



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. E020 OF 2020**

**BETWEEN**

**KENGEN STAFF RETIREMENT BENEFITS**

**SCHEME LIMITED.....APPELLANT**

**AND**

**VILLA CARE LIMITED.....RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. P. N. Gesora, CM dated 28<sup>th</sup> May 2020 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 6895 of 2017)**

**JUDGMENT**

1. The Appellant, as Defendant before the subordinate court, has appealed against the judgment and decree of the trial court directing it to pay the Respondent Kshs. 9,191,840.00 with interest thereon from the date of filing suit until payment in full on account of outstanding commission on sale of housing units. For convenience I shall refer to the parties in their capacities before the subordinate court unless the context otherwise admits.
2. The Plaintiff's case as set out in the plaint dated 20<sup>th</sup> September 2017 is that by a letter dated 11<sup>th</sup> January 2015, the Defendant appointed the Plaintiff as its sole sales and marketing agent for a development known as Rosslyn Springs comprising town houses. The agreed commission was 2% of the sale of each unit. The Plaintiff pleaded that it successfully marketed and sold 8 units but was only paid Kshs. 3,343,320.00 as commission for 3 units leaving a balance of Kshs. 9,191,840.00 inclusive of VAT for the 5 units which it claimed in the plaint.
3. In its Amended Defence dated 31<sup>st</sup> October 2018, the Defendant stated that it engaged the Plaintiff, amongst other consultants, to advice on market demands and market properties for sale when constructing Rosslyn Springs for a period of 26 months. In January 2015, it accepted the Plaintiff's application and appointed it its sole marketing agent for the sale of the units in the Rosslyn Springs at a commission of 2% of the purchase price for a period of 6 months from the date of completion of the project which was on 30<sup>th</sup> April 2015. Thereafter the Defendant would appoint other companies to market and sell the units.
4. The Defendant further pleaded that the Plaintiff only sold 3 units for which it was paid commission. It further stated that the commission was payable upon full payment of the deposit and as regards the 5 units, the prospective purchasers either failed to pay the full deposit toward purchase of the properties, withdrew the partially paid deposit or repudiated the contracts. The Defendant also accused the Plaintiff of breaching the contract by failing to obtain buyers, failing to sell the units and failing to discharge its duties as the sole agents.
5. At the hearing of the suit, the Plaintiff called its Chief Executive, Daniel Ojijo (PW 1), as its witness. The Defendant called Henry Nyachae (DW 1), a former trustee, as its witness. After hearing the evidence, the learned magistrate concluded the case in favour of the Plaintiff on the following terms:

It is not in dispute the defendant did appoint the plaintiff as its sole agent for marketing and sale of 17 town house at Rosslyn within Nairobi County. The plaintiff was entitled to a commission of 2% per sale (i.e per unit). The contract period was six months. There are prospective purchasers who came out and three sales were completed. DW 1 did concede that the plaintiff was entitled to

payment. There is evidence that five other sales took off. The buyer executed letters of offer and there is evidence that deposits were paid for the units.

It is not true that no evidence was adduced that any of the contracts were cancelled. There is nothing that was said of what became of the deposits that they made.

On *Kimotho vs KCB* [2003] EA, the court held; “An adverse inference should be drawn upon when a party who fails to call evidence in his possession.”

I find and hold that the plaintiff has proved its case as required by law .....

6. The Appellant has now challenged the findings of the trial court based on the Memorandum of Appeal dated 27<sup>th</sup> June 2020. The thrust of the grounds of appeal is that the trial magistrate came to the wrong conclusion based on the facts and law in entering judgment against the Defendant. In particular, the appellant complained that the trial magistrate failed to appreciate the fact the letters issued by the Respondent to prospective buyers were merely letters of offer and did not constitute acceptance for persons who failed to pay the deposit to the Appellant within the stipulated 7 days. That the trial magistrate erred in finding that there was evidence that 5 sales took off despite the failure by the Respondent to produce evidence of the alleged sales. The Appellant contended that the trial magistrate erred in finding in favour of the Respondent despite failure on its part to produce evidence of payment of alleged deposits as required by **section 112** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. The Appellant complained that by failing to appreciate the nature and effect of the agreement between the parties, the trial magistrate erred by re-writing the agreement by requiring payment of commissions subject only to a successful sale and/or payment of deposits.

7. Both parties filed written submissions in support of their respective positions. I will consider them in light of the duty of the first appellant court which is that the court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123**).

8. The basic facts relating to the dispute are a matter of common cause. By the letter dated 11<sup>th</sup> January 2015, the Defendant engaged the Plaintiff to market its units on terms that the, “*Commission payable is 2% of the sale price.*” Although the Defendant requested the Plaintiff to forward a draft agreement, it was not sent and no further agreement was executed by the parties. It was also not disputed that following the Plaintiffs efforts 8 prospective buyers executed letters of offer. The Defendant only paid Kshs. 3,343,320.00 as commission for 3 units leaving a balance of Kshs. 9,191,840.00 inclusive of VAT for the 5 units.

9. Shorn of niceties, the issue for resolution is on what basis the commission was to be paid. Counsel for the Appellant submitted that the commission could only be paid once the prospective buyer had executed not only the letter of offer but also the sale agreement and had paid the deposit hence the 2% commission would be paid based on the sale price. He submitted that only the 3 transactions satisfied the criteria while the prospective buyers for the 5 transactions opted out despite signing the letters of offer. In his view, the trial magistrate erred by holding that acceptance of the letter of offer was tantamount to a sale even in the absence of evidence proving compliance with the conditions in the letter of offer. Counsel cited the cases of ***Maisha Investments Limited v Mohamed Hassanali Alimohammed Janmohamed & Another* NRB ELC No. 208 of 2014 [2019] eKLR** and ***East Africa Fine Spinners Limited (in Receivership) and 3 Others v Bedi Investments Limited* CA Civil Appl. No. NAI 72 of 1994 [1994] eKLR** to support the proposition that the letter of offer was merely conditional and subject to a formal contract being executed.

10. Counsel for the Appellant further submitted that the letter dated 11<sup>th</sup> January 2013 only referred to the commission based on the sale price and since there was no express contractual provision stipulating at what stage of the commission would be due, the commission would only be payable upon completion of the sale and from the proceeds of sale as is usual in transactions of this kind. To support this position, the counsel relied on ***Arthur Igeria t/a Igeria and Company Advocates v Michael Ndaiga* NRB CA Civil Appeal No. 51 of 2008 [2017] eKLR** and ***Wells v Devani* [2019] UKSC 4**.

11. In conclusion, the Appellant argued that the commission could only accrue on completed sales and that there was no evidence adduced to prove that the Appellant received any proceeds of sale from the 5 units hence the Respondent was not entitled to the commission thereon.

12. The Respondent supported the judgment of the trial court and the conclusions reached by the trial magistrate. Counsel for the Respondent submitted that since the Appellant pleaded that, “*the alleged Purchasers of the 5 units failed to pay full deposits, withdrew or repudiated the contracts*”, it was bound to prove the allegation through its witness, DW 1, and documentary evidence. Since it failed to do so, counsel submitted, that the trial magistrate was entitled to make an adverse inference and reach the conclusion he did.

13. Counsel for the Respondent further submitted that the Appellant’s contention that the trial magistrate failed to find that the letters of offers issued by the Respondent were not sale agreements and could not form the basis of payment of commission was not raised as an issue before the trial court hence could be raised in this appeal as a novel issue. In any case, counsel urged that the evidence supports the position that the Respondent’s responsibility was to procure the signed letter of offer from the prospective buyers and leave the issue of drawing the sale agreement and payment to the Appellant’s Advocates. Counsel pointed out that contrary to the Appellant’s assertion, the evidence shows that the commission was paid even prior to the execution of the sale agreement.

14. Counsel for the Respondent concluded by submitting that the Respondent proved on the balance of probabilities that it made 8 sales for which it was entitled to the full commission and that the Appellant did not establish or prove that the sales were cancelled. He urged the court to dismiss the appeal.

