REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 729 OF 2011

KIMANI NG'ONDU MBURU ……....…… PLAINTIFF

VERSUS

CATHERINE WAITHIRA MWANGI

T/A WAITHIRA MWANGI & CO. ADVOCATES…. DEFENDANT

JUDGEMENT

1. The Plaintiff's claim against the Defendant is based on professional negligence and in his Plaint dated 22nd February 2010, he seeks General and Special damages as against the Defendant plus costs and interest. In his evidence, the Plaintiff stated that while he was on official duty as an Assistant Chief in Gitithia sub-location at Lari, he was involved in an accident in which he fell down and broke his left leg at the knee joint and had been hospitalised for 12 days. Sometime later, he was compensated by the Government under workmen's compensation to the tune of Shs. 86,310/-. Being dissatisfied with such compensation, he sought the services of the Defendant advocate who is practising under the style of Waithira Mwangi & Co. Advocates with offices at Thika. He had been recommended to the Defendant firm by a friend of his, a senior Principle Magistrate.
2. The Defendant herein filed a Defence dated 22nd March 2010 which consisted mainly of denials as regards the various paragraphs of the Plaint. However, she confirmed that the Plaintiff herein had filed a complaint against her before the Advocates Disciplinary Committee containing allegations of a similar nature as detailed in the Plaint. Eventually, the Disciplinary Committee had delivered judgement and the Defendant was acquitted on all of the charges. The Defence went on to say that the Defendant had made persistent requests of the Plaintiff to put her in funds by way of deposit of Shs. 20,000/- to cover legal fees and disbursements. The Plaintiff had failed and/or neglected to pay the requested sum and had stopped visiting the Defendant's offices in Thika town. The Defendant further averred that the Plaintiff was in possession of all the relevant original documentation in respect of his claim that the amount of damages that he had been awarded by way of workmen's compensation was inadequate. She stated that the Commission who had adjudged the claim had adopted the procedure that it deemed fit and if the Plaintiff felt aggrieved, he was at liberty to appeal and review the Commission's judgement.
3. As regards the complaint made by the Plaintiff before the Advocates' Disciplinary Committee, he filed a list and bundle of documents on 2nd August 2012. Such bundle contained his letter of complaint as against the Defendant to the Law Society of Kenya dated 19th February 2008. His complaint was supported by an Affidavit sworn on 13th August 2008 which basically detailed that he had been dissatisfied with the award of damages for workmen's compensation and had instructed the Defendant to take up the matter on his behalf with the Attorney General. He had

been advised by the Defendant that she had entered into negotiations with the Attorney General to settle the matter out of court. Thereafter on 12th February 2008 he had called at the Defendant's offices to be informed that several records from her office had been misplaced including his file. He stated that he had been very upset that the Defendant had not given him any satisfactory reason why his claim had not been finalised by February 2008.

4. The Defendant was given due notice of the hearing of the complaint by the Disciplinary Committee of the Law Society. She filed a Replying Affidavit sworn on 4th March 2008 before the Disciplinary Committee which, interestingly, the Plaintiff had not included in his said bundle of documents of 2nd August 2012. That Replying Affidavit noted the instructions that the Defendant had been given by the Plaintiff and she had asked for time to consider the matter. She stressed that at no time, had she informed the Plaintiff that she was negotiating with the Attorney General in respect of his matter. She had only required him to deposit Shs. 20,000/- to cover filing fees and other disbursements. He had failed to do so. She had also not, at any time, told the Plaintiff that his file was lost. In any event, she had taken copies of the Plaintiff's original documentation in relation to his workmen's compensation claim having returned the originals to him. From the Plaintiff's said bundle of documents, the Plaintiff was copied in to correspondence to the Defendant from the Law Society of Kenya. He was notified by notice dated 10 November 2008 that the hearing of the complaint as against the Defendant would be at 9 AM on 1st December 2008. In handwriting on his copy of the notice, the Plaintiff detailed that he received the same at 7:20 PM on 2nd December 2008. That would not seem to be unlikely as the Post stamp on the envelope addressed to the Plaintiff was dated 28th November 2008.
5. However, both the Defendant and the Plaintiff, were addressed by the Law Society of Kenya that Judgment, mitigation and sentence as regards the Disciplinary Committee's findings had been fixed on a variety of days including 15th January 2009, 12th February 2009 and 9th April 2009. From the copy of the proceedings of the Disciplinary Committee included in the Defendant's list and bundle of documents dated 26th September 2011, it appears that on the 1st December 2008 the prosecutor, being the Plaintiff herein, was absent and a Mr. Muthimo appeared for the Defendant advocate. Mr. Muthimo made brief submissions on behalf on the Defendant and the Order of the Disciplinary Committee is that judgment would be delivered on 15th October 2009! Be that as it may be Judgment was delivered on 9th April 2009 when again Mr. Muthimo appeared for the Defendant but the Plaintiff was absent. The Judgment was read and the Defendant acquitted. I consider it worth setting out that Judgment as herein below:

"The complainant herein Mr. Kimani Ng'ondu Mburu lodged a complaint against the advocate vide his affidavit of complaint sworn on the 13th August 2008.

The complaint against the advocate is that the advocate has failed to discharge his duties as an advocate by failing to persue a compensation claim on behalf of the complainant against the office of the Attorney General.

The advocate has filed her replying affidavit and annexed documents confirming that the complainant had been paid the sum of Kshs. 86,310/= and notified the complainant that she needed a deposit of Kshs. 20,000/= if she were to persue a review of the judgment we have perused the entire file and we have not seen any documents to confirm that the complaint made any deposit as fees towards his case.

We are satisfied that the advocate gave her legal option to the complainant and further that no fees was paid by the complainant and in the circumstances we give the advocate the benefit of doubt and acquit her of the charge.

Dated at Nairobi this 9th day of April, 2009.

Signed.

V.T. AWORI

[CHAIRPERSON]

Signed.

DS KITAA

[MEMBER]

Signed.

D.O.E. ANYUL

[MEMBER]".

6. Obviously dissatisfied with the Judgment of the Disciplinary Committee as above, the Plaintiff first of all, lodged a protest with the National Legal Aid & Awareness Program of the Ministry of Justice, National Cohesion and Constitutional Affairs who advised him to sue the Defendant because of her negligence. As a consequence, he thereafter filed this suit. In his evidence, the Plaintiff recounted that he had visited the Defendant's offices initially on 6th May 2006 in which he related his wish to seek further compensation from the Government under workmen's compensation legislation arising out of his accident on 2nd January 2001. The Defendant had told the Plaintiff that she required 3 months to study and familiarise herself with the case. The Plaintiff then said that in September 2006, the Defendant had informed him that she considered that he had a valid case and that she would take up his instructions. The Plaintiff maintained that the Defendant had agreed that her legal fees would be deducted from the sum awarded to him after completion of the case. She had also informed the Plaintiff that she would not follow the process of going through the insurance company but that she would write to the Attorney General to facilitate filing the Plaintiff's case against the Provincial Administration. The Plaintiff maintained that the Defendant had then informed him that she had reached an out-of-court settlement with the Attorney General's office. He was assured that payment would be made around November 2006 but that the Defendant required certain documentation to be provided to her including details of the medical treatment incurred as a result of his accident and the costs thereof.
7. The Plaintiff then stated that he provided the required documentation to the Defendant in January 2007. The Plaintiff had then visited the Defendant's offices on 10th April 2007 accompanied by one George Njoroge Waweru (PW 2). He had been advised by the Defendant, on that occasion, that the settlement cheque in respect of the claim was ready save for a signature from a person who was out of the country. The Plaintiff gave evidence that he followed up the matter with the Defendant' office in May and June 2007 but, upon receiving a telephone call from the Defendant's clerk he had gone to see the Defendant again in August 2007 accompanied by one James Waithumbi Kariuki. On that occasion, she had told him that she had not received the money and that the person that she was dealing with at the Attorney General's Chambers had been transferred to Nyeri. His replacement had indicated that the claim was faulty as he, as the client, had not signed the claim forms. As a result, the Plaintiff signed a fresh claim form with amendments made thereto by the Defendant. The Plaintiff stated that he had gone back to the Defendant's offices in the November and December 2007 but had not met up with the Defendant. However, upon visiting her in January 2008, the Plaintiff was told that there was nothing that she could do about his claim since her employee, whom she had sacked, had messed with all her files including the Plaintiff's. Again, in February 2008, the Plaintiff stated that he had gone back to the Defendant's offices with the said James Waithumbi Kariuki and had been informed by the Defendant that all his documents had been lost and she could not pursue his claim. It was at that stage that the Plaintiff decided to report the matter to the Disciplinary Committee as above.
8. In contrast, the Defendant's witness statement dated 26th May 2012, was brief. Relating what she had been told by the Plaintiff, she had informed him that she would carry out research and advise whether he had a cause of action. After carrying out research, the Defendant had informed the Plaintiff that his only cause of action was to reapply for the assessment of his incapacity. She had felt that he would succeed in such reassessment as he had received further treatment to his injured

leg at the Kijabe Hospital. The Defendant stated that she had drafted the appropriate pleadings and then requested the Plaintiff to pay Shs. 20,000/- to cover costs and disbursements. He had never so paid. In fact, the Plaintiff had kept on asking her for transport money every time he came to her offices. At no time the Defendant stated had she held onto original documents from the Plaintiff, she having taken copies thereof. She noted the complaint filed against her with the Disciplinary Committee of the Law Society and concluded her statement by saying that at no time did she inform the Plaintiff of any proposed settlement as the Attorney General's Office had never offered to settle.

9. In cross-examination the Plaintiff admitted that he had been paid his workmen's compensation in February 2004, the accident having occurred on 2nd January 2001. He was unaware of any limitation of one year with regard to taking a tortious action against the Government. He noted that the Defendant had advised him that he had a valid case. This was in September 2006. He denied that she had ever asked him to pay a deposit of Shs. 20,000/-. He continued to maintain that the agreement that he had with the Defendant as regards fees was that she would be taking her fees from the amount of the settlement that was reached but he admitted that this agreement was verbal. As regards the complaints that he had filed with the Disciplinary Committee, he had been led to believe that the Defendant had received monies paid to her on his behalf by the Attorney General. He had not been involved in the proceedings before the Disciplinary Committee. He had not appealed or sought a review of the Judgment of the Disciplinary Committee. Further, he had not consulted another advocate with regard to his case. The Plaintiff then went on to detail his complaint made to the Ministry for Justice and thought that they had enquired of the Defendant as to the position.
10. PW 2 had signed a witness statement on 29th March 2012. He recorded that he and the Plaintiff had visited the offices of the Defendant at Thika on 10th April 2007. He was present when the Plaintiff had enquired of the Defendant about the progress of his claim. The witness stated that the Defendant had informed the Plaintiff that a cheque in settlement of the Plaintiff's claim was ready save for a signature of one person who was outside the country. She asked the Plaintiff to hold on and wait and once the cheque was signed, she would phone him to collect the same. Under cross-examination, PW 2 stated that the main reason for accompanying the Plaintiff on 10th April 2007 was that he had been asked by the Plaintiff to accompany him. He was never cross examined as regards what he had heard the Defendant say in her offices on that day. Unfortunately for the Plaintiff, his second witness, the said James Waithumbi Kariuki, never appeared at Court until after the Defendant had given evidence. As a result, I disallowed for Mr. Kariuki to give evidence before Court as I considered that the same would be prejudicial to the Defendant.
11. In her examination in chief, following upon the adoption of her witness statement, the Defendant stated that she had never received any money on the Plaintiff's behalf from the Attorney General. She noted that she had been acquitted of all charges brought by the Plaintiff against her before the Disciplinary Committee. She had not been aware of any appeal against the Committee's Judgment. She denied that she had ever agreed that her fees would come out of any settlement monies received. She admitted to receiving a call from the Ministry of Justice sometime in 2009 but she never received anything in writing. Under cross examination by the Plaintiff in person, the Defendant maintained that the Plaintiff was the one who had brought the original documentation to her in relation to the injury claim. She had photocopied them and the originals were handed back to the Plaintiff. She denied that there had ever been an agreement reached with the Plaintiff as regards her fees. Every time the Plaintiff had come to her office, she had informed him that she would incur disbursements such as Court fees which is why she had asked him to deposit the sum of Shs. 20,000/-. She recorded that the Plaintiff had been told by Mr. Kiarie, a Principal Magistrate at Milimani but who resided in Thika, and who had referred the Plaintiff to her, that advocate's fees would be payable. The Defendant maintained that she could not remember the Plaintiff coming to her office accompanied by any third person. It was the only the last time that the Plaintiff had come to her offices accompanied with someone that she had chased them both away after they had asked her for their fares back to Nairobi. She denied that at any time had she had ever told the Plaintiff that she had a cheque available. She had informed him that in order to reassess his injuries sustained in the accident, an Order of leave from the Court would be required. The Defendant reiterated that she could not have said that there was a cheque waiting in relation to the claim for reassessment of the Plaintiff's injuries. She did not know any of the Plaintiff's

