



John Mbugua Muiruri t/a Liberia Majestic Asset International v Kahiu & another (Civil Appeal E122 of 2022) [2023] KEHC 1654 (KLR) (Civ) (13 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E122 OF 2022

AA VISRAM, J

MARCH 13, 2023

BETWEEN

**JOHN MBUGUA MUIRURI T/A LIBERIA MAJESTIC ASSET
INTERNATIONAL APPELLANT**

AND

**JACOB KAMAU KAHIU 1ST RESPONDENT
Q-CIKU INVESTMENTS LIMITED 2ND RESPONDENT**

(Being an appeal from the judgment of and decree of the small claims court at Nairobi by Hon J W Munene (RM) delivered on February 16, 2022 in SCCOMM No E1001 of 2021)

JUDGMENT

1. This is an appeal emanating from the judgment of the Small Claims Court.
2. According to the Statement of Claim dated November 30, 2021, the appellant (the claimant in the lower court) stated that on November 1, 2020 vide a letter of authority, the 1st respondent as a director of the 2nd respondent, authorized him to act as agent to scout for buyers of its properties known as LR no 154/145 and LR no 154/146, which were subdivisions of LR no 154/66, and held in the name of the 2nd respondent.
3. Based on the terms of the said letter of authority, the appellant was entitled to a commission of three percent (3%) of the total purchase price of the said parcels of land.
4. The appellant alleged that he found buyers for both parcels of land and was accordingly entitled to commission pursuant to the letter of authority referred to above.



5. In particular, he alleged that LR no 154/145 was sold at kshs 26,000,000/=, and LR no 154/146 was sold at kshs 28,000,000/=. Accordingly, the respondents ought to have paid him a total commission (for the sale of the two parcels of land) in the sum of kshs 1,620,000/=. They had only paid him kshs 630,000/= and still owed him kshs 990,000/=: which they had refused to pay.
6. The respondents denied that they owed the appellant the amount claimed. They stated, among other reasons, that the letter of authority to sell was based on a condition that that the plots would be sold at a minimum of kshs 35 million each, which had not been done.
7. The respondents admitted that they had paid the appellant part of the commission due in respect of the sale and purchase of LR no 154/145, but added that the sale was still pending completion because they had not yet received the full purchase price.
8. The respondents denied the appellant's involvement in the sale and purchase of plot LR no 154/146 entirely. Their position was that he was not entitled to any commission whatsoever in respect of the same.
9. In the lower court, the appellant testified on his own behalf, while the respondents called Mr Jacob Kamau Kahiu (RW 1), the 1st respondent, as its witness. The parties also filed written submissions.
10. In the judgment, the magistrate held that the authority to sell the plots was not subject to payment of the full purchase price. Further, that the payment of commission was not subject to the clearance of the sale price by the buyer.
11. The lower court therefore found that the appellant was entitled to be paid kshs 150,000/=: being the balance of the commission due in respect of the sale of plot LR no 154/145.
12. The appellant being aggrieved by the judgment of the lower court preferred this appeal and put forward the following grounds:
 - a. The learned magistrate erred in law and fact by failing to award the appellant the agency commission of Kenya shillings Eight Hundred and Forty Thousand (kshs 840,000/=) due over the sale of LR no 154/146.
 - b. The learned magistrate erred in law and fact by holding that the appellant was not involved in his capacity as an agent in the sale of LR no 154/146.
 - c. The learned magistrate erred in law and fact in holding that, instead, the 1st respondent sourced for the purchaser of the aforesaid property a claim which was not backed by any evidence whatsoever.
 - d. The learned magistrate erred in law and fact by disregarding the contents of the letter of authority dated November 30, 2020 which authorized the appellant to scout for buyers for both parcels of land being LR no 154/145 and LR no 154/146 which are sub-divisions of LR no 154.66.
 - e. The learned magistrate erred in law and fact by upholding the appellant's agency commission in LR no 154/145 but dismissing appellant's agency commission due over the sale of LR no 154/146 yet the appellant was authorized by the respondent to sell both parcels of land under the aforesaid letter of authority.
13. In support of the above grounds, the appellant submitted that the respondents' defence was not backed by any evidence whatsoever. In his view, the trial court ought to have shifted the evidentiary burden of proof to the 1st respondent to show that he had advertised the properties for sale and found the buyer.



