



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 19 OF 2015

KIARIE G. KARIUKI t/a

KIARIE KARIUKI & CO. ADVOCATES.....APPELLANT

VERSUS

OMAR PAMBA HAMISI.....RESPONDENT

J U D G M E N T

1. The dispute between the parties at trial was pleaded in the plaint dated 14/2/2006 and filed on 20/6/2006 to have been a dispute over the application of the sums of money awarded to the Respondent as a plaintiff in HCC No. 243 of 2001 in which the Appellant acted for the Respondent as an advocate.
2. As pleaded the dispute was narrowed down to the application of some Kshs.350,000/= which was directed by the court to be held by the Appellant for purposes of purchase of a 'House without land' and registered in the joint names of the parents of the plaintiff, then a minor. There was also a sum of Kshs.40,000/= to be paid to the two parents of the plaintiff.
3. The dispute was pleaded to be that contrary to the court order the Appellant never paid the Kshs.40,000/= to the parents nor did he purchase the house. For his failure or default the Respondent sought the recovery of the sum of Kshs.390,000/=
4. There was an alternative plea that the defendant having retained the said sum of Kshs.390,000/= acted in a negligent manner by drawing an agreement for the purchase of a house at Kshs.350,000/= and paid out the sum to third parties in breach of the court orders as a result of which the plaintiff suffered loss injury and damage. The particulars of negligence and breach of court order were set out to be failure to involve the plaintiff's mother in the sale and thereby permitting the father and seller of the property to misappropriate the money in that he alleged house does not exist. For the alternative prayer the plaintiff sought the recovery of the sum of Kshs.390,000/= plus costs and interests.
5. For the appellant, a defence was filed in which it was asserted that settlement was recorded lawfully upon grant of leave by the court and the order for apportionment granted.
6. On the sums in dispute, it was pleaded that the sum of Kshs.350,000/= was released to the plaintiffs father who in turn released it to the seller of the house one Mohammed Bakari, and a discharge voucher was lawfully executed although the same was then refunded to the plaintiffs said father for which a criminal case was preferred and a conviction achieved upon plea of guilt. On the Kshs.40,000/= it was contended that the same was paid to the plaintiffs both parents for the plaintiffs school fees, uniforms and upkeep.
7. Detention of any money due to the Respondent was denied it being asserted that to ensure that the land was registered in the joint names of parents of the plaintiff the court order was incorporated in the agreement for sale. Upon execution of the agreement the Appellant contended he had no further part to play in the insuring processes. It was then contended that the plaintiff diligently excused his mandate as an advocate and that the suit as drafted and filed was bad and inerrably defective deserving being struck out for disclosing no reasonable cause against the Appellant.
8. The matter proceeded for trial before the lower court during which trial the Respondent called four witnesses, the minor plaintiff, the mother as next friend, an archivist of Mombasa Law Courts who produced the primary suit file and a brother to the minor plaintiff.
9. On its side the Appellant, as defendant called four (4) including the father to the Respondent, an advocate who was employed by the Appellant and who handled the primary suit, an account clerk of the appellant and the proprietor of the firm himself.

10. After the close of evidence and written submissions having been rendered the trial court in a reserved judgment dated 30/01/2015 found for the Respondent and entered judgment for Kshs.353,000/= plus costs and interests. In that judgment the trial court held as follows:-

“From the testimonies on record it does appear that after the defendant receipt of the money, the defendant totally excluded the plaintiff’s mother in all transactions but dealt with Juma Abitoya (Defendant Witness 1). This was contrary to the express provisions of the apportionment that the court had allowed. The matter now for determination is whether the defendant in excluding the plaintiff’s mother was in any way professionally negligent as it the plaintiff’s contention that the house that was to be bought for him was never bought and even the Kshs.40,000 was never given to his parents. He therefore suffered loss. Juma Abitoya was infact charged in court, jailed and according to Defendant Witness 4 the defendant had his sentence reduced on appeal.

I am therefore persuaded that he was convicted on his own plea of guilt because he never bought the house. Juma Defendant Witness 1 also admitted that only Kshs.250,000 was paid to Mohammed Bakari the house seller and that he received the Kshs.100,000 which he used to buy a piece of land in Lunga Lunga. This supports the plaintiff’s contention that infact the defendant paid only Kshs.250,000 for the house and either retained the Kshs.100,000 or released it to Juma Abitoya which was contrary to the apportionment sanctioned by court.

