectively. The plaintiff submitted that it has proved its

claim to the required standard and urged the court to allow its prayer for Kshs. 7,518,034/-.

25. The plaintiff relied on: -

- (1) **Equity Bank of Kenya & Another v Robert Chesang [2016] eKLR**
- (2) **Equity Bank (Kenya) Limited v Don Ogalloh Riario & another [2019] eKLR**
- (3) **Co-operative Bank of Kenya Ltd v Biwott (Civil Appeal 18 of 2019) [2022] KEHC 9946 (eKLR)**
- (4) **Karak Brothers Company Ltd v Burden (No. 2) [1972] 1 W.L.R 602**
- (5) **McCarthy Ltd v Absa Bank Ltd [2009] ZASCA 118**
- (6) **Selangor United Rubber Estates Ltd v Cradock (No. 3) [1968] 1 WLR 1555**

- (7)Navidas (Pty) Ltd. v Essop, Metha v
Essop (426/92, 427/92) [1994]
ZASCA 84**
- (8)Ahmed Mohammed Noor v Abdi Aziz
Osman [2019] eKLR**
- (9)Philipp v Barclays Bank UK PLC
[2024] A.C. 346**
- (10)Eunice Wairimu Muturi & Another
v James Maina Thuku & Another
[2018] eKLR**
- (11)Premier Bag and Cordage Ltd v
National Irrigation Board [2014]
eKLR**
- (12)In Re Estate of M'Mugambi
M'Mbiro-Deceased [2022] eKLR**

26.The defendant filed written submissions dated 26.9.2025. It submitted that it acted in compliance with clause 3 of the letter of offer stipulated that the disbursement of the bridging finance was to be by way of a

cheque for Kshs. 18,750,000/- directly to the vendor.

27.The defendant relied on: -

**(1)Selangor United Rubber Estate Ltd
v Cradock (No. 3) [1968] 2 ALL ER
1073**

**(2)Karak Brothers Company Ltd v
Burden [1972] All ER 1210**

**(3)National Bank of Kenya Ltd v
Pipeplastic Samkolit (K) Ltd &
Another [2001] eKLR**

**(4)Independent Electoral and
Boundaries Commission & Another
v Stephen Mutinda Mule & 3 Others
[2014] eKLR**

**(5)Adetoun Oladeji (NIG) v Nigeria
Breweries PLC SC 91/2002**

**(6)CFC Stanbic Bank Limited v Kenya
Programmes for Sustainable**

**Development [2024] KECA 154
(KLR)**

**(7)Mbuthia Macharia v Annah Mutua
and Another [2017] eKLR**

**(8)Muriu Mungai & Co. Advocates v
section 50(1) of the Advocates Act
[2009] eKLR**

**(9)Ndung'u v Koskei Joel Kipkurui
Monda Ombori Rogers & E.J Ruto t/a
Koskei Monda & Company
Advocates [2023] KECA 1381 (KLR)**

**(10)County Government of Migori v
Hope Self Help Group [2020] eKLR**

**(11)Goss v Lord Nugent [1883] 110 ER
716**

**(12)Minister of Safety and Security v
Van Duivenboden 2002 (6) SA 431
(SCA)**

(13)**Securicor Courier (K) Ltd v Benson
David Onyango & another [2008]
eKLR**

(14)**Provincial Insurance Co. EA Ltd v
Mordechai Mwanga Nandwa (KSM
Civil Appeal No 179 of 1995)**

(15)**Dharamshi v Karsan [1974] EA 41**

(16)**Jasbir Singh Rai & 3 Others v
Tarlochan Singh Rai & 4 Others
[2014] eKLR**

Analysis and Determination

28.Has the plaintiff proved its case to the required standard as to be entitled to the relieves sought?

29.The burden of proof is upon the plaintiff to establish his case on a balance of probability. **Sections 107 and 108 of the Evidence Act.**

30. The plaintiff's claim is based on the tort of negligence. Therefore, the plaintiff ought to establish the elements of negligence, being, that the defendant owed it a duty of care; that the defendant breached that duty, causation between the breach and the loss suffered and that the loss was foreseeable. **Equity Bank Limited v Wells Fargo Limited [2025] KEHC 8907 (KLR)**

31. From the evidence, the plaintiff and the defendant were in a bank-customer relationship and the defendant owed the plaintiff a duty of care in disbursing the bridging facility. The big question, however, is whether the duty was breached.

Breach of duty of care

32.The plaintiff argued that the defendant breached its duty of care owed to it. According to the plaintiff, the breach was in; a) the defendant releasing Kshs. 18,750,000/- to the vendor directly against the requests made by its own advocates to release the cheque in the name of the plaintiff's advocates to satisfy a professional undertaking that had been issued by them; and b) the defendant ignoring its letter of 12.5.1998 notifying it of the payments made on behalf of the vendor and requesting it to issue a cheque for Kshs. 11,232,216/-.

33.The defendant responded to the two claims of breach. First, that it released the cheque in accordance with **clause 3 of the letter of offer** which provides that the disbursement of the facility would be

by way of a bank cheque of Kshs. 18,750,000 issued directly to the vendor.

34.Second, that the defendant only received the plaintiff's letter dated 12.5.1998 on 14.5.1998 after it had already released the cheque to the vendor.

35.The defendant's witness acknowledged that the three parties were each represented by advocates. However, it contended that the plaintiff did not exhibit the alleged professional undertaking issued by its advocates.

