



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO 1218 OF 1977**

**VAMOS & PARTNERS .....PLAINTIFF**

**VERSUS**

**GITONGA.....DEFENDANT**

**JUDGMENT**

This application for summary judgment under Order XXXV rule 1 concerns the plaintiffs' claim against the defendant for fees in respect of two separate instances of services rendered. As to the first instance of services rendered, the plaintiff claims that during the period October, 1975 to March, 1976, the plaintiffs prepared building plans and did ancillary work for a residence at the request of Wammo Associated Development Ltd, the then owners of plot 209/7888, Nairobi. The property was subsequently sold to the defendant with the benefit of the said services rendered by the plaintiffs to Wammo including the said building plans and it was agreed between Wammo and the defendant that the plaintiffs' fees of Kshs 44,543 was to be paid by the defendant to the plaintiffs and that Wammo would be released and discharged from liability for the same. On September 2, 1976, the defendant called at the offices of the plaintiffs and agreed with them that he had taken over the liability for the plaintiffs' said fees and would be responsible for its payment. At the defendant's request then and in consideration of the defendant personally taking over the said liability, the plaintiffs released and discharged Wammo from the liability thereof.

As regards the second instance of services rendered, the plaintiff states that at the request of the defendant made on or about September 2, 1976, they prepared building plans for the reconstruction of an existing unauthorised structure as a farm store and the erection of new servant's quarters on the defendant's property being Plot No 55 LR No 7158, Shanzu Road, Nairobi. The plaintiffs' fees for services rendered on this instance amounted to Kshs 1,500.

The defence admits that the defendant bought LR 209/7888 from Wammo but denies knowledge of the alleged services rendered and states that he was not notified of them at the time of purchasing the plot. The defendant denied that he ever called at the plaintiffs' offices or that he ever agreed to take over payment or to pay the alleged fees. The defendant denied that he ever instructed the plaintiffs to prepare any building plan in respect of the Shanzu Road plot. The defendant further pleaded that the plaintiff was bad in law and should be struck out.

A bundle of letters addressed by the plaintiffs to the defendant, to the previous owner of plot 209/7888, to the City Engineer and two letters from the previous owner of plot 209/7888 to the plaintiffs, is attached to the affidavit of Lustman accompanying the application. The replying affidavit is a reiteration of the statement of defence and a complete denial of the allegations made in the plaintiff. The defendant also claimed that he did not receive any of the alleged letters, that the plot 209/7888 was still undeveloped and that the plaintiffs' claim for work done, if any, in respect of that land should be directed at Wammo. The replying affidavit has also drawn attention to the provisions of Section 3(1) of the Law of Contract Act, Cap 23.

As regards the claim for services rendered in respect of plot 209/7888 the question whether Section 3(1) of the Law of Contract Act, Cap 23 applies or not will have to be gone into at length. That work is not claimed to have been done on the instructions of the defendant. There is nothing shown that the defendant

has acknowledged or agreed in writing to answer for this claim which accrued on instructions of the previous owner of the plot. As to whether the defendant received the copy of the letter dated May 15, 1976 from Githunguri to the plaintiffs or not is a matter of evidence. Further if the defendant received that letter, is that enough to make him liable for the said fees? All these I am satisfied are triable issues and the defendant must have leave to defend unconditionally in respect of this part of the claim.

Coming now to the second part of the claim arising out of services rendered in respect of the Shanzu Road plot, the position is different from that in respect of plot 209/7888. Unlike what happened in respect of plot 209/ 7888, the plaintiff claims that the defendant had given instructions to render the professional services in respect of the Shanzu Road property. The defence is that the defendant not only never gave any such instructions but that he in fact never went to the offices of the plaintiffs. If that was the case, then how could the plaintiffs have known that the defendant was in fact the owner of Plot 7158/56, Shanzu Road? The defendant has not denied that this is not his plot. Why should the plaintiffs have become interested in it?

I am satisfied on balance that it was the defendant and no other person who had told the plaintiffs that this plot was his. Why should the defendant have given this information to the plaintiffs? In the bundle of correspondence attached to Lustman's affidavit dated April 16, 1982 accompanying the application there are two letters dated September 3, 1976 and September 13, 1976 - the latter with a fee note from the plaintiffs attached to it, written by the plaintiffs to the defendant. I am not making any finding as to whether the defendant received both or either of these letters. Nevertheless, I am satisfied on balance from these letters that the reason why the defendant disclosed to the plaintiffs the fact that he was the owner of this plot was that he had asked the plaintiffs to render him the services as claimed in the plaint. I reject the defendant's allegation that he did not give instructions to the plaintiffs in respect of the Shanzu Road plot. I am satisfied that the defendant does not have a reasonable defence to this part of the claim and the plaintiffs are entitled to a judgment for Kshs 1,500 claimed therefore.

As to the claim of Kshs 44,543 for services rendered in respect of plot 209/7888 the defendant is granted an unconditional leave to defend.

As regards the claim of Kshs 1,500 for services rendered in respect of plot 7158/55, Shanzu Road, judgment is entered for the plaintiffs for the sum plus costs and interest @ 12% pa from the date of filing of the suit till payment of the decretal amount in full. The plaintiffs shall be at liberty to tax costs and on non-payment of the decretal amount to execute for recovery of the same forthwith.

**Dated and delivered at Nairobi this 1st day of July 1, 1982.**

**A.M COCKAR**

**JUDGE**