



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 777 OF 2006

JESSE KAMAU TANU.....PLAINTIFF

V E R S U S

J.A. GUSERWA.....DEFENDANT

J U D G M E N T

This is a claim in professional negligence. The Plaintiff is the erstwhile client of the Defendant, an advocate of this court.

The Plaintiff's case as pleaded in his home-made and undated plaint filed in court on 17th July, 2006 is that following an accident on 10th October, 1999 involving his motor vehicle registration number KRT 386 and another motor vehicle the Plaintiff instructed the Defendant to file suit for recovery of material and other damages occasioned by the negligence of the driver of the other motor vehicle; and that the Defendant indeed filed suit on behalf of the Plaintiff but "dishonestly neglected to give out the evidence on the loss of user, i.e. 401 days at KShs. 60,000/00 per day" and recovered only damages of KShs. 835,000/00.

Particulars of the alleged negligence of the Defendant were pleaded as follows:-

"A) Not paying the interest as agreed in writing.

B) Losing the vehicle (KRT 386) car sale original agreement form.

C) Losing the cheques and also the bank statements and only refunding the bank slips.

D) Delaying the case.

E) Dishonest (sic).”

Damages for professional negligence and/or misconduct are sought as follows:-

a) KShs.60,000/00 per day

for 401 days..... KShs. 24.06 millions.

b) Interest on that sum from 2002 to 2006 (5 years).

The Defendant entered appearance and filed defence. She admitted having been retained by the Plaintiff to file a material damage claim arising from an accident involving his motor vehicle, and that she indeed filed suit for him vide Nairobi CMCC No. 13352 of 2003.

The Defendant further pleaded that the said suit was professionally prepared, filed and prosecuted in favour of the Plaintiff, and denied that there was anything dishonest or negligent in the manner she handled the matter. She put the Plaintiff to strict proof.

The Defendant counter-claimed against the Plaintiff the sum of KShs. 125,000/00 in respect of her professional fees for services to the Plaintiff as agreed and undertaken by the Plaintiff.

I finished taking evidence in this case on 11th May, 2011. The Plaintiff testified on his own behalf and called no other witnesses. Likewise the Defendant testified on her own behalf and called no other witness. I have considered their respective testimonies and the documents produced in evidence. I have also considered their written submissions, filed respectively on 31st May, and 3rd June, 2011. No authorities were cited.

The parties' respective bundles of documents were admitted in evidence by consent as **Exhibit P1** and **Exhibit DI** respectively.

The Plaintiff's testimony was that after he instructed the Defendant to file suit on his behalf the Defendant indeed filed Nairobi HCCC No. 1466 of 2002. The case was subsequently transferred to the subordinate court at Milimani without his knowledge and it became Milimani CMCC No. 13352 of 2003. Eventually the case was heard and he testified.

The Plaintiff further stated that when he was testifying in the said case the Defendant never gave him the agreement by which he sold his motor vehicle after repairs to produce in evidence. He claimed that it was this agreement which would have shown the number of days his motor vehicle was off the road since accident. The Defendant was therefore negligent. He further claimed that she had in fact destroyed the

agreement. There was thus no evidence for the 401 days loss of user that he wanted to claim at KShs. 60,000/00 per day, which claim the Defendant failed to include at paragraph 5 of the plaint.

The Plaintiff also claims in his testimony that the Defendant lost the following other documents that he had given to her:-

1. Cheques “of the money he used to withdraw from the bank”.
2. Bank statements.
3. Agreement “for the business contract which the motor vehicle was performing before the accident”.

The Plaintiff also claimed that though he got judgment for KShs. 834,200/00, there was no one to enforce the judgement against as the Defendant had cited the wrong defendants in the suit, and the Defendant thereafter declined to continue acting for the Plaintiff in the matter and demanded fees from him. He then instructed another lawyer at Murang'a to take up the case.

