REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, SHAH & OWUOR JJ.A
CIVIL APPEAL NO. 264 OF 1997
BETWEEN

1 KINLUC HOLDINGS LTD ..... APPELLANT

AND

MINT HOLDINGS LTD ..... 1ST RESPONDENT

MACHARIA NJERU ..... 2ND RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mr. Justice S.E.O Bosire) dated 26th June, 1996
in
H.C.C.C. NO. 3698 OF 1995)
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JUDGMENT OF THE COURT

By an agreement in writing made on 28th August, 1995 the appellant (hereinafter referred to as the "vendor") agreed to sell and the first respondent, Kinluc Holdings Limited (hereinafter referred to as "the purchaser") agreed to purchase the appellant's leasehold interest in a property known as L.R. NO. 12494/10, Karen. This property has an area of some of 2.037 hectares and the agreed price was Kshs.6,000,000. The written agreement was drawn by the second respondent (hereinafter referred to as "the advocate or the advocCaltaeuss ea s5 aopfp rtohper isaatied")a.greement reads as follows:-

> ***"The balance of the purchase price being shillings five millions, four hundred thousand (KShs.5,400,000) shall be paid by the purchaser to the advocates as stakeholders within 30 days from the date of signing of***
>
> ***this agreement who shall release the same to the vendor on successful completion of the transfer in favour of the purchaser"***

It is not in dispute that 10% of the agreed purchase price was paid by the purchaser to the vendor upon execution of the said agreement, on the 29th day of August 1995. By a letter dated 29th August, 1995 the advocates gave the following professional undertaking to the vendor:

"1.That we shall not release the registered transfer and title documents relating to the above property to Mint Holdings Limited (the purchaser) until you have been paid the full purchase price.

2.That as soon as we receive the balance of the purchase price, the same shall be paid to you."

The so-called professional undertaking purports to vary the contents of clause 5 of the agreement for sale. What it purports to say is that the purchaser could proceed to have the title registered in its name notwithstanding that payment of Shs.5.4 million may not have been made and that the advocate will not part with the said title documents until he received the said balance of the purchase price and that the said sum would be paid to the vendor on receipt thereof by the advocIatt e.is a matter of some importance; that is to say can a written agreement between two parties be varied by an advocate by way of giving a professional undertaking? The advocate says that immediately after the execution of the sale agreement, the vendor instructed him to prepare a transfer for its immediate execution notwithstanding that the purchaser had not paid the purchase price. The advocate goes on further to say that he advised against such a course of action but the vendor insisted otherwise and hence the said undertaking of 29th August, 1995 came into existence. The vendor company's Director Mr. Kinyanjui says otherwise. He says that he left a signed transfer with the advocate for action by him upon receipt by him of the sum of Kshs.5,400,000 in terms of the sale agreement.

The vendor is tying to introduce, by way of evidence, what transpired prior to the execution of the agreement and the advocate is attempting to introduce a new factor to show that clause 5 of the said agreement was varied upon the insistence of the vendor. At this stage we can only point out that the 'variation' introduced by the advocate is unilateral in that the purchaser was not a party thereto. It is settled law that when a contract is in writing, no extrinsic evidence can be called to add to or detract from it unless there is some ambiguity therein.

The advocate was acting for both the vendor and the purchaser. It is an unfortunate aspect of legal practice in Kenya that an advocate can act for both parties in a transaction for sale of land. This does create problems and having seen the problems, we understand, why the Law society in England agitated, successfully, to bar such a practice. We hope that the Law Society of Kenya will deem it fit to bring an end to such practice in Kenya.

Clause 5 of the agreement for sale is therefore of fundamental importance to the vendor. As the clause is worded it quite clearly imposes a duty on the advocate to see to it that the vendor gets its Shs.5,400,000 upon registration of the transfer in favour of the purchaser. It also imposes on the advocates a duty to collect the said balance from the purchaser before registration of transfer or successful completion of the transfer.

