



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 288 OF 2010

HENRY KURIA KARARA T/A WESTMINSTER MERCHANTS.....PLAINTIFF
VERSUS
NATION MEDIA GROUP LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff's Complaint was dated and filed on 6th May 2010. It sought judgment against the Defendant for:-
 - a. **Kshs 2,900,650/=.**
 - b. **Damages for loss of business and future earnings.**
 - c. **Costs and interest of this suit at court rates.**
2. On 4th June 2010, M/S Wakini Kiarie & Co Advocates for the Plaintiff applied for judgment to be entered against the Defendant after it entered appearance but failed to file a defence within the stipulated time. In a letter dated 2nd July 2010 and filed on 5th July 2010, the said advocates informed the Deputy Registrar of the High Court of Kenya Milimani Commercial courts that they had abandoned the claim for Loss of business and future earnings.
3. Interlocutory Judgment was therefore entered against the Defendant for the sum of Kshs 2,900,650/= (sic). A decree for the said sum and costs was issued on 28th June 2010. A Certificate of Costs for the sum of Kshs 149,274.75 was issued on 14th July 2010 whereafter Warrants of Attachment of Property were issued to Eliud M. Kingara t/a Starline Commercial Traders.
4. M/S Archer & Wilcock Advocates filed a Notice of Appointment of Advocates for the Defendant on 26th July 2010 and a Chamber Summons application that was also dated the same date. The same was heard and on 15th November 2011, Muga Apondi J set aside the *ex parte* judgment that had been entered on 26th June 2010 and granted the Defendant fifteen (15) days from the date of the said Ruling to file a defence.
5. The Defendant filed its Defence dated 22nd November 2011 on 24th November 2011. On 6th December 2011, the Plaintiff filed a Reply to Defence dated 5th December 2011. The Plaintiff's

- List of Documents, List of Witnesses and Witness Statement were all dated 24th July 2012 and filed on 9th August 2012. His 1st Further List of Documents was dated 20th March 2013 and filed on 21st March 2013 while his 2nd Further List of Documents was dated 30th May 2013 and filed on 28th August 2013. Its Written Submissions were dated 16th December 2014 and filed on 18th December 2014.
6. Despite having been given an opportunity, the Defendant did not file a List of Witnesses and Witness Statements and List and Bundle of Documents and thus did not call any witnesses to support its case. However, its Written Submissions were dated 10th December 2014 and filed on 16th December 2014.
 7. Parties informed the court that they did not wish to highlight their respective written submissions. The judgment herein is therefore based on the said written submissions.

THE PLAINTIFF'S CASE

8. On or about 19th February 2010, the Plaintiff paid for advertisements which the Defendant was to place in the Daily Nation of 22nd and 24th February 2010. The said advertisements were to notify the general public of an intended auction of several vehicles on 26th February 2010 and inviting their bids for the same.
9. On 22nd February 2010, the Defendant placed the advertisement but indicated a different name of auctioneers. The following day, the Defendant placed another advertisement with the word "**cancelled**" on the name of the wrong auctioneers. The correct advertisement bearing its name was placed in the Daily Nation on 24th February 2010.
10. It was the Plaintiff's case that the erroneous advertisement had caused confusion and had misled the members of the public to believe that the said intended auction had been cancelled. As a result, the Plaintiff said that he had suffered great loss and damages which he particularised as follows:-
 - a. **Loss of sales commission at Kshs 2,900,650/=.**
 - b. **Loss of business and future earning, particulars which were to be adduced at the hearing hereof.**
11. He therefore sought to have its claim allowed as prayed.

