



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 324 of 2006

OSORO MOGIKOYO T/A OSORO MOGIKOYO & CO.
ADVOCATES.....APPELLANT

VERSUS

JARED OMOLLO.....1ST RESPONDENT
PAUL KANG'ETHE.....2ND RESPONDENT

*(An appeal from the judgment of the Chief Magistrate's Court at Nairobi,
Milmani Commercial Courts by Mr. Cherono (SRM) dated 22nd May, 2006
in Civil Suit No.3726 of 2001)*

J U D G M E N T

1. This is an appeal brought by Osoro Mogikoyo t/a Osoro Mogikoyo & Company Advocates (hereinafter referred to as the appellant). The appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi, by Jared Omollo, who is the 1st respondent in this appeal. In the suit, the 1st respondent had sued the appellant and E.N. Ireri t/a Ireri & Company Advocates (hereinafter referred to as the 2nd defendant). The 2nd defendant is not a party to this appeal. Paul Kangethe Waruhiu who is the 2nd respondent in this appeal, was joined as a Third Party to the suit pursuant to an application made by the appellant.

2. In the suit, the 1st respondent sought judgment against the appellant and the 2nd defendant for amounts of Kshs.180,000/= received by each of them. The amounts were allegedly paid by the 1st respondent pursuant to an agreement entered into with the 2nd respondent for purchase of property known as Nairobi Block 112/13 (hereinafter referred to as the suit property). Upon signing the sale agreement, the 1st respondent paid a sum of Kshs.180,000/= to the 2nd defendant who was the advocate for the 2nd respondent to hold the money as stakeholder. The 2nd respondent subsequently changed advocates and appointed the appellant in place of the 2nd defendant.

3. On 4th April, 2000, the 1st respondent forwarded a further amount by banker's cheque for a sum of Kshs.180,000/= to the appellant to be held by him as stakeholder. The sale agreement however expired before the transaction was concluded, and the 1st respondent requested the appellant and the 2nd defendant to refund the monies paid to them. However, neither the appellant nor the 2nd defendant refunded the money to the 1st respondent thereby rendering the 1st respondent's suit necessary.

4. The appellant filed a defence in which he denied that the sum of Kshs.180,000/= was forwarded to him as stakeholder. The appellant stated that the money was meant to be utilized in paying for the rates and other outgoings at the City Council in respect of the suit premises. The appellant maintained that the 2nd respondent negotiated directly with the 1st respondent for the release of the sum of Kshs.180,000/=. Consequently the money was used to pay for the rates and other outgoings. The appellant therefore denied liability to the 1st respondent.

5. The 2nd defendant also filed a defence in which he denied the 1st respondent's claim. In the alternative the 2nd defendant contended that he was not bound to refund the deposited amount to the 1st respondent but was to recover his legal fees from the said amount. The 2nd defendant contended that the 2nd respondent had undertaken to pay the 2nd defendant his legal fees from the said proceeds, and therefore instructed the 2nd defendant to recover the said fees from the deposit.

6. The 2nd respondent filed a defence in respect to the Third Party notice issued against him by the appellant. He denied that the sum of Kshs.180,000/= was released to him by the appellant. The 2nd respondent further denied that he was a beneficiary of the alleged Kshs.180,000/= or that the said amount was used for payment of rates, outgoings and the appellant's legal fees as alleged.

7. During the hearing in the lower court, the 1st respondent testified that he entered into an agreement with the 2nd respondent for sale of LR.No.Nairobi/Block 112/13 at a consideration of Kshs.1.8 million. The 1st respondent paid a sum of Kshs.180,000/= to the 2nd defendant herein to hold as stakeholder. The 2nd defendant did not forward the documents to the 1st respondent's counsel to facilitate the finalization of the transaction. Instead, the 2nd respondent replaced the 2nd defendant by appointing the appellant to take over as his counsel. The 2nd defendant undertook to return the money received by him as stakeholder. The payment was however not forthcoming, so the 1st respondent forwarded another amount of Kshs.180,000/= to the appellant as deposit towards the purchase price.

