



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 167 OF 2005

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....PLAINTIFF

-VERSUS-

BENJAMIN MUSAU T/A B. M. MUSAU & COMPANY ADVOCATES.....DEFENDANT

J U D G M E N T

1. **NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES** (hereinafter NSSF) is the Plaintiff in this action. NSSF is vested with the responsibility of managing a fund which provides basic social security for its members and their dependants for various contingencies as provided under the National Social Security Fund Act.

2. The Defendant, **BENJAMIN MUSAU T/A B. M. MUSAU & COMPANY ADVOCATES**, is a practicing Advocate of the High Court of Kenya.

3. NSSF has alleged, in this action, that the Defendant received money on behalf of NSSF which he failed to remit to NSSF. The particulars of NSSF's claim against the Defendant are in respect to properties sold on behalf of NSSF whose proceeds, NSSF claims, was not remitted to it by the Defendant. Those proceeds are:

PROPERTY	AMOUNT RECEIVED BY DEFENDANT
a) Nairobi/Block 111/499	Kshs. 850,000.00
b) Nairobi/Block 111/499	Kshs. 99,503.50
c) Nairobi/Block 140/159	Kshs. 3,450,000.00
Total	Kshs. 4,399,503.50

4. The above sum is the amount NSSF claims in this case against the Defendant, plus interest at commercial rate.

5. The Defendant filed a defence and a counter-claim against NSSF's claim. By his defence the Defendant denied the NSSF's claim for Kshs. 99,503.50. The Defendant however, by his defence admits NSSF's claim for Kshs. 4,175,000; which is made up of Kshs. 850,000 and Kshs. 3,450,000.

6. The Defendant counter-claimed for Kshs. 35,016,999.60.

NSSF'S CASE

7. NSSF's evidence was led by Caroline Rakama, its legal officer.

8. By her evidence, that witness, stated that NSSF gave the Defendant on 29th May 2000, instructions to provide legal services in its disposal of two properties. Those properties were Nairobi/Block/111/4999, for sale by public auction; and Nairobi/Block 140/159 Nyayo Embakasi for sale by private treaty. That the Defendant completed the sale of those two properties, but failed to deliver to NSSF Kshs. 4,399,503.50, in breach of his professional duty. The witness proceeded to testify that the Defendant was not entitled to hold onto the proceeds of sale of those properties, as alleged by the Defendant, because NSSF did not owe the Defendant any amount of money in respect to what he was instructed to act for it.

DEFENDANT'S CASE

9. The Defendant by his defence only admitted holding in lien for NSSF Kshs. 4,175,000. He denied owing NSSF the amount of Kshs. 99,503.50. When the Defendant, however, was cross examined he stated:

“The Plaintiff's claim – It is true the amount claimed is correct, we hold these (sic) on account of the fees due to us.”

10. The Defendant's case is that NSSF instructed him to carry out legal work for which NSSF failed to pay him and it is on that basis he holds the amount in the claim on a lien.

11. The Defendant, by his counter-claim, proceeded to claim from NSSF Kshs. 35,016,999.60 for which he pleaded he is entitled to set off from the proceeds he holds on behalf of NSSF.

ANALYSIS AND DETERMINATION

12. There are two issues for consideration. They are:

a. Has the Defendant proved his claim for Kshs. 35,619,861.60 and if so is the Defendant entitled to a lien or set-off from the proceeds of sale of the properties of NSSF?

b. Who bears the costs of this suit?

ISSUE (a)

13. The Defendant has claimed to have a right to hold onto the proceeds of sale of NSSF's property as a lien for the amount owed to him by NSSF.

14. The Defendant pleaded that NSSF instructed him on 22nd June 2000 in writing, to assist it in a matter involving Prudential Building Society whereby NSSF was exposed to the tune of Kshs 1.51 billion. According to the Defendant that matter presented different and unique legal difficulties and involved the application of different legal skills and expertise. The Defendant's legal fee for this was stated by the Defendant to be Kshs. 26,756,500.

