



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 822 OF 2010

CANUK HOLDINGS LIMITED.....PLAINTIFF

VERSUS

- 1. PATRICK LUTTA ^{T/A} LUTTA & COMPANY ADVOCATES**
- 2. ENOCK TUITOEK**
- 3. MAURICE ALDOUS OPAR.....DEFENDANTS**

JUDGMENT

1. The Plaintiff has brought this suit against the Defendants for restitution for KShs. 60,360,570/= plus interest thereon at 12% per annum on the said amount. It is alleged that the Plaintiff has been deprived the said sum after having paid the same for the purchase of a property known as L.R. No. 209/13561 (*'the suit property'*) measuring 3.656 hectares which purchase failed as a result of an alleged fraud on the part of the Defendants.
2. By two agreements dated 31st July, 2007, respectively, the 2nd and 3rd Defendants, posing as Directors of Brentwood Traders Limited, sold to the Plaintiff the suit property. In the first agreement, the agreed purchase price was KShs. 23,764,000/=. In the second agreement, it was agreed that negotiation fees and other clearance charges was KShs.35,646,000/=. Payment for the total sum of Kshs.59,410,000/= was made to the 1st Defendant for the alleged vendor as follows:-

Cheque No. 235978	30 th July, 2007	KShs. 5,941,000/=
Cheque No. 235979	23 rd August,2007	KShs. 5,941,000/=
Cheque No. 235983	2 nd November,2007	KShs. 11,882,000/=
Bankers Cheque No. 001361	2 nd November,2007	KShs. 35,646,000/=

3. A transfer was thereafter purportedly registered in favour of the Plaintiff by a transfer dated 7th November, 2007. Despite the said transfer, the Plaintiff was unable to take vacant possession of the suit property. The Plaintiff particularised the fraud of the Defendants in paragraph 12 of the Plaintiff and pleaded that as a result of the said fraudulent acts of the part of the Defendants, the plaintiff had suffered loss and damage.
4. Zohar Pirbhai (PW1) testified that the 2nd and 3rd Defendants were introduced to the Plaintiff as the Directors of Brentwood Traders Ltd by one Siddart Patel in the year 2007. That after the purported transfer, the licensed surveyor sent to the property to mark out the beacons was expelled

from the site on account that the suit property was not the Plaintiff's. On conducting a search at the lands office, the Plaintiff confirmed that the title it had received from the Defendant was not genuine. The Plaintiff thereafter conducted a search at the Registry of Companies whereby it discovered that the true Directors/Shareholders of Brentwood Traders Limited were Kantibhai Maganbhai Patel, Harish Ashabhai Patel and Pritibala Shah and not the 2nd and 3rd Defendants. The Plaintiff later discovered that the money paid for the purchase of the suit property was never released to Brentwood Traders Limited but was paid to the 2nd and 3rd Defendants as entities associated with the said Defendants. He claimed that two other payments of KShs.6,750,000/= each were made to Siddhart Patel and Mr. Pramod Patel who was the Plaintiff's advocate in the transaction. PW1 denied having authorised any payment to Mr. Pramod Patel and concluded that the Plaintiff had been defrauded.

