



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CIVIL APPEAL NO. 23 OF 2011**

**1. ECO BANK LIMITED**

**2. NOAH NDEMO NYACHAE..... APPELLANTS**

**=VERSUS=**

**JANET NDERITU.....RESPONDENT**

**J U D G M E N T**

In her plaint dated 10<sup>th</sup> February 2009 the respondent sought to be paid Kshs.800,000 being her commission for procuring premises in Malindi for the 1<sup>st</sup> Appellant. The above amount was equivalent of two months rent for the premises. The trial court agreed with the respondent's claim and awarded the claimed amount. This led to the filing of the current appeal.

The grounds of appeal are that the trial court erred in law by holding that an oral agreement to pay the commission did exist, that the trial court erred by finding that the appellant had contracted the respondent as their agent to be paid an equivalent of two months rent, that the respondent is not an estate agent under Section 7 of chapter 533 Laws of Kenya and could not qualify to be paid a commission and that the respondent did not prove her case on a balance of probabilities.

In his written submissions dated 1<sup>st</sup> October 2015, counsel for the appellant expounded on the above grounds. Counsel contends that there is nowhere in the pleadings or the oral evidence indicating that a commission was to be paid. The 2<sup>nd</sup> appellant testified that the issue of paying a commission did not arise in their discussion. The respondent was allowed to produce phone text messages from the 2<sup>nd</sup> appellant but none of them indicated that money was to be paid. It is further submitted that the 2<sup>nd</sup> appellant only asked for a favour from the respondent who was his girlfriend without any monetary terms involved.

Counsel for the appellants further contend that the respondent was not the appellants' agent. She testified that she was not an agent for the bank. The suit was not proved to the required standard as the issue of payment does not come out clearly in the evidence adduced by the respondent and her witness. It is only DW2, a legal officer with the 1<sup>st</sup> appellant who offered to pay the respondent Kshs.200,000 on without prejudice basis. There was no agreement to pay a commission.

On his part, counsel for the respondent maintains that an oral agreement has elements similar to a written agreement. An oral agreement is just enforceable as a written agreement. Only dealings in land or guarantee contracts need to be in writing under Section 3 of the Law of Contract Act, Chapter 23 Laws of Kenya. The evidence did prove that there was a valid oral contract. The respondent negotiated the rent payable on behalf of the 1<sup>st</sup> appellant. The 2<sup>nd</sup> appellant was tasked by his employer, the 1<sup>st</sup> appellant to obtain the premises. The appellants allowed the respondent to do their errands and procure the premises. This made the respondent to be their agent.

The record of the trial court shows that the respondent testified as PW1. Her evidence is that she is the proprietor of Elite School of Careers and has lived in Malindi for over 14 years. The 2<sup>nd</sup> appellant used to be her friend. Sometimes in July and August 2008 the 2<sup>nd</sup> appellant called her. He met her at her school premises and informed her that he was working with the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant was looking for premises to open a branch in Malindi and the 2<sup>nd</sup> appellant tasked her with the responsibility to get the premises. She was to get two (2) months rent.

It is the respondent's evidence that she managed to obtain the premises. The owners wanted monthly rent of Kshs.800,000 but she negotiated up to Kshs.400,000. A Lease was drawn and the bank took the premises. The bank sent their architect to inspect the premises and she met him. She was not paid her commission. She was later called to Nairobi and met Wilfred Orok (DW2), an employee of the 1<sup>st</sup> appellant who promised to settle her claim. No payment was made. She incurred expenses in trying to get the premises. She spent money on communication and used her vehicle in trying to obtain the premises. When called to go to Nairobi, she went by air, used taxis from the airport and slept at 680 hotel. She settled all her bills.

PW2 JOSIAH BUKACHI MUNYORA is PW1's employee at the Elite School of Careers. His evidence is that he knew the 2<sup>nd</sup> appellant. Sometimes in July 2008 the 2<sup>nd</sup> appellant visited the school. He sat in PW1's office and they talked on the issue of getting business premises for the 1<sup>st</sup> appellant in Malindi. PW1 told the 2<sup>nd</sup> appellant that she was to be paid two months rent equivalent as her fees. The first appellant said it was okay. PW3 JASMINDER SINGH KALS, is an architect. He was hired by Eco bank to design their Malindi branch premises. He met PW1 several times. He was given PW1's contact by the 2<sup>nd</sup> appellant. He did not discuss any issue of payment in relation to the respondent.

In his evidence, the 2<sup>nd</sup> appellant testified that the respondent was his friend since 1998. He was assigned the responsibility of getting premises in Malindi by the 1<sup>st</sup> appellant. He contacted the respondent as she was living in Malindi. She obtained the premises and a lease was drawn by M/S Muli Ole Kina Advocates. He signed the lease agreement. He further testified that he went to PW1's school but they did not talk about a payment of Kshs.800,000 as commission; There was no written agreement: It is his position that the respondent assisted him on friendly basis. The bank took over the premises.

DW2 WILFRED NYASINI OROKO was the head of legal department and secretary to Eco bank. His evidence is that the bank managed to get the premises at a monthly rent of Kshs.400,000. He was not aware of the claimed commission. The 2<sup>nd</sup> appellant only makes recommendation but cannot decide on his own as to payment of a commission. He talked to PW1 and told her that instead of suing the bank, they would pay her Kshs.200,000 on without prejudice basis. PW1 declined that offer.

The main issue for determination by the court is whether the respondent proved her case on a balance of probabilities. The respondent claimed Kshs.800,000/= as her commission. The amount was claimed on the basis that it is the equivalent of two months rent. The appellant's position is that the respondent was engaged on friendly basis. There was no agreement on commission. The respondent is not registered as a land and estate agent.

The evidence shows that the respondent was engaged to obtain business premises for the 1<sup>st</sup> appellant's Malindi Branch. The appellants do not dispute the fact that it is the respondent who assisted them to procure the premises. The issue is whether the respondent was to be paid any commission.

It is also evidence from the proceedings that the respondent did all what she could to obtain the premises. She even negotiated the rent from Kshs.800,000/= per month to Kshs.400,000/=. She spent her own money in form of fuel, phone calls, air ticket to Nairobi and accommodation. All those expenses were incurred for the benefit of the appellants. It is true that there was no written agreement. However, the fact remains that it is the respondent who procured the premises. When the appellants sent their architect, PW3, to Malindi, they referred him to the respondent. The respondent was therefore the appellants' contact person in Malindi. The appellants had the option of utilizing the services of a registered Land and Estates Agent. They could have well placed an advertisement in the newspapers asking for landlords to offer the premises. All the two alternatives, the appellants would have incurred expenses. The respondent knew the 2<sup>nd</sup> appellant only. She had no business obtaining premises for a fully fledged bank for free. She went to a great extent to negotiate the monthly rent. She could have as well stuck to a higher rent than the Kshs.400,000/= so that she could claim a commission higher than what she is claiming.

I do find that the appellants herein are ungrateful. The appellants could not have expected the respondent to work for free for them. I believe the offer of Kshs.200,000/= made by DW2 was out of the realization that the appellant that the appellant ended some valuable services to the appellants. She did not do that out of her relationship with the 2<sup>nd</sup> appellant. The premises were not for the use of the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant was only seeking the respondent's assistance. However, there is a price for that assistance as the benefit was to accrue to the 1<sup>st</sup> appellant.

This was a civil dispute. From the outset, the respondent claimed two months rent equivalent as her commission. She left her work and managed to procure the premises. The 2<sup>nd</sup> appellant was tasked by his employer, 1<sup>st</sup> appellant, to obtain the premises. I do find that all the appellants are liable to pay the respondent her commission. There is no evidence that the 1<sup>st</sup> appellant asked the 2<sup>nd</sup> appellant to look for someone who could procure the premises for free.

I am satisfied that the respondent proved her case on a balance of probabilities. The respondent need not be a registered Land and Estate Agent for her to qualify for a commission. Why didn't the appellants go to the registered Land and Estate Agents? I am satisfied that the trial court made the correct decision. The case was proved to the required standard.

In the end, I do find that the appeal lacks merit and is hereby dismissed with costs.

**Dated and delivered in Malindi this 17<sup>th</sup> day of March, 2016.**

**S.CHITEMBWE**

**JUDGE**