If an advocate whilst acting for a client, is in breach of some duty he owes to the client, professionally, he may become personally liable to the client who has therefore a cause of action against the advocate. In this case, the advocate was mandated by the sale agreement to collect the sum of Kshs.5,400,000 from the purchaser prior to successful completion of the transfer which sum he did not collect, but on the strength of the aforesaid "undertaking" registered the transfer, thereby completing the same, in favour of the purchaser, before he was in receipt of the said balance. He could not have been a stakeholder prior to the receipt of the said sum and he was to become the stakeholder as per the agreement for sale.

The learned judge appreciated that as a general rule, an advocate who is retained to complete a transaction, may become liable to the client in an action against him for breach of retainer either in negligence or breach of contract or even for breach of trust. The learned judge, however, relied on the fact that there was no clause in the agreement for sale between the vendor and the purchaser which required the advocate to the pay the balance of the purchase price to the vendor after date of completion. There, with respect, the learned judge erred. As already pointed out by us a duty was cast on the advocate, to collect the purchase price prior to presentment for registration of the transfer. Advocates are retained to look after the interests of a client. It is common ground that the meaning of retainer as set out in

Halsbury's Law of England, Third Edition, paragraph 84, is correct. The learned authors set out the following.

> ***"Meaning of retainer. The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by the client; consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment, and the rights and liabilities of the parties under the contract will depend on any terms which they have expressly agreed, partly on the terms which the law will infer or imply in the particular circumstances with regard to matters on which nothing has been expressly agreed and partly on such statutory provisions as are applicable to the particular contract. By the giving and acceptance of the retainer the solicitor acquires his authority to act for and bind the client and the client becomes bound both personally as between himself and his solicitor and as between himself and third parties with whom the solicitor deals within the limits of his authority on behalf of his client."***

The Law implies clearly that an advocate will protect the interests of his client. Here the vendor was selling land. It was to get the balance of the purchase price before successful completion. The retained advocate was bound to carry out his duties. He could easily have refused to register the transfer until payment of the balance of the purchase price was made to him, which sum he was to hold as stakeholder pending successful completion. We think, the learned judge, with respect, erred, when he said:

> ***"As stakeholder can only make payment of what he has received from the purchaser but not from his pocket"***

It is not as simple as that. A retainer binds an advocate to act for his client in such manner as to protect his client's interest and not to jeopardize his interest.

The learned judge placed reliance as paragraph 9 of the plaint in saying that the advocate was obliged to register the transfer even before the purchase price was fully paid. In that paragraph the vendor is referring to what is to be implied in the contract of sale upon or after registration of the transfer but the vendor is not saying that the advocate was obliged to so register the transfer. That pleading is not an elegant pleading but the tenor of it is such that it talks of what could happen if the transfer was registered prior to receipt of payment of the balance of the purchase price.

Again, with respect, the learned judge erred when he concluded that the sale agreement does not require the advocate to register the transfer unless he received the payment of the balance of the purchase price. Clause 5 as worded is clear. It brooks of no two meanings. It obliges the advocate to have the money as stakeholder prior to registration. The learned judge, by reference to clause 9 of the agreement (payment of interest by the purchaser in the event of delayed completion) reinforced his conclusion that the agreement for sale does not require the advocate to register the transfer until he received the balance of the purchase price. That is clearly a misdirection, as clause 9, as Mr. Lubullelah in fact conceded before us, simply extends the scope of clause 5. Clearly parties saw the possibility of delay and hence there is clause 9 in the agreement for sale which reads:

> "***The rate of interest payable on the balance of the purchase price by the purchaser to the vendor on later completion by the purchaser shall be eighteen percent (18%) per annum."***

It cannot be said that late completion would necessitate no receipt of balance of the purchase price by the advocate. As pointed out that clause simply extended the scope of clause 5 The learned judge relied upon certain conflicting averments in the plaint to say that the plaintiff is unsure of what it wants. There are some averments which may appear to conflict. Amendments are generally allowed to put the pleading in order but bad pleadings which do not detract from the substance of the claim are not fatal.

