



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 249 OF 2007

RUSSY WAIRIMU MBUGUAPLAINTIFF

VERSUS

1. KARANJA MURAI

2. NICANORY AKANGA ALERADEFENDANT

J U D G M E N T

1. The suit before court as pleaded by the plaintiff is that sometime in the months of November and December 2006, the plaintiff was in the need to buy a residential house. She came by a house in Nyali area where she met the 1st defendant who informed her that the same house was on sale and that the said 1st defendant had a power of Attorney donated by the registered proprietor for such sale.

2. The two people then, with the assistance of a taxi driver one John Nginya Ngigi, were then driven to the 2nd defendants house in Bamburi whereafter the two signed a hand written agreement dated the 4/01/2007 by which the 1st defendant, as a holder of a power of Attorney of the Registered Proprietor, agreed to sell the house identified as LR No. MN/1/6560 at an agreed price and consideration of KShs.7,000,000/= and a deposit/commitment fees of KShs.100,000/= paid upon execution on 4/1/2007.

3. On 6/3/2007 the plaintiff paid a further sum of KShs.200,000/= being additional commitment fees. In the month of February and March 2007, the said defendant prepared and had the plaintiff execute a transfer and a sale agreement over the same property on the promise that the registered proprietor of the property would execute his part. On 16/3/2007 the plaintiff paid the balance of KShs.6,700,000/= was paid to the 1st defendant to make a total of KShs.7,000,000/= being the full purchase price.

4. It was after the full payment that the plaintiff pleads and asserts in evidence that, she met the registered owner and came to learn that the 1st defendant did not have authority to sell the property or receive the purchase price. On that discovery and after failure to recover the sums paid, the plaintiff opted to file the current suit alleging that the two defendant had conspired to commit acts of fraud against her. Particulars of fraud and misrepresentation were setforth as follows:-

“14. The plaintiff contends that the first and the second defendants conspired to commit acts of fraud and misrepresented to the plaintiff and actually defrauded the plaintiff.

PARTICULARS OF FRAUD AND MISREPRESENTATION

a. On or about 4th January 2007 the first and second defendants indicated to the plaintiff that the first defendant had a lawful power of attorney.

b. In furtherance thereof the second defendant prepared a sale agreement which the first and second defendants knew to be false and unlawful, signed and executed the same and caused the plaintiff to execute the same.

c. On 4th January, 2007 obtained from the plaintiff KShs.100,000/= being the commitment fees.

d. On 23rd February, 2007 the first and second defendants prepared a transfer in favour of the plaintiff which purported transfer was false and caused the plaintiff so sign the same.

e. On 6th March, 2007 the first and second defendants obtained Kshs.200,000/= from the plaintiff.

f. The first and second defendants prepared a purported lease in favour of the plaintiff which lease the plaintiff executed.

g. On 14th March, 2007 the first and second defendants prepared another sale agreement which sale agreement was executed by the first and second defendant and caused the plaintiff to execute the same.

h. The first and second defendants intentionally failed to carry any search and/or contact the registered owner of the subject property.

i. The first and second defendants misrepresented to the plaintiff that the first defendant had authority from the registered owner to transact the sale of the subject property on behalf of the registered owner.

j. Falsely misrepresenting to the plaintiff that the registered owner had executed all the documents in respect to the sale.

k. Falsely misrepresenting to the plaintiff that all the outgoings including the stamp duty on the transfer had been paid.

l. Falsely defrauding the plaintiff a total sum of Kshs.7,320,000/= by way of cash, bank transfers and cheques.

5. The plaintiff additionally grounded her claim against the defendant on breach of fiduciary duty and trust and gave the particulars of such breach as follows:-

“15. The plaintiff also contends that the first and second defendants conspired with each other and without the knowledge and/or consent of the plaintiff and contrary to express instruction or law and to the detriment of the plaintiff’s interest in the property and her earnings and without any benefit to the plaintiff were in breach of fiduciary duty and trust.

PARTICULARS OF BREACH OF TRUST

a. Failing to disclose to the plaintiff that the subject property was not for same.

b. Failing to carry out a diligent search.

c. Obtaining money from the plaintiff.

d. Failing to summon and/or disclose the registered owner to the plaintiff.

e. Causing the plaintiff to execute unlawful documents.

f. Intimidating to the plaintiff that documents had been executed.

g. Obtaining the entire sum of Kshs.7,320,000/= without any transfer of the property in favour of the plaintiff.

h. Lacking any moral obligation to the plaintiff”.

6. The plaintiff therefore blames the two defendants for having misrepresented to him that both had the authority to sell the property on which representation she paid to them the sum of Kshs.7,320,000/= as a result whereof she suffered great mental anguish, actual and irreparable loss and damage for which she prayed for judgment against the two jointly and severally for not only the pecuniary sum but also for general damages, costs and interests.

7. In support of the plaint, the plaintiff filed a list and copies of documents and four witness statements by; the plaintiff herself, her husband one Habegger Peter, her daughter Hanna Wanjiku Mbugwa and the taxi driver John Nginya Ngigi.

8. After service the 1st defendant did not enter appearance nor file a defence and a request for judgment in default was made and final judgment entered for against him on the 23/4/2008 for the sum of Kshs.7,32,000/- together with interlocutory judgment for general damages for fraud and breach of contract, costs and interests. The 2nd defendant however entered appearance filed a statement of defence and a witness statement.

9. In the statement of defence filed in court on 12/11/2007 and dated the 9/10/2017, the 2nd defendant admitted having meet the plaintiff and a third party at his house for purposes of him being retained to act for both in the intended sale but denied having had any knowledge about the location and identification of a property to be sold and that it was the same plaintiff who took the 1st defendant to the 2nd defendants office and introduced the two who were thereto before unknown to each other. Further the 2nd defendant pleaded that by the time he met both plaintiff and the 1st defendant, the two had negotiated, identified the property and agreed on the purchase price without his input and that he had no opportunity to convince the plaintiff on the ownership of the property or otherwise.

10. The fact that a handwritten agreement was prepared and signed is admitted but it is then pleaded that the agreement apportioned obligation upon the parties and in particular tasked the 1st defendant with the duty to conduct searches on the title, procure rates clearance certificate, have the property valued in conjunction with the plaintiff and also procure an approvals and as the holder of power of attorney of the registered owner have the transfer endorsed and facilitate the registration thereof in favour of the plaintiff.

11. In addition it was pleaded that the plaintiff did introduce the 1st defendant as the proper holder of the power of attorney having verified that from the registered owner, the plaintiff was still obligated by the agreement to pay commitment fees of Kshs.100,000/= to the 1st defendant, pay all charges, fees and disbursements leading upto the issuance of the title document in the plaintiffs favour and to release to balance of purchase price to the vender through the 2nd defendant upon completion and not before. The payment of the sum of Kshs.200,000/= to the 2nd defendant was denied but the 2nd defendant admitted having prepared the transfer, a sale agreement and a lease between the parties but did so on the assurance by the plaintiff of the authenticity of the vendor and the title to be sold.

12. On the payment of the balance of Kshs.6,700,000/= before Completion, the 2nd defendant pleaded that the payment was done directly by the plaintiff to the 1st defendant in the absence of the 2nd defendant contrary to the terms of the agreement and that the plaintiff and the 1st defendant only visited the 2nd defendant to confirm to him that there had been full payment of the balance of purchase price on the basis that the plaintiff was in haste to take possession and occupation of the property ever before completion.

13. On contact with the registered proprietor, the 2nd defendant made explicit pleading that prior to the agreement, the plaintiff had assured him of having met the registered owner and arising from that knowledge the plaintiff did sue the registered owner and the 1st defendant in HCCC No. 117 of 2007. He contended that in bringing the suit against the 2nd defendant, the plaintiff was acting out of malice having discovered that she was taken for a ride by the 1st defendant and the Registered Proprietor. The 2nd defendant therefore denied any impropriety or wrong-doing as alleged together with all the particulars given and reiterated that the representation of the subject property having been up for sale was made to him by the plaintiff and not vice versa. Finally the 2nd defendant faulted the suit for having been filed against him individually and not as a firm of advocates and reserved the liberty to raise the same preliminarily prior to the hearing on the merits. The jurisdiction of the court was admitted but the 2nd defendant prayed that the plaintiff's suit against him be dismissed with costs.

14. Those pleadings were reiterated in the witness statement dated 2/11/2013 and filed in court on the 5/11/2013 and the 2nd defendant sought to clarify the fact that the plaintiff had got the contact of the registered proprietor from a watchman/caretaker of the premises and the proprietor, doctor, had assured that the contractor was his agent and holder of power of attorney with authority to transact on his behalf including receipt of purchase price and its deposit into his account.

15. On the agreement having been by handwriting the 2nd defendant sought to offer an explanation that the offices had closed for Christmas vacation and he had no Secretary nor Clerk to undertake typing. He also highlighted the fact that he had known the registered owner of the property since 2001 and that for the transaction subject matter of his dispute he did talk to him on phone and he infact visited his office once. On payment, the 2nd defendant admitted having been present when the initial Kshs.100,000/= was made but was absent when Kshs.200,000/= and Kshs.6,700,000/= were paid and was only informed by the plaintiff later. To him the balance of purchase price was paid in full prior to completion and against the terms of the contract because the plaintiff was in a hurry to take possession as their guests were about to arrive from Europe. He even added that the acknowledgement of the Kshs.6,700,000/= was done prior to the payment and was intended to have been by a bankers cheque in the name of the registered proprietor and not to the 1st defendant.

16. He reiterated the denial of any wrongdoings and that the payments having taken place in his absence he should not be blamed for the actions the plaintiff freely and voluntarily chose to take.

Evidence by the plaintiff

17. At trial, the plaintiff called the four persons who had filed witness statement as witnesses. PW 1, the plaintiff's, evidence was to the effect that in the year 2006 she was in need to purchase a residential house, went to Nyali area and identified and inspected a house she was informed belonged to one DR. GATHUA but was being sold by the 1st defendant as an agent because DR. GATHUA was out of the country. The plaintiff said negotiations settled on a purchase price of Kshs.7,000,000/=. On the advise of PW 2, the plaintiff her daughter and husband in the company of the said PW 2, as a taxi driver, visited the 2nd defendant who had been recommended as a good advocate to do an agreement for sale. They went to the advocates house at night on 3/01/2007 but nothing was written till the next day, the 04/01/2007 when the advocate drafted a handwritten agreement which was signed by the parties upon payment of Kshs.100,000/=. That document was marked Exhibit P1. The witnesses equally signed a lease agreement marked Exhibit P2 which she said was prepared and signed by her in the 2nd defendants offices. She then said the entire balance of the purchase price was paid to the 1st defendant on one day by a cheque for Kshs.3,500,000 in the 1st defendants name and cash of similar sum transferred into the 1st defendants account on the advise of the 2nd defendant as the plaintiffs lawyer. That was on 6/3/2007. Exhibit P3 was the transfer signed by the plaintiff as purchaser but not by the vendors. The plaintiff said she did not know why the vendor did not sign it. Exhibit P4 was acknowledgment of receipt of the purchase price signed by the 1st defendant and witnessed by the defendant.

18. She added that there was a bank cheque for Kshs.3,700,000/= in favour of the said defendant and in cash of Kshs.3,000,000/= given to the 1st defendant as well as cash of Kshs.350,000/= for the transfer. A bank statement was produced and marked Exhibit P5 it shows a bank cheque of Kshs.3,700,000/= and a cash withdrawal of Kshs.3,100,000/= to make a total of Kshs.6,800,000/=. The property was valued at Kshs.6,500,000/= the cost of the plaintiff in the sum of Kshs.24,000/-. The valuation report and receipt for values fees were produced as exhibits 7 & 8.

19. To the witness she came to know the registered owner when told by the 2nd defendant to go and see him at Doctors Plaza, Aga Khan Hospital, Mombasa and the Doctor said he was not selling. From there she made a report and the 2nd defendant was arrested. The witness pleaded that she be helped to recover a sum of Kshs.7,600,041 he had spent on the transaction from the two defendants jointly and severally.
20. In cross examination, the witness said that by 4/1/2007, she knew the house belonged to Dr. Gathua and she infact saw documents to that effect. She denied the existence of HCC No. 117 of 2007 between her Dr. Gathua and 1st defendant but admitted paying Kshs.40,000/= for another case which was withdrawn and in which she pleaded that 1st defendant had power of attorney of the vendor. She admitted that she identified the house and negotiated purchase price with the 1st defendant and in the absence of the 2nd defendant. She reiterated having paid Kshs.100,000/= commitment fees in the presence of the 2nd defendant but not the Kshs.200,000/-
21. The witness repeated that the 1st defendant aid he had the authority to sell and that he had some documents which she did not know and that it was her who proposed to the 1st defendant that both go to the 2nd defendant. She critically admitted that they spoke to Dr. Gathua once when he told them to deal with the 1st defendant and that the 1st defendant stated at a meeting in the 2nd defendants office that he had a power of attorney.
22. She then said that the sum of Kshs.320,000/= was paid to the 1st defendant being facilitation for transfer made up of Kshs.280,000/= stamp duty and Kshs.40,000/= for miscellaneous expenses in terms of an agreement reached at in the 2nd defendants office. On exhibit P4, she said she signed it before going to the bank to pay the sum of Kshs.6,700,000/=. When the witness reported the matter at the police station she stated Dr. Gathua denied having received any money.
23. A further sum of Kshs.171,000/= was also said to have been paid to the 1st defendant for purposes of installing grills. When the transaction was not progressing and 1st defendant could not be traced, the plaintiff sought to sue and Mr. Akanga 2nd defendant advised that she does so through another lawyer. Indeed one Mulongo Advocate was instructed and filed the suit No. HCC 117/2007. The witness said she was paying to the 1st defendant and paid a total of Kshs.7,300,000 but with the knowledge of the 2nd defendant.
24. When re-examined the witness went on record and said she had not known the 2nd defendant prior to the sale and that it was the PW 2 who introduced him to her and that even the 1st defendant did not know the 2nd defendant prior to the transaction.
25. On payment of the Kshs.6,700,000/=:, the witness said as she effected Payment, the lawyer, 2nd defendant, was waiting in the car. After that payment the 2nd defendant said he was going to Bungoma and that they would meet him on Monday but come Monday he was still away and asked her to call 1st defendant who was then in Nyeri. Later he said defendant came back to Mombasa and they visited him. In conclusion she said that she came to learn about Dr. Gathua as the registered owner towards the end.
26. The evidence of JOHN NGINYA NGIGI, PW 2, was to the effect that he was called to pick the plaintiff, her daughter and husband from Mtwapa so as to take them to Nyali to view a house they wanted to buy. At the site, they met the 1st defendant and he PW 2 then proposed the name of the 2nd defendant, which was his customer as a possible lawyer for the transaction. While at the plaintiff's house, in Mtwapa later that day, the witness called the 2nd defendant who agreed to meet the prospective client and PW 2 actually drove the plaintiff's party to the 2nd defendants house arriving there at about 7pm and the plaintiff explained the work she desired to be done. It was agreed that they meet in the office the next day and a meeting indeed took place in the presence of the PW 2. In the offices, 1st defendant demanded Ksh.100,000/= as commitment fees and was paid the sum. A handwritten agreement was done and signed with PW 2 as one of the witness. All that while, the witness thought or know the house belonged to the 1st defendant.
27. On cross examination, the witness accepted having known the 1st defendant since 1988 as a customer. That on the material day it was the plaintiff who called him with a message that they had identified a house and were to be driven there. On site they found Mr. Karanja, the 1st defendant. On site, the 1st defendant told them, the plaintiff's party, that the house belonged to Dr. Gathua. Of all, present, he knew Karanja longest and trusted he was speaking the truth and he confirmed being the person who introduced them to the 2nd defendant who was never involved in identification of the house. He added that it was possible, the 2nd defendant opened the offices purposely for the transaction on the 4/01/2007 and that he personally heard Karanja say he had power of Attorney to sell.
28. PW 3, the plaintiffs husband gave evidence that they met 1st defendant at the house and he told them that he had built it for somebody else and had the power and authority to sell on the owner's behalf. He said the price was agreed on at the 2nd defendants office on the 4/01/2007 at Kshs.7,000,000/= and a handwritten agreement signed but he did not sign it himself. He confirmed payment of Kshs.100,000/= to the 1st defendant as deposit and that the rest was paid out of money withdrawn from Barclays Bank Account in the joint names of himself and the plaintiff.
29. On payment of the sum of Kshs.6,700,000/= to that the 1st defendant the witness said although the 1st defendant wanted to be paid by cash, the bank refused to have everything paid by cash. The witness said, the two defendants were waiting in the car when he was at the bank withdrawing the cash and making out a cheque in favour of the 1st defendant and that he handed over the cash to the 1st defendant who went across to his bank with a security man. There was then an acknowledgment made by the advocate which was signed by the parties. He was consistent that it was Dr. Gathua who was to transfer to them the house on account of what the plaintiff told him. However when they went to Dr. Gathua for the keys the said doctor denied selling the house nor having given the 1st defendant any authority to sell.
30. On cross examination, he said they communicated with the wife in English and German. He said that the wife was the first to identify

the house and took him to the same on the 3.0.1.2007. At the house they found the 1st defendant who said the house was being sold but denied having discussed price with the 1st defendant but when they visited the 2nd defendant he was aware about the price. He could not remember when the 1st defendant said he had the authority of the owner to sell but confirmed that all the money was paid to the 1st defendant and not the 2nd defendant. On the day the Kshs.6,700,000/= was paid, the witness said the advocate was in the car and did not witness the payment and that they thereafter went and picked the acknowledgement Exhibit P4 from the 2nd defendant.

31. He was not aware if the wife had spoken to Dr. Gathua but reiterated that the 1st defendant said he had a power of attorney which he believed. He thought the 1st defendant showed the power of Attorney to the 2nd defendant and that 1st defendant told them to pick the keys from Dr. Gathua and even told them where to get Dr. Gathua.

32. On re-examination, the witness said the 2nd defendant acted for both purchaser and vendor and that keys to the house would be picked after payment in full.

33. PW 4, was HANNAH WANJIKU MBUGUA, the plaintiff's daughter. She reiterated the evidence by the plaintiff that they went to Nyali where there was a sign post indicating a house was, on sale, went in talked to a fundi who gave her the telephone number of the 1st defendant and that later in the day they went back to the house with PW 3 whereafter the party visited Mr. Akanga at his residence and it was agreed that all meet the next day in the office. At the office, a handwritten agreement was signed evidencing sale at Kshs.7,000,000/= with a deposit of Kshs.100,000/=. She confirmed that the 1st defendant showed to them a document/paper representing the authority of Mr. Karanja to sell but denied that the mother was ever showed the lease. Even the transfer was never shown to them. She however confirmed that she was not there when the Kshs.6,700,000/= was paid but added that upon payment they were to go to the 2nd defendants officers to get receipts and title but that was not to be because the 2nd defendant disappeared and his phone went off and could not be reached. To her it was later on that they discovered the house belonged to Dr. Lawrence Githua.

34. With such evidence the plaintiff closed her case and matter progressed to the defence case.

Evidence by the 2nd defendant

35. Only the 2nd defendant gave evidence and produced the document he sought to rely upon. His evidence was that in 2007, he was a partner at Fadhili, Kilonzo & Co. Advocates before he went on his own in 2009. He said that the plaintiff and 1st defendant were brought to his house by PW 2 who was his taxi-man and a person who had introduced to him two or three other clients. He met the plaintiff and family one evening at about 6pm and it was agreed that they meet in the office on 4/01/2007.

36. He waited for them in the office, which had not opened since christmas vacation, and the plaintiff, PW 2, PW 3 and PW 4 arrived together in PW 2's taxi while 1st defendant came alone in a motor vehicle KBH.

37. He was meeting the 1st defendant for the 1st time. A discussion ensued and the plaintiff and her husband were keen to buy the property, a 5 bedroom maisonette, with 4 complete en-suites from one Dr. Gathua. That the plaintiff introduced the 1st defendant to the advocate and the 1st defendant indicated that he had been authorized in writing by a power of Attorney to sell on behalf of Dr. Githua. He, the 2nd defendant said he had known the doctor since 2002 when he would be their witness in cases involving Invesco Insurance Co. Ltd. To him he was told by the plaintiff and PW 4 that on their search for a house to buy they came by the subject house and called two numbers on an advertising board. The numbers turned out to belong to the 1st defendant and Dr. Gathua. His evidence was that he was convinced the two had spoken to Dr. Gathua and were prepared to buy the house at Kshs.7,000,000/= and all he did was to reduce the agreement between the parties into a handwritten document – Exhibit P1. He witnessed the payment of deposit in the sum of Kshs.100,000/= and that the 1st defendant had agreed to undertake the search of the title, pursue change of user from agricultural to residential and since consents were obtainable for Nairobi. The 1st defendant undertook to obtain same and facilitate payment of stamp duty.

38. He then referred to Exhibit P1 and noted that parties later own met at the house on 6/3/2007 and the 1st defendant was paid a further sum of Kshs.200,000/= in his absence. He later on prepared a printed document dated 14/3/2007 Exhibit P2 whose content is the same as Exhibit P1. He also prepared a final lease which remained to be dated upon presentation for registration and the same were to be taken to Dr. Gathua to sign in Nairobi. After preparation of the documents, Exhibit P2 and PW 3, were sent by Coast Bus Courier to Nairobi. The lease was prepared using a precedent provided by one Elly Ogola, a staff of the Land Registry, Nairobi, who met and discussed with the plaintiff and 1st defendant on way forward and was introduced to 2nd defendant by the plaintiff.

39. Later the plaintiff agreed to pay to the 1st defendant further sum of Kshs.320,000/= to cater for stamp duty- Kshs.280,000/= and 1st defendants travelling costs Kshs.40,000/.

40. In early March, the 2nd defendant said, he received a call from Mr. Elly Ogola and the 1st defendant when he was assured that stamp duty had been paid. Thereafter, the plaintiffs and her family in the company of the 1st defendant visited him in chambers and he placed a call to Mr. Ogola who assured him that the lease would be endorsed as soon as it was received from Mombasa. The parties then agreed on the need to pay more to the 1st defendant because he needed to start construction of a similar house within compound for another prospective buyer. Despite hesitation by the advocate and senior partners in the firm the plaintiffs family members made a decision to pay to the 1st defendant the balance of the purchaser price to the vendor because they expected guests and they needed the house to move in.

41. While debating on the law how the plaintiff would move into the house, either as a tenant or purchasers, the exhibit P4 was prepared with a clear understanding that the payment would be by interbank transfer in favour of Dr. Gathua's bank so that the vendor gets the funds in the sum of Kshs.6,700,000/=.

42. The acknowledgment was done and signed prior to transfer of the funds. On 16/3/2007 while the 2nd defendant was at a restaurant with a colleague, the plaintiff, her husband and the 1st defendant approached him and said they had brought the payment for legal fees of Kshs.70,000/= which he took and issued a receipt the next day. He denied advising the payment to the 1st defendant and denied having been present at the bank or inside a black car while reiterating that he has never owned a black car. After that day the 2nd defendant said he did not meet the plaintiff nor the 1st defendant for a period of one month. As Easter vacation was approaching he took leave and went to Bungoma for one week during which time he received no call at all.

43. However when called with the message that Dr. Gathua had denied the plaintiff the keys to the premises he came to Mombasa immediately but could not reach the 1st defendant. He arrived in Mombasa and called the plaintiff's daughter and husband to the office and together they went to Urban police station where they recorded statement with Inspector Sang and he gave out the telephone number of the 1st defendant and Dr. Gathua to the officer. Dr. Gathua was called and he went to the police station in a Kaunda Suit. The 2nd defendant denied having been arrested or his finger prints lifted to date and that the plaintiff had in fact sued the 1st defendant and Dr. Gathua in HCC No. 117 of 2007 but withdrew the suit for no known reasons.

44. The witness was stood down at a juncture parties agreed that they would refer to the file No. HCCC No. 177 of 2007 and the matter was then adjourned. When hearing resumed on 28/10/2015 the 2nd defendant introduced the documents obtained from HCC No. 117 of 2007 among them an interlocutory injunction application restraining the defendant from dealing with the land pending the determination of the application inter-parties. He produced the order and pleadings in that file as Exhibit D5. He sought to highlight paragraph 3 of the supporting affidavit which averred that the plaintiff was in constant touch with the defendants, Mr. Karanja Murai and Dr. Gathua in that first suit. He sued the 1st defendant here as an agent of Dr. Gathua who she had met prior to the suit. In that suit the plaintiff did set out the agreed obligations of the 1st defendant as seller contrary to the ascertainment here that it was the duty of the 2nd defendant. Those pleadings were relied on extensively to show that what the plaintiff contended there is not what she has sought to assert in the earlier including that the 1st defendant was paid the sum of Kshs.6,700,000/= after the acknowledgement had been signed not before. In that former suit the witness said no wrongdoing was alleged against him as has been done here. He then contends that everything he did was lawful as an advocate and that none of the particulars of fraud had been established by the plaintiff. On the pleading that the plaintiff is illiterate and never spoke English, the witness said, she was all the time with the daughter and the husband and would not be misled on account of language. He therefore prayed that the plaintiff's suit be dismissed with costs to him.

45. On cross examination, the witness admitted drawing the agreement, and the undated lease which was to be signed by the vendor in Nairobi and dated upon presentation for registration. He admitted having seen a power of attorney which he deemed valid. He confirmed payment of a further Kshs.200,000/= but not in this absence and that he later on met Mr. Ogola who was said to work at the Land Registry in the presence of the plaintiff and the defendant and that Mr. Ogola would always give assurances that all was well.

46. On re-examination, the witness said even if he was negligent here he was accused of fraud and that he met Mr. Ogola before the substantive lease was drawn and it was the 1st defendant who introduced them. The lease was only signed by the plaintiff because the vendor would sign it in Nairobi.

47. With such evidence the respective cases were closed and the parties then filed submissions. The plaintiff submissions are dated 20/5/2016 while those by the 2nd defendant are dated 30/8/2016.

48. I have had the benefit of reading the two sets of submissions and I have benefitted immensely for the industry by counsel. Having done so I have come to the conclusion that the determination of the dispute between the parties would depend on whether there is evidence to prove that the 2nd defendant while engaged by the plaintiff as an advocate to transact sale of land did commit fraud or breach of trust as against her so as to lead to the loss of the sum paid. Once that issue is determined the nature of the remedies to be awarded would inevitably fall in place.

Analysis and determination Has the plaintiff proved fraud against the 2nd defendant?

49. While the standard of proof in civil litigation is on the balance of probabilities, where a party relies on a fraud to prove liability, that burden is pushed upward beyond balance of probabilities but below the criminal law standard of beyond reasonable doubt.^[1]

50. The reasoning is that fraud has criminal connotations even when pleaded in a civil litigation hence the standard of proof must be raised above the usual balance of preponderance. When these standards are applied to this case, it is noteworthy that the suit is framed to be against the defendants jointly and severally. In fact the pleadings at paragraph 14 of the plaint can be read to accuse the two defendants of conspiracy to defraud the plaintiff of the sums of money paid to the 1st defendant.

51. However, the evidence availed was that there had been no contract between the 1st and 2nd defendant and that it was the plaintiff who introduced the two. It would have been different had the 1st defendant have been the person who proposed the 2nd defendant's name as the lawyer to be engaged. The evidence that is from both sides is that it was PW2 as a taxi driver to the plaintiff's party and family who floated the 2nd defendant's name. To get it clearer, it is important to revisit what the plaintiff's witnesses said:-

“He said he has the authority he had a letter. We agreed on a price of Kshs.7,000,000... We agreed to look for a lawyer. I looked for a lawyer there was a taxi driver called John Njagi. He said he knew Mr. Akanga who was a good advocate”.

(PW 1s evidence in chief page 21 of the typed proceedings)

“...Karanja said at that meeting that he had authority to sell... Karanja was selling the loose on behalf of Gathua. It was us who asked Karanja to go to Mr. Akanga. We identified the house first then went to the lawyer”(PW 1 in cross examination).

52. In fact the evidence by PW 2 was to the effect that when he took the plaintiff and her family to the 2nd defendant house the 1st defendant was not there. He did say so twice upon cross examination.

53. Now, if the suit against the defendant was grounded on fraud committed upon her by conspiracy between the two defendant one needed to avail evidence.

It was not enough that particulars of fraud or collusion to defraud would be thrown at the court without more. In this case those particulars at paragraph 14 were never proved and they at the conclusion of the case remain just but allegations.

54. I understand the term fraud in legal parlance to mean a deliberate mis-presentation of facts or concealment of the truth intended to lead one to act to his disadvantage or just an unconscionable dealing.

55. Black law dictionary defines fraud to mean:-

“A knowing mis-representation of the truth or concealment of material fact to induce another to act to his or her detriment. Unconscionable dealing; especially in contract law, the unconscious use of power arising out of the parties’ relative position and resulting in an unconscionable bargain”.

56. In this matter it was never the plaintiff’s case that the 2nd defendant convinced him as her lawyer to buy. The case is that the advocate needed to have investigated the title to establish that it was genuine and registered in the name of one Dr. Gathua. I think that is the usual duty of an advocate in a sale transaction. However, at the close of the case, there was never a dispute that the property belonged to the doctor. The dispute was whether the 1st defendant had the doctor’s power of Attorney. The decision to buy was made by the plaintiff before he met the 2nd defendant. In fact in the pleadings and affidavit filed in a previous suit, the fraud was specifically alleged as against the said Dr. Gathua and the 1st defendant. It is also discernible from the pleading in that matter, that the plaintiff admitted having spoken to Dr. Gathua directly.

57. Granted that it was the advocate’s duty to establish the authenticity of the power of Attorney and whether it was a general one or specific to the parcel of land, that can only be a breach of professional duty of care and only if the agreement between the parties obligated him to do so. Here, the agreement is explicit that the duty to carry out searches and even pay stamp duty and lodge documents for registration was that of the 1st defendant.

48. I do find that there has not been proof of fraud as against the 2nd defendant and the plaintiff’s claim being grounded on it must fail.

How about breach of trust?

59. It must be difficult to divorce the evidence required to prove fraud from that to prove breach of trust if one looks at the evidence adduced and the pleadings filed. Needless to say that there was no duty on the 2nd defendant or indeed capacity to establish that the property was not up for sale especially if it be noted as above that the plaintiff made a decision to buy before meeting the 2nd defendant and adverted to having spoken to the disclosed registered owner. It has also been found that the duty to carry out a search was contractually placed upon the 1st defendant in writing. Even the other particulars of receiving money from the plaintiff, the evidence adduced is that no money for the purchase price was ever paid to the 2nd defendant but to the 1st defendant. Even on being a witness to payment the evidence on record is that the 2nd defendant only witnessed the payment of the initial Kshs.100,000/= and not anything else.

60. That alone would suffice to draw a conclusion that the plaintiff did not discharge his onus to prove breach of trust. The word trust as used in law goes beyond the ordinary parlance as used in grammar. Generally but not always a trust is created by an instrument or deed with specific obligations and mandate. It generally and normally arises where the trustee holds property on behalf of a beneficiary. Hence, a lawyer can easily be a trustee to his client where the client deposits with or vests upon the lawyer a control over an asset or just property of any kind. In that context the relationship between an advocate and his client may create a trust relationship but the nature of transaction and conduct, in the absence of a written deed would determine that. One of such clear cases where the law implies a trust relationship in Kenya is by dint of Section 80 of the Advocates Act. That provision says that trust relationship is created where the advocate is entrusted with money, valuable security or other property to retain in safe custody. I read this to take into account situations where an advocate is; deposited with say money for purchase price to pay upon an occurrence of an event, where he is paid on behalf of a client for onward transmission or where he is a stakeholder. Those do not appertain here.

61. The evidence and the documents produced in this matter do not at all prove that any money was ever deposited with the advocate or

indeed intended to be so deposited. Instead the money was paid to the 1st defendant.

62. I therefore find, and the court record bears me out with the final judgment against the 1st defendant, that any fraud against the plaintiff was committed by the 1st defendant and the 2nd defendant played no part at all.

63. That being my finding, I do find that any damages suffered, and I do not doubt that the plaintiff has suffered damage, was occasioned by the 1st defendant against whom the plaintiff has a judgment and has a right to recovery.

64. The upshot is that the plaintiff's suit against the 2nd defendant is dismissed with costs to be paid by the plaintiff to the said 2nd defendant.

Dated and delivered at Mombasa this 22nd day of March 2018.

P.J.O. OTIENO

JUDGE

[1] Central Bank of Kenya vs Trust Bank Ltd & 4 Others, NBI CACA No. 215 of 1996 and Ratilah G. Patel vs Lalji Makaji [1957] EA 314