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The Republic of Uganda

In The High Court of Uganda at Kampala

Commercial Division

Civil Suit No. 939 Of 2019

Namayega Barbara ..... Plaintiff

10

Versus

Etot Denis

Mooli Albert Sibuta

Waluku Ronny

{T/a Waluku Mooli & Co. Advocates}

..... Defendants

15

Before: Hon. Justice Dr. Henry Peter Adonyo

Ruling On a Preliminary Objection

Namayega Barbara (the Plaintiff) brought this suit against the defendants for the recovery of Uganda Shillings Sixty Million Only (UGX 62,000,000/=) being the sum lost the defendants' gross professional negligence, fraud and breach of statutory duties as advocates, general damages and costs of the suit.

The background to this matter is that in August 2019 one Nanfuka Kintu Bakia stated to be the registered proprietor of land described as Kibuga Block 23, Plot 612 informed Namayega Barbara (the plaintiff) that she had land for sale. The plaintiff showed interest in



5 buying the land. She carried out a search on the land through her lawyers known as M/s Mukiibi Sentamu and Co. Advocates and established that indeed the registered proprietor was the said seller called Nanfuka Kintu Bakia.

10 Thereafter, on the 22<sup>nd</sup> August 2019, the plaintiff Nanfuka with Nanfuka Kintu Bakia went to the chambers of M/s Waluku, Mooli and Co. Advocates stated to be the advocates for Nanfuka Kintu Bakia at their premises in Nakawa where the two met one Etot Denis, a lawyer, who then drafted a sales agreement for the parties, had the two parties sign it and even witnessed in addition to preparing the  
15 necessary transfer forms.

Upon all these being completed the parties together with Mr. Etot proceeded to Standard Chartered Bank at Speke Road where Namayega Barbara paid Uganda shillings sixty-two million (UGX 62, 000,000/=) to Nanfuka Kintu Bakia and was handed a land title with  
20 Nanfuka Kintu Bakia to hand over vacant possession the following day to Namayega Barbara.

The next day Namayega Barbara sought to secure vacant possession of the land but could not do so due to the fact that Nanfuka Kintu Bakia became evasive and had switched off her phone and could not  
25 be traced.

Upon further inquiry Namayega Barbara established that Nanfuka Kintu Bakia had impersonated the registered owner of the land and had conned the plaintiff of her monies. The plaintiff was aggrieved

5 and thus filed this suit. When the matter came up for directions, the defendants four preliminary objections to the, to wit,

- i. Whether the plaint discloses a cause of action against the defendants.
- 10 ii. Whether the plaintiff has a locus standi to bring a suit against the defendants.
- iii. Whether the plaint is frivolous, vexatious and an abuse of the court process.
- iv. The remedies available to the parties.

The defendants argued the first two issues together submitting that  
15 Order 7 rule 11 of the Civil Procedure Rules provides for a plaint to be rejected where it does not disclose a cause of action. In making this submission, the defendants relied on the holding in ***Auto Garage vs Motokov (3) (1971) EA 514*** and ***Tororo Cement Co. Ltd vs Frokina International Limited Supreme Court Civil Appeal***  
20 ***No. 2 of 2001.***

On whether the plaintiff enjoyed a right which put the defendants under a legal duty which rights was violated occasioning injury to the plaintiff, it was argued that the injury alleged by the plaintiff was self-inflicted as it the injury arose out of negligence of the plaintiff and  
25 her own counsel with the defendants not being liable for any duty of care to the plaintiff since under Regulation 12 of the Advocates (Professional Conduct) Regulation SI 267-2 and section 1 (b) of the Advocates Act Cap. 267 the plaintiff was not a client of the defendants and thus was not owed any duty of care since the defendants only

5 acted for Nanfuka Kintu Bakia as her transactional lawyer and at no  
point gave the plaintiff professional advice in relations to the land  
transaction arguing that rather all the relevant information should  
have been sought by the Plaintiff's from own lawyers of M/s Mukiibi  
Ssentamu & Co. Advocates which she did not and had no *locus standi*  
10 to bring this suit as against the defendants which suit was frivolous,  
vexatious and an abuse of court process brought without any  
probable cause and was only intended to annoy the defendants since  
even according the plaintiff's own averments proper search of the title  
was conducted and ascertained through her lawyers which search  
15 confirmed that the suit land was registered in the name of Nanfuka  
Kintu Bakia. Additionally, it was argued that through her plaint, the  
plaintiff had failed to disclose particulars of fraud thus given all these  
reasons, the suit should be dismissed for the reasons given.

