



Gulf African Bank Ltd v Hanif Tours & Travel Agency Limited & 4 others (Civil Case E403 of 2018) [2025] KEHC 486 (KLR) (Commercial and Tax) (27 January 2025) (Judgment)

Neutral citation: [2025] KEHC 486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E403 OF 2018
JWW MONG'ARE, J
JANUARY 27, 2025**

BETWEEN

GULF AFRICAN BANK LTD PLAINTIFF

AND

HANIF TOURS & TRAVEL AGENCY LIMITED 1ST DEFENDANT

HASSAN MOHAMUD MOHAMED 2ND DEFENDANT

KASSIM MOHAMUD MOHAMED 3RD DEFENDANT

MILLIGAN VALUERS LIMITED 4TH DEFENDANT

RAMADHAN O. ABDUL 5TH DEFENDANT

JUDGMENT

1. By a plaint amended on 30th September 2019, the Plaintiff has moved this Honourable Court seeking judgment against the Defendants, jointly and severally, for:-
 - a. USD 345,926.15
 - b. Default damages on a) above at the rate of 20% per annum with effect from 16th November, 2017 until payment in full.
 - c. Cost of the suit.
 - d. Such further or other reliefs as this Honourable Court may deem fit and appropriate to grant.
2. The Plaintiff's case is that by a letter of offer dated 16th December 2016 and at the 1st Defendant's request it advanced a Tawarruq banking facility to finance working capital. The facility's limit was USD 300,000/= and the profit was charged at 11% per annum. In consideration for the extension of the



facility to the 1st Defendant, the 2nd and 3rd Defendants guaranteed payment and to keep the Plaintiff indemnified of the principal amount not exceeding USD 300,000/= and interest at the agreed rate of 11%. Default damages would be charged at 20% per annum on the amount due from the due date until payment upon default.

3. The facility was secured by a first ranking legal charge in favour of the Plaintiff for USD 300,000/- over the property known as Kajiado/Loodariak/680 In Kambuak Area of Loodariak, Kajiado County (The Charged Property) and a joint and several guarantees for USD 300,000/= by the 2nd and 3rd Defendants.
4. The Plaintiff engaged the 4th Defendant to conduct a mortgage valuation. The 5th Defendant warranted to the Plaintiff that he would carry out the valuation with reasonable care and skill. Through a valuation report dated 21st December 2016, by the 4th Defendant and signed by the 5th Defendant, the charged property was valued at Kshs. 180,000,000/- as the current value and Kshs. 135,000,000/- as the forced sale value. The Plaintiff availed the facility to the 1st Defendant based on the 5th Defendant's professional advice. However, the 1st Defendant defaulted in making scheduled repayments.
5. The Plaintiff then instructed NW Realite Valuers Ltd (NW Realite) to conduct a fresh valuation of the charged property. It intended to exercise its statutory power of sale. NW REALITE prepared and submitted a report dated 11th December 2017 returning a market value of Kshs. 33,000,000/- and a forced sale value of Kshs. 24,700,000/-. Upon comparison between this report and the 4th and 5th Defendant's initial report, it was deduced that the 5th Defendant had deliberately and negligently exaggerated the value of the charged property in contravention of Section 24 of the Valuers Act and breach of contract. It later emerged that, based on the georeferenced position (GPS), the 4th and 5th Defendant valued a different property from the charged property.

1st, 2nd and 3rd Defendants' Response

6. The 1st, 2nd and 3rd Defendants filed a joint statement of defence dated 9th January 2019 denying the claim. Their case was that the determination of the suitability of the property as security for the facility was the Plaintiff's sole responsibility. That the Plaintiff's failure to do so was a breach of duty of reasonable care and skill. They confirmed that the Plaintiff retained the 4th and 5th Defendants to conduct the mortgage valuation but asserted that they were not privy to that contract. They therefore stated that they were not liable for any loss or damage resulting from gross undervalue of the charged property by the Plaintiff's

agent.