15. The terms of the agreement between the parties was set out in the letter dated 11<sup>th</sup> January 2015 under which the Plaintiff would offer sales and marketing services and would be paid commission of 2% of the sale price. The parties did not agree on terms of payment unlike in the case of ***Arthur Igeria t/a Igeria and Company Advocates v Michael Ndaiga* (Supra)** where the parties agreed that the commission was

payable on completion or where the commission was conditioned upon the happening of an event.

16. As I understand, the Respondent's position is that it was only required to ensure that prospective purchasers sign the letters of offer as all payments and subsequent processes were in the hands of the appellant's advocates. That the plain and ordinary meaning of, "*commission of 2% of the sale price*" is that once the Respondent had consummated the letter of offer it was entitled to the commission.

17. The Appellant's defence was that the prospective buyers for the 5 units did not pay the deposit or complete the sale. The Appellant argued that even where the agreement was silent or did not provide the terms of the commission, the court could imply the usual terms of this kind of transactions as the Court of Appeal observed in *Arthur K. Igeria t/a Igeria & Co. Advocates v Michael Ndaiga (Supra)* that, "*In normal circumstances in transaction of this nature, commission is paid from the sale proceeds.*"

18. This same position was set out in *Wells v Devani (Supra)* where the facts of the case are not dissimilar to those of this case. Although the agreement between the seller and estate agent was oral, the trial judge concluded that the parties agreed on a commission of 2% plus VAT. The parties, however, did not agree on the terms upon which or the precise event that would rise to payment of the commission. The Supreme Court upheld the conclusion of the trial judge that the estate agent was entitled to the commission once the sale was completed as this was what the parties intended. Indeed, Lord Briggs, in the concurring judgment, observed:

[60] So it is with the contract in issue in the present case. All that was proved was that there was a short telephone call initiated by Mr Devani, who introduced himself as an estate agent, and Mr Wells, who Mr Devani knew wanted to sell the outstanding flats. Mr Devani offered his services at an expressly stated commission of 2% plus VAT. It was known to both of them that Mr Wells was looking for a buyer or buyers so that he could sell the flats, and it was plain from the context, and from the conduct of the parties towards each other, that Mr Devani was offering to find one or more buyers for those flats. The express reference by Mr Devani to the 2% commission was, in the context, clearly referable to the price receivable by Mr Wells upon any sale or sales of those flats achieved to a person or persons introduced by Mr Devani. Furthermore it was evident from the fact that nothing further was said before the conversation ended that there was an agreement, intended to create legal relations between them, for which purpose nothing further needed to be negotiated. [Emphasis mine]

19. Previous decisions, which the court cited, had arrived at the same conclusion. In *Fowler v Bratt [1950] KB 96* where despite the parties agreeing on a commission, the sale did not go through, the Denning LJ observed as follows:

I confess that I approach claims by estate agents from the point of view, which I am sure is the common understanding of men, namely, that, in the absence of express terms to the contrary, the commission of the agents is to be paid out of the proceeds of sale. If the sale does not go through, the presumption is that no commission is payable. But in point of law if an agent succeeds in finding a person who actually enters into a binding and enforceable contract to purchase, and if that contract afterwards goes off by the vendor's default, the vendor is liable to pay commission.

20. The same conclusion had been reached in *Dennis Reed Ltd v Goody [1950] 2 QB 277* where the home owners instructed the agents to "find a person ready, willing and able" to purchase their property and agreed to pay the agents a commission upon them introducing such a person. The agents found a prospective purchaser but he withdrew before an enforceable agreement for sale had been made. The agents nevertheless claimed they were entitled to their full commission. In the Court of Appeal, Denning LJ explained the nature of the relationship between the vendor and estate agent as follows:

All the familiar expressions 'please find a purchaser', 'find someone to buy my house', 'sell my house for me', and so on mean the same thing: they mean that the agent is employed on the usual terms; but none of them gives any precise guide as to what is the event on which the agent is to be paid. The common understanding of men is, however, that the agent's commission is payable out of the purchase price. The services rendered by the agent may be merely an introduction. He is entitled to commission if his introduction is the efficient cause in bringing about the sale: *Nightingale v Parsons [1914] 2 KB 621*. But that does not mean that commission is payable at the moment of the introduction: it is only payable on completion of the sale. The house owner wants to find a man who will actually buy his house and pay for it.