witnesses and never had any appointment with any of them.

12. The Plaintiff filed his submissions herein on 9th September 2013. Having set out the facts of the case and the evidence as he saw it, the Plaintiff maintained that he had demonstrated that the Defendant had acted negligently in pursuing his case. He felt that the Defendant should be held liable for such acts and that the Plaintiff should be paid damages as prayed for in the Plaint. It is to be noted that the Plaintiff failed to give evidence or to submit as to what damages he had suffered as a result of the Defendant's alleged negligence. Thereafter, the Plaintiff referred the Court to the cases of **Naphtali Paul Radier v David Njogu Gachanja t/a Njogu & Co. Advocates (2006) eKLR** as well as the **Kenya Commercial Bank Ltd v Adala (1983) KLR 467**. As both these cases related to breach of professional undertaking, this Court saw no relevance in either to the suit before it.
13. The Defendant's submissions were filed herein on 18th September 2013. She maintained that it was trite law that in order for a claim for professional negligence to succeed the claimant must satisfy the court as to 3 key elements:

i. The existence of a duty of care;
ii. The breach of that duty;
iii. The loss suffered therefrom.

The Defendant submitted that there was never an advocate/client relationship as between the Plaintiff and the Defendant. She made the submission that the relationship is only formed when a client signs a contract for representation by the advocate. It could also be formed upon payment of a sum of money by the client to the advocate in order to secure legal advice. The Plaintiff did neither of these. As a result, it was the Defendant's submission that the Plaintiff had never retained the Defendant as his advocate with regard to his claim. Further, the Plaintiff had not shown that the Defendant was in any way in breach of a duty of care. The Defendant had given her opinion and advice to the Plaintiff as to his case, for which she was never paid a single cent. When the Plaintiff was asked to deposit fees in the amount of Shs. 20,000/- to cover filing fees and other disbursements, he had declined and/or neglected to do so. As a result, the Defendant submitted that she could not be said to have acted negligently. The Defendant further submitted that the Plaintiff had failed to show that he had suffered any loss from the alleged negligence of the Defendant. The latter had only retained copies of relevant documents supplied to her by the Plaintiff. If he had been dissatisfied with her services rendered and the advice given, he was at liberty to consult and instruct any other advocate to act for him and to pursue his claim. In the Defendant's opinion, the failure by the Plaintiff to prove any of the said 3 key elements rendered his claim unmeritorious. The Defendant referred this Court to the Court of Appeal's decision in the case of **Kogo v Nyamogo & Nyamogo Advocates (2004) 1 KLR 367**. In that case the Court had held that:

