

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION

CIVIL CASE NO. 130 OF 2018 (O.S)

**IN THE MATTER OF ENFORCEMENT OF A PROFESSIONAL
UNDERTAKING**

-BETWEEN-

KENCOM SACCO SOCIETY LIMITED.....PLAINTIFF

-VERSUS-

NICK NDEDA T/A

NICK NDEDA & ASSOCIATES ADVOCATES.....DEFENDANT

-AND-

**INTRACAPITAL INVESTMENT GROUP LTD.....THIRD
PARTY**

JUDGMENT

1. By way of suit commenced by Originating Summons **dated 30/05/2018, Kencom Sacco Society Ltd** (*hereafter the Plaintiff*) seeks the following orders against **Nick Ndeda t/a Nick Ndeda & Associates Advocates** (*hereafter the Defendant*) :-
 - a) *The Plaintiff who claims to enforce a professional undertaking in the sum of Kshs. 3,500,000/- together with interest at Court rates from 13/07/2017 plus costs for the determination of the following question namely;*
is the Plaintiff entitled to enforce a professional undertaking vide affidavit annexed against the Defendant plus costs and interest.
2. The grounds on the face of the summons are amplified in the **supporting affidavit** and **further affidavit** sworn by **Moses**

Sande Makhandia 30/05/2018 and **07/10/2019**, who cites being an advocate practicing in the style and name of **M/s Makhandia & Makhandia Advocates**. The gist of his deposition is that the Plaintiff desired to obtain a loan facility and made an application to **IntraCapital Investment Group Ltd**, who was the Defendant's client. That as a requirement, prior due diligence ought to have been done, to wit, the Plaintiff would pay a due diligence fee to the Defendant in the sum of USD35,000.

3. He goes on to depose that the latter amount was secured or its equivalent in Kenya Shillings by a professional undertaking that was given by the Plaintiff's advocate **M/s Makhandia & Makhandia Advocates**. That vide a letter dated 06/03/2017, the Defendant advised that the Plaintiff that it had successfully executed the former's client terms sheets and called for the payment of USD 35,000, to wit, on 08/02/2017 the firm of **M/s Makhandia & Makhandia Advocates** made payment of Kshs. 3,500,000/- to the Defendant vide RTGS. Thereafter, they received a letter from the Defendant acknowledging receipt of the amount, which also indicated that there was a deficit of Kshs. 88,238.50/- which amount was forwarded to the Defendant vide cheque and letter dated 11/04/2017.
4. He goes on to depose that vide a letter dated 03/05/2017, under instruction of the Plaintiff, he wrote to the Defendant to inquire on the current position of the loan application, to wit, the Defendant responded and alleged that **IntraCapital Investment Group Ltd** was in direct contact with the Plaintiff, which fact was not true. He states that he had been under constant instruction, of the Plaintiff, to get back the monies paid therein to the Defendant whereas on 13/07/2017 he wrote to the

Defendant's indicating that Plaintiff did not wish to proceed with the transaction because of delays on the Defendant's part and lack of communication. That despite follow-ups vide letters dated 05/09/2017 and 20/02/2018 the Defendant has yet to respond.

5. He states that in terms of the professional undertaking, it was clear that the Defendant would hold the said sum and only transfer it to **IntraCapital Investment Group Ltd** after receipt of notification, which to date they have not received. Therefore, without the notification being sent by the Defendant and received by the Plaintiff, the Defendant was not supposed to forward the sum of Kshs. 3,500,000/- to **IntraCapital Investment Group Ltd**. That **M/s Makhandia & Makhandia Advocates** undertaking was clear, unequivocal and enforceable whereas in spite of the various requests to the Defendant, the latter is silent and unwilling to observe the undertaking or refused to refund the Kshs. 3,500,000/-.
6. The Defendant opposes the summons through **grounds of opposition** and a **replying affidavit** sworn by **Nick Ndeda, both dated 29/01/2025**. He takes issue with the application on grounds that the application is incompetent in law vexatious therefore null and void as the Defendant did not and has not at any time of the contract given an undertaking; that the Plaintiff is in contravention and in disregard of the rules governing professional undertaking in specific under the Law Society of Kenya Code of Conduct and Ethics as well as **Order 52 Rule 7** of the **Civil Procedure Rules (CPR)**; that the Plaintiff cannot approach the Court to enforce its own undertaking or for the Defendant to observe an undertaking that neither he nor the

firm issued; that the application is premised on the wrong footing and does not shed light from the manner in which it has been instituted before Court; that the Plaintiff's application is otherwise incompetent misconceived, misplaced, untenable and or lacks any legal underpinning and an abuse of the process of the Court and ought to be struck out.