In cross-examination the Plaintiff admitted that he swore an affidavit in verification of the plaint, and that at paragraph 2 of the verifying affidavit he deposed that he had read and understood all the contents of the plaint. He also admitted that the name of the driver of the motor vehicle that had hit his, **Benson Murigi Mugo**, was correctly stated in the plaint, but that the name of the owner of the motor vehicle, **James Mwangi Kimani**, was wrong stated as **James Kamau Kimani**.

The Plaintiff also admitted that when the Defendant ceased to act for him he collected from the Defendant his file of papers and signed a document to that effect, and that he did not indicate in the acknowledgement any missing document. He also admitted that during his testimony in his claim before the lower court he applied for and was permitted to amend his claim upwards as set out in paragraph 5(a) of the plaint, and that he did not apply to court to include a claim of loss of user for 401 days at KShs. 60,000/00 per day. He further admitted that he did not show to the trial court any evidence that he was earning KShs. 60,000/00 per day from the motor vehicle before the accident. Nor did he tell the trial court that his motor vehicle did not do business for 401 days after the accident.

The Plaintiff stated in further cross-examination that the sum awarded to him by the trial court KShs. 830,200/00 was what he proved by receipts to have been his loss as a result of the accident. He stated he was satisfied with that judgment of the lower court.

Finally the Plaintiff admitted that he has never paid the Defendant any fees in connection with the work she did for him in the lower court.

In her testimony the Defendant stated that she has been in practice as an advocate since 1984. She further testified that upon being instructed by the Plaintiff to act for him in respect to a material damage claim touching on his motor vehicle, the Plaintiff signed a retainer for fees dated 3rd September, 2002. He also supplied to the Defendant certain relevant documents to enable her to prepare the plaint.

The Defendant then applied for and obtained a copy of the records of the tortfeasor's motor vehicle involved in the accident. She then took his statement regarding how the accident had occurred and the loss suffered thereby, prepared the plaint and verifying affidavit and gave them to the Plaintiff to read. He ascertained that the facts as stated in the plaint were correct and that his claims were properly set out at paragraph 5 of the plaint. He then signed the verifying affidavit.

The Defendant then filed the plaint in court (Nairobi HCCC No. 1966 of 2002). Summons to enter appearance were subsequently issued. The Plaintiff accompanied the process server for purposes of

pointing out the defendants for service, and the summons were served. The defendants did not enter appearance or file defence. Interlocutory judgment was then sought and obtained. When the case came up before a Judge in March 2003 for formal proof, the judge directed that the matter be transferred to the lower court. That was done and the suit became Milimani CMCC No. 13352 of 2003.

Subsequently the case was heard and the Plaintiff testified under oath in proof of his case.

The Defendant pointed out that the plaint in the lower court had included a claim for loss of income for 12 month at KShs. 60,000/00 per day. The claim was disallowed by the court because there was no evidence to support it.

Subsequently, and after judgment had been obtained in his favour the Plaintiff refused to pay additional court fees so that decree might be extracted. Instead he instructed another firm of advocates to take over the matter. The Defendant then released the Plaintiff's file of papers to the new advocate upon an undertaking for payment of her costs. But soon thereafter the new advocates informed the Defendant that the Plaintiff had chosen to act in person in the matter. As the Defendant waited for payment of her fees she was served with summons to enter appearance in the present suit.

The Defendant denied in her testimony that she was negligent in the way she handled the Plaintiff's suit. She denied that she lost any documents that the Plaintiff had given to her regarding his claim. She denied particularly that the Plaintiff had ever given to her any sale agreement in respect to his motor vehicle. She stated that she returned to the Plaintiff his entire file of papers, including all the documents he had given to her and documents produced evidence at the trial (which had been released to the Defendant by the court upon application).

