



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE 62 OF 2001

TRANS-NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

CHARLES KIMITA WILLY.....1ST DEFENDANT

CHARLES M. KARIUKI t/a APPLE CROSS SURVEYORS.....2ND DEFENDANT

JUDGMENT

The plaintiff, Trans-national Bank of Kenya Limited sued the defendants Charles Kimita Willy (*hereinafter referred to as the 1st defendant*) and Charles M. Kariuki t/a Apple Cross Surveyors (*hereinafter referred to as the 2nd defendant*) seeking to be paid the sum of Kshs 1,261,787/= plus interest at bank rates on account of an alleged professional negligence on the part of the 2nd defendant who undertook a valuation of parcel No. **Elburgon/Elburgon Block 3/153** (*hereinafter referred to as the suit property*) and thereby influenced the plaintiff to advance a loan to the 1st defendant based on the said valuation which later turned out to be an over valuation of the said parcel of land. The plaintiff particularised the particulars of negligence and breach of contract by the 2nd defendant in its plaint and averred that as a result of the said professional negligence on the part of the 2nd defendant, it had suffered loss and damage on account of the loan advanced to the 1st defendant on the strength of the erroneous and misleading valuation report prepared by the 2nd defendant. It averred that it could not sell the suit property by public auction due to the fact that the sum advanced to the 1st defendant exceeded by far the value of the charged property. The plaintiff further prayed to be paid damages by the 2nd defendant for negligence and breach of contract.

The 1st defendant filed a defence. He admitted that he had been advanced a loan by the plaintiff and the security offered was the suit property owned by the 1st defendant. He denied any knowledge of the impropriety on the part of the 2nd defendant and further denied that he owed the plaintiff any money. He averred that whatever money that had been advanced to him had been repaid in full. He therefore averred that the plaintiff had no cause of action against him. On his part, the 2nd defendant admitted that he had been instructed by the plaintiff to value the suit property for mortgage purposes. He averred that he undertook the valuation of the said property in a professional manner as was expected of him having been shown the suit land by the 1st defendant in the presence of a representative of the plaintiff. He averred that he had relied on a survey map which had been properly stamped by the survey department. He

however later learnt that the survey map which he had used to undertake the valuation was an incorrect one. He denied that he was negligent when he based his valuation on the said incorrect map. He put the plaintiff to strict proof on its claim against him that he had been professionally negligent. The 2nd defendant counterclaimed against the 1st defendant and sought indemnity from him in the event that judgment would be entered for the plaintiff against him.

At the hearing of the case, the plaintiff called two witnesses. PW1 Phillip Kimolo Komen, the Nakuru Branch Manager of the 1st plaintiff testified that the 1st defendant approached the bank with a view of being advanced a loan. The 1st defendant offered the suit property as a security. He testified that the plaintiff instructed the 2nd defendant to undertake a valuation of the suit property after which it made an offer to advance the 1st defendant an overdraft of Kshs 400,000/= and a term loan of Kshs 800,000/= (*letter of offer dated the 8th of November 1996 produced as plaintiff's exhibit No. 1*). The loan was to be secured by a legal charge over the property known as **Elburgon/Elburgon Block 3/153**. The property was situate at Matuiku. The property was charged (*legal charge produced as plaintiff's exhibit No. 2*).

He testified that the plaintiff issued instructions to the 2nd defendant to value the suit property before it made the decision to advance the loan to the 1st defendant (*letter of instructions produced as plaintiff's exhibit No. 3*). The valuation was undertaken for the purposes of the loan that was to be advanced to the 1st defendant. The 2nd defendant prepared a valuation report of the suit property and handed the valuation report to the plaintiff (*valuation report produced as plaintiff's exhibit No. 4*). In the said valuation report the 2nd defendant had valued the developments on the suit land at Kshs 1,475,000/=. The land was valued at Kshs 100,000/=. The 2nd defendant therefore valued the suit land at Kshs 1,575,000/=. It is on the basis of this valuation that the plaintiff advanced the 1st defendant the sum of Kshs 1.2 million. He testified that after the suit land was charged, they advanced the 1st defendant the said amount of Kshs 1.2 million.