THE DEFENDANT'S CASE

12. The Defendant denied that the Plaintiff paid for the advertisement he wanted placed in the Daily Nation. It was its contention that the Plaintiff issued cheque No 000022 drawn on Co-operative Bank of Kenya Limited Moi Avenue Branch in the sum of Kshs 50,143/= that was dishonoured after payment was stopped and that the Plaintiff was therefore barred from making the claim herein.
13. It further stated that its running the advertisement with the word "**cancelled**" on 23rd February 2010 did not mislead the public as had been alleged by the Plaintiff and thus urged the court to dismiss the Plaintiff's suit against it with costs.

LEGAL ANALYSIS

14. In his List of Documents dated 24th July 2012 and filed on 9th August 2012, the Plaintiff annexed several documents showing that his firm was known as "**Westminister Merchants**" and that the Defendant had carried advertisements in the said name on several occasions previously. It was his argument that the running of the advertisement on 22nd February 2010 in the name of "**Westminister Commercial Traders**" confused members of public as they failed to bid for the vehicles that were scheduled for sale by public auction on 26th February 2010.
15. The schedule of vehicles to be sold was on page 2 of the said List and Bundle of Documents. The sale price for the twenty six (26) vehicles was given as Kshs 29,650,000/=. It is from this figure that the Plaintiff derived the computation of his commission in the sum of Kshs 2, 900, 650/=

- (sic), which was ten (10%) per cent of the said sale price. This amount actually ought to have been Kshs 2,965,000/= as shown on page 9 of the said List of Bundle of Documents.
16. As could be seen in paragraph 2 hereinabove, the Plaintiff appeared have abandoned his claim for future business in the sum of Kshs 59,300,000/= which had been set out in his advocates' letter to the Defendant dated 19th March 2010 on pg 9 of the said List and Bundle of Documents. However, in his Written Submissions, the Plaintiff appeared to have revived his interest in his claim for loss of business and future earnings as he submitted that he was entitled to the same.
 17. Although he submitted that he suffered loss as a result of commission and future business, he did not demonstrate how a one (1) time event of placing of an advertisement bearing the name of another auctioneer impacted on his business, a loss that he had calculated for a period spanning twenty (20) years. He did not provide any justification to show why he applied a multiplier of twenty (20) years in the calculation of this claim.
 18. There did also appear to be an assumption that the Plaintiff would be making a commission of Kshs 2,965,000/= for the next twenty (20) years. The court cannot accept such a multiplier and income merely because the Defendant did not call evidence to rebut the same. This was a special damage that was subject to strict proof. The Plaintiff therefore failed to prove this claim and it must fail in its entirety.
 19. Notably, the Defendant did not call or adduce any evidence to demonstrate that the Plaintiff did not pay for the said advertisement or that his cheque was returned unpaid as it had alleged in its Defence. As the evidence was not rebutted by the Defendant and the same was not an issue that was before the court for determination, the most the court could observe was that the Plaintiff paid a sum of Kshs 25,071/= vide cheque No 000026 a copy which was annexed on pg 3 of his List and Bundle of Documents that was filed on 9th August 2012.
 20. The court did also note the documents from Leakey's' Storage Limited on pp 1- 24 of the Plaintiff's Further List of Documents. However, the Plaintiff did not show the nexus of the said documents and his claim of the ten (10%) per cent commission, in the sum of Kshs 2,965,000/=. Indeed it was not contested that the Plaintiff had advertised for the sale of the twenty six (26) motor vehicles or that the said vehicles had been stored at Leakey's Storage Limited. The court therefore found no relevance of the said documentation.
 21. In his evidence and submissions, the Plaintiff testified that members of the public called "**Westminster Commercial Traders**" to enquire about the intended sale of the said vehicles. The contacts given in copies of the advertisements in the Plaintiff's Further List of Documents dated 20th March 2013 and filed on 21st March 2013 was shown as "**Westminster Merchants**" Narshi House 1st Floor Moktar Daddah Street P.O. Box 12548 00400 Tel 230789/244510 Nairobi. This was the same contact that was shown in the erroneous advertisements by the Defendant.
 22. Noteworthy, the Plaintiff did not provide any documentation to show that there was another entity by the name of Westminster Commercial Traders. Indeed, a logical conclusion would be that members of public would not have known the name of the auctioneers as they would be seeing it for the first time in the Daily Nation and would be expected to call the telephone numbers that had been indicated in the said advertisement.
 23. Similarly, if the Plaintiff's clients had called the owner of "**Westminster Commercial Traders**" about the auction, it would have been expected that they would have been re-directed to him to enable them place their bids. In any event, the question that begs an answer is where did members of the public get the telephone number of "**Westminster Commercial Traders**" when the advertisements did not bear any of their contacts?
 24. As was rightly pointed out by the Defendants, advertisements carried in the Daily Nation showed the location of the public auction. The same was to be held on Friday 26th February 2010 at Leakey's Storage Limited, Kitui Road, Off Kampala Road Nairobi. The name of the auctioneer who had instructions to dispose of the subject vehicles was therefore immaterial.
 25. Be that as it may, it was correct as the Plaintiff submitted that the word "**cancelled**" on the advertisement of 23rd February 2010 could have caused confusion. A reasonable man would not have been expected to know that what the Defendant was cancelling was the name "**Westminster Commercial Traders.**"
 26. Having said so, the advertisement with the correct information was carried in the Daily Nation of 24th February 2010 which was the first date of viewing of the subject motor vehicles. The second

