



REPUBLIC OF KENYA



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**Railways Housing Cooperative Society Limited v Thuo t/a Cossy Homes
Commercial agency Limited & another (Environment & Land Case
E015 of 2021) [2023] KEELC 20850 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20850 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE E015 OF 2021

A NYUKURI, J

OCTOBER 18, 2023

**IN THE MATTER OF THE APPLICATION FOR AN ORDER OF SPECIFIC
PERFORMANCE WITH RESPECT TO THE DELIVERY OF 45 TITLES AT
KITENGELA L.R NO 42702 (24 PLOTS), KITENGELA L.R NO. 87277 (4
PLOTS), KITENGELA L.R NO. 75182 (13 PLOTS), KITENGELA L.R NO.
89846 (4 PLOTS)**

BETWEEN

RAILWAYS HOUSING COOPERATIVE SOCIETY LIMITED PLAINTIFF

AND

**JAMES MBATHA THUO T/A COSSY HOMES COMMERCIAL AGENCY
LIMITED 1ST DEFENDANT**

**NJOROGE KIRIKA T/A COSSY HOMES COMMERCIAL AGENCY
LIMITED 2ND DEFENDANT**

JUDGMENT

Introduction

1. The suit before court was initiated by way of Originating Summons dated 23rd April 2021 and filed on 3rd May 2021. The Applicants sought the determination of the following issues;
 - a. Whether the Defendants herein contracted the Plaintiff in the sale of plots to members of the public on their behalf in an agency capacity.



- b. Whether the Plaintiff was entitled to a commission of 5% of each sale and a further 3% of the total sales for the costs of marketing, advertisement and transport expenses under their agreement.
 - c. Whether the Plaintiff sold all the plots on behalf of the Defendants in the agency agreement.
 - d. Whether the Defendants owe the Plaintiff a total of Kshs. 6,761,505/= in unpaid commissions.
 - e. Whether the Plaintiff is in possession of Kshs. 9,088,000/= on account of 55 titles paid for by the individual titles but not yet transmitted to the Defendants.
 - f. Whether the Plaintiff owes the Defendants Kshs. 2,326,495/= being the difference between the unpaid commission by the Defendants and the purchase price paid to the Plaintiff.
 - g. Whether the Defendants submitted 10 titles to the Plaintiff of the 55 titles and whether the Defendants ought to submit 45 original titles together with all completion documents thereof to the Plaintiff.
 - h. Whether the Defendants have failed and/or refused to deliver to the Plaintiff 45 titles together with all completion documents.
 - i. Whether the Plaintiff has demanded from the Defendants the submission of the 45 original titles and the relevant completion documents.
 - j. Whether the Defendants should be ordered to submit the 45 original titles and the completion documents thereof as tabulated above?
2. Subsequently, they sought the following orders;
 - i. That the Defendants be ordered to submit to the Plaintiff titles to the 45 plots in Kitengela L.R No. 42702 (24 plots), Kitengela L.R No. 87277 (4 plots), Kitengela L.R No.75182 (13 plots), and Kitengela L.R No.89846 (24 plots) as per table shared;
 - ii. That the Defendants be condemned to pay costs arising therein.
 3. The summons are supported by the Affidavit of Francis Waweru Kamau, the Chairman of the Applicant. He deposed that the Applicant had been engaged in an agency relationship with the Defendants, whereof the Applicant would sell plots to the members of the public on behalf of the Defendants and had so far undertaken 16 projects on behalf of the Defendants. Further that the responsibility of the Applicant would be to procure purchasers whereas the Defendants would enter into land sale agreements with the individual purchasers. That upon execution of sale agreements, the Defendants were to release the original title documents together with completion documents to the Plaintiff for purposes of registration of the transfers in favour of the individual purchasers.
 4. He stated that pursuant to an audit conducted in 2019, he prepared a report dated 13th August 2019, which indicated that the Plaintiff had effected sales worth Kshs. 128,254,886/= which entitled the Plaintiff to retain Kshs.6,761,505/= in regard to unpaid commissions. He also stated that he was in possession of Kshs. 9,088,000/= on account of 45 titles that are still held by the Defendants with only 10 of the titles released to the Plaintiff.
 5. It was his averment that he had requested the Defendants to release the remaining 45 titles and all completion documents in exchange for his transmission of Kshs. 2,326,495/= to the Defendants, but that the Defendants refused to honor their obligation. He stated that there had been several meetings



to arbitrate the matter between the parties at the Sub-County Co-operatives Office but the dispute was not resolved.

6. The Plaintiffs/Applicants attached copies of the agency agreements dated 9th January 2011, 16th December 2015, and 14th October 2016; report dated 13th August 2019; and demand letter dated 29th October 2019.
7. The Defendants did not enter appearance or file any response to the summons, despite service.
8. On 22nd March 2022, the court directed that the matter proceeds by way of viva voce evidence.

Plaintiff's Evidence

9. PW1 was Francis Waweru Kamau, the chairman of the Plaintiff, who testified on 1st February 2023. He adopted contents of his witness statement dated 4th April 2023 and his supporting affidavit dated 23rd April 2021 as his evidence in chief. It was his testimony that the Plaintiff was engaged in an agency relationship with the Defendants wherein the Plaintiff would sell the Defendants' plots to the public on the Defendants' behalf. He stated that they had completed over 16 projects, some being in Kitengela and Kajiado. He stated that under the agency agreement, agreements for sale were entered into between the Defendants and the individual purchasers and that the Defendants were obligated to release to the Plaintiff completion documents and the original title documents for the registration of transfers in favor of the individual purchasers.
10. He further stated that sometime in August 2019, the management board of the Plaintiff obtained audit of the sales with a view to ascertaining the status of the projects thereof and prepared a report dated 13th August 2019. It was his testimony that the agency engagement entered into between the parties provided for a commission of 5% of the purchase price per plot to the Plaintiff and a further 3% of the total sales to cover costs of advertisement, marketing and related expenses.
11. PW1 further testified that the Plaintiff effected on behalf of the Defendants sales worth Kshs. 128,254,886/= out of which the Plaintiff was entitled to retain Kshs. 6,761,505/= in unpaid commissions. He also stated that the Plaintiff was in possession of Kshs. 9,088,000/= on account of 55 titles paid for by the purchasers but not transmitted to the Defendants herein.
12. He also stated that out of the 55 titles held by the Defendants, 10 titles were submitted to the Plaintiff while 45 titles are still being held by the Defendants. It was his testimony that the Plaintiff demanded that it transmits Kshs. 2,326,495/= to the Defendants and in return the Defendants submit the 45 original remaining titles and all the other completion documents thereof to the Plaintiff which demand the Defendants have and continue to refuse to honor.
13. He stated that there had been several meetings arbitrated at the offices of the Sub-County Cooperatives Officer with the Defendants but the matter was not resolved. He produced the following documents in support of the Plaintiff's case; copies of agency agreements dated 9th January 2011, 16th December 2015 and 14th October 2016; a copy of the report dated 13th August 2019; and a copy of the demand letter dated 29th October 2019.
14. That marked the close of the Plaintiff's case. On 14th February 2023, the Plaintiff filed submissions in support of their case.

Plaintiff's Submissions

15. Counsel for the Plaintiff submitted that the evidence shown in the agency agreements produced, show that the Defendants engaged the Plaintiffs to sell their plots, and that after the purchase, the Defendants



were obligated to release the original titles and completion documents for registration of transfers in favor of individual purchasers. They argued that it was evident that the Plaintiff was entitled to 5% commission on each sale and a further 3% of the total sales. It was their argument that the contracts entered into were valid as they had met all essential elements of a contract, and that the parties intended a meeting of minds. They buttressed their arguments by citing the case of *Stancam Sacco Society Ltd v Alliance One Tobacco Limited* [2018] eKLR, for the proposition that to create a contract, there must be a common intention.

16. On the issue of titles, counsel submitted that the evidence adduced confirmed that only 10 titles were submitted and that the Defendants have been unresponsive to efforts or proposals to reach an amicable settlement on the release of 45 original titles to the Plaintiff. They also submitted that no iota of evidence had been tabled to controvert the evidence by the Plaintiff. On this point, they cited the case of *Gateway Insurance Co. Ltd vs Jamila Suleiman & Another* [2018] eKLR.
17. On whether the Plaintiff is entitled to an order of specific performance, they argued that the agency agreements required the Defendants to forward the titles and that an award of damages could not be adequate since the purchasers already completed payment of the parcels of land. They relied on the case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited (2006)* eKLR to argue that specific performance is based on the existence of a valid contract.
18. In conclusion, they submitted that the Plaintiff had proved their case to the required standard of balance of probability and prayed for the court's discretion to grant the prayers sought with costs.

