



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE 640 OF 2009**

**NJOGU MACHARIA.....PLAINTIFF**

**VERSUS**

**P.K. NJOROGE T/A P.K. NJOROGE & CO. ADVOCATES.....DEFENDANT**

**LAW SOCIETY OF KENYA .....INTERESTD PARTY**

**JUDGMENT**

This is a case of a party against his lawyer. The plaintiff by his plaint dated 13<sup>th</sup> November and filed on 25<sup>th</sup> November, 2009 pleaded that he instructed the defendant to act for him in Civil Appeal No. 231 of 2006. It was his expectation that the lawyer would use his skills, craftsmanship and competence to do a professional job.

The lawyer however filed a Notice of Motion on 5<sup>th</sup> July, 2006 without grounds as stipulated under rule 40 (1) of the Court of Appeal Rules and failed to articulate the grounds during the hearing. The lawyer, it is pleaded, owed the plaintiff a duty of care to file an application that was competent and legally sound, but this he did not do, leading to adverse consequences which were noted by the court. This, it was pleaded, was gross negligence and amounted to breach of duty, gross negligence and dereliction of duty in filing a hopeless case in the Court of Appeal which led to the plaintiff losing his case.

Particulars of negligence and breach of contract were set out in the plaint and the subsequent loss sustained by the plaintiff. The plaintiff therefore sought special damages, general damages and costs of the suit. The plaintiff filed a list of documents which included the evaluation report prepared by Camp Valuers, depicting the loss he sustained following demolition of his property after he lost the case. There are also several annexures relating to proceedings in the Court of Appeal.

When the suit came up for hearing, only the plaintiff and his wife attended and testified while the defendants did not appear despite service of the hearing notice. It is not clear why The Law Society of Kenya was joined in this suit as an Interested Party. May be it is because the defendant is a member of the Society, but I see no reason in the pleadings or evidence that required such joinder. If the 3<sup>rd</sup> paragraph of the plaint is anything to go by, I see no reason why the Society should be made a party in matters of negligence unless the defendant was subjected to the proceedings of the Disciplinary Committee and the determination aggrieved the plaintiff. No such allegation was been made.

The plaintiff and his wife adopted the witness statements filed herein. There is evidence that the plaintiff lost his case in the High Court to the then defendant. There is evidence that he paid the defendant to lodge an appeal. There was some delay on the part of the advocate which has not been explained.

The defendant filed a statement of defence in which he denied the plaintiff's claim. It remains a denial because he did not appear during the hearing to present his case.

The Court of Appeal in a ruling delivered on 12<sup>th</sup> February, 2010 made an observation that there were mistakes made by the lawyer who represented the plaintiff before the single judge in that, the application filed failed to state on the face thereof the grounds upon which it was brought, and the contents of the motion were at variance with the contents of the affidavit.

The defendant on the other hand has made a tacit admission that his office staff failed to bring to his attention a file so that he could prepare the record of appeal thereby occasioning the delay. It was also within his knowledge that once a notice is issued by the Deputy Registrar, the record of appeal must be filed before the expiry of 60 days.

In the affidavit in support of the certificate of urgency, the defendant stated at paragraph 6 thereof as follows,

**“That the failure to file and serve the notice of appeal was not the fault of the applicant but that of my firm whose negligence occasioned the expiry of time.”**

There cannot be a better way of construing an admission of negligence than the admission by a party. I find that the defendant was negligent and therefore liable to the plaintiff.

The evaluation report presented by the plaintiff in the bundle of documents filed put his loss at Kshs. 3,208,100/=. The plaintiff is entitled to the said sum. There is no evidence that the plaintiff would have succeeded in reclaiming the land that he lost to the respondent had his lawyer lodged the appeal in the Court of Appeal. I am unable therefore to accede to his claim for Kshs. 8,000,000/=. Neither am I in a position to award any sum for loss of business for the reason that this was never pleaded in specific terms and strictly proved as required.

There is no doubt however, that he suffered some emotional stress due to the failure on the part of the plaintiff to act professionally. For that I award him Kshs. 200,000/=. He did not mitigate his loss and I have no doubt that he was able to. Therefore, that is the best I can do in the circumstances of this case.

Accordingly there shall be judgment for the plaintiff in the sum of Kshs. 3,208,100/= special damages plus Kshs. 200,000/= general damages. He shall have the costs of the suit and interest at court rates.

***Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of December, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**