The 1st defendant, however, after a while defaulted in repaying the said sum advanced. At the time PW1 testified in court the overdraft amount had accumulated to Kshs 1,021,748/10 while the term loan account stood at Kshs 839,244.10 (*statements of accounts produced as plaintiff's exhibit No. 5 & 6 respectively*). He testified that when the 1st defendant defaulted in paying the loan, they instructed an auctioneer to sell the suit land by public auction in order for the plaintiff to recover the outstanding amount. Before the auction could take place, the plaintiff instructed another valuer to prepare a valuation report of the suit property for the purposes of determining the forced sale value. The valuer visited the suit land and found that there were no developments on the suit property. He determined the forced sale value of the suit land to be Kshs 60,000/= (*valuation report produced as plaintiff's exhibit No. 7*).

He testified that the bank had instructed a lawyer to issue a statutory notice after making a demand for payment of the defaulted amount from the 1st defendant (*statutory notice and demand notice produced as plaintiff's exhibit No. 8 & 9 respectively*). He testified that the plaintiff was claiming the sum of Kshs 1,261,787/= from the defendants which was the amount owed in respect of loan at time the suit was filed. He recalled that when the demand notice was written to the 2nd defendant, he responded by a letter dated the 5th of February 2001 addressed to K & A Insurance Brokers informing the said insurance brokers that a suit had been filed against them. The letter was copied to the plaintiff's advocates (*letter produced as plaintiff's exhibit No. 10*). In the said letter, the 2nd defendant admitted that a genuine mistake had been made but stated that he was not negligent as he had relied on a map which he thought was genuine.

He further testified that the plaintiff held the 2nd defendant liable because he failed to diligently value the property as was professionally required of him and therefore gave a misleading valuation to the plaintiff who acted upon it and advanced the loan to the 1st defendant to its detriment. He recalled that although the 1st defendant made proposals to pay the money owed, he failed to honour the promise made and thus forcing the plaintiff to file the suit (*letter of proposals by the 1st defendant produced as plaintiff's exhibit No. 11*). PW1 confirmed that he was present when the 2nd defendant inspected the property which was

alleged to belong to the 1st defendant. He denied that the 1st defendant was also present when the said inspection of the property was undertaken. He recalled that an agent of the 1st defendant was present when the valuation was undertaken.

He conceded that the property which he saw corresponded with the valuation which was undertaken by the 2nd defendant. He reiterated that the plaintiff realised the mistake made when it sought to sell the property in a public auction after the 1st defendant defaulted in repaying the loan advanced to him. He confirmed that the plaintiff sought a second opinion when it learnt from the auctioneer that the property to be sold was not the one appearing in the valuation report. He conceded that after the mistake was discovered by the plaintiff, it did not inform the 2nd defendant. He reiterated that the plaintiff had not experienced any problems with the other valuation reports which had been prepared by the 2nd defendant except the subject matter of this suit.

PW2 Dr. Mwangela Munyoki testified that he was a registered valuer and had been in the profession for twenty eight years. He recalled that he prepared the report which was produced as *plaintiff's exhibit No. 7*. Before he undertook the valuation, he procured the map of the area from the provincial surveyor's office Nakuru. The map was produced as *plaintiff's exhibit No. 12*. The map was under reference 118/4/287. He testified that the title of the suit land specified the map where the land is situate. He testified that it would be imprudent for a valuer to rely on information given by the owner of a property about the particulars of the property without independently verifying it. It was his further testimony that the map in question was compiled in 1990 and therefore was available to the public from that date onwards. He conceded that, as a valuer, he would rely on a map presented to him by a client if the map was properly stamped and was authentic. He conceded that there are times when the official maps gave wrong information. He conceded that the map which was relied on by the 2nd defendant to undertake the valuation, appeared on the face of it to be genuine but insisted that it was incumbent upon a person seeking to obtain an authentic map to collect it himself from the survey office. He testified that relying on a map presented by a client could be misleading.

The 1st defendant called one witness; himself. He testified that he took a loan of Kshs 1.2 million from the plaintiff and presented his property known as ***Elburgon/Elburgon Block 3/153 (Matuiku)*** as a security. He recalled that he was not involved in the valuation process as the same was undertaken by the plaintiff. He denied that he had colluded with the 2nd defendant to give wrong valuation of the suit property. He testified that he had repaid the entire sum of money that was loaned to him by the plaintiff. He reiterated that he inherited the suit property from his father. He insisted that on the land there was a one storey permanent house which used to belong to his father. At the time the valuation was undertaken there were four tenants who resided in the said property. He denied that he had supplied the map of the area to the 2nd defendant for the purposes of valuation. He further denied that he had sent an agent to be present when the valuation was undertaken. He insisted that he had repaid the entire sum which was advanced to him although he did not have any documentary evidence to prove that he had made the said payments as he alleged that the said documents were burnt during the tribal clashes.

