



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 94 OF 2016

LIVINGSTONE GITONGA MUCHUNGI.....1ST PLAINTIFF

DUNCAN MWANGI GICHUNGI.....2ND PLAINTIFF

SAMWEL NJAGAH MUNGAI T/A LIVINGSTONE REAL ESTATE.....3RD PLAINTIFF

VERSUS

ICEA LION LIFE ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

(1) The Plaintiffs herein **LIVINGSTONE GITONGA MUCHUNGI, DUNCAN MWANGI GICHUNGI and SAMWEL NJAGAH MUNGAI T/A LIVINGSTONE REAL ESTATE** filed in the High Court the Plaintiff dated **18th March 2016** seeking Judgment against the Defendants jointly and severally for:-

“(a) Kshs. 46,250,000.00

(b) General damages for breach of contract.

(c) Interest on (a).

(d) Costs of the suit.”

(2) The Defendant **ICEA LION LIFE ASSURANCE COMPANY LIMITED** opposed the suit and filed the Defence dated **27th April 2016** which Defence was subsequently amended on **21st June 2017**. Thereafter the Plaintiff filed a Reply to the Amended Defence. The matter was initially referred to Mediation but the parties failed to reach an agreement. As such the suit proceeded for hearing by way of viva voce evidence. The Plaintiff called **four (4)** witnesses in support of its case whilst the Defendant called **six (6)** witnesses.

THE EVIDENCE

(3) **PW1 LIVINGSTONE GITONGA MUCHUNGI** told the Court that he was one of the Partners in **Livingstone Real Estate** together with **Duncan Mwangi Gichungi** and **Samwel Njagah Mungai**. **PW1** relied on his written statement dated **18th March 2016** as his evidence in chief. **PW1** stated that the Plaintiffs operated as a Real Estate Agency involved in selling properties for clients for an agreed commission or fee. He stated that the Plaintiff has previously conducted business with the Defendant Company through its Chairman **Mr. James Ndegwa** and claims that between the years **2005 to 2010** the Plaintiff had upon instructions from the said **Mr. James Ndegwa** sold three parcels of land for which they received a **2.5%** commission.

(4) The evidence of **PW1** is that sometime in the year **2009** the Defendants' Chairperson informed him that the Defendant intended to dispose of **ICEA Building** along **Kenyatta Avenue** in **Nairobi County** (hereinafter the **“Suit Property”**) by way of sale. That the Plaintiffs' obtained the relevant details and documentation relating to the suit property from one **Mr. J. K. Ndung'u** the **CEO** of the Defendant.

(5) **PW1** states that the Plaintiff then immediately set about seeking for buyers for the suit property before being informed that the Defendant had decided not to sell the property. Later in the year **2012** the suit property was put back on the market and **PW1** alleges that the Defendants Chairman then introduced him to one **JUSTUS MUTIGA** the **CEO** of the Defendant Company, who provided him with documentation relating to the suit property.

(6) Once again the Plaintiffs commenced the search for a buyer. That though **Kenya Revenue Authority (KRA)** and **JAMIA MOSQUE** initially expressed interest in purchasing the property, they later pulled out and did not buy the suit property. **PW1** asserts that the Plaintiffs had also written to **Jomo Kenyatta University of Agriculture and Technology ('JKUAT')** regarding the purchase of the suit property. That on **20th September 2012** he accompanied one **Ms. HELLEN KARU**, the Estate Manager for **JKUAT** on a site visit to enable her view and inspect the property. **PW1** states that following the site visit he informed the Defendant that **JKUAT** were serious buyers whereupon the Defendants Chairman verbally agreed to pay the Plaintiff a **2.5%** commission once the sale was completed. **PW1** later learnt that the suit property as sold to **JKUAT** for a purchase price of **Kshs. 1.85 Billion**.

