



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 478 OF 2011

GABRIEL MUGAI NJIRI PLAINITFF

VERSUS

WANGA ROBERT HAWI T/A R.H. WANGA &

CO. ADVOCATES.....1ST DEFENDANT

R.H. WANGA & CO. ADVOCATES...2ND DEFENDANT

JUDGMENT

The plaintiff has moved this court by way of a plaint dated the 26th October, 2011 seeking both general and special damages for professional negligence. He has claimed a sum of ksh 1,652,680.00 in special damages being monetary loss that he suffered as a consequence of the defendants' negligence.

The plaintiff pleaded that he entered into a sale agreement with one Jane Wairimu Muiruri, the registered owner of land parcel number NAIROBI /BLOCK 110/927 (herein referred as the suit property) for Ksh.7,300,000 and the completion date was to be 90 days from 26/10/2010 when the agreement was executed.

In due performance of the agreement, the plaintiff paid a deposit of Ksh.3,000,000 on the 26/10/2010 which amount was paid by way of bank fund transfer from the plaintiff's account to that of the vendor.

That, to allow the release of the completion documents to the plaintiff's advocates, the 1st defendant, through the 2nd defendant issued an unequivocal and irrevocable professional undertaking to the vendors advocates to pay the balance of the purchase price of Ksh.4,300,000 which undertaking was accepted. The said undertaking was issued only after the plaintiff had put the 2nd defendant into funds equivalent to the balance of the purchase price.

It is further pleaded that the defendants negligently refused and/or failed to release the balance at the expiry of 90 days as a consequence whereof the vendor's advocate issued a 21 days completion notice to the first defendant expressly indicating that the sale agreement was to be rescinded and the deposit forfeited for non compliance.

That following the issuance of that notice, the 2nd defendant released a sum of Ksh.3,300,000 to the vendor's advocates leaving a balance of Ksh.1,000,000 which he promised to release soon thereafter, but the same was not paid prompting the vendor's advocate to demand the same vide a letter dated 9/2/2011.

That in a letter dated the 21/2/2011, the first defendant under took to pay the withheld amount together

with accrued interest of ksh. 13,000 which they dishonoured and despite seeking for more time vide another letter dated 1/3/2011 the defendants failed to pay the said amount. The failure by the defendants to pay the said balance resulted in the filing of E.L.C number 164/2011 by the vendor against the plaintiff, seeking the cancellation of entries in the title document and a declaration that the vendor was the registered owner of the suit land.

The plaintiff avers that he incurred a lot of costs in defending the aforesaid suit and blames the 1st defendant for professional negligence, the particulars whereof are set out in paragraph 23 of the plaint. Among those particulars are failure to honour the professional undertaking dated 1/12/2001, failure to release the balance of the purchase price, withholding part of the purchase price and lack of duty and care as is necessary of an advocate.

That the suit against the plaintiff (aforesaid) was withdrawn after he paid the vendor a sum of ksh. 1,160,000 being the price that the defendants failed to remit to the vendor of ksh 1,000,000 and costs of the suit in the sum of ksh 160,000. That in addition, the plaintiff paid a sum of ksh 432,680 as legal fees to his advocate in defending the suit filed by the vendor, ksh 50,000 in legal fees for lodging a complaint with Disciplinary Committee of the Law Society of Kenya and a further Ksh.10,000 as costs for withdrawal of caution which the vendor had registered against the title, which costs he avers, he could not have incurred had the defendants not acted negligently.

The plaintiff contends that, him and his family suffered untold mental anguish, anxiety and emotional stress in having to attend court process, dealing with the caution, attending the disciplinary committee of the Law Society and time spent with his advocates. He avers that by reason of the matters pleaded in the plaint, he has suffered damages and loss which he now claims from the defendants.

The defendants filed a joint defence on the 21/12/2011 denying the claim. They have denied being indebted to the plaintiff as pleaded in the plaint but admitted having acted for him in the sale transaction that gave rise to the claim herein.

The defendants aver that the agreement for sale dated 26/10/2010 was itself varied unilaterally by the vendor's advocates leading to delay for a period in excess of 10 days. That the plaintiff has failed to pay the defendants' advocates – client fees despite being due and owing.

The defendants further state that the transfer was effected on 2/2/2011 and the title issued to the plaintiff which he acknowledged receipt of. That the suit herein is an afterthought and merely calculated to harass the defendants as the Plaintiff has already opted to lodge a complaint with the Law Society of Kenya, in Disciplinary committee cause No. 88 of 2011 seeking a refund of the Ksh.1,000,000.

The particulars of negligence enumerated in paragraph 23 of the plaint are denied. The defendants state that the suit against the plaintiff referred to herein above was withdrawn as it lacked merits and the defendants herein cannot be found liable for costs. They deny the particulars of mental anguish, anxiety or emotions and states that the same was remote and cannot be recovered in this suit. The loss and damages as particularized in the plaint are denied.

The defendants further contend that the transfer was effected on the 2nd February, 2011 and a title issued to the plaintiff which he acknowledged as received. The defendants aver that the suit is an afterthought and res judicata, in that the plaintiff has already lodged a complaint with the Law Society of Kenya Disciplinary committee cause No 88 of 2011 seeking the refund of ksh 1,000,000. The defendants denied owing ksh. 1,160,000 as the same was not disclosed at the time the suit was withdrawn.

I have carefully considered the pleadings filed herein as well as the submissions by both parties. The issues for determination by this Court are:-

- a. Whether the 1st defendant is guilty of professional negligence.
- b. Whether the suit is Res Judicata and;

c. Whether the Plaintiff is entitled to the prayers sought herein.

The Advocates Act sets out the instances in which a disciplinary action can be taken against an advocate for Professional misconduct. **Section 60 (1)** of the Act provides that:-

“A complaint against an advocate for professional misconduct, which expression includes disgraceful or dishonorable conduct incompatible with the status of an advocate, may be made to the Committee by any person.”

The conduct complained of herein is that the first Defendant failed to remit an amount of money which was meant for the balance of purchase price towards the suit property. It is not in dispute that the 1st Defendant refused and/or failed to remit an amount of Kshs. 1,000,000/= but he alleges that the Plaintiff did not pay his legal fees as per the Advocates remuneration order. On the contrary, the Plaintiff has annexed receipts showing that he paid an amount of Kshs. 40,000/= as the agreed legal fees. In my opinion, whether there was a dispute on legal fees or not, the advocate was not justified in withholding the money which he held as a stakeholder pending onward transmission to the vendor’s advocate. The said action can be said to be a conduct which is *disgraceful or dishonorable and is incompatible with the status of an advocate*.

The case of **National Bank of Kenya Ltd. v. E. Muriu Kamau & Njoroge Nani Mungai T/A Muriu Mungai & Company Advocates HCCC 539 of 2004** also describes what constitutes professional negligence and misconduct where the court held inter alia:

“The law is clear that an advocate who holds himself out to his client as having adequate skills and knowledge to conduct the case he is instructed owes a duty to his client both in contract and tort. Where the advocate is in breach of his contractual obligation/duty to his client or where he fails to use proper care towards the fulfillment of the instructions he was given, he is liable in damages in so far as the client suffers the loss...when a client goes to an advocate, it is a reasonably foreseeable consequence that if anything goes wrong to the litigation, owing to the advocate’s negligence, there will be a liability that would arise or occur. It is also clear that a charge of negligence against an advocate is a serious matter and must be strictly and distinctly proved.”

The Defendants have denied the claim and have raised a question of law that the suit is res judicata due to the fact that the same is being dealt with by the LSK Disciplinary Committee. In response to that, the Plaintiff in his submissions stated that the claim before the disciplinary committee was only limited to the issue of disciplinary action against an errant advocate and that the Plaintiff had not sought refund/restitution from the tribunal. It is evident from the Defendants’ submissions that the disciplinary committee heard the matter and gave its verdict. It is clear that the orders of the Disciplinary Committee included a restitution order that the Advocate do refund the sum of Kshs.1,000,000 together with interest at the rate of 12% per annum.

