



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 129 OF 2010

**FRANCIS BEN NJUGUNA t/a PROPENSITY
PROPERTIES & CONSULTANTSPLAINTIFF/APPLICANT**

- VERSUS -

**HON. STANLEY M. GITHUNGURI.....1ST DEFENDANT/RESPONDENT
TASSIA COFFEE ESTATE LTD.2ND DEFENDANT/RESPONDENT**

RULING

The Plaintiff/Applicant brought this application under Certificate of Urgency and prays for Orders under Order XXXIX Rules 1, 2, 3 and 9, Order V Rule 17 and 32 of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure Act. Most of the orders prayed for have been overtaken by events leaving prayer numbers (e) and (h) in his Chamber Summons application dated 5th March 2010, the same date the Plaint was filed in the court. The application is supported by grounds as stated on the face of the application.

The Plaintiff's application arises from allegations of breach of contract of an Estate Agency relationship by the Defendant. The Plaintiff states that he is a duly registered Estate Agent in line with the provisions of the Estate agents Act Cap 533 of Laws of Kenya, and that the 1st and 2nd Defendants are the registered proprietors of the parcels of land known as L.R. No. 10916 (original no. 108/1) and L.R. No. 4299 of total acreage 790, and that he was approached by the 1st Defendant on his own behalf and on the behalf of the 2nd Defendant to scout for purchases of the parcels of land at an agreed commission of Kshs.79,000,000/=.

The Plaintiff states that after securing a purchase for the said parcels of land the 1st and 2nd Defendants have refused to pay him his agency fees and are thus in breach of the Agency Agreement.

These allegations are vehemently denied by the 1st and 2nd Respondents who have actually stated in their replying affidavit that they do not know, have never met the Plaintiff/Applicant. The Respondents have disowned all the annexures to the supporting and supplementary affidavit sworn by the Applicant and the two supplementary affidavits by F. G. Ngere Muchai and Francis Gitau Ng'ang'a.

Most of the Plaintiffs/Applicants prayers have been dispensed with, leaving the two prayers (e) and (h) which are:

(e) in the alternative the Defendants herein be ordered to deposit the sum of Kshs.79,000,000/= in court prior to effecting transfer to the parcels of land known as L.R. No. 10916 (original no. 108/1) and L.R.

No. 4299, and

(h) that costs of this application be borne by the Defendants/Respondents.

The reduction of prayers sought has reduced my workload on this matter, and I will not delve into the issues already overtaken by events.

The only issue, apart from costs, that I need to address is whether the Plaintiff/Applicant is, in the absence of other would have been prayers, entitled to prayer no. (e). Prayer number (e) on its own, appears like a prayer for security for suit or attachment before judgement and may in fact not have been necessary if the other prayers were still tenable.

I have looked at the pleadings, the affidavits in support and replying affidavits, and the submissions of counsel. The issues raised by the Applicant are vehemently opposed by the Respondents. It is clear that a full hearing would be necessary to determine which party is telling the truth. The Respondents have challenged the existence of any contract of Agency between the parties, saying that its evidence must be in writing, and that all the annexures to the supporting affidavits are one sided communication involving the Plaintiff with other parties, and that there is no response from, or connection with, the Respondents. That may well be so. However, in matters like the one at hand, oral evidence may be led to prove the contrary view. It is clear from the affidavits and annexures thereto that there existed some kind of relationship between the parties, and the averments by the 1st Respondent that such relationship was actually terminated is an acknowledgement of its existence, even if it was not written down. The affidavits also demonstrate a determined effort to deny the Plaintiff of the fruits of his labour by what appears to be a termination of a contract with one party only for the Respondents to “independently” approach the said party to conclude the deal started by the Plaintiff in a manner which points at, in the least, some irregularity if not dishonesty.

Finally we have two employees or elders of the Purchaser – PCEA Messrs F.G. Ngere Muchai and Francis Gitau Ng’ang’a swearing affidavits in support of the application and stating that the Applicant was indeed an agent of the Respondents. On the other hand we have Milele Ventures Ltd. (the legal vehicle used in purchase) writing a letter (annexture **SMG 11**) saying that they have never at any time appointed the Applicant to scout for a property on their behalf. Obviously there are glaring discrepancies.

Even though this court believes that the Plaintiff/Applicant has an arguable case, I am reluctant to grant the order prayed for at number (e) for the reason that it would amount to an order for security for suit or attachment before judgement, both of which were not contemplated by the application and in any event would be draconian to grant under the circumstances as the Respondents ability to satisfy the decree if granted is not in issue now, nor are the Respondents likely to abscond. In other words the legal threshold for granting such an order has not been interrogated in this application and for that reason I decline to grant prayer number (e).

In the upshot I dismiss the application with costs.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI
THIS 26TH DAY OF OCTOBER 2011.**

E. K. O. OGOLA

JUDGE

PRESENT:

D. N. Gichuru or the Plaintiff

Imende H/B Wambo for the Defendant

Irene - Court Clerk