REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 112 OF 2013 (O. S.)

IN THE MATTER OF THOMAS GICHANA NYAKAMBI MAOSA T/A MAOSA AND COMPANY ADVOCATES AND IN THE MATTER OF THE ADVOCATES ACT

PUTHUCODE KRISHNAIRYER SESHADRI ……..…… 1ST PLAINTIFF

PREMA SESHADRI ……..…… 2ND PLAINTIFF

VERSUS

THOMAS GICHANA NYAKAMBI MAOSA T/A

MAOSA AND COMPANY ADVOCATES …….....…….. DEFENDANT

R U L I N G

1. On 17th March 2014, this Court entered Judgement in favour of the Plaintiffs in the amount of Shs. 21,840,000/- as against the Defendant, together with costs of the suit. That Judgement arose out of an *ex-parte* hearing of the Originating Summons dated 1st March 2013. This Court requested the counsel for the Plaintiffs that it would like to hear further submissions as regards the question of the amount/rate of interest to be awarded on the Judgement sum. In that regard, the Plaintiffs' Submissions were filed herein on 24th March 2014. They noted that the Plaintiffs had prayed in their pleadings, for payment of interest at the rate of 3% above the base lending rate for Barclays Bank Ltd in accordance with clauses 1.1.4 and 10.2 of the Agreement for Sale dated 13th November 2011 (hereinafter "the Agreement"). The Barclays Bank base lending rate was 21% and consequently the rate to be applied to the Judgement sum was, in the opinion of the Plaintiffs, 24%. The Plaintiffs commented in their submissions that this Court had pointed out, upon delivery of the Judgement as aforesaid, that the advocate whose professional undertaking the Court decreed enforcement was not a party to the Agreement. Indeed, the Court had queried whether the Agreement's rate of interest applied to the advocate concerned.
2. It was the view of the Plaintiffs, as per their submissions, that the Defendant Advocates, having been entrusted with the entire purchase price, Stamp Duty and registration charges in respect of the registration of the Conveyance arising out of the Agreement, should be required to pay at the interest rate provided for in the Agreement. The Plaintiffs maintained that the aborted sale transaction appeared to have all the hallmarks of a well-orchestrated fraud to deprive the Plaintiffs of their money and that the Defendant Advocates who were acting in a fiduciary/stakeholder/trustee capacity were undoubtedly liable to reimburse the Plaintiffs the

monies that they held in trust and also pay interest thereon. The Plaintiffs were of the opinion that the Court should be concerned to put the Plaintiffs in the position that they would have been had the retainer been properly discharged. As things stood, the Plaintiffs neither owned the land being the subject matter of the Agreement with its appreciable value, nor did they have the use of their money for any alternative investment. Counsel for the Plaintiffs pointed out that most commercial land activities/transactions in Kenya involved the regular use of borrowing monies and, as a result, an aborted sale through fraud, as was the case here, had obviously resulted in a delay in the repayment of the Plaintiffs' borrowings and a continuing liability for interest thereon. As a result, the Plaintiffs maintained that they were entitled to interest at the rate detailed in the Agreement in order to duly recompense them for bank interest and other bank charges that they had incurred in servicing their borrowing.

3. To bolster this proposition, the Plaintiffs referred this Court to the Court of Appeal authority of **Kinluc Holdings Ltd v Mint Holdings Ltd & Anor (1998) eKLR, Moses v Macferlan (1760) 2Burr 1005** as per the finding of **Lord Mansfield** at page **1012** and **Ajay Shah v Guilders International Bank Ltd Civil Appeal No. 135 of 2001**. The Plaintiffs seemed to rely upon the definition and meaning of retainer as set out and quoted by the Court of Appeal in the **Kinluc Holdings** case with reference to **Halsbury's Laws of England, 3rd Edition, paragraph 84** as follows:

"Meaning of retainer. The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by the client; consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment, and the rights and liabilities of the parties under the contract will depend on any terms which they have expressly agreed, partly on the terms which the law will infer or imply in the particular circumstances with regard to matters on which nothing has been expressly agreed and partly on such statutory provisions as are applicable to the particular contract. By the giving and acceptance of the retainer the solicitor acquires his authority to act for and bind the client and the client becomes bound both personally as between himself and his solicitor and as between himself and third parties with whom the solicitor deals within the limits of his authority on behalf of his client".

