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- 1) Civil Law suit
 - 2) Professional negligence by advocate of the High Court of Kenya
 - 3) Negligence - in summary
 - a) Failure to attend court
 - b) Failure to file submissions
 - c) Failure to call evidence and witnesses
 - d) Failure to advise adequately on the chances of success
 - 4) Claim:
 - a) Judgment decree of court 1,032,358/-
 - b) Auctioneers fee 50,000/-
 - c) Costs of review setting aside 9,525/-
 - d) New advocate fee 75,000/-

Ksh. 1,100,883/00
 - 5) Hearing order 2b r 3 (a) CPR non attendance by defendant
 - 6) Held: The advocate is immunised from being sued in negligence (but this is in certain cases which does not amount to solicitors work)
 - 7) Statute Law
 - a) The Advocates Act Cap. 16 Laws of Kenya
 - 8) Case Law by plaintiff:
 - a) Eolamu vs Friern Hospital Management Committee (1957) 2 ALL ER 118
 - 9) Text book law and courts case law
 - a) Charlesworth and Percy on negligence 8th Edition by R.A. Percy, M.A. (Oxon)
 - b) Rondel v Worsley 1969 IAC 191
 - c) Sief Ali v Sydeney Mitchell & Co. (1980) AC 198
 - d) Somasundaram v M. Julius Melchior & Co. (a firm) 1982 WLR 1394
 - e) Fell v Brown (1791) 1 Peake 131
 - 10) Advocates:

K.K. Nyaencha advocate for the plaintiff - present

No appearance advocate for the defendant - absent

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 431 OF 2002

APOLLO INSURANCE CO. LTD.

PLAINTIFF

VERSUS

FLAVIA RODRIGUES
T/a M/S FLAVIA RODRIGUES & CO. ADVOCATES

DEFENDANT

JUDGMENT

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On the 18.2.02 the parties took dates for hearing of this suit by consent to be heard on 24th and 25th June 2003. On the said day fixed for hearing, the suit was called out. The advocate for the plaintiff came late. The advocate for the defendant did not appear at all despite the court waiting for her. The proceeding proceeded the following day under order 9b r 3(a) CPR; namely that the court was satisfied that the defendant had notice of the hearing date but had failed to appear, the hearing is permitted to proceed ex parte.

A: Background of the case.

Flavia Rodrigues

T/a M/s Flavia Rodrigues and Co. Advocates

has been sued for Professional negligence by her then instructing client M/s Appollos Insurance co. Ltd.

Appollos Insurance Co. Ltd insured the client M/s Car and General Automotive Limited's motor vehicle registration KUQ 553 Mazda Saloon. The vehicle was being driven by one John Nyarangi Rasugu (now deceased) an employee of Car and General (Automotive) Limited on the 13th day of October, 1993. Whilst driving along the Kitale/Webuye road, the vehicle had a tyre

burst resulting to a self accident. John Nyarangi Rasugu sustained bodily injuries being multiple fractures to his forearm and legs. He then sued his employer for damages. He had instructed by plaint dated 11.10.96 M/s Masese and company advocates but later changed advocates to M/s Gichuki Kingara & Co. Advocates.

The defendants engaged the services of M/s Lilian Njuguna & Co. advocates who duly filed a defence and signed the agreed issues for determination in this case. The plaintiff amended his plaint. It was for the first time that the name of Flavia Rodrigues and Co. advocates appeared. There was no mention of M/s Lillian Njuguna who had originally entered appearance for the defendant. As it stands M/s Flavia Rodrigues have never been on record in this matter nor did they file any documents to this effect. They had no legal authority to conduct this suit on behalf of the defendant.

If perchance they were indeed on record then the sequence of event can be noted as follows:-

The advocate/defendant in this case send another advocate to conduct this case on and off. The trial proceeded before

Visram (C.A.) (as he then was) in the High Court case 2531/96.

John Nyarangi Rasugu

V

Car and General Automotive Ltd.

Later John Nyarangi Rasingu died and the plaint was duly amended to substitute him with his legal representative.

The court proceeded with the trial at one point exparte.

In brief:-

- a) The Plaint was filed in 1996
- b) The defence was filed in 1997
- c) Issues agreed on 16.5.97
- d) Plaintiff dies and is substituted 23.10.98
- e) Hearing of cases:-
 - i) Adjourned Amin J defendant absent 14.7.00.
 - ii) 15.7.99 – defendant had no witnesses adjourned Amin, J.
 - iii) 24.11.99 and 25.11.99 – defendant – Flavia Rodrigues advocate in court. Unaware defendant has died – adjourned

- iv) 7.4.00 consent before Deputy Registrar Mr. Bhatti for the amendment of the plaint.
- v) 13 and 14.11.03 Visram J.
 - aa) 13.11.03 case not reached
 - bb) 14.11.03 hearing at 3.00 p.m.
 - cc) Representative of defendant arrives at 3.25 p.m.
 - dd) 14.12.00 at 9.00 defendant is absent.
Plaintiff closes his case.
 - ee) Submissions set for 22.1.01
 - ff) Adjourned to accommodate advocate for defendant to 2.2.01
 - gg) On 7.2.01 finally judge (C.A.)
Orders:- written submission to be filed.
 - hh) 14.3.01 judgment read by Visram CA
defendants advocate holding brief present
- vi) Bill of costs 27.03.01 adjourned granted by the deputy registrar to 4.5.01.
- vii) 4.5.01 – defendants advocate absent

viii) Application of 26.6.01 filed for review and setting aside judgment.

aa) Application adjourned to 12.7.01

30.7.01

19.9.01

ix) Defendants amends the Notice of Motion on 12.11.01.

