



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 12 OF 2006

**GITONGA KAMITI
1ST PLAINTIFF**

**BROWN M. KAIRARIA.....2ND
PLAINTIFF**

T/A GITONGA KAMITI KAIRARIA & CO. ADVOCATES

VS

**ROSE M. SIMBA
.....1ST DEFENDANT**

**JOHN P.N. SIMBA.....2ND
DEFENDANT**

T/A SIMBA & SIMBA ADVOCATES

JUDGMENT

1. The Plaintiffs are advocates of the High Court practicing in partnership principally in Nairobi. The Defendants are also advocates practicing in partnership mainly in Nairobi.
2. The Plaintiffs through a Plaint dated 17th January 2006 and filed on 18th January 2006 seek judgment against the Defendants jointly and severally for:
 - 1) Immediate return of completion documents forwarded to the Defendants on 17th June 2005 for purposes of registration;
 - 2) Damages for breach of trust and
 - 3) Costs of the suit.
3. The background to the suit is that the law firms of the Plaintiffs and the Defendants were engaged in a conveyance transaction involving sale of a parcel of land known as Nairobi/Block 112/63. The Plaintiffs' firm represented the purchaser one Joseph Njagi Kanake while the Defendant's firm acted for the vendor

one Ben Duke Omwenga. The sale transaction was satisfactorily concluded on or around 23rd May 2005 by payment of the full purchase price to the vendor's advocates and release of all the completion documents to the Plaintiffs as advocates for the purchase for registration purposes.

4. Subsequently, the Plaintiffs sought to register the transfer but could not do so due to a caution placed against the title by the wife of the Vendor one Abigael Bonareri Omwenga. The Plaintiffs notified the Defendants of the existence of the caution as a result of which the 1st Defendant undertook to have the transfer duly registered through her law firm. In reliance with these representations, the 1st Plaintiff released all the completion documents back to the Defendants' law firm for registration. Receipt of the documents was acknowledged by the Defendants on 16th June 2005. On 17th June 2005, the documents were lodged for registration at the Lands Registry but registration could not be effected due to the caution aforesaid. On 16th December 2005, the 1st Defendant wrote to the Plaintiffs' law firm indicating that the sale transaction had been repudiated and enclosing a cheque for Kshs. 2.6 Million being the purchase price that had been paid for the property. Since then, the Defendants had failed to return the documents.

5. It is therefore the Plaintiffs' case that having relied on the 1st Defendant's representations that she would procure registration of the transfer documents, the 1st Defendant had acted in breach of trust in failing to successfully effect the transfer or return the documents to the Plaintiffs.

6. In response to the statement of claim, the Defendants filed a defence on 26th May 2006 in which they aver that they discharged their duty of care by ensuring that the Vendor performed his part of the sale transaction but that they could not take responsibility for the actions of the Vendor's wife in placing a caution against the title before completion of registration. They state that the assistance that the 1st Defendant offered to the 1st Plaintiff was entirely voluntarily and without any assurance to the Defendants that registration would succeed. The Defendants had also been compelled through civil proceedings viz. **Nairobi CMCC No. 10851 of 2005** to return the title documents over the suit property to the Vendor's wife. At the same time, the Vendor withdrew the sale instructions and requested the Defendants to refund the purchase price paid of Kshs. 2.6 Million. The Defendants were therefore not in any breach of trust as they acted upon the instructions of their principal, the Vendor.

7. Counsel for both parties filed agreed issues by consent dated 20th September 2006 on 15th November 2006.

8. At the hearing of the suit, each party availed one witness for oral testimony.

9. Mr. Gitonga Kamiti advocate testified on behalf of the Plaintiffs. In his evidence, he explained that the conveyance transaction in which the Plaintiffs' law firm and that of the Defendants did sometime in October, 2004 involving sale of L.R. No. Nairobi/Block 112/63. He confirmed that the 1st Defendant attempted to refund the purchase price paid on account that she had instructions not to proceed with the transaction. The instructions she purported to be acting on had not been evidenced. In any case, at the time the 1st Defendant sought to rescind the agreement, the transaction was not capable of reversal. Mr. Gitonga told the court that he believed that the suit **HCCC No 10851 of 2005 – Abigael Bonareri Omwengavs J.P.N. Simba Advocates** was stage managed so that it would appear that the 1st Defendant could not transfer the property. That the letter of 16th December, 2005 returning the purchase price was issued simultaneous with receipt of a bankers cheque from one Kipkurui Ng'eno in the sum of Kshs 94,600/- being costs of that suit was evidence that the had been settled after serving its purpose of defeating registration of the transfer. Mr. Gitonga testified further that as a consequence of the breach of trust by the Defendants, there had been attempts by their client to sue them; they had lost the client; he had personally been embarrassed as a lawyer and his standing in the legal profession has been adversely affected. That is why the suit herein sought damages, the return of the documents and costs.

10. On cross-examination by counsel for the Defendants Mr. Bw'Omwo, Mr. Kamiti repeated that when his firm had received the documents in the first instance, the transaction had been sealed, the purchase price having been paid to the defendant firm and the documents having been forwarded to them. The 1st

Defendant had promised to get the caution withdrawn by the Vendor's wife. He trusted the 1st Defendant as an advocate and that is why he forwarded the documents to her. However she did not register the documents. Initially, she said the delay was due to the caution. He kept talking to her on progress made in registration and even asked her to return the documents if the registration did not succeed. As regards CMCC No. 10851 of 2005, he only learnt of the case when he received the letter of 16th December 2005 from the Defendants. He never attempted to review the decision in that case as he was not a party. It was also not possible to review a consent judgment when one was not a party.

11. Mr. Kamiti further testified further that he had taken the 1st Defendant to the Disciplinary Committee of the Law Society of Kenya because it was professional misconduct for her not to register the documents. He admitted that the decision of the disciplinary committee was not in his favor. He had also rejected the refund money from the Defendants so as to protect the interests of his client as accepting the cheque would have meant acquiescing to the rescission of the agreement. Although he dealt with the 1st Defendant, the arrangement was from one firm to another firm hence the firm was liable. As a result of the breach by the Defendants, his firm had suffered the losses due to lost business. He had also lost face as a result of the defendant's conduct. The cause of action in this suit was breach of trust, not professional misconduct.

12. At the close of the Plaintiff's case, and upon a question from the court on the fate of the sum of Kshs. 2.6 Million, counsel for the Defendants clarified that the money was placed in a call deposit in the name of Simba&Simba Advocates on 13th March 2006.

13. Mr. Anthony Maruti Kamala advocate was the sole Defence Witness in this case. He confirmed that there was a conveyance between one Ben Duke Omwenga as vendor through his wife Abigail Bonareri Omwenga through a power of attorney and Joseph Njagi Kanake. The agreement of sale was dated 6th October 2005. The agreement was executed and completion documents released to the purchaser's advocates. The Plaintiffs Mr. Gitonga Kamiti and Mr. Brown Kairaria trading as Gitonga Kamiti, Kairara & Co. Advocates acted for the purchaser. The completion documents were sent to the purchaser's advocates. They were then sent back to the 1st Defendant pursuant to some telephone conversation between her and the 1st Plaintiff. The conveyance never went through as a civil suit was filed by the vendor being CMCC No. 10851 of 2005 against the Defendants. The suit was eventually withdrawn after the title document was released to the Plaintiff.

14. Mr. Kamala testified further that the Disciplinary Cause No. 95 of 2006 lodged by the 1st Plaintiff against the 1st Defendant related to the conveyance transaction the subject matter of the present proceedings. In the present proceedings, the Plaintiffs never suffered any damage at all. They had no cause of action meriting any relief from the court. The prayer for return of the documents could not be implemented as the Defendants no longer held the documents. The claim for damages had no basis. On the claim for breach of trust, the instructions to the Defendants had terminated when the firm released the conveyance documents to the Plaintiffs' law firm. The Defendants were not liable for cancellation of the conveyance as it was compelled by the caution filed against the title and the suit filed against the Defendants by the wife of the Vendor seeking orders to stopping the sale. The arrangement for registration of the transfer was a personal arrangement between the 1st Plaintiff and the 1st Defendant and did not involve the Defendants' firm. The purchase price under the conveyance was Kshs. 2.6 Million which amount was put in an interest earning account sometime in the year 2006. The court could release the monies to the plaintiff as it was not part of the client account. The money was held on a call deposit in an account at Development Bank of Kenya Limited.

15. In cross-examination by counsel for the Plaintiffs Mr. Kahonge, Mr. Kamala told the court that the transaction over L.R. No. NRB/BLOCK 112/63 was handled by the 1st Defendant who was well acquainted with the matter. She had however been unwell although he had no medical evidence to show that she could not testify in this matter. He confirmed that all completion documents were executed. No completion notice was issued to the Plaintiffs. He was not privy to the arrangement between the 1st Plaintiff and the 1st Defendant. The complimentary slip acknowledging receipt of the completion

documents dated 18th July 2005 was in the name of the Defendants' firm. There was no evidence that the documents were returned to the vendor as claimed in the defence.

