



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. E032 OF 2019**

**DAYTON VALUERS LIMITED.....PLAINTIFF**

**-VERSUS-**

**JOHN NGUGI ..... DEFENDANT**

**J U D G M E N T**

1. Dayton Valuers Limited, the Plaintiff, has brought this action against John Ngugi, the Defendant. The Plaintiff had employed the Defendant for a period slightly over 6 years, that is from January 2010 to December 2016. The Defendant was employed as a Valuer cum Property Manager.
2. The Plaintiff's claim is for general and punitive damages, against the Defendant which the Plaintiff pleaded it suffered following the Defendant's negligent and/or fraud in carrying out a valuation of a property under the instructions of Equity Bank Limited. The Plaintiff pleaded that it suffered damages because as a consequence of the Defendant's negligent and/or fraudulent valuation the Plaintiff was removed from the Equity Bank Limited panel of approved valuers.
3. The Plaintiff filed this claim on 14<sup>th</sup> March 2019. The Defendant although was served with the summons and Plaintiff failed to file the Memorandum of Appearance within the requisite period. Following the failure to file the Memorandum of Appearance, interlocutory judgment was entered against the Defendant on 29<sup>th</sup> May 2019. This case was fixed for formal proof on 3<sup>rd</sup> October 2019 when the Learned Advocate, Mr. Njenga, attended Court and requested that the Defendant be given time to file an application to set aside the interlocutory judgment. The Court, with the consent of the Plaintiff's Learned Advocate for the Plaintiff, obliged the Defendant and adjourned the matter to 25<sup>th</sup> November 2019. The Court in adjourning the matter stated that if the Defendant did not file his application to set aside as parte interlocutory judgment by 25<sup>th</sup> November 2019 the Court would proceed to hear the Plaintiff's formal proof. On 25<sup>th</sup> November 2019 the Court did proceed with the Plaintiff's formal proof because the Defendant had not, by then, sought to set aside interlocutory judgment.
4. The Plaintiff's evidence was led by Justus Munene Munyi, its director Mr. Munyi confirmed that the Defendant was employed by the Plaintiff in the year 2010. On 19<sup>th</sup> September 2010 the Plaintiff received instructions to conduct a valuation of a property from Equity Bank Limited. The purpose of that valuation was to enable the bank establish the property's open market value, forced sale value and insurance value of that property. The valuation was to inform the bank's decision in advancing a loan to the owner of that property.
5. The duty of carrying cut that a valuation was assigned to the Defendant. The Defendant produced a valuation report date d21st September 2015. In that report the Defendant stated that he had visited the property in conduction that valuation. The Defendant also put in photographs of the property, Survey map and the location of the property in that valuation report. The Defendant valued that property for Kshs. 55 million, as the open market value, and Kshs. 44 million, as the forced sale value.
6. Mr. Muinyi, as the Plaintiff's director, appended his signature to that valuation report, once he confirmed that the report met the internal standards of the Plaintiff.
7. That valuation report was forwarded to the bank and the bank placing its reliance on that report advance a loan of Kshs. 25 million. There was default in the repayment of that loan and in order to place the property on sale by auction the bank obtained another valuation from another firm. That valuation revealed that the value of the property was Kshs. 6 million, market value, and Kshs. 4.5 million being forced sale value.
8. The bank on realizing the disparity of the Plaintiff's and the independent valuer's report threatened the Plaintiff with Court action to recover from the Plaintiff the loss it had incurred in placing reliance on its valuation report. Further the bank by its letter dated 2<sup>nd</sup> July 2018

removed the Plaintiff's name from the bank's approved panel of valuers.

**ANALYSIS AND DETERMINATION**

9. As stated before interlocutory judgment was entered, in this case, against the Defendant. The Court role now is to simply assess the damages of this case. This was so stated by the Court of Appeal in the case **PAUL MUIYORO T/A SPOTTED ZEBRA VS BULENT GULBAHAR REMAX REALTORS (2016) eKLR** as follows:

“It is now settled that once interlocutory judgment has been entered the question of liability becomes a foregone conclusion. In **Felix Mathenge -v- Kenya Power Lighting Company Limited [Civil Appeal No. 215 of 2002] UR**, the Court held:

**"The role of the court after entering interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages".**

10. The Plaintiff produced in evidence its agreement with Equity Bank Limited by which the Plaintiff provided valuation services to the bank. The Plaintiff also produced in evidence fees notes raised by it for the years 2013 and 2015. Nine out of ten of those fees notes are for the year 2013. One fee note is for the year 2015.

11. There is clear evidence that the Defendant was negligent and/or fraudulent in producing the valuation report which the bank placed reliance on, to its detriment. It is also clear that as a consequence of that negligence and/or fraud, by the Defendant, the Plaintiff lost opportunity to get work from the bank since it was removed from the bank's approved panel of valuers.

12. The Plaintiff's claim is both for general and punitive damages. The Plaintiff relied on fee notes presented to the bank. There is no clear proof that those fees notes were paid. (the fees notes the Plaintiff relied upon, although has on them printed "paid", the print could have been done by anyone. That is, it could have been printed by the Plaintiff. It therefore follows there is no clear evidence that indeed that Plaintiff earned the amount showed in those fee notes. It is also a concern that the Plaintiff in presenting those fee notes may have cherry-picked those fee notes which, perhaps, reflected the most lucrative earning. Why else would the Plaintiff have nine fee notes for the year 2013 and one for 2015. Does it mean that up to the year 2018, when the bank removed the Plaintiff from its approved panel of valuers those are the only fee notes the Plaintiff raised. I doubt it.

13. For avoidance of doubt I need to state that I am of the view that the Plaintiff did suffer loss and damage following the wrongful act of the Defendant. I am however not convinced that the loss the Plaintiff suffered is as much as was stated by the Plaintiff's witness, that is Kshs. 21 million, or as was stated by the Plaintiff's learned Advocate, in his submissions, that is Kshs. 31 million.

14. Doing the best that I can I find that the Plaintiff is entitled to general damages of Kshs. 4 million and to punitive damages of Kshs. 1 million. The Plaintiff will also be awarded costs of the suit.

15. In conclusion judgment is hereby entered for the Plaintiff for:

- a. Kshs. 4 million in general damages;**
- b. Kshs. 1 million as punitive damages.**
- c. Interest on (a) and (b) above will be at Court rate from this date until payment in full;**
- d. The Plaintiff is awarded costs of the suit.**

**DATED, SIGNED and DELIVERED at NAIROBI this 12<sup>TH</sup> day of MARCH, 2020.**

**MARY KASANGO**

**JUDGE**

**Judgment Read and Delivered in Open Court in the presence of:**

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT