



**Adhiambo & 2 others v Ambrose Rachier, Otiende Amollo & Jotham Arwa  
All t/a Rachier & Amollo Advocates & 5 others (Environment & Land Case  
1135 of 2016) [2023] KEELC 17475 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17475 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1135 OF 2016**

**LN MBUGUA, J  
MAY 11, 2023**

**BETWEEN**

**JANE MARY AWERO ADHIAMBO ..... 1<sup>ST</sup> PLAINTIFF  
JOHN AWERO OGANJA ..... 2<sup>ND</sup> PLAINTIFF  
ROSE GWENYANI AWERO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**AMBROSE RACHIER, OTIENDE AMOLLO & JOTHAM ARWA ALL T/A  
RACHIER & AMOLLO ADVOCATES ..... 1<sup>ST</sup> DEFENDANT  
THE REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT  
THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT  
BEATRICE IMBUHIRA MUYEKHO ..... 4<sup>TH</sup> DEFENDANT  
PETER OGOMBE ODWESSO ..... 5<sup>TH</sup> DEFENDANT  
PAUL RADHALO ODWESSO ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. The background to the dispute herein is that the 2<sup>nd</sup> plaintiff is a brother and spouse of 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs respectively. The 5<sup>th</sup> and 6<sup>th</sup> defendants are brothers residing in the United States of America and are the registered owners of parcels Nairobi Block 63/419 and 418 (the suit parcels) respectively. Sometime in year 2010, the plaintiffs bought the suit parcels through their advocates, the 1<sup>st</sup> defendant, where in, 1<sup>st</sup> plaintiff was purchasing parcel 419, while 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs were jointly buying parcel 418, but the sellers turned out to be fraudsters. By then, the plaintiffs had paid a total sum of Ksh.5,



- 710 000 for the two suit properties. The 4<sup>th</sup> defendant is the person who had presented herself as the agent of the 5<sup>th</sup> and 6<sup>th</sup> defendants in the transactions.
2. Upon realization of the fraud, the plaintiffs filed this suit against their erstwhile advocates (1<sup>st</sup> defendant) vide a Plaint dated 15.10.2012. They were accusing the said advocates of negligence in the sale transactions and were demanding special and general damages. On 25.3.2014, the plaintiffs brought forth an Amended Plaint bringing on board the Registrar of titles and the Attorney General as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Finally the plaintiffs filed the Further Amended Plaint dated 15.10.2019, filed on 30.10.2019 wherein they sued 4<sup>th</sup> defendant Beatrice Imbuhira Muyekho as the contact person who acted as the agent of the alleged owners/ sellers of the suit properties, and also sued the two brothers who actually owned the suit land as 5<sup>th</sup> and 6<sup>th</sup> defendants.
  3. In their pleadings, the plaintiffs have alluded to particulars of negligence, fraud and illegality and they seek the following orders as against the defendants; Special damages for Ksh. 5,710 000, General damages, interest thereon plus costs.
  4. The first defendants filed their statement of defence on 20.3.2013 denying the claims of the plaintiffs averring that they fully executed the instructions given to them by the plaintiffs. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their statement of defence on 18.2.2016, where they also denied the claims of the plaintiffs. The joint statement of defence of the 5<sup>th</sup> and 6<sup>th</sup> defendants is dated 29.6.2021. Similarly, they deny the claims of the plaintiffs. The 4<sup>th</sup> defendant did not enter appearance or defend the suit.

## **The Evidence**

### **Plaintiffs' Case**

5. The case of the plaintiffs was advanced by the 2<sup>nd</sup> plaintiff who testified as PW1. He adopted his two witness statements dated 1.2.2012 and 1.7.2020 as their evidence. He also produced the documents in their list dated 1.7.2020 (26 items) as P-exhibits 1-26.
6. It is the testimony of Pw1 that in February 2010, they came across an advertisement posted on the Daily Nation Newspaper putting up for sale the two suit properties. The plaintiffs became interested. Pw1 contacted the cell phone number availed in the advertisement and was referred to the 4<sup>th</sup> defendant. The 1<sup>st</sup> plaintiff was interested in parcel 419, whereas the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs wanted parcel 418.
7. The plaintiffs proceeded to retain the 1<sup>st</sup> defendant to act for them in the sale transaction, of which the said 1<sup>st</sup> defendant drafted the two agreements in their bundle of documents and commenced engagements with the advocates for the sellers namely James Achoki Mbogah & Co. Advocates. The purchase price for each parcel was Ksh. 2, 550 000 and the plaintiffs paid these amounts in full.
8. On 8.12.2010, Pw1 visited the offices of their advocate, the 1<sup>st</sup> defendant and they learnt from a Mr. Fred Omolo that the Criminal Investigations Department (CID) were investigating the transactions relating to the sale of the suit properties. It also emerged that the 5<sup>th</sup> and 6<sup>th</sup> defendants, the alleged vendors were not the owners of the suit properties and that the vendors firm of advocates, James Achoki were none existent. They also found that Mr. Fred Omolo who was handling their transactions at the 1<sup>st</sup> defendant's offices was not an advocate. The plaintiffs were never given vacant possession of the suit properties.
9. The plaintiffs accuse their advocates of failing to safeguard their interests, yet they owed them (plaintiffs) a duty of care. They also accuse the 2<sup>nd</sup> and 3<sup>rd</sup> defendants of issuing information to their



- advocates to the effect that the 5<sup>th</sup> and 6<sup>th</sup> defendants were the lawful vendors which information was not true; and issuing them with the bogus title documents.
10. They further accuse the 4<sup>th</sup> defendant of negligence, contending that the said defendant ought to have known that the 5<sup>th</sup> and 6<sup>th</sup> defendants were fraudsters. In the circumstances, the plaintiffs are demanding the special damages of sh. 5, 710 000 plus general damages, interest and costs thereof.
  11. During cross-examination by counsel for 1<sup>st</sup> defendant, pw1 stated that they had seen the cell phone contacts in the Newspaper advertisement, but he could not recall that number, though he spoke to someone who identified himself as Benjamin, who then referred Pw1 to the 4<sup>th</sup> defendant, one Beatrice.
  12. Pw1 apparently met Beatrice who took him to the two suit properties, they then negotiated the prices and they reached an agreement. He also asked for the title deed. They then proceeded to the office of the 1<sup>st</sup> defendant and retained them to act for the plaintiffs in the transactions. He also instructed the 1<sup>st</sup> defendant to carry out due diligence, though he simply asked them to act on their behalf. After being taken through the various steps of conveyancing, Pw1 admitted that the 1<sup>st</sup> defendant had conducted due diligence. That titles were eventually issued in their (plaintiffs names) and he collected them when the case was ongoing.
  13. Pw1 avers that despite talking to Benjamin and meeting the 4<sup>th</sup> defendant, he never met or talked to the sellers of the suit properties or their lawyers. He denies informing their advocates as to who the lawyers for the vendors were. Pw1 blames their advocate for failing to detect the fraud.
  14. On cross examination by the advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, Pw1 reiterated that he only talked to Benjamin but never met him. He further stated that the 4<sup>th</sup> defendant had introduced herself as an agent of the 5<sup>th</sup> and 6<sup>th</sup> defendants, but she had no document appertaining to such agency. Beatrice is the one who took him (Pw1) to the site of the suit properties. She is also the one who availed the copies of titles to the 1<sup>st</sup> defendant. He however never met the sellers of the land.
  15. Pw1 further stated that the plaintiffs did not carry out any due diligence at the lands office or at Nairobi city council when they were buying the suit properties.
  16. However, after the transactions, they did searches and found that the suit properties were in their names, they later did the searches again, and they were in the name of the 5<sup>th</sup> and 6<sup>th</sup> defendants. He however clarified that he is not sure as to what is contained in the latest searches as time has gone by. He blames the Land registrar for not keeping proper records.
  17. On cross examination by counsel for the 5<sup>th</sup> and 6<sup>th</sup> defendants, pw1 stated that they are blaming their advocates. They however can't really blame the 5<sup>th</sup> and 6<sup>th</sup> defendants as they never met them. The plaintiffs however sued the 5<sup>th</sup> and 6<sup>th</sup> defendants because they were dealing with possibilities that the two could have been involved in the fraud. Pw1 reiterated that Beatrice, the 4<sup>th</sup> defendant had no letter of authority from the sellers, adding that their advocate was supposed to confirm the identity of the said sellers. He is not sure if the actual owners of the suit properties were involved in the fraud. He believes that some people can be fraudsters in their own properties.
  18. Pw1 further confirms that the purchase price was paid to Achoki Mboga and other strange names. That he even informed his sister through email that they (plaintiffs) were dealing with fraudsters and impersonators as the real owners of the land reside in America. He is therefore not demanding for any payments from the 5<sup>th</sup> and 6<sup>th</sup> defendants.
  19. Pw1 also stated that the sale agreements were not executed in his presence, so he doesn't know as to who executed the said agreements.