He denied that a demand notice was issued to him by the plaintiff although he conceded that the postal address which appears on the said notices is his postal address. He conceded that he had not counterclaimed against the plaintiff to demand the release of his title documents. He reiterated that he was aware that to be granted a loan of Kshs 1.2 million, he had to offer a security which was equivalent or more than the loan advanced. He insisted that he had not given the map of the area where the suit property is situate to the 2nd defendant for the purposes of valuation. He testified that on the suit property there were four residential properties each containing a sitting room, two bedrooms, kitchen and a water closet.

He conceded that he had seen the valuation report but admitted that the developments indicated in the said valuation report were not the developments that appeared on the ground. He denied that he had taken the 2nd defendant to the house of one Gerald Wachira where the valuation was undertaken in order to dupe the plaintiff into granting him the said loan which was advanced to him. He conceded that the 2nd

defendant could not have intentionally valued the wrong property. He insisted that he had repaid the amount that was advanced to him by the plaintiff in full. He denied that he had misled the 2nd defendant to undertake a valuation of a wrong property in order to fraudulently obtain credit from the plaintiff. He testified that the 2nd defendant had no right to seek indemnity from him if judgment was entered against them in this case.

The 2nd defendant called one witness; himself. He testified that he obtained a Bachelor of Arts in Land Economics from the University of Nairobi. He was a member of the Institute of Surveyors of Kenya, in both the Valuation chapter and the Building Survey chapter. He recalled sometimes in September 1996, he was instructed by the plaintiff to value a property at Matuiku, Elburgon. He recalled that the 1st defendant went to his office and accompanied him to the suit land. Before he went to the suit land, he requested the 1st defendant to get him a certificate of search in respect of the suit property and the official survey plan of the area. He produced the map which he was given by the 1st defendant as *2nd defendant's exhibit No. 1*. He testified that he did not doubt the genuineness of the survey map. He visited the suit land accompanied by the 1st defendant and PW1. He recalled that he saw the map and confirmed that the suit land where they had been taken by the 1st defendant was the same as it appeared on the map. He confirmed that he had undertaken the valuation of the property after which he prepared the valuation report which was produced as *plaintiff's exhibit No. 4*.

He recalled that he had seen a block of residential flats on the suit land which he noted in his valuation report. In 1999, he learnt that the property which he had valued was not the one whose title had been charged by the bank. When he went to the survey office and obtained another map and compared it with the map which he had relied on when he had undertaken the valuation. It was only then that he became aware that the parcel of land which he had valued was a different parcel of land from the suit property. He conceded that he had relied on the wrong map and therefore arrived at the wrong valuation. He reiterated that he had no reason to doubt the authenticity of the map which he produced as an exhibit in this case because the map was properly stamped.

He testified that he had counterclaimed against the 1st defendant because the said defendant had given him wrong information. He testified that the 1st defendant should be ordered to pay the general damages to the plaintiff because he was the one who gave him a mis-description of the suit property. He conceded that he was aware that he was undertaking the valuation of the suit property for the purposes of the plaintiff assessing the amount which it would advance to the 1st defendant based on the property to be charged. He testified that he was aware that there were people who fraudulently dealt with land matters. He conceded that he had asked the 1st defendant to get him the map and the certificate of search. He testified that prior to the said valuation, he had not known the 1st defendant and therefore could not know his character. He reiterated that he had no reason to doubt the authenticity of the map which was provided by the 1st defendant although he conceded that the stamp at the survey office was an ordinary stamp which could be manufactured by anyone in the streets of Nakuru.

He conceded that it was a mistake on his part to trust the 1st defendant. He recalled that he was informed in 1999 that there was a problem with the valuation which he had undertaken on the suit land in 1996. He conceded that the mistake which he did had caused the plaintiff to suffer a loss to the tune of Kshs 1.5 million. He however reiterated that the mistake was not intentional. He recalled that he had visited the suit land with PW1 and the 1st defendant and not with the 1st defendant's agent. He reiterated that he had been given instructions to value the suit property by the plaintiff and not the 1st defendant. He conceded that he had not obtained the survey map from the survey office but was given the same at the material time by the 1st defendant.

