



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 336 OF 2009

MIKE MUNGA MBUVI.....PLAINTIFF

VERSUS

KENYA AIRWAYS LIMITED.....DEFENDANT

R U L I N G

1. This suit came before court on 18/7/2016 for a case conference when the parties were not ready for the conference as both indicated to court that they were yet to file a statement of agreed issues.

2. The court on own motion having reviewed the pleadings and taking note of the provisions of Order 11 Rule 3 gave direction as follows:-

“This suit is grounded on claimed loss earnings of commission for sale of land. That to the court is a matter that substantially goes to the root of the suit and in terms of order 11 Rule 3(b) the court directs that the suit comes up for determination of that one issue as a preliminary issue:

“Whether or not the plaintiff was an estate agent entitled to charge and recover commission for sale of land. Parties shall attend court on 12/4/2016 at 2.30pm to address the court one that single issue”.

3. This determination therefore concerns itself with the claim at prayer 2 of the plaint crafted as ‘general damages for loss of expected business commission’.

4. Pursuant to the court directions the defendant did file a list of authorities dated and filed on 7/9/2016. The matter was then set for submissions on the 30/3/2017 on which date an affidavit of service was duly filed to show that the defendant did serve the plaintiff’s advocate with a hearing notice on the 11/11/2016. On the appointed date and time, only the advocate for the defendant attended but not that for the plaintiff.

5. I have taken into account the authorities cited and the oral submissions offered and the only issue for determination is whether or not the plaintiff was as at the dates pleaded a registered estate agent to be entitled to commission for the sale of land.

6. Section 18, Estate Agents Act Cap 533 provides:-

1. After the expiration of six months from the commencement of this Act or such further

period as the Minister may, by notice in the *Gazette*, allow either generally or in respect of any particular person or class of person:-

- a. No individual shall practice as an estate agent unless he is a registered estate agent;
- b. No partnership shall practice as estate agents unless all the partners whose activities include the doing of acts by way of such practice are registered estate agents;
- c. Nobody corporate shall practice as an estate agent unless all the directors thereof whose duties include the doing of acts by way of such practice are registered.

2. Any person who contravenes subsection (1) shall be guilty of an offence and liable to fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding two years or to both.

7. In the list of authorities filed by the Defendant, as aforesaid, there was exhibited to court the gazette notices pursuant to section 9 of the Act for the years 2008 and 2009. In both lists the plaintiffs is not listed as a registered estate agent.

8. The inevitable conclusion one must reach is that during the years 2008 – 2009, the plaintiff was not a registered estate agent under the Act, was not in law at liberty to practice as such, claim or seek to recover commissions. If he did so engage, then he violated the law and by dint of section 18(2), subject to be charged with a criminal offence.

9. It is now well settled that a court of law cannot enforce a contract or right undertaken contrary and in violation of a statutory provision. The most oftenly quoted decision in the line is **Scott vs Brown Doering, McNab & Co. (3) [1992] 2 QB 724 at page 728** to the effect that:-

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not, if the evidence adduced by the plaintiff proves the illegality the court ought not to assist him”.

10. In this matter the pleadings and documents filed by the plaintiff point to the fact that the damages sought to be recovered pursuant to prayer (b) to are measurable on account of an agreement for payment of commission for the sale of land. That to this court is a preserve of the estate agents as known to law and the plaintiff having been proved to be not a registered estate agent cannot get the court’s assistance without the court been seen as an instrument for the enforcement of a transaction evidently affronting the statutory provisions.

11. In the end, I find that the plaintiff was not a registered estate agent and was therefore not entitled to charge, earn or seek to recover commissions and to that extent his prayer for damages based on such commission is barred by the legal maximum *Ex-turpi causa non oritur actio* – from a dishonourable cause an action does not arise.

12. I therefore strike out the claim grounded on damages for lost commission and award to the defendant the costs thereof.

13. It is so ordered.

Dated and delivered at **Mombasa** this **21st** day of **April 2017**.

HON. P.J.O. OTIENO

JUDGE