### **Case for the 1<sup>st</sup> Defendant**

20. The case for the 1<sup>st</sup> defendant was advanced by one FRANCIS OLALO who testified as DW3. He introduced himself as a partner in the firm of the 1<sup>st</sup> defendant. He adopted his witness statement dated 16.6.2022 as his evidence. He also produced the 27 documents in their list dated 19.3.2013 as their exhibits 1-27. Dw3 contends that their law firm has a conveyancing/commercial department with assistants including Fred Omolo.
21. That sometime in March 2010, they were instructed to act for the plaintiffs in the purchase of the suit properties, of which the clients were introduced by Fred Omolo. By the time of getting instructions, the clients had identified the properties and made contacts with the sellers. The 1<sup>st</sup> defendant then embarked on carrying out the searches, drafted the agreements, obtained completion documents and then booked the transfer of the leases for registration in the month of October 2010. Thereafter, the certificates of leases were duly issued in the month of November 2010.
22. Dw3 avers that they acted professionally and they were not negligent at all.
23. Upon cross examination by the plaintiffs' advocate, Dw3 stated that the stamp and signature on the sale agreements were put there by their employee, Fred Omolo with the firm's authority. Thus the said Omolo had capacity to witness those signatures. To this end, Dw3 made reference to the provisions of Section 110 of the repealed Registered Lands Act Cap 300, Section 45 of the [Land Registration Act](#) and Section 3 of the [Law of Contract Act](#) which allows any person to verify the signatures of any individual in a contract.
24. Dw3 further stated that they did what was required of them by carrying out a search at lands office to ensure that the titles were clean and there was no encumbrance as that is the role of the conveyancing lawyer. That there was no need for Dw3 to conduct a search on his fellow advocate, more so when the said advocate was introduced to them by the plaintiffs.
25. On cross examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, Dw3 stated that they just lodged the documents for registration, so the parties could not have appeared before the Land Registrar.
26. On cross examination by counsel for the 5<sup>th</sup> and 6<sup>th</sup> defendants, Dw3 stated that the plaintiffs and the vendors had carried out their negotiations before appearing in the offices of the 1<sup>st</sup> defendants. The funds were paid to the advocates of the alleged fraudsters.

### **Case for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants**

27. The case of these defendants was advanced by one CHARLES KIPKURUINGETICH who testified as DW4. He introduced himself as a Chief Land Registrar at the ministry of lands and physical planning. He adopted his witness statement dated 25.10.2022 as his evidence. He also produced the documents in their list dated 7.3.2018 as their exhibits 1-17, and he went on to give the registration history of the two suit parcels.
28. For parcel No. Nairobi/Block 63/418 their records indicated as follows:-
  - a. That the file in respect of this parcel was opened on 5<sup>th</sup> December, 2001 and registered in favour of Nairobi City Council.
  - b. That the parcel Nairobi/Block 63/418 was leased to Pauline Wahome for a term of 99 years from 1/1/68 at an annual rent of Ksh. 1,800.