36.I have closely examined the evidence on record. In a letter dated 22.12.1997 addressed to **Oraro & Rachier Advocates** for the plaintiff, **M/s Kimani Kairu & Co. Advocates** for the vendor requested that the outstanding land rent is paid and amount deducted from the balance of the purchase price just like it is

done for rates. The plaintiff produced land rent receipt numbers 122411 and 122518 dated 4.12.1998 and 5.2.1998 for Kshs. 2,606,848/- and Kshs. 4,352/- respectively. The plaintiff produced a certified copy of its bank statement showing the amount paid in respect of the rates. However, the plaintiff did not produce evidence of payment of the special consent of Kshs. 750,000/-.

37.The event that led to the filing of this suit was the release of the cheque which occurred on 12.5.1998.

38.The release of the cheque was closely preceded by the letter dated 11.5.1998, wherein the defendant's advocates confirmed that the charge over the property to secure the facility had been registered in the defendant's favour. The advocates further wrote that: -

“We shall be grateful to receive your cheque for Shs. 18,750,000/-in favour of the Society’s advocates, M/s Oraro & Rachier Advocates, for onward transmission to them in satisfaction of our undertaking given to them in that regard.”

39.I do note that the said letter referred to a professional undertaking issued to the plaintiff’s advocates. However, in a professional undertaking, the advocate being the person who gave the undertaking should honour it, not the client, unless it is proved that the advocate was acting merely as agent of the client, not in his professional capacity.

**[Halsbury’s Laws of England](#),
4th Edition by Lord Hailsham of St. Marylebone, Vol. 44(1), pages 222, 223, 224, **Mokoosio v Angela Mulwa t/a Mulwa & Partners Advocates & another [2024] KEHC 7241 (KLR)** and**

**Harit Sheth t/a Harit Sheth Advocate v
K. H. Osmond t/a K. H. Osmond
Advocate [2011] KECA 286 (KLR).**

40. It is worth noting, however, that this suit is not against the advocate to honor a professional undertaking. The professional undertaking is being used as evidence to show breach of duty by the defendant bank.

41. In the letter dated 12.5.1998, the plaintiff wrote: -

“Please note that we have incurred certain expenses on behalf of Jackim Limited as follows: -

-Land Rent

2,611,200

-Special Consent

750,000

-Land Rates

406,584

3,767,784

Further more at the time of applying for the loan, we had not taken into consideration the 10% deposit paid to Jackim Ltd: Kshs. (3,750,000).

We are therefore requesting you to prepare a cheque to Jackim Ltd: of Kshs. 18.75 million less 3,767,784 + 3,750,000 which amounts to Kshs. 11,232,216.”

42.The above letter has the defendant’s acknowledgement stamp for May 1998, but the exact date is not clear. Leaving the matter to ‘your word against mine’ situation which makes it a difficult case- a kind of a squirm.

43.As the person applying for the loan and being aware that the agreement with the bank was that the loan amount was to be paid directly to the vendor, the plaintiff ought to have been more diligent in ensuring any changes of circumstances are duly communicated to and acknowledged by the bank and the terms of the loan accordingly altered. Likewise, ordinarily the vendor pays the rates and rents. Therefore, where it is agreed that the

purchaser shall pay these charges, it should be in writing and should inform the balance due. In addition, any deposit paid by the purchaser informs the balance. But, some borrowers do it differently hoping to get 'refund' of these payments from the loan proceeds payable to the vendor- an arrangement that may become quite precarious as is the case here.

44. That aside, it bears repeating that the plaintiff relied on failure by the bank to pay the loan amount for purposes of clearing the balance of the purchase price in accordance with their advocate's undertaking- which was not produced or whose terms established in court. Secondly, the plaintiff relied on communication of the extra expenses to the bank which the bank acknowledged receipt but after it had paid the funds as

per their letter of offer- a fact that has been denied by the plaintiff. Yet, it bears repeating, the exact date of the receipt of the said letter is not clearly established. Leaving this a case of 'your word against mine'.

45. In the circumstances of this case, it is obscure whether the bank received the letter before or after the disbursement of the balance of the purchase price to the vendor. Thus, this is not a case where the court can confidently say, I '...think it more probable than not' as the probabilities are equal in this case. **Miller vs Minister of Pensions [1947] 2 ALL ER 372 Denning MR**

46. In the upshot, the court finds that the plaintiff has not proven that the defendant was aware of the extra expenses incurred by the plaintiff on behalf of the vendor

before disbursing the loan sums as per the letter of offer. The court also notes the plaintiff's failure to take into consideration the 10% deposit when it was applying for the loan.

Disposition

47. Thus, from the foregoing, the overall conclusion is that the plaintiff has not established that the defendant breached its duty of care in relation to the disbursement of the bridging facility to the vendor directly. The plaintiff has not proved its case on a balance of probabilities.

48. In conclusion, the plaintiff's case is dismissed. But given the circumstances of this case which have been expressed in the judgment, this is one case where each

party should bear its own costs. It is so ordered.

**Dated, signed and delivered at Nairobi
this 22nd day of January, 2026 through
Microsoft Teams online application**

F. Gikonyo M

Judge

In the presence of:

Kimulu for Mbaluto for Plaintiff

Ole-Ntome for Kiche for defendant

CA- Godfrey