(7) Upon learning of the sale the Plaintiffs made a claim for their Commission but to their surprise the Defendant denied their claim alleging that the sale had been facilitated by **KNIGHT FRANK KENYA LIMITED** whom the Defendants claimed had sought and secured **JKUAT** as purchaser of the property. The Defendant according to the Plaintiffs falsely claimed that the Plaintiffs had played no role whatsoever in the sale of the suit property and thus denied the Plaintiffs their rightfully earned commission accruing from the sale transaction. The Plaintiffs instructed their Advocates to write to the Defendants the Demand Letter dated **11th November 2015**. Hence the present suit.

(8) **PW2 DUNCAN MWANGI GICHUNGI** told the Court that he was one of the Partners in **Livingstone Real Estate** (the Plaintiff herein). **PW2** relied upon his written statement dated **16th February 2018** as well as his Supplementary Statement also dated **16th February 2018**. **PW2** stated that he was an Estate Agent and a Registered Valuer. That he was registered to practice as an Estate Agent in **1987** and that since that time his registration has been current. **PW2** confirmed that he had no personal and/or direct involvement in the transaction in question. That the events leading upto the filing of this suit were not within his personal knowledge.

(9) **PW2** denies the contents in a letter dated **29th March 2018** from the office of the Registrar of Companies, which letter indicated that he and one **Samuel Njagah Mungai** only joined the partnership on **29th January 2008**. He further states that a Notice to that effect filed on **25th November 2015** was also incorrect.

(10) **PW3 HELLEN WAMUYU KARU** told the Court that she is a Quantity Surveyor who was at the material time the estate Manager with **JKUAT**. **PW3** told the Court that on **20th September 2012** she visited and inspected the suit property in the Company of **PW1** and the Caretaker. Following her inspection **PW3** prepared her report dated **25th September 2012** which report she produced as an exhibit (Pages **70 to 71** of Plaintiffs Bundle filed on **24th March 2016**). **PW3** states that her role in this matter ended with the submission of her report. That her role was purely technical and that she played no role whatsoever in the negotiations and eventual purchase by **JKUAT** of the property.

(11) **PW4 ABDUL MAJID MUNGAI** is a Contractor and a Worshipper at **Jamia Mosque** in **Nairobi**. **PW4** relied on his written statement dated **22nd February 2018**. He told the Court that sometime in the year **2012** the **Jamia Mosque Committee** was looking for space to set up University. That he met one **Samuel Njagah Mungai** a Partner in **Livingstone Real Estate** who informed **PW4** that **ICEA Building** was up for sale. On **6th September 2012**, the Plaintiffs formally wrote to **Jamia Mosque** advising that they were the agents for the sale of the property and providing a summary of the particulars of the property.

(12) **PW4** stated that he and **Mr. Mungai** and **PW1** later met a **MR. MUTIGA** the **CEO** of the Defendant who confirmed to them that the suit property was indeed available for purchase and confirmed that the Plaintiffs had been instructed to source for buyers. On behalf of the Defendant **PW4** told the Court that despite the engagement between the Plaintiffs and **Jamia Mosque**, the Mosque leadership eventually opted for a different property along **Globe Roundabout**.

(13) As stated earlier the Defendant called **six (6)** witnesses in support of their Defence. **DW1 JUSTUS MUTABARI MUTIGA** told the Court that he was the Chief Executive Officer of the Defendant. He stated that sometime in the year **2012** **PW1** contacted him with a view to finding purchasers for the suit property. **DW1** told the Court that he did not know how **PW1** came to know of the Defendants intention to sell the property, as this had only been revealed to **Knight Frank (K) Ltd**, who were the Defendants property managers. **DW1** went on to state that the Plaintiffs did secure **KRA Pension Fund** as a potential purchaser of the suit property. However he stated the deliberations with **KRA Pension Fund** fell through and did not result in a sale.

(14) **DW1** confirmed that the Defendant had entered into an Agency Agreement dated **19th November 2012** with the Plaintiff (Annexed at pages **64-66** of Plaintiffs Bundle) but asserted that this Agency Agreement was never executed by or on behalf of the Defendant. **DW2** further asserts that the Agency Agreement of **19th November 2012** was specific to the submission of an offer to the **LAP FUND** and that in any event the said Agreement was to terminate on **14th December 2012**. **DW1** further insisted that the Agency Agreement of **19th November 2012** provided that the fees payable the Plaintiff was to be agreed with **Knight Frank (K) Ltd** who were the lead agents in the matter. He denied that the Defendant had granted to the Plaintiff exclusive authority to market the suit property and maintained that **Knight Frank** as the lead agents were the ones responsible to source for other agents to assist them in marketing the property.

(15) **DW1** also stated that sometime in **mid-2014** he received the information about the interest of **JKUAT** in purchasing the suit property from one **MR. MWANGI MAINA** who was the Executive Director of **Knight Frank (K) Ltd** and **MR. ABRAHAM SAMOEI** the Property Manager with **Knight Frank**. **DW1** went on to state that he attended a meeting held on **3rd July 2014** at which negotiations were held between the Defendant and **JKUAT** and confirms that the suit property was eventually sold to **JKUAT**. **DW1** was categorical that the only agents engaged by the Defendants for purposes of the sale was **Knight Frank (K) Ltd** to whom a commission was paid for the sale.

(16) **DW2 NORAH AGINA NYAKORA** was the Registrar of **Estate Agents Registration Board**. She produced as an exhibit her letter

dated 29th March 2018 in which she confirmed that neither **Livingstone Gitonga Muchungi (PW1)** nor **Samwel Njagah Mungai (PW3)** had ever been registered as Estate Agents. That **Duncan Mwangi Gichungi (PW2)** was registered as an Estate Agent in 1987 but only paid the annual registration fees upto the year 1996 when he stopped paying the annual fee as required. The witness clarified that during the period 2012 to 2016 PW2 was **not** registered to practice as he had failed to pay the requisite annual fees thus he was neither gazetted nor registered to practice during that period.

(17) **DW3 ABRAHAM KIPLAGAT SAMOEI** was the Senior Property Manager with **Knight Frank Limited** who was responsible for the management of **ICEA Building**. **DW3** stated that he received a letter dated 30th August 2013 from **JKUAT** seeking to lease space in the suit property. **DW3** responded that the landlord was reluctant to accept an educational institution as a tenant but were open to accept offers for the purchase of the property. **DW3** stated that he later met **DR. MWAURA** the Director **JKUAT CBD Campus** to discuss the sale of the suit property. **JKUAT** confirmed their interest in purchasing the property vide their letter dated 7th April 2014. He then handed over the negotiations to **MR. MAINA MWANGI** the Executive Director of **Knight Frank**.

(18) **DW3** insists that at no time did he ever hold discussions or have any dealing with the Plaintiffs regarding the purchase of the suit property. He denies that the Plaintiffs introduced **JKUAT** as a potential buyer of the property. **DW1** further denies the claim by **PW1** that he arranged the visit of 20th September 2012 to the suit property by **JKUAT**. He insists that the visit of that date involved **KRA Pension Fund** who did **not** eventually purchase the property. **DW3** also stated that the list of tenants and rents which he forwarded to the Plaintiffs was sent in connection with the possible sale to **KRA Pension Fund** and was **not** intended to be given to **JKUAT**.

(19) **DW4 DR. FLORENCE ONDIEKI MWAURA** was the Director of the **JKUAT CBD Campus**. She relied on her statement dated 4th August 2016 as her evidence in chief. **DW4** states that in the year 2013 she was searching for premises to rent in the **CBD** and identified the suit property. However **Knight Frank (K) Limited** the Agents for the Defendants indicated that the Defendant though not willing to lease out the property, were amenable to selling the same. **DW4** discussed the possibility of purchasing the suit property with the **Vice-Chancellor** of the University. She states that the details concerning the property were supplied to **JKUAT** by **Knight Frank** vide their letter dated 20th September 2013. That once all necessary approvals had been obtained the **Vice Chancellor** wrote a letter dated 7th April 2014 to **Knight Frank** indicating the interest of **JKUAT** to purchase the property.

(20) **DW4** asserts that at no time were the Plaintiffs ever involved in the purchase of the suit property by **JKUAT**. That at no time did she ever meet **PW1** or hold discussions with the Plaintiffs regarding the sale of the property. Indeed **DW4** asserts that she had never heard of **Livingstone Real Property** until **JKUAT** received from them a letter dated 4th November 2014 demanding payment from the University. That the **Vice-Chancellor** responded to the Plaintiffs demands through a letter dated 21st November 2014 denying any dealings by **JKUAT** with the Plaintiff regarding the purchase of the suit property.

(21) **DW5 JAMES PHILLIP MAINA NDEGWA** was the Chairman of both **First Chartered Securities Limited** and of the Defendant. **DW5** relied on his written statement dated 28th April 2016. He confirmed that he had previously dealt with **PW1** in respect of sale of other unrelated properties.

(22) **DW5** told the Court that he does not hold any executive position in the Defendant and does not participate in any way in the management of the Defendant. He asserts at no time did he ever instruct the Plaintiffs to act as agent in the sale of any property belonging to the Defendant and specifically that he did **not** instruct the Plaintiffs to assist the Defendant in the sale of **ICEA Building**. According to **DW5** the Plaintiffs made enquiries about the Defendants intention to sell the suit property but he referred them to **Knight Frank (K) Ltd**. **DW5** maintains that the Plaintiffs had no involvement at all in the sale of the suit property to **JKUAT**.

(23) **DW6 MAINA MWANGI** was the Executive Director of **KNIGHT FRANK KENYA LIMITED**. He relied on his statement dated 28th April 2016 as well as his Supplementary Statement dated 24th May 2017. **DW6** told the Court that **Knight Frank** was appointed by the Defendant as the **sole agent** for the management, leasing and sale of all its properties including **ICEA Building**. That **MR. ABRAHAM SAMOEI DW3** a Senior Property Manager with **Knight Frank** was responsible for the management of the suit property.

(24) **DW6** told the Court that, in **September 2013 DW3** informed him of an enquiry by **JKUAT** with respect to leasing the suit property. Later in **April 2014 DW3** informed him that **JKUAT** had expressed an interest in purchasing the property. **DW6** stated that on 3rd July 2014 he attended a meeting with **Mr. Justus Mutiga** the **CEO** of the Defendant and **seven (7)** representatives of **JKUAT**. That following that meeting **JKUAT** made an offer to purchase the suit property for **Kshs. 1.85 Billion**. The offer was accepted by the Defendant and the sale transaction took place.

(25) **DW6** states that he later saw the letter of demand dated 4th November 2014 written by the Plaintiff to **JKUAT**. **DW6** confirms that sometime in the year 2009 **Knight Frank** were approached by the Plaintiffs who said they had potential buyers for the suit property which potential buyers included **KRA Pension Fund, LAP Trust Fund** and **JKUAT** and that they gave the Plaintiffs the requisite documents so as to enable them engage these potential purchasers. However **DW6** insists that **Knight Frank** were the lead agents for the sale of the suit property and asserted that it was **Knight Frank** who represented the Defendants during the negotiations with **JKUAT** over the sale of the suit property.

