IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 16 OF 2019

BETWEEN

SAFARI EIGHT TWO THOUSAND AND

TWO CO., LIMITED.....APPELLANT

AND

EVANSON NYASANI T/A

NYASANI E. N & COMPANY ADVOCATES..... .....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N. Kyanya-Nyamori,

RM dated 8th February 2011 at Thika Magistrates Court in Civil Case No. 336 of 2011)

JUDGMENT

1. The appellant, who was the plaintiff in the suit before the subordinate court, is aggrieved by the judgment and decree of the trial magistrate dismissing its claim against the defendant for Kshs. 1,534,000/-, costs and interest. For ease of reference I shall refer to the parties in their respective capacities before the trial court unless the context otherwise admits.

2. The plaintiff commenced suit by a plaint dated 16th June 2011. It alleged that the defendant, a firm of advocates, was in breach of his professional duty and contract to refund it Kshs. 1,534,000/- received by him in his professional capacity as an Advocate and stakeholder for which no consideration was rendered.

3. The plaintiff pleaded that on 28th November 2010, Stephen Kinini Wangondu and Scholastica Wachuka Wangondu ("the vendors'') offered to sell it a property known as Thika Municipality 8/186. They took the plaintiff to the defendant, who they presented as their advocates, to commence the transaction. The defendant drew up an undated sale agreement under whose terms the plaintiff deposited Kshs. 1,500,000/- on 29th January 2010 into the defendant's bank account at NIC Bank, Thika for him to hold as a stakeholder and to only transmit it to the vendors upon transfer of the property in favour of the plaintiff. It further stated that on 5th February 2010 it deposited Kshs. 152,500/- in the defendant's account for Stamp Duty and legal fees.

4. The plaintiff also alleged that on 29th January 2010, the defendant withdrew Kshs. 1,500,000/- in cash from his account. Consequently, the defendant having failed to deliver the completion documents, the plaintiff rescinded the sale agreement and demanded refund of Kshs. 1,532,500/- from the defendant. On 31st July 2010, the defendant issued to the plaintiff cheque no. 000184 for Kshs. 120,000/- which was dishonoured on presentation causing the plaintiff to be charged Kshs. 1,500/- in charges. The plaintiff then filed suit after the defendant failed to respond to its demand and notice of intention to sue.

5. The defendant filed a statement of defence dated 26th July 2011. He stated that the plaintiff and vendors were walk-in clients and that he had never acted for either of them prior to that date. He admitted that he drew up the sale agreement but averred that Kshs. 1,500,000/- was not paid to him as stakeholder but was to be transmitted to the vendors as deposit in accordance with Clause 2 of the sale agreement. He stated that the said amount was in fact forwarded to the vendors who acknowledged receipt. He further stated that he has refunded Kshs 120,000/- being the unspent Stamp Duty out of the Kshs. 150,000/- paid to him but lawfully held Kshs. 32,500/- on account of his legal fees.

6. The defendant stated that under the sale agreement he was only supposed to be the stakeholder for the further sum of Kshs. 3,000,000/- which was never paid since the agreement was rescinded. He further stated that it was the duty of the plaintiff to identify the vendors and validity of the title before making payment. He therefore stated that the suit was premature and ought to be struck out.

7. At the hearing, Dr Anthony Ndungu Wanyoike (PW 1), a director of the plaintiff, and Mwihaki Muiruri (PW 2), the Branch Manager of the Thika branch of NIC Bank testified on the plaintiff's behalf. The defendant (DW 1) testified on his own behalf.

8. After considering the evidence and submissions, the trial magistrate held that the dispute between the parties was to be decided on the basis of construction of the sale agreement. That in accordance therewith the plaintiff paid Kshs. 1.5 million as a deposit to the vendors and the defendant was not a stakeholder in that respect. Consequently, the court dismissed the suit with costs thus precipitating this appeal.

9. In the memorandum of appeal dated 18th January 2019, the appellant complained that the trial magistrate failed to appreciate, interpret and apply the law applicable to the subject matter and in particular regarding the advocate-client relationship. That the trial magistrate failed to consider all the evidence before the court and ignored the plaintiff's material evidence including correspondence exchanged between the parties and incompletely executed agreement. The appellant criticised the trial magistrate for attaching weight to an acknowledgment letter to which the plaintiff was not party in coming to the conclusion that the defendant remitted funds to a third party who was not in court. The appellant also contended that the trial magistrate took into consideration submissions by the defendant that were not filed or placed on record and never served on it. Finally, the appellant faulted the trial magistrate for failing to find that the money paid to the defendant in the advocate/client account was paid to him as a stakeholder.

10. Both parties agreed to canvass the appeal by way of written submissions. Before I deal with the issues raised in this appeal, it is important to recall the duty of the first appellate court. It is to evaluate and re-examine the evidence afresh taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect (see ***Selle and Another v Associated Motor Boat Co., Ltd and Another*** **[1968] EA 123**).