7. The 4th and 5th Defendants filed a joint statement of defence amended on 18th October 2019, denying the claim. They admitted that they were contracted to conduct a valuation of Title No. Kajiado/Loodariak/680, but denied that the valuation was expressed to be for mortgage purposes. Their case is that the Plaintiff acted negligently by failing to instruct a qualified surveyor and to obtain a confirmation certificate which was a precondition to use and rely on the valuation report; failing to professionally point out the location, boundary and size of property, ignoring the limiting condition which the report is subject to and failing to read, understand and accordingly act on the valuation report.

The Evidence:-

8. Hearing of the matter commenced on 20th November 2023. The Plaintiff called 3 witnesses, starting with its legal officer, Lawi Sato (Mr. Sato) as PW1, who adopted his primary and further witness statements dated 19th November 2019 and 29th June 2020, reflective of the Plaintiff, as his evidence in



chief. He produced the Plaintiff's primary and further bundles of documents dated 19th November 2018 and 29th June 2020, marked as Plaintiff's exhibits 1-20 and 21-28. He also produced a supplementary bundle of documents dated 14th April 2021.

9. Upon cross-examination by the 1st to 3rd Defendant's counsel, Mr. SATO stated that although the charged property is still charged to the Plaintiff, it cannot be sold as its value cannot adequately settle the debt. He also intimated that the Plaintiff has had difficulties finding a buyer. The Plaintiff has not exercised the first option of suing to recover the monies secured by the charged property under clause 6.1.1 of the charge.
10. Upon cross-examination by the 4th and 5th Defendant's counsel, Mr. Lawi Sato confirmed that in the instructions letter to the 4th Defendant, it was required to bring to the Plaintiff's attention any relevant matters in carrying out the valuation. That the contact person indicated in the letter who was to show the property to the 5th Defendant was Kassim Mohamud Mohamed (Mr. Kassim), the 3rd Defendant and the 1st Defendant's Director. That the 4th Defendant absolved itself from responsibility under condition 6 in case the information provided was false. That under condition 7 the 4th & 5th Defendants indicated that they relied on a copy of conveyance given to them by the client, they were unable to confirm the title details as the file was not readily available at the Land Registry. That due to this, they absolved themselves from responsibility for deficiency in the information in the report. That the property was not surveyed or fenced as recommended in the report due to the vastness of the land and lack of salient features, there was need for a surveyor's confirmation certificate to verify their coordinates vis a vis the registry index map (RIM) map and property fenced. That the surveyor was on the ground but he was not able to verify the GPS coordinates. That the bank was only interested in the value. That NW Realite Valuers Ltd was also not able to confirm the property's boundaries and in its report advised that a surveyor does so if necessary. That the only evidence of collusion is the valuation report by NW Realite Valuers Ltd.
11. In re-examination, Mr. Sato stated that the actual location of the property is not necessarily the subject of a surveyor's certificate meant to confirm the extent of the boundaries.
12. The Plaintiff called Frederick Patrick Akela Indetie, a land surveyor registered with the Surveyors' Board and the Institution of Surveyors of Kenya as PW2. He mentioned that he trades with Prime Kenya Limited. He produced a survey report dated 15th April 2019 which was marked as Plaintiff Exhibit 21. He established that the location and coordinates of the charged property which were indicated in the report.
13. Upon cross-examination, Mr. AKELA confirmed that the value is given with a proviso that a surveyor's report equivalent to a beacon certificate is required to identify the land. That it is a presumption that the owner knows his property and a surveyor goes to confirm the coordinates.
14. In re-examination, he clarified that the 5th Defendant's Milligan's report does not indicate that he had a problem with location but suggested that the survey report would show the roads and the boundaries.
15. The Plaintiff called, Simon Oruka, a registered valuer with 15 years' experience at NW Realite Valuers Ltd as PW3. He obtained instructions from the Plaintiff to value the charged property after which he obtained the RIM and visited the site. He collected data which formed the basis of the valuation report dated 11th December reflecting a value of Kshs. 33M of 322.4 acres of land.
16. Upon cross-examination, Mr. Oruka was firm that they had no reason to undervalue the charged property.



17. The 4th and 5th Defendants called one witness, Ramadhani Odhiambo Abdul, a director of Milligan and a registered valuer with 30 years of experience as DW1. He adopted his witness statement dated 7th April 2019 as his evidence in chief. He also produced the 4th and 5th Defendant's bundle of documents dated 7th February 2019, marked as 4th and 5th Defendants exhibits 1-6.
18. Mr. Abdul testified that he was contracted by Mr. Kassim who took him to the site through Ongata Rongai. They met with the Area Assistant Chief and drove 3KM off-road for 3 KM before Mr. KASSIM told him they had arrived at the site. The Assistant Chief confirmed that it was the correct place. He had a Registry Index Map (RIM) and the land was over 200 acres. He took the co-ordinates since the place was unfamiliar.
19. Mr. Abdul stated that prepared the valuation report for the Plaintiff.
That in the report he raised the question of uncertainty of the location and recommended verification of the location and coordinates by a surveyor. That there were no other salient features that he could use to confirm that he was in the correct location. That in a surveyor's report, meant to compute the GPS coordinates, the location would include the confirmation of the coordinates. That unlike him, NW Realite was not given a contact person but found his way to the property.
20. During cross-examination, Mr. Abdul confirmed that the RIM had details to help him find the location of the property. Both the RIM in Millgan's and NW Realite's report are the same. He denied that he knew the owners of the 1st Defendant prior. Mr. KASSIM did not know the exact location of the property. The Assistant Chief may know the location of the property. He did not get his contact. He could not confirm that he was the Assistant Chief.
21. Mr. ABDUL acknowledged that when he was shown the land, he was unable to confirm the location from the RIM. That he did not indicate that he had an issue with the location or co-ordinates. That the land he valued and that valued by NW Realite are different. That the surveyor's report coincides with the valuation report by NW Realite.
22. In re-examination, Mr. ABDUL stated that the surveyor's report dated 5th April 2019 was not given to him. That the RIM was complicated and only a surveyor could have understood it. That confirmation of the coordinates would have helped as a location can't have two coordinates.
23. The 1st to 3rd Defendants called one witness, Mr. Hassan Mohamud Mohamed (Mr. Hassan) as DW2, who adopted his witness statement dated 18th January 2019 as his evidence in chief. He confirmed that the 1st Defendant took the loan of USD 300,000 from the Plaintiff. That the 1st Defendant has not repaid the loan. That it does not object to the sale of the charged property.
24. During cross-examination, Mr. Hassan admitted that he did not have a sale agreement to prove that he bought the charged property for Kshs. 49M in August 2006. He intimated that the property was transferred to the 1st Defendant in 2016. He denied that he knew Mr. Abdul. He also stated that he did not go to the site with Mr. Abdul to conduct the valuation.

Submissions

25. The Plaintiff filed written submissions dated 9th July 2024. The 1st to 3rd Defendants filed written submissions dated 30th October 2024 while the 4th and 5th Defendants filed written submissions dated 28th September 2023.



Analysis and Determination

26. I have considered carefully the pleadings, the evidence and the parties' respective submissions. The issues for determination are whether the Plaintiff has proved its claim to the required standard and whether it is entitled to the reliefs sought.
27. The Plaintiff's claim against the 4th and 5th Defendants is for professional negligence. To prove professional negligence, the Plaintiff must establish that there was a duty of care, breach of that duty and causation: link between the breach and the loss suffered.
28. The particulars of negligence were, among others, failing to exercise due care, skill, diligence or competence in identifying, inspecting and preparing the valuation report as would be expected of a prudent valuer and preparing a misleading valuation report for a different property.
29. In *Kenya Commercial Bank v Philip Odongo Kabita T/A Odongo Kabita Valuers (HCCC No. 56 of 2000) [2002] eKLR*, the Court stated that:-

I have considered the evidence and the submissions. I find that the Defendant as a professional man duly instructed by the Plaintiff owned a duty care to the Plaintiff. He knew that a professional opinion which the Plaintiff would rely on was required. I also find that he was in breach of that duty in that he did not proceed to value the property in accordance with the ordinary standard of care skill and diligence expected of a professional valuer. Instead of identifying the property using the accepted professional tools of a certificate of official search and a registry index map for the relevant registration section or a copy of the mutation survey plan if the registry index map was not helpful he relied on and was misled by the borrower. To err may be human, but for a professional to err as a result of not applying professional skills and tools is negligence in any language. I also find that the Bank suffered loss as a result of the Defendant's negligence. The only issue outstanding is the measure of damages.

