



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO.928 OF 1999**

**SHEPHERD GROUP OF COMPANIES LIMITED.....PLAINTIFF**

**VERSUS**

**MUCHUANGI NDUATI NGINGO**

**T/A MUCHANGI NDUATI & CO.ADVOCATES.....DEFENDANT**

**JUDGEMENT**

The plaintiff filed this suit against the defendant seeking kshs 7, 000, 000, cost of this suit and interest at bank rate. The plaintiff particularized in the plaint complicity and negligence on part of the defendant leading to loss of the said 7 million being deposit for purchase of land together with buildings and other moveable property therein. The defendant filed defence on 9<sup>th</sup> August 1999 and apart from denying negligence on his part, he alleged malice on part of plaintiff and plaintiff's Advocate. He also blamed the plaintiff's Advocate for complicity and professional negligence. Particulars are set out in the defence. The defendant later filed application dated 10<sup>th</sup> July 2001 seeking leave to issue 3<sup>rd</sup> party notice to enjoin plaintiff's Advocates wanjama & co. Advocates as third party. The application was allowed on 22<sup>nd</sup> October 2001. The third party filed defence on 24<sup>th</sup> April 2003. The defendant subsequently amended statement of defence filed on 21<sup>st</sup> march 2006. Plaintiff filed amended reply to defence on 30<sup>th</sup> march 2006. The third party also filed an amended defence the same day. On 24<sup>th</sup> February 2017 this matter was listed for notice to show cause why it should not be dismissed for want of prosecution. Counsel for the plaintiff submitted to court that the parties complied with pretrial procedures way back in the year 2012 and the plaintiff has been desirous in prosecuting this suit. Notice to show cause was discharged and hearing scheduled for 22<sup>nd</sup> march 2017. On 22<sup>nd</sup> march 2017 the hearing was rescheduled to 11<sup>th</sup> April 2017 on ground that the defendant had changed Advocates. The case proceeded for hearing on 11<sup>th</sup> April 2017. The plaintiff availed one witness peter Wangondu mwangi who is a director of the plaintiff. He testified that the plaintiff has five directors who include his father, mother and brother. He informed the court that the plaintiff had an interest in purchasing a school running as St. Savio which was being offered for sale at kshs 70 million. He said after negotiation, the plaintiff was issued with a letter of offer by the defendant who were acting as Advocates for St. Savio. He produced bundle of documents filed in court as exhibits. He further stated that after receiving the letter of offer from the defendant there was exchange of communication between their Advocates Wanjama & co, Advocates and the defendant. He said the sale agreement was amended after they agreed on terms. He said a cheque of 7 million being 10% of the purchase price was drawn in the name of the defendant. He said that in his opinion the 7million was to be paid to the directors of St. Savior to enable the vendor finalize matters pending so they could take over the school in the new term. He testified that the sale was not completed as it turned out that the persons acting as vendors were not directors of St. Savio. He prayed for refund of the 7 million from the

defendant for paying out the money to people who are not directors of St. Savio. Pw1 said he did not know directors of St. Savio School and that he trusted their lawyer the defendant herein.

In cross examination pw1 said that the plaintiff was incorporated in 1991 and that he was not a director of the plaintiff in 1991 but he became director in the year 2004. He however never produced in court CR12 form nor articles and memorandum of Association for the plaintiff. He said the letter of offer identified the defendant's clients as St. Savio secondary school. He said he was 17 years old at the inception of the purchase but he participated in the whole transaction. He confirmed one Guram Singh alias Handa was charged with conspiracy to defraud and found guilty of stealing 7 million. He said the money was hastily distributed in the bank. He said as per memorandum of understanding dated 12<sup>th</sup> February 1999 the deposit was to be deposited and interest was to be shared between parties. Following correspondences between the parties an agreement dated 4<sup>th</sup> March 1999 was done. He confirmed that the agreement had a clause indicating that the purchaser had inspected and officially searched the property before the agreement was done. He said plaintiff never searched the vendor but he knew that Mr. Handa was the director of St. Savio School. Pw1 said that his father Mwangi Wagondu who participated in this transaction is now 82 years old and sickly but he worked closely with him and he has adduced evidence as a director of the plaintiff.

