



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 279 OF 2012

STEPHEN NJIHIA MBUGUA.....APPELLANT

VERSUS

STEPHEN KIHARA MUCHUI

FREDRICK OTIENO

MUCHUI & COMPANY ADVOCATES.....RESPONDENTS

(Appeal from the original judgment and decree of Hon. Riechi (CM) in Milimani Commercial Courts, CMCC No. 3541 of 2007 delivered on 23rd January 2012)

JUDGMENT

1. The appellant **Stephen Njihia Mbugua** sued the respondents who were his counsels in a land transaction following loss of a deposit sum of Kshs 2,500,000/= to one **Fredrick Toroitich**. The appellant was aggrieved by his advocates whom he alleges acted negligently and without due diligence causing him to lose the hefty sum of money and the transaction generally. Upon hearing the matter, the trial court found that the respondent's had acted diligently and could not be held liable for a land transaction which emanated from criminal activities. The court further stated that the respondents acted with utmost professional etiquette and proceeded to dismiss the claim.
2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:
 - a. *The Learned Magistrate erred in law and in fact in dismissing the appellants claim;*
 - b. *The Learned Magistrate erred in law and fact in misconstruing the nature of the appellants claim, the applicable law and the standard of proof required;*
 - c. *That the Learned Magistrate erred in law and fact in failing to evaluate the totality of the evidence adduced before him;*
 - d. *That the Learned Magistrate erred in law and fact in finding that the appellant had established his case on a balance of probability;*
 - e. *That the Learned Magistrate erred in law and fact in failing to find that the respondent had been professionally negligent, failed to exercise their skill and due diligence when they acted for the appellant and that the power of attorney relied on was fraudulent and not valid in law.*
3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. In the case of **Peter v. Sunday Post (1958)EA at Pg. 429** the Court of Appeal held thus:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

When the appeal came up for hearing before this court, parties consented to have the appeal disposed of by written submissions. I have re-evaluated the case before the trial court. I have also considered the rival written submissions before I go into the substance of the appeal I wish to first set out in brief the history behind this appeal.

4. According to the court record, the Appellant wished to purchase 5.2 acres of land, LR. 675/26 on Ridgeways road. He contracted the services of the respondents, due to their expertise in Law to oversee the acquisition. The land cost a sum of Kshs 25,000,000/= with a 10% deposit payable to the vendor amounting to kshs 2,500,000/= to be paid upon execution of the agreement for Sale. The vendor through her special power of attorney, proposed that the deposit be released to her for purposes of payment of rates and rent and the appellant agreed after seeking extension of the standard completion of 90 days to 120 days, which he was granted. The appellant later learnt that the vendor's power of attorney was a swindler after the vendor confirmed that she was not selling her property. The appellant then sought to recover his deposit without success. Subsequently, he sued his advocates, the respondents herein for professional negligence.
5. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. The appellant has appealed on various grounds. The first four grounds are somewhat interrelated. He has argued that, the Honorable Magistrate erred in misconstruing the nature of the appellants claim, applicable law, standard of proof required, failing to evaluate the totality of evidence and eventually dismissing his claim. He stated that, he is aggrieved by the actions and omissions of his advocates whom he relied on and acted on their advice in a land transaction due to their expertise in conveyancing matters. It is the appellants contention that he contracted the services of the respondents whilst buying land reference number 675/ 26 from the vendor **Jennifer Moi**. The appellant claims that he spotted an advertisement in the newspaper of the land on offer and on his own volition contacted the purported agents who had put up the advertisement. It is his testimony that he willingly went to view the land and was satisfied with the land which he opted to buy. It is at this point that that he contacted the respondents who are also his advocates in another land transaction and expressed his wish to purchase the said property. The advocate took down the instructions and proceeded to act for the appellant. **Mr Muchui** in his testimony was categorical with the agent whom he informed that it is only proper to transact with the vendor's advocate and not the agent. The firm of **Gibson Morara** then contacted the respondents stating that it was acting for the vendor and proceeded to negotiate on the buying price. The appellant himself negotiated with the agents and agreed on a sum of Kshs 25,000,000/= as the purchase price. The respondents drafted an agreement to that effect and after negotiations amended the same to suit both parties and continued to have the agreement executed and the deposit released. However, the parties came to understand that the transaction was not valid as the purported vendor was not selling her land yet the deposit had changed hands and the same had been allegedly released to the vendor. The appellant is aggrieved that the respondent despite their knowledge in law failed to act with due diligence by advising him accordingly for purposes of securing the deposit.
6. In this case the appellant retained the services of the respondents. A retainer binds an advocate to act for his client in such a manner as to protect his client's interest and not to jeopardize. It is clear in conveyancing practice that there are duties of the purchasers advocate and those of vendors advocates and the question therefore is whether the respondents here being the appellants advocates breached their duty while acting for the appellant. From the onset, it is clear that the appellant through a letter dated 2nd February 2006 addressed to the vendor, **Jennifer Moi**, personally offered to purchase land for kshs 22,000,000/=. He later through another letter dated 13th February 2006, reviewed his offer upwards to kshs 25,000,000/=. On 5th April 2006, the respondents wrote to the appellant informing him of correspondence they had received from **Morara advocates** accepting the Kshs 25,000,000/= and the power of attorney that they had

received from the vendor. Then there was correspondence directed to the vendors advocate from the purchasers advocate who offered to vary the required completion date of 90 days to 180 days. The respondents wrote to their client vide another letter dated 24th May 2006 where they informed the appellant that the vendor was proposing a deposit of 20% and a completion of 120 days. What followed was another letter dated 16th May 2006 where the vendors advocate relayed the instructions of his client to the effect that the completion period be increased from 90 to 120 days and a deposit of 20% be paid upon execution of the agreement which deposit was to be released to the vendor to utilize to clear any outstanding rates, rents and other utilities. It was further proposed that the vendors obligation to hand over the documents to be subject to either the purchasers undertaking not to release them until full payment of the purchase price, or within 7 days of the successful registration of the transfer in favour of the purchaser or payment of the balance of the purchase price. The purchasers advocate then wrote to the appellant a letter dated 7th June 2006 stating the vendors terms including the release of the deposit to the vendor which terms the appellant had agreed to.

7. In addition to the numerous correspondences exchanged between the advocates and the appellants advocate and their clients, I have also looked at the agreement for Sale. Clause 3(a) provided that the deposit of kshs 2,500,000/= has been paid to the vendors advocate upon execution of the agreement with authority from the purchaser to release the same to the vendor. The agreement was executed by both the appellant and the holder of a power of attorney.
8. On the question as to whether or not the respondents negligently released the deposit to the vendor's advocate . The correspondences clearly indicate that there were ample communication between the appellant and the respondents. He was kept informed of the transaction throughout. Vide the letter dated 7th June 2006, the respondents were authorized by the appellants, to release the deposit to the vendor immediately upon the execution of the agreement for Sale. The respondents stated in part as follows: ***"since you have confirmed that the above matters are acceptable to you, let us have a bankers cheque drawn in favour of the vendor's advocate..."*** The respondents upon receipt of the letter proceeded to release the cheques. The appellant is of the opinion that the respondents should have advised him against release of the deposit to the vendor. The respondent on the other hand argues that he followed the appellant's instructions which they advised against but the appellant insisted on the release of the deposit which was used as a bargain on the part of the appellant to have the completion period extended by 30 days. This was evident by the fact that the appellant sent Geddatta surveyors and consultants who were denied access to the subject land. A further look at the record of appeal, there is a draft agreement of sale, which the respondents had drafted and forwarded it to the vendors advocate. In Clause 3, before engrossment, shows that the respondents had followed conveyance practice by indicating that the vendor's advocate be paid the deposit to hold as stakeholders. The same was amended by the vendors advocate to have the deposit released to the vendor which the parties agreed to. An advocate can only act upon instructions from his client. He cannot proceed in a particular manner even if he feels it's right without the go head from his client. I am convinced that the appellant in this case was properly advised by his counsel. The appellant instructed the respondent to release the deposit to the vendor's advocate to aid the vendor in clearing the rent and rates payable, which was done. He cannot now feign ignorance, turn around and point a finger at his advocate.
9. The deposit was required to be released to the vendor and not the donee, in that case, the vendor's advocate ought to have released the same to the vendor and not any other proxies not even the donee. The person to be held responsible is the vendor's advocate who unfortunately is deceased.
10. The appellant has also appealed on the ground that the learned magistrate erred in failing to find the respondents negligent for failing to exercise their skill and due diligence especially in relying on power of attorney that was fraudulent. It is the appellants contention, that his advocates did not pay attention to the special power of Attorney which was drawn by Equatorial registrars & legal consultants (k) ltd in respect of the subject property. According to **PL Onalo book on Land Law and Conveyancing in Kenya on page 282**: it reads that:

