



**Kimbio & another v Nyaribo t/a IN Nyaribo & Company Advocates (Civil Appeal E186 of 2020) [2024] KEHC 6120 (KLR) (Civ) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6120 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E186 OF 2020**

**HI ONG'UDI, J**

**MAY 30, 2024**

**BETWEEN**

**RACHAEL NYASI MAKOKO KIMBIO ..... 1<sup>ST</sup> APPELLANT**

**CHARI MWADIME ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ISHAMEL NYANGARA NYARIBO T/A IN NYARIBO & COMPANY  
ADVOCATES ..... RESPONDENT**

*(Being an appeal from the Judgment and decree of Hon. D.W  
Mburu (Mr.) Senior Principal Magistrate in Nairobi Milimani  
Commercial CMCC No. 3850 of 2018, delivered on 21st August, 2020)*

**JUDGMENT**

1. This appeal arises from the judgment and decree entered in Nairobi Milimani Commercial CMCC No. 3850 of 2018. In the said suit, the appellants' claim against the respondent is contained in the Complaint dated 18<sup>th</sup> April, 2018 and filed in court on 20<sup>th</sup> April, 2018, seeking for Kshs. 681,361/= with interest at court rate from 1<sup>st</sup> October, 2015 until payment in full, costs, and any other or such other relief the court the court may deem.
2. The appellants claim that the respondent, an advocate of the High Court of Kenya, was professionally negligent in representing them in Nairobi High Court Civil suit number 158 of 2014. They allege that they instructed and retained the respondent to act for them in a lawsuit to recover damages for fatal injuries sustained by Janet Manena Mwandime (deceased), the appellants' kin, from the estate of Caleb Nyende (deceased), who was the driver and registered owner of motor vehicle registration number KBM 830Z, which caused the demise of Janet Manena Mwandime.



3. The appellants aver that there was an implied term that the respondent would exercise all the care, skill, and diligence in carrying out the appellants' instructions. The appellants claim that the respondent failed to exercise their right of appeal. On the other hand, the respondent pleaded that he acted only within the scope of the appellants' instructions as an advocate and that the suit was an afterthought. In conclusion, the respondent urged the Honourable Court to dismiss the suit with costs.
4. The matter was fully heard and the trial Magistrate delivered his Judgment on 21<sup>st</sup> August, 2020 dismissing the suit with costs.
5. Being aggrieved by the judgment, the appellants lodged a memorandum of appeal dated 3<sup>rd</sup> November, 2021 on the following grounds:
  - i. That the learned magistrate erred in law by dismissing the appellants' suit with costs.
  - ii. That the learned magistrate erred in law and fact in finding that the scope of instructions issued by the appellants was not provided while the same was averred in the plaint and admitted in the statement of defence
  - iii. That the learned Magistrate erred in law and fact by stating that the particulars of negligence were not provided for while the same was provided in the plaint
  - iv. That the learned magistrate erred in law and fact by failing to appreciate the different circumstances raised in the lower court and the authorities relied on by the respondent to enjoin the Jubilee Insurance Limited as a party to the suit.
  - v. That the learned magistrate erred in law and fact by failing to find the actions of enjoining Jubilee Insurance Company Limited in the primary suit was reckless, negligent, and exposed the appellants to payment of costs
  - vi. That the learned magistrate erred in law and fact by failing to find that the respondent was negligent in handling Nairobi HCCC No. 158 of 2014.
6. The appellants urged this Honourable Court to allow the appeal and the judgment and decree of the lower court dated 21<sup>st</sup> August, 2020 to be set aside and substitute the judgment and decree of this Honourable Court allowing the appellants' claim as was sought in the Plaint with costs to be awarded to them and the Honourable Court to grant any other or further orders as it may deem just.
7. The Appeal was canvassed by way of written submissions.