In cross examination by the third party pw1 said the cheque paid to the defendant was a banker's cheque drawn on the instructions of the plaintiff. He said instructions were given on how the 7 million was to be spent; that the amount was to be used to clear debts to enable plaintiff take over the school in the new term. He said that in the transaction his father who was an Architect and planner was accompanied by one Kimathi who was a surveyor and both were knowledgeable on matters of land. He said he expected payment to be made in the name of the company. In re-examination pw1 said he has CR12 form from registrar of companies and that it is a public document. He said the plaintiff did not enjoin Mr. Handa in this suit because the money was given to the defendant and the defendant had responsibility on the good will of the transaction.

The defendant herein adopted his witness statement dated 27<sup>th</sup> March 2017 and bundle of documents dated 13<sup>th</sup> April 2005 as evidence. He testified that he has been sued as an agent of a disclosed principal who was well known to the plaintiff before he got into picture. Pw1 said criminal proceedings were instituted against his principals and all those who were involved and that they were convicted and sentenced. Criminal proceedings are reflected at page 59 of the defendant's documents. He said Mwangi Hillary Wagondu who is the director of the plaintiff clearly admitted that he commenced transactions in December 1998 and at page 6 of the criminal proceedings he admitted that the deal was sealed between him and the agent one Paul Kimani who was dealing with the property at that time and what he wanted was for the vendor to formally write to them. Defendant said he only came in to formalize the transaction which was already sealed. He added that at the time of writing offer letter none of the parties was known to him. He said the purchaser did not disclose to him that they knew the real owner of the property Mr. Handa and that he was surprised to learn that from the criminal proceedings; he pointed out page 22 & 23 of the criminal proceedings. Defendant said initially, the deposit was to be deposited in an interest earning account until the transaction was over but was changed by the plaintiffs Advocate the 3<sup>rd</sup> party herein. He added that the 3<sup>rd</sup> party is a senior lawyer and he had a duty of protecting his client's interest and that greater responsibility is placed on him by the doctrine of caveat emptor. Defendant said that there was a lot of pressure on his side to release the money as there was need to finalize the transaction within closure of the school term to enable the purchaser take over the school in the new term. He said that he issued a cheque which was to take 7 days to be cleared and following a complaint that it was to go beyond take over time and intervention by Mr. Wagondu to pay cash, he requested the bank manager to release the money in cash. He said that he had no business holding the money as he was acting on instructions given by the parties in accordance with the modified agreement. Defendant confirmed that he received 1 million as part payment of his legal fees as per the sale agreement and that he issued receipt to that effect. Defendant said he issued the letter of offer on instructions of the vendor and that he had no property to sell. He said negligence should be attributed to the 3<sup>rd</sup> party for altering the deposit clause. He blamed the 3<sup>rd</sup> party for abdicating his duty as a lawyer of the plaintiff. He prayed that this suit be dismissed for being misconceived and brought in bad faith as negligence cannot be attributed to him.

In cross examination by counsel for the plaintiff defendant said there was no express written instructions from St. Savio. He said agreement had been reached and his role was to reduce it to writing and that deposit from the plaintiff was to be paid upon execution of the agreement. He learnt after one month that the purported vendors were not the real owners of the property. He further stated that he released 7million and his client paid him 1million.on further cross examination he said the cheque and voucher were both dated 4<sup>th</sup> march 1999.He said that the greater burden to confirm whether the vendors were real fell on the purchasers Advocates.

On cross examination by the 3<sup>rd</sup> party the defendant said he had verbal instructions from the vendor and that the vendors came with original documents. He said he checked title documents and not identities of the vendor. He said he drew a cheque of 6million in the name of the vendor which was a limited liability company but they went back to his office and asked to be paid cash. Defendant said he paid cash after receiving a call from Mr. Wangondu who instructed him to pay cash. He said there was no legal fee agreement between him and the vendor. He produced in court a letter dated 4<sup>th</sup> march 1999( page 32 of defendants documents) enclosing a cheque in the name of St. Savio which indicate that he retained kshs 1 million as his legal fee. He denied holding the plaintiffs money. He said that at the point of releasing completion documents he learnt that the plaintiff had been coned.

In reexamination the defendant said the agreement provide for payment of legal fee upon execution of the agreement but the manner of payment is not provided. He said that he paid individuals on behalf of St. Savio and confirmed that there was no written agreement on payment of legal fee. He said he does not normally ask for identification cards from clients. He confirmed that remuneration order will be applicable when an Advocate and a client have disagreed on legal fees.

Plaintiff and the defendants filed written submissions.

Counsel for the plaintiff submitted that the defendant being an Advocate of 7 years' experience at the time of the agreement, was expected to act competently, diligently and ethically. He submitted that diligence in providing legal services involve identifying the clients one is dealing with and this is particularly important in conveyancing transaction where one of the completion documents are documents verifying the identity of the parties. He submitted that due diligence require identifying clients before acting for them especially where such colossal sum of money is changing hands. He further submitted that the fact that the defendant is an experienced a lawyer demand that he leaves a paper trail during payment. He urged court to find the defendant complicit in commission of the fraud. Plaintiff cited **Nairobi HCC No.539 of 2004 National Bank of Kenya vs,Muriu kamau and Njoroge Nani Mungai (Both trading as muriu Mungai & co. Advocates)** where **Justice Warsame** restated the holding in **Champion Motors spares Limited vs phadke & others (1969) E.A.42** where the court of Appeal held as follows:-

**“The law places a responsibility on all professionals to exercise prudent and reasonable care for the safety, security and protection and preservation of the property /life entrusted to them.”**

**The court held further 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 any act of gross negligence or ignorance of elementary matters of law constantly arising in practice.”**

Plaintiff submitted that identification of parties is one of the fundamentals of law which arise constantly in practice. He submitted that the defendant received 7 million on stakeholder basis and was supposed to return to the purchaser where the vendor fails or neglect to deliver on their obligations.

The defendant submitted that in December 1998 the plaintiff entered into negotiations with the directors of st Savio School to purchase property in title number NAIROBIBLOCK 79/783.He submitted that his role as an advocate was to draw an agreement. He submitted that both parties presented to the defendant a document titled memorandum of understanding on sale of plot no. NAIROBIBLOCK 79/783 which laid down terms and conditions to be incorporated in the agreement. He submitted that on 19<sup>th</sup> February the

third party who were acting for the plaintiff proposed amendment of the agreement to provide for payment of deposit of 10% to the vendor upon execution of the agreement and the execution of the agreement to be witnessed by 2 directors of the respective companies. He submitted that upon amendment of the agreement the 3<sup>rd</sup> party forwarded to him a cheque of 7 million .he did a cheque of 6 million and retained 1 million as part of his legal fee. He submitted that the person who presented himself as director of st Savio on Guram Singh alias Handa was later charged in Makadara chief magistrate's court and that he (defendant) was a state witness in the criminal case. He submitted that the said Guram Singh alia Handa was convicted of conspiracy to defraud and obtaining the same amount of 7 million being claimed in this court.

Defendant submitted that the 3<sup>rd</sup> party exposed his client to fraud by introducing an amendment on deposit paid to vendor's lawyer.

Defendant further submitted that he was wrongly sued in this matter as he had a disclosed principal who ought to have been sued. He added that the sale agreement was between the plaintiff as a purchaser and a disclosed vendor; and that he was not privy to the contract and that the plaintiff had an Advocate who owed him a duty of care. He submitted that there was misjoinder or non-joinder of parties.

I have considered evidence adduced and submissions by both plaintiff and the defendant. There is no dispute that the plaintiff who was the purchaser in alleged land transaction paid kshs 7 million to the defendant who was acting for the vendor. Payment was done through its lawyer the 3<sup>rd</sup> party herein. The fact that the purported owner of property was a limited liability company was a fact known by all the parties involved including the lawyers. The initial arrangement as per the agreement was to have the deposit of kshs 7 million which was 10% of the purchase price deposited in a joint interest earning account. From evidence adduced parties agreed to amend that part of the agreement to allow release of deposit to the vendor. This was meant to facilitate the vendor in clearing pending bills during school closure time to enable the purchaser take over when schools open. There is no doubt that the money paid as deposit ended up in wrong hands. Criminal proceedings produced confirm that the people who received 6 million being part of the deposit were fraudsters. I wish to consider the following issues:-