The learned judge felt that nothing more in terms of facts could come out at the trial. He said:

"It is also clear that the facts are not in dispute. The parties are in agreement that there was a sale agreement, that 10% of the purchase price was paid, that the balance would be paid within 30 days of signing the sale agreement, that the 2nd defendant would be the stakeholder of the same, that the 1st defendant did not pay the balance of the purchase price on due date, that there is no clause in the said agreement prohibiting the 2nd defendant from registering the transfer before payment of the purchase price, that the 1st defendant was obliged to pay interest on late payments, and that possession of the property would not pass before the full purchase price was paid. In the circumstances I do not see what matters would be considered at the trial with regard to the 2nd defendant, more so considering what I had stated above. The alleged contract of service, if in existence and if its terms include a term that the 2nd defendant would not effect registration of the transfer of the land in question, would run counter to the sale agreement which in effect required the 2nd defendant to effect registration nonpayment of the balance of the purchase price notwithstanding".

What the learned judge did not consider was "what is the duty an advocate owes to his client when he is asked to see to it that he has the money in his clients' account before effecting registration of transfer?" Had the learned judge considered this he could well have said that the client (vendor) has a cause of action against the advocate. What we have so far said shows, at least prima facie, that the vendor has a cause of action against the advocate for breach of contract as well as in possible negligence and we are not prepared to say at this stage that the advocate was not negligent or that he was in no breach of duty. That must be a matter for the trial court after a full hearing.

Obligations of advocate arising out of a retainer are set out in Cordery's Law Relating to Solicitors, 7th Edition at page 150. The learned authors say:

B. Obligations arising out of retainer 1.TO BE SKILFUL AND CAREFUL

"At common law a solicitor contracts to be skilful and careful, for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill. It follows that this undertaking is not fulfilled by a solicitor who either does not possess the requisite skill or does not exercise it. It is immaterial whether the solicitor is retained for reward or volunteers his services, or whether or not he has a practicing certificate in force at the time.

A solicitor's duty is to use reasonable care and skill in giving such advice and taking such action as the facts of the particular case

demand.

The standard of care is that of the reasonably competent solicitor, and the duty is directly related to the confines of the retainer. It has been said that the court should beware of imposing on solicitors duties going beyond the scope of what they are requested and undertake to do. There is no such thing as a general retainer imposing on the solicitor a duty, whenever consulted, to consider all aspects of the client's interest generally.

A solicitor is not bound to have a perfect knowledge of the law, but he should have a good knowledge - eg.: he should know about the statutes of limitation. Although a solicitor is not liable for a mistake as to the construction of a doubtful statute, difficult to interpret or unexplained by decisions, he may be liable if he fails to realise that the statute presents difficulties of interpretation. On the question as to how far as solicitor may be liable in negligence for delay, it has been said that it would be wrong to hold a professional man guilty of negligence because everything is not dealt with by return of post".

It was held by the House of Lords in England as long ago as in 1830 in the case of Stevenson v. Rowand 6, English Reports, 668, that if an agent departs from the usual practice of introducing the double manner of holding, and having neglected to procure confirmation, he was bound to make good the loss.

The ratio decidendi of the Stevenson case can be summed up as

follows:

> "***A law-agent is bound to obey the instructions given to him by his employer, and if he exceed or fall short of these instructions, he may be justly made liable for the damages which result from his disregard of them." Having held that the vendor has a cause of action against the advocate we come to the issue as to whether or not the advocate and the purchaser have been properly joined as codefendants in the suit. Order 1 rule 3 of the Civil Procedure Rules says:***
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> ***"3.All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise"***

The object of this rule is to avoid multiplicity of suits and needless expense, if it could be done without embarrassment to the parties and the court, provided that the rights in question arise in respect of the same act or transaction or series of acts or transactions and the case is one where if separate suits were instituted against the defendants any common question of law or fact would arise. It is not necessary that all the defendants should be interested in all the reliefs and transactions comprised in the suit or that liability of all the defendants should be the same. Nor is it necessary that the evidence as regards each of the defendants should be the same or that the cause of action against each of the defendants should be the same. There is one question common to both the defendants in the suit in the superior court which is that the claim against both defendants is for a sum of Shs.5,400,000 plus interest at 18% per annum, against the purchaser being in respect of unpaid balance of the purchase price and against the advocate being in respect of damages suffered(quantified) by the purchaser as a result of the alleged negligence or breach of duty on the part of the advocate.