5. On cross-examination, PW1 stated that when he and his fellow directors visited the suit property before the transaction, there was no interference. That it was upon their advocate to protect their interest in the transaction and that the 1st Defendant too should have exercised due diligence to check whether his client had power to sell the property. PW1 insisted that the 1st Defendant should have carried out a search at the company registry to establish who the Directors of Brentwood Traders Limited were before acting for that company. He confirmed that the price quoted in the transfer document PExh 1 pages 20-25 was KShs.23,764,000/= which he claimed the Plaintiff was advised to put its Advocate so as to pay less tax on the transfer. He admitted that the 1st Defendant's role in the transaction was to receive money and surrender it to Brentwood Traders Limited. He confirmed that the Plaintiff had sued Mr. Pramod Patel in Nairobi HCCC No. 455 of 2010 for professional negligence and that the amount claimed in that suit was the same as in this suit. He concluded that when he met the 2nd and 3rd Defendants in Siddart's office, the 1st Defendant was not present.
6. Mr. Edwin Wafula (PW2), the lands registrar, testified that the title presented to him by the Plaintiff was fraudulent. He stated that the said title did not correspond with the one retained at the land registry, that entry No. 2 in the Plaintiff's title read that the property had been transferred to the Plaintiff while the one retained at the lands office bore the names of Brentwood Traders Limited as the owner of the property had no such entry. He testified that the signature on the Plaintiff's title bore an alleged signature of G.G. Gachihi which signature did not correspond with G.G. Gachihi's true signature. That when a new grant is prepared, one is required to pay stamp duty and the title must be franked but the title which the Plaintiff held was not franked although stamp duty had been assessed on the face of it. He stated that the land registry seal on the correct title was bolder than the one affixed on the Plaintiff's title and concluded that the Plaintiff's title was therefore a product of fraud.
7. The 1st and 2nd Defendants filed defences and denied the alleged fraud while interlocutory judgment was entered against the 3rd Defendant on 7th October, 2011 for failing to appear or file any defence.
8. The 1st Defendant (DW1) testified that he acted for the 2nd and 3rd Defendants as the Directors of Brentwood Traders Limited in the transaction. He told the court that there was a meeting between the 2nd and 3rd Defendants and the Plaintiff's Directors wherein it was agreed that Brentwood Traders Limited would sell the property to the Plaintiff. He was then instructed to prepare a sale agreement. That it was Mr. Pramod Patel's idea that he prepares the two agreements produced by the Plaintiff. That he attested to the first agreement but not the second one since there were some discussions and agreements to be made on it. The agreements were forwarded to Mr. Pramod Patel who was acting for the Plaintiff. The transfer was prepared by Mr. Pramod to whom he forwarded the original title given to him by the 2nd and 3rd Defendants. He testified that, upon the signing of the transfer, he released the deposit in accordance with the instructions he received. That he had no idea that the 2nd and 3rd Defendants were not directors of Brentwood Traders Limited. He was categorical that he had met the 2nd and 3rd Defendants at Pramod Patel's office where they produced the Memorandum and Articles of Association, Certificate of Incorporation and company resolution of Brentwood Traders Ltd. That he performed his duty in the transaction fully as the advocate for the vendor and that it was upon the advocate for the purchaser to investigate the authenticity of the title.

9. The 1st Defendant denied breaching his professional undertaking and maintained that he had a duty to disburse the monies received as per instructions of his client. That he had only retained KShs.3 Million as his fees, KShs. 1.6 Million being for the particular transaction and the balance as fees in other matters where he had acted for the 2nd and 3rd Defendants. He stated that he was instructed to pay Siddart N. Patel Kshs. 6,750,000/= by the 2nd and 3rd Defendants and that it never occurred to him that the two were giving him self-serving instructions and not those of the vendor. He contended that he cannot be held liable for the fraud since he never met the directors of the Plaintiff at the conception of the transaction and that he had relied on the genuineness of the documents presented to him by the 2nd and 3rd Defendants to act in the transaction. According to him, he had conducted himself professionally.
10. The 2nd Defendant did not appear at the trial and the parties closed their respective cases. The Plaintiff and the 1st Defendant filed their respective submissions which were ably hi-lighted by their respective counsels. There I have carefully considered and I need not reproduce them here.
11. Having considered the pleadings and the evidence on record, it is clear that there was a contract of sale of the suit property by the 2nd and 3rd Defendant as directors Brentwood Traders Ltd on the one hand and the Plaintiff on the other. It is also not disputed that pursuant to the said contract, whether lawful or fraudulent, the Plaintiff paid a total sum of Ksh.59,410,000/- as the purchase price and negotiation and other charges while it did not get any value therefor. It is also not in dispute that the 2nd and 3rd Defendants were neither directors nor shareholders of Brentwood Traders Ltd. It was agreed that in the impugned transaction, the 1st Defendant acted for the 2nd and 3rd Defendants while the Plaintiff was represented by one Pramond Patel, Advocate.
12. Whilst the parties filed a total of 17 issues, my view is that the same could be reduced to three (3). These are; whether the 1st Defendant was professionally negligence; whether the Defendants were fraudulent in their dealings with the Plaintiff and if so, whether they are liable to the Plaintiff for the sum claimed in the plaint. Finally, the order as to costs.
13. On the first issue, the evidence on record shows that the Plaintiffs were represented by Pramond Patel whilst the 1st Defendant represented the 2nd and 3rd Defendant. I have always known the law to be that an advocate owes first and foremost a professional duty of care to his client emanating from the contract for legal services between the two. The Advocate is usually paid by his client for that professional duty. The Advocate also owes a professional duty in his dealing with his professional colleagues as well as to court. This duty extends to but not limited to acting in good faith and being truthful. Of course while executing his duties, an Advocate should guard against his actions causing deliberate damage or loss to third parties unless that is a natural consequence of his professional duty undertaken in good faith in safeguarding his client's instructions. I think it would not only be unfair but also preposterous to extend an Advocates professional duty beyond the parameters I have set above.
14. PW 1 testified that the 1st Defendant was professionally negligent for having failed to carry out a search at the Registrar of Companies to ascertain the proper shareholding and directorship of Brentwood Traders Ltd. The 1st Defendant on his part testified that, it was not his duty to do so. I agree with the position taken by the 1st Defendant. The moment the 1st Defendant had individuals before him who presented a Memorandum and Articles of Brentwood Traders Ltd showing that they were not only shareholder but also directors of that company, the 1st Defendant was entitled to trust his clients. It is the Plaintiff's Advocate who in my view, should have verified the veracity of the transaction by carrying out searches both at the Lands Office and at the Companies Registry.
15. As regards the Plaintiffs submission on the 1st Defendants alleged breach of Professional undertaking, I will deal with it when considering the second issue. Accordingly, I find that the 1st Defendant was not in breach of his professional duty.
16. The next issue is whether the Defendants were fraudulent in their dealing with the Plaintiff. An allegation of fraud is a very serious indictment against a party to whom it is made. It is quasi-criminal with the result that, courts have consistently held that the standard of proving such an allegation in civil cases is higher than on a balance of probability. A party alleging fraud must therefore adduce evidence to prove the allegation to the required standard. The allegation must

