



1. *Civil Appeal*

2. *Subject of Subordinate Court case:-*

- i. *Contract*
- ii. *Commission agent*
- iii. *Sale of houses*
- iv. *Respondent/Agent introduces one buyer*
- v. *Respondent review paid by appellant*
- vi. *Appellants deny appointing respondent as*
- vii. *Trial magistrate finds a contract exist. Gives*
- viii. *Appellant file appeal*

agent

judgment for respondent

3. *Appeal*

a. *Hon. Magistrate erred as:*

- i. *No evidence to support evidence or record.*
- ii. *No contract of agency existed*
- iii. *Failure to have a key witness of respondent*
- iv. *In awarding 5% commission.*
- v. *In final entitlement of commission.*
- vi. *Sued in capacity*
- vii. *No jurisdiction on award.*
- viii. *Decision cant be supported by law*

4. *Respondent in reply*

a director

capacity but funds deposited in his account.

- i. *Admitted that appellant No.1 S. Mwaniki was*
- ii. *Should not have been sued in personal*
- iii. *Respondent brought the buyers*
- iv. *Contract exists due to conduct.*
- v. *Contract for marketing need not be in*

writing

5. *Held*

- i. *Appeal allowed*
- ii. *Judgment of subordinate court set aside*

6. *Case Law*

7. *Advocate*

Co. Advocates for the Respondent

Advocates for the Appellant

- i. *S. S. Kinyanjui instructed by M/s Igeria &*
- ii. *D. Njonge instructed M/s Kantai & Co.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 730 OF 2003

STEPHEN W. MWANIKI.....1ST APPELLANT/ORIGINAL 1ST DEFENDANT
SUNA DEVELOPERS LTD.....2ND APPELLANT/ORIGINAL 2ND DEFENDANT

VERSUS

SUBURBIA LTD.....1ST RESPONDENT/ORIGINAL PLAINTIFF
KAMAU MUCHUHIA2ND RESPONDENT/ORIGINAL THIRD
PARTY

*(Being an appeal from the judgment of M. W. Wachira, the Principal Magistrate, Milimani
Commercial Courts Nairobi, in Nairobi CMCC No. 7322 of 1997)*

JUDGMENT

I. INTRODUCTION

1. M/s Suburbia Ltd the Original Plaintiff and Respondent in this appeal describe themselves as a company that carries out business as property agents.
2. M/s Suna Developers the Original Defendant No. 2 and appellant herein are developers of Suna Estate, a housing Estate in Nairobi.
3. It was concluded that Stephen W. Mwambi was a director of the 2nd defendant.
4. The respondent had applied to the 2nd defendant/appellant No.2 to be appointed as commission agent for the sale of the houses they were developing by a letter dated 19 August 1991. The appellants wrote back through Capital Finance Brokers, the same developer as Suna Estate on the 27 August 1991, declining to appoint the respondent as an agent to the houses of the estate.
5. The respondent though their proprietor found a client who wished to buy houses. The proprietor put the said client (not available to give evidence in court) with the appellants.
6. One house was brought at Suna Estate.
7. The issue arose as to whom between the said client and the appellant were to pay the respondent the commission.
8. The appellant claimed that the respondent was an appointed agent, that he was not so appointed but merely acted as a volunteer.
9. The respondent sued for his commission that amounted to about Kshs.67,500/=. The court held that the appellant were liable to pay the said commission.

II. APPEAL

10. The appellant filed appeal and stated that a the Hon. Trial Magistrate erred as there was:-
 - i. *No evidence to support the evidence on record.*
 - ii. *There existed no contract of agency.*

iii. ***The higher of the buyer of the premises was spoken of extensively but was never called to give evidence.***

iv. ***As to the 5% commission, the respondent was not entitled to this. The award was not justified nor could the decision aimed at be supported by law.***

11. In reply, the respondent admitted that one S. Mwambi was a director ought not to be sued in his personal capacity. The only reason why this was so was due to direct payments made to him. This was explained by the appellants that that was the directors that had been deposited in his account.

12. According to the respondent, there existed an implied contract due to the conduct of the appellants. In a contract for marketing there was no need to have a contract in writing.

III. OPINION

13. I believe that the trial Magistrate should have looked closely at the letter dated 27 August 1991. This letter was in response to a request made to the developers of the Estate through Capital Insurance that the respondent act as a commission agent for the sale of the houses. The said letter of 27 August 1991 declined the offer of any arrangements between the parties.

14. The fact that the Respondent now found the parties to buy one house from the appellant did not constitute a commission agreement. As stated by the respondent, this was voluntarily done by the respondent.

15. I would therefore hold that the Hon. Trial magistrate was misdirected in coming into a conclusion that there was a contract between the parties.

16. The appeal is accordingly allowed. The judgment of the Hon. Magistrate is set aside and the judgment to read that the suit be dismissed with costs to the appellant in this appeal and in the Subordinate Court.

JUDGMENT DATED THIS 3RD DAY OF JUNE 2011 AT NAIROBI

**M. ANGAWA
JUDGE**

Advocate

a. *S. S. Kinyanjui instructed by M/s Igeria & Co. Advocates for the Respondent*

b. *D. Njonge instructed M/s Kantai & Co. Advocates for the Appellant*