Kakunia v Ndung'u practicing as Annie W Thoronjo & Co Advocates (Civil Appeal 94 of 2019) [2023] KEHC 17324 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 17324 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 94 OF 2019

HM NYAGA, J

MARCH 16, 2023

BETWEEN

MUTUA KAKUNIA .... APPELLANT

AND

ANNIE W NDUNG'U PRACTICING AS ANNIE W THORONJO & CO ADVOCATES .... RESPONDENT

JUDGMENT

Background

1 By a Plaint dated 7th September 2017, the Appellant filed a suit at Tawa Senior Resident Magistrate's Court seeking the following prayers;

1. Kshs. 300,000/= with interest with effect from 1st July 2016.
2. An amount of money received by the Defendant on the Plaintiff's behalf or account
3. Any other prayer the court may consider justified to grant.
4. Costs of the suit.

2 The appellant's case in the lower court was premised upon alleged professional negligence on the part of the Respondent.

3 This suit (2nd suit) stemmed from a previous suit namely Tawa Senior Resident Magistrate's Court Civil Case Number 152 of 2015 (first suit). In the said suit, the respondent had acted for the appellant in which he sought general and special damages for injuries sustained in a road traffic accident that occurred on 14th December, 2014. Judgment was delivered in the first suit on 25th May, 2017 and the Appellant was awarded Kshs. 171,742.50 as general damages and costs.

4 It was appellant's contention that the Respondent had failed to plead a prayer for future medical expenses amounting to Kshs. 300,000/= when filing the first suit, yet she had assured him that she had pleaded the same. That it turned out that the future medical expenses were not pleaded and the trial court did not award the same.

5 Aggrieved by the turn of events in the first suit, the Appellant filed the 2nd suit against the Respondent, citing professional negligence on their part. The appellant thus sought orders that the Respondent be held liable for failing to plead the said amounts and payment thereof by the Respondent personally.

6 The Appellant further stated that though the Respondent received Kshs. 171,742.50 on his behalf, she failed to pay it to him.

7 The Respondent file a defence, denying the averments by the Appellant. It was the Respondent's case that the Appellant was not entitled to the Kshs. 300,000/= as future medical expenses. That the appellant had prior to the filing of the first suit, signed a verifying Affidavit and a Witness Statement and had thus confirmed the contents of the Plaint. It was further stated that the Appellant had been informed of the amount received by the Respondent and when called upon to receive his dues, he refused to do so, then proceeded to file the 2nd suit.

8 The 2nd suit went to full trial and in his judgment delivered on 19th June 2019 the trial magistrate dismissed the Appellant's suit with an order that each part bears their own costs.

9 Dissatisfied with the findings of the lower court in the 2nd suit, the Appellant filed a Memorandum of Appeal dated 17th July 2019. The grounds set out are as follows;

1. That the Learned Senior Resident Magistrate erred Law and fact by dismissing the Appellant's suit.
2. That the learned Magistrate erred in Law and in fact in failing to determine what was payable to the Applicant.
3. That the learned Magistrate erred in law and fact in failing to appreciate the evidence placed before the court by the Appellant.
4. That the Learned Magistrate erred in law and fact in failing to appreciate the essence of the Law of Agency and the effect of the failure by the Advocate in professional duty.
5. That the learned Senior Resident Magistrate erred in law and fact in failing to deliver a clear reasons and definite judgment in the case.
6. That the Learned Magistrate erred in law and fact by basing his entire decision on assumptions and unrelated issues not before him.
7. That the entire judgment by the learned Magistrate lacked fairness and failed to give closure and determination of the dispute between the parties.
8. That in all the circumstances of the case, the Learned Senior Resident Magistrate failed to render any justice to the Appellant and unfairly rewarded the Respondent for the wrongs the Respondent had continued to visit upon the Appellant.

10 The Appellant thus seeks the following orders:-

a. The appeal herein be allowed and the judgment delivered on 19th June 2019 be set aside.

b. Judgment be entered in favour of the Appellant as Prayed in the Plaint or as the court may consider fair and just taking into account the special the circumstances of this case.

c. Court be pleased to issue an order giving directions to the relevant bodies on what action to take against the Respondent.

d. That the costs of this Appeal and costs of the suit in the surbodinate court be awarded to the Appellant.

11 At the hearing of the Appeal, the court directed that the same be canvassed by way of Written Submissions which I will summarise hereinafter.

Appellant's Submissions

12 The Appellant filed his Submissions on 31st January 2022. He argues that the Respondent, as a practicing advocate, owed the Appellant the duty of care in handling his matter. That the Respondent was fully aware of the contents of the medical report dated 5th May 2015, which clearly showed that the Appellant required future medical procedures at a cost of Kshs. 300,000/= yet when filing suit, she failed to plead the same in the Plaint filed in the first suit.