### **The appellants' submissions**

8. The appellants' submissions were filed by J.M Mugo & Company Advocates and are dated 19<sup>th</sup> September, 2023. Counsel listed the grounds in the memorandum of appeal and submitted on each of them. She cited Nairobi Civil Case No. 539 of 2004- [\*National Bank of Kenya Limited vs E. Muriu Kamau & another \[2009\]\*](#) eKLR where Justice M. Warsame (as he was then) analysed an advocate's negligence as follows:

“An advocate is usually liable for negligence where before bringing the action he fails to make proper investigations into the cause of action, preparing wrong or defective pleadings, or fail to check documents in order to establish whether they conform with the law, practice, and procedure commonly used within the corridors of the High Court and Court of Appeal. Where an advocate advises a party to commence proceedings for a particular sum and where he advises the client to enter into litigation even though success is improbable, where he



proceeds under wrong statutes or where he fails to remedy the situation in time to prevent limitation, where there is inexcusable delay in the prosecution of the claim or where he fails to inform his client the details and progress achieved in his case or where he fails to prepare the case properly for trial or where he advises a hopeless appeal which could not benefit the client, or where he fails to register a pending action, the implication of the law stipulates negligence on the part of the advocate”.

9. On the second ground, counsel submitted from pages 7 to 10 and pages 72 to 74 of the record of appeal that the respondent’s defence clearly showed that the scope of instructions was indicated was to file a case for special and general damages resulting from Janet Manena Mwadime’s demise as a result of a road traffic accident. Paragraph 3 from page 7 of the record of appeal confirms the instructions, and thus the trial magistrate erred in finding that the scope of instructions was not proved.
10. On the third ground, counsel defined “particular” as follows:

“The details of a claim, or the separate items of an account. When these are stated in an orderly form, for the information of a defendant.”
11. Counsel submitted that the record of appeal on page 8 at paragraphs 9 and 10 of the Plaintiff shows the particulars of negligence or the basis upon which the appellants held the advocate negligent. It is indicated that the suit against Jubilee Insurance ought not to have been filed as it was not a declaratory suit and the actions of the respondent’s advocates suing Jubilee Insurance were negligent as they exposed the appellants to the payment of costs of striking out the suit assessed at Kshs. 681, 361/=.
12. On the fourth, fifth, and sixth grounds, counsel argued that the respondent’s advocates were retained by the appellants to file a suit for recovery of damages due to a fatal accident resulting in Janet Manena Mwadime’s demise. It was expected that the respondent’s advocates would exercise skill, care, and attention in filing the claim. In Nairobi Civil Case No. National Bank of Kenya Limited (supra) Warsame J stated that the respondent’s advocate was expected to make the proper investigations into the cause of action, prepare the correct pleadings, or ensure that the documents filed conform with the law, practice, and procedure commonly used within the corridors of the High Court and Court of Appeal. The respondent’s advocates however failed to do this and hence the action for negligence.
13. Counsel argued that the respondent filed defective and incorrect pleadings by involving Jubilee Insurance Company Limited as noted in the record of appeal at pages 17 to 20. It was stated that there was no cause of action pleaded or shown against them. Additionally, no description was given to Jubilee Insurance to be included as the 2<sup>nd</sup> defendant, and no negligence was attributed to it. Furthermore, the advocates pleaded for general damages amounting to Kshs. 42,096,040/= to be as awarded by the court at its discretion and guided by precedents.
14. Counsel submitted that a competent advocate would not have sued the Insurance company or sought general damages, which could lead to high court fees and costs if the claim fails. The value of the subject matter is a key factor in determining instruction fees.
15. Counsel cited Nairobi Civil Case No. National Bank of Kenya Limited (supra) where Warsame J (as he then was) in awarding party to party costs as a result of striking out a suit as a result of defective pleadings stated:

“In any case, an advocate is bound to acquaint himself with the machinery by which the practice of a particular court is regulated and to see that it is adequate to the carrying out of the objects of the suit, he intends to undertake on behalf of his client. Before filing a suit an



advocate should or is expected to take care to identify the proper parties, the correct cause of action, the pleadings are in order, and above all, all documents are proper and/or legitimate to appear before the court.”