The Defendant further denied that the Plaintiff gave him any cheques or bank statements that she could have lost as alleged. She stated that the Plaintiff was unable to prove loss of income at KShs. 60,000/00 per day for 12 months because he had no such documents. She denied that she delayed the Plaintiff's case in any way, or that she was dishonest with the Plaintiff or with any other person regarding the Plaintiff's case. She stated that the Plaintiff's claim for loss of income is fanciful and that he is not entitled to claim from her. She denied any professional misconduct as alleged.

In proof of her counter-claim, the Defendant produced in evidence a letter dated 19th July, 1994 written to her by the lawyer the Plaintiff had appointed to act for him in his suit instead of the Defendant (Exhibit D2).

In that letter the Defendant's fees are clearly agreed at KShs. 125,000/00 which the Plaintiff's new advocate had undertaken to pay upon receipt of the decretal sum. As it happened, the Plaintiff dismissed his new advocate as well before the decretal sum had been paid.

In cross-examination the Defendant denied that she had substituted another plaint for the one that the Plaintiff had read and verified. She reiterated that the claims she set out in the plaint were as per the Plaintiff's instructions. She explained that the Plaintiff instructed her to claim loss of income, not loss of user.

No statement of issues was filed. But issues for determination in this suit, as I see them, are as follows:-

1. Was the Defendant guilty of professional negligence and/or misconduct in the way she dealt with the Plaintiff's claim?
2. Did the Defendant lose or destroy any document given to her by the Plaintiff in respect to his claim?
3. Is the Defendant liable to the Plaintiff in damages for professional negligence?
4. Is the Plaintiff liable to the Defendant for professional fees in the sum of KShs. 125,000/00

5. Who should bear the costs of this suit?

Issues Nos. 1, 2 & 3

The Plaintiff has alleged that the Defendant substituted another plaint in place of the plaint that he had read and verified as being correct, thereby omitting his claim for loss of user at KShs. 60,000/00 per day for 401 days. He also alleges that the Defendant either destroyed or lost certain documents that he would have produced in evidence in proof of that claim. But he tendered no evidence of such substitution, and I do not believe that there was such substitution.

The Plaintiff has alluded to collusion between the Defendant and the insurers of the tortfeasor's motor vehicle involved in the accident. He tendered no evidence of such collusion or conspiracy.

Upon withdrawing instructions from the Defendant after judgment had been obtained for him, the Defendant released to the Plaintiff, upon written acknowledgement of receipt, his file of papers to take to his new advocates. He did not then raise any claim of any missing documents from his file of papers, nor did he instruct his new advocates to make any demand of such documents.

I do not believe that the Defendant lost or destroyed any documents given to her by the Plaintiff.

It is apparent that a claim for loss of user at KShs. 60,000/00 per day for 12 months had been made in the plaint. The Plaintiff was unable to adduce any evidence in proof thereof, and the claim was dismissed. For some strange reason he has now sought to recover from the Defendant what he could not prove against the tortfeasor in his original suit.

For the above reasons, I find that the Defendant was not guilty of any professional negligence or misconduct in the way she dealt with the Plaintiff's claim.

Issues numbers 1, 2 and 3 are all therefore answered in the negative.

Issue No. 4

The letter dated 19th July, 2004 addressed to the Defendant by the Plaintiff's new advocates (Exhibit D2) is sufficient proof that the Defendant's professional fees for services rendered to the Plaintiff in his claim against the tortfeasor was agreed at KShs. 125,000/00. The Plaintiff has so far not paid anything towards this sum. I am satisfied on a balance of probability that the said sum is owed to the Defendant by the Plaintiff.

In summary, the Plaintiff has failed to establish his case on a balance of probabilities, and the same is hereby dismissed with costs to the Defendant. On the other hand the Defendant has proved her counter-claim of KShs. 125,000/00, and I hereby award it with costs. There shall be interest upon that sum at court rates from the date of suit until payment in full. Those shall be the orders of the court.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JULY, 2011.

H.P.G. WAWERU
JUDGE