15. NSSF denies having instructed the Defendant in that regard.

16. The Defendant further pleaded that he was instructed and did transfer, on behalf of NSSF, properties situated in Eldoret valued at Kshs. 54 million. The Defendant alleged his legal fees for this was Kshs. 6,254,000. That, however, after discussion with NSSF the Defendant agreed to reduce his said legal fee to Kshs. 3,540,000, in consideration that NSSF would continue to give him business, more specifically that NSSF would give him conveyancing work. The Defendant's case is that NSSF did not continue to give him legal work and that, accordingly, the consideration of reducing the legal fee failed.

17. NSSF's case in regard to that claim is that the Defendant accepted the amount of Kshs. 1,542,260 as his fee and that, since he had been paid that amount, he was estopped from any further claim thereof.

18. The Defendant further alleged that NSSF instructed him to negotiate the release of Kshs. 7 million, to NSSF, held by Central Bank of Kenya (CBK). The Defendant claims Kshs. 887,360 as legal fee for that legal work.

19. The Defendant's claim for Kshs. 887,360 was denied by NSSF which proceeded to plead that the Defendant had waived his claim for this fee.

ANALYSIS OF ISSUE (a)

20. The Defendant's claim for lien over NSSF's proceeds of sale is that NSSF owes him money in respect to the legal work he undertook on its behalf: he therefore claims to have a lien over those proceeds of sale.

21. There are three transactions the Defendant alleges he is entitled to be paid by NSSF legal fees. One of those transactions is the legal advise in respect to the NSSF's exposure of Kshs. 1.5 billion held by CBK on behalf of Prudential Building Society. The Defendant relied on NSSF's letter, to him, dated 22nd June 2000.

22. I have looked at that letter dated 22nd June 2000. It is clear that NSSF gave the Defendant the background upon which a decision was made for Prudential Building Society to transfer to NSSF thirty properties in Eldoret. The transfer of those properties, as stated in that letter,

was to be in part payment of the debt Prudential Building Society owed NSSF, which debt was close to Kshs. 1.6 billion.

23. I cannot read any more than NSSF's instructions to the Defendant to transact the transfer of those thirty properties, in Eldoret, into the name of NSSF, in the said letter. In my view, the Defendant's reliance on that letter as being the instructions to act and advise NSSF on the debt owed by Prudential Building Society is in error. Paragraph three of NSSF's said letter of 22nd June 2000 shows the Defendant's error. NSSF stated thereof:

“Our instructions are that you proceed to obtain the said title documents from the Society, (Prudential Building Society) whereafter draw transfer document, for signature by the parties, register transfers so that the titles revert to the name of NSSF Board Trustee.”

24. The Defendant responded to NSSF's letter dated 22nd June 2000 with his letter dated 26th June 2000. By that letter, which the Defendant addressed to The Managing Trustee of NSSF, the Defendant confirmed that the NSSF's instructions, contained in the letter of 22nd June 2000, related to the instructions for the Defendant to transfer of titles of thirty properties into NSSF's name. the Defendant, in part, by his said letter of 26th June 2000 stated:

“Thank you very much for your letter of 22nd June.

We are pleased to confirm that we will act for the Board of Trustee, NSSF in connection with the matter of transfer of Titles from Prudential Building Society to the Board of Trustee, NSSF.

We note that your current instructions are in respect of 30 houses in Kapsoya, Eldoret valued at Shs. 54 million.”

25. If there was any doubt, I believe that letter of the Defendant, dated 26th June 2000, makes it abundantly clear that both NSSF and the Defendant were clear that the instructions of NSSF in its letter dated 22nd June 2000 were restricted to instructing the Defendant to undertake the transfer into NSSF's name the thirty properties in Eldoret.

26. Although the Defendant sought to rely on various other correspondence, from which the Defendant stated can be read instructions, for him to advise NSSF on its debt of Kshs. 1.5 owed by Prudential Building Society, I beg to differ with the Defendant in that regard. Here is why.

27. The Defendant on 27th June 2000 gave a breakdown of fees for legal work of transferring the 30 titles into NSSF's name. In that breakdown the Defendant did not include fee for any advise he gave in respect of Kshs. 1.5 billion debt. Even the Defendant's letter to NSSF, dated 3rd July 2000 the general theme of it is the transfer of the 30 titles. Nothing in the various correspondences which the Defendant wrote to NSSF, in the year 2000, can remotely be said to confirm substantive instructions that NSSF instructed the Defendant to advice on the debt of Kshs. 1.5.