13 It is argued that the Respondent breached her duty of care to the Appellant as her client and thus seeks orders that the Respondent be ordered to pay the said amount personally.

14 It was further submitted that the Respondent received a total of Kshs. 243,387/= out of which the Appellant was entitled to Kshs. 171,742.50 but the Respondent only offered to pay Kshs. 93,476/=. That the amount payable to the Respondent as costs could only be determined upon taxation of advocate-client bill of costs.

15 On the question of negligence the advocate for the Appellant referred the court to "The Law of Torts" by R.F. Heuston, 19th Edition at Page 258.

16 Counsel further cited Bolam vs Friern Hospital Management Committee [1957] 2 All E.R. 118 and the case of Kogo vs Nyamogo and Nyamogo advocates (2004) I KLR 367.

17 Relying on the above authorities, the Appellant argues that as a qualified advocate the Respondent was fully aware of the law as set out in the Civil Procedure Rules, Order 2 Rule 10, on what ought to be pleaded. In this case, in failing to specifically plead the future medical expenses, the Respondent was professionally negligent.

18 It is further argued that the fact that the Appellant was given a copy of the Plaint to read and that he signed the Verifying Affidavit did not absolve the Respondent from professional duty to her client. That the Appellant was not an expert in law and was expected to have known that the pleadings were not in order.

19 On the issue of jurisdiction of this Court, as submitted by the Respondent, the Appellant argues that the cause of action arose in Machakos and it was not clear why the primary or first suit was filed in Tawa, which is under Makueni High Court's jurisdiction. That the Respondent's officer are at Machakos not Makueni. That this was a case of overlapping jurisdiction of the Subordinate Court and therefore. This court ought to take cognisanze of this fact and proceed to determine the appeal.

Respondent's Submissions

20 In reply the Respondent submitted that at the time of receiving instructions from the Appellant. The latter had confirmed that he did not have any neurological complications as envisaged in the Medical

Report by Dr. Laiposha. That the doctor had opined that the Appellant may had required future medical procedure for neurological complications at a cost of Kshs. 300,000/=. That the Appellant read the Plaint and signed the Verifying Affidavit as required. He also signed his Witness Statement.

21 It is further argued that there was no way the Appellant could prove the claim for further medical expenses as the Appellant had sustained soft tissue injuries. Accordingly, there was nothing wrong in the manner the pleadings were drawn by the firm.

22 On the alleged negligence on her part, the Respondent cited NBK Limited vs Mwiu Kamau & Another (2009) eKLR.

23 It is submitted that the Appellant failed to establish that the Respondent made any mistake or error in their handling of the Appellant's case. That an action for professional negligence is founded on contract. In this case it was within the contemplation of the contracting parties that a foreseeable result of a breach of contract will be to cause loss or damage. Then if the breach occurs, which does bring about that result, damages are reasonable. That it was within the contemplation of the parties that if the respondent failed on their duty, the Appellant would be succeptible to grave loss and damage.

24 The Respondent also raised the issue of jurisdiction of the court. It is argued that the cause of action, if any, arose in Nairobi County and therefore this court lacks the territorial jurisdiction to handle the matter.

Determination

25 In my opinion there are the issues of determination:-

(a) Whether this court has jurisdiction to entertain the Appeal or not.

(b) Whether the Appellant proved professional negligence on the part of the Respondent.

(c) The relief available to the Appellant, if successful on (b) above.

(d) Costs of the Appeal.

Jurisdiction of the Court

26 I note that this issue was pleaded in a very casual manner. It actually appears like the Respondent raised the issue as a by the way.

27 Issues of jurisdiction are weighty and must be given the attendant attention. Jurisdiction is what gives any court the powers to entertain any matter before it. Therefore, a question as to jurisdiction, ought to preferably, be raised at the earliest opportunity.

28 In the celebrated case of the The Owners of Motor Vehicle 'Lilian 's' vs Caltex Oil Kenya Limited Limited (1989) eKLR the court was clear on what effect of Jurisdiction or lack thereof has on a court. It held as follows;

> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

29 The above principles have been restated by the Supreme Court of Kenya in two well known decisions. The first in the Matter of Interim Independent Electoral Commission [2011] eKLR where it was held that:-

> ‘A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law’

30 The other is Samwel Kamau Macharia vs Kenya Commercial Bank Limited and others 2012 eKLR where is was held that:-

> A Court’s jurisdiction flows from either *the Constitution* or Legislation or both. Thus, a Court can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law… the Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.”

31 As I have stated, a question of jurisdiction ought to be raised at the earliest opportunity. It is usually raised as a preliminary point or objection asking the principles set out in Mukisa Biscuits Manufacturers Limited vs West End Distributors Limited [1969] EA 696. It was stated that:-

> A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration… a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

32 In the instant appeal, the question of jurisdiction was raised in the submissions on the appeal itself, 3 years after it was filed and the matter mentioned on several occasions. Directions were also given on the mode of canvassing the Appeal.

33 Despite the lapse of time, this court is enjoined to consider any issue raised on jurisdiction at any time. It is also well settled that the court can on its own motion address a question of its jurisdiction even where the parties don’t raise it and even accede to the court’s jurisdiction.

34 The High Court is a creature of *the Constitution*. Article 165 thereof establishes the court. Article 165(3) set out the jurisdiction of the court as follows;

Subject to clause (5), the High Court shall have —

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

    (i) the question whether any law is inconsistent with or in contravention of this Constitution;

    (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

    (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

    (iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.

35 The only limitation to the High Courts jurisdiction is provided under Sub-Article (5) which expressly states that:-

36 The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

37 If I got the Respondent correctly their argument to that this court did not possess the geographical jurisdiction to entertain this appeal in the first place. Further, that Tawa Law Courts from where the 2nd suit arose, is under the jurisdiction of the High Court in Makueni.

38 The High Court, as established under *the Constitution* has territorial jurisdiction all over Kenya. Its limit cannot be localized like, say, the magistrates court. Therefore the fact that there is a High Court in Makueni did not extinguish the jurisdiction of this court to hear and determine the Appeal. The establishment of the High Court at Makueni was largely an administrative undertaking and does not affect the inherent jurisdiction of the High Court.

39 To buttress this point, I refer to the authority of Selina Vukinu Ambe v Ketan Shashikant Khatri [2020] eKLR where it was held that;

> ' Besides the fact that the provision clearly regulates the filing of suits in subordinate courts, it is pertinent to note that the jurisdiction of the High Court is derived from the Constitution of Kenya 2010 which at Article 165 (3) confers on the court unlimited original jurisdiction in both criminal and civil matters.'

40 Having disposed of the issue of the jurisdiction, I will now address the substantive matter at hand.

41 This is an appellate court of the 1st instance. As such, the court had a duty to consider, to re-evaluate and re-analyse the evidence adduced afresh and come to its own independent conclusion. This point

is well settled in law but far god measure, I refer to the authority of Gitobu Imanyara and 2 Others vs Attorney General [2016] eKLR where the Court of Appeal held that:

> An Appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its conclusions through it should always bear in mind that it has neither seen not heard the witnesses and should make due allowances in this respect."

40 Similarly in Abok James T/A A. J. Odera and Associates vs John Patrick Machira T/A Machira and Company Advocates it was held that:

> This being a first appeal, we are reminded of our primary role as a first appellate court namely to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the Learned Trial Judge one to stand as not and give reasons either way."

41 It follows that this court is not being asked to analyse the findings of the trial court and poke holes into it or agree with it. It is only after this court has made its own independent determination that can it can conclude that the trial magistrate's decision is to be upheld or set aside.

42 In this instance, the Appellant's claim was based on alleged professional negligence on the part of the Respondent. The Appellant states that the Respondent acted negligently in not claiming Kshs. 300,000/= for future medical expenses as set out in the medical report submitted to the respondent.

43 The respondent's answer is that having seen the appellant, he did not provide any evidence of neurological complications as envisaged in the report. She therefore saw no need to pray for the same. She also argues that the Appellant had a chance to peruse the Plaint prior to its filing in court and approved of it by signing a Verifying Affidavit and a Witness Statement.

44 The question to be answered is whether, in failing to include a prayer for future medical expenses the Respondent was professionally negligent.

45 Like all professions, advocates owe their clients a duty to act professionally and to act within the instructions of the clients.

46 To me, an advocate acts more like an advisor to the client. A client may want to pursue a certain claim but the advocate can advise him/her not to do so, for one reason or another. Such reasons may include limitation of time or even a claim which is not sustainable. The client entrusts the advocate to act in accordance with the acceptable standards required of the latter.

47 The test, it has been said, is what a reasonable and competent practitioner would do having regard to the standards and limits normally and/or usually adopted in his/her possession.