Even though the Defendants filed an application before the committee challenging the legality of the orders, which application was not opposed by the Plaintiff, it is the Defendants’ argument that the suit contravenes the provisions of **Section 7 of the Civil Procedure Act** and that any further penalty imposed upon the Defendants will expose them to double jeopardy. It is of paramount importance to determine whether this suit is res judicata in reference to the prayers being sought and the jurisdiction of the Disciplinary Committee in that respect.

The jurisdiction of the Committee can be derived from the provisions of **Section 60 (4) of the Advocates Act** that provides:-

“After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Committee may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Committee may order–

- d. that such advocate be admonished; or
- e. that such advocate be suspended from practice for a specified period not exceeding five years; or
- f. that the name of such advocate be struck off the Roll; or
- g. that such advocate do pay a fine not exceeding one million shillings;
- h. that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings”

Looking at the wording of that section and specifically **subsection 60(4) (h)**, the committee has jurisdiction to hear a dispute relating to reimbursement of money, restitution and compensation and that is the reason the Committee issued an order that the Defendants pay Kshs.1,000,000 back to the Plaintiff.

The Advocates Act provides for enforceability of orders of a tribunal as espoused in **Section 60 (11) of the Advocates Act** which provides that:-

“If no memorandum of appeal is filed in accordance with subsection (1) of Section 62 the party in favour of whom the order is made may apply ex parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the court to the like effect and, if it is an order for the recovery of money, may be enforced on the immovable and movable property of the advocate in accordance with the Civil Procedure Rules.”

At the close of the case and upon parties filing submissions, new issues were raised by the defendants and the Court felt that the parties needed to clarify the same, particularly the position of the matter that was before the Advocates Disciplinary Tribunal. A mention notice was issued to that effect. The Plaintiff sought leave to file further submissions and annex the proceedings before the disciplinary tribunal. From the further submissions dated 24th October, 2017, it emerged that indeed there was an application for review that was heard and a ruling delivered on 17th July, 2017. In the said ruling, the sentence on refund of the sum of Kshs. 1,000,000 together with interest at 12% per annum was varied.

I have also perused the judgment of the tribunal delivered on 18th April, 2016 where the tribunal held:-

“The tribunal wishes to point out at this stage that there is nothing wrong or irregular with an aggrieved person opting to file a case in court against an Advocate, while at the same time, filing a complaint with the Tribunal against the Advocate, on the same facts. The tribunal addresses itself on the Advocate’s professional misconduct, while the Court deals with the other reliefs sought by the Complainant.”

From the foregoing, it is now clear to my mind that the tribunal only addressed the issue of professional misconduct of an errant Advocate thereby leaving out the issue of professional negligence, restitution and the other prayers for the determination by this Court. This suit is therefore not res judicata and the Court is properly empowered to determine the issues herein.

Professional negligence will normally arise when a person does not exercise the degree of skill, duty and care of a reasonable person in that profession. An Advocate is not liable for any reasonable error of Judgment or for ignorance of some obscure point of Law, but is liable for an act of gross negligence or ignorance of elementary matters of law consistently arising in practice. What constitutes professional negligence was well stated by justice M. Warsame in the case of **NATIONAL BANK OF KENYA LIMITED v E. MURIU KAMAU & another [2009] eKLR** that,

“The point I am making is that a doctor who forgets his surgical materials inside the stomach of his client after closing the wound would be liable for negligence unless he can show that the surgical room was attacked by the illegal gang who endangered his life or that he found

himself in an extraordinary or unusual circumstances at the time he was closing the wound. The law places a responsibility on all professionals to exercise prudent and reasonable care for the safety, security and protection and preservation of the property/life entrusted on them. One cannot escape liability by asking for half payment or for saying that what he/she did was reasonable. The test is not what he endeavours or undertakes to do but that which can meet the test of reasonability.”

It is also important to note that an action by a client against an advocate alleging negligence in the conduct of the client’s affairs is an action of breach of contract. It is also the law that where at the time of making a contract it is within the contemplation of the contracting parties that a foreseeable result of a breach of the contract will be to cause loss or damages then if a breach occurs which does bring about that result, damages are reasonable under that heading. In this case the bank instructed the advocate to take the proceedings at law to protect and return monies lost by the bank and as a result HCCC No.1464 of 2000 was commenced. The advocates, in law, were under a duty by contract to use reasonable care and to avoid putting the bank in a situation that would result in want of care. It must have been in the contemplation of the parties herein that if the advocates failed on their duty the bank would be susceptible to grave loss and damages.”