In reply to defendants' submissions, the plaintiff urged court to find  
20 that the suit disclosed a cause of action against the Defendants after  
looking at the plaint and its Annextures which clearly indicate a  
claim for the recovery Shs 62,000,000/= arising from gross  
professional negligence, fraud and breach of statutory duty since the  
defendants as advocates had the statutory duty under the Advocates  
25 Act to account for their actions persons since the alleged vendor was  
well known to them and given the fact that this was not a onetime  
transaction between the defendants thus clearly showing connivance  
as was pointed out in the case of ***Kampala Rugby Union Football  
Club vs Capital Ventures International Limited MA 523 of 2011.***



5 Further, the plaintiff urged court to ignore the preliminary objection and allow the dispute between the parties to be resolved at trial as it was clear that the defendants had prior knowledge and dealings with the vendor and the defendants owe the plaintiff a duty of care to the plaintiff which duty they breached.

10 On whether negligence of the Defendants had been established, the plaintiff asked court to find so given the fact that the act of negligence not arising out of a contract but rather from the "who is my neighbour" principle as articulated in *locus classicus* case of **Donoghue vs Stevenson 1932 AC 562** since the defendants had the  
15 duty to disclose the fact of or not whether their client was indeed the owner of the registered suit land since the vendor was their client and who took the plaintiff to the defendant who then acted which on the misrepresentation by their client.

Further, the plaintiff urged court to find that she was a client of the  
20 defendants by virtue section 1 (b) of the Advocates Act which defines who a client is and that she even paid for the defendants' services for drafting and even the witnessing of the suit agreement.

Furthermore, it was also submitted that since fraud had been  
25 pleaded which act of fraud arose from the defendants' dishonesty, then the court should find that the suit raises serious issues and thus was not frivolous hence giving the plaintiff the *locus standi* to bring the suit given that her case is based on statutory duties owed to her under the law.

5 **Decision:**

Appropriate consideration has been made as regard the submissions of parties in relations to the preliminary objections raised. My decision on the same are as below.

Order 7 rule 11 of the Civil Procedure Rules provides that;

10 **“The plaint shall be rejected in the following cases—**

**(a)where it does not disclose a cause of action”**

The holding in ***Auto Garage vs Motokov [1971] EA 514*** establishes the elements of a cause of action and these include a plaint showing that a plaintiff enjoyed a right, the right has been violated and the  
15 defendant is the one who violated the right and thus is liable.

If these principles are answered, then *locus standi* of a plaintiff to bring a suit would be established

In regard to *locus standi*, the case of ***Dima Dominic Poro vs Inyani and Another Civil Appeal No.0017 of 2016*** of assistance for it was  
20 held in that case that;

***“The term locus standi literally means a place of standing. It means a right to appear in court, and conversely, to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding.”***

25 In the said case of ***Dima Dominic Poro (above)***, the court generously borrowed with approval the holding in ***Njau and Others V. City Council of Nairobi [1976-1985] 1 EA 397 at 407*** in relations to



5 the same for in Njau's case the court noted that "... to say that a person has no locus standi means the person cannot be heard, even on whether or not he has a case worth listening to."

I find the above mentioned principles in deciding this instant matter relevant.

10 The suit herein is by the plaintiff's claims against the defendants the recovery of Sixty-Two million shillings (UGX 62,000,000/=) lost due to the allegations of defendants' gross professional negligence, fraud and breach of statutory duty.

Preliminary objections have been raised tending to question the plaintiff's rights to bring this suit. More importantly it is alleged that the plaintiff never enjoyed any right which should have been exercised by the defendants arising from any professional duty thus resulting in negligence, fraud and breach of statutory duty.

20 In law, there is no general duty to take care and if there were indeed a duty not to cause damage to another carelessly, there would be no need to establish the existence of a duty in each case, since this would be implied in all situations. Thus in ordinary terms professional negligence results from the breach of the duty of care between professionals and their clients.

25 The duty of care is a common law principle where a client expects certain level of professionalism and standard commonly held by those in the particular profession. No other person elaborated this requirement well other than out this requirement well Lord Atkin in

5 **Donoghue v Stevenson [1932] UKHL 100** where the Lord Justice had this to say;

10 **“The rule that you are to love your neighbor becomes, in law, you must not injure your neighbor; and the lawyer’s question, ‘who is my neighbor? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor.**

**Who, then, in law is my neighbor?**

15 **The answer seems to be persons who are closely or directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts of omissions which are called in question.”**

20 This insight is the precursor to modern law of negligence and it establishes the general principles of the duty of care by requiring that all care must be taken by one person to the other when relating with other persons who are so likely to be affected by one’s acts or omissions for any such breach would likely give rise to liability in negligence.

25 The said principles luckily have been domesticated in a number of decision in Uganda including that of **Kabiito Telesphorus vs Attorney General and 2 Others Civil Suit No. 26 of 2012** where the court when confronted with the same question went on to



5 elaborate on negligence as being the act of doing something or an omission by a reasonable man, guided upon certain considerations which regulate the conduct of human affairs which if breached would make one liable in negligence as a result of the duty of care owed and the damage suffered by the person to whom the duty was owed.