- c. That a lease from the City Council of Nairobi to Pauline Wahome was lodged at the District Land Registry Nairobi on 5<sup>th</sup> December, 2001 and registered.
- d. That the lease for Nairobi Block 63/418 in favour of Gatune Pauline Wahome was transferred to Paul Radhalo Odwesso of P O Box 17017 Makongeni vide a transfer registered on 21<sup>st</sup> December, 2006.
- e. That the certificate of lease in favour of Pauline Wahome of P O Box 30065 Nairobi was cancelled upon transfer to Paul Radhalo Odwesso.
- f. That from the records the registered proprietor of suit parcel No Nairobi Block 63/418 is Paul Radhalo Odwesso.”

29. That in respect of the suit parcel Nairobi/Block 63/419 the records shows as follows:-

- “ a. a. The suit Parcel measuring approximately 0.0187 hectares was registered in the name of Nairobi City Council on 15<sup>th</sup> May, 2001.
- b. That on 15<sup>th</sup> May, 2001 the Nairobi City Council issued a lease to Belinda Wambui Njoroge of P O Box 52228 which lease was registered on 15<sup>th</sup> May, 2001.
- c. That the suit property was subsequently transferred to Jeremiah Siage of P O Box 40596 Nairobi and a Certificate of lease was issued on the same day.
- d. That the property was subsequently transferred to Peter Ogombe Odwesso of P O Box 17017 Makongeni on 3<sup>rd</sup> April, 2007 and a certificate of lease was issued on the same day.
- e. That on 6<sup>th</sup> January, 2011 the registrar placed a restriction on the parcel restricting dealings without the consent and presence of the registered owner.”

30. Dw4 contends that they had kept proper records of the true owners of the land, that on their face, proper documents had been lodged at the ministry of lands, thus the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not negligent in any way. That it was incumbent upon the plaintiffs to verify the identities of the persons they were dealing with, they failed to do so and were therefore duped by persons who purported to be the owners of the land.

31. On cross examination by the plaintiffs’ advocates, Dw4 stated that he could see the searches in the names of the plaintiffs, but he countered that the same could be forgeries.

Referred to the documents at page 29 of the 1<sup>st</sup> defendant’s bundle, (lease for parcel 418 issued to 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs), Dw4 confirmed that the document was from the ministry and that the purported Registrar who signed it joined the Anti-corruption some years back.

32. On cross examination by counsel for the 1<sup>st</sup> defendant, Dw4 stated that he is not sure if the two owners of the suit properties had sold the land. However, the documents which were lodged at their office were registered and they would not attract any suspicion.

33. On cross examination by counsel for the 5<sup>th</sup> and 6<sup>th</sup> defendants, Dw4 stated that during registration, the transfer instrument is submitted together with original title to the registrar. The original title is then surrendered, cancelled and is put in a deed file. He averred that if the 5<sup>th</sup> and 6<sup>th</sup> defendants are still having their original titles, then there was no transfer, and any such transfer was a forgery.



34. Dw4 reiterated that as per their records, parcel 418 is still in the name of the 6<sup>th</sup> defendant, while parcel 419 is in the name of the 5<sup>th</sup> defendant.
35. On cross examination by the court, Dw4 outlined the documents in their custody in relation to the suit properties which was a recital of his evidence in chief.
36. In re-examination, Dw4 stated that he has no original titles of the 5<sup>th</sup> and 6<sup>th</sup> defendants which were allegedly surrendered, and on the face of the documents, one cannot tell if the 5<sup>th</sup> and 6<sup>th</sup> defendants did the transfers.

### **Case for the 5<sup>th</sup> and 6<sup>th</sup> defendants**

37. The two brothers advanced their own case with the 6<sup>th</sup> defendant, PAUL RADHALO ODWESO testifying as Dw1. He adopted his witness statement dated 29.6.2021 as his evidence. He avers that he is the registered owner of parcel 418, of which he has never sold the said land to any one, he never instructed the 4<sup>th</sup> defendant to sell his land nor did he give instructions to James Achoki Mboga advocates to sell the said land.
38. On cross examination by counsel for the plaintiff, Dw1 reiterated that he never gave any instructions to Beatrice, he doesn't even know her. He was even outside the country at the time of the alleged transaction.
39. Dw1 was not cross examined by counsel for the 1<sup>st</sup> defendant. Upon cross examination by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, he again reiterated that he has never sold his land and that he still has the original title and that as per the government records, he is still the owner of parcel 418.
40. The 5<sup>th</sup> defendant Peter Ogombe Odwesso testified as Dw2 and he did so virtually as he was in Dallas, United State of America. He adopted his witness statement dated 29.6.2021 where he states that he is the owner of parcel 419. His evidence is more or less similar to that of his brother, Dw1. He was not cross examined by the other counsels.