21. After reviewing the aforesaid and other decisions on the subject, Lord Kitchin in *Wells v Devani (Supra)*, concluded that:

[26] ..... It may be an express term of the bargain that the commission is payable upon the introduction of a prospective purchaser who expresses a willingness to buy at the asking price, or it may be an express term that it is payable upon exchange of contracts. But if, as here, there is no such express term and the bargain is, in substance, "find me a purchaser" and the agent introduces a prospective purchaser to whom the property is sold, then a reasonable person would understand that the parties intended the commission to be payable on completion and from the proceeds of sale.

22. In my view, the reference to commission on the sale price in the letter dated 11<sup>th</sup> January 2015, being a letter issued in the ordinary course of business, meant and was understood to mean that the commission was only payable upon a completed sale. This leaves the question whether sales for the 5 units were completed so as to entitle the Respondent to the Commission which is due on the completed sales. In resolving this issue, the consideration of the burden of proof is important.

23. The uncontested evidence is that once the Letters of Offer was signed by the prospective buyer the matter was handed over to the Appellant's advocates, Oraro and Company Advocates who received the deposit, drew the sale agreement and later received the purchase price. All these matters were within the knowledge of the Appellant hence under **section 112** of the *Evidence Act*, the Appellant had the burden of proving that each sale had in fact failed. It provides as follows:

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

24. In addition, the Defendant raised an affirmative defence, “that the Purchasers of the 5 units failed to pay deposits, withdrew or repudiated the contracts” hence the Respondent was not entitled to a commission. Since this was an affirmative defence, the Appellant had the burden of proving the facts alleged by way of evidence. The Court of Appeal summarized the principle of burden of proof in the *Evidence Act in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013]eKLR* as follows:

We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

25. The Respondent produced signed letters of offer for units nos. 1, 2, 5, 6, 11, 12,13 and 14 and a report to the Appellant dated 10<sup>th</sup> November 2015 showing that the deposits had been paid. Prior to this, the Respondent had forwarded the invoice dated 18<sup>th</sup> August 2015 claiming commission for the 5 houses. Neither the invoice nor demand letters elicited any positive response from the Appellant. The Appellant did not communicate the fact that the offers had lapsed and that the Respondent was not in fact entitled to the commission.

26. The Appellant produced, as part of its list of documents, sale agreements for Units 2, 5 and 13 for which it paid. DW 1’s testimony supported by his witness statement is that only 3 houses were sold. He stated that, “the alleged purchasers of the five (5) units either failed to pay the full deposit towards the purchase of the properties. Withdrew the partially paid deposits and/or repudiated the contracts”. When cross-examination on this issue, DW 1 stated as follows:

Some of the purchasers withdrew. Our Advocates gave us a status report of the transactions that went through. The 10% deposit was payable upon execution of the letter of offer. All purchasers were to pay the 10% upon execution of the letter of offer. I have no record to that (sic) and some of them repudiated the contract. I have not brought evidence to that effect.

27. The Respondent had surmounted its evidential burden of showing that it procured 8 prospective purchasers who signed letters of offer and paid deposits. Whether the prospective purchasers complied with the letters of offers subsequently by executing contracts of sale or completing the transaction was a matter within the Appellant’s knowledge. The Appellant did not discharge its burden of showing the sale were cancelled.

28. Having appraised the evidence afresh, I have no option but to find that the Appellant failed to establish its defence. The Respondent established its case on a balance of probabilities. I affirm the decision of the trial court.

29. The appeal fails. It is dismissed with costs to the Respondent.

**DATED and DELIVERED at NAIROBI this 23<sup>RD</sup> day of OCTOBER 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Gichangi instructed by G. M. Gamma Advocates LLP for the Appellant.

Mr Gachungi instructed by Hiram Gachugi and Company Associates Advocates for the Respondent.