- day for viewing was on 25th February 2010, with the sale being scheduled for 26th February 2010.
27. In his evidence, the Plaintiff testified that only one (1) client called him and brought three (3) vehicles at the auction. This therefore lent credence to the Defendant's assertions that interested bidders had the liberty of inspecting the subject motor vehicles and/or called the Plaintiff to seek clarification of whether or not the intended auction had been cancelled.
28. It did therefore appear to the court that members of public had been given two (2) days' notice of the intended sale of the subject motor vehicles which was the original intention of the initial advertisement of 22nd February 2010 and that any interested bidder ought to have taken such reasonable steps to have ascertained the status of the auction and/or visited Leakey's Storage Limited to inspect the subject vehicles when the advertisement appeared in the Daily Nation on 24th February 2010.
29. As regards the client who purchased three (3) vehicles, the Plaintiff did not provide any evidence to show what he recovered. These three (3) vehicles were also part of the sum of Kshs 29,650,000/= making it difficult for the court to make a definite conclusion that the commission the Plaintiff was entitled to was Kshs 2,960,000/=.
30. Audited accounts for previous years as had been proposed by the Defendant or any relevant documentary evidence were critical in this case. What was concern to the court was that if indeed the Plaintiff had managed to sell the said three (3) vehicles, nothing would have been easier than for him to have annexed proof of such sale and the amount the said vehicles had been sold. This would have given the court clearer understanding of how much the Plaintiff would have been entitled to as commission based on those three (3) vehicles.
31. Accordingly, having considered the pleadings herein and the written submissions by the respective parties, the court was of the firm view that the Plaintiff's claim was largely speculative. He did not show a nexus between the placing of the advertisement of 23rd February 2010 and the failure by members of public to visit Leakey's Storage Limited to bid for the subject vehicles.
32. The fact that the Defendant did not call any evidence to rebut his evidence was not sufficient reason for the court to have entered judgment in his favour against the Defendant as he had sought in his Plaint. As was stated hereinabove, the Plaintiff's claim was a special damages claim that had to be strictly proven. This was, however, not proven. His claim appeared remote and unsubstantiated.
33. Evidently, the burden of proof was on the Plaintiff but he failed to discharge the same by not proving his case to the required standard of proof. This lends the court to come to only one conclusion, which was that the Plaintiff's case had to fail in its entirety.

DISPOSITION

34. Accordingly, the Plaintiff's suit dated and filed on 6th May 2010 is hereby dismissed with costs to the Defendant.
35. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of April 2015

J. KAMAU

JUDGE