ANALYSIS AND DETERMINATION

(26) I have carefully examined the evidence adduced in this case, the written submissions filed by the two parties as well as the relevant law. In my view there are two main issues which arise for determination as follows:-

(i) **Whether the Plaintiffs were instructed as agents of the Defendants in the sale of the suit property to JKUAT.**

(ii) **Whether the Plaintiffs are entitled to the commission of Kshs. 46,250,000.00 as prayed for in the Plaint.**

(i) **Existence of an Agreement**

(27) I have carefully considered the evidence adduced by all the witnesses in this case, the material / documents filed by the parties as well as the written submissions filed by both Counsel. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107** of the **Evidence Act Cap 80, Laws of Kenya** provides as follows:-

“Burden of proof

(1) Whoever desires any Court to give Judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

(28) It is common ground that the Defendants were the proprietors of the suit property being **ICEA BUILDING** situate on **L.R. No. 209/8287** which was said to be a **19 Storey** Commercial Building with a total area of **163,788 square feet**. At **page 26** of the Complaint dated **18th March 2016** is a copy of the Title Document for the said property. At **page 37** is entry **No. 4** on the Title indicating a transfer of the suit property to **Insurance Company of East Africa Limited (ICEA)**.

(29) Further it is common ground that sometime in the year **2014** the suit property was sold to **JKUAT** for **Kshs. 1.85 Billion**. **DW4 DR. MWAURA** who was the Director of **JKUAT CBD Campus** confirms that this sale took place. Likewise **PW1** in his evidence also confirms that the suit property was eventually sold by the Defendant to **JKUAT**.

(30) The Plaintiffs claim that they acted as Agents of the Defendant in the sale and that they procured the buyer being **JKUAT**. The evidence of **PW1** is that he personally received instructions from **James Ndegwa DW5** who was the Defendants Chairman in early **2009** and that he received from **Mr. Mutiga (DW1)** the CEO of the Defendant Company the requisite documentation relating to the sale being:-

- **Copy of Title Deed**
- **Copy of Deed Plan**
- **Copy of Memorandum and Articles of Association of the Company.**
- **Certificate of Incorporation of ICEA.**
- **Copy of PIN.**
- **Certificate of Change of Name.**

(31) Upon receiving the above documents the Plaintiffs began to source for potential purchasers. That in the course of this assignment as Agent the Plaintiffs on **11th September 2012** wrote to **JKUAT** who though initially desirous of leasing the property later agreed to purchase the same. **PW1** testified that he facilitated and accompanied **Ms. Hellen Karu (PW3)** the Estate Manager for **JKUAT** to the property for viewing and inspection. **PW3** confirms that she did visit and inspect the premises in the company of **PW1** after which she prepared her report dated **25th September 2012**, which report she presented to the University Council.

(32) However on their part the Defendant vehemently denies ever having appointed the Plaintiffs as their Agent in the sale to **JKUAT**. The Defendant asserts that their lead Agent in the matter was **Knight Frank Ltd** and insist that it was **Knight Frank** who introduced **JKUAT** to them as potential purchasers. **DW5** the Chairman of the Defendant admitted previous dealings with the Plaintiffs but stated that it was **PW1** who approached him offering to solicit buyers for the property. **DW5** stated that he played no role in the sale of the suit property but maintained that it was **Knight Frank** who were authorized to handle all property matters for the Defendant.

(33) **DW1** the CEO of the Defendant, told the Court that he met the Plaintiffs through **DW5**. He states that the Plaintiffs introduced **KRA Pension Fund** as potential buyers but no sale materialized. **DW1** reiterates that **Knight Frank** were the sole agents for the Defendant in the matter and asserts that he was informed of the interest by **JKUAT** to purchase the property by **Mr. Abraham Samoei DW3**, the Property Manager of **Knight Frank**.