After the close of the plaintiff's and the defendant's case the parties to the suit agreed by consent to file written submissions and present it to the court on their respective clients' cases. I have carefully read the pleadings filed by the parties to this suit. I have also carefully considered the evidence that was adduced by the parties to this suit. I have further considered the written submissions by the parties

presented to this court. The issues for determination by this court are as follows:

- (i) Whether or not the plaintiff instructed the 2nd defendant to undertake a valuation of the suit land.
- (ii) Whether or not the 2nd defendant undertook a valuation of the suit land and prepared a valuation report.
- (iii) Whether or not the plaintiff relied on the said valuation report and advanced a sum of Kshs 1.2 million to the 1st defendant on the security of the suit property.
- (iv) Whether or not the 1st defendant defaulted in repaying the said sum thus necessitating the plaintiff to realise the security charged.
- (v) Whether the 2nd defendant was professionally negligent when he failed to establish the particulars of the suit property before valuing it.
- (vi) Whether the plaintiff is entitled to be paid damages on account of the said alleged professional misconduct.
- (vii) What orders should be made as regard the issues in this case.

Certain facts are not in dispute in this case. It is not disputed that the plaintiff advanced to the 1st defendant a sum of Kshs 1.2 million on the security of the suit property. It is further not disputed that prior to the plaintiff advancing the said sum of money to the 1st defendant, the plaintiff had instructed the 2nd defendant to undertake a valuation of the suit property. It is not disputed that the 2nd defendant undertook a valuation of the suit property and presented a valuation report dated the 12th of September 1996 to the plaintiff. The valuation report was produced as plaintiff's exhibit No. 4. In the said valuation report, the 2nd defendant valued the developments on the suit property at Kshs 1,475,000/=. He valued the land at Kshs 100,000/=. In the said report, the 2nd defendant stated that he had relied on the survey plan of the area known as **Elburgon/Elburgon Block 3 (Matuiku)**. The survey plan was stated to be number 118/4/2 & 7 (*produced as 2nd defendant's exhibit No. 1*). It is further not disputed that the suit property was charged to the plaintiff by the 1st defendant. The charge instrument was produced as *plaintiff's exhibit No. 2*.

It is further not disputed that after a period of two years, when the plaintiff sought to realise the security charged to it, it discovered that the valuation which was presented to it by the 2nd defendant was not the valuation of the property which was charged. The 2nd defendant admitted that he was informed by the plaintiff of the discrepancy between what was appeared in the valuation report and the true position on the ground. When the 2nd defendant received this information, he went to the survey office and obtained another map of the area where the suit property is situated. He compared the map that he had obtained from the survey office and the one that he had relied on to prepare the valuation report. He discovered that he had made a mistake. In his testimony, the 2nd defendant concedes that he made the mistake but insists that it was an honest mistake and did not mean that he was professionally negligent. He testified that he had relied on the survey plan because he honestly thought that it was a genuine survey plan. He conceded that it was wrong on his part to have trusted the 1st defendant when he presented him with the survey plan and a copy of the search certificate. He further conceded that as a result of his mistake, the plaintiff had suffered loss of the sum it had advanced to the 1st defendant.

The 2nd defendant however insisted that it is the 1st defendant who should bear the blame for the mistake because he was the one who gave him the wrong map. On its part, the plaintiff testified that it should be paid damages by the 2nd defendant because of the wrong information that the 2nd defendant provided in the said valuation report and which the plaintiff had relied on to advance the sum of Kshs 1.2 million to

the 1st defendant, to the plaintiff's detriment. The 1st defendant in his testimony insisted that he had repaid in full the sum advanced to him by the plaintiff. He however could not produce any documentary evidence to establish that he had repaid the said sum advanced to him.

The applicable law in cases involving an alleged infringement of a professional duty of care is set out in **Charlesworth & Percy On Negligence, 9th Edition, London, Sweet & Maxwell (1997)** at page 535 under paragraph 8-01 which states that;

“Where special skill is required for a task a reasonable man would not be expected to attempt it, unless he is possessed the skill in question. In the event that he undertakes the work, he is bound to exercise the skill and competence of an ordinarily competent practitioner in that calling.”

In **Bolam –vs- Friern Hospital Management Committee [1957]1WLR 582** at page 586 McNair J. held that;

“Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill... A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular act.”

In the present case, the 2nd defendant is a registered valuer. He therefore professes the professional skill of a valuer and has opened an office to conduct such a business of a professional valuer. As a registered valuer, he is recognised by the profession of valuers as a person who is trained and possesses the skill to undertake valuations on instruction of the members of the public. When the plaintiff instructed the 2nd defendant to undertake valuation of the suit property, the plaintiff expected the 2nd defendant to use reasonable care and skill that is required of a professional valuer to value the said property and to give his opinion as to the true value of the suit property. In this regard it was expected that the 2nd defendant would have personally obtained the survey plan from the offices of the Provincial Surveyor, Rift Valley to confirm the true position on the ground of the property that he was instructed to value.

PW2 Dr. Mwangela Munyoki, a registered valuer as the 2nd defendant, testified that it was incumbent upon a valuer to obtain the official survey plan from the survey office to enable him independently verify the information given to him by the owner of the property. In the present case, the 2nd defendant admitted that he relied on a survey plan which was provided to him by the 1st defendant. He relied on the said survey plan, because according to him, it was stamped by the official stamp of the survey office. He testified that he had no reason to doubt the genuineness of the survey plan given to him by the 1st defendant, although he admitted that at the time he did not know the 1st defendant. He also admitted that the stamp used by the survey office was an ordinary stamp which could be manufactured in the streets of Nakuru.

Having evaluated the evidence adduced, it is clear that the 2nd defendant was negligent when he undertook the valuation of the suit property. He did not exercise due diligence and skill that was required of a professional like him. By accepting to be guided by a survey plan which was presented to him by the 1st defendant, he denied himself an opportunity to independently verify if the said survey plan that was presented to him by the 1st defendant was genuine or not. It is clear from the events that subsequently took place that the said survey plan under reference number 118/4/2 & 7 was false. The true survey plan of the area was produced by the plaintiff as plaintiff's exhibit No. 12 was under reference 118/4/287.

I believed the evidence of PW2 when he testified that one could only obtain a true survey plan from the survey office and not from any other source. It is clear that the 2nd defendant was careless and unprofessional when he relied on a survey plan which he could not independently verify. Further it was the height of incompetence that clearly was negligent when the 2nd defendant relied on documents

supplied to him by the owner of a parcel of land which he was valuing without making an effort to independently verify if the documents availed to him were genuine. In that regard therefore, having evaluated the evidence adduced, I do hold that the 2nd defendant was professionally negligent when he undertook the said valuation. He failed in his duty of care to the plaintiff and therefore is liable to pay damages to the plaintiff.

In this case, the plaintiff has established on a balance of probabilities that it relied on the said valuation report to advance a loan of the sum of Kshs 1.2 million to the 1st defendant. The plaintiff was convinced that the suit property had been properly and professionally valued by the 2nd defendant to be of the value Kshs 1,575,000/=. The plaintiff was persuaded that the 1st defendant had undertaken developments on the suit property valued at Kshs 1,475,000/=. I did not believe the testimony of the 1st defendant that he had not deliberately misled the plaintiff and the 2nd defendant by showing them a house which belonged to his cousin called Gerald Wachira and pretended that it was his. I did not believe his testimony that he had repaid the amount which was advanced to him by the plaintiff. He did not produce any documentary evidence to prove that he had made the said payments. His testimony to the effect that the said documents had been destroyed by fire during the tribal clashes was therefore a lie.

It is clear that the 1st defendant took advantage of the negligent conduct of the 2nd defendant and succeeded in duping him into valuing a property of his cousin to enable him obtain a higher amount than he would otherwise qualified from the plaintiff with the sole intention of defrauding the plaintiff of the said sum of money. The 1st defendant did not intend to repay the said sum of money advanced to him by the plaintiff. The 2nd defendant's protestation that he honestly was mistaken when he had undertaken the said valuation of the suit property cannot afford him a defence from being held liable in law on account of his professional negligence. The 2nd defendant shall therefore pay general damages to the plaintiff that shall compensate the plaintiff for the loss that it has suffered as a result of placing reliance of the said false valuation report.

The upshot of the above reasons is that judgment is entered for the plaintiff against the defendants jointly and severally as follows:

- (i) The defendants shall pay the plaintiff the sum of Kshs 1,261,787/= as prayed in the plaint.
- (ii) The said amount shall attract interest at 23% per annum from the 24th of February 2001 when the plaintiff filed this suit until the payment in full of the decretal sum.
- (iii) The plaintiff shall have the costs of the suit.
- (iv) The counterclaim of the 2nd defendant against the 1st defendant is hereby dismissed with no orders as to costs.

DATED at NAKURU this 27th day of June 2006.

L. KIMARU

JUDGE