From the above I have established that the standard if care required of an advocate where money is concerned is that he has to be competent diligent and comply with law. In dealing with only one parent Juma Defendant Witness 1 and totally excluding the mother, the Juma who infact was said to be the plaintiff’s step father later misappropriated the money, then one can fault the fact that the money was paid to Juma.

The defendant in paying Juma only was professionally negligent and had breached his duty to act with competence, diligence and in compliance with the law. It is now my finding therefore that due to the above negligence the defendant is liable to pay the plaintiff the Kshs.350,000 which was to be used to pay the house”.

11. It is that judgment and decision which has been challenged by the Appellant by the fifteen grounds in the Memorandum of Appeal. Even though so set out, the appeal blames the trial court for finding the appellant liable on the basis of error in appreciation of the evidence and circumstances of the case and in particular that it was an error to have found that the court order on how to deal with the decretal sum was not complied with. The only ground that does not go to the merits of the finding is ground 11 which faults the trial court for failure to make a finding on limitation of actions act.

12. Before I delve into the grounds on the merits I will deal with the issue of limitation which was pleaded at paragraph 11 of the statement of defence in the following words:-

“the defendant states that the plaintiffs alternative claim as alleged in paragraph 10 and 11 of the plaint is barred by limitation of actions Act”.

13. Before the trial court the Appellant did not offer any submissions on the point but the Respondent did so as shown at page 87 of the Record of Appeal. Being a first appeal, the law mandates me to reappraise the record and come to own conclusions. The determination of these two grounds of appeal simply ask the questions whether the Respondents suit was barred by statute when filed. The Appellant had submit that by dint of Section 4(2) and 20a of the Limitations of actions Act, the cause having bene pleaded that the actions complained about having taken place on 5/5/2003 when the suit was filed on 20/6/2006 the same was statute barred.

14. My reading of the pleadings reveal that the Respondent sought to recover from the Appellant trust property being money the Apellant received and retained pursuant to a court order to be spent and dealt with in accordance with such orders. In my view the provisions of the law that governed the suit are Section 4(1)e as read with Section 20 of the Limitation of Actions Act.

15. In both cases the law mandates that the claim be brought before expiry of six years. The record at trial show that the money was received sometimes shortly before the 5/5/2003 and the suit was filed in June 2006. That in my computation was a period of 3 years and some months. The suit was infact filed within the time permitted by the law. It is not true as contended by the Appellant that the claim was one based on the tort of negligence wholly. I do find that as pleaded, none clarity of the plaint notwithstanding, the Respondent faulted the Appellant for having acted contrary to a court order regarding the application of trust property in the decretal sum.

16. In the words of the consent order recorded before JOYCE KHAMINWA J on 10/12/2003, the money in dispute was to be held by the Appellant and used to buy a house to be registered in the joint names of the parents for the minor. I do find that the Appellant was being called upon to account for his dealing with the trust property and the suit was for the recovery of such property and the trial court even if she did not address her mind to the plea of limitation cannot be faulted. However proceeding by way of a retrial I find that the suit was not statute barred.

17. On the merits, the question to be answered is whether the Appellant answered to his duty in dealing with the trust property. The starting point is the court order on investment of the decretal sum due to the plaintiff as a minor. That order was produced by the Appellant as an exhibit and availed at page 255 of the Record of Appeal. At the pertinent part, it provided:-

“The remaining balance of Kshs.390,000/- be apportioned as follows:-

i. A sum of Kshs.350,000/= be held by the firm of M/S KIARIE KARIUKI & CO. ADVOCATES on account of the minor herein to be used to purchase A HOUSE WITHOUT LAND (SWAHILI HOUSE) for and on behalf of the minor herein.

ii. The house without land so purchased to be registered jointly in the names of the minors father and mother as trustees of the minor until he reaches the age of 21 years and not to be transferred and or changed to new parties without consent from the court. A copy of this order be deposited with the landlord of the house without land so purchased on behalf of the minor.

iii. The rental income derived from the said house without land to be used by the father and mother of the minor as trustees thereof towards the upkeep, school fees and payment of medical bills incurred on behalf of the Plaintiff.

iv. The balance of Kshs.40,000/- be paid to the mother and father of the minor plaintiff by M/S KIARIE KARIUKI & CO. ADVOCATES to be used to pay for the minors school uniform, school fees and upkeep for the school year commencing January 2003”.