48 This position was buttressed by the authority of NBK Limited vs Muriu Kamau and Another (Supra). It was held as follows;

> The law is clear that an advocate who holds himself out to his client as having adequate skills and knowledge to conduct the case he is instructed owes a duty to his client both in contract and tort. Where the advocate is in breach of his contractual obligation/duty to his client or where he fails to use proper care towards the fulfillment of the instructions he was given, he is liable in damages in so far as the client suffers the loss...when a client goes to an advocate, it is a reasonably foreseeable consequence that if anything goes wrong to the litigation, owing

> to the advocate's negligence, there will be a liability that would arise or occur. It is also clear that a charge of negligence against an advocate is a serious matter and must be strictly and distinctly proved."
>
> "The point I am making is that a doctor who forgets his surgical materials inside the stomach of his client after closing the wound would be liable for negligence unless he can show that the surgical room was attacked by the illegal gang who endangered his life or that he found himself in an extraordinary or unusual circumstances at the time he was closing the wound. The law places a responsibility on all professionals to exercise prudent and reasonable care for the safety, security and protection and preservation of the property/life entrusted on them. One cannot escape liability by asking for half payment or for saying that what he/she did was reasonable. The test is not what he endeavours or undertakes to do but that which can meet the test of reasonability."

49 It is now well settled law and this is submitted by the Respondent, that the relationship between an advocate and his/her client is a contractual one. However, it has also been held that where the advocate acts negligently in performing the said contract, then he/she could be held liable for professional negligence for breach of duty, which is a tort. In National Bank Of Kenya Limited v E. Muriu Kamau & another (supra) the court further held that;

> ' It is also important to note that an action by a client against an advocate alleging negligence in the conduct of the client's affairs is an action of breach of contract. It is also the law that where at the time of making a contract it is within the contemplation of the contracting parties that a foreseeable result of a breach of the contract will be to cause loss or damages then if a breach occurs which does bring about that result, damages are reasonable under that heading. In this case the bank instructed the advocate to take the proceedings at law to protect and return monies lost by the bank and as a result HCCC No.1464 of 2000 was commenced. The advocates, in law, were under a duty by contract to use reasonable care and to avoid putting the bank in a situation that would result in want of care. It must have been in the contemplation of the parties herein that if the advocates failed on their duty the bank would be susceptible to grave loss and damages."

50. The limits of liability of an advocate towards his/her client were clearly set out in Kago vs Nyamogo and Nyamogo (Supra). It was held that;

> On the contentious issue of an advocate's negligence towards his client and the basis for liability, we wish to point out that in Champion Motor Spares Ltd v Phadke and others [1969] EA 42 the predecessor of this Court held, among other things, that an advocate is not liable for any reasonable error of judgment or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice."

51. To me, an advocate is not guilty of negligence if he merely commits an error of judgment whether on matters of discretion or law (See Clifford Okello Rachuonyo T/A Rachuonyo and Rachuonyo vs Mohammed Yusuf Saroya (2018) eKLR.

52. In the instant case, the Respondent has explained why she felt that the prayer for the future medical expenses was left out. She was not provided with any evidence of continued medical procedure by the Appellant at the time of taking up the instructions.

53. In my opinion, an advocate is not obligated to sue for all the prayers that his/her client wants. She has a duty to sieve and only pursue a claim that, in her opinion, is sustainable in a court action. Therefore, the Respondent, in deciding not to seek a prayer for future medical expenses was well guided by her perception of the facts and the law. She cannot be faulted for that.

54. The appellant, in seeking legal advice from the Respondent cannot now become more knowledgeable than the advocate herself in matters of law.

55. I am therefore of the opinion that the Appellant has failed to demonstrate that the Respondent acted negligently.

56. To this extent, I agree with the decision of the trial magistrate.

57. The other question to be addressed is whether I should order the Respondent to pay the Kshs.271,832/= to the Appellant as claimed.

58. Having looked at the matter, I am of the opinion that the suit was actually conceived when the Appellant was offered Kshs. 93,476/= by the advocate. He probably felt slighted and refused to accept the same. There is really no proof that the Respondent refused to pay that money.

59. I am of the view, and in agreement with the trial magistrate that this was a matter that called for taxation of advocate client bill of costs. At that forum, the issue of agreed fees, if any, will be dealt with by the taxing master.

60. For the Appellant to seek payment of the Kshs. 271,831/= he is actually trying to bypass the taxation process. He is entitled to the amount due after taxation. The advocate must remit the amount determined to be due to the appellant or face action over the same.

61. For the foregoing reasons and subject to the rider above, I find that the appeal lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY FROM NAKURU THIS 16 TH DAY OF MARCH, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Immanuel

Ms Mboya for Mutua for Appellant

Mr. Makau for Gicharu for Respondent