It is not disputed that the Defendants received the sum of Kshs. 4,300,000/= from the Plaintiff meant for the balance of the purchase price following which the 2nd defendant issued a professional undertaking to release this amount upon registration of the title in favour of the Plaintiff. Upon the said registration, the 2nd Defendant only remitted the sum of Kshs. 3,300,000 leaving a balance of Kshs. 1,000,000 a fact not disputed by the defendants. It is as a result of the defendants failure to remit the whole of the balance of the Purchase price to the Vendor that the dispute herein arose.

There was a professional undertaking which was not honoured that led to a suit against the Plaintiff who suffered loss as a result. In the circumstances, this court finds that the Defendants did not act prudently. When a client instructs an advocate to act for him, the Advocates steps in the shoes of the Client and is therefore expected to act professionally in the best interests of the Client but the 1st defendants herein acted in his own interest by converting the sum of Kshs. 1,000,000 for his own use and issuing empty promises to the Vendors Advocate. This court finds the 1st Defendant liable for professional negligence.

On the quantum of damages, the Plaintiff claims a total sum of Kshs. 1,652,680/= plus interest at courts rate. It is trite law that special damages must be specifically pleaded and proven. In their submissions, the Defendants disputes the costs of Kshs 160,000/= and 432,680/= on the basis that they were not awarded or taxed by the Deputy Registrar. The fee of Kshs. 160,000/= was properly incurred by the Plaintiff as legal fees and interest upon the unpaid balance of the purchase price of Kshs. 1,000,000= . As to the legal fee incurred in ELC 164/2011, I also find that the Plaintiff paid the same. From the evidence placed before this court, the plaintiff has been able to plead and prove the following amounts in special damages:-

- i. Kshs 1,160,000/= being the balance of purchase price, interests and the Vendor’s Advocate’s fees as per the resolution to withdraw the case.
- j. Kshs. 425,680/= being legal fee for ELC 164/2011
- k. Total **Kshs.1,585,680/=**

On general damages, the plaintiff proposes a figure of Kshs. 10,000,000/=. In determining an award on general damages, courts would normally be guided by decided authorities on the same.

In the case of **Co-operative Insurance Company Limited v Secucentre Limited & another [2016] eKLR** the court awarded general damages against a negligent advocate and held that,

“...In its place I enter judgment for the 1st respondent as prayed as against the 2nd respondent on liability for professional negligence. I further enter judgment in favour of the 1st respondent against the 2nd respondent herein Susan Kahoya advocate for kshs 104,628.30 being special damages claimed and general damages of kshs 100,000 for professional negligence together with costs and interest at court rates to be paid by the 2nd respondent. Interest on special damages to accrue from date of filing suit in the lower court until payment in full whereas interest on general damages will accrue from date of judgment in the lower court until payment in full. I also award costs of this appeal to the appellants against the 2nd respondent.”

In **Trans-National Bank of Kenya Ltd V Charles Kimita Willy & Another [2006] Eklr**, whereby the Plaintiff Bank had sued a valuer for professional negligence for colluding with a customer and overvaluing the customer’s property, the bank was unable to recover the owing amount advanced on the over valuation and the court held that,

“The 2nd defendant shall therefore pay general damages to the plaintiff that shall compensate the plaintiff for the loss that it has suffered as a result of placing reliance on the said false valuation

Similarly in this case, I find the Defendants liable for general damages for the time spent, mental anguish and anxiety the Plaintiff went through in following up this matter all through. In the premises I find that an award of Kshs.200,000 would be adequate in the circumstances.

The plaintiff is therefore entitled to an award of damages as follows:-

- a. Special damages Kshs.....1,585,680/=
- b. General damages Kshs.....200,000/=

The Plaintiff is also awarded the costs of the suit.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 25th Day of January, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

..... For the Plaintiff

..... For the 1st Defendant

..... For the 2nd Defendantfen