8. The sale transaction hit a rock as the 1st appellant was not able to have the documents registered since there was a caveat against the title. Subsequently the 1st respondent's advocate received a letter from Waruhiu, Kowade and Nganga Advocates advising them that the vendor was not selling the property. The 1st respondent demanded refund of the sum of Kshs.180,000/= which was paid to the appellant but the money was not paid to him. The 1st respondent denied having negotiated with the vendor for the money to be released directly.

9. The 1st respondent explained that according to the agreement, the 2nd respondent was to obtain consent and relevant clearance certificate while the 1st respondent was to pay stamp duty. Each of the parties were to bear their advocate's costs. The 1st respondent produced a bundle of documents which included the following: A letter dated 2nd February, 2000 from the 2nd defendant undertaking to hold the sum of Kshs.180,000/= as a stakeholder. A letter dated 24th March, 2000, from the 2nd respondent to the 2nd defendant advising that he had replaced the 2nd defendant with the appellant and requesting the 2nd defendant to forward to the appellant all the documents plus the deposit. Several letters written to the 2nd defendant demanding for return of the deposit held by him as stakeholder.

10. Also included in the bundle, is a letter dated 10th April, 2000, addressed to the appellant by the 1st respondent's advocate forwarding the additional deposit of Kshs.180,000/=. A letter dated 5th May, 2000 from the appellant to the 1st respondent's advocate, confirming receipt of Kshs.180,000/= towards the purchase of the suit property. A letter dated 15th May, 2000 from Waruhiu Kowade and Nganga Advocates stating that Paul K. Waruhiu, the owner of the suit property had not given any instructions for the sale of the property and that the appellant's client was a fraudster. And a letter dated 23th May, 2000 from the appellant explaining how he had received instructions from his clients and conducted a search at the Lands Office from which he noted that there was a caution lodged on the property, and that there were unpaid rates of Kshs.136,440/=.

11. The appellant further indicated in the letter of 23rd May, 2000 that his client informed him that he had agreed with the 1st respondent, that the 1st respondent would release a further sum of Kshs.180,000/= to enable the appellant's client pay the rates and other outgoings. Consequently, the 1st respondent's advocate forwarded a cheque for Kshs.180,000/= which the appellant banked and released the entire amount to his client. The 1st respondent denied having authorized the 2nd respondent to use the sum of Kshs.180,000/= for any other purpose other than as a deposit. The 1st respondent therefore claimed from the appellant and the 2nd defendant, a sum of Kshs.180,000/= each.

12. In his defence the appellant testified that the 2nd respondent was introduced to him by one of his old clients. The 2nd respondent instructed the appellant to take over a conveyancing transaction involving the suit property from the 2nd respondent's advocate who was the 2nd defendant. The 2nd respondent explained that the suit property was his and that he wanted to change counsel because the 2nd defendant was not handling the transaction as speedily as the 2nd respondent wanted. The appellant agreed to take over the matter, and the 2nd respondent wrote a letter to the 2nd defendant which he copied to the 1st respondent's advocate informing them that the appellant was taking over the matter from the 2nd defendant.

13. The 2nd defendant forwarded the file to the appellant through the 2nd respondent. The 2nd defendant did not release to the appellant the sum of Kshs.180,000/= which the 2nd defendant was holding as stakeholder. Since the 2nd respondent wanted the conveyancing expedited, the appellant asked him to deposit the amount of Kshs.136,340/=:, in respect of the rates outstanding, and the appellant's fees which was Kshs.49,392/50. The 2nd respondent informed the appellant that he did not have the money but had negotiated with the 1st respondent for release of a further sum of Kshs.180,000/= which the 2nd respondent could use for settling the rates and legal fees. The appellant accepted the arrangement and the cheque for the amount was forwarded to him through the 1st respondent's advocates.

14. The appellant maintained that until the 10% which was paid to the 2nd defendant was refunded to the 1st respondent's advocates, the 1st respondent had no obligation to make any further deposits. Therefore, when the 1st respondent forwarded the cheque for

additional sum of Kshs.180,000/= the appellant understood that it was in accordance with what the 2nd respondent had informed the appellant that the money was additional deposit which the appellant was not meant to hold as a stakeholder. The appellant therefore released the sum of Kshs.180,000/= to the 2nd respondent. Later the 2nd respondent surrendered a receipt to the appellant showing that a sum of Kshs.136,440/= had been paid as rates, and Kshs.1,600/= for the rates clearance certificate. The appellant thereafter wrote to the 1st respondent's advocates informing him that he had all the necessary documents. The 2nd respondent was to come back the next day to sign the transfer form. He did not however show up.

15. On 29th April, 2000, the 2nd respondent went to the appellant's offices and paid a sum of Kshs.41,960/= as legal fees. The 2nd respondent however refused to sign the transfer forms explaining that he could not do so in the absence of his wife. The 2nd respondent thereafter kept away from the appellant's offices. On 5th May, 2000, the appellant forwarded the documents in his possession to the 1st respondent's advocate, copying the forwarding letter to the 2nd respondent using the address that the 2nd respondent had given him. It was thereafter that the appellant received a letter from Waruhiu, Kowade and Nganga advocates contending that their client, Paul K. Waruhiu, the proprietor of the suit land had never instructed the appellant to sell the suit land. The appellant maintained that he had instructions from the 2nd respondent. He explained that he had no doubt that the 2nd respondent was the owner of the suit property. The appellant maintained that he was not holding the sum of Kshs.180,000/= forwarded to him as stakeholder. Therefore he had no reason not to release the money to the 2nd respondent. The appellant explained that the money was utilized in paying for the rates for the suit property. He contended that he should not be held personally liable as he was simply an agent.

16. The 2nd respondent testified that he was the registered owner of the suit property which is located in Runda. He denied having instructed the appellant either directly or through Saflo Services Ltd to sell the suit property on his behalf. The 2nd respondent further denied having instructed Ileri & Company Advocates. He also denied knowing the 1st respondent, or having entered into any agreement with the 1st respondent. The 2nd respondent produced his National Identity Card to confirm that the identity card number indicated in the agreement purported to have been signed between the 2nd respondent and the 1st respondent was not his identity card. He denied having gone to the appellant's office on 18th April, 2000, or having received the sum of Kshs.180,000/= or any other sum from the appellant. The 2nd respondent testified that between March and April, 2000 he was moving around in a wheelchair as he had been involved in a serious road accident. He produced a medical report confirming his medical condition. The 2nd respondent testified that when he came to know of the fraud involving the suit property, he instructed his advocate Mr. Nganga who wrote to the appellant. He also reported the matter to the police. The 2nd respondent testified that he sold the suit property to his younger brother George Waruhiu through his advocate.

17. In his judgment the trial magistrate found that when the appellant was instructed to take over the sale transaction from the 2nd defendant, he became a stakeholder for any monies received for and on behalf of his client during the sale transaction. The appellant could not therefore spend any money received in that capacity during the pendency of the agreement, before the transaction was completed, and transfer duly registered in favour of the purchaser. The trial magistrate noted that since the parties were represented by counsel, any authority for utilization or release of the money ought to have come from their counsel. The trial magistrate therefore rejected the appellant's contention that the 1st respondent and the 2nd respondent mutually agreed to release an additional sum of Kshs.180,000/= to pay for rates and clearance certificate. The trial magistrate noted that the additional sum of Kshs.180,000/= given to the appellant by the 1st respondent, had not become the 2nd respondent's money so that the 2nd respondent could instruct the appellant to release the money to the 2nd respondent, nor did the 2nd respondent have any capacity to authorize the use of the money.

18. The trial magistrate found that the monies were being held by the appellant and 2nd defendant as stakeholders and that it was reckless and negligent for them to release the money to the 2nd respondent without consent or instructions from the 1st respondent's advocate. The trial magistrate therefore concluded that the claim against the appellant and 2nd defendant was proved, and ordered each to refund the sum of Kshs.180,000/= to the 1st respondent together with interest at court's rates from the date of filing suit. As regards the appellant's claim against the 2nd respondent, the trial magistrate found the claim not proved and dismissed the appellant's 3rd party proceedings.

19. Being aggrieved by that judgment the appellant has lodged this appeal citing 9 grounds as follows:

- (i) That the learned magistrate erred in law and fact in failing to hold that the Third Party is the Registered owner of all that parcel of land known as L.R.No.Nairobi/Block 112/13.
- (ii) That the learned magistrate erred in law and fact in failing to hold that the rates amounting to Kshs.138,080/= were paid to the Nairobi City Council in respect of L.R.No.Nairobi/Block 112/13 and Kshs.41,960/= paid to

the appellant as legal fees.

- (iii) That the learned magistrate erred in law and fact in failing to take into account in his judgment the 2nd respondent's admission that he purchased L.R. No.Nairobi/Block 112/13 from his brother, one George K. Waruhiu.
- (iv) That the learned magistrate erred in law and fact in letting his findings for the 1st respondent against the appellant to influence him in his analysis of the case between the appellant against the 2nd respondent and in so doing arrived at a wrong conclusion.
- (v) That the learned magistrate erred in law and fact in failing to analyze the appellant's case as against that of the 2nd respondent and in so doing, he eventually arrived at a wrong conclusion.
- (vi) That the learned magistrate, in considering the appellant's case against that of the 2nd respondent, erred in proceeding on the wrong principles of law and also placing reliance on erroneous considerations, thus arriving at a wrong decision against the appellant.
- (vii) That it was not legally and procedurally right for the learned magistrate to consider the merits or otherwise of the 1st respondent's case when considering the appellant's case against that of the 2nd respondent in circumstances of the case at hand.
- (viii) That the learned magistrate erred in law and fact in holding that the appellant received the Kshs.180,000/= to hold as stakeholder when the 2nd defendant in the suit had not been discharged as stakeholder.
- (ix) That the learned magistrate erred in law and fact in failing to find that the appellant not being a stakeholder within the meaning of the contract of sale in respect of the case, was not under legal obligation to seek authority from the 1st respondent on how to disburse the Kshs.180,000/= that was forwarded to him without there being a prior request for payment of the same.

20. Following an agreement between the parties, written submission were duly exchanged and filed. For the appellant it was submitted that the trial magistrate erred in finding the appellant's claim against the 2nd respondent not convincing and also holding that the clearance certificate and the rate receipts issued by the City Council of Nairobi as Defence Exhibit 3 and 4, had no relation to the suit property and therefore not relevant to the suit. Counsel for the appellant pointed out that the 1st respondent made reference to the sale agreement in respect of the suit property, and that the clearance certificates and rates payment receipts produced by the appellant both related to the suit property. The appellant pointed out that the only difference was the name appearing on the receipt which was indicated as that of George K. Waruhiu and not the 2nd respondent.

21. Counsel for the appellant explained that the 2nd respondent had in fact confirmed that he bought the property from George K. Waruhiu who was his brother. Counsel maintained that the evidence confirmed that the property belonged to the 2nd respondent during the period in question, and that the rates receipts and clearance certificates related to the suit property. Counsel further submitted that the two receipts confirmed that a total sum of Kshs.138,040/= was paid against the 2nd respondent's property LR No.112/13 and therefore the 2nd respondent benefited from the payment. Counsel argued that since the money was not used for the benefit of the appellant, the 2nd respondent was in law and equity under an obligation to indemnify the appellant for that amount.

22. It was further submitted for the appellant that there was evidence that the 2nd respondent instructed the appellant to act for him in the sale as contained in the letter dated 23rd March, 2002. Although the 2nd respondent disowned the letter there was overwhelming evidence on record showing that the 2nd respondent appointed the appellant to act for him. The failure by the 2nd respondent to cross-examine the 1st respondent or challenge the 1st respondent on the signature on the sale agreement was identified as such evidence. It was pointed out that the signature of the 2nd respondent on the sale agreement and the signature on the letter dated 22nd March, 2002 appeared to be the same.

23. Counsel for the appellant further noted that the address used by the 2nd respondent in the sale agreement, the letter of 22nd March, 2002 and all other correspondences that the 2nd respondent used in communicating with his advocate was P.O. Box No.49492. Therefore, the 2nd respondent's evidence that he ceased to use the address in the year 1990, confirmed that the 2nd respondent was not truthful. Counsel pointed out the trial magistrate's observation that the 2nd respondent did not impress him as an honest person. It was maintained that despite the denials of the 2nd respondent the evidence confirmed that the 2nd respondent indeed instructed the appellant to act for him.

