



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL CASE NO. 225 OF 2005**

**FARID ABDUL ALI.....PLAINTIFF**

**VERSUS**

**MOHAMED FAROUK ADAM**

**T/A FAROUK ADAM & CO. ADVOCATES.....DEFENDANT**

**JUDGMENT**

[1] This is a suit that was filed on **29 April 2005** by the Plaintiff, **Farid Abdul Ali**, against the Defendant, **Mohamed Farouk Adam**, who is an Advocate of the High Court of Kenya, practising under the name and style of **M/s Farouk Adam & Co. Advocates**. It was averred in the Plaintiff that in **2003**, the Defendant undertook to facilitate the sale of all that piece of land known as **NAIROBI/BLOCK 112/41** situate in Nairobi (the Suit Property); and that pursuant thereto, the Defendant drew, witnessed and attested the Sale Agreement dated **2 April 2003** between the Plaintiff and **Henry Wairiri Karume** and **Hazel Wanjiku Wairiri**.

[2] It was further averred by the Plaintiff that the Defendant was under instructions to undertake the necessary due diligence and carry out the relevant searches and ascertain the vendors' proprietary interests in the Suit Property; but that in breach thereof, the Defendant negligently failed to exercise due professional care, skill and diligence as an advocate, thereby inducing the Plaintiff to enter into an agreement with the vendors who turned out to be fraudsters, who not only impersonated **Henry Wairiri Karume** and **Hazel Wanjiru Wairiri**; but also held themselves out as the registered owners of the Suit Property. The particulars of negligence were set out at **page 15** of the Plaintiff thus:

[a] Failing to conduct proper or any land search to ascertain the proprietary interest of the purported vendors in the Suit Property;

[b] Failing to ascertain the true owners of the Suit Property;

[c] Failing to ascertain that the purported vendors were mere fraudsters who did not have and could not have had good title or any title at all to the Suit Property as they were not the registered owners thereof;

[d] Negligently and/or in breach of duty, misrepresenting to the Plaintiff that he had conducted the land searches and that the purported vendors had good title to the said land while he knew

or ought to have known that it was not true;

[e] Receiving the purchase monies from the Plaintiff while knowing that the purported transaction was a nullity as the purported vendors had no title to the land;

[f] Witnessing and attesting to the signatures of the purported vendors in the Transfer of Lease for **NAIROBI/BLOCK 112/41** dated **11 April 2003** when indeed the true owners did not appear before him.

[3] It was the Plaintiff's contention that, on account of the Defendant's negligence, he paid **Kshs. 2,600,000.00** in respect of the transaction, through the Defendant's office, to persons who turned out to be fraudsters; thereby suffering loss and damage. The Particulars of Loss have been pleaded in paragraph 17 of the Plaint thus:

**[a] The Plaintiff was subsequently charged with the criminal offence of making a document without authority in respect of the subject sale transaction that was presided over by the Defendant;**

**[b] The Plaintiff lost the purchase price that he paid, amounting to Kshs. 2,600,000.00.**

**[c] Mental anguish.**

[4] It was on account of the foregoing that the Plaintiff prayed for judgment in his favour against the Defendant under the following heads:

**[a] Kshs. 260,000.00 being refund of the deposit of the purchase price paid on 11 April 2003;**

**[b] Sterling Pounds 19,990.00 (equivalent to Kshs. 2,340,000.00 at the then prevailing exchange rate of Kshs. 117.06 to the Sterling Pound)**

**[c] General damages for negligence;**

**[d] Costs of the suit;**

**[e] Interest on [a], [b], [c] and [d] above at court rates until payment in full.**

[5] In his Defence, filed herein on **5 July 2005**, the Defendant denied the Plaintiff's claim and averred that he was requested by the Plaintiff to act for him in a land transaction for the purchase of the Suit Property as well as for **Henry Wairiri Karume** and **Hazel Wanjiku Wairiri**, the vendors of the said piece of land; and that he agreed to so act; whereupon the Plaintiff introduced the aforesaid **Henry Wairiri Karume** and **Hazel Wanjiku Wairiri** to him as the owners of the Suit Property. It was further the contention of the Defendant that he only attested the Sale Agreement between the Plaintiff and the vendors pursuant to the Plaintiff's request and representations.

[6] The Defendant added that he caused searches to be carried out at the Lands Office to confirm the true position as indicated to him by the Plaintiff and the said vendors; and that the Plaintiff did not dispute the fact that the searches indicated that the vendors were the registered owners of the property. That it was upon being satisfied with the preliminary inquiries that the Plaintiff appended his signature to the Sale Agreement. Accordingly, the Defendant denied that he made any false representations to the Plaintiff or that he was a party to any forgery and/or fraud by the purported vendors. He thus denied the particulars of misrepresentation and negligence set out in Paragraphs 9 and 15 of the Plaint.

[7] With regard to the purchase price, the Plaintiff averred that he only released the purchase price to the said vendors at the request and/or representation of the Plaintiff; and that the Plaintiff witnessed and attested to the signatures of the said vendors pursuant to the representations made by the Plaintiff. Accordingly, the defendant denied the averments set out in the Plaint and put the Plaintiff to strict proof

thereof.

[8] The Plaintiff joined issue with the Defendant vide the Reply to Defence that he filed herein on **15 July 2005**, reiterating that it was the Defendant's professional responsibility to advise him generally and specifically on the true owners of the Suit Property by carrying out the requisite searches and investigations rather than rely on the fraudsters' representations. Accordingly, it was the contention of the Plaintiff that the Defendant owed him a duty of care as his advocate, which he was in breach of, thereby causing him loss and damage, and ought to be held liable as prayed.

[9] The suit came up for hearing on **1 November 2016** whereupon the parties adopted their respective Witness Statements as well as Lists and Bundles of Documents. The Plaintiff adopted his Witness Statement filed herein on **7 February 2012**. It was thus his evidence that sometime in **2003**, he saw an advertisement in the newspaper in respect of the sale of a plot in **Mimosa Court in Runda**. He set out to see the property and met two people who introduced themselves as agents of the proprietor of the property. He accordingly directed them to the Defendant's offices where they all met. According to the Plaintiff, it was at this meeting that the two agents informed the Defendant of the alleged proprietors of the Plot to be **Henry Wairiri Karume and Hazel Wanjiku Wariri**.

[10] The Plaintiff testified that he then instructed the Defendant to conduct due diligence to ascertain both the identity of the proprietors and the ownership of the Suit Property; and that the Defendant informed him, upon conducting a search at the Land's Registry and scrutinizing the identification documents, that the property did in fact belong to **Henry Wairiri Karume and Hazel Wanjiku Wariri** as indicated by the two agents. He was also shown a Certificate of Search to that effect dated **2 April 2003**; and that on the basis of that assurance, he authorized the Defendant to draw, witness and attest the Sale Agreement on **2 April 2003**. He was thereupon advised to forward a cheque for the deposit of **Kshs. 150,000.00** for onward transmission to the vendors, whose identities the Defendant assured him he had ascertained.

[11] It was further the evidence of the Plaintiff that, on **11 April 2003** the Defendant prepared a Transfer of Lease in respect of the Suit Property in his name and represented to him that the vendors had appeared before him and he witnessed the signing of the Transfer of Lease; and that on the basis of that representation, he forwarded to the Defendant **Cheque Number 00101** dated **11 April 2003** for **Sterling Pounds 19,990.00** for onward transmission to the vendors. He thereafter received the Certificate of Lease dated **28 April 2003** from the Defendant and thereupon set about commissioning the drawing of plans and design with a view of developing the property; and that it was not until a year later, in **2004** that the Defendant called him to urgently present himself at his offices. On arrival, he was arrested by CID officers along with the Defendant on allegations that they had defrauded the actual owners of the Suit Property of their property.

[12] The Plaintiff further stated that he was shocked to learn, upon his arrest, that the representations that the Defendant made to him in regard to the suit property were false, and that he never ascertained the true identity of the proprietors of the Suit Property. He added that, when he asked the Defendant how the situation could be remedied, his advice was for the title documents to be surrendered to the Police on his personal undertaking to refund the purchase price paid by the Plaintiff. It was the evidence of the Plaintiff that, believing this to be sound advice, he surrendered the title documents to the Police as advised; but that the Defendant did not honour his undertaking, and even purported to deny liability for his negligence.

[13] On his part, the Defendant adopted his Witness Statement together with his List and Bundles of Documents filed on **9 April 2010 and 13 April 2010**. While conceding that he was instructed by the Plaintiff to act for him in the sale transaction that is the subject of this suit, it was his evidence that he did his best in the circumstances; and that he could not have known then that the persons who presented themselves to his office as the vendors were imposters, given that they presented to him what appeared to be genuine identity cards which bore their photographs. He therefore urged the Court to dismiss the Plaintiff's claim with costs.

[14] Having considered the pleadings, the evidence adduced herein, including the Bundles of Documents

filed by the parties as well as the written submissions filed by their Counsel, it is evident that most of the facts appear not to be in dispute. Indeed Learned Counsel on record herein filed, on the **4 March 2014**, a Statement of Agreed Facts dated **21 February 2014**, conceding that the Plaintiff and the Defendant were at all material times Client and Advocate, respectively; and that the Defendant acted for the Plaintiff and the vendors in respect of the Sale Agreement dated **2 April 2003** pursuant to which the Plaintiff paid out as purchase price, a sum of **Kshs. 2,600,000.00**. They are further in agreement that the persons purporting to be vendors under the subject Sale Agreement were in fact impersonators. Accordingly, they narrowed down the issues to the following two:

**[a] What was the scope of the Defendant's duty of care to the Plaintiff?**

**[b] Whether the Defendant was negligent in the discharge of that duty.**

**[15]** As to the scope of the Defendant's duty of care, I find instructive a passage in **Cordery's Law Relating to Solicitors**, 7<sup>th</sup> Edition at page 150, in which the authors stated thus:

**"At common law a solicitor contracts to be skilful and careful, for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill. It follows that this undertaking is not fulfilled by a solicitor who either does not possess the requisite skill or does not exercise it...A solicitor's duty is to use reasonable care and skill in giving such advice and taking such action as the facts of the particular case demand. The standard of care is that of the reasonably competent solicitor, and the duty directly relates to the confines of the retainer...A solicitor is not bound to have a perfect knowledge of the law, but he should have a good knowledge..."**

**[16]** The foregoing excerpt has been cited with approval in several local decisions, notably **Kinluc Holdings Ltd vs Mint Holdings Ltd & Another [1998] eKLR**. Thus the retainer between the Plaintiff and the Defendant having been conceded, the question to pose is whether the Defendant discharged his duties with a reasonable degree of care and skill; bearing in mind the holding of the Court of Appeal in **Champion Motor Spares Ltd vs. Phadke and Others [1969] EA 42** that 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 constantly arising in practice (see also **Kogo vs Nyamogo & Nyamogo Advocates [2004] 1 KLR 367**).

**[17]** There appears to be no dispute that when the Plaintiff referred the two persons who posed as an agent of the proprietors of the Suit Property, he made it plain that he had seen the property advertised in one of the newspapers. He left it to the Defendant to undertake due diligence as necessary for a successful transaction. Defendant himself did concede in cross-examination that the Plaintiff left it to him to undertake due diligence, including scrutinizing the title documents and the identity of the vendors. Accordingly, I would be of the same mind as **Warsame, J.** (as he then was,) when he stated that:

**"...you can only expect from an advocate that he will be honest and diligent ... In general an advocate owes a duty to his client to take reasonable care not only to protect his client against a breach of the law but also to protect him against a risk of being in a litigation which is hopeless."**

**[18]** It was the submission of the Plaintiff's Counsel that the Defendant undertook to facilitate the purchase of the property in his professional capacity as an Advocate and conveyancing practitioner; and was therefore expected to undertake due diligence and to carry out the relevant searches and ascertain the proprietary interests of the vendors in the suit property. It was further urged that the Defendant's duty arose not only out of the retainer contract, but also in tort; such that he was not only to scrutinize and verify the ownership of the Suit Property, but also to prepare the transfer documents and ensure the attestation thereof, and to hold and pay out the purchase price. There appears to be no disputation that the Defendant carried out the tasks afore stated to the Plaintiff's satisfaction. This must be the reason why he released the purchase price for onward transmission to the 'vendors'.

[19] The Plaintiff however now contends that the Defendant was not thorough enough in his verification, and to that end the following points were raised in proof thereof:

[a] The Transfer instrument dated **11 April 2003** required the Defendant to certify that the vendors appeared before him and that he either knew them personally or that they were satisfactorily identified by other means. That although the Defendant certified that the vendors appeared before him, he did not verify or make further inquiries into their identities in the manner envisaged by **Section 110** of the **Registered Land Act, Chapter 300** of the **Laws of Kenya** (now repealed); and therefore attested the instrument without the benefit of a credible witness identifying the purported vendors.

[b] That despite admitting to the risky nature of land transactions in Nairobi, the Defendant did not advise the Plaintiff on how to protect his interests;

[c] That the Defendant gave the fraudsters open cheques in settlement of both the deposit and the balance of the purchase price, thereby obliterating any chance of tracing the money or the fraudsters;

[d] That the Defendant, when contacted by CID in 2004 over the transaction, failed to ask for documentation or evidence disproving the identity of the "vendors" that he dealt with.

[20] In support of the foregoing arguments, Counsel relied on the cases **of National Bank of Kenya Limited vs. E. Muriu Kamau & Another [2009] eKLR** and **Bolam vs. Friern Hospital Management Committee [1957] 2 All ER 118** and urged the Court to find that the Defendant herein did not exercise due care in the discharge of his duties, and therefore that he is liable to the Plaintiff as prayed in the Plaintiff.

[21] The Defence Counsel, on the other hand, posited that in 2003 when the transaction was undertaken, Advocates were not under any duty to prevent fraudulent criminal actions in the matters they were handling. It was thus the Defence contention that the Defendant an Advocate had no way of knowing that the identification cards presented to him as well as the title document were forgeries, granted that they bore the same names that were confirmed by official search. It was further submitted that in normal conveyancing practice, Advocates do not verify the authenticity of clients' identification documents unless there was reason to suspect that fraud was about to be committed. Contending that the Plaintiff's title was tainted by the criminal acts of others, it was Counsel's submission that one cannot be held liable in negligence for the criminality of others. Accordingly, he posited that the circumstance of this case fall under the exceptions enunciated in the case of **Kogo vs. Nyamogo & Nyamogo Advocates** and **Champion Motor Spares Limited vs. Phadke & Others** (supra). He urged the Court to find that the Defendant was diligent in the discharge of his professional duties and is therefore not liable herein, and that this was why the Certificate of Lease was issued to the Plaintiff by the Lands Office.

[22] From the evidence adduced herein, it is indubitable that the Defendant acted in the ordinary course of things and did what any advocate of his stature would have done. The fraudsters were introduced to him by the Plaintiff and the names they gave were the same names that were in the identification and title documents. He further caused a search of the title to be conducted and nothing untoward was evinced thereby. He therefore had no reason to be suspicious. His posturing is buttressed by the fact that even the Lands Office was unable to detect any anomaly; and consequently approved and processed the transaction and issued a Certificate of Lease in the name of the Plaintiff. Moreover, no query was raised over the transaction until one year later.

[23] I would thus take the view that the Defendant performed his duties as was expected, and undertook due diligence within his scope of duty in the circumstances. He had the vendors identified by their identity cards, which was an acceptable option at the material time. There was no particular prohibition against payment by open cheque. Thus, it cannot be said that there was gross negligence on his part in the foregoing respects. As was explicated in the case of **Bolam vs. Friern Hospital Management Committee [1957] 2 All ER 118**, the test is:

"...the standard of the ordinary skilled man exercising and professing to have that special

**skill ... It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."**

**[24]** In the premises, it is my resultant finding that the Plaintiff has failed to prove either gross negligence on the part of the Defendant, or shown that the Defendant was ignorant of some elementary matters of law constantly arising in practice. Accordingly, I would dismiss this suit, which I hereby do, with an order that each party shall bear own costs, given the nature of the dispute.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE 2017.**

**OLGA SEWE**

**JUDGE**