### **Submission**

41. On 26.10.2022, the court gave directions on the filing of submissions after all parties had closed their cases. The plaintiffs were to file and serve their submissions by 26.11.2022, with the defendants filing and serving theirs by 17.1.2023 and the matter was to be mentioned on 8.2.2023 to give a date for judgment. Come the said date of 8.2.2023 and it emerged that the plaintiffs had not filed any submissions, they were also absent. The court gave directions for the defendants to file their submissions by 1.3.2023. I have only seen the submissions of the 1<sup>st</sup> defendant.
42. The submissions of the 1<sup>st</sup> defendant are dated 24.2.2023. They reiterated their evidence that it is the plaintiffs who had engaged the alleged sellers of the suit properties, they even viewed the said lands. Thus the 1<sup>st</sup> defendant was not involved in the identification of the sellers and the properties. The 1<sup>st</sup> defendant also rehashed the steps they undertook in carrying out the instructions of the plaintiffs which did not include investigating the true identity of the vendors. That the transaction was even approved by the Land Registrar and was only recalled and cancelled upon complaints by the real owners of the land.
43. The 1<sup>st</sup> defendant cited the case of Patrick S. Kimiti Vs. John Ngugi Gachau & Another (2015) eKLR, where Aburili J. quoted the decision of the Court of Appeal in Kinluc Holdings Limited Vs. Mint Holdings Limited & Another (1998) eKLR where the court of Appeal while quoting Cordery's Law



Relating to Solicitors, 7<sup>th</sup> Edition page 150 set out obligations of an advocate arising out of a retainer thus:

“At common law a solicitor contracts to be skillful and careful, for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill.”

44. They also cited the case of *Kimani Ngongdu Mburu Vs. Catherine Waitthera Mwangi t/a Waitthera Mwangi & Company Advocates* (2013) eKLR where Havelock J quoted with approval a passage of the Court of Appeal decision in *Champion Motor Spares Vs. Phadke* (1969) E.A 42 thus:

“... I remain of the opinion that counsel will only be guilty of crassa negligetia or gross negligence by some really elementary blunder... I agree with Russel J that the liability of an advocate to his client for negligence in performing his professional duties must generally arise from some really elementary mistake and not an error of judgment on some complicated point or one of doubtful construction. Each case must depend on its own particular facts....”

### **Determination**

45. The 5<sup>th</sup> and 6<sup>th</sup> defendants claim to be the registered owners of the two suit properties. Their evidence was buttressed by the registration records at lands office. Even the plaintiffs appear to recognize the 5<sup>th</sup> and 6<sup>th</sup> defendants as the real owners of the suit properties, even stating in cross examination of pw1 by counsel for the 5<sup>th</sup> and 6<sup>th</sup> defendants that they (plaintiffs) would not demand for any payments or general damages from the said 5<sup>th</sup> and 6<sup>th</sup> defendants.
46. Despite this state of affairs, it is noted that the plaintiffs had embarked on buying the suit parcels and they paid tidy sums as purchase price. They were even issued with titles. Thus there was negligence, fraud and illegality in the said transactions. The question for determination is; Who is culpable for the alleged negligence, fraud and illegality?. Are the plaintiffs entitled to damages?.
47. In paragraph 17, 18, and 20 of the statement of Pw1 dated 1.7.2020, the 2<sup>nd</sup> plaintiff has outlined the reasons as to why he is blaming the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants for the botched purchase of land transaction. They blame 1<sup>st</sup> defendant because they had given them a retainer, they owed the plaintiffs a duty of care and the said firm of advocates was supposed to safeguard their interests. They also blame the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for failing to keep proper records and for issuing the wrong information to the 1<sup>st</sup> defendant.
48. It has emerged that the plaintiffs never dealt with the vendors. They relied on an agent known as Beatrice (4<sup>th</sup> defendant) whose particulars they were given over a telephone conversation by a faceless person known as Benjamin. The plaintiffs had obtained the contacts of Benjamin in a newspaper advertisement. Further, the plaintiffs admitted that Beatrice did not have any documents to show that she was an agent of the vendors. She is the person who showed them the suit property and documents of title. Thereafter is when they walked into the offices of their advocate, the 1<sup>st</sup> defendant retaining them to conduct the sale transaction.
49. This far, it is clear beyond peradventure that the plaintiffs are the ones who unwittingly introduced the fraudsters to their advocates, thereby triggering the avalanche of the shoddy transactions which ended up at the lands registry. It follows that the back stops with the plaintiffs who authored their own misfortune by negligently dealing with faceless entities through an unconfirmed agent.