18. I have underlined what I consider to be the operative words. Those words vested upon the Appellant the obligation and duty to hold the funds and only release the same for the purposes of purchase of a house and the house when purchased be registered in the Joint names of the two parents. In fact clauses c(ii) & (iii) constituted the two parents as trustees. The Appellant was thus expected by that order to facilitate the employment of the trust money for the object of the trust. The question before the trial court was whether he did answer to the duty as expected and directed by the court order.

19. The evidence led by the parties at trial was that the Appellant did pay to one Juma Abitoya Baya for purchase of some house from one Bakari Muhamed. In evidence in chief, the said Abitoya, DW 1, said that the purchase price was Kshs.350,000/= but in cross examination he said Muhammed Bakari signed for Kshs.350,000 but was paid only 250,000 and the balance taken by the said DW 1. He infact admitted that that house was never brought for Kshs.350,000 as ordered by the court. He further made a pertinent confession that the house was never registered in the joint names of the parents in terms of the court order and that as at the date of giving evidence the same had not been done and he had been charged and jailed for the loss of the money.

20. The advocate who handled the transaction gave evidence as DW 2 and said money was paid to DW 1 to buy a house in accordance with the court order but that the sum was later on handed over to DW 1 behind their backs. He further admitted that he could not confirm if the Swahili house existed.

21. To whom the payment was made, was made clearer by the evidence of DW 3, the accountant who effected payment. His evidence was that he made the payment to DW 1 in the presence of the seller who then signed a payment voucher. He was affirmative that no house was brought to be jointly owned between the two parents in trust for minor as dictated by the court order. He however said that there was money paid out before the court order was given and that only Kshs.7000/= was paid after the court order. When the Appellant himself (DW) was asked the same question he confirmed that the Kshs.40,000/= was never paid to the parents in terms of the court order because they had borrowed it before the order was made. In fact in his words he said:-

“I did not obtain the leave of the court to pay the money due to circumstances we did not disclose to the court that we had made advance payments in Kshs.37,000/=. The advance payment were not approved by the court”.

22. Faced with that state of evidence the trial court framed the question for determination to be;

“Whether the defendant in excluding the plaintiff’s mother was in any way professionally negligent”.

23. In determining that single question the trial court found that the negligence was on the part of the Appellant in totally excluding the mother of the child in the handing of the money. I do not find any error in that finding. I would agree with the trial court that the court order was explicit. It commanded that the sum of Kshs.350,000/= be held by the Appellant on behalf of the minor and be used to purchase a house without land for and on behalf of the minor and that once purchased the same be registered in the joint names of the mother and father of the minor. I read clauses c(i) & (ii) to place the obligation of holding the money and buying the house together with that of ensuring that the house was registered in the joint names of the parents to have been squarely upon the Appellant. In holding the money on account of a minor the Appellant was constituted a trustee for the minor for that purpose. He was given a personal responsibility that was not capable of being delegated.

24. The general principle of the Trust is that a trustee has no power to appoint a delegate unless the instrument appointing him permit^[1]. However even if there was power to delegate which I find to be lacking in the court order, such a delegate would be an agent of the Appellant from whose fault he cannot escape.

25. The first duty of a trustee is the fiduciary duty by which the trustee is legally and morally bound to manage the trust property in a responsible and productive manner with an obligation to act solely for the benefit of the beneficiaries.

26. In this matter when the Appellant said that he did not participate in the purchase of the house he was confirming that he abandoned his office and duty imposed by court order and pursuant to request drafted and presented to court by his office. In addition, the Appellant having said that he had dealt with the concept of House without land prior to the Respondents case, he is deemed to have known what benefit the transaction of sale he conducted was vesting on the minor as beneficiary of the trust property. Having made the application to court, as counsel, an expert in the law, it was not open for him to say on oath that interests on house without land are irregistrable.

27. I do find that in failing to ensure that the minor benefit from the sale and failing to secure the benefits of a continuing trust, the Appellant failed in his duty of care as expected of a person in his position and that default having led to the loss of the trust property, he is liable and the trial court was perfectly in full appreciation of the law as proved by the evidence led, came to sound conclusion and cannot be faulted. I find no reason to interfere with the finding by the trial court for which reason I find the appeal lacking in merits.

28. Without merit, it cannot succeed hence I order it dismissed with costs.

Dated and delivered at Mombasa this 21st day of November 2019.

P.J.O. OTIENO

JUDGE

[\[1\] www.lexology.com](http://www.lexology.com)