



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HCC NO. 56 OF 2000

KENYA COMMERCIAL BANK PLAINTIFF

VERSUS

PHILIP ODONGO KABITA

T/A ODONGO KABITA VALUERS DEFENDANT

JUDGMENT

By a plaint filed in court on 16.8.2000, the Kenya Commercial Bank Ltd, the plaintiff herein, sues Philip Odongo Kabita t/a Odongo Kabita & Co. Valuers for professional negligence. It is pleaded that sometimes on or about 30th November, 1996, the Bank contracted the said valuer for reward to identify, inspect and prepare a mortgage valuation report in respect of property known as East Bukusu/ South Kanduyi/5131. It is also pleaded that it was a term and condition of the said contract and the valuer thereby warranted or alternatively it was his duty to the Bank to exercise reasonable care, skill, diligence and competence in carrying out the assignment. It is further pleaded that he submitted a valuation report to the Bank and that the bank acting in reliance thereon advanced to one Saul Wekesa Nyongesa, its customer loan facilities to the tune of Kshs.900,000/= which facility together with accrued interest stood as Kshs.1,912,311.80 as at 15th November, 1999. It is further pleaded that in carrying out the plaintiff's instructions the valuer was guilty of breach of the terms conditions and warranties pleaded and also of his duty to the Bank.

The particulars of negligence pleaded are failing to exercise due care, skill, diligence or competence in identifying, inspecting and preparing the valuation report; failing to exercise due care, skill, diligence and/or competence expected of a prudent valuer; submitting to the plaintiff a misleading valuation report. Stating in the valuation report that the parcel of land was extensively developed with business and residential buildings when in the real sense there were no such buildings; failing to observe and report to the plaintiff that there were no buildings erected on the said land; and failing to advise the plaintiff of the correct and right value of the mortgage property. It further pleaded that in consequence of the aforesaid matters, the services of the defendant were useless and the value of land was infact worth less than its value as reported by the defendant and the plaintiff has suffered loss and damage. The particulars of special damages are pleaded as (a) the amount of loan facility granted in the sum of Kshs.900,000/= and (b) the amount paid to the defendant for the valuation report to be stated at the hearing. In the premises, the plaintiff seeks relief against the defendant for general damages for breach of contract and full indemnity for the loan facilities granted to Saul Wekesa Nyongesa; costs of the suit; interest at the Bank rate of 44% per annum, and any other relief that the court may deem fit to grant.

The defendant has entered an appearance and duly filed a statement of defence whose purport is to deny that he was negligent as alleged or at all.

The suit was listed for hearing before me on 15.5.2002. There was no appearance by or for the defendant. On being satisfied that the defendant's Advocates had been served with a sufficient hearing notice, I proceeded to hear the case *ex parte*.

The plaintiff called two witnesses. The first was Alex Simiyu, an officer in the advances department of the Bank at Bungoma. He testified that he instructed the defendant to carry out the valuation pleaded and that a report was duly submitted. That report which was produced in evidence showed that the property was developed and comprised of both commercial and residential buildings. It was valued for Kshs.1,900,000/= which was broken down to Kshs.350,000/= as the value of the plot and Kshs.1,550,000/= as the value of the buildings thereon. He further testified that the Bank paid Kshs.6,400/= as professional fees for the said valuation and in reliance thereon it sanctioned an overdraft of Kshs.200,000/= and a loan of Kshs.700,000/= to Saul Wekesa Nyongesa, its customer, who charged the said property to secure the aforesaid financial accommodation. The witness further testified that the borrower defaulted in his repayment and the Bank instructed another valuer to value the property. The second valuer returned a value of Kshs.400,000/= and observed in his report that the property was undeveloped. After noticing those discrepancies, the Bank wrote to the defendant asking him for an explanation. The defendant did not respond to that letter but did respond to a reminder thereof. His reply was produced in evidence as Exh 8. In short his explanation was that he was deliberately misled by the borrower who showed him a developed plot located next to his empty site. He claimed the borrower had cheated other Bank appointed valuers in the past and he was one in that chain of fraud. He stated he had acted in good faith and pleaded to be treated leniently as to err is human. The witness further testified that according to the Bank, it was the duty of the valuer to identify, inspect and value the property. The defendant had not done that. On the contrary, he relied on a customer to identify the property for him and as a result he submitted an erroneous report which gave an exaggerated value of the property on the basis that it was developed. In his opinion, the valuation, was done negligently. He further testified that the Bank had relied on the report and had suffered loss because it advanced the customer Kshs.900,000/=. He said that if the report had not been as presented, the Bank would not have given that much. He swore that the amount outstanding in the account of the customer as at the date of the hearing was Kshs.1,786,718/=. He prayed that the Bank should be indemnified to the extent of the outstanding loan balance plus interest accrued thereon and the costs of the suit. When I asked the witness how much the Bank would have advanced to the customer if the value of the property had been stated to be Kshs.350,000/=: he replied that only a sum of Kshs.175,000/= would have been advanced because the Bank normally advances a sum equivalent to 50% of the value of the property.

The second witness for the Bank was Boniface Wafula Muse, a professional valuer. He testified that he was instructed to value the said property in July 1998. He identified it on the ground by obtaining and using a certificate of official search, and a copy of the mutation survey plan from the survey office in Bungoma District. He used the latter document because the registry index map for the relevant registration section which he had obtained from the provincial survey office at Kakamega did not reflect the plot in question. The witness was categorical that in his profession of valuation, it is the duty of the valuer to identify and inspect the property he is instructed to value and he cannot rely on any other person to do that for him. He was also emphatic that the professional way of doing a valuation is to first identify the property by the use of appropriate documents from the relevant Government Departments and then inspect the same. He followed the correct procedure and identified and valued the property. He found it was an undeveloped plot and gave it a value of Kshs.400,000/=. Asked to comment on the proposition that the property was developed and its value was Kshs.1,900,000/=: he opined that that could only be so if a different property had been inspected and valued.

At the close of the evidence, Mr. Makokha, advocate for the plaintiff submitted that on the evidence adduced the plaintiff had proved its case on the balance of probability as it was clear that defendant was negligent in his work as a professional valuer for instead of relying on documents from the relevant land department and the relevant survey office, he relied on the Bank's customer in identifying the property to be valued. As a consequence of that he submitted an erroneous and misleading report which led the Bank to advance to the customer Kshs.900,000/= instead of Kshs.175,000/=. He submitted that the amount of Kshs.900,000/= would never have been given had it not been for the incompetent report. He asked for judgment against the defendant.

I have considered the evidence and the submissions. I find that the defendant as a professional man duly instructed by the plaintiff owned a duty care to the plaintiff. He knew that a professional opinion which the plaintiff would rely on was required. I also find that he was in breach of that duty in that he did not proceed to value the property in accordance with the ordinary standard of care skill and diligence expected of a professional valuer. Instead of identifying the property using the accepted professional tools of a certificate of official search and a registry index map for the relevant registration section or a copy of the mutation survey plan if the registry index map was not helpful he relied on and was misled by the borrower. To err may be human, but for a professional to err as a result of not applying professional skills and tools is negligence in any language. I also find that the Bank suffered loss as a result of the defendant's negligence. The only issue outstanding is the measure of damages.

Whether the claim be in tort or in contract, *restitutio in integrum* is the guiding principle in law. The plaintiff should be restored to the same position as he would have been had the breach of contract or tort complained of not occurred. The other principle is that only those losses which are not too remote should be compensated. And of course the plaintiff is duty bound to mitigate his loss. While on this statement of general principles, I might also state that the court will not award special damages unless the same are pleaded with particularity and then strictly proved. Even if evidence on special damages is led, the same will be ignored if the particulars thereof were not pleaded.

Applying the above principles, I take the following view of the matter. Had the defendant not negligently identified and valued the wrong property, the plaintiff would not have advanced Kshs.900,000/= to the customer. That is a direct loss. I have considered whether the direct loss should not be affixed at Kshs.725,000/= the same being the difference between what was advanced on the basis of a value of Kshs.1,900,000/= and what would have been advanced on the basis of a valuation of the land in the sum of Kshs.350,000/. I have concluded that such an approach would be fallacious for the reason that the value of the plot at Kshs.350,000/ = was not the value of the correct plot but another one altogether and it would accordingly be speculative to hold that the same would have been the value of the correct plot. As regards the amount of Kshs.1,786,718/= which is said to be outstanding on the customer's account, I must decline to find it as the of loss for which the plaintiff should be compensated for two reasons. First, it was not pleaded as required by law, and secondly, it is obvious that the same consists of interest and there was no evidence on how it has been calculated.

Furthermore, even if the plaintiff had surmounted the procedural hurdle of lack of pleading and the evidential hurdle of proof, I would still decline to award the same on the grounds that it had not been proved that the defendant had or could reasonably have foreseen that the customer would fail to service his loan and that the plaintiff would not take action to mitigate its loss at the first sign of trouble. In my considered opinion, all the loss at the first sign of trouble. In my considered opinion, all the loss which is comprised of interest is too remote and accordingly unrecoverable in this action.

As regards the fees paid to the valuer, the same is irrecoverable as the plaintiff did not plead the same. As regards the interest on damages, I am unable to see any legal basis for the plaintiff claiming 44% per annum from the defendant. The defendant is not a borrower and there is no contractual obligation on his part to pay damages at commercial rates. I think given that this is a claim for professional negligence which has succeeded on the basis that the defendant has breached his duty of care to the plaintiff, the interest on damage should be applied at court rates from the date of assessment as is the usual practice.

In the result, I enter judgment for the plaintiff against the defendant in the sum of Kshs.900,000/= with interest thereon at court rates from the date hereof until payment in full plus the costs of the suit. Those, then, are the orders of this court.

Dated and delivered at Bungoma this 11th June, 2002

A.G RINGERA

JUDGE