7. In his response, **Nick Ndeda**, states that in his capacity as advocate he did not issue any professional undertaking in relation to the matter at hand. That the documents relied on by the Defendant demonstrate material non-disclosure on the part of the Plaintiff, the specifics of which are-; the Plaintiff got into a loan agreement with **IntraCapital Investment Group Ltd** and was required to pay a processing fee before the financier would execute the term sheet; that it is the Plaintiff advocate who issued an undertaking guaranteeing payment of the processing fees in order to facilitate the execution of the term sheet; at no time did the Defendant issue an undertaking; that the undertaking was spent when Plaintiff made the payment to **IntraCapital Investment Group Ltd** through the applicant's offices; that the processing fee was sent in full to **IntraCapital Investment Group Ltd** and the parties put in direct communication; and that the Plaintiff failed to completely meet its obligations under the contract and vitiate the agreement with full knowledge of the attendant risk.
8. On application by the Defendant and vide the resultant order of this Court on 07/04/2025, **IntraCapital Investment Group Ltd** was enjoined into these proceedings as a Third Party
9. The summons was heard orally, wherein at the hearing, on behalf of the Plaintiff, **Moses Sande Makhandia** testified as

PW1. He adopted the contents of his affidavits as his evidence in chief meanwhile adduced the bundle of documents attached to the same, as **PExh.1.**

10. On behalf of the **Defendant, Nick Ndeda** testified as **DW1** he too adopted the contents of his replying affidavit as his evidence in chief and adduced the document attached thereto as **DExh.1-35.** At this juncture it would be pertinent to note that counsel for the parties had the opportunity to cross-examine the respective witnesses.
11. Despite enjoinder, **IntraCapital Investment Group Ltd** (*hereafter the Third Party*) did not participate in the instant proceedings.
12. Upon the close of the hearing, directions were taken on filing of submissions. The parties duly complied with the said directions.

Analysis and determination

13. The Court has duly considered the rival affidavit material, oral evidence and submissions filed by the respective parties, to wit, it **postulates that the issues for determination concern-**
 - a) *Whether there is a professional undertaking capable of enforcement?*
 - b) *Whether the Defendant breached the professional undertaking and whether the same is capable of enforcement by this Court?*
 - c) *Who bears the costs of the suit?*

Whether there is a professional undertaking capable of enforcement?

14. Concerning enforcement of a professional undertaking the same is specifically provided for in **Order 52 Rule 7** of the **CPR**, upon which the Plaintiff's summons is anchored. It provides that-;

“(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.”

15. **Black's Law dictionary, 10th Edition** defines an “undertaking” as *“a promise, pledge or engagement”*. In the case of **Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited [2016] KECA 835 (KLR)**, 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.

In enforcing undertakings, 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).

16. The same Court went on to address itself concerning the term undertaking as follows-;

“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. It would amount to deceit and unjust enrichment and ultimately, would erode public confidence in the administration of justice. As we have stated, a professional

undertaking protects all the parties to a transaction, and it is therefore not open for one party to unilaterally and without knowledge and consent to refuse to comply with the terms of that undertaking. Advocates should also note that failure to abide by the terms of a professional undertaking without lawful justification, amounts to professional misconduct. See Rooks Rider (a firm) v Steel and Others [1993] All ER 716.