16. Counsel argued that during cross-examination, the respondent confirmed that he sued Jubilee Insurance Company because he did not have the names of the Administrators of Caleb Nyende (deceased), the registered owner of motor vehicle registration number KBM 830Z. He admitted that he was aware of the procedure for establishing the administrator of an estate but chose not to follow it. Instead, he filed the suit against the wrong party, which led to the appellants incurring party-to-party costs once the suit was dismissed.
17. Counsel cited Nairobi Civil Suit No. 478 of 2011- *Gabriel Mugai Njiri vs Wanga Robert Hawi t/a R.H. Wanga & Co. Advocates & R.H. Wanga & Co. Advocates [2018]* eKLR where the Honourable Judge in finding the advocates guilty of professional negligence stated:

“When a client instructs an advocate to act for him, the advocate steps in the shoes of the client and is therefore expected to act professionally in the best interests of the client.”
18. In conclusion, counsel submitted that the learned magistrate erred in both law and fact as demonstrated above and prayed that this Honourable Court so finds and sets aside the judgment, decree, and orders of 21<sup>st</sup> August, 2020 allowing the appellants’ claim in the lower court as sought in the Plaintiff.

#### **The respondent’s submissions**

19. The respondent’s submissions were filed by I.N Nyaribo & Co. Advocates and are dated 14<sup>th</sup> November, 2023. Counsel listed two issues for determination and submitted on each issue. On the first issue, he argued that the respondent in the defence indicated that they were denied the opportunity to prove before the High Court that Jubilee Insurance was a necessary party or that the misjoinder, if any, was not fatal as stated in the Plaintiff.
20. The Advocates Act, Cap 16 Laws of Kenya (the Act) recognizes that an advocate may be liable to his clients for negligence under section 46 of the Act. Counsel relied on the case of National Bank of Kenya Ltd (supra) which describes what constitutes professional negligence and misconduct where the court held that:

“The law is clear that an advocate who holds himself out to his client as having adequate skills and knowledge to conduct the case he is instructed owes a duty to his client both in contract and tort. Where the advocate is in breach of his contractual obligation/duty to his client or where he fails to use proper care towards the fulfilment of the instructions he was given, he is liable in damages in so far as the client suffers the loss... when a client goes to an advocate, it is a reasonably foreseeable consequences that if anything goes wrong to the litigation, owing to the advocate’s negligence, there will be a liability that would arise or occur. It is also clear that a charge of negligence against an advocate is a serious matter and must be strictly and distinctly proved.”



21. Counsel also relied on the case of *Kogo vs Nyamogo & Nyamogo Advocates* (2004) 1 KLR 367 where the court held that:
- “An advocate is not liable for any reasonable error of judgment or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice.”
22. In the Court of Appeal case of *Itute Ingu & another vs Isumael Mwaniki Mwendwa* [1994] eKLR where by faced with similar circumstances where the mistake of an advocate was the basis on which an application to file an appeal out of time, the court stated:
- “What I understood the applicants to be telling me by citing this case is that the error by their advocates should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court’s rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court’s discretion in his favour. But before doing so, the court, must, of necessity, examine the nature or quality of the mistake, or mistakes.”
23. On the second issue, counsel submitted that the appellants failed to specifically plead the details of the alleged negligence, breach of care, or contract and should not be allowed to prove what they have not specifically pleaded. He relied on the case of *Dilpack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR where Odunga J held that pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought to be visited on the client.
24. Counsel urged this Honourable Court not to exercise its discretion in favour of the appellants and placed reliance on the case of *Edney Adaka Ismail vs Equity Bank Limited* [2014] eKLR where the court declined to exercise its discretion simply because the applicant claimed a mistake of counsel.
25. In conclusion, counsel submitted that the appeal be dismissed for the reason that the appellants failed to demonstrate that the respondent had acted in a manner that would amount to professional misconduct and negligence. He placed reliance on the case of *K & K Amman Ltd vs Mount Kenya Game Ranch Ltd others* NBI HCC No. 6076 of 96(UR) where it was held that to prove professional negligence, it must be shown that the professional did not meet the expected standards of competence, diligence, and skill, or that their actions were negligent. Also, in the case of *Sielle vs Associated Motor Boat Company Ltd* where the court of appeal held that it would not interfere with the factual findings of a trial court unless there was no evidence to support the findings or a misunderstanding of the evidence.