50. It is pertinent to consider the nature of instructions which the plaintiffs had given their advocates. Pw1 had stated that they had given instructions to their advocates to do due diligence. But went ahead to state that;

“I simply asked them to act on my behalf to ensure that the title was clean.”

51. There are no written instructions from the plaintiffs to the advocates. And as per the instructions appertaining to the sale of the land, the 1<sup>st</sup> defendant did a search which revealed the owners of the suit land to be the would be vendors. The 1<sup>st</sup> defendant drafted the sale agreements and eventually lodged the relevant completion documents at lands office. Again this far, there is nothing to indicate that the advocates acted outside the instructions appertaining to the sale transaction.

52. The Plaintiffs have intimated that the person identified as Fred Omolo was not qualified to execute the documents. The 1<sup>st</sup> defendant have on the other hand stated that this person was their employee and had the mandate of the firm to carry out the verification exercise. Section 45 of the [Land Registration Act](#) cited by Dw3 provides that;

“Verification of execution

1. Subject to subsection (3), a person executing an instrument shall — (a) appear before the Registrar, public officer or other person as is prescribed; and (b) be accompanied by a credible witness for the purpose of establishing identity, unless the person is known to the Registrar, public officer or other person”

53. The aforementioned proviso is a replica of Section 110 of the repealed Registered Lands Act Cap 300. I find that the plaintiffs have no cogent evidence to blame 1<sup>st</sup> defendant on account of the conduct of Fred Omolo.

54. The plaintiffs contend that their advocate ought to have known whom he was dealing with in view of the fact that the lawyer for the vendors turned out to be a fake one. The question is; who introduced this lawyer to the 1<sup>st</sup> defendant? Pw1 denies having done so. However, the letter dated 5.3.2010 from the 1<sup>st</sup> defendant to vendors’ advocates reads as follows:

“M/s James Achoki Mbogoh & Company

Advocates

N.H.C House

Nairobi

Dear Sirs,

Re: Title Numbers Nairobi/block 63/418

Sale To John Awero Ogaja

We thank you for your letter dated 12<sup>th</sup> February, 2010 addressed to our client a copy of which has been handed over to us.

We confirm that we are acting for the purchaser herein and have prepared the Agreement for Sale which we enclose herewith in triplicate.

Kindly approve the agreement and have the same executed by your client and return the same to us.



We shall thereafter forward to you our cheque for the 10% deposit.

Yours faithfully

RACHIER & AMOLLO ADVOCATES”