> **"An advocate is not liable for any reasonable error of judgement or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice."**

The Defendant concluded her submissions by stating that there was no gross negligence or any negligence at all in this case. There was no ignorance of elementary matters of law. After commenting upon the character of the Plaintiff, the Defendant submitted that the Plaintiff's suit was scandalous, frivolous and vexatious and should be dismissed with costs.

14. This Court has some sympathy with the Plaintiff as regards the proceedings before the Disciplinary Committee of the Law Society. Quite clearly, the Plaintiff received notice of the hearing scheduled for 1st December 2008, after the same had happened. Thus he was given no opportunity to put his side of the story before the disciplinary panel. As a result, the disciplinary panel only heard from the advocate appearing for the Defendant and from the record of the proceedings, it would seem to have accepted her view of the instructions given to her by the Plaintiff. The Judgment delivered by the disciplinary panel dated 9th April 2009, as spelt out above, came to the conclusion that the Defendant had given her legal opinion to the Plaintiff as regards opening up the question of quantum of compensation that he had been awarded as a result

of his accident in 2001. The panel had given the Defendant the benefit of the doubt and acquitted her of the charge brought by the Plaintiff.

15. However, and in my opinion, the said disciplinary panel was not judging the Defendant as to whether she was professionally negligent or otherwise. This is the question put before this Court. To this end, the Court has received some considerable guidance as regards to what amounts to professional negligence from the Court of Appeal case of **Champion Motor Spares v Phadke (1969) EA 42**. At page 47, **Duffus Ag V-P** (as he then was) had this to say on the subject:

"The extent of an advocate's liability to his client for negligence has been considered at various times by this Court. I would refer to the case of *Stephens & Co. v. Allen* (1918), 7 E.A.L.R. 197. This case went to the Privy Council (1921), 8 E.A.L.R. 211. The following extract from the judgment of the Privy Council is of some assistance:

'The question of negligence with regard to the performance of a solicitor's duty must to some extent be affected by the local conditions and the local circumstances, as to which their Lordships might not be perfectly informed. In the present case the negligence is alleged to be due to the ignorance of the provisions of an Act of Parliament. It may well be that in Nairobi this Act of Parliament has practically never been heard of in judicial proceedings; it is impossible for their Lordships to know; but the question as to whether a solicitor is negligent or not in omitting to give effect to a statutory provision cannot be disentangled from the consideration of whether the statute that is involved is one which is of constant and common occurrence in practice or whether it is one unfamiliar and remote. With those circumstances their Lordships are unable to deal'.

Russell, J., in his judgment on appeal considered this question very fully and with respect has, in my view, correctly set out the degree of care required by an advocate practicing in Uganda. He quoted from the following passage from the judgment of Lord Denning, in the recent English decision of *Rondel v. Worsley*, [1967] 3 All E.R. 993.

'Finally it must be remembered that counsel is not liable in negligence merely because he expresses an opinion which ultimately turns out to be wrong nor merely because he overlooks one of a number of relevant authorities. Further, in spite of the expression of Lyneskey, J., in *Pentecost v. London District Auditor*, [1951] 2 All E.R. 330 that so far as civil proceedings are concerned gross negligence is not known to the English Common Law, I remain of the opinion that counsel will only be guilty of crassa negligentia or gross negligence by some really elementary blunder, see *Purves v. Landell* (1845), 12 Cl. & Fin. 91'.

I agree with Russell, J., that the liability of an advocate to his client for negligence in performing his professional duties must generally arise from some really elementary mistake and not be an error of judgment on some complicated point or one of doubtful construction. Each case must depend on its own particular facts, and as Scrutton, L.J., said in *Fletcher & Son v. Jubb Booth & Helliwell*, [1920] 1 K.B. 275 at p. 280:

'And moreover I accept the opinion of Tindal, C.J., in *Godefroy v. Dalton*, 6 Bing. 460, that it would be extremely difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia, or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed".

16. With the above guidelines in mind, this Court being bound to follow the decisions of the Court of Appeal, has the Defendant herein crossed the dividing line by which skill and diligence of a member of her profession in the conduct of the case should have been advanced? It is the evidence of the Plaintiff and to a certain extent backed up by PW 2, that he had been informed by the Defendant that she had taken up the matter of reassessment of his workman's compensation damages with the Attorney General. Such assertion is strenuously denied by the Defendant, who

detailed in her Replying Affidavit that no such discussions were ever had with the Attorney General. However, is the Defendant guilty in the words of Scrutton LJ as above of *crassa negligentia* or *lata culpa*? Her version of her association with the Plaintiff is that she had considered the legal position and felt that there may be room for some sort of appeal as to the quantum of the workman's compensation damages, of which she advised the Plaintiff. However and not unreasonably, the Defendant requested the Plaintiff to deposit Shs. 20,000/- towards disbursements and Court fees. Without such, it does not appear that she was prepared to take up the Plaintiff's case. In my view, such action or inaction cannot amount to negligence.

17. To this end, I concur with the Defendant's submissions as to the 3 key elements that the Plaintiff must prove to establish his claim as detailed above. Having said that, I disagree with the Defendant when she submitted that there was never an advocate/client relationship as between Plaintiff and herself. Although she did not keep the plaintiff's original documents in relation to the assessment of workman's compensation damages, she did take copies thereof and undertook, after a period of 3 months, to give the Plaintiff an opinion as to whether he had any chance of the re-assessment of those damages or otherwise. To my mind and without the necessity of money changing hands, the Defendant owed a duty of care to the Plaintiff. However, the Defendant never pursued the matter and received no monies from the Plaintiff as motivation for doing so. As a result, I do not consider that the Defendant breached her duty of care to the Plaintiff and certainly, the latter has not shown what loss he has suffered therefrom. It may be that from paragraph 7 of the Plaintiff's witness statement, he was trying to imply that, as a result of the Defendant's delay, his chances of reassessment of damages had disappeared owing to limitation. However, I am inclined to believe the Plaintiff's statement that he had been advised by the Defendant that his claim would come under tort. What I find difficult to believe is that the Defendant could have advised the Plaintiff that tort cases needed to be filed within 6 years of the same having arisen under the provisions of the Limitation of Actions Act. I would consider it to be an elementary matter of law for the Defendant to have known that the limitation period for tort is 3 years not 6. I also find it difficult to believe that the Defendant could possibly have informed the Plaintiff that she would agree to take on his case and that her fees would be deducted from any increase in compensatory damages awarded to the Plaintiff in due course. The provisions of the **section 46 (c)** of the *Advocates Act (Cap 16, Laws of Kenya)* are self-explanatory in that regard as follows:

"Nothing in this Act shall give validity to – ….(c) any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof;"

Finally, I have failed to understand the allegations of both the Plaintiff and PW 2 that the Defendant required the Plaintiff to sign claim forms. One would ask the obvious question – claim forms for what? If there was to be any action over the reassessment of the compensatory damages for the Plaintiff, such would have had to come before Court by way of Judicial Review and the only document that the Plaintiff may have been required to sign in that connection would have been a Supporting Affidavit. As a result, I find no merit in the Plaintiff's evidence in that regard.

18. In conclusion, I find no merit in the Plaintiff's case herein and dismiss the same with costs to the Defendant.

DATED and delivered at Nairobi this 20th day of December, 2013.

J. B. HAVELOCK

JUDGE