Analysis And Determination

19. The court has carefully considered the pleadings, evidence and submissions. The issues that arise for determination are;
 - a. Whether there is a valid contract between the Plaintiff and the Defendants; and
 - b. Whether the Plaintiff is entitled to orders sought of specific performance.
20. Section 2 of the *Law of Contract Act* Cap 23 Laws of Kenya provides that the English law on contract and common law shall apply in Kenya as modified by equity. Under common law the elements of a valid contract are offer, acceptance, intention for a contractual relationship and consideration. The Plaintiff pleaded and testified that they entered into an agency agreement with the Defendants. He produced three agreements to that effect. Having considered the agreements produced, and which contained similar terms, it is clear that the Defendant authorized the Plaintiff to sell on his behalf several plots at a commission of 5% of the consideration and another 3% to cover the costs of advertisement, transport and related costs. That agreement was signed by both the Plaintiff and the Defendants. In view of the above evidence, I am satisfied that the Plaintiff and the Defendants entered into valid contracts.
21. Specific performance is an equitable remedy granted where there exists a valid contract and where damages would be inadequate in the circumstances of the case.
22. In the case of *Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 the court held that:

The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages, the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.



23. Consideration for specific performance was clearly laid out in the case of *Reliable Electrical Engineers Ltd v. Mantrac Kenya Limited (2006) eKLR* where the court stated as follows;

The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are not an adequate remedy, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.

24. In the instant case, the Plaintiff stated that they had been engaged as the sole sales agent for the Defendants at a commission of 5% with an additional 3% to cover advertisement and other expenses. The Plaintiff produced three agreements to support that allegation. No evidence was produced by the Defendant who failed to enter appearance and file defence, despite service.

25. This court is alive to the fact that even where a suit is undefended, the burden of proof in a suit still rests with the Plaintiff as provided for in section 107 of the *Evidence Act*. In the case of *Mercy Wanjiru Nyaga v Josphat Kiura & Another [2020] eKLR*, the court held that;

[p.20] In my opinion, a suit cannot be allowed as prayed just by the mere fact that it was not opposed. The Plaintiff in a suit has a duty to tender sufficient evidence in support of his case. Otherwise, the court would end up allowing even frivolous claims just because the evidence was uncontroverted.

26. From the Plaintiff's evidence and considering the agreements produced by the Plaintiff, it is clear that they were engaged by the Defendants to sell plots to the public on behalf of the Defendants which they did, at 5% and 3% of the consideration to cover commission and the cost of advertisement and attendant costs respectively. The Plaintiff sought specific performance by asking that the Defendants do release 45 original titles with attendant completion documents, contending that the Defendants were bound under the contracts produced to release those titles.

27. I have considered the agency agreements dated 9th January 2011, 16th December 2015 and 14th October 2016. I note that the three agreements are similar in all material aspects. Essentially the agreements granted the Plaintiff the power to sell the Defendants' plots on behalf of the Defendants. The consideration was 5% of the purchase price as commission and 3% of the total sales to meet incurred expenses of advertisement, marketing, transport and other related expenses. Under the contracts, the Plaintiff was obligated, on completion of payment of the purchase price, in the company of the surveyor to show the purchasers their boundaries and beacons and see to it that the surveyor signs the beacons indemnity certificates.

28. Having considered the three contracts, I note that there is no clause on release of any titles by the Defendants to the Plaintiff. This therefore means that there is no evidence that the Defendants were obligated to release original title documents and completion documents to the Plaintiff whose role was under the contracts herein, limited to procuring purchasers and showing them their respective properties and boundaries. The Plaintiff's evidence is that they have received a sum of Kshs. 2,326,495/= over and above that which they are entitled to.



29. In the premises, I am not persuaded that there is material before court to demonstrate breach of contract on the part of the Defendants in the manner described by the Plaintiff or at all. The upshot is that the Plaintiff has failed to prove their case on a balance of probabilities and I hereby dismiss the same with no order as to costs.

30. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