Dates 26.11.01

20.11.01

4.12.01

11.12.01

20.12.01

A ruling on the application of 26.6.01 to stay the proceeding, review and or set aside the judgment was delivered and stated:-

The principles in the case of
Naji Ahmed Sheikh t/a Hasa Hauliers &
Highway Carriers Ltd.
Mombasa, 46/86 unreported
Gachuhi J.A. Apaloo JA as he then was and
Masime Ag JA. as he then was.

That said:-

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"the mistake of advocate should not be visited upon the innocent client, However his principle cannot be employed generally to defeat or delay the cause of justice."

Visram judge (as he then was) also found that:-

"The history of this case was carefully outlined . . . this court proceeded to bear this suit exparte due to the . . . non attendance. The record and the deposition . . . indicates that the applicant and its advocates had little interest in this case."

The defendant only began to be active in the case when auctioneers came to execute the courts judgment.

The judge also then stated that:-

"It may be that its advocates put them in the predicament they are now in. If that is so I think that it would be unfair to saddle the respondent for no fault of hers. THE APPLICANT MAY HAVE RE COURSE AGAISNT THE ADVCOATE
(Emphasis my own)

On those grounds the plaintiff in this case at once sued Flavia Rodrigues t/a Flavia Rodrigues and Co. Advocates in negligence. By now the plaintiff was embarrassed as their client Car and General (Automotive) Ltd. was auctioned. The decreetal amount of General

Damages 600,000/- Special Damages of 261,000/- Totaling 144
Ksh.861,000/- was paid together with interest.

I have always stated in the past that an advocate who takes over a file or case from another advocate, it is advisable to attend to the court registry pay, the archives fees and read the file. If this had been done by M/s Gichuki-Kigara for the original/plaintiff in Hccc 2531/96 Rasugu v Car and General Case (supra) he would have discovered that M/s Flavia Rodrigues and Co. Advocates had not filed their requisite papers.

If the current advocate for the plaintiff in this case had likewise taken time to read the two files – one finalized and this current one he too would have noted the anomaly.

In Hccc 431/2002 the defendant Flavia Rodrigues represented herself and filed her own defence denying the allegations. I must bring out the point that where there is a suit against an advocate, he or she should not defend themselves but as far as possible get a new advocate not only to defend them but to file the defence. If perchance the defendant attended court it would have been difficult to be in the witness box then conduct her trial.

follow the treatment. Failure to warn the patient of the danger of the treatment is not, itself negligence.

The advocate for the plaintiff brought my attention to the passage in the said authority that dealt with the meaning of "negligence."

"In the ordinary case which does not involve any special skill, negligence in law means this:-

Some failure to do some act which is reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury then there is a case of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said that you judge that by the action of the man in the street. He is the ordinary man, ...

But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a clapher omnibus, because he has not got his special skills. The test is the standard of the ordinary skilled man exercising and professing to have that special skill."

I must point out that this case law concerns medical practitioner. In this particular case we are dealing with an advocate of the High Court of Kenya. What is the position concerning an advocate?

The parties did not enter into agreed issues for determination by the court. I can only frame the issue to be:-

"Did the plaintiff have a right to sue the advocate and claim under subrogation for the negligence as incurred or given by the advocate?"

The plaintiff relied on the particulars of negligence as per his plaint stating inter alia that the defendant was negligent because

- a) She failed to attend court
- b) She failed to file written submission
- c) She failed to call evidence and witness
- d) She failed to advise adequately on the chances of success of the suit.

The case law:-

Bolam v Friern Hospital Management (1957) 2 All ER 118

Whereby the plaintiff underwent electro-convulsive therapy treatment at the defendant's hospital on August, 23, 1954. He sustained injuries and sued the hospital for being negligent in his treatment.

It was held that there were two schools of thought as to the medical treatment. It was therefore not negligent for a doctor to

I presume that the defendant herein holds a practicing ¹ certificate under the advocates Act Cap. 16.

"Advocate" means any person whose name is duly entered upon the Roll of advocate or upon the Role of advocates having the rank of senior counsel and for the purposes of Part IX include any persons mentioned in section 10"

Section 9

"Subject to this act, no person shall be qualified to act as an advocate unless

- a) He has been admitted as an advocate; and
 - b) His name is for the time being on the Roll; and
 - c) He has in force a practicing certificate and
 - d) He has in force an annual license
- And for the purpose of this act a practicing certificate shall be deemed not to be in force at any time unless he is suspended by virtue of section 27 or by an order under section 60(4)."

In England, the legal profession is under two types of lawyer.

The solicitor and the barrister.

- i) The solicitor owes a duty to his client in all kinds of business which involve and gives legal advice. His qualification is

similar to the qualification under the Kenya laws of section 11 of Advocates Act Cap. 16.

Under the solicitors act the solicitor are subjected to the powers and control on disciplinary matters, by the law society.

"The professional services provided by a solicitor in connection with any matter in which he or his firm had been instructed by a client were in any respect not of the quality that could reasonably have been expected of him as a solicitor."

The Barrister on the other hand is the lawyer who argues cases in court on brief prepared by solicitors.

According to:-

Charles-Worth and Percy on negligence

By R.F. Percy M.A. (Oxon)

8th Edition 1990

A Barrister is immuned from action in negligence.

Fell v Brown (1791) 1Peake 131 where an action was brought against a barrister for unskillfully and negligently settling and signing a bill filed by the plaintiff in the court of Chancery.

It was held by Lord Kenyon that the action could not be maintained.

"The basis of establishing immunity from suit in tort is due to:-

- i) The absence of any contractual obligation towards a client.
- ii) The difficult nature of work so undertaken in public policy.

This briefly under public policy

"If a party desires to retain the power of directing counsel how the suit shall be conducted, he must agree with some counsel willing to so bind himself. A counsel is not subject to an action for calling or not calling a particular witness or for putting or omitting to put a particular question or for honestly taking a view of the case which may turn out to be quite erroneous.

If he were so liable, counsel would perform their duties under the permit of an action by very disappointed and angry client."

(Emphasis my own)

The duty of a barrister extends to the court and public at large.

The duty of a solicitor is that it arises under contract by virtue of his retainer. The solicitor has a duty of care to his client. Under tort a duty of care lies to his client and including to a third party. The solicitor has a duty of care in contentious matter.

A few illustration given by serving is as follows:-

Take instructions

Ascertain the relevant facts. If there is no cause of action, to so advise.

There is an implied authority to settle actions but any compromise must be reached with the clients express authority.

" a solicitor has held liable for proceeding under a wrong section of a statute; deliberately allowing time to run out; failing to ascertain a clients current address, so that the client was not informed of the hearing . . . that the client desired to defence

Non contentious matter

A solicitor has been held liable in negligence for:-

Not explaining to his client the documents which he is being asked to execute,

Not making usual searches,

Failing to search the registers,

Forwarding the whole of the purchase money to the vendors solicitors in exchange of the

letters understanding to forward the executed title documents within a reasonable

time.

It is thus clear that a barrister has special immunity to be sued for negligence but a solicitor has no such special immunity to be sued in negligence unless he acts as an advocate for purpose of advice such as pleas and appears in court as an advocate.

See Rondel v Worsley (1969) IAC 191.

In Kenya where the two profession are fused, that is the work of a barrister and a solicitor is done by one person then the lawyer is

referred to as an advocate. The immunity of that advocate now ¹ requires to be addressed.

Is an advocate of the High court of Kenya immuned from legal proceeding?

I am guided by the case law of Rondel v Worsley (supra) and the case law of Saif Ali v Sydney Mitchell & Co. Advocates 1980 AC 198 at page 206 para F at (6).

Where a solicitor acts as an advocate, namely goes to court and negligently makes a mistake he is immuned from being sued.

Where the advocate acts as a solicitor he is bound to be sued as outlined above.

The public policy that was established in 1791 in the case of Fell v Brown 1791 1 Peake 131 and followed in the Rondel v Worsley case (supra) is a policy that assist the Barrister to conduct this cases without fear. There are five persons to be looked at as far as immunity is concerned. This is the party, the witnesses, the jury the judge and the Barrister.

To some extent even the press has immunity and cannot be sued for reporting a court case correctly whilst it may amount to libel. The news paper/press have a duty to inform the public what goes on in the courts of law and therefore their immunity.

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In the case of Sommasudaran v Merchior & Co. CA 1988 WLR 1 at page 1394. It held a barrister was immuned from acting where a solicitor so acts as an advocate the immunity extends to that solicitor and he may not be sued.

In this special role of an advocate Flavia Rodrigues was alleged to be negligent and indeed was for failing to do:-

"everything reasonable expected of an advocate to protect the plaintiffs' and its interest in the suit"

The acts of the advocate for failing to call a witness is in itself negligent. The advocate is immuned from being sued on this. The advocate filed the wrong applications court. In the capacity as an advocate and in the role of a barrister the said advocate is immuned from being sued.

I would hereby hold that as the advocate was acting as a solicitor/advocate or a barrister with the immunity on her n... be upheld to allow the advocate to represent and to persecute cases without fear of being sued. This is a public policy.