



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CAUSE NO. 684 OF 2012

DONNA FERRARI LTD.....PLAINTIFF

VERSUS

PHILLIP KARANJA WACHIRA

T/A KARANJA OTUNGA ADVOCATES.....1ST DEFENDANT

TIMOTHY V.M. OKWARO.....2ND DEFENDANT

(IN CONSOLIDATION WITH)

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC CIVIL SUIT NO. 927 OF 2011

DONNA FERRARI LTD.....APPLICANT

VERSUS

TIMOTHY VITALIS MAKHOHA OKWARO

T/A TIM OKWARO & CO. ADVOCATES..... RESPONDENT

J U D G M E N T

1. **DONNA FERRARI LIMITED** is the plaintiff. It has brought this case against **PHILIP KARANJA WACHIRA** t/a Karanja Otunga Advocates the 1st defendant claiming that the 1st defendant acting for it as an advocate, under a retainer, acted negligently, recklessly in handling a transaction which as a direct consequence thereof the plaintiff suffered harm and loss. The plaintiff has also sued **TIMOTHY VITALIS MAKOKHA OKWARO** t/a Tim Okwaro & Company advocates the 2nd defendant, claiming that the 2nd defendant owed it professional duty of care to disclose information regarding title documents which duty he failed to discharge. The plaintiff prays for judgment against both defendants, jointly and severally for Ksh 5,550,000 and Ksh 800,000 being costs for legal advice it obtained.

2. The plaintiff, through its director Ali Haji Hussein (Ali) instructed the 1st defendant to act for it in purchase of land title No L.R. No. 12715 I.R. 44354 located in Syokimau. The 2nd defendant acted for the vendor in that transaction. A sale agreement was signed by both the plaintiff and the vendor on 19th September 2011. It is the 1st defendant's case that he applied for an official search over the property. He was informed by the land registrar that the deed file was misplaced. The land registrar requested the 1st defendant to furnish her with the original certificate. On the 1st defendant requesting, from the 2nd defendant, the vendor's advocate, to avail the original certificate, the 2nd defendant in turn requested for the 10% purchase price to be paid into his account and then undertook to avail the original certificate. On 21st September 2011 the 1st defendant transferred into 2nd defendant's bank account Ksh 3.5 million, the 10% of the purchase price. On the 2nd defendant forwarding the purported original title to the property, the registrar confirmed that the same was a fake. The 2nd defendant

declined, to date, to retransfer the 10% to the 1st defendant and hence the action by the plaintiff.

3. The 2nd defendant did not file defence to this action and nor did he attend trial.

4. The 1st defendant filed a defence denying 'breach of retainer' and counter claimed against the plaintiff for his legal fees in the transaction.

ANALYSIS

5. The issues for determination are:

i. *Did the plaintiff prove its claim of professional negligence against the defendants.*

ii. *If the answer to (i) above is in the affirmative what remedy is it entitled to.*

iii. *Has the 1st defendant proved his counter claim.*

6. A useful place to start in discussing the issues above is to determine what negligence is and what its standard of proof is. On this I will rely on a discussion in the case **Malton v Attia, (2013) ABQB 642 (CanLII)**

*“What is negligence? In the foundational case of **Donoghue v Stevenson**[1], Lord Atkin explained negligence as a failure to act in a reasonable manner to one’s neighbours, when these are “... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.”.....*

Standard of Care

An act or omission is negligent when it is conducted in breach of a person’s standard of care. The appropriate standard of care is a question of mixed fact and law.[2]

The scope of a standard of care is a contextual question – “It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time.”[3] In other words, standard of care depends on the facts of each case.”

7. I also wish to make reference to the case **Kimani Ngundu Mburu v Catherine Waithira Mwangi & Co. Advocates [2013] eKLR** viz:

*“To this end, the Court has received some considerable guidance as regards to what amounts to professional negligence from the Court of Appeal case of **Champion Motor Spares v Phadke (1969) EA 42**. At page 47, **Duffus Ag V-P** (as he then was) had this to say on the subject:*

*“The extent of an advocate’s liability to his client for negligence has been considered at various times by this Court. I would refer to the case of **Stephens & Co. v. Allen (1918)**, 7 E.A.L.R. 197. This case went to the Privy Council (1921), 8 E.A.L.R. 211. The following extract from the judgment of the Privy Council is of some assistance:*

‘The question of negligence with regard to the performance of a solicitor’s duty must to some extent be affected by the local conditions and the local circumstances, as to which their Lordships might not be perfectly informed. In the present case the negligence is alleged to be due to the ignorance of the provisions of an Act of Parliament. It may well be that in Nairobi this Act of Parliament has practically never been heard of in judicial proceedings; it is impossible for their Lordships to know; but the question as to whether a solicitor is negligent or not in omitting to give effect to a statutory provision cannot be disentangled from the consideration of whether the statute that is involved is one which is of constant and common occurrence in practice or whether it is one unfamiliar and remote. With those circumstances their Lordships are unable to deal.’

8. In the case **Kogo v Nyamongo & Nyamongo Advocates (2004) I KLR 367** the Court held:

“An advocate is not liable for any reasonable error of judgement 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.”

9. There is no doubt that the test in the case **Malton v Attia (supra)** on what is negligence, stated in **Donoghue v Stevenson**, has been met by the plaintiff in this case. The acts of both the defendants directly affected the plaintiff and consequently the two defendants should have contemplated that the plaintiff would be so affected. The plaintiff was their neighbour in the context of **Donoghue v Stevenson** case. The other authorities above show that the local conditions must be borne in mind when determining if there has been professional negligence. Negligence has to be contextualised.