10 Was there any duty of care owed to the plaintiff by the defendants? This, in my view is the questions raised in the head suit and which form the basis of the instant preliminary objection which seeks to have the head suit dismissed.

The fact of this matter is that the plaintiff is suing the defendants in  
15 their professional capacity as advocates for negligence with the claim that the defendants owed a duty of care arising from a professional situation of an advocate – client relationship.

Fortunately, an advocate – client relationship is codified with  
**Regulation 12 of the Advocates (Professional Conduct)**  
20 **Regulations SI 267-2** placing a professional duty of care on advocates.

**Regulation 12 of the Advocates (Professional Conduct)**  
**Regulations provides as follows;**

25 “Every advocate shall advise his or her clients in their best interest, and no advocate shall knowingly or recklessly encourage a CLIENT (emphasis mine) to enter into, oppose or continue any litigation, matter or other transaction in respect of which a reasonable advocate



5            **would advise that to do so would not be in the best interests of the client or would be an abuse of court process”.**

Who then is a client of an advocate?

The Advocates Act, Cap 267, section 1 (b), defines a client as follows;

10            **Section 1 (b) The Advocates Act:**

**“client” ... include any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or**  
15            **employs, or is about to retain or employ, an advocate and any person who is or may be liable to pay to an advocate any costs.”**

From the above definition, can we say that the plaintiff was a client of plaintiff the client of Mr. Etot Denis, the advocate?

20            To unravel this position one needs to look into the facts surrounding this matter from the pleadings in this suit.

The fact of the matter indicates the plaintiff and one Nanfuka Kintu Bakia were interested in entering into a deal for the sale of land. They agreed to go to the chambers of Nanfuka Kintu Bakia’s lawyers’ and  
25            met Mr. Etot Denis, the 1<sup>st</sup> Defendant who is stated to not only assist the parties draft a sales agreement but witnessed the signing of the same before him in the said chambers even the execution of the transfer forms and of the purchase price.



5 These facts are not denied although the defendants distance themselves from the plaintiff arguing their professional role in relation to the impugned transaction was to Nanfuka Kintu Bakia and not the applicant who ought to have been properly advised by her transactional counsels of M/s Mukiibi Ssentamu & Co. 10 Advocates such that if the plaintiff suffered any injury then such suffering arose from as a result of the plaintiff's negligence of the plaintiff and her counsel not the defendants.

I totally disagree with this proposition. The fact of this matter which is clear to is that the defendant law firm through Mr. Etot Denis put 15 onto paper the intention of parties in a contractual document within the environment of the defendants' premises. Not only was the same witnessed therein but Mr. Etot Dennis hobbled along with the parties and even witnessed the receipt of the purchase price.

These facts alone would in my view convince any person that there 20 existed a duty of care as they fit and show an advocate-client relationship between the defendants and the plaintiff and thus establishes the ingredients of the duty of care.

That being the case, I would conclude that the appearance, the ambience and the action taken by the defendants provided the 25 confidence and the cushion for the impugned transaction to take place enabling to come into play the relationship which Lord Atkin anticipated in *Donoghue's case* (cited above) of "**... you are to love your neighbor becomes, in law, you must not injure your**

5 ***neighbor; am satisfied that there indeed existed a client  
advocate relationship which carries with it the duty of care.***”

Invariably, actions and steps which were taken by the defendants correlated with the end result since every action has consequences.

That being the case, I would overrule the preliminary objection in  
10 whole and make finding that not only does the plaintiff has ***locus in  
quo*** to bring the instant matter but this suit is not frivolous,  
vexatious and an abuse of court process and the plaint discloses a  
cause of action since the actions and appearance of transacting in a  
law firm brought in the confidence which allowed the parties to the  
15 land transaction to have such assurance to transact without  
question.

This suit is thus not frivolous, or an abuse of court process but one  
wherein serious triable issues have been raised which need  
investigation by court in order for the court to arrive at a just  
20 conclusion for the plaintiff is indeed aggrieved since consideration  
flowed from her to the one Nanfuka Kintu Bakia who was well known  
to the defendants not only within the confines of the defendants’  
chambers where an agreement was executed and witnessed but  
included the extension of such environment to the point of the receipt  
25 of funds by one party which did not in return pass the necessary  
consideration.

Therefore, given the above, the preliminary objection raised by the  
defendants is dismissed and I order this suit to proceed to completion  
on its own merits between the parties, one way or the other.

5 **Orders:**

- a. The preliminary objections raised by the defendants is dismissed with its costs to be in the cause
- b. This suit to proceed to completion on its own merits between the parties, one way or the other.

10 I so order.

.....  
Hon. Dr. Justice Henry Peter Adonyo

Judge

5<sup>th</sup> February 2021