1. Whether the defendant is guilty of complicity and gross negligence
2. Whether the defendant was properly paid kshs 1 million
3. Who should pay back kshs 6 million

The defendant knew that the 3<sup>rd</sup> party was acting for the purchaser. They agreed on the terms of the agreement. Upon amendment of the agreement to provide for release of the deposit, the defendant alleged that the purchaser talked to him on phone instructing him (defendant) to pay out the deposit in cash. He added that he also called the 3<sup>rd</sup> party informing him of the new developments. There is no confirmation that new instructions were given through telephone conversation. As a lawyer I would have expected the defendant to ask his colleague the 3<sup>rd</sup> party herein, to reduce the new instructions into writing. There is no confirmation that indeed it is the purchaser or his Advocate who spoke to him on phone. Having known that the 3<sup>rd</sup> party was acting for the purchaser in the transaction, it was incumbent upon the defendant to confirm the new instructions. There is nothing to show that the defendant got instructions to pay cash from the 3<sup>rd</sup> party nor his client; and even after deciding to pay the alleged directors of st Savio Ltd, defendant had a duty to confirm if the people he was paying were indeed the directors of the vendor. In cross examination by the 3<sup>rd</sup> party the defendant confirmed that he never checked identification of the people he was paying. He should have confirmed their identities more so in a situation where mode of payment had changed from cheque to cash. I agree with the holding in **Champion Motors spares Limited vs phadke & others (1969) E.A.42** that the law places a responsibility on all professionals to exercise prudent and reasonable care for the safety, security, protection and preservation of the property /life entrusted to them and that an Advocate is liable for any act of gross negligence or ignorance of elementary matters of law constantly arising in practice.Verification of recipients of such colossal amount of money in cash was crucial. Every lawyer is expected to verify identity of parties before making

payments or executing documents. Whereas I agree that the defendant owed duty to his client, he also had a duty to guard against his action causing loss to third parties. The defendant knew the vendor was a company. When he decided to pay the deposit in cash, he should have ensured that he was paying the directors of the vendor. The defendant's omission occasioned loss to the plaintiff.

In so far as kshs 1 million being the defendant's legal fee is concerned, Defendant testified that he paid his clients who in turn paid him his legal fee. Cross examination however shows that defendant drew a cheque of 6 million in the name of St. Savio meaning he paid 6 million to the fraudsters and retained 1 million for himself. He admitted that there was no legal fee agreement between him and his clients. If there is no agreement, how did the figure of 1 million reach in the year 1999? Clause 13 of the sale agreement indicates that each party agrees to bear their respective legal fee. There is no mention that that part of the deposit be retained by vendors Advocate as legal fee. Retention of 1 million by the defendant cannot be construed to be payment of legal fee. Even if the defendant was paid by his clients as he alleged, he has admitted both in evidence and submissions that the 7 million was the subject of the criminal charges against his clients; the 7 million was therefore proceeds of crime to his clients and he shouldn't have benefited from the same. I refer to the case of **Mistry Amar Singh v Serwano Wofunira Kulobya [1963] EA 408**, where the court held that whenever an act of illegality is brought to the attention of the Court, then the court will not allow anybody to benefit from such an illegality. From the foregoing I find that the defendant is holding the plaintiff's money being kshs 1 million.

In respect of the 6 million, criminal proceedings produced herein clearly confirm that Gurman Singh Alias Mr. Handa was arrested, and charged in court with four counts. He was convicted of two counts which are conspiracy to defraud Mwangi H.C. Wangonde kshs 70 million and obtaining 7 million from the said Mwangi Wangonde. From page 7 of the judgment it is evident that money was released to Gurman Singh, his agent Mr. Kimani and Mike Anderson. None of them has been enjoined in this suit despite the fact that they are known. The main suspect Gurman Singh having been convicted for obtaining the 6 million he should have been enjoined in this suit for recovery of the 6 million. I do not see any fault on part of the 3<sup>rd</sup> party. Plaintiff is entitled to refund of kshs 1 million from the defendant.

I therefore enter judgment for the plaintiff against the defendant for kshs 1 Million plus costs and interest.

Judgment dated, signed, and delivered at Nairobi this 28<sup>TH</sup> day of July 2017.

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

.....court Assistant

.....counsel for the plaintiff

.....counsel for the defendant