17. Here, it is not in dispute that the Plaintiff expressed interest to obtain a facility in the sum of USD 30,000,000 from the Third Party. The same seemed to have been formally communicated vide a letter dated 01/03/2017, titled **“Letter of Interest and Term Sheet”** in which the Plaintiff’s interest was acknowledged. Meanwhile, certain conditionality’s were highlighted therein, to aid in advancing the facility.
18. The above letter, to wit, *ex facie* appeared to have been accepted by way of execution by a chairperson of Plaintiff at the time, on Mr. Robley Ngoje, read in part and I quote *ad verbum* that-;

10. Pay administration fees of US\$65,000..... The fees is required to cover the costs of: facility arrangement fees, due diligence fees, costs of reviewing the project documentation by one of he world’s accounting firms, legal fees and the costs of travel expenses to Kenya by project experts to be commissioned by us and our financing partners to undertake the site visit with the view of carrying out the due diligence. A part payment of US\$35,000.....will be acceptable with remaining balance of US\$30,000 to be deducted from the loan

amount plus an additional US\$30,000...at the time drawn-down of the loan funds. To avoid unnecessary delays or disappointment we would strongly recommend that payment of the US\$35,000 be made or transferred to arrive in our account on or before the 7th March 2017. Upon receipt of the fee, which shall, thus, constitute a binding commitment, the requested loan amount will be secured and reserved or set aside while we proceed with paperwork. Payment of the fee should be made through our legal representative in Nairobi, Kenya, Nick Ndeda.

11.

NOTE: all fees paid are subject to refund without any deductions or set off if for any reason your application is declined although this is highly unlikely to happen. However, the full amount of the fees will not be refunded if you decide to withdraw at the advanced stage of the process or fail to provide proven evidence of the land that have been acquired specifically for the proposed housing development or unable to provide the necessary compliance documentation issued by the relevant authorities or government. Should such a situation occur, then the cost of travel expenses and other related cost incurred in connection with the procession of this loan facility will be deducted from the total fees paid and the balance return to you.” (sic)

19. It would further seem that a few days earlier, the Plaintiff advocates **M/s Makhandia & Makhandia Advocates**, with due

knowledge in part, of the contents of the aforecaptioned letter, wrote to the Defendant vide a letter dated 28/02/2017 concerning the intended facility. I find it useful to equally set out *verbatim* the contents of the said letter in order to contextualize the dispute herein in. It read as follows-;

“We refer to the captioned matter and advice as follows

That we are instructed by our client, Kencom Sacco Society Limited, that they are in the process of securing certain funds from your clients Messrs. InfraCapital Investments Group Limited, a duly registered legal entity situate in London, Unity Kingdom.

That our client is required to pay or cause to be paid certain sums to facilitate the processing of their application by the lenders, including Due Diligence Fees USD35,000 to be paid to the duly appointed due diligence experts and solicitors drafting the loan documentation.

As part of the application process, our client shall receive and have opportunity to negotiate, if they so desire, the terms of the Letter of Interest/Term Sheet from the financiers, after which and upon execution they shall be required to make payments for the due diligence exercise.

Based on the foregoing and on our client’s instruction, we hereby unequivocally and irrevocably undertake that-;

We shall, immediately and in any event not later than 24 hours, upon receipt of your first written notification that our client has executed the Term Sheet/Letter of Interest and without any cavil, pay you or as directed by yourselves USD35,000.....in free and clear funds without any

deductions or withholdings whatsoever such that the said sum shall be available for transfer to your client for further processing of the loan application within 48 hours of our receipt of your notifications. (sic)

20. On the backdrop of the letter dated 01/03/2017, the Defendant wrote to the Plaintiff vide a letter dated 06/03/2017 acknowledging that the Plaintiff's representative had executed the Letter of Interest & Term sheet and an addendum to the latter dated 04/03/2017, to wit, demand for US\$35,000 was made towards processing of the facility.
21. From the material adduced, it is not in contention that the due diligence funds were eventually remitted to the Defendant whereas the latter vide his evidence and material before this Court contends that the said funds were eventually transmitted to the Third Party. Thus, premised on the above, can it be concluded that there exists a professional undertaking capable of enforcement between the parties hereto.
22. **Part III – Clause 23 (SOPPEC-9) of The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (SOPPEC)** provides that-;

The Advocate has 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. Failure to honour an undertaking is professional misconduct.

