



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndung'u v Nairobi Institute of Business Studies & 2 others (Civil Appeal E60 of 2021) [2023] KEHC 2189 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2189 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E60 OF 2021  
JM CHIGITI, J  
MARCH 1, 2023**

**BETWEEN**

**DAVID NDUNG'U ..... APPELLANT**

**AND**

**NAIROBI INSTITUTE OF BUSINESS STUDIES ..... 1<sup>ST</sup> RESPONDENT**

**LIZZIE MUTHONI WANYOIKE ..... 2<sup>ND</sup> RESPONDENT**

**FELISTER WAIRIMU KAMANDE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling of the Honourable Senior Resident Magistrate Hon O. Wanyaga in Thika SRMCC No.76 of 2019 delivered on 24th March 2021)*

**JUDGMENT**

**Brief Background**

1. Through the Complaint dated January 31, 2019 in Thika SRMCC no 76 of 2019, the Appellant alleged that the Respondents refused to pay his commission, calculated at 3% of the purchase price of 180,000,000/= arising from the sale of 10 acres excised from LR No 11261/76.
2. In the said case, the Appellant had sued the Respondents for the non-payment of Kshs 4,450,000/= being the balance of the agreed commission.
3. The Respondent filed a Notice of Preliminary Objection dated October 16, 2019, on the grounds that the complaint lacks locus standi to institute the suit, and the suit is an abuse of the court process, on the ground that the plaintiff is not the registered owner of the suit property.
4. The trial court dismissed the Appellant's suit for lack of locus standi. The trial court found the plaintiff ought to register his business under Section 18 of the *Estate Agency Act*, and the failure to which the contracts entered by the Appellant are illegal and unenforceable.



5. Aggrieved by the trial court ruling, the Appellant filed the Memorandum of Appeal dated April 13, 2021 challenging the trial court's decision that dismissed the Appellant's suit for lack of locus standi on a matter that could be determined at trial.
6. The Appeal was heard through written submission.

### **Appellant's submissions**

7. The Appellant filed submissions on November 14, 2022, wherein he submitted that the dismissal of his suit was draconian, as the court did not accord him an opportunity to ventilate all the issues that would be ideally raised by the plaintiff at the main trial.
8. Counsel submitted that the trial magistrate erred in shifting the burden of proving locus standi on the Appellant contrary to Section 107 of the *Evidence Act*. That the Appellant was denied the right to a fair hearing as enshrined in the *Constitution* under Article 50.
9. Appellant's counsel submitted that the Appellant was entitled to the doctrine of Restitution and compensation - and cited Section 65 of the Indian Contract Act, 1872 which gives the obligation of a person who has received advantage under a void agreement, or contract that becomes void and states, 'when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he received it.'
10. It was submitted that the Respondent cannot be allowed to disown a contract which has been partly enforced. Cited the case of *Bhagwat Sharan vs purushottam and others civil Appeal no 6875 of 2008* where the supreme court of India held that 'a party cannot be permitted to approbate and reprobate at the same time it was further held that when the benefits of a particular contract or conveyance or order are knowingly accepted by the party that party is estopped to deny the validity of such a contract or conveyance or order'
11. The Appellant urged this court to allow the Appeal and set aside the Ruling of the trial court.

### **Respondents submissions**

12. The Respondent's counsel submitted that the Appellant lacked the locus standi before the court, and thus that suit could not stand. He submitted that the failure of the Appellant to register his business as an Estate Agency - as per Section 18 of the *Estate Agents Act*, lacks the locus standi to bring the instant suit before court. The Respondent urged the court to dismiss this Appeal with costs, and uphold the holding of the trial court.

### **Analysis and determination**

13. This being the first Appellate court, the duty of the court is to re-evaluate the evidence adduced in the trial court and arrive at its own conclusion. In *Gitobu Imanyara & 2 others v Attorney General [2016] eKLR*, the Court of Appeal held:

' This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.'



14. The Appellant is challenging the decision of the trial court - dismissing the suit in the trial court, for lack of locus standi. The Appellant alleges that having entered into a contract with the Respondents, the Respondents were bound to adhere to the terms of the contract. The Appellant contends that he entered into an agreement with the Respondents, where he was to procure 10 acres of land to be purchase by the Respondent. As per the agreement, the Appellant was to be paid a commission, calculated at 3% of the purchase price of 180,000,000/= from the sale of 10 acres excised from LR No 11261/76.
15. On one hand, the Appellant submitted that out of the Kshs 5, 400,000/= to be paid as commission, the Respondents paid a sum of Kshs 950,000/= leaving a balance of Kshs 4,450,000/=. The Respondent, on the other hand, alleged that the Appellant had no locus standi to institute the suit, since he had not registered its business under the Estate Agency Act.
16. According to the Appellant, after procuring the 10 acres for the Respondent, made the Appellant to tabulate the commission payable, and it was on the strength of that, that the Respondent paid a sum of Kshs 950,000/= to the Appellant.
17. In as much as the Respondents alleged that the Appellant had not registered his business under Section 18 of the Estate Agency Act, the Respondent is precluded from alleging this fact at this point. The Respondents knowingly entered into a contract with the Appellants when purchasing the property. They cannot at this point run away from their contractual obligations.
18. The Appellant honored his obligation while the Respondent, who has already secured the land they wanted are now renegeing their promise after partly settling what they owed the Appellant.

### **Disposition**

19. The court of Appeal in [\*William Mutebe Muthami versus Bank of Baroda \(2014\) eKLR\*](#), stated that,  

' In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.'
20. Oral agreements may be enforceable if supported by credible evidence. Section 3(1) of the [\*Law of Contract Act\*](#), does not make all contracts void and unenforceable, if they haven't been reduced into writing.
21. The Respondent made part payment of the commission due to the Appellant. I therefore, find the contract between the Respondents and the Appellant had the three main essentials of a valid contract: offer, acceptance, and consideration.
22. It is my find that the trial magistrate erred in dismissing the Appellant's suit, at an interlocutory stage without considering the merits of the suit, the move by the trial magistrate was draconian to the Appellant's case.
23. In [\*Nkuba v Nyamiro \[1983\] KLR 403\*](#), the same court stated: A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.
24. Guided by the above decision, I am persuaded that the trial magistrate misdirected himself in dismissing the Appellant's suit without considering the merits of the case. As such, I proceed to interfere with the trial court decision.



**Orders**

- A. The Appeal is allowed.
- B. The ruling dated March 24, 2021 is hereby set aside.
- C. The file is to be remitted back to the trial court for hearing, before any other magistrate.
- D. The costs of Appeal are awarded to the Appellant.

**DATED AND DELIVERED AT KIAMBU THIS 1<sup>ST</sup> DAY OF MARCH, 2023.**

.....

**J. CHIGITI (SC)**

**JUDGE**

