



**Kenred Housing Co-operative Society Ltd v Adipo & Company Advocates (Civil Suit E422 of 2018) [2024] KEHC 15863 (KLR) (Commercial and Tax) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15863 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E422 OF 2018  
JWW MONG'ARE, J  
DECEMBER 16, 2024**

**BETWEEN**

**KENRED HOUSING CO-OPERATIVE SOCIETY LTD ..... PLAINTIFF**

**AND**

**ADIPO & COMPANY ADVOCATES ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit against the Defendant vide a plaint dated 6/12/2018. The Plaintiff's case was that on or about 21/2/2017, it instructed the Defendant to act for it, as its advocate, in a transaction to purchase the property identified as Title Number; Donyosabuk/Komarok Block 1/13192 measuring 4.04 Hectares (hereinafter 'the property').
2. The Plaintiff stated that the Defendant went on to represent it in the said transaction without exercising due care and skill and in a manner that was so negligent causing it to lose the purchase price paid together with attendant costs being stamp duty.
3. Particulars of the negligence committed by the Defendant as alleged by the Plaintiff were the following:
  - a. a. Advising the Plaintiff to have half of the purchase price released to the vendor while disregarding/ignoring the Plaintiff's recommendation to have the agreement for sale be worded to provide that the entire purchase price of the property should be held by the vendor's advocate in trust.
  - b. Misadvising the Plaintiff to pay the instalments on an accelerated program faster than that stipulated under the Law Society Conditions of Sale.



- c. Falsely indicating to the Plaintiff that the completion documents had been verified by themselves and thereby advising the Plaintiff to make payments knowing very well that this was not true and/or was misleading.
  - d. Procuring the Plaintiff to make payments to the vendor in the transaction without having procured a professional undertaking from the advocate of the vendor as provided for under the agreements for sale governing the transaction.
  - e. Procuring the Plaintiff to make payments to the vendor of the balance of the purchase price without having received the original title document for the property.
  - f. In the alternative, procuring the Plaintiff to make payment to the vendor of the balance of the purchase price without verifying whether the alleged title document received by the Defendant was indeed genuine and valid.
  - g. Instructing the Plaintiff to make payment of the balance of the purchase price without the Defendant being in possession of the title document as provided for under the agreement for sale.
  - h. Failing to conduct an official search for the property.
  - i. Failing to notice that the copies of titles were materially different on the face of it.”
4. Based on the alleged acts of negligence, the Plaintiff averred that it lost Kshs.17,500,000/- being the purchase price paid for the property, Kshs.350,000/- paid towards stamp duty and Kshs.5,500,000/- being loss of business owing to lack of capacity to trade on account of having no funds.
  5. The Plaintiff prayed inter alia for court orders to have the aforementioned sums compensated by the Defendant, general damages and a declaration that the Defendant was negligent.
  6. In support of its case, the Plaintiff relied on one witness, SUSAN NG’ONG’A, its chairperson. She adopted her witness statement dated 28/11/2018.
  7. Her testimony was that on 21/2/2017, the Plaintiff instructed the Defendant to handle the entire transaction and informed him that the purchase price had been agreed at Kshs.17,500,000/-; that the Defendant advised the Plaintiff to agree to the provision in the sale agreement which stated that only half of the purchase price would be held in trust and that the Defendant did not verify the completion documents.
  8. PW1 stated that the Defendant acted negligently in a transaction of this nature and misled the Plaintiff to make payments without conducting basic due diligence and/or protecting its interests.

**Defendant’s Case:**

9. The Defendant filed an amended statement of defence dated 15/11/2019 and a third-party notice of a similar date.
10. The Defendant contended that the Plaintiff identified the property and negotiated for the purchase of the property with one of the third parties, a MR. DAVID MULWA NGUMBI, purporting to be the owner of the property- SABBAS KIVUVA NZEKI (“the alleged vendor”) and that the Plaintiff conducted a search on the property and then gave instructions to the Defendant to represent it in the transaction.



11. That the Plaintiff agreed to pay half of the purchase price to the alleged vendor prior to registration of the transfer on account of his alleged illness; that upon receiving the completion documents inclusive of the purported original title deed to the property and the Lands Control Board Consent, the Defendant advised the Plaintiff that it could proceed to release the funds to the vendor's advocate in accordance with the sale agreement.
12. The Defendant stated that he was informed at the Machakos Land Registry that the title documents were false and as a result the sale transaction could not be completed and that he duly informed the Plaintiff of these findings.
13. Further the Defendant contended that the advice it gave to the Plaintiff was within the parameters of the law and the sale agreement and that its professional duties did not extend to the verification of the genuineness of the title documents and/or the veracity of the identity of the alleged vendor.
14. The Defendant averred that the Plaintiff was itself wholly negligent in its dealings with the alleged vendor and that fraud was perpetrated on the Plaintiff by the alleged vendor and his advocate together with another party, which fraud was reported to the police and is now the subject of Milimani Criminal Case No.1854 of 2017. The Defendant enjoined the alleged vendor, his advocate and the said Anthony Munyambu Busani as third parties to the suit.
15. It was the Defendant's case that the third parties have been charged with conspiracy to defraud contrary to section 317 of the Penal Code in respect of the same matters complained of in this suit by the Plaintiff.
16. The Defendant filed a third party notice whereby it claimed reliefs against David Mulwa Ngubi, Anthony Munyambu Busani And Timothy Njoroge Mwaura (hereinafter the third parties) in the event that the prayers sought by the Plaintiff against it in the plaint are granted.
17. The Defendant called one witness, Collins Odhiambo, who signed a witness statement amended on 15/11/2019. He adopted the said statement as his evidence in chief. He produced two bundles of documents dated 8/2/2019 and 19/11/2019 as his evidence.
18. DW1 testified that the Defendant had previously represented the Plaintiff in other transactions however it was not part of his duty to identify the vendors; that the Plaintiff as a purchaser ought to have met the vendor, visited the property, confirmed that the vendor is the true owner and engage a surveyor to confirm the property in question, the size and identify the beacons on the ground.
19. On cross examination, DW1 reiterated that it was not his duty to confirm whoever they were dealing with was the proper vendor and that his instructions did not include investigating the vendor. Further that the Defendant did owe a duty of care to the extent of the instructions given.

**Analysis and Determination:**

20. The Plaintiff filed written submissions dated 15/7/2024 while the Defendant filed submissions dated 1/10/2024. The court has considered the same together with the pleadings and evidence availed by both parties.
21. I believe that the issues for determination are the following:
  - 1) Whether the Defendant owed the Plaintiff a duty of care in the transaction?
  - 2) Whether there was breach of the duty of care/ negligence on the part of the Defendant?



**Issue one: Whether the Defendant owed the Plaintiff a duty of care in the transaction.**

22. The Plaintiff retained the Defendant to act as its advocate for the purchase of the property. This is evidenced by the letters of instruction dated 17/2/2017 and 21/2/2017 produced on page 13-14 of the Defendant's bundle. Enclosed with the letter of instruction was a copy of the title deed to the property, the search conducted by the Plaintiff on the property and the alleged vendor's identity card.
23. In *Kinluc Holdings Ltd Vs Mint Holdings Ltd & Macharia Njeru* [1998] KECA 126 (KLR), the Court of Appeal held:

“Advocates are retained to look after the interests of a client. It is common ground that the meaning of retainer as set out in *Halsbury's Law of England*, Third Edition, paragraph 84, is correct. The learned authors set out the following:

“Meaning of retainer. The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by the client; consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment, and the rights and liabilities of the parties under the contract will depend on any terms which they have expressly agreed, partly on the terms which the law will infer or imply in the particular circumstances with regard to matters on which nothing has been expressly agreed and partly on such statutory provisions as are applicable to the particular contract. By the giving and acceptance of the retainer the solicitor acquires his authority to act for and bind the client and the client becomes bound both personally as between himself and his solicitor and as between himself and third parties with whom the solicitor deals within the limits of his authority on behalf of his client.”

The Court of Appeal went on to state as follows:

“The Law implies clearly that an advocate will protect the interests of his client...A retainer binds an advocate to act for his client in such a manner as to protect his client's interest and not to jeopardize his interest.”

24. I concur with the authority above. It is well-established that advocates owe their clients a duty of care to act with due diligence, skill, and competence within the scope of their instructions. Thus, the court finds that the Defendant, as the Plaintiff's legal representative in the transaction, owed the Plaintiff a duty to ensure that the transaction was conducted in accordance with the law and protected the Plaintiff's interests.

**Issue 2: whether there was breach of the duty of care/ negligence on the part of the Defendant?**

25. The Plaintiff entered into a sale agreement dated 24/3/2017 regarding the property. It was later discovered that the entire transaction was a conspiracy to defraud the Plaintiff by David Mulwa Ngumbi (the alleged vendor), his advocate, Timothy Mwaura Njoroge and another. Criminal charges were preferred against the aforementioned individuals in *Milimani Criminal Case No.1854 of 2017* as consolidated with *Criminal Case No.1908 of 2017*. A copy of the charge sheet is produced at page 38-38 of the Defendant's bundle.
26. I have analysed the documents availed by the parties in this suit.
27. Vide an email dated 21/3/2017, the Defendant advised the Plaintiff that only the balance of the purchase price ought to be retained in trust by the vendor's advocate pending the successful registration of the transfer in favour of the purchaser. A copy was produced on page 20 of the Plaintiff's bundle.



28. In a letter dated 29/6/2017 the Defendant informed the Plaintiff that it had verified the completion documents and advised it to proceed with the payment of Kshs.3,500,000/- to the alleged vendor's advocate, being the 2nd deposit of the purchase price. A copy of the letter was produced on page 33 of the Plaintiff's bundle.
29. Vide a letter of 8/9/2017, the Defendant informed the Plaintiff that it had received all completion documents and advised the Plaintiff to remit the balance of the purchase price of Kshs.8,750,000/- to the vendor's advocate. A copy of the letter was produced on page 42 of the Plaintiff's bundle.
30. Vide a letter dated 20/9/2017, the Defendant wrote to the alleged vendor's advocate stating that it had discovered that the title document availed by the them was materially different from the one availed to the vendor. The Defendant requested the alleged vendor's advocate to furnish it with the original title document. A copy of the letter was produced on page 46-47 of the Plaintiff's bundle.
31. The documents above indicate that contrary to standard practice and safeguards the Defendant prematurely advised the Plaintiff to make payments. The Defendant failed to verify the authenticity of the completion documents and to conduct a formal search of the property to confirm ownership.
32. Further the Defendant failed to secure a professional undertaking from the alleged vendor's advocate which would ensure that the balance of the purchase price is held in trust and not released to the alleged vendor pending the successful registration of the transfer. This was a requirement under clause 2 of the sale agreement.
33. I am persuaded that the Defendant's inaction in verifying crucial documents and conducting due diligence directly facilitated the loss suffered by the Plaintiff. While the Defendant argued that the fraud was perpetrated by third parties and that the Plaintiff had the responsibility to investigate who the true owners of the property were, the advocate's role as a professional includes taking reasonable steps to detect irregularities and safeguard the client's position.

I find that the Plaintiff suffered loss due to the negligence of the Defendant in handling the land transaction and that the Plaintiff is entitled to compensation for the loss directly attributable to the Defendant's negligence. However, I find that claim for Kshs. 5,500,000/- for business losses was not substantiated with sufficient evidence to establish a direct causal link to the Defendant's actions.

34. Subsequently, I am satisfied that the Plaintiff has established its case against the Defendant to the required legal standard, on a balance of probabilities, and therefore enter judgment for the Plaintiff against the Defendant in the following terms:-

- 1) Kshs. 17,500,000/- for the lost purchase price
- 2) Kshs. 350,000/- for stamp duty paid.
- 3) Kshs. 2,000,000/- as general damages for the inconvenience and financial strain caused.
- 4) Interest at court rates from the date of this judgment on (1), (2) and (3)
- 5) Costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2024**

.....

**J.W.W. MONG'ARE**



## **JUDGE**

In the Presence of:-

1. Mr. Okoth for the Plaintiff.
2. Mr. Wakhisi holding brief for Mr. Imende for the Defendant.
3. Amos - Court Assistant.

