



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 472 OF 2012

DR. ERNEST MUINDE KIOKO.....PLAINTIFF

VERSUS

DAVID MUNIU Ruinge.....1ST DEFENDANT

INSIGHT COMMUNICATIONS LIMITED.....2ND DEFENDANT

EDWARD NJENGA MUCHAI, ADVOCATE.....3RD DEFENDANT

JUDGMENT

1. Dr. Ernest Muinde Kioko (Dr. Kioko or the Plaintiff) brings this claim against David Muniu Ruinge, Insight Communications Limited and Edward Njenga Muchai as Defendants. He seeks judgment against the 1st Defendant for the sum of Kshs.8,300,000.00 together with interest thereon at Court rates from 10th April, 2010 until payment in full. He also seeks general damages against the 3rd Defendant.

2. The Plaintiff sets out his case in a lengthy Plaint dated 6th July 2012. A prolix and which contains unnecessary evidence! At all material times to the suit, Dr. Kioko was the owner of a medical services business known as "Valley Arcade Medical Centre" operating on a rented premises on LR 330/466 on Mbaazi Avenue in Valley Arcade area, Lavington Estate Nairobi. By an agreement dated 10th November 2009 entered between himself and the 1st Defendant who is said to have held himself out as a director of Insight Communication Limited, he sold the medical business at a price of Kshs.10,000,000.00.

3. It is the case of Dr. Kioko that the 1st Defendant has only paid Kshs.1,700,000.00 towards the purchase price and there remains a balance of Kshs.8,300,000.00.

4. As to why he seeks judgment against the 1st Defendant and not Insight Communication Limited (the 2nd Defendant) which is the contracting party, the Plaintiff bespeaks the lifting of the corporate veil. It is averred that the 1st Defendant and the 3rd Defendant (who is said to be the Advocate who prepared the sale agreement that is the subject matter of this dispute) fraudulently misrepresented to Dr. Kioko that Insight Communication Limited was a body corporate when it was a business name whose proprietors were the 1st Defendant and one Rebecca Waiyego Muniu. For that reason, the Plaintiff seeks the personal liability of the 1st Defendant.

5. In respect to the claim against the 3rd Defendant, Kioko asserts that he was negligent in his duty. He sets out the following particulars of negligence;

a) Ideally the 3rd Defendant ought to have cautioned the Plaintiff as to the sloppiness of the Agreement the Plaintiff was executing with the 1st and or 2nd Defendant.

b) Relying on the advice, express and or implied, by the 3rd Defendant to the Plaintiff, the Plaintiff signed the Agreement prepared by the 3rd Defendant in his capacity acting as the Advocate for both the 1st and 2nd Defendants as well as the Plaintiff, just to burn the Plaintiff's fingers.

c) The Plaintiff relying and believing that the Agreement which the Plaintiff signed was watertight in so far as protecting the interests of the Plaintiff in the subject transaction the Plaintiff let go, by handing over to the 1st and 2nd Defendant the clinic all

equipment as described in the schedule hereinbefore and the clinic premises.

d) The 3rd Defendant failed to exercise due care, skill and diligence expected of the 3rd Defendant in the discharge of the 3rd Defendant's duty to the Plaintiff as the client to the 3rd Defendant, in that the 3rd Defendant failed to carry out a routine search of "Insight Communication Limited" to establish whether or not the same was duly registered as a limited liability corporate body or at all and its suitability to engage in the subject agreement for sale and Assignment of Lease.

6. Kioko infact thinks that the negligence on the part of the 3rd Defendant went beyond an error of judgment and constitutes gross professional negligence and breach of duty.

7. On another front, the 3rd Defendant who acted for both parties to the agreement is assailed for failing to advise Kioko of his right to choose his own Advocate. That to the contrary, the 3rd Defendant presented himself as capable of diligently acting for both sides without fear, favour or bias.

8. The three (3) Defendants filed a joint statement of Amended Defence dated 17th September 2012. The Defendant deny the averments set out in the Plaintiff. In particular, the 3rd Defendant denies any privity of contract between himself and the Plaintiff and asserts that any remedy lies against the two (2) Defendants. The allegation of gross or any negligence as an advocate are disputed and rebutted.

9. In respect to the Sale Agreement, the Defendants aver that clause 3(b) thereof provided that the balance of the purchase price was to be paid from 50% net income generated by the 2nd Defendant. It is their Defence that the performance of the agreement was rendered impossible as the Plaintiff failed to secure the consent of the landlord in regard to the assignment of the lease of the rented premises on which the clinic operated. The Defendants take it that the performance of the agreement was therefore frustrated by operation of law.

10. At the hearing only witnesses for the Plaintiff testified as the Defendants failed to attend Court notwithstanding due service of the Hearing Notice. The witnesses for the were himself, Daniel Kabiru and Timothy Otieno Owour. Their evidence in so far as they may be relevant in resolving the following issues is discussed:-

1. Was there an Agreement of sale dated 10th November 2009 made between the Plaintiff and "Insight Communication Limited"?
2. Was there breach of that Agreement?
3. If so, should the 1st Defendant be held personally liable for the breach and to what extent?
4. Is the 3rd Defendant guilty of professional negligence?
5. If so, what damages, if any, does the Plaintiff deserve?
6. What is the appropriate order on costs?