### **Analysis and Determination**

26. This being a first appeal, this court has a duty to re-consider and re-evaluate the evidence that was tendered before the trial court, and make its own conclusions in the circumstances. It must bear in mind that it did not see nor hear the witnesses testify, and must give an allowance for that.
27. In the classic case of *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 the Court of Appeal stated as follows on the power of the first appellate court:

“I accept counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such



an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself, and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif vs Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).[emphasis added]

28. Having considered the record of appeal, grounds of appeal the parties' submissions and the authorities relied on by the respective parties, I opine that the issues for determination are:
- i. Whether there was professional negligence on the part of the respondents to the appellant
  - ii. Whether the failure to plead the particulars of negligence is fatal to the appellant's case
  - iii. Who should bear the costs of the suit?

29. I will address issue No (i) and (ii) together. On professional negligence, the *Black's Law Dictionary 9<sup>th</sup> Edition* defines it as follows:

“An instance of negligence or incompetence on the part of a professional.”

30. The above, clearly explains that professional negligence is incompetence on the part of a professional. In this particular instance, it is not in dispute that the appellants approached the respondent to represent them in Nairobi HCCC No. 158 of 2014 where the appellants' kin died in a road traffic accident for compensation since it was fatal. This court has perused the record of appeal and noted that the respondent as an advocate for the appellant sued the deceased driver of motor vehicle registration KBM 830Z. He did not manage to trace the estate of the deceased driver thus sued the Insurer which is Jubilee Insurance Company. From my understanding, when an accident occurs, the matter is usually reported to the police station for purposes of procuring an abstract whereby a P3 form is given to the persons injured in the accident. In this particular case, both the appellants' kin and the driver and registered owner of motor vehicle registration KBM 830Z died as a result of the road traffic accident.
31. The Insurance company went ahead and filed an application stating that the company was never the administrator of the estate of the deceased driver. The suit does not disclose any reasonable cause of action against the Insurance Company and it is not a declaratory suit against the Insurance. The said application was allowed and the suit dismissed. Thereafter the Insurance Company proceeded to file party to party bill of costs which the court awarded at Kshs 681,361/=.
32. The appellants filed a suit CMCC 3850/2018 in the lower court for professional negligence. Both counsel relied on the case of National Bank of Kenya Limited vs E. Muriu Kamau & another [2009] eKLR which dealt with professional negligence. In the case Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is the case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



33. The appellants counsel's argument was that the particulars of negligence were pleaded in the Plaintiff while the respondent's counsel's argument was that the said particulars were not pleaded. This Honourable Court is guided by the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR where the Court of Appeal held that parties are bound by their pleadings. This court has perused and considered the record of appeal and finds that indeed the appellants did not particularize the particulars of professional negligence in the Plaintiff as required.
34. All that was pleaded at paragraph 9 of the said plaintiff was that the respondent erred by enjoining the Insurance Company as a party to the proceedings in HCCC No. 158/2014. The appellants failed to particularize the professional negligence of the respondent expected by the law. The plaintiff was filed by an advocate who should have known better than the appellants. My finding is that due to failure to particularize the particulars of professional negligence the appellants were unable to prove their case.
35. The above being the position, I do not find any reason to fault the learned trial magistrate for the findings he made.
36. The upshot is that the appeal has no merit and is hereby dismissed with costs to the respondent.
37. Orders accordingly.

**DELIVERED VIRTUALLY, DATED, AND SIGNED THIS 30<sup>TH</sup> DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