16. I have carefully considered the pleadings, the court record, the oral and documentary evidence tendered and the respective submissions by counsel for the parties. I have also reviewed the authorities relied upon by the parties.

17. The principal claim in this matter relates to damages for breach of trust. Breach of trust has been defined as follows:

“A breach of trust is essentially a broken trust, a way in which someone fails to fulfill promises connected to something or someone entrusted to him/her. For instance, the trustee of an estate could spend all the money in it or merely fail to do his/her job. Breach of trust may also be used in other contexts, not merely administration of trust funds, to show how a person deliberately or through neglect failed to act in the terms specified in agreements; an accountant who embezzles funds breaks trust with his client”

See: www.wisegeek.com/what-is-a-breach-of-trust.htm

18. In the suit before me, it is common ground that the law firms of the Plaintiffs and the Defendants acted for the purchaser and vendor, respectively, in a sale transaction involving a parcel of land known as L.R. No. Nairobi/Block 112/63 Nairobi. It is not disputed that the sale transaction was in essence completed with the purchase price being paid to the advocates of the vendor and in turn the completion documents being delivered to the Plaintiffs as advocates for the purchaser. The letter from the Defendants' firm dated 23rd May 2005 acknowledging receipt of the balance of the purchase price and forwarding the completion documents listed in the letter fully confirms this position.

19. Equally, it is not contested that upon attainment of the above-stated level of performance of the sale transaction, and whilst all that remained was registration of the transfer in favour of the purchaser, the 1st Plaintiff sought the assistance of the 1st Defendant with regard to registration of the transfer. The 1st Plaintiff in his evidence stated that the reason why the assistance was sought was because the Plaintiffs' attempts to register the transfer were thwarted by existence of a caution lodged by the vendor's wife. He testified that the 1st Defendant on being notified of this hitch agreed to convince the vendor's wife to withdraw the caution to allow registration. This evidence is not controverted by the evidence led on behalf of the Defendants. This position is further supported by the Plaintiffs' firm's letter to the Defendants' firm dated 16th June 2005 returning the completion documents for registration and which was duly acknowledged through a “Received” stamp of the latter law firm. The letter alluded to a teleconversation between the 1st Plaintiff and the 1st Defendant and contained the following critical instruction:

“Due to the surrounding circumstances, please proceed to lodge the same for registration. We undertake to refund the registration fees”.

20. Both the receipt of the documents by the defendants' firm and the telephone conversation aforesaid were acknowledged through a complimentary slip dated 18th July 2005 that is not disputed by either party.

21. From the evidence under review, matters started to take a turn for the worse when the 1st Defendant upon receipt of the completion documents and with the sole role of registering the same in favour of the Plaintiffs' client not only failed to do so but also refused to return the documents if indeed she could no longer procure registration. The 1st Defendant completely kept the 1st Plaintiff uninformed of what was transpiring in spite of several correspondence seeking updates. The anxiety and desperation on the part of the Plaintiffs intensified to the extent that they could no longer bear the delay as can be discerned in the letter of 28th November 2005 from the Plaintiffs' law firm to the Defendants' law firm which was worded

as follows:

“We refer to the above matter and our letter of 16th June 2005 and request you to urgently return all original documents we forwarded to you to assist in expediting the transfer herein. You will note that we paid stamp duty and the same was lodged for registration and therefore we require the said documents to enable us finalise this transaction. We are under intense pressure from our client to do so. We did not anticipate the inordinate delay on your end. Kindly note that we require the same by close of business today to enable us conclude this matter. Further note that unless we receive the same as above requested, we shall take appropriate steps to enforce our client’s rights”

22. The response to the above letter through a letter from the Defendants dated 16th December 2005 must have been not only surprising but shocking to the Plaintiffs. The letter stated:

“We thank you for your letter dated 28th November 2005. Our Client has instructed us that he will not be able to proceed with this transaction. The factors that have led to this situation are now beyond his control. His own wife has registered a caution against the title. She has also filed a suit being Nairobi CMCC No. 10851 of 2005 – Abigael Bonareri Omwenga vs. J.P.N. Simba, Rose M. Simba T/A Simba & Simba Advocates. As you note Mr. Simba and I are the Defendants. She has also filed an application to get an order from the court restraining us from dealing in any way with the above property. Given the circumstances, our Client has therefore decided not to proceed with the sale. He regrets this very sincerely. Kindly therefore find enclosed herewith our cheque Number 000786 in the sum of Kshs. 2,600,000/- being the purchase price that you forwarded to us. May we wish you a Merry Christmas and a Prosperous New Year”.

