



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL CASE NO. 26 OF 2013 (O.S)

IN THE MATTER OF ADVOCATE/CLIENT ACCOUNTS

AND

IN THE MATTER OF DELIVERY OF PAPERS AND DOCUMENTS

TO WHICH THE CLIENT IS ENTITLED

BETWEEN

PETER GACHAU NJUGUNA.....PLAINTIFF/RESPONDENT

-VERSUS-

HARI GAKINYA P/A GAKINYA & CO ADVOCATES.....DEFENDANT

JUDGMENT

1. The background to the Originating Summons hereof is straightforward. It involves two properties **Nakuru Municipality Block 16/679** and **Nakuru Municipality Block 16/680**, being the suit premises, then owned by the plaintiff who engaged the Defendant in his professional capacity to represent him in a sale transaction of the suit premises to one Grace Rhoda pursuant to a sale agreement dated 31st May 2012 executed between the vendor and the purchaser for a consideration of Kshs.3,000,000/=.

2. The plaintiff states that he left the properties documents with the Advocate on instructions to release them to the purchaser only upon receipt of the purchase price.

This never happened as it is alleged that the documents were stolen from the Advocates offices and were used to transfer the two properties to a 3rd party who was not a party in the sale agreement and who proceeded to register them in his favour in what the Advocate states was through fraud and deceit.

3. It is upon that background that the plaintiff filed the Originating summons seeking

a) deliver up of the original title documents to the land parcels.

b) In the alternative deliver up to the plaintiff the sum of Kshs.3,000,000/= being the agreed purchase price.

c) Costs of the proceedings and interest.

4. On his part, the defendant advocate in his replying affidavit sworn on the 18th March, 2013 denied the claim but admitted that he drew the sale agreement, and averred that the documents were left with his secretary who then released them to a 3rd party without his knowledge or consent and deceitfully used by the 3rd party, one George Kimani who achieved registration as proprietor, following which he proceeded to place a caveat over the titles to prevent further dealings with the suit properties.

5. He further stated both in the replying affidavit as well as in his oral evidence that he never received any money for the sale of the properties and therefore could not give a cash account of that which he never received, and further that his duty to the plaintiff was limited to

preparing and drawing the sale agreement which had indicated that the sale proceeds would be paid to another named party directly.

6. Following the fraudulent and illegal transfer of the suit properties, the plaintiff and the defendant, in consultation filed a suit in the **High Court being Nakuru HCCC No. 296 of 2012 seeking for orders of cancellation of the Titles and Rectification of the Registers in favour of the plaintiff as having been obtained fraudulently.**

An alternative prayer was sought that this originating summons be stayed pending hearing and determination of the case Nakuru HCCC No. 296/2012.

I have not been told whether the suit has been heard and determined and if so the outcome.

7. The originating summons was heard by both affidavit and oral evidence after which the parties filed their submissions that I have considered.

8. What comes out clearly in the matter by their respective pleadings and evidence is that the Advocate owed a duty of care to the plaintiff who entrusted him with the title documents of his land parcels, which he denied, but later admitted to have been left with his secretary, his employee and agent. The issue of the documents having been stolen from the office was not pursued or proved.

9. At all times an advocate remains a trustee of his clients fund and property left in his possession and therefore has a fiduciary duty to the client.

10. The orders sought by the plaintiff against the advocate are anchored under provisions of **Order 52 Rule 4 of CPR – power to order an advocate to deliver accounts and documents to his client, or to deliver a cash account.**

The evidence on record does not suggest that the advocate ever recovered the cash being the purchase price and therefore cannot deliver that which he did not receive in the first place, unless it is proved that indeed the money was paid to him on behalf of the vendor.

11. As to the documents, it is evident that they were fraudulently used by the purchaser stated in the sale agreement as **Grace Rhoda Osome and the 3rd party George Kimani to obtain the registration in his favour.**

The advocate can therefore not deliver up the documents as they were used to register the transfer to the said George Kimani fraudulently.

12. However how the said documents left the advocates possession and office and control is not well articulated. The said secretary alleged to have given them out did not testify.

Nevertheless, the advocate facilitated filing of the suit for recovery of the suit premises for cancellation of the titles and to reversion back to the plaintiff.

13. The sale agreement dated 31st August 2012 between the plaintiff and the said Grace Rhoda was categorical that the money (purchase price) was to be channelled to the vendors (plaintiffs) account with Moline Credit which was to finance the purchase. Moline Credit officers were not called to testify as to whether or not it eventually financed the sale as no money was channelled to the plaintiff's account as per the terms of the agreement, and evidence tendered.

14. Thus considering all the facts and evidence in their totality, it is a clear botched up sale transaction which ended up in a fraudulent and illegal transfer of the suit properties to a third party to the disadvantage and loss to the plaintiff.

15. Admittedly the suit filed as **Nakuru HCCC No. 296 of 2012** against the fraudsters by the plaintiff may give relief to the plaintiff when heard and finalised if already not finalized. I have no doubt going by the pleadings and reliefs sought that the fraudulent transfer will be cancelled and the titles reverted back to the plaintiff, but subject to prove to the required standard, on a balance of probability.

16. A court will not give orders in vain. It has not been demonstrated that the Advocate was involved in the scheme of corruption, fraud or deceit.

To allow or grant the reliefs sought by the plaintiff in the Originating Summons would in my view be acting in vain in that the documents sought to be delivered up as well as the cash account by the defendant advocate are not in his possession. It would be an academic and futile exercise.

17. However a suit against the advocates for professional negligence may give some relief to the plaintiff.

Had the advocate acted more diligently and exercised sufficient duty of care over the plaintiff's documents by himself or his employees, this action would not have been necessary.

18. Consequently I find that the plaintiff has not proved his case against the Defendant to the required standard.

The suit is therefore dismissed.

However pursuant to provisions of **Section 27 of the Civil Procedure Act** and for circumstances stated in the body of this judgment I direct that each party shall bear own costs of the suit.

Dated, signed and delivered this 31st Day of January 2019.

J.N. MULWA

JUDGE