If this rule (01 rule 3) enables say, the joinder as defendants in the same suit of a person against whom damages are claimed at the basis of a breach of contract and another against whom damages are claimed on the basis of a tort, where both causes of action arise out of the same transaction or series of transactions, then we are no difficulty in the prosecution of suit against both the defendants.

The reliefs sought against the purchaser will not prejudice or embarass the advocate. On the contrary his being on record in the suit as a co-defendant may help the court determine all issues or matters in controversy.

Mr. Lubullela's main flank of argument was that there are referred to by the plaintiff, two different contracts, one between the vendor and the purchaser and the other between the vendor and the advocate and two cannot be tried together as there are no common questions of the fact or law. But is that so? The advocate drew up the agreement for sale. He knew what it contained. If he is alleged to have acted against the interests of the vendor by transferring the property to the purchasor prior to being in receipt of the balance of the purchase price, there are some common question of law as well as fact which the superior court must look into. Mr. Lubullelah conceded that the purchaser is not prejudiced by the joinder as co-defendant of the advocate.

Mr. Ngatia correctly stated that the terms of a written agreement, if clear, leave no room for implied terms but what he did not appreciate was that the terms of a retainer do call for implied terms, to name one, does the advocate owe a duty of care to the client to safeguard the interests of his client? Mr. Ngatia's argument that a suit cannot be founded on the basis of an oral assurance is misplaced. What the vendor is

saying is that the acceptance of retainer put certain obligations on the part of the advocate.

The obligation of the purchaser to pay the balance of the purchase price and the obligation of the advocate to receive the said sum as a stakeholder and hold the same until successful completion are two factors closely interwoven and it would be prudent for the superior court to decide on all issues at the same time to bring finality to the litigation. One of the hotly contested issues before us was whether an application under 01 rule 10 has the same effect as an application under order 6 rule 13(1). The learned judge said: "An application under O.1 rule 10 Civil Procedure Rules may in certain cases be considered on the same legal principles as an application under 0.6 rule 13(1). Those cases are few because the issues raised in an application brought under 0.1 rule 10 deal with misjoinder of a party in a Civil action not necessarily whether or not a cause of action is disclosed".

One thing stands out clear. A defendant can be dismissed from a suit when there is no reasonable cause of action shown against him. To that extent we agree with what Windham C.J. said in the Tanganyika High Court case of Parry v. Carson (1962) E.A. 516 at page 516(I). He said: "In the first place, I could not at this stage order that the defendant be

> ***"dismissed from the suit" without holding that the plaint discloses no cause of action against him, or that on the face of the pleading as a whole the plaintiff has no chance of success."***

By that parity of reasoning the learned judge could not have dismissed the advocate from the suit as there is, as we have set out, a cause of action against him. Rules of procedure, although technically expressed, are based on common sense and it stands to reason that the advocate could only have been dismissed from the suit if the plaint failed to show any or any reasonable cause of action against him.

The upshot of all this is that this appeal is hereby allowed with costs. The order of the superior court dismissing the second respondent from the case is set aside and substituted with an order that the second respondent's application dated 8th January, 1996 be dismissed with costs. As the first respondent has always supported the second respondent's said application the appellant's costs of this appeal and its costs of the application dated 8th January, 1996 be paid by both the respondents jointly and severally.

Dated and delivered at Nairobi this 22nd day of

September, 1998.

P.K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.