23. The above letter was the first communication that the Defendants made to the Plaintiffs in relation to the documents almost six months from the date the documents had been remitted for registration. All along, the Plaintiffs had entrusted the documents and the registration thereof to the 1st Defendant, an advocate of long standing and reputation in the field of conveyancing law practice in Kenya. All along, it was clear that the 1st Defendant had long been divested of any instructions from the Vendor as the transaction had been completed. The latter arrangement between the two law firms in which the Defendants agreed to assist in the registration of the transfer on behalf of the Plaintiffs had absolutely no bearing to the previous instructions as between the Defendants and the Vendor. How now the Vendor could now be said to have issued instructions to the 1st Defendant stopping the sale that had long been completed was not only baffling but was completely misplaced in the context of the latter arrangement. For the 1st Defendant to purport to have been acting on instructions of the Vendor six months after the transaction was finalized was strange and invites ethical concerns if not a conspiracy to divest the purchaser from his rights to the property. The only instructions, if I may call them so, that the 1st Defendant had as of December 2005 were from the 1st Plaintiff. How did the Vendor even know that such arrangements existed? Obviously, the 1st Defendant was at the centre of the Vendor’s afterthought in relation to the sale. Unfortunately, by agreeing to be drawn in that scheme, the Defendants and the 1st Defendant in particular fell squarely in breach of the trust with which the Plaintiffs had bestowed the completion documents unto them.

24. As to the caution that the Defendants claim was the reason for rescission of the sale, the existence of the caution was obviously a fact known to the 1st Defendant when she agreed to assist in getting the documents registered in favour of the purchaser. Indeed, the reason why the Plaintiffs returned the documents seeking the assistance of the Defendants was exactly the existence of the caution. If therefore the Defendants found it difficult to surmount the challenge of the caution, the basic thing that they were expected to do is to return the documents to the Plaintiffs in the same condition as they got them. There was no reason to hang on to the documents for over five months only to get back with a purported rescission of the sale. In my humble view, that was unprofessional.

25. As regards the court case ***Nairobi CMCC No. 10851 of 2005 – Abigael Bonareri Omwenga vs. J.P.N. Simba, Rose M. Simba T/A Simba & Simba Advocates*** my first reaction is that the suit raised no cause of

action against the Defendants as they were not legally possessed of the documents. For all intents and purposes, the documents had been released to the purchaser and any professional undertakings as between the Defendants and the Vendor full extinguished. No liability of any kind could attach on the Defendants at this point in time. That was the simple defence that the Defendants needed to lodge. Secondly, the suit was fatally defective in as long as it sought to stop or restrain a sale transaction that had been completed. Thirdly, the Defendants were non-suited in as long as they had released the documents to the purchaser. The proper defendants would have been the purchaser of the property. The Defendants in this suit in that regard had nothing to fear. Fourthly, the Defendants had a strong defence to the suit as the Plaintiff in that suit was the very party who had executed the sale agreement under a power of attorney and who had overseen the whole transaction from the beginning to the end. She could not approbate and reprobate. Fifthly, the natural course for the Defendants having been sued in relation to a property which had already passed on to the purchaser should have been to enjoin the purchaser to the suit as a co-defendant to not only accord him an opportunity to defend his interest in the suit property but also for indemnity in the event that any liability was found on the part of the Defendants. As advocates, the Defendants were no doubt aware of this. Lastly, the acquiescence and speed with which the Defendants moved to oblige to the suit and settle the same by agreeing to release the documents even without any recourse to the purchaser leaves one unable to resist entertaining the view of the Plaintiff's witness that the suit was stage managed. Overall, I am not convinced that the Defendants were candid on the real reason as to why they engaged in the course of action leading to the present dispute. With due respect, I read overt connivance between the Defendants and the Vendor in the whole travesty.

26. Evidence was led by the Defendant's witness that the arrangement between the 1st Plaintiff and the 1st Defendant was firstly, personal to them, and secondly, was purely voluntary and without any assurance that the registration would succeed. To the first part of this evidence, I do not see how the Defendants' firm can extricate itself from liability when all the correspondence in relation to this latter arrangement between the two advocates was done on the official letterhead of the firm and when indeed the whole transaction was done within the ambit of the firm. On the second part of the evidence, my view is that even if no consideration was to pass to the 1st Defendant for offering to register the documents, the voluntary nature of the arrangement did not permit the 1st Defendant to derogate from the basic tenets of trust with which the documents were placed before her. The voluntary nature of the assignment the 1st Defendant agreed to undertake does not therefore found a mitigating basis.

