



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NUMBER 9 OF 2015**

**HARILAL VELJI SHAH.....1<sup>ST</sup> PLAINTIFF**

**NIKUNJ HARILAL SHAH.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MATIRI MBURU & CHEPKEMBOI ADVOCATES.....DEFENDANT**

**JUDGMENT**

**1. Background and Pleadings**

The background leading to this case is fairly straightforward. The plaintiffs enlisted the defendants legal services in respect of a purchase of a land parcel **No. Nakuru Municipality Block 23/746**. The plaintiffs were and are still clients of the defendant firm of Advocates, and specifically Mr. Matiri Mburu Advocate. The Vendor was introduced to the said Advocates by the 1<sup>st</sup> plaintiff who together with his (Vendors) agent visited the defendant advocates and instructed him to represent him in the conveyance. The vendor also sought to be represented by the advocates and there being no objection, the Advocates agreed to act for the two parties.

2. Both the vendor and the purchaser presented a certificate of official search to the advocates and the vendor produced his identification document, an Identity card, whose particulars matched those stated on the copy of certificate of title and the official search. Upon instructions, the defendant firm of Advocates prepared a sale agreement that was executed by the parties in the presence of the Advocates and thereafter they conducted their own official search on the title and being certified that the documents and the search were similar, and that the vendor **KIPOKI OREU TASIER** was the vendor, the plaintiff paid Kshs.2,500,000/= that was due under the sale agreement dated the 5<sup>th</sup> November 2014 to the vendor.

It thereafter turned out that the sale transaction was a sham and a fraud perpetrated by the purported vendor who was not and had never been the proprietor of the subject land parcel, but had impersonated the registered proprietor and had obtained forged documents to perfect the fraud.

3. In their plaint dated 24<sup>th</sup> February 2015 and filed on the 26<sup>th</sup> February 2015, the plaintiffs blamed the Advocates for breach of their duty of care for failure to investigate the authenticity of the Title documents and credibility of the vendor thereby causing them a loss of Kshs.2,527,000/= paid to the purported vendor pursuant to the sale agreement.

The plaintiffs stated particulars of negligence against the Advocates and urged that the advocates refund the said sum of Kshs.2,527,000/= being the loss they suffered pursuant to the sale agreement.

4. In defence of the suit, the Advocates filed a defence on the 26<sup>th</sup> March 2015, and denied having been negligent in their professional duties and that they did due diligence by procuring an official search certificate that confirmed the proprietorship of the Land parcel and the purported Vendors identification documents. Mr. Matiri Njuguna Advocate further stated that the purported vendor was brought to their offices by the 1<sup>st</sup> plaintiff and his agent, hence the Advocates had no reason to doubt the identification documents of the purported vendor. The court was urged to find that the plaintiffs claim is unmerited and dismiss it with costs for reasons that the vendors loss was perpetuated by criminal activities by the vendor and not the advocates who co-operated fully with the police in the investigations.

5. At the commencement of the hearing of the case, both counsel recorded a consent that all the plaintiffs documents filed on the 24<sup>th</sup> February 2015 and on the 23<sup>rd</sup> September 2016, together with the Defendants bundle of documents filed on the 26<sup>th</sup> March 2015 be admitted by consent.

A further consent was recorded that the loss pleaded of Kshs.2,527,000/= was not in dispute.

## 6. Plaintiffs Evidence

**Mr. Harilal Velji Shah** testified as PW1. His testimony was that Mr. Matiri Njuguna t/a as Matiri Mburu & Chekemoi Advocates was his advocate for more than five years and that he visited him together with his agent and the vendor and instructed him to act for him in the transaction.

That when documents were presented for registration, the Land Registrar found the certificate of Title as a forgery. He accused the Advocate Mr. Matiri for not doing due diligence to protect his interests for failing to establish credibility of the vendor.

Upon cross examination PW1 stated that he trusts Mr. Matiri Advocate who is his Advocate to date. He explained how he met the vendor through his known agent and that it is him who introduced the vendor and the agent to Mr. Mariti with a copy of the title and an official search on the property, and which copy of Title the advocate too used to conduct an independent search. He stated that he had no doubts on the identity of the vendor nor did he ask the Advocate to conduct a background check on the vendor to authenticate his identity and was aware that the Advocate obtained spousal consent to sell the property. He testified that he saw the purported spouse and he too had no doubts about her identity. He testified that the vendor agreed to indemnify the purchaser should the transaction abort and not advocates and upon execution of the agreement, he delivered the payment cheques for onward transmission to the vendor after obtaining land control board consent and all clearance certificates. He confirmed that he did not have any objection to Mr. Matiri advocate acting for both the vendor and himself. Further that Mr. Matiri acted as per the instructions he gave him, but further stated that had Mr. Matiri done due diligence, he would not have lost the money.

## 7. Defence Evidence

Mr. Simon Njuguna Matiri testified as a partner in the defendant firm of Advocates and as the advocate who was seized with the conveyance in issue.

He adopted a statement he recorded on the 2<sup>nd</sup> April 2015.

It was his evidence that the vendor was brought to his office by the plaintiff who also gave him a copy of the title upon which he conducted an official search on the ownership of the suit property.

He further testified that the purported vendor presented himself and his wife and signed the spousal consent, produced their original identification cards, photographs and Personal Identification Number(PIN) certificates, and the original certificate of Title that looked genuine.

He further testified that his official search rendered that the purported vendor was the proprietor, and as he had no doubts, fear or suspicion that this character had forged documents.

It is his further testimony that no instructions were given to him by the plaintiff to investigate the identity of the vendor.

8. Having carried out due diligence as expected of a conveyance advocate, he testified that he had discharged his duty of care to the plaintiff and as the loss of the money was through criminal acts that he was not party to, he ought not be held liable.

Parties filed written submissions. I have considered the pleadings evidence and the submissions.

The issues that comment to me for determination, being a re-edition of the Advocates framed issues are:

***1. Whether the defendant was negligent in the performance of his professional duty to the plaintiff.***

***2. Whether the defendant was in breach of the duty of care to the plaintiff.***

***3. If the answers to 2 above is in the affirmative, whether the defendant is liable in damages.***

9. It is evident that the fraud that led to the loss of money by the plaintiff was perpetuated by the purported vendor who had forged the certificate of title and his identification documents. I agree with the Advocate that given that the purported vendor was brought to his offices by the plaintiff and his agent, and just like the plaintiff, he had no suspicion whatsoever that the said vendor was a fraud and all documents he presented were all forgeries.

I am satisfied that the Advocate conducted due diligence in respect of the conveyance as expected of a normal conveyance, without suspicion of fraud.

10. The plaintiff confirmed that he trusted the Advocate and actually absorbed him from the fraudulent acts by the purported vendor, and the loss of the sum claimed. The plaintiff had no objection whatsoever by his advocate acting for the vendor and he testified such, and continued to state that, even if the vendors advocate was different, the fraud would still have been committed. I therefore find no fault with the Advocate acting for both the vendor and the purchaser especially when there was no objection by either.

11. I have perused the various cases cited by both parties.

In **Momanyi -vs- Hatimy & Another (2003) e KLR 545**. In this case, the advocate failed to conduct a search on the title and advised the client that the property was unencumbered only to turn out that there were encumbrances and therefore the title cloud not be transferred. The court struck out the advocates defence and entered summary judgment. This case is distinguishable to the present situation.

An official search was conducted and indeed ownership was confirmed to the fake vendor. I do not agree with the plaintiffs submission that the advocate had a duty to verify the identity of the vendor more than requiring production of an original Kenyan identity card and a photograph of the likeness of the vendor.

The search conducted by the Advocate showed no encumbrances on the title and an **Original certificate of title** (which turned out to be a forgery) was produced by the vendor. There was no way the Advocate and also the vendor would have known that the documents so produced were forgeries as there was no an iota of suspicion by either party.

12. I am satisfied that the the defendant had discharged his duty of care to the plaintiff. Indeed the plaintiff confirmed that he did not instruct his advocate to verify identification of the vendor.

It is trite that an advocate will protect the interest of his client and act in a manner as to protect his clients interest that did not to jeopardize his interest. The **Advocates Act, Cap 16 Laws of Kenya** recognises that an advocate may be liable to his clients for negligence – See **Section 46**.

I do not agree that the advocate did not investigate the title documents. An official search dated 28<sup>th</sup> October 2014 and produced as DExt No2 confirm that the search was conducted. Unless there is suspicion that some illegality or fraud may have been committed by vendor, in my considered view, an official search is sufficient to confirm ownership and if the property indeed exists or is encumbered. However if fraud is detected, then, further investigation ought to be conducted. This was not the case in this case.

13. For the above reasons, I come to the findings that the Advocate owed a duty of care to the plaintiff, and that duty was diligently discharged and no breach of such duty of care was demonstrated as the title documents were adequately scrutinized, and the title investigated.

Unless there is suspicion of fraud or collusion, once a vendor produces his original identity card, Personal Identification Number and photographs, and in this case even the spouses original identification documents and that such documents agree with the title documents, there would be no requirement to do a verification exercise on the vendors identity. The vendor did not appear to be a fraud before the advocate, nor before the vendor himself.

**See Civil Appeal No. 55 of 1993 King Woolen, Mills Ltd & Another -vs- M/S Kaplan & Stratton Advocates (1993) e KLR and National Bank of Kenya Ltd -vs- E. Muriu Kamau & Another (2009) e KLR.**

The end result is that I find no breach of the duty of care by the Advocates to the plaintiffs, and therefore the said advocates are not liable for the damages that the plaintiff suffered.

14. I am alive to the fact that the plaintiff suffered through the calculated scheme of fraud perpetuated by the purported vendor, a fact that the plaintiffs acknowledge. This was through criminal activities which the advocates reported to the police for investigations and action. It has not been suggested the plaintiffs that the Advocates were involved in the criminal activities.

There would be no justification in law or otherwise to punish the advocates in damages for illegal acts that they did not participate in.

15. Consequently and for the above reasons, the plaintiff's claim for Kshs.2,527,00/= against the defendant is dismissed.

Circumstances pertaining to the case comment to me that each party shall bear its own costs of the suit.

**Dated, Signed and Delivered this 13<sup>th</sup> Day of April 2017.**

**J.N.MULWA**

**JUDGE**