"The legal phenomenon of power of attorney must be understood as the concept that enables among others persons outside Kenya, or under disability or an agent of any principal to validly effect a conveyance having the execution carried out by his attorney...The power of attorney maybe general power of attorney or it may be specific. Specific maybe power by the donor or donee to

charge, mortgage his donors particular piece of land... the power of attorney regarding dealing in land interest is itself executed and attested as if it were an instrument of transfer...as the power of attorney is registerable, it will have registration mark or identification "

11. In this particular case, a close look at the special power of attorney signifies that the power is donated by **Jennifer Moi** of Nairobi to **Fredrick Kipkorir Toroitich** whose address is Eldoret. The appellant's witness PW2, argued that had he had the conduct of the matter, he would have questioned the fact that the vendor was in Nairobi while the donee is in Eldoret yet the same was registered in Nakuru. He also testified that a power of attorney should have been registered by an advocate and executed by an individual and not a company as in this case. I have scrutinized the power of attorney and I have established that the specific power of attorney gives the donee power to manage, superintended, control and manage interests of the donor in the subject property. Clause 10 goes ahead to permit the donee to transfer, sell, charge, mortgage build, improve, let and take possession of the property for himself or his nominees. Moreover, this special power of attorney contains a Land Titles Registry stamp that connotes that the same was registered in the Lands office. It must be for these reasons that the appellants advocates felt confident enough to proceed with the transaction. The respondents stated they carried out a search and found out that the power of attorney was registered. I have examined the special power of attorney which was produced before the trial court and the same contains the Land titles registry mark which signifies the same had been registered in the lands office. This confirms the respondents' claim that they sent their clerk to the Land's office to carry out a search to verify the fact that the document was genuine, which they did prompting them to proceed with the transaction. The aforesaid special power of attorney categorically donated the power to the donee to inter alia sell the property in dispute. What is important therefore is that the special power of attorney was registered. I fail to understand how the respondents can be held liable for professional negligence as far as the power of attorney is concerned. I adopt the views expressed by **Byles J in Stagg v Elliot (1862)6 L.T. 433** in which the learned judge stated in part as follows:

"...where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair instrument, the authority in question is to be found within the four corners of the instrument, either in express form or by necessary implication."

12. I am convinced after re-evaluating the evidence and the case generally that the appellant did not prove his case on a balance of probability in the trial court and the respondents were not negligent in their duties.

13. The trial court's decision cannot be faulted. Therefore, the appeal lacks merit and is hereby dismissed with the costs to the respondents.

Dated, Signed and Delivered in open court this 28th day of October, 2015.

J. K. SERGON

JUDGE

In the presence of:

Ondieki H/b Gitonga Muriuki for the Appellant

.Gichohi H/b Onguti for the Respondent