11. From the pleadings, evidence and submissions, it is not disputed that the vendors and plaintiff appeared before the defendant who drew a sale agreement and who received Kshs. 1,152,000/-. The issue for determination is whether the defendant received Kshs. 1,500,000/- as a stakeholder and if so, what were his obligations. In the submissions, counsel for the appellant pointed to the following finding in the judgment as the heart of the issue in contention:

> *Both the plaintiff and the vendors were clients of the defendant, there was no condition as far as seen from the sale agreement for any condition to be met before the Ksh. 1.5 Million was forwarded to the vendor.*

12. The testimony of PW 1 was that the vendors insisted that the transaction be done by the defendant who was their advocate. He recalled that since the vendors did not have any identification documents or bank account, it was agreed the sum of Kshs. 1,500,000/- would be deposited with the defendant and who, upon receipt of documentation from the vendors would release the money to them.

13. The plaintiff's case was grounded on a sale agreement signed between it and the vendors. In the evidence, it emerged that there were two agreements which the defendant admitted emanated from his office. PW 1 produced the first version which was undated and not attested and which PW 1 explained was given to him by the police who recovered it from the defendant. DW 1 produced the second version. It was a sale agreement dated 28th January 2010 signed by the parties and witnessed by DW 1. The defendant also produced an acknowledgement of payment dated 29th January 2010 signed by the vendors confirming that they received Kshs. 1,468,750/-.

14. PW 1 admitted that he signed the sale agreement which he produced in evidence. A perusal of both agreements shows that the terms are the same. Counsel for the appellant contended that under both agreements, the respondent was to be paid Kshs. 3,000,000/- as a stakeholder and that the Kshs. 1,500,000/- was part of that amount and was to be held until the transfer was completed. Counsel emphasised that this amount was not to be paid directly to the vendors. As regards the acknowledgment dated 29th January 2010, counsel submitted that it was contrived and intended to provide a defence to the suit and that a cursory look at it reveals that the signatures purported to be those of the vendors differ from those on the sale agreements. In essence, the appellant urged that the money was never paid to the vendors.

15. Counsel for the appellant further submitted that the trial magistrate ignored the evidence that the vendors did not have any identification documents or bank account and that is why the plaintiff paid Kshs. 1,500,000/- into the defendant's account to be held as a stakeholder and it was wrong for the defendant to release this money to the vendors.

16. Resolution of this issue depends on construction, first and foremost of the sale agreement. As I stated earlier, when cross-examined, PW 1 admitted that he signed the sale agreement which he produced in evidence. Since the agreement governed the parties understanding of their rights and obligations, the trial magistrate was correct in making reference to the rule against parol evidence as a guiding principle.

17. In summary, the rule against parol evidence states that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. The trial magistrate correctly cited ***Fidelity Commercial Bank Limited v Kenya Garage Vehicle Industries Limited*** **NRB CA Civil Appeal No. 61 of 2013** ***[2017] eKLR*** *where the Court of Appeal stated as follows:*

> *So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.*

18. The obligations of the parties and in turn the defendant turn on the interpretation of the sale agreement which PW 1 admitted that he signed and which forms the basis of the case as pleaded in the plaint. The relevant part of the sale agreement reads as follows:

2. DEPOSIT

The Purchaser has paid a deposit of Kenya Shilling One Million, Five Hundred Thousand only (Kshs. 1,500,000/=) on the date of execution of this agreement to which the vendors jointly acknowledge receipt thereof.

3. BALANCE OF THE PURCHASE PRICE AND COMPLETION

*3.1 The purchasers shall within **SEVEN (7) DAYS** of executing this agreement deposit the sum of Kenya Shillings Three Million (3,000,000/=) with the firm of M/S NYASANI E.N ADVOCATES only to hold as stake holder and shall only transmit the same to the vendor upon transfer being effected of the property in favour of the purchaser herein.*

19. Counsel for the plaintiff submitted that the Kshs. 1,500,000/= was to be paid as part of the Kshs. 3,000,000/= to be held by the defendant as stakeholder. On the other hand, counsel for the respondent contended that Clause 2 was clear that the vendors acknowledged receipt of the deposit hence the defendant was not a stakeholder in so far as that amount was concerned.

20. Under the sale agreement, the purchase price was Kshs. 4,500,000/= which was to be paid in two instalments. The deposit under Clause 2 was to be paid upon execution of the agreement and was indeed acknowledged in the agreement itself. Under Clause 3.1, the balance of Kshs. 3,000,000/= was to be paid to the defendant as stakeholder and would only be released after the transfer was effected. I therefore reject that appellant argument that Kshs. 1,500,000/= was part of the Kshs. 3,000,000/= as the two clauses governing payment were distinct and clear in that regard.

