



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GICHERU, KWACH & OWUOR, J.J.A)

CIVIL APPEAL NO. 68 OF 1998

BETWEEN

CHARLES NGARE KEBUCHIAPPELLANT

AND

T. M. ONGALO

T/A T. M. ONGALO & COMPANY ADVOCATESRESPONDENTS

(Appeal from the Judgment and Decree of the High Court of

Kenya at Nairobi (Mr. Justice M. Ole Keiwua) dated 23rd
February, 1998

in

H.C.C.C. NO. 300 OF 1997 O.S)

JUDGEMENT OF THE COURT

Charles Ngare Kebuchi, the appellant, to whom we shall hereinafter refer in his original capacity as "the plaintiff," took out an Originating Summons in the superior court under Order 52 rule 4 of the Civil Procedure Rules against T. M. Ongalo t/a "Ongalo and Company Advocates" (hereinafter referred to as "the defendant"). The plaintiff sought the following orders against the defendant:-

"(1) That the defendant do deliver a cash account of the sum of Kshs 1.5m received on or about July 1993 in respect of the sale of LR Nos 21/1/143 and 21/1/140 formerly plots G and E within LR No. 21/1/40 Rosslyn Lone Tree Estate on behalf of the plaintiff.

(2) That pending the hearing and determination hereof, the defendant do pay into court the sum of Kshs 1.5m.

(3) That the defendant do pay to the plaintiff: -

(i) The sum of Kshs 1.5m less any necessary costs incurred and legal fees to be agreed or otherwise taxed by the court;

(ii) General and exemplary damages;

(iii) Interest on (i) and (ii) at market rates from the date of receipt until payment thereof in

full.

(4) That in any event the defendant be condemned with the costs of this application."

The plaintiff swore an affidavit in support of his application. It is dated 7th February, 1997. He deponed that on 2nd March, 1993, he instructed Lenana Properties Limited (hereinafter called "LPL") to sell three of his plots G,C and E which were curved out of Plot LR No. 21/1/40 at Rosslyn Lone Tree Estate Nairobi, at a price of Kshs 750,000/ each. That at the instance of LPL he retained the defendant to prepare the necessary sale agreement and conveyance instruments for the three plots and to do all that was necessary to procure the sale and transfer of the said plots. In June, 1993, the defendant drew a sale agreement and conveyances for plots G and E in respect of which the purchaser was Minju Kariuki. In terms of the agreement for sale, completion date was to be 31st July, 1993. The plaintiff further alleged that after the execution of this agreement, he heard nothing at all from the defendant who kept silent and failed to advise him about the progress of the sale or to account to him for the proceeds of sale.

In paragraph 7 of the affidavit, the plaintiff deponed:-

"(7) On 2nd March 1994, I personally paid a visit to the Chambers of the defendant to demand payment of the proceeds of sale of my two plots only to learn from the defendant that he paid the same to Lenana Properties Limited without my express authority and or instructions" (emphasis added).

The agreement for sale is dated 10th June, 1993. The purchase price was Kshs 1.5m. There was a deposit of Kshs 300,000/- paid to the defendant as a stakeholder but subject to Special Condition No.3 by which the plaintiff authorised the defendant to release this sum to LPL to meet the costs of the proposed roads and other ancillary works.

In his affidavit dated 19th March, 1997 the defendant deponed inter alia:-

"(4) That I was instructed by both the said Lenana Properties Limited and Charles Ngare Kebuchi to act in the said transactions.

(5) That by letter dated 6th April, 1993, addressed to the said Lenana Properties Limited and copied to me, the plaintiff advised the said company and instructed me that the proceeds of sale of the said plots being G,E and C shall be utilised by the said Lenana Properties Limited for the purposes of construction of a proposed road serving the development. The plaintiff further directed that the said Lenana Properties Limited be paid a commission at 2 2% of the sale price which was assumed to be Kshs 750,000/ -. Apart from instructions given to me through the said letters the plaintiff did not at any time give me any other instructions.

(8) That out of the intended purchase price, I paid disbursements to the Nairobi City Council as follows: - Land Rates Kshs 58,838.40 Advocates Kshs 800.00 Land Rates Clearance Certificate 500.00

(9) That the balance of the purchase price being Kshs 1,439,861.60 was paid to the said Lenana Properties Limited in accordance with the plaintiff's instructions contained in his letter of 6th April, 1993 aforesaid.