(34) The Plaintiffs sought to rely on the Agency Agreement dated **19th November 2012** between themselves and the Defendant. This Agreement could not be relied of as proof of an Agreement to engage the Plaintiffs or Agents for the sale of the suit property to **JKUAT** for several reasons. Firstly as pointed out by **DW5** the said Agreement was not executed by or on behalf of the Defendant and so cannot bind them. Secondly the Agreement specifically referred to an Agency with respect to the **LAP FUND**. No mention was made of **JKUAT**. Finally the Agency Agreement of **19th November 2012** terminated on **14th December 2012** way before **JKUAT** purchased the suit property. Under cross-examination **PW1** admitted:-

“... an Agency Agreement dated 19th November 2012. It relates to Lap Trust and gives authority upto 14th December 2012. This is the only Agency Agreement which I have relating to the property ...” [own emphasis]

(35) Therefore the Plaintiffs have not adduced any real and / or tangible documentary evidence to prove that the Defendant had appointed them as agents in the sale. There is no written Agreement / Agency Agreement between the parties specific to the sale of the suit property to **JKUAT**. The mere fact that the Plaintiffs learnt of the availability of the suit property for sale and offered or took it upon themselves to solicit for buyers does not prove that an Agency Agreement existed between the parties.

(36) It is trite law that he who alleges must prove. This was a High Value Commercial building in the centre of the **CBD** valued at over **Kshs. One Billion**. I do not accept that an Agreement involving the sale of such a high value property would be entered into in such a casual manner as is suggested by the Plaintiffs without any written documentation to support the Agency Agreement. Furthermore **PW1** does not seem to be clear on what agreement if any was reached between the parties regarding the commission payable in event of a sale. **PW1** oscillates between claiming that the agreed commission was **3%** and **2.5%**.

(37) In the Demand Letter dated **11th November 2015** [page **96-97** of Plaintiffs Bundle] the Plaintiffs claim **Kshs. 60,000,000/-** being **3%** of the purchase price yet in their Plaintiffs claim is for **Kshs. 46,500,000/-** representing **2.5%** of the purchase price. In his evidence **PW1** stated that the question of commission was left open ie no percentage was agreed upon. Indeed under cross examination **PW1** states:-

“We did not agree on a commission.”

(38) If there was no agreement on commission then what is the basis of the Plaintiffs claim for **Kshs. 46,500,000?** Further on in cross-examination **PW1** admitted-

“We had no written agreement on commission payment.”

Again there is no express written document setting out the commission that would be payable to the Plaintiffs. Once again I am not convinced that in a sale involving such a high end, lucrative property issues would be handled by the Defendant in so casual a manner.

(39) The Plaintiffs appear to place reliance on the fact that they had previously handled property sales on behalf of the Defendant through its Chairman **Mr. Ndegwa** and that their introduction of **KRA** and **LAPFUND** as potential buyers of the suit property as proof of the fact that they were also the Agents in the sale of **ICEA Building**. Each Agency contract is separate and distinct. **DW1** the CEO of the Defendant is categorical that he only held discussions with **PW1** in relation to the introduction of **KRA Pension Scheme** as a buyer. They did not discuss **JKUAT** at all. The fact that the Plaintiff previously acted as Agent and received commission for the Defendant does **not** amount to proof that they were the Agents engaged by the Defendants to facilitate the sale of the suit property.

(40) Essentially from the evidence available the Plaintiffs involvement if any in the sale of the property to **JKUAT** appears not to have been based on any express instructions from the Defendant. The Plaintiffs appear to have insinuated themselves into the matter as agents hoping thereby to reap a healthy commission. The Plaintiffs involvement was clearly peripheral and neither the Defendant nor the purchaser **JKUAT** recognized the Plaintiff as their agents in the sale. **DW4 DR. FLORENCE MWAURA** who was the Director of the **JKUAT CBD Campus** stated that she never met or spoke to the Plaintiffs regarding the purchase by the University of the suit property. If as they claim the Plaintiffs were the Agents who introduced **JKUAT** to the Defendants then **DW4** would certainly have interacted with them. The fact that **DW4** had never heard of the Plaintiffs belies their claim that they introduced **JKUAT** to the Defendants as buyers. The Defendant and **JKUAT** both state that **Knight Frank** was the Agency which brought them together. In her reply dