



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 637 OF 2011**

**KIMAIYO KIPTANUI & PETER G. MUNYA**

**T/A KIMAIYO & MUNYA ADVOCATES.....APPELLANTS**

**- V E R S U S -**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

*(An appeal from the judgement of A. K. Ndungu (Mr) SPM delivered at Milimani*

*Chief Magistrate Commercial Court, on the 30<sup>th</sup> September 2011*

*in CMCC No. 9811 of 2006)*

**JUDGEMENT**

1) The respondent herein, filed an action against the appellants seeking to recover a sum of ksh.870,000/= together with interest and cost before the Chief Magistrate's Court, Milimani Commercial Courts. The action was based on a claim for loss allegedly suffered by the respondent when the appellants recorded a consent order on behalf of the respondent without prior instructions from the respondent. The suit was heard and decided in favour of the respondent. Being aggrieved, the appellants filed this appeal to impugn the decision.

2) On appeal, the appellant put forward the following grounds:

- i. The honourable magistrate erred in law and in fact in dismissing the appellant defence dated 27<sup>th</sup> day of October, 2006.*
- ii. The honourable magistrate erred in law and in fact in holding that a firm of advocates is vicariously liable for the acts of omission and commission done by its associates in his conduct of a matter before this courts.*
- iii. The honourable magistrate erred in law and in fact in holding that an advocate is liable for negligence in regard to matters conducted in court.*
- iv. That the honourable magistrate erred in law and in fact in failing to recognize that public policy precludes suits by client in regard to matters conducted in court.*
- v. The honourable magistrate erred both in law and in fact in failing to uphold the judgment of the disciplinary committee in Miscellaneous Cause No. 345 of 2007 in the matter of Kiptanui Kimaiyo, Peter G. Munya and Rodgers Ruthua Advocates.*
- vi. The honourable magistrate erred in law in completely ignoring the incontrovertible position of the law established in the English authority of Rondel –vs- Worsely and the long line of cases acted therein that an advocate is not liable for negligence in respect of matters conducted in court.*
- vii. The honourable magistrate erred in law and fact in supposing that English cases law in the case Rondel –vs- Worsely and the cases cited in it, do not apply to Kenya*

- 3) When the appeal came up for hearing, this court gave directions to have it disposed of by written submissions. Though the appellant put forward a total of seven grounds of appeal, those grounds may be determined together.
- 4) The main ground which commends itself for determination is whether or not a firm of advocates can be held liable for the acts or omissions of its associates and or employees in conducting matters before a court of law. It is the submission of the appellant that they cannot be held liable for the acts or omissions of one Rogers Tithugua, an employee of their law firm.
- 5) The appellants further submitted that Mr. Rogers Rithugua was specifically seised with the conduct of the matter in the initial suit and was in constant communication with the respondent.
- 6) It is also argued that it is Rogers Rithugua who personally signed the consent in dispute and also advised the respondent that the matter had been concluded by taxation which was not true.
- 7) It is the submission of the appellants that being strangers in the initial suit meant that they cannot be held professionally negligent for the outcome of the action.
- 8) It is also submitted that the individual advocate always has the control of the conduct of the matter in court and the actions of one advocate cannot attach to another merely because they practice in the same law firm.
- 9) The respondent has urged this court to dismiss the appeal for want of merits. The respondent argued that the partners are liable for the actions or omissions of their associates and or employee in executing their obligations to the respondent client. This court was beseeched to find that the trial magistrate correctly held that the appellants were vicariously liable.
- 10) Having re evaluated the case that was before the trial court and having considered the rival submissions there are certain facts which are not disputed. First, it is not in dispute that one Rogers Rithugua was employed by the appellants' law firm as an associate. Secondly, that the appellants' law firm was instructed by the respondent to appear and oppose **miscellaneous application No. 541 of 2004, Muganda Wasuwa t/a Keysian Auctioneers =vs= Kenya Pipeline Co. Ltd and Another**.
- Thirdly, that Rogers Ruthugua appeared on behalf of the appellants' law firm and recorded a consent order settling the bill of costs at ksh.850,000/= without first consulting the respondent.
- Fourthly, that the appellants did not enjoin Rogers Rithugua as a third party to the suit giving rise to this appeal.
- 11) The question which must be determined is whether in the circumstances of this dispute, the appellants should be held liable for the actions and or omissions of their employee and or associate? Both the appellant and the respondent agree that Rogers Ruthugua had no instructions from the respondent to tax the Bill of Costs by consent.
- 12) In my considered view, a firm of advocates like that of the appellants is vicariously liable for the actions of its employee and or associate. The learned Chief Magistrate cannot therefore be faulted in his decision.
- 13) The appellants' employee/associate simply acted outside the instructions of the client, the respondent herein. With respect, the fact that the appellants were found not professionally liable for the misconduct of Rogers Ruthugua, did not in itself shield them from being vicariously liable for his actions or omissions visited upon their client.
- 14) The duty of care to the client was bestowed upon the law firm and not its employees and or associates.
- 15) I have considered the authorities cited by both parties. I find the case of **National Bank of Kenya Ltd =vs= E. Muriu Kamau and Njoroge Nani Mungai t/a Muriu Mungai & Co. Advocates (2009) eKLR** to be quite relevant to this case.
- 16) In the end, I find no merit in this appeal. It is dismissed in its entirety with costs to the respondent.

**Dated, Signed and Delivered in open court this 19<sup>th</sup> day of October, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

.....for the Respondents