(10) That following the plaintiff's complaint to the Complaints Commission I asked Lenana Properties Limited to confirm that they had received the amount claimed by the plaintiff. By their letter dated 2nd March, 1995 annexed hereto and marked "TMO2" the said Lenana Properties Limited confirmed the receipt of the said amount.

(11) That at the request of the Complaints Commission, the said Lenana Properties Limited wrote to the Complaints Commission on 10th January, 1996 confirming having received the money and stating how the amounts received were utilised for purposes of the plaintiff."

The case was heard by Ole Keiwua J, who on the basis of the plaintiff's letter to LPL dated 6th April, 1993, and copied to the defendant, held that the defendant had dealt with the sale proceeds in accordance with the plaintiff's instructions, and dismissed the suit with costs. It is against that decision that the plaintiff has now appealed. Although the plaintiff has set out 6 grounds of appeal in his memorandum of appeal, the cumulative effect of these is that the learned Judge erred in holding that the defendant had dealt with the money in accordance with his instructions.

Before we deal with the main ground of appeal, we would like to refer to a matter which was not raised before the learned Judge but which we consider to be important and should not be overlooked. In his Originating Summons the plaintiff sought a number of reliefs including general and exemplary damages. The reliefs that are available to a plaintiff on an Originating Summons under Order 52 rule 4 are only five and these are:-

- (1) the delivery by the advocate of a cash account;*
- (2) the payment or delivery up by the advocate of money or securities;*
- (3) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant;*
- (4) the payment into or lodging in court of any such money or securities;*
- (5) the delivery up of papers and documents to which the client is entitled.*

Those are the only reliefs available and permissible under Order 52 rule 4 and a plaintiff cannot augment them by adding any other relief not specified thereunder. Damages, general or otherwise, cannot properly be claimed on a summons under Order 52 rule 4.

The claim as laid also offended Order 36 of the Civil Procedure Rules which lays down the situations in which an Originating Summons can be taken out and spells out in clear language what reliefs can be sought. In the case of Kenya Commercial Bank Limited v James Osebe (1988) 1 KAR 48, this Court held that a judge has no power to award damages on an originating summons under Order 36 of the Civil Procedure Rules. So, that part of the plaintiff's claim by which he sought damages ought to have been struck out and not left to stand.

We now revert to the main ground of appeal. The letter on which the defendant relied to make payment to LPL was addressed to LPL and dated 6th April, 1993 and was in the following terms:-

" Dear sir

AUTHORITY FOR SALE OF PLOTS EX LR 21/1/40

Please refer to our discussion of yesterday and my letter of 2nd March, 1993. You will utilize the proceeds of sale of plots G,E,C to meet the cost of the proposed road serving the development and also the ancillary works indicated in the letter from the Director of City Planning. It is understood that the completion period will be three months.

It is also understood that your commission will be as earlier agreed i.e 2 2%. The price assumed for each plot is now Kshs 750,000/-.

Yours faithfully,

C. N. Kebuchi
c.c. Ongalo & Company Advocates
P.O. Box 61558

NAIROBI."

Mr Kyalo Mbobu, for the plaintiff, submitted that this letter did not confer any power on the defendant to pay the balance of the proceeds of sale to LPL. He said that since the letter was not addressed to the defendant, and the defendant was not privy to the contract between the plaintiff and LPL, he could not rely on the terms of that letter to part with the proceeds of sale to anyone else except the plaintiff. But Mr Mbobu, when pressed, did not explain why the letter was copied to the defendant if he was not supposed to give effect to it. The money was lying with the defendant. The plaintiff informed LPL in explicit language that it would be paid to it,

"to meet the cost of the proposed road serving development and the ancilliary works."

The plaintiff's claim includes the sum of Kshs 300,000/- which was the deposit paid by the purchaser and was supposed to be held by the defendant as a stakeholder but was by Special Condition No.3 released to LPL on the instructions of the plaintiff. We do not understand how the plaintiff can turn round again and require the defendant to account to him for this amount as well.

We are satisfied that the defendant dealt with the money in strict compliance with the instructions of the plaintiff, as his client, and was not liable to deliver any cash account to him under the provisions of Order 52 rule 4 of the Civil Procedure Rules. The Judge was accordingly plainly right in dismissing the motion. Accordingly this appeal fails and is dismissed with costs to the defendant.

Dated and delivered at Nairobi this 11th day of December, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR