



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
MILIMANI COMMERCIAL COURTS  
CIVIL CASE NO. 335 OF 1998**

**MAPIS INVESTMENTS (K) LIMITED .....PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION .....DEFENDANT**

**JUDGMENT**

When this case came up for hearing on 12th October 2004 the defendant and its counsel who had been served were absent and the case proceeded in their absence.

The Plaintiff's claim is the commission earned as a selling agent of the defendant's property.

P W 1 gave evidence and he said that he was a share holder and the managing director of the Plaintiff come at the material time.

He said that the defendant retained the plaintiff company to sell their property for the price of kshs 95 million. He said that the agreement was that the plaintiff would sell the property for the said kshs 95 million and any amount realized over and above that figure represented the plaintiff's commission. The defendant's by two letters dated 6th January 1998 informed their advocates namely Oraro & Rachier advocates that the Plaintiff had been appointed as the selling agents.

P W 1 then said that the plaintiff found a buyer, namely Japan Embassy who offered to purchase the property for \$2 million (USD) which was equivalent to kshs 120, 000, 000/-,.

The said sale was concluded and a cheque for the full amount was forwarded to Oraro & Rachier Advocates.

The firm Oraro & Rachier advocates paid the plaintiff kshs 1.3 million and later an amount kshs 4.3 million was again paid by the aforesaid firm to the plaintiff.

The Plaintiff's claim, P.W. 1 said was kshs 17.5 million which is the balance outstanding after payment of kshs 7.6 million.

The evidence of the Plaintiff does to some extent not fully support the Plaintiff's claim. P.W 1 said that the agreement was that the Plaintiff was entitled to anything over kshs 95 million realized in the sale. There was no clear documentary to this but the court has no reason to disbelief the evidence of PW 1 on this account.

What, however, is not clear is who was to pay the Plaintiff its commission; Was it the defendant or the firm of Oraro & Rachier advocates who, after all, received the purchase money. P.W. 1 in his testimony said that the firm of Oraro Rachier advocates released the kshs 95 million to the defendant and to date has

never released the commission to the plaintiff. PW 1 failed to clearly state in his evidence why he held the defendant liable to pay the commission where else, according to him the firm of Oraro & Rachier Advocates did not release the Plaintiff's commission to the defendant. I am of the view that the plaintiff failed to prove its claim against the defendant on a balance of probability.

Over and above that finding I noticed that the summons issued herein contravened the mandatory provision of Order 4 Rule 3 (4) of the Civil Procedure Rules. This rule relates to the issue of summons and states: -

**“The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear. Provided the time for appearance shall not be less than 10 days”.**

The summons in this case provided the period of appearance of 10 days. In the case CENEAST AIRLINES LTD – V – KENYA SHELL LTD (2000) 2 E.A. 362, per curium of that judgment was as follows: -

**“It was a mandatory requirement of the Civil Procedure Rules Order 4 Rule 3 (4) that the time given for entering appearance had to be at least ten days. A summons that require a defendant to enter appearance within 10 days of service was invalid and of no effect.**

On that ground alone I would dismiss the Plaintiff's case.

In view of my finding aforesaid, I do hereby dismiss the plaintiff's case as against the defendant with costs to the defendant.

**Dated and delivered this 10th day of November 2004**

**MARY KASANGO**

**AG JUDGE**