This Court has framed the issues by considering the pleadings filed and reworking the 17 issues proposed by the Plaintiff.

11. For some reason the Plaintiff did not produce the Agreement of 10th November 2009 as an exhibit notwithstanding that it was referred to in the Plaintiff and his witness statement of 27th October 2018 and is, undoubtedly, central to this dispute. However, that may not be a fatal blow to the claim because the existence of the agreement is acknowledged in the Amended Defence. Indeed, in Paragraph 8C the pleading specifically makes mention of clause 3(b) of the said agreement. In addition, though not produced, an Agreement of sale dated 10th November 2009 is listed as one of the documents for the Defence. On a balance of probabilities, I hold that there was indeed an agreement made between Valley Arcade Medical Centre and an entity called Insight Communication Limited. The Plaintiff being the owner and registered proprietor of the former business.

12. That the agreement was for the sale of the clinic at a consideration of Kshs.10,000,000.00 may not be seriously contested because in a letter dated 9th January 2012 from S. M. Munikah and Company, acting for the Plaintiff, to Insight Communication Limited (P. Exhibit 1 pages 2-4) and the 1st Defendant, Counsel sets that out and the same is not disputed in a response to it (P. Exhibit 1 pages 4-5). Also not contested is that only Kshs.1,700,000.00 of the consideration had been paid. That would leave a balance of Kshs.8,300,000.00 which is the sum sought.

13. As to why this amount was not paid, the Defendants specifically make following averment in Paragraph 8c of the Amended Defence.

"[8c] In answer to paragraph 12 and 13 of the Plaintiff the Defendants aver that clause 3(b) of the said Agreement expressly provided that the balance of the purchase price was to be paid from the 50% net income generated by the 2nd Defendant. The Defendants will aver that as a result of the Plaintiff having failed to secure the consent of the Landlord to the said Assignment, performance of the said Agreement became impossible and the same was frustrated by operation of law. In the premises the Defendants deny the Plaintiff's claim for Kenya Shillings Eight Million Three Hundred Thousand (Kshs.8,300,000.00) or any other sum whether as pleaded in Paragraph 13 and 14 of the Plaintiff or at all and the Plaintiff is put to strict proof thereof".

14. That really is the linchpin of the Defence. However, as the Defendant did not lead any evidence in support of the assertion that the Plaintiff failed in its obligation, it remains unproved as he who asserts must prove. For that reason I find no difficulty holding that there was

default in payment of the balance of the purchase price being Kshs.8,300,000.00.

15. Should the 1st Defendant be personally liable? It has turned out that “Insight Communication Limited” does not exist and is not a registered liability company as upon a search been conducted by Munikah & Co. at the Registrar of Companies, the letters “N/R” were marked on the letter requesting for particulars (See letter of 3rd April 2012 P. Exhibit Page 8). I do not doubt when it is said that the words “N/R” stand for “not registered”. In addition, there is a subsequent communication of 20th April 2012 from the Registrar of Companies to Munikah & Co. Advocates (P Exhibit 2 Page 9) indicating that “Insight Communication Consultants” is a Business name whose proprietors are the 1st Defendant and one Rebecca Waiyego Muniu named as w/o (wife of) the 1st Defendant.

16. If, by holding out that “Insight Communication Limited” was a registered liability company, the 1st Defendant deliberately misled the Plaintiff, then the 1st Defendant should not be allowed to reap a benefit from this misrepresentation and misdeed. This Court concludes that the 1st Defendant should be personally liable for Plaintiff’s claim. It is not a matter of lifting the corporate veil as there does not exist a corporate entity. It is holding a person who was truly the party to the agreement liable for default.

17. I turn to consider whether the 3rd Defendant was guilty of any professional negligence. On this, the entire evidence of the Plaintiff’s witnesses is singularly silent (See the written statements of the three witnesses adopted as evidence in chief). That limb of the case is not proved.

18. And even if proved there was no material placed before the Court upon which the general damages sought against the 3rd Defendant would be founded. It is not surprising that in the final submissions filed on behalf of the Plaintiff, no proposal on quantum is made. The claim may well have been abandoned!

19. I turn to consider a semi ultimate matter. A claim for interest at Court rates from 1st April 2010 is made by the Plaintiff. This is a claim for interest from a date before the filing of the suit which was on 24th July 2012. It is a claim for interest antecedent to filing of suit. It is therefore a matter of substantive law not only to be pleaded but also to be proved. This Court has not been given a basis for granting such interest and interest will have to run from the date when suit was filed.

20. The final orders of Court are:-

20.1 Judgment is entered for the Plaintiff against the 1st Defendant for Kshs.8,300,000.00 with interest thereon at Court rates from the date of filing suit until payment in full.

20.2 The Plaintiff shall also have costs against the 1st Defendant.

20.3 The 2nd Defendant does not exist and no order can be made against it.

20.4 The Plaintiff’s suit against the 3rd Defendant is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 24th Day of January 2020

F. TUIYOTT

JUDGE

PRESENT;

Chacha for Munikah for Plaintiff

No appearance for Defendants

Court Assistant: Nixon