55. This letter does show that the vendors lawyers are the ones who contacted the 1<sup>st</sup> defendant and they in turn must have been dealing with the actual fraudsters, the ones connected with Beatrice.
56. In the case of Patrick S.K.Kamiti vs. John Ngugi Gachau & Another (2015) eKLR, it was stated that;
- “ the duty of an advocate in a conveyancing transaction is to ensure that his clients money is protected at all times until the sale is complete.”
57. However, and as pointed out in the cases cited by the 1<sup>st</sup> defendant, an advocate is only expected to act professionally with reasonable degree of care and skill and can only be guilty of gross negligence on account of some really elementary blunder.
58. The blunder herein was initiated by the plaintiffs. Pw1 had stated as follows during cross examination;
- “ Beatrice convinced me and took the documents to Rachier and Amolo, so I thought I was in good hands.”
- He then went on to say that;
- “ We dealt with fraudulent guys who may include owners”
- In re-examination Pw1 stated that;
- “ I just told Beatrice to take titles to Fred Omolo. Beatrice made me believe that she was acting for Odwessos”
59. From the foregoing it is again crystal clear that even the documents which triggered the shoddy transactions were introduced by the plaintiffs through Beatrice. Acting on those documents, the 1<sup>st</sup> defendant carried out a search and then went ahead with the conveyancing upto its rather illogical transaction. It follows that had the plaintiffs introduced the real vendors with the correct documents, the 1<sup>st</sup> defendant would still have followed the same procedure but with a logical end!.
60. To this end, I find that no fault can be attributed to the 1<sup>st</sup> defendant.
61. What about the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants? Dw4 has given a chronology of the registration history of the two parcels, of which the current registered owners are the 5<sup>th</sup> and 6<sup>th</sup> defendants. When the court cross examined Dw4 in relation to the documents in their possession, he again recited the registration history of the two suit parcels. The alleged forged transactions and documents were not mentioned by Dw4 as being part of the registration history of the suit parcels.
62. What resonates from that evidence of Dw4 is that the documents of titles held by the plaintiffs are not recognized as part of the registration records at the lands registry. Dw4 explained that the documents lodged at their office would not on their face attract suspicion. That explanation is plausible as documents of registration are filed without the parties appearing before the registrar.
63. However, the documents of title which were eventually issued to the plaintiffs apparently emanated from the ministry of lands as per the evidence of Dw4. Further, there was no evidence of surrender of the original titles of the Ongwesso’s, which means that the transactions leading to issuance of titles to



the plaintiffs were forgeries. The foregoing evidence indicates that some one at lands office must have been in collusion with the fraudsters. But again, the documents which were lodged at the lands office reflecting the 5<sup>th</sup> and 6<sup>th</sup> defendants as the owners of the land must have emanated from the contacts of Beatrice.

64. Flash back, the plaintiffs are the ones who introduced Beatrice with the fake documents to their lawyers. Thus by extension, the plaintiffs unknowingly perpetuated the fraud right up to the lands office. There is no clear evidence as to who issued the fake titles, but it is clear that the negligence of the plaintiffs is what birthed the fraudulent transactions.

65. I find that the master mind of the crafty machinations can only be attributed to Beatrice and her faceless acquaintances.

However, there is no sufficient evidence to lay blame on the side of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

66. As for the 5<sup>th</sup> and 6<sup>th</sup> defendants, there is no iota of evidence to connect them with the fraudulent activities. Pw1 admitted that much during cross examination by counsels for the said 5<sup>th</sup> and 6<sup>th</sup> defendants.

67. The upshot of the findings herein is that the plaintiffs jumped into the fraudulent transactions with their eyes wide open by not only failing to identify the real owners of the suit properties before going to their advocate, but by introducing a fraudster named Beatrice with fake documents to their advocate and at the lands office.

68. The claim of the plaintiffs can only mature as against the 4<sup>th</sup> defendant. In that regard, the plaintiffs are entitled to damages as against the said defendant even though they have not made any submissions as to the quantum thereof. I am inclined to award them a sum of sh. 3 000 000 in total.

#### **Final orders**

- 1) The plaintiffs claim against the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> 5<sup>th</sup> and 6<sup>th</sup> defendants is hereby dismissed.
- 2) Judgment is hereby entered for the plaintiffs against the 4<sup>th</sup> defendant to the tune of sh 5, 710 000 as special damages and sh. 3 000 000 as general damages.
- 3) As to cost, the 4<sup>th</sup> defendant is condemned to pay costs of the suit with interests at court's rates to the plaintiffs. The other parties shall bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Otieno for the Plaintiffs

Mungla for 1<sup>st</sup> Defendant

Allan Kamau for 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

Ochieng Ogutu for 5<sup>th</sup> and 6<sup>th</sup> Defendants

Court assistant: Eddel

