



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE 30 OF 2017

DENNIS KIMAKIA KIURA T/A

WASONGA KIMAKIA & CO ADVOCATES.....PLAINTIFF

VERSUS

LOUIS MUGAMBI NJUKI.....1ST DEFENDANT

LILIAN KAWIRA MUGAMBI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaint dated and filed on 8th August 2014, the Plaintiff sought the following reliefs against the Defendant, jointly and severally:-
 - a. **Special damages for Kshs 3,850,000/=.**
 - b. **Costs of the suit.**
 - c. **Interest on (a) and (b) at court rates from the date of filing suit.**
 - d. **Such other or further relief as this Honourable court deems fit to grant.**
2. On 29th August 2014, the Defendants herein entered appearance. They filed their Statement of Defence dated 11th September 2014 on even date. On 7th April 2017, the Defendants filed Copies of Documentary Evidence of the same date. They also filed an additional Witness Statement.
3. The Plaintiff's Reply to the Defendants' Statement of Defence was dated and filed on 30th September 2014. The Plaintiff also filed a Statement of Agreed Issues dated 23rd October 2014 on 27th October 2014.
4. On 28th June 2018, this court directed both parties to exchange fresh witness statements cross-referenced to their indexed and paginated bundle of documents by 28th July 2018. The Plaintiff filed its documents on 4th July 2018 while the Defendants filed theirs on 15th October 2018. On 5th July 2019, the firm of M/S Murunga & Co Advocates for the Defendants filed a Notice of Change of Advocates dated 4th July 2019.
5. On 6th February 2019, this court directed that the hearing of the case would proceed on 25th and 29th April 2019. However, only the Plaintiff attended court on 25th April 2019. Upon being satisfied that the Defendants had been duly served with the Hearing Notice for both days, the court took his evidence and directed that the Defence case proceed for hearing on 29th April 2019.
6. On 29th April 2019, Mr Ndetto, the Defendants' counsel attended court and indicated that he was not able to proceed as he was unwell. He also informed the court that the matter proceeded *ex parte* on 25th April 2019 because the counsel who was to hold his brief did not attend court on that day. He requested that the Plaintiff be recalled for Cross-examination.
7. The Plaintiff's counsel acceded to the Defendants' counsel request on condition that the latter paid him throw away costs in the sum of

Kshs 5,000/=. By consent of the parties, the proceedings of 25th April 2019 were set aside and/or vacated and the matter was adjourned to 25th and 26th June 2019. It was agreed that the Defendants would pay the Plaintiff the said sum of Kshs 5,000/= for thrown away costs. The court also gave the last and final adjournment to the Defendants.

8. On 25th June 2019, the Defendants did not attend court despite having given them an extra half hour to attend. The Plaintiff therefore adduced his evidence afresh and closed his case. The court therefore directed him to file Written Submissions, which he did on 4th July 2019.

9. On 24th September 2019, Mr Murunga, counsel for the Defendants attended court and indicated that they had just come on record having filed their Notice of Change of Advocates on 4th July 2019. He informed the court that they were considering filing an application to set aside the proceedings of 25th June 2019. Mr Wasonga, counsel for the Plaintiff stated that despite having served the previous advocates with their Written Submissions, they had not received the Defendants' Written Submissions. He therefore prayed for a judgment date.

10. Having noted that the Defendants' advocates filed their Notice of Change of Advocates on 5th July 2019 and that they ought to have brought their application to set aside the proceedings of 25th June 2019, if at all, in good time and not on the date when the matter was being mentioned to confirm filing of Written Submissions, this court reserved its Judgment. It, however, granted the Defendants leave to file their Written Submissions by 16th October 2019. As the time of writing the Judgment herein, the Defendants had not filed their Written Submissions.

11. The judgment herein is therefore based on the Plaintiff's Written Submissions only. Notably, this matter had initially been filed at the Environment and Land Court but was subsequently transferred to the High Court of Kenya Milimani Law Courts Civil Division on 9th December 2017.

LEGAL ANALYSIS

12. The Plaintiff listed the following as the issues for determination by the court:-

- 1. Whether the Plaintiff entered into a written Commission Sale Agency Agreement with the Defendants?**
- 2. Whether there was a Principal-Agent relationship that was established by the said Agreement?**
- 3. Whether such an appointment of an advocate as an agent, knowing very well that the Plaintiff was an advocate, if 1 and 2 were in the affirmative, amounted to practice as an estate agent by an advocate in the course of his practice as such?**
- 4. Whether the written Commission Agency Agreement, if any, was illegal under the Estates Agents Act Cap 533 Laws of Kenya?**
- 5. Whether the exemption of an advocates under the Estates Agents Act Cap 533 allows advocates to practice as estate agents in the course of their practice?**
- 6. Whether the Commission Sale Agency Agreement was properly executed and attested?**
- 7. Whether it was necessary for the Plaintiff to introduce the purchasers to the Defendants in the circumstances of this case?**
- 8. Whether there was non-joinder of parties, and if at all, whether it had any effect on the suit?**
- 9. Whether the Plaintiff was entitled to commission under the Commission Sale Agency Agreement?**
- 10. Whether the Plaintiff as an advocate was required to be a registered Estate Agent to practice as an Estate Agent?**
- 11. Whether the Defendants received the total selling price of Kshs 20,000,000/= and if they did, whether they ought to have paid the Plaintiff the agent's commission amounting to Kshs 3,850,000/=?**
- 12. Whether the Plaintiffs made a demand and notice of intention to sue?**
- 13. Whether this Honourable Court had jurisdiction to hear and determine this matter?**
- 14. Whether the Plaintiff was entitled to judgment as prayed for in the Plaintiff?**

13. Having considered the aforesaid issues, it appeared to this court that the issues that were really before this court for determination were :-

- 1. Whether there was a written Commission Sales Agency Agreement between the Plaintiff and the Defendants herein?**
- 2. Whether the Plaintiff fulfilled its obligations under the said Commission Sales Agency Agreement?**
- 3. Whether the Defendants received the full purchase price of the aforementioned parcel of land?**

4. Whether the Plaintiff was entitled to agency commission amounting to Kshs 3,850,000/=.

14. According to the Plaintiff's evidence, the Defendants who were the registered owners of all that parcel of land known as LR No 209/12035/4 situated at New Kitisuru or Kitisuru West in Nairobi in the Republic of Kenya instructed his firm M/S Wasonga Kimakia & Co Advocates to secure a buyer for the said parcel of land at a commission of five (5%) per cent of the purchase price that was agreed at Kshs 17,000,000/=. This agreement was reduced into writing.

15. His firm secured a buyer of the said parcel of land for Kshs 20,000,000/= whom they acted for in the transaction. However, when he sought to deduct the commission, the Defendants' advocates declined on the ground that his firm was not entitled to a commission as they were not estate agents.

16. His contention was that he was entitled to the agency commission fee amounting to Kshs 3,850,000/= from the Defendants which sum was made up as follows:-

a. 3% of Kshs 17,000,000/=	Kshs 850,000/=
b. Amount over and above Kshs 17,000,000/=	<u>Kshs 3,000,000/=</u>
Total commission payable	<u>Kshs 3,850,000/=</u>

17. The Plaintiff adduced in evidence the Commission Sale Agency Agreement (hereinafter referred to as "the Agency Agreement") for sale of the aforementioned property. It was duly executed by himself and the Defendants herein. According to Clause 5 of the Agency Agreement, the principle obligations and terms of business were shown as follows:-

- 1. The principal shall pay to the agents by way of commission at the rate of Five Percent (5%) of the selling price. It is emphasised for purposes of clarity that the selling price is Kshs 17,000,000/=.**
- 2. The principal shall further pay to the agents by commission any such amounts that they may sell above the selling prices.**
- 3. The agent shall not make any representations, warranties or guarantees about the property except such as are in or consistent with the principal's conditions of selling.**
- 4. The agent, being the advocates for the purchaser in the transaction, shall be entitled to deduct their commissions directly from the monies paid to them by the purchaser and pay the balances to the principal-vendors' advocates, in accordance with the definition of commission day in clause 1.1.**

18. The Agency Agreement was duly executed by the Plaintiff and the Defendants and attested by an advocate. It was evident that a principal-agent relationship was created. As there was no evidence that was adduced to show that the said contract was voidable, illegal or could be voided for having been a forgery or fraudulent, for all purposes and intent, the contract was therefore valid and binding between the Plaintiff and the Defendants herein.

19. However, entering into a contract that complies with all the ingredients of a valid and binding contract is one thing. The pertinent question is whether the Plaintiff could purport to benefit from the Contract that he entered into with the Defendants.

20. The Plaintiff argued that the Estate Agent Act does not exclude anyone from acting as an estate agent only that such person must be registered to act as an estate agent. He was categorical that the Estate Agent Act exempts advocates from seeking registration to act as estate agents. He added that all over the world, advocates are permitted to act as estate agents. It was therefore his argument that as there was a valid Agency Agreement, the Defendants were estopped from walking away from their obligations under the agency agreement.

21. Section 3(2)(c) of the Estate Agent Act stipulates as follows:-

"Nothing in this Act shall extend to the doing of any acts which would constitute practice as an estate agent by an advocate in the course of his practice."

22. The Estate Agent Act did not extend to any act which would constitute practise as an estate agent by an advocate in the course of his practise. Consequently, the Plaintiff herein was perfectly entitled to act as an estate agent and thus connect a purchaser to the Defendants herein for the purchase of the aforementioned said parcel of land.

23. There was no dispute that the aforementioned parcel of land was sold to Maxmillah Munyisi Muhatia and Faith Ayemba for a purchase price of Kshs 20,000,000/=. This was evidenced in the Agreement for Sale between them and the Defendants herein and the several letters that were exchanged between the Plaintiff and the Defendants' advocates relating to the transmission of the purchase price.

24. As can be seen hereinabove, the Defendants did not defend their claim and the matter therefore proceeded uncontested. The Witness Statements and documentary evidence merely remained as documents with no evidentiary or probative value as they were not adduced or in evidence or put through the test of cross-examination.

25. As the Plaintiff duly fulfilled his obligations under the Agency Agreement for a purchase price of Kshs 20,000,000/=: he was entitled to the sum of Kshs 3,850,000/= from the Defendants which sum was made up as follows:-

a. 3% of Kshs 17,000,000/=	Kshs 850,000/=
b. Amount over and above Kshs 17,000,000/=	<u>Kshs 3,000,000/=</u>
Total commission payable	<u>Kshs 3,850,000/=</u>

DISPOSITION

26. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's suit that was dated and filed on 8th August 2014 was merited and accordingly, it is hereby directed that judgment be and is hereby entered in favour of the Plaintiff against the Defendants jointly and severally for the sum of Kshs 3,850,000/= plus interest thereon at court rates from the date of filing suit until payment in full and costs.

27. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of January 2020

J. KAMAU

JUDGE