24. Reference was made by the appellant's counsel to the evidence that the 2nd respondent went underground after the payment of rates and part payment of the appellant's legal fees, and only resurfaced later to denounce the sale when the appellant wrote to

him. It was maintained that the trial magistrate failed to analyze the appellant's case against the 2nd respondent before drawing any conclusions. Counsel pointed out the appellant's evidence that the amount of Kshs.180,000/= was remitted to him by the 1st respondent without any prompting, after the 2nd respondent had negotiated for the release of the money. Defence exhibit 7 was relied upon as showing that the 2nd respondent and the 1st respondent, and or 1st respondent's advocates were in constant negotiations. It was argued that that this crucial evidence was never considered by the trial magistrate.

25. It was contended by the appellant's counsel that the available evidence showed that the appellant did not use the sum of Kshs.180,000/= for any other purpose other than paying rates and legal fees. The fact that the rates were cleared and the 2nd respondent sold the property to another person at a higher amount than what 1st respondent was offering, showed that the 2nd respondent realized the full benefit of the payment of Kshs.180,000/=.

26. Finally, counsel for the appellant submitted that the appellant did not ask for the release of the additional Kshs.180,000/= from the 1st respondent, as his takeover of the conveyance from the 2nd defendant did not nullify the transaction. It was the appellant's contention that since the 2nd defendant was holding on to the original deposit of Kshs.180,000/= and the sale agreement had not been amended to provide for an additional deposit, the 1st respondent was under no legal obligation to remit the sum of Kshs.180,000/= to the appellant. It was maintained that the release of the sum of Kshs.180,000/= by the 1st respondent to the appellant was negotiated by the 2nd respondent, for use to settle outgoings of the property. The appellant having utilized the sum of Kshs.180,000/= as advised by his client, the 2nd respondent was the proper party to be sued and not the appellant.

27. Counsel for the appellant concluded his submissions by arguing that the appellant was an agent of a disclosed principle who was the 2nd respondent. Therefore the appellant ought not to have been sued. Having been sued the appellant had the right to join his client the 2nd respondent to seek indemnity from him. Thus, it was the 2nd respondent who ought to be called upon to pay the 1st respondent. Counsel for the appellant therefore urged the court to allow his appeal and order the 2nd respondent to indemnify the appellant.

28. For the 1st respondent it was noted that the crux of the appeal was the appellant's contention that he was not a stakeholder and therefore had no obligation to seek authority of the 1st respondent before spending the sum of Kshs.180,000/= deposit received from the 1st respondent. It was submitted that when the appellant took over the conduct of the conveyance from the 2nd defendant he got bound by the terms of sale as set out in the agreement for sale. It was noted that clause 1(a) of the agreement provided that the sum of Kshs.180,000/= be paid on the signing of the agreement to the vendor's advocate to be held in the usual manner as stakeholder.

29. Counsel for the respondent noted that a deposit of Kshs.180,000/= had previously been paid to the vendor's former advocate the 2nd defendant, who upon being debriefed of the transaction undertook to return the deposit to the purchaser. Therefore, the purchaser who was the 1st respondent, was under a duty to deposit a further or additional sum of Kshs.180,000/= with the vendor's new advocate who was the appellant, as the vendor's previous advocate the 2nd defendant, had undertaken to refund the deposit to the 1st respondent, and there was no need for the appellant to call for it. It was contended that when the additional deposit of Kshs.180,000/= was forwarded to the appellant the appellant admitted having received the amount as deposit towards the purchase of the property. It was submitted that the appellant could only receive such money as stakeholder, and in trust as the same was not yet due to his client. He could not therefore part with the money except with the express consent of the 1st respondent through the 1st respondent's advocate.

30. Counsel for the respondent contended that the trial magistrate considered the issue at length and arrived at the correct decision that any monies received by the appellant in the course of the sale transaction, was received by them as stakeholders, and that the sum of Kshs.180,000/= paid to the appellant was an additional deposit to the deposit paid earlier to the 2nd defendant. Therefore the appellant knew or ought to have known that he was holding the money as stakeholder. Counsel for the respondent argued that the appellant erred in disbursing the money to his client's benefit without seeking authority from the 1st respondent whose money he held in trust. It was contended that even assuming that there was solicitation for such disbursements, the appellant being an advocate ought to have queried the same. The court was therefore urged to dismiss the appeal.