27. The legal profession is a high fidelity calling. It is built on utmost trust and confidence. When a client seeks counsel and assistance from an advocate, they expect nothing short of flawless prudence, care and circumspection. The expectation is even higher when the engagement is between an advocate to an advocate. In the present matter, I am convinced that the 1st Plaintiff fully entrusted the 1st Defendant with the completion documents and believed that she was capable of and would duly cause the documents to be registered in the purchaser's favour. Even if the registration failed to materialize, the 1st Plaintiff had absolutely no reason to doubt that the documents would be returned to his firm for further necessary action. This did not happen. The Defendants did something that the Plaintiffs would not have expected even in their wildest imagination.

28. In my view, and revisiting the definition of breach of trust above, the sum total of the conduct of the Defendants and particularly that of the 1st Defendant is that they deliberately or through neglect failed to act in the terms under which the documents were released to them by the Plaintiffs. That conduct was culpable and amounted to plain breach of trust. And has the Plaintiffs suffered loss and damage as a consequence of the breach, this court is looked upon to provide a certain measure of compensation that will remedy the loss and anguish caused, albeit not adequately.

29. The prayers sought in the Plaint are three-fold: return of the completion documents, damages and costs. In his evidence Defence Witness Mr. Kamala testified that there was no evidence that the documents were eventually returned to the Vendor. However, there is in the court record a letter dated 16th December 2005 from the firm of the Defendants to the firm of Kipkurui Ng'eno & Company Advocates forwarding the original title document in the name of Ben Duke Omwenga. The title document was released to the latter advocates on the instructions of the Vendor. In essence, the completion

documents can no longer be returned to the Plaintiffs if the original title has long been given back to the Vendor.

30. With regard to the claim for damages, I have agonized over the claim as ideally a court of law should not be enforcing trust obligations as between advocates of this Court and neither should it be punishing advocates for breach of trust. Unfortunately, it remains my duty to deal with this question on this occasion. The easier part is known and agreed. In his evidence, Mr. Kamala testified that the sum of Kshs. 2.6 Million which the Plaintiffs refused to accept upon the rescission of the agreement was still held in a call deposit account held at Development Bank of Kenya Limited since the year 2006. Mr. Kamala confirmed in his evidence that the monies did not form part of the Defendants' client account and could be released. Now that the sale transaction is incapable of being enforced, I order that this sum of money together with all accrued interest from the year 2006 to the date of remittance be released forthwith to the Plaintiffs.

31. Now the harder part. The Plaintiffs claim to have suffered loss and damage on account of having lost their client, having lost face and having had their standing in the profession adversely affected as a result of the Defendants' breach of trust. The 1st Plaintiff claims to have further suffered personal embarrassment as an advocate.

32. In assessing quantum of damages, **Lord Browne-Wilkinson** in the case of *Target Holdings vs. Redfern [1995] UKHL 10* held as follows:

“At common law, there are two principles fundamental to award of damages. First, that the defendant’s wrongful act must cause the damage complained of. Second that the plaintiff is to be put “in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation”

33. The first principle enunciated in the *Target Holdings Case* has already been proved. With regard to the second principle, neither party addressed me on what quantum of damages would suffice in the claim in this matter. I do not therefore have an objective yardstick with which to measure what quantum of damages would be reasonable and commensurate with the loss stated to have been suffered by the Plaintiffs. Certainly, I do not think there would be an empirical measure to guide on what would place the Plaintiffs in the same position they would have been had they not sustained the wrong caused by the Defendants.

34. However, to underline that advocates should at all times keep their word, and without any intention whatsoever to be punitive to the Defendants, I will in my discretion allow an award of Kshs. 2 Million in damages. This amount in my view would fairly recompense the Plaintiffs for the loss of their client, loss of new business, loss of face and standing in the profession and the anguish and anxiety suffered with regard to the botched sale transaction in this matter.

35. Consequently, I enter judgment in favour of the Plaintiffs against the Defendants jointly and severally for the sum of Kshs. 2.6 Million together with accrued interest at the obtaining interest rates applicable to the deposit from the date the sums were placed in an interest earning account until the date of payment. I further enter judgment for the sum of Kshs. 2 Million in favour of the Plaintiffs and against the Defendants jointly and severally being general damages, together with interest thereon at court rate from the date of this judgment until payment in full.

36. I further award costs of this suit to the Defendants.

37. These then shall be the orders of this court.

DATED, SIGNED AND DELIVERED IN OPEN COURT IN NAIROBI THIS 12TH DAY OF JULY 2012.

J.M. MUTAVA
JUDGE