

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E150 OF 2024

GODFREY GEOFFREY OCHIENG OLEW 1ST APPELLANT
JOHN OLEWE ABIERO 2ND APPELLANT

- VERSUS -

ONYANGO SAMUEL MICHAEL T/A
S.M. ONYANGO ASSOCIATES ADVOCATES RESPONDENT

(Being an appeal from the judgment/decree of the Honourable E.N. Ngugi
Mwenda (PM) delivered on 22/7/2024 in Kisumu CMCC No. E092 of 2023)

J U D G M E N T

1. By a plaint dated **22/2/2023**, the appellants sued the respondent for professional negligence and sought general damages for breach of contract and professional negligence, special damages of **Kshs. 232,000**, an order compelling the respondent to handover the files over which he acted for them as well as costs of the suit.
2. They alleged that the respondent had failed to render proper legal representation in executing his services while handling **Kisumu Chief Magistrate’s Court ELC Civil Case No. 206 of 2018** and **Kisumu Chief Magistrates Court ELC Civil Case No. 001 of 2021**.
3. They pleaded particulars of negligence that the respondent failed to exercise due care requisite of Counsel in that, he failed to make an application for joinder of **Jospeh Odhiambo Ondiek** as a defendant in **Kisumu CMCC ELC 206 of 2018** and that he withdrew **ELC No. 001 of 2021** without their instructions and without any basis.

4. That they consequently lost an opportunity to get injunctive relief against **Joseph Odhiambo Ondiek** in **ELC 206 of 2018** and further because of the withdrawal of suit **ELC 001 of 2021**, they were condemned to pay costs. That they have had to incur additional legal expenses to file a fresh suit against **Jospheh Odhiambo Ondiek**.
5. The respondent appeared and filed a statement of defence dated **13/4/2023** in which he denied the appellant's claim. He contended that he acted for the appellants having taken over from the firm of P.D. Onyango & Co. Advocates.
6. The trial ensued and only the appellants called a witness in support of their case. By a judgment made on **22/7/2024**, the trial Court found that the appellants had failed to prove breach of contract and professional negligence on the part of the respondent and thus the orders of damages sought were not merited. However, the trial Court ordered the respondent to release to the appellants client files relating to **ELC 206 of 2018** and **ELC 001 of 2021**.
7. Aggrieved by the said decision, the appellants preferred this appeal vide a Memorandum of Appeal dated **2/8/2024**. It set out 10 grounds of appeal which can be summarized as follows;
 - a) *That the trial court erred in law and fact by holding that the negligent misstep by the respondent of filing for injunctive relief in a matter where the subject of that relief was not a party did not occasion the appellants any damage.*
 - b) *That the trial court erred in law and in fact by holding that Joseph Odhiambo Ondiek implicitly submitted to the court's jurisdiction.*

- c) *That the trial court erred in law and in fact by holding that the respondent did not act in bad faith by withdrawing ELC E001 of 2021.*
 - d) *That the trial court erred in law and in fact by placing reliance on the Advocate's Complaint Commission's ruling dated 21/11/2022 whereas the Commission held that the issues raised therein were beyond the mandate of the commission.*
 - e) *That the trial court erred in law and in fact by holding that the appellants were not entitled to the reliefs sought.*
 - f) *That the trial court erred in law and in fact in taking into consideration irrelevant issues, misguiding himself and misinterpreting facts and law, and taking no consideration of the evidence placed before court by the appellants in arriving at the impugned decision.*
8. This being a first appellate court, it is its duty to re-assess, re-evaluate and analyse the evidence afresh and come to its own independent conclusions and findings but at all times having in mind that it did not see the witnesses testify. See **Selles & Another –vs- Associated Motor Boat & Co. Ltd & Others (1968) EA.**
9. The 1st appellant testified as **Pw1**. He adopted his witness statement dated **22/2/2023** as his evidence in chief and his bundle of documents as Exhibit 1 – 53. His testimony reiterated the claims made in the plaint dated **22/2/2023**.
10. The 2nd appellant testified as **Pw2** and similarly adopted his witness statement dated **22/9/2023** as his evidence in chief which testimony corroborated that made by the 1st appellant.

11. The respondent did not testify in support of his defence. It is on the foregoing, that the trial court found that the appellants had failed to prove breach of contract and professional negligence on the part of the respondent and thus dismissed the claim for damages.
12. From the pleadings before the trial court, the appellant's case was that the respondent filed for injunctive relief in the wrong suit and further that he withdrew a suit without instruction.
13. Professional negligence describes a failure to meet the standard of care expected of a professional in their field of expertise. To succeed in a claim, one needs to prove that the professional failed to meet the expected standard of care and that this failure resulted in injury or loss. In such a case, a claimant needs to provide evidence of the professional's breach and the resulting harm.
14. In the present case, the appellant's case before the trial court was that they instructed the respondent to apply for injunctive relief in **ELC 001 of 2021** against one **Joseph Odhiambo Ondiek**. There was no evidence presented by the appellants to support this claim. However, an invoice dated 23/9/2020 on which he sought to rely showed that the instructions for injunctive relief by the appellants to the respondent were issued in **ELC Case No. 206 of 2018**. That being the case, it would appear therefore that the instructions for injunctive relief by the appellants to the respondent were issued in **ELC Case No. 206 of 2018** and not **ELC 001 of 2021**.
15. Notwithstanding the foregoing, the record in **ELC Case No. 206 of 2018** reveal that on the **8/11/2021** the case against one **Joseph Odhiambo Ondiek** was expunged on account of the said individual not being properly enjoined in the

suit. The question then is whether the expunging of **Joseph Odhiambo Ondiek** in **ELC Case No. 206 of 2018** constituted professional negligence on the part of the respondent.

16. It is very clear that the respondent was instructed to seek injunctive relief in **ELC Case No. 206 of 2018** against the said **Joseph Odhiambo Ondiek**. That subsequently, on the **8/11/2021** the name of **Joseph Odhiambo Ondiek** was expunged from the record for failure by the respondent to properly join him in the suit. Surely that must have been and actually constituted negligence on the part of the respondent. How else could an advocate just insert a name of a party in an ongoing proceeding and purport to seek orders against him without first seeking to formally join him in the suit? It was but negligence.

17. The trial court held that despite negligence on the part of the respondent, the respondent had secured injunctory orders against **Jospeh Odhiambo Ondiek** vide the ruling delivered on the **25/3/2021** thus executing the appellant's instructions.

18. I do not agree with this finding. Having found on the **8/11/2021** that **Jospeh Odhiambo Ondiek** had not been properly joined, the injunctive orders of **25/3/2021** could not bind the said individual. That is why the appellants had to subsequently lodge another suit where the said individual was properly enjoined.

19. The second aspect of the appellants claim for negligence against the respondent was that he withdrew **ELC E001 of 2021** (formerly ELC 44 of 2020) without instruction. The correspondence between the parties, particularly the email correspondence dated **16/6/2021**, **12/7/2021** and **13/7/2021**, reveals that there seems to have been an attempt to consolidate **ELC 206 of 2018** with **ELC E001**

of 2021. That the respondent advised against it on account of the issues therein being different. That there was a preliminary objection that **ELC 206 of 2018** was sub judice **ELC E001 of 2021** thus necessitating its withdrawal.

20. It is clear therefore from the foregoing that the appellants were made aware of the intention of and subsequent withdrawal of that suit. In my view, this act by the respondent did not amount to professional negligence.

21. Having found that the respondent was negligent in as far as he failed to properly join **Jospeh Odhiambo Ondiek** in **ELC 206 of 2018** before seeking the injunctive orders instructed of, this Court has to determine what reliefs are available to the appellants.

22. The appellants contended that due to the respondent's negligence, they suffered damages by incurring additional legal expenses in **ELC 126 of 2022** and further that, they incurred additional expenses in being condemned to pay costs of **Kshs. 150,000/-** and filing a survey report at **Kshs. 82,000/-**.

23. The trial court held that had it found in favour of the appellants it would have awarded **Kshs. 100,000/-** in nominal damages and general damages of **Kshs. 150,000/-**. I find no reason to depart from that finding. Nothing was presented before this Court to show that the estimation of damages by the trial court was erroneous.

24. Accordingly, I award the appellants damages of **Kshs. 250,000/-** for professional negligence.

25. As regards the special damages of **Kshs. 232,000/-** pleaded by the appellant, it is trite that these must be specifically pleaded and strictly proved. See the case

of **Hann versus Singh (1985) KLR 716** wherein the Court of appeal held, *inter alia*, that: -

“Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof depend on the circumstances and the nature of the acts themselves”

26. There are no receipts on record to justify the award of special damages as claimed by the appellants. This claim thus falls.

27. The upshot of the above is that the appeal is partially successful as follows: -

a) General damages for professional negligence of Kshs. 250,000/-.

b) Each party to bear own own costs.

It is so decreed.

DATED and DELIVERED at Kisumu this 26th day of September, 2025.

A. MABEYA, FCI Arb

JUDGE