



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 853 of 2002

JUMA MUCHEMI.....PLAINTIFF

VERSUS

CHARLES WAWERU GATONYE

t/a WAWERU GATONYE & COMPANY ADVOCATES.....DEFENDANT

RULING

On 23rd April 1993 the plaintiff contracted to purchase five (5) properties from M/s Williams & Kennedy for kshs 30 million.

The defendant/advocate presented the plaintiff in that transaction.

The plaintiff has sued the defendant alleging that the defendant was negligent in his representation thereof. The particulars of negligence are that:

- (a) Failing to carry out a thorough search in respect of parcel L.R. No. 5989/5/R;
- (b) Failing to advise the plaintiff that the said plot L.R. No. 5989/5/R was charged to another party as security and hence enable the plaintiff to stop purchasing the same;
- (c) Advising the plaintiff to pay M/s Williams & Kennedy Ltd, the vendor of the said property knowing that the same was charged.
- (d) Failing to get the vendor's said advocates to have the said charge discharged and get his professional undertaking hence advising the plaintiff to pay the aforesaid sum of money;
- (e) Failing to act in his best interest with regard to disbursement of funds in the sale transaction herein thus ending up in the plaintiff losing his funds.

The plaintiff further pleads that it was part of the defendant's retainer/contractual relationship to ensure the plaintiff secured legal title of the aforesaid properties free from all encumbrances but that due to the aforesaid negligence the plaintiff lost kshs 11, 628, 000.

The plaintiff's claim is denied by the defendant.

The defendant has now moved this court by an application brought under Order VI Rule 13 (1) (b) and (d) of the Civil Procedure Rules, for dismissal of this suit on the basis that it is frivolous, vexatious and an abuse of the process of the court.

The defendant argued that the plaintiff's suit lacks merit and that the allegations of negligence against the defendant had no foundation and had no bearing to the alleged loss. The defendant stated the alleged failure to do a search or the alleged advise to the plaintiff to pay money to the vendor had no connection to the alleged loss because, the sale transaction failed due to the plaintiff's failure to pay the balance of purchase price, within the contractual period of 90 days. That there was therefore no nexus between the alleged wrong and loss.

Defence stated that the plaintiff by a sworn affidavit had accepted that the sale had failed due to the non payment of the balance of the purchase price. By affidavit sworn by the plaintiff dated 21st September 2005, the plaintiff deposed as follows in paragraphs 4 and 6

“(4) Though the initial transaction was to be completed within ninety (90) days the same was not possible as I was being financed by third party persons who withheld the funds for a period not hitherto contemplated resulting in several extensions of the completion period and as a corollary thereto the extension of the defendants retainership contract with myself.

(6) the sale transaction herein fell through when my new advocate, Messrs J.M. Njage Mwangi advocates, were served with a twenty one (21) days completion notice dated 6th September 1995 which notice came to an end on the 27th day of September 1995.....”

Defence learned counsel submitted that the defendant's firm carried out a search over the property L.R. No. (original No.) 5989/5/R (I.R. No.35802), and therefore refuted the plaintiffs allegation that the defendant did not do such a search, but also added that even if a search had not been carried out it did not lead to the failure of the sale transaction. Defence argued that the sale agreement, between the plaintiff and Ms Williams & Kennedy Ltd, provided as one of its conditions that the properties were being sold free of any encumbrances. That The Law Society Conditions of sale condition 16 (2) provided

“The vendor is responsible for obtaining the discharge of any encumbrance to which the property is not sold subject.”

Those Law Society conditions of sale were incorporated into the agreement for sale between plaintiff and Ms William & Kennedy Ltd.

On the plaintiff's allegation that the defendant was negligent in advising the plaintiff to pay William & Kennedy an amount of kshs 6.2 million, defence submitted that such payment was part fulfilment of the plaintiffs obligation on the transaction of sale and if indeed the transaction was completed the paid amount would have been credited towards the purchase price.

Defence relied on the case; **CORK V KIRBY MACLEAN, Ltd [1957] 2 ALL ER 402**. Denning, L.J. stated in his judgement:

“Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage.....if is always a matter of seeing whether the particular event was sufficiently powerful a factor or bring about the result as to be properly regarded by the Law as a cause of it.”

Defence relied on this case to support its contention that there was no nexus between the failed transaction and the alleged lack of a search or the alleged payment to William & Kennedy Ltd.

The application was opposed. Plaintiff argued that his suit was not frivolous, vexatious nor was it an

abuse of the court process. Plaintiff stated that the defendant's retainer obligated the defendant to act in good faith and to protect the interest of the plaintiff.

Plaintiff's learned counsel, in a statement that was not easily understood by the court, argued, that, the plaintiff's present case was not on the basis that the plaintiff lost out on the transaction but that his complaint, against the defendant, was that the defendant advised the plaintiff to do certain things which ended in the plaintiff suffering loss.