14. The appellant relied on the High Court decision of *Abmed Mobammed Noor v Abdi Aziz Osman* (2019) eKLR where Justice Mrima made the following finding on burden of proof:

“For clarity, the legal burden of proof in a case is always static and rests on the claimant throughout the trial. It is only the evidential burden of proof which may shift to the defendant depending on the nature and effect of evidence adduced by the Claimant.”

15. In response to the above grounds of appeal, the respondents submitted that the appellant was misleading the court.
16. The respondents submitted that the correct position was that the 1st respondent had received a telephone call directly from the buyer, who told him that he had seen the respondents’ numbers on a bill board indicating that the property was for sale. This bill board had been published by the respondents, and not the appellant.
17. The respondent further submitted that the buyer had actually denied any association with the appellant, and that he thought the appellant was trying to unlawfully enrich himself.
18. The respondents submitted that the appellant could not shift the burden of proof to them as this was contrary to law. They submitted that no communication between the appellant and the buyer had been placed before the court to prove that there was any relationship between the two.
19. The respondent relied on the case of *Susan Mumbi v Kefala Grebedhin* ;(Nairobi HCC No.332 of 1993) Justice Juma stated that:

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.”

Analysis and Determination

20. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, where the court stated that:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”

21. I have considered the rival submissions and the authorities cited by the parties. I have also re evaluated the material placed before the trial court. I find the issues falling for determination are:
- a. Which of the parties found the found the buyers for LR nos 154/146? And;



- b. Is the appellant entitled to receive commission in respect of the sale and purchase of LR nos 154/146?
22. Looking at the evidence in the record before me, I am persuaded that the appellant did in fact find the buyer for the sale and purchase of plot LR no 154/145. I say this because there is no other reasonable explanation as to why the respondents would have paid him part of the commission due otherwise. I am of the view that this is a case where it may be safely presumed that the part payment (by the respondent to the appellant) of the debt was an admission (by the respondent) that the whole amount was due to the appellant.
23. I am satisfied that the lower court reached a reasonable conclusion in directing the respondent to pay the appellant the balance of the commission due in respect of the sale and purchase of the above said property.
24. As regards the second property, LR 154/146, looking at the record, I am more inclined to agree with the respondents' version of events as the truth of the matter.
25. I say this because the appellant simply did not provide sufficient evidence to show that he found the buyer (Mr Maxwell Otieno). He testified that he communicated with the buyer by way of telephone, sms, and WhatsApp, but admitted that none of this communication had been produced in court. Moreover, he did not call the buyer as his witness to testify in support of his claim that he had found him.
26. On the other hand, the 1st respondent testified that the buyer had called him directly. He provided details of the conversation he had with the buyer and gave context as to how the purchase price was arrived at. He testified that, "I was called by Dr Otieno, and (he) asked me whether I am selling land because I had put up a bill board indicating that I was selling the plots. He requested if we could meet. We met at Lavington mall. We agreed at a price of kshs 28.5 million". He further stated that " I called Mr Maxwell and he told me that he had no dealings of my land with MrMbugua".
27. Looking at the evidence, I am persuaded that the respondents' testimony was a more probable version of the events that unfolded compared to the appellant's version.
28. As regards the legal and evidentiary burden of proof, it is trite that the burden of proof in civil matters is that he who alleges must prove. This maxim is grounded in section 107 of the Law of Evidence. In the High Court decision of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR the court stated that:

"...As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."

29. In the case of *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua* [2015] eKLR the court held as follows with regard to the burden of proof:

"... in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The



Trial Magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the Trial Court Magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.”

30. Similarly, I do not think that the appellant established the necessary factual evidence to shift the evidentiary burden from him to the respondent for the reasons outlined above.
31. Based on totality of the evidence on the record, I am satisfied that the appellant did not prove on a balance of probability that he found the buyer of LR 154/146. Accordingly, he was not entitled to any commission in relation to the sale and purchase of that property. I am satisfied that the lower court arrived at a reasonable conclusion in this regard and I find no good reason to interfere with the same.
32. Based on the reasons above, I find that the appeal is without merit and is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....for the appellant.

.....for the respondent.