21. The appellant further argued that the trial magistrate erred in finding that there was no condition attached to the release of Kshs. 1,500,000/= to the vendors by the defendant. According to PW 1, it was agreed that the money would only be released to the vendors upon furnishing identification documents. At this point I would like to add that there are exceptions to the rule against parol evidence. In ***Fidelity Commercial Bank Limited v Kenya Garage Vehicle Industries Limited*** **(Supra)**, the Court of Appeal recognised as much. It stated as follows:

*The rule of exclusion of negotiations prior to entry of a contract as well as the parole evidence rule are subject to a number of exceptions. For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning. Extrinsic evidence of terms additional to those contained in the written document will be admitted if it is shown that the document was not intended to express the entire agreement between the parties. If the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement. In **Gillepsie Bros. & Co. v Cheney, Eggar & Co. (1896) 2QB 59** Lord Russell C.J. expressed this as follows;*

"…although when the parties arrive at a definite written contract the implication or presumption is very strong (sic) and such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."

22. As I have held in para. 20, the terms of the payment expressed in the sale agreement do not admit any doubt and any negotiations prior to signing the agreement on the terms of release of any sums do not clarify terms of the sale agreement that are unambiguous. Clause 2 of the sale agreement is clear that the deposit had been paid and acknowledged by the vendors. Payment of that sum into the defendant's account was sufficient discharge of the plaintiff's obligation to pay the deposit since the agreement did not dictate how the sum was to be paid to the vendor. In other words, how the vendor received the money from the defendant was of no concern to the plaintiff as it was discharged upon the execution of the sale agreement. It is for this reason that the acknowledgement dated 29th January 2010 neither adds nor subtracts to the plaintiff's case.

23. From the provisions of the sale agreement, I therefore find that under the sale agreement the plaintiff was required to pay and did pay a deposit of Kshs. 1,500,000/= which was acknowledged by the vendors upon signing the sale agreement. It follows that the defendant was not a stakeholder for the sum of Kshs. 1,500,000/= otherwise nothing would be easier than to so provide in the contract.

24. Counsel for the appellant submitted that the defendant had a duty of care to the plaintiff to secure its interest as a purchaser and it was his duty to incorporate a clause in the agreement that would provide for the vendors to produce identification documents. Counsel referred to several cases among them ***Patrick S. K. Kimiti v John Ngugi Gachau & Another*** **NRB HCCA No. 116 of 2011 [2015] eKLR** and ***Kinluc Holdings Ltd v Mint Holdings Limited and Another*** **NRB CA Civil Appeal No. 264 of 1997 [1998] eKLR** where the courts have held that an advocate has a duty to exercise care and skill as the facts and circumstances of the case and to protect his client's interest.

25. The duties of an advocate are governed by a retainer which may be express or implied (see ***Ochieng Onyango and Kibet & Ohaga Advocates v Akiba Bank Limited*** **[2008] 1 EA 380**). In this case, the retainer is implied because it was not in writing and the terms thereof must be gleaned from the nature of the transaction at hand which is the sale agreement. What then was the role of the advocate in the transaction?

26. In the sale agreement, the role of the advocate under Clause 3 of the agreement was that of stakeholder in respect of the Kshs. 3,000,000/= and not the deposit of Kshs. 1,500,000/=. It is common ground that the Kshs. 3,000,000/= was never deposited with the defendant. The parties' relationship was defined by the sale agreement which they signed and in this case, the appellant cannot say he was misadvised as the clear intention expressed in the sale agreement was that the deposit paid was duly acknowledged as received by the vendors.

27. The final issue raised by the appellant is that the trial magistrate failed to consider the correspondence in particular the letter dated 2nd

June 2011 from the defendant's advocate to the plaintiff's advocate in which the defendant admitted indebtedness and proposed to settle the outstanding sum in instalments. That letter was marked *"without prejudice."* Counsel for the appellant submitted that this letter constituted an express admission in light of the decision in ***Mumias Sugar Company Limited and Another v Beatrice Akinyo Omondi*** **KKG HCCA No. 38 of 2015 [2016] eKLR** where the court admitted the contents of a without prejudice communication and stated that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it. The court relied on the dictum of Lindley LJ in ***Walker V Wilsher*** **[1889] 23 QBD 335 at 337** who considered the meaning of the words, "without prejudice" in a letter. He stated that:

> *I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.*

28. In this case, the letter refers to previous correspondence and the defendant's counsel made an order for settlement of the matter. There is no evidence that the offer was accepted to constitute a contract or agreement. This was the position taken by the court in ***Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd*** **NRB HCCC No. 3586 of 1985 [1986] eKLR** where it held that:

> "*...if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of that 'without prejudice' lette*r."

29. I therefore find and hold that in this case, the correspondence between the parties, being on a without prejudice basis was not evidence of an admission and did not constitute an agreement to settle the matter.

30. Having re-evaluated the evidence afresh, I find that the parties entered into a sale agreement under whose terms the respondent was the stakeholder for the Kshs. 3,000,000/- that was never paid. I also find and hold that the deposit claimed by the appellant was under the sale agreement paid to the vendors who acknowledged receipt upon execution of the agreement. The trial magistrate therefore came to the correct conclusion by dismissing the suit. This appeal must fail.

31. The appeal is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MAY 2020.

D. S. MAJANJA

JUDGE

Ms Chege instructed by R. W. Chege and Company Advocates for the appellant.

Mr Mboha instructed by Mwihia and Mutai Company Advocates for the respondent.