23. Whereas **Clause 131** states that-;

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 profession 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.

24. Addressing itself to the purport and definition of a professional undertaking as juxtaposed as against **The Law Society of Kenya Code SOPPEC - 9**, the Court of Appeal in **Ndung'u v Koskei Joel Kipkurui Monda Ombori Rogers & E.J Ruto t/a Koskei Monda & Company Advocates [2023] KECA 1381 (KLR)** observed that-;

22. The above definitions make it clear that a professional undertaking is a bond by an advocate on the authority of his client. It is an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. The question that follows, as of right, is the effect of an undertaking given by an advocate. The Encyclopaedia of Forms and Precedents (supra), at pages 581 and 582 provides that:

“An undertaking given by a solicitor is personally binding on him and must be honored. Failure to honour an undertaking is prima facie evidence of professional misconduct...A solicitor is personally

liable to honour an undertaking given by him on behalf of anyone unless such liability is expressly and clearly disclaimed in the undertaking itself. If the solicitor intends to exclude his personal liability on the undertaking, this should be manifestly clear in the terms of the undertaking.”

25. Indubitably, in this matter, the undertaking was issued by **M/s Makhandia & Makhandia Advocates**, to the Defendant, for due performance with respect to the receipt of written notification, that the Plaintiff had executed the **“Term Sheet/Letter of Interest”**. It is apparent from the evidence on record that one Mr. Robley Ngoje, executed the latter document, to wit, performance of the undertaking was demanded by the Defendant vide his letter dated 06/03/2017.
26. It is equally ostensible that the **“Term Sheet/Letter of Interest”** did not provide for timelines within which the Defendant was to hold and or transmit the due diligence fees but it would appear from **DExh.1-35**, that once the Defendant received the funds the same was transmitted to the Third Party.
27. As is, applying my mind to the authorities on professional undertaking and provisions earlier cited herein there was no formal promise, whose effect was to make the Defendant responsible for the fulfilment of any obligation in respect to which it was given, here being, the **“Term Sheet/Letter of Interest”**
28. In any event, the latter document constituted a contract between the Plaintiff and the Third Party whereas it provided for certain conditionalities that ought to have been met by the

Plaintiff. The Defendant was merely a conduit of the funds in question in order to facilitate smooth transaction however was not in any way obligated towards performance and or fulfilment of any obligations. Palpably, the **“Term Sheet/Letter of Interest”** was express and unequivocal as to what to make of the due diligence fees in the event the deal fell through.

29. The Court further concurs with the rendition in **STG Muhia TIA. Muhia v J. M. Chege TIA. J.M. Chege & Company Advocates [2009] eKLR**, wherein it was pithily observed that

—

"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."

30. Here, the Defendant issued no obligation and or there was no implied obligation discernable from the **Term Sheet/Letter of Interest”** or correspondences between the counsel for the parties that the Defendant was to withhold the due diligence funds pending fulfillment of the **“Term Sheet/Letter of Interest”**, dispatch of funds and or drawn down of the facility.
31. Further, the Defendant did not contract to any further obligation independent of the **“Term Sheet/Letter of Interest”**, to wit, would be enforceable against him independently. If the Plaintiff’s intent was to seek for a refund of the due diligence fees, as tacitly sought through these proceedings, his recourse

lay with the Third Party for a claim breach and not the Defendant through the instant originating summons. The **“Term Sheet/Letter of Interest”** was express and unequivocal on the modalities to realize the due diligence fees in the event it fell through, which *ex facie* appear to have been the case.

32. At this juncture it necessitates a reminder that it is well-trodden that a Court cannot re-write a contract between parties whereas its role is limited to interpretation of the contract because contracting parties are free to specify the terms and conditions of their agreement.
33. **Consequently, it is the Court unreserved determination that there exists no professional undertaking capable of enforcement. Thus, the suit lacks merit and is dismissed with costs to the Defendant.**

Orders according,

Delivered Dated and Signed at Nairobi this 12th March, 2026.

.....
JANET MULWA.

JUDGE