31. For the 2nd respondent, it was submitted that the documents produced by the appellant in his defence as exhibits Nos.3 and 4 showed that the payment made in respect of the suit property, were in favour of George K. Waruhiu and not the respondents. It was pointed out that George K. Waruhiu was not the vendor of the suit property, nor was the discrepancy justified. It was noted that the trial magistrate considered that evidence and found that the receipts had no relation to the suit property, and had no relevance to the suit. Counsel for the 2nd respondent argued that the evidence that appellant an advocate of many years standing purported to have gone to his bank with the 2nd respondent and withdrew a sum of Kshs.180,000/= in cash and gave the money to the 2nd respondent without the consent of the

purchaser or the purchaser's advocate, and without any acknowledgement of receipt of the money was incredible. It was noted that neither the 2nd respondent nor the appellant had the capacity or the authority to use the monies received which in law had not become available to them. It was submitted that the conduct of the appellant amounted to professional negligence for which he must be held responsible.

32. Counsel for the 2nd respondent further submitted that there was clear evidence through medical reports produced, that at the material time, the 2nd respondent was moving on a wheelchair, and it would not have been practically possible for the 2nd respondent to proceed to City Hall and obtain the rates clearance certificates as was alleged. Counsel maintained that there was no proof of the release of the money by the appellant to the 2nd respondent. Counsel argued that the receipts for payment of rates and clearance certificate were issued in favour of someone other than the 2nd respondent, supporting the contention that the money was not used for the benefit of the 2nd respondent. Counsel noted that the 2nd respondent denied having signed the sale agreement and produced his identity card which bore a different number and signature as that indicated by the person who signed the sale agreement as the vendor.

33. Counsel for the 2nd respondent contended that the vendor's advocate who witnessed the signing of the agreement ought to have noticed that discrepancy if indeed it was the 2nd respondent who signed the agreement. It was maintained that the evidence on record confirmed that the 2nd respondent neither instructed the appellant to act for him, nor signed the purported sale agreement and therefore the appellant was not entitled to be indemnified by the 2nd respondent. It was submitted that the transactions alleged to have been conducted over the suit property by a Paul Kangethe Waruhiu were not conducted by the 2nd respondent but by an impersonator. The court was urged to uphold the judgment of the lower court and dismiss the appeal against the 2nd respondent.

34. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial court, being mindful of the fact that the trial magistrate had the advantage of seeing and assessing the demeanour of the witnesses. I have also considered all the submissions that were made before the trial court and before me. I do note that the 2nd defendant has not appealed against the judgment made against him by the lower court, with regard to the sum of Kshs.180,000/= which was initially paid by the 1st respondent to the 2nd defendant to hold as stakeholder. Therefore, the payment to the 2nd defendant and the 2nd defendant's liability to refund the amount of Kshs.180,000/= to the 1st respondent is not an issue in this appeal. This appeal revolves around the 2nd payment of Kshs.180,000/= made by the 1st respondent to the appellant. It is noteworthy that the appellant does not deny having received the payment. Nor does the appellant deny that he was acting for the vendor in the land transaction involving the 1st respondent.

35. From the memorandum of appeal and the submissions made before me, the issues which arise in this appeal for determination is: firstly, whether the appellant received the sum of Kshs.180,000/= as stakeholder or as part payment on behalf of the vendor. Secondly, whether the appellant was entitled to pay out the sum of Kshs.180,000/= to the vendor. Thirdly, whether the appellant is liable to the 1st respondent for refund of the money. As between the appellant and the 2nd respondent, the issue is whether the 2nd respondent was actually the appellant's client, who covenanted as the vendor in the sale transaction, whether the money was actually paid to the 2nd respondent as vendor and if so, whether the appellant is entitled to indemnity or contribution from the 2nd respondent.

36. I find from the evidence and the correspondences exchanged between the 1st respondent's counsel and the appellant, that the sum of Kshs.180,000/= was forwarded to the appellant as additional deposit. This was after the vendor had withdrawn instructions from his previous advocates the 2nd defendant, who was holding the initial deposit as stakeholder. It is evident that the 2nd defendant refused to hand over the money to the appellant, and indicated that he would refund the money to the 1st respondent's counsel. Therefore, it was reasonable for the 1st respondent to forward the additional Kshs.180,000/= as deposit, as his advocate was anticipating that the initial sum of Kshs.180,000/= paid to the 2nd defendant would be refunded as they had demanded from the 2nd defendant.

37. Although strictly speaking the 1st respondent did not need to pay the additional deposit as the 2nd defendant was still deemed as holding the initial sum of Kshs.180,000/= as stakeholder, the reasoning of the 1st respondent is easy to appreciate. The 1st respondent simply wanted to ensure that in the event that the 2nd defendant refunded the sum of Kshs.180,000/= which he was holding as stakeholder, the vendor's current advocate continued to hold the sum of Kshs.180,000/= deposit as stakeholder in accordance with the sale agreement. The payment to the appellant was simply out of abundant caution. Indeed, counsel for the 1st respondent reiterated through the forwarding letter that the sum of Kshs.180,000/= was being paid to the appellant as deposit. I find that the appellant was holding the money as stakeholder for and on behalf of both the 1st respondent and the vendor. The appellant could not accept any contrary instructions from his client without any confirmation from the 1st respondent's counsel. I find that as was held by the trial magistrate, the appellant had no authority to release the sum of Kshs.180,000/= to his client before the transaction was finalized. The appellant is therefore liable to the 1st

respondent for refund of Kshs.180,000/=.

38. As regards the appellant's claim against the 2nd respondent, the appellant maintained that the 2nd respondent was the client who instructed him as vendor in the land transaction involving the suit property. Apparently, the appellant did not know the vendor personally but explains that the person was introduced to him by one of his old clients. The appellant never identified the person who introduced the vendor to him, nor was the person called to testify as a witness. Secondly, there was no evidence or any explanation from the appellant as to how he confirmed the identity of the vendor during the sale transaction. The 2nd respondent who is the registered owner of the suit property denied ever having entered into any agreement with the 1st respondent or instructed the appellant or the 2nd defendant to act for him.

39. I find that although someone who identified himself as Paul Kang'ethe Waruhiu entered into an agreement with the 1st respondent for sale of the suit property, and that both the 2nd defendant and the appellant purported to act for that person in the sale transaction, neither the appellant nor the 2nd defendant positively identified the person for whom they acted as Paul Kang'ethe Waruhiu the 2nd respondent. The appellant was under an obligation to establish the identity of the person for whom he was acting, to ensure that he was the person he claimed to be. Further, the medical reports which were produced by the 2nd respondent, and the National Identity Card, confirmed the 2nd respondent's contention that he was not the person with whom the appellant dealt. Thus, the appellant failed to establish that the 2nd respondent was his client or that the 2nd respondent was the vendor to whom he released the sum of Kshs.180,000/=

40. It is evident that the manner in which the appellant dealt with the alleged vendor was not consistent with the professionalism required of the appellant. The allegation that the appellant withdrew the sum of Kshs.180,000/= in cash, and gave it to the alleged vendor in cash, without any acknowledgement, confirms the appellant's lack of professionalism. Moreover, even the receipts that were allegedly brought to the appellant by the vendor as evidence of payment of rates and rates clearance certificate, were in the name of a person other than the vendor. The receipts did not therefore confirm that payment was actually made to the vendor. Thus, even assuming that the 2nd respondent was the appellant's client, there was no evidence that the sum of Kshs.180,000/= was paid to the 2nd respondent. Secondly, if the appellant dealt with an imposter, then, the appellant must bear responsibility for his own negligence. I find therefore that the appellant failed to prove that he was entitled to any indemnity or contribution from the 2nd respondent.

41. The upshot of the above is that I find no merit in this appeal and do therefore dismiss it in its entirety. I award costs of the appeal to the 1st respondent.

Dated and delivered this 14th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Bigambo H/B for Mungla for the 1st respondent

Miss Kipkorir H/B for Thangei for the 2nd respondent

Eric - Court clerk