The defendant's breach, plaintiff's counsel argued, was that he advised the plaintiff to pay an amount above the 10% of the purchase price which was a departure from the terms of the agreement for sale; and further that he failed to conduct an official search. The plaintiff argued that this proves that the defendant did not act in his best interest.

Plaintiff relied on the case between KINLUC HOLDINGS LTD - AND – MINT HOLDING LTD & OTHERS whereby it was held:

“The law implies clearly that an advocate will protect the interest of his client.....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.”

I am minded to state, as I begin to consider the arguments presented before me that it is not the practice in the civil process of our courts to have preliminary hearing cases, except, in plain and obvious case, the court can determine whether a cause is frivolous or an abuse of the courts process. When a party seeks the striking out of the other side's pleadings the essence of justice requires the court to act cautiously and carefully and consider all facts of the case without indeed embarking on a trial. In the case between D.T. DOBIE – AND – JOSEPH MUCHINA it was held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment.”

Bearing in mind the above caution I will begin to examine the plaintiff's case.

The plaintiff claim is that the defendant breached his retainer in two aspects; (1) that he failed to carry out a search on the suit property; and, (ii) that he advised the plaintiff to pay an amount over and above the 10 % of the purchase price.

The two issues raised by the plaintiff, I need to consider whether the breach of them, caused the plaintiff the damage he claims.

The damage the plaintiff claims he suffered is the loss of the amount of kshs 11, 628, 000 which is the 10% of the purchase price, kshs 3.2 further paid towards the purchase price and the legal fees incurred in the failed transaction.

In consideration of causation, in this case I am assisted by the case of CORK – V – KIRBY MACLEAN (Supra), where I will have to determine ‘**but for**’ the breaches alleged against the defendant would the alleged loss not have occurred to the plaintiff.

In my consideration of causation, I cannot fail but state that the plaintiff, by his sworn statement in his affidavit sworn on 21st September 2005, clearly indicated what to him caused the failure of the sale transaction. At first in paragraph 4 he stated that the completion period was 90 days, which he was not able to meet because of failure to get a financier and later stated that a 21 days notice was served by the vendors advocate upon his advocate.

It is pertinent also to note that the agreement for sale between the plaintiff and the vendor (William & Kennedy Ltd) provided:

“Should the purchaser fail to pay the balance of the purchase price on the completion date he shall forfeit the 10% deposit paid to the vendor’s advocates in addition to any other remedy open to the vendor”.

It seems clear from the clause that the plaintiff only stood to forfeit 10% of the purchase price, it does there seem that the plaintiff can claim any amounts paid to the vendor over and above the 10%.

There is no breach that I can fathom which is constituted by the defendant advising the plaintiff, in the course of the transaction, to make further payment towards the purchase price. It is after all the obligation of each party to abide by the contract of sale and therefore the further payment made by the plaintiff, as rightly stated by defence, was in fulfilment of that contract.

The issue of the alleged failure of the defendant to carry out a search the court finds had no effect on the failure of the sale transaction, because the agreement for sale, and The Law Society conditions of sale, provided that the vendor was selling the properties free from encumbrances. Had the plaintiff paid the full purchase price, and then thereafter had the vendor failed to transfer the properties because they were encumbered the plaintiff would have rightly had a cause of action against the vendor. That however, was not to be because this court’s finding is that the sale failed to conclude because of the plaintiff’s failure to pay the balance of the purchase price.

The plaintiff, I find has failed to show, to this court that **‘but for’** the alleged breaches of the defendant, the sale transaction would have not failed. This would mean that the plaintiff’s case against the defendant is unsustainable and consequently is frivolous or vexatious.

The plaintiff as disclosed in his replying affidavit has separately sued the vendor, in HCCC NO. 2459 of 1997, seeking for order of specific performance and for damages for failure to transfer the un-encumbered properties to the plaintiff; and in respect of the encumbered property he seeks that the same be transferred to him free of any encumbrance. That suit which was filed before this present one is yet to be determined. The plaintiff I find was abusing the process of the court in filing the present suit, in that, on one had, he blames the vendor for the failed transaction, and on the other hand, he blames the defendant for the same failure. He would, if he was to succeed in both cases, be compensated twice over, that is blatant abuse.

The court’s finding is that the defendant does succeed in his application for indeed the plaintiff’s case, for reasons stated herein before, is **“so clearly frivolous that to put it forward would be an abuse of the process of the court”** per JENUNE P in YOUNG V HOLLAWAY [1895].

The orders of the court are: -

- (1) **That the plaintiff’s suit is hereby struck out with costs to the defendant;**
- (2) **The defendant shall also have the costs of the chamber summons dated 2nd February 2006.**

MARY KASANGO

JUDGE

Dated and delivered this 23rd May 2006.

MARY KASANGO

JUDGE