



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 3 OF 2017

BETWEEN

1. ERICK JUMBA

2. BALONGO & COMPANY ADVOCATES.....APPELLANTS

AND

RICHARD ASIROLSA ISAAC MAKOKHA.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Chief Magistrate's Court Civil Case No.423 of 2013 by Hon. J.N Maragia-Resident Magistrate).

JUDGMENT

1. **Erick Jumba** and **Balongo & Company Advocates** the appellants herein, were the defendants in the Busia Chief Magistrate's Court Civil Case Number 423 of 2013. They were sued for a claim of professional negligence whereby the respondent was seeking for orders of payment of the value of the suit motor vehicle. This was after the appellants were instructed to act for the respondent where he claimed that his motor vehicle **KAK 670F** was erroneously attached in a suit where he was not a party. The first appellant was an advocate who was instructed by the respondent while the second appellant was the firm of advocates in which the first appellant worked.

2. After the hearing of the case the learned trial magistrate made a finding that the appellants were liable.

3. The appellants were aggrieved by the judgment which was delivered on 21st February 2017 and filed this appeal. They were represented by the firm of Obwoye Onsongo & Company advocates. The appellants in their Memorandum of Appeal set out the following grounds of appeal:

1. The Learned Trial Magistrate erred in law and fact by failing to find that the appellant did not prove withdrawal of Notice to the attaching creditor directly led to the auction of motor vehicle registration No.KAK 670F TOYOTA SALOON.

2. The learned Trial Magistrate erred in law and fact by failing to determine whether there was stay of execution orders by the time of withdrawal of notice to the attaching creditor was filed.

3. The Learned Trial Magistrate erred in law and fact by holding that withdrawal of a fatally defective notice to the attaching creditor was not tantamount to professional negligence.

3A. The Learned Trial Magistrate erred in law and fact that upon finding the Appellants could not be faulted for withdrawal of improper pleadings proceeded and made determination on unpleaded and unparticularized negligence of filing an application out of time.

3B. The Learned Trial Magistrate erred in law and fact by finding that value of the motor vehicle had been determined by mere production of an agreement without a valuation report.

3C.The Learned Trial Magistrate erred in law and fact by failing to find negligence on the part of the appellant for failing to provide sufficient instructions to the advocate on record.

3D. The Learned Trial Magistrate erred in law and fact by awarding specific damages whereas the further amended claim was for

general damage.

4. The Learned Trial Magistrate erred in law and fact by failing to hold that motor vehicle ownership had not fully been ascertained by the respondent to the Appellants.

5. The Learned Trial Magistrate erred in law and fact by failing to warn itself of concurrent proceedings being held by the Law Society of Kenya.

6. The Learned Trial magistrate erred in law and fact of failing to find the Plaintiff as drawn did not particularize the negligence alleged against.

7. The Learned Trial Magistrate erred in law and fact by holding that an agreement for sale of motor vehicle is proof of payment of the purchase price.

8. The Learned Trial Magistrate erred in law and fact by holding negligence without the benefit of the entire proceedings from **BUSIA CMCC NO.361 OF 2009**.

4. The respondent was represented by Mr. Otsiula of the firm of J.B Otsiula and Associates. His contention was that the appeal lacked merit.

5. On 10th May 2018 when the matter came up for directions, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged.

6. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

7. In his pleadings, the respondent did not plead particulars of negligence on the part of the appellants. He only talked of an advocate-client relationship. Which the court correctly found existed.

8. The advocate-client relationship is a contractual one. An advocate can be held liable for negligence to his client in some instances. In **Champion Motor Spares Limited vs Phadke & others (1969) E.A. 42**, the Court of Appeal held:

An Advocate is not liable for any reasonable error of Judgement 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. on an advocate's liability for negligence, the English cases are not, I think, of great assistance, because the law in England relating to barristers is different from that relating to solicitors, while in East Africa we have a unified profession. In regard to negligence, as in all other matters, I think all advocates must be treated alike. It is clear from s. 72 of the Advocates Act (Cap.258), that advocates in Uganda may be liable for negligence and cannot divest themselves of that liability, and it would seem, from Barry v. Keharchand (1919), 8 E.A.L.R. 102, that that liability extends to instituting proceedings on the instructions of a client, without informing the client that those proceedings were bound to fail. That seems to me analogous to the present position, where the respondents were, in the words of the plaintiff "instructed by the Plaintiff... to defend the Plaintiff and to take all steps necessary to protect the Plaintiff's interests in the said suit" and where they failed to advise their client that the third-party proceedings could and should be resisted.

9. The respondent ought to have demonstrated what his instructions to the appellants were. These would have enabled the trial court to evaluate the evidence visa-vis the evidence adduced to make a finding whether there was negligence or not. What emerges on record is what he alleges to have been his instructions to the appellants. Some of these alleged instructions were disputed by the appellants. The learned Trial Magistrate was therefore disadvantaged by the lack of evidence on the part of the respondent to prove the negligence alleged.

10. In her judgment, the learned trial magistrate reached her verdict on the basis of proof of the purchase of the motor vehicle by the respondent when he produced a sale agreement. With due respect to the learned magistrate, a sale agreement cannot be proof of purchase of the motor vehicle. Proof of purchase of the motor vehicle can only be authenticated by the production of a copy of the log book. The agreement of purchase of motor vehicle KAK 670F is dated 15th October 2009 and it was proclaimed on 9th November, 2010. If indeed the purchase was authentic, then there was no explanation why he did not have a log book in respect of the motor vehicle in his name. This was a period of one year since the alleged agreement.

11. Erick Jumba the 1st appellant in his written statement of defence averred that when he required for documents to authenticate the respondent's claim of ownership of motor vehicle KAK 670F the latter advised him to withdraw the notice he had filed. Without proof of ownership of motor vehicle KAK 670F by production of the requisite documents, then the notice of objection to the sale filed by the respondent would not have been sustained. This must have been the reason why he advised his advocates to withdraw the objection. In my view, there was no negligence exhibited on the part of the advocates of the respondent. The learned trial magistrate did not specifically make a finding on this claim of negligence. It was erroneous therefore for the learned trial magistrate to reach the verdict that the appellants were liable to the respondent.

12. It is curious that the respondent did not deem it fit to file a suit against the auctioneer whom he alleged wrongfully attached his property. If indeed it was his property, this is where his claim lay. One can only speculate that probably the property was not his and that the sale agreement was prepared solely to defeat the attachment. My saying so is bolstered by the fact that the copy of insurance policy in respect of motor vehicle KAK 670F was issued in the name of MUKOKHO ERIC STEPHEN on behalf of MUKOKHO ERIC STEPHEN. Nowhere

does the name of the respondent appear. Although during trial he said his brother was the one using his motor vehicle this to me is not convincing.

13. The learned trial magistrate having not made a finding of negligence on the part of the appellants and my perusal of the record having not seen any instance of negligence on their part, I find that the finding by the learned trial magistrate was erroneous. I therefore allow the appeal and set aside the orders by the learned trial magistrate. Costs of the appeal and in the court below to the appellants.

DELIVERED and SIGNED at BUSIA this 27th day of November, 2018

KIARIE WAWERU KIARIE

JUDGE