30. It is not disputed that the 4th Defendant was contracted by the Plaintiff to conduct a valuation of the charged property. The evidence on record confirms that the 5th Defendant, the 4th Defendant's director and agent, relied on the owner and a third person, the Assistant Chief to guide him to the property's location. The 5th Defendant confirmed during cross-examination that he did not confirm the location of the property independently as required of a professional valuer. He also confirmed that the RIM would guide him to the location of the charged property but he could not explain why he could not find the correct location of the charged property yet he used the same RIM as NW Realite.
31. Based on the above, I find that the 5th Defendant is a professional valuer and that he had a duty of care to the Plaintiff to give a professional opinion on the value of the charged property that would be relied on to give the 1st Defendant a loan facility. I also find that he breached that duty of care by failing to independently verify the correct location of the charged property. I further find that there is a link between the breach of duty and the loss suffered by the Plaintiff because the negligence.
32. The 4th and 5th Defendants submitted that the 4th Defendant is a corporate entity and is therefore not capable of negligence. However, under the doctrine of vicarious liability, a corporate entity may be found responsible for the negligent acts and omissions of its agents. The employee's tort is sufficiently linked to the employer's enterprise, to justify the imposition of liability on the employer. See *Teachers Service Commission v WJ & 5 others (Civil Appeal No. 309 of 2015) [2020] eKLR*.
33. The 4th Defendant is company that deals with property management and valuation company and therefore I find that it is vicariously liable for the 5th Defendant's professional negligence.



34. I now turn to the Plaintiff's claim against the 1st, 2nd and 3rd Defendant for fraud. Black's Law Dictionary, 2nd Ed. states:-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.”

35. Fraud is quasi-criminal and therefore it has a higher standard of proof than an ordinary civil claim. The law is that fraud must be specifically pleaded and strictly proved. See *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR.

36. In this case, the particulars of fraud against the Defendants were offering the property as security for the repayment of USD 300,000/= and the interest thereon while knowing that the land was worth much less; colluding and conspiring with the 5th Defendant to have the land valued at a value far in excess of its actual value and thereafter failing to pay the loan.

37. During trial, the 2nd Defendant, Mr. Hassan confirmed that the 1st Defendant obtained a loan from the Plaintiff based on the valuation report by the 4th Defendant which was in respect of a different property which returned a value that was way over the real value of the charged property. He also claimed that he bought the property for Kshs. 49,000,000/- in 2009 but did not furnish a sale agreement in proof. He further claimed that the charge property was now worth over Kshs. 200,000,000/- but did not provide a valuation report to confirm this. Therefore, I find that the Plaintiff has proved its claim for fraud as against the 1st, 2nd and 3rd Defendants.

38. The other aspect of fraud related to collusion between the 1st to 3rd Defendants and the 4th and 5th Defendants. Black's Law Dictionary, 2nd Ed. defines collusion as:-

“A deceitful agreement or compact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third party of his right.”

39. The 5th Defendant testified that the bank gave him the 2nd Defendant, Mr. Kassim's contact and that it was Mr. Kassim who contacted him to go to the site. He also testified that Mr. Kassim directed him to the property location. However, I am not convinced that there was collusion between the 5th Defendant and the 1st - 3rd Defendants.

40. I now move to consider whether the Plaintiff is entitled to the reliefs sought. In *Kenya Commercial Bank v Philip Odongo Kabita T/A Odongo Kabita Valuers* (HCCC No. 56 of 2000) [supra] the Court noted that:-

“The Defendant is not a borrower and there is no contractual obligation on his part to pay damages at commercial rates.”

Disposal

41. Accordingly, I enter judgment for the Plaintiff: -

- a. against the 1st, 2nd, 3rd, 4th and 5th Defendants, jointly and severally for USD 300,000.00/- together with costs of the suit.



- b. against the 1st, 2nd and 3rd Defendants for USD 45,000/- together with Default damages on USD 345,000/- at the rate of 20% per annum with effect from 16th November 2017 until payment in full. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2025.

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Musyoka for the Plaintiff.
2. No appearance for the 1st, 2nd and 3rd Defendants.
3. Ms. Misere holding brief for Mr. Olunya for the 4th and 5th Defendants.
4. Amos - Court Assistant