To this end, there would seem to be no doubt that the Defendant Advocates, as regards the property transaction, envisaged in the Agreement that they were acting for both the Vendors of the property in Nyari Estate, Nairobi as well as the Plaintiffs herein. Such is detailed firstly, in the letter from the Defendant Advocates to the Plaintiffs dated 10th November 2011, it was then repeated at paragraph 1.1.8 of the Agreement, as well as in the letter of undertaking given by the Defendant Advocates to the Plaintiffs dated 19th September 2012. In that regard, the Court takes cognizance of the further finding of the Court of Appeal in the **Kinluc Holdings** case (supra) wherein it detailed:

"We think, the learned judge, with respect, erred, when he said: *'A stakeholder can only make payment of what he has received from the purchaser but not from his pocket'*. It is not as simple as that. A retainer binds an advocate to act for his client in such manner as to protect his client's interest and not to jeopardize his interest."

4. The Court of Appeal, as regards the obligations of an advocate arising out of a retainer, quoted from **Cordery's Law Relating to Solicitors, 7th Edition** at page 150 as follows:

"B. Obligations arising out of retainer 1.TO BE SKILFUL AND CAREFUL

'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. It is immaterial whether the solicitor is retained for reward or volunteers his services, or whether or not he has a practicing certificate in force at the time.

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 is directly related to the confines of the retainer. It has been said that the court should beware of imposing on solicitors duties going beyond the scope of what they are requested and undertake to do. There is no such thing as a general retainer imposing on the solicitor a duty, whenever consulted, to consider all aspects of the client's interest generally.

A solicitor is not bound to have a perfect knowledge of the law, but he should have a good knowledge – eg.: he should know about the statutes of limitation. Although a solicitor is not liable for a mistake as to the construction of a doubtful statute, difficult to interpret or unexplained by decisions, he may be liable if he fails to realize that the statute presents difficulties of interpretation. On the question as to how far a solicitor may be liable in negligence for delay, it has been said that it would be wrong to hold a professional man guilty of negligence because everything is not dealt with by return of post'.

It was held by the House of Lords in England as long ago as in 1830 in the case of *Stevenson v Rowand* 6, English Reports, 668, that if an agent departs from the usual practice of introducing the double manner of holding, and having neglected to procure confirmation, he was bound to make good the loss.

The ratio decidendi of the Stevenson case can be summed up as follows:

> **'A law-agent is bound to obey the instructions given to him by his employer, and if he exceed or fall short of these instructions, he may be justly made liable for the damages which result from his disregard of them'."**

5. **Section 26(1)** of the *Civil Procedure Act* empowers the Court with the discretionary power to award interest on pecuniary judgments. This power, as with all discretionary powers of the Court, is to be exercised cautiously, judicially and in the interest of justice. The aforementioned section reads:

> **"(1) Where and in so far as a decree is for the payment of money, *the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum*** (emphasis added) **adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."**

6. What then is the fair rate of interest that the Defendant should pay in relation to the Judgement already entered herein? Should it be related to the interest rate that the Plaintiffs could have obtained by deposit of their monies with a commercial bank? Such would have been far less than the lending rate as prescribed by Barclays Bank of Kenya Ltd of 21% as above. Indeed, it would have been far less than the rates being claimed by the Plaintiffs in relation to the Agreement being 24%. In my view, counsel for the Plaintiffs is correct in that his clients should be compensated for their actual loss arising out of the professional undertaking not honoured by the Defendant Advocates. But what is that actual loss? There is no evidence before this Court in the Affidavit of the first Plaintiff in support of the Originating Summons dated 1st March 2013, that he and his Co-Plaintiff had to borrow monies from Barclays Bank or indeed any other bank in Kenya to finance the purchase of the property at Kyuna Estate. There is no evidence of what that interest rate on borrowing would have been.
7. The Plaintiffs' counsel maintains that the correct interest rate is as detailed in the Agreement being that as prayed for in the Originating Summons. The counsel also submitted that the rate of interest applicable and payable on the decretal sum, should be such to put the Plaintiffs in the position that they would have been had the retainer been properly discharged. I agree with the sentiment but what are the Plaintiffs losses in that regard? In my view, in the absence of any evidence in that regard, the rate of interest that should apply to the decretal sum is the rate that the Plaintiffs would

have earned had they placed the decretal sum on deposit with a commercial bank.

8. Accordingly, I direct and consider fair and reasonable, that the rate of interest to be applied to the decretal sum will be at the rate that the Defendant Advocates would have charged the Plaintiffs had their fees not been paid being 14% per annum from the date of the Agreement (being 13th November 2011) until payment in full. I consider such rate to be fair when one bears in mind that there is no evidence before this Court as to what a deposit with a commercial bank at the time would have earned by way of interest. Order accordingly.

DATED and delivered at Nairobi this 29th day of May, 2014.

J. B. HAVELOCK

JUDGE