10. It is therefore necessary to consider the acts of each of the defendants to determine their liability, if at all.

11. The 1st defendant stated in evidence, and it was not denied by the plaintiff that the plaintiff was their client prior to the transaction in this matter. The plaintiff contacted the 1st defendant and requested him to act for him in respect to the land transaction. This is evidence from the letter of the 1st defendant dated 29th August 2011 to the 2nd defendant. In that letter the 1st defendant, inter alia, stated:

“We are informed that you have instructions to act for the registered owner in this matter.

Our client has negotiated with yours for the purchase of the said property (subject to favourable outcome of normal due diligence) on the following terms and conditions:

1. The purchase price is ksh 37,500,000.00 of which sum Ksh 2,500,000 is commission due to the vendor’s agent.

2. The purchaser shall pay upon execution of the sale agreement the sum of Ksh 3,500,000 to yourselves being 10% of the purchase price to keep as stakeholders for the vendor pending the registration of the property in our client’s (or its nominees) name.....

3. The purchaser shall upon execution of the sale agreement pay the sum of Ksh 2,500,000 to the agent of the vendor.”

12. I have taken time to reproduce part of that letter to show firstly the actions the 1st defendant took initially as the transaction commenced and secondly to show that the plaintiff’s director Ali was not candid when he stated in cross examination by the 1st defendant thus:

“You contacted us (sic) to say you have that land.”

The plaintiff did however confirm that the 1st defendant wrote the letter reproduced above which it is clearly seen to show that it is the plaintiff who negotiated with vendors then instructed the 1st defendant to act for it in the transaction. This holding is reinforced by the 2nd defendant’s letter of 30th August 2011, in response to the letter reproduced above where he stated inter alia

“Our client generally agrees with the rest of the terms in your letter, but stated that she had agreed with the purchaser (here it is the plaintiff) that the 10% deposit will be released to her as she is also acquiring a developed property elsewhere and she is required to post the requisite 10% immediately, in return of which the vendor lets the purchaser take possession upon execution of the sale agreement.”

13. As stated before, on the sale agreement being executed by the plaintiff and the vendor the 1st defendant embarked on carrying out an official search. The deed file was said to be missing at the land registry and on 1st defendant requesting the 2nd defendant to provide the original title the 2nd defendant responded by his letter of 13th September 2011 where he stated:

“Please remit Kshs 3,500,000 to our client’s Account No.....Equity Bank Kimathi Street.

We undertake to furnish your with the original certificate of Title on receipt of deposit.”

14. The 10% deposit was indeed released to the 2nd defendant only for the title document he forwarded to the 1st defendant to be declared, by the land registrar, to be a fake document.

15. The local circumstances of land transactions in Kenya are that they have many times been riddled with fake documents. That is the local circumstances. In view of that can the acts of the defendants said to be professionally negligent?

16. The 1st defendant requested a clause be inserted in the sale agreement indicating that 10% of the purchase price would be paid to 2nd defendant as stakeholder for the vendor pending completion. That we now know the 2nd defendant did not do because he was unable to return the 10% back to the 1st defendant when the title documents were found to be fake. The 1st defendant, to his credit, began a flurry of activities to salvage the situation. He reported the matter to police, although the court was not informed of its outcome, he complained to the disciplinary committee of the Law Society of Kenya, the 2nd defendant was eventually found guilty by that committee and ordered to refund the 10% plus interest to the 1st defendant, and the 1st defendant filed a civil court action, on behalf of the plaintiff, against the 2nd defendant for the refund of that 10% (**that is Misc. Civil Case No. 927 of 2011 Donna Ferrari Ltd v Timothy Vitalis Makokha Okwaro t/a Tim Okwaro & Company Advocates**).

17. All that action of the 1st defendant came to nothing. No negligence, on the evidence adduced, can be attributed to the 1st defendant. He conducted the transaction as a professional lawyer would be expected to. He only transferred the 10% to the 2nd defendant on condition, as clearly provided in the agreement of sale, as a stakeholder. It is the 2nd defendant who is guilty, from the evidence, of professional negligence. He owed a duty to the plaintiff to ensure that he held the 10% as a stakeholder but he did not. It is clear that the 2nd defendant was aware that the title documents were fake – no wonder he only agreed to release the fake documents in return of 10% purchase price. He had no intention of holding that amount as a stakeholder and upto today, since he failed to defend this case, it is unknown what became of that amount. It follows that as much as the plaintiff feels aggrieved that it lost Ksh 3.5 million that loss cannot be attributed to the 1st defendant that loss and the blame lays at the ‘door’ of the 2nd defendant.

18. My finding in respect to the 1st issue is that the plaintiff proved that the 2nd defendant was professionally negligent.

19. Having proved negligence of the 2nd defendant the plaintiff is entitled to judgment for Ksh 3.5 million being the 10% of the purchase price and ksh 500,000 being commission paid on plaintiff's behalf. The plaintiff failed to prove the balance of his claim which is in the nature of special damages.

20. The 1st defendant proved, and it was admitted by the plaintiff, that he acted for the plaintiff in the transaction. Although he claimed, by his counter claim for retainer from the plaintiff, the 1st defendant did not prove the amount, yet this is a claim in special damages which should have been specifically claimed and proved. The 1st defendant's counter claim therefore fails.

21. The plaintiff having succeeded in its case against the 2nd defendant it is entitled to costs from that defendant.

CONCLUSION

22. The Judgment of the court is:

a. The plaintiff's case against Philip Karanja Wachira is dismissed with no order as to costs.

b. Judgment is entered for the plaintiff against Timothy V.M. Okwaro for Ksh 4 million plus interest from the date of filing suit until payment in full.

c. The plaintiff is awarded costs of the suit to be paid by Timothy V.M. Okwaro.

d. The 1st defendant's counter claim is dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of MAY, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **4th** day of **May, 2020**.

MARY KASANGO

JUDGE