28. NSSF, as stated before, did indeed instruct the Defendant to carry out transfer of the 30 titles of properties in Eldoret. The Defendant by his letter dated 29th June 2000 gave a reduction of his legal fees, for carrying out those transfers, at Kshs. 3,540,000. In that letter, and in reducing his legal fee, the Defendant wrote:

“We have considered reducing our fee note considerably and hope for continued business relationship with the Board of Trustees.”

29. NSSF's response to the Defendant's said letter is by its letter dated 26th October 2000. By that letter NSSF did not confirm that the reduction of Defendant's legal fees was in consideration of the Defendant continuing to getting legal work from NSSF. Rather NSSF responded to the Defendant by stating that the correct legal fee for the transfer of the 30 titles into NSSF's name, according to the Advocate's (Remuneration) Order, was Kshs. 1,542,260. The Defendant by his letter of 26th October 2000 confirmed that that fee was acceptable to him. NSSF after deducting Kshs. 25,140 as tax paid on behalf of the Defendant eventually forwarded to the Defendant a cheque of Kshs. 1,517,120 in payment of Defendant's legal fee for the transfer of the 30 titles in Eldoret.

30. In my view the Defendant having received the payment of legal fees for the transfer of those 30 titles in Eldoret, there is no legal basis for him to claim an additional amount thereof. The Defendant is estopped from making such claim. This is by virtue of Section 120 of the Evidence Act. that Section provides:

“When a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing.”

31. The Defendant having confirmed that his fee from the transfer of the 30 titles, and NSSF having acted on that confirmation and forwarded the payment of that fee, the Defendant is estopped from reneging on that confirmation.

32. The third transaction the Defendant claims legal fees over is the NSSF debt of Kshs. 7 million by Prudential Building Society which amount was held by CBK.

33. The Defendant's such claim is defeated by the Defendant's confirmation that he had forgone part of his fee on the legal work he

undertook in respect to that debt of Kshs. 7 million. Having forgone his claim to part of his legal fees in that regard he cannot now lay claim to any further legal fee.

34. Having gone through the above analysis it becomes clear that the Defendant has no right to a lien or set-off the amount he holds for NSSF. A lien in any case does not permit a party to reduce the debt owed. This is what was stated in the case **EVANS OTIENO NYAKWANA V CLEOPHAS BWANA ONGARO [2015] eKLR** as follows:

“The classic definition of lien is to be found in the case of Hammonds V Barclay (1802) 2 East 227, 235 where Grose J., described it as, “a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession are satisfied.” A lien does not grant the holder the power to sell the goods to discharge the debt or reduce the debt owed. The right of a lien may be terminated when an action is taken that is inconsistent with the possessory lien or when the owner tenders the outstanding amount.”

35. In the above discussion I have also found that the Defendant failed to prove, on a balance of probability, NSSF’s indebtedness to him of Kshs. 35,619,861 or at all. I do indeed find that NSSF has no debt in respect to its legal relationship with the Defendant. Further, the fact the Defendant’s claimed legal fees was reflected in NSSF’s annual accounts is not proof of debt owed to the Defendant. The Defendant had an obligation to prove that debt which he did not.

36. Since the NSSF’s claim, for the amount the Defendant received on behalf of NSSF, is not denied by the Defendant - more particularly when the Defendant was cross examined at the trial, NSSF is entitled to judgment as sought in the Plaint. NSSF did not lead evidence on why the Court should award it commercial rate of interest and accordingly the Court will only award interest at Court rate.

ISSUE (b)

37. NSSF having prevailed in its claim it is entitled to the costs of this suit which shall be borne by the Defendant.

CONCLUSION

38. In the end the judgment of the Court is as follows:

- a. There shall be judgment for the Plaintiff against the Defendant for Kshs. 4,399,503.50 with interest at Court rate from the date of filing suit until payment in full.**
- b. The Defendants counter-claim is dismissed.**
- c. The Plaintiff is awarded costs of the suit and costs of the counter-claim.**

DATED, SIGNED and DELIVERED at NAIROBI this 13TH day of JUNE, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE DEFENDANT