also not be generalised and must not lack specificity. Such an allegation must be precisely pleaded and full allegations of the facts and circumstances should be detailed showing that there was fraud.

In **Bullen, Leake and Jacob's Precedents and Pleadings, 12th Edition page 452** it is stated:-

“General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

17. In **Ratilal Govedhabhai Patel v. Lalji Makanyi (1957) EA 314** it was held that:-

“ Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

18. And in **Kerr on Law of Fraud & Mistake 7th Edn. Page 644** it is stated as follows of fraud:-

“It is not easy to give a precise definition of what constitutes fraud in the extensive signification in which that term is understood by Civil Courts of justice. The Courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety, and rather than define it, the courts have reserved unto themselves the liberty to deal with it under whatever form it may present itself. Fraud, in the contemplation of a civil court may be used to include properly all acts, omissions and concealment which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another or by which an undue or unconscious advantage is taken of another... Fraud in all cases implies a willful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, or what he is entitled to.” (emphasis mine)

19. It is therefore, clear from foregoing that fraud should not only be specifically pleaded, it must be proved by cogent evidence. That the standard proof in a claim for fraud is a little higher than on a balance of probability that is required in normal civil claims. In its plaint at paragraph 12, the Plaintiff pleaded that the Defendants had colluded to defraud it. It gave the particulars of fraud as; the 2nd and 3rd Defendants presenting themselves as directors of Brentwood Traders Ltd which they were not; the Defendants purporting to transfer a fraudulent document of title to the Plaintiff; the Defendants paying the Plaintiff's Advocate, Pramond Patel, Kshs.6,750,000/- at the conclusion of sale; the 1st Defendant representing the 2nd and 3rd Defendant with full knowledge that they did not own the suit property and his receipt of Kshs.59,410,000/- from the Plaintiff on behalf of the vendor with the knowledge that the 2nd and 3rd Defendants were not directors of Brentwood but were fraudsters. Those then were the particulars of fraud which the Plaintiff pleaded and which, by law, the Plaintiff was called upon to prove at the trial.

20. In his defence dated 6th April, 2011, the 2nd Defendant denied ever entering a Sale Agreement dated 31st July, 2007 of the suit property; he insisted that he was a director of Brentwood Traders Ltd and that the money he received was not for the Sale Agreement dated 31st July, 2007. From the sale evidence on record, it is clear that the 2nd and 3rd Defendants executed the Sale Agreements dated 31st July, 2007 in respect of which a sum of Kshs.59,410,000/- was paid by the Plaintiff. The said Defendants executed the said agreements as directors of Brentwood Traders Ltd and not otherwise. It is clear from PExh pages 36 – 38 that from the records at the companies registry, neither the 2nd nor the 3rd Defendant were directors or shareholders of Brentwood Traders Ltd.

21. At page 39 of P Exhibit 1, is a letter dated 31st July, 2007 by the 2nd and 3rd Defendants addressed to Pramond Patel Advocate indicating that a sum of Kshs.6,750,000/- was to be paid to him for onward transmission to an undisclosed principal at the conclusion of the transaction. In his testimony, the 1st Defendant stated that this sum was paid to one Siddhart Patel on 2nd November, 2007 (D Exhibit 10) page 42. In his testimony, PW 2 informed the court that the title document that the Plaintiff was given as a result of the transaction was a fraud. The same did not match the

- original copy held at the lands Office. The 2nd Defendant did not testify to prove his defence or contradict the Plaintiff's evidence.
22. From the evidence on record therefore, I am satisfied that the 2nd and 3rd Defendant were not Directors of Brentwood Traders Ltd. They presented to the Plaintiff a fraudulent title document for the suit property and caused to be made a payment of Ksh.6,750,000/- to one Siddhart Patel for reasons not clear to the court. The Plaintiff has accordingly proved his case for fraud as against the 2nd and 3rd Defendant.
23. On the Transfer of the fraudulent document of title to the suit property and the payment of Kshs.6,750,000/- to Pramond Patel, the 1st Defendant's testimony was clear. He told the court that he received the letter dated 31st July, 2007 from the 2nd and 3rd Defendant authorizing him to pay the sum of Kshs.6.750,000/- which he did in November, 2007. That the document of title was brought to his offices by the 2nd and 3rd Defendant whereupon he transmitted the same to the Plaintiffs Advocates. This evidence was unshaken. I have already found that the 1st Defendant was professionally bound to his clients to carry out all their instructions that seemed to be prima facie lawful and not inherently illegal. There was no evidence that was tendered to show that on a prima facie basis, the title presented to the 1st Defendant was fraudulent. There is no rule of thumb which he should have applied to suspect that the title was not genuine. Neither was there any evidence tendered to show that withholding Ksh.6,750,000/- from the purchase price and paying the same to the Plaintiff's Advocate for onward transmission to a 3rd party was illegal. In my view, these two particulars of fraud were not proved as against the 1st Defendant.
24. The other allegations against the 1st Defendant were that he received Ksh.59,410,000/- on behalf of the vendor with the knowledge that the 2nd and 3rd Defendant were not directors of Brentwood and that he represented them whilst he knew that they did not own the suit property. It was further submitted that the 1st Defendant released funds in breach of his professional undertaking which was evidence of fraud. That since the 1st Defendant had previously acted for the 2nd and 3rd Defendant and it had turned out in that transaction that they were fraudulent, he knew that they were fraudsters. It was further submitted that the speed at which the transaction took was clear evidence of fraud. The case of **JOSE ESTATES LTD VS MUTHUMU FARM LTD & 2 OTHERS (2006) EKLR** was cited in support of those submissions.
25. On the issue of speed of the transaction, in the case of Jose Estates Ltd that the Plaintiff relied on, the purchaser of the property was incorporated 10 days before an advertisement for sale of the subject was published; a consent by the land control board was made within two (2) days of the advertisement, offer and acceptance. Then the transfer was effected two months later. Between the incorporation of purchaser and the sale and transfer of the property in that case, there was a record of two months. In the present case, the Sale Agreements were executed on 31st July, 2007, the transfer was drawn and executed on 7th November, 2007 and the same was registered on 11th December, 2007. There was a period of approximately four (4) months. I do not think the period the transaction took can be held to be evidence of fraud on the part of the 1st Defendant.
26. There was no evidence that was produced to show that the 1st Defendant knew before hand that the 2nd and 3rd Defendant were not directors of Brentwood Traders Ltd. His uncontroverted evidence was that when they presented themselves before him with documents relating to that company, there was nothing to arouse his suspicion as to their genuineness or lack of it. As regards his previous dealings with the two, he told the court that he had represented them in another sale where it turned out to be fraudulent. That he only discovered this fact in 2010, way after the transaction the subject of this suit which was in 2007. On the alleged breach of professional undertaking, I do not think that the 1st Defendant released the monies fraudulently. The monies were to be held until after the transfer was registered. The transfer was successfully registered only that it turned out that it was fraudulent. Even if the 1st Defendant released some monies before the transfer, that per se cannot be evidence of fraud. If the registration of transfer had failed then the 1st Defendant would have been called upon to honour his professional undertaking. The registration of the transaction was successful.
27. From the foregoing, it is clear that there was no cogent evidence to show that the 1st Defendant

had knowledge that the 2nd and 3rd Defendant were fraudsters and not directors of Brentwood; that he released the funds with a fraudulent intention or that he was involved in any way in the identification of the suit property, the falsification of the documents of Brentwood as well as the title to the suit property. Further, there was no evidence to show that he acted in the transaction otherwise than as an advocate. In any event, it is clear that in the entire transaction, the only benefit that enured to the 1st Defendant was payment of his legal fees and nothing more. In my view therefore, no case for fraud has been established as proved as against the 1st Defendant.

28. One issue which was raised is the existence of HCCC No. 445 of 2010. I think I should not pronounce myself on anything regarding that suit as it is yet to be heard. I also restrain from commenting on the efficacy of the two sale agreements for the suit property so as not to prejudice the parties in that suit.

29. In the premises, I am satisfied that the Plaintiff has proved his case as against the 2nd and 3rd Defendant but not as against the 1st Defendant. I make the following orders: -

- a. The Plaintiff's case against the 1st Defendant is dismissed with costs.
- b. Judgment is entered against the 2nd and 3rd Defendant in favour of the Plaintiff for a sum of Ksh.60,360,570/- together with interest thereon at 12% and costs.

It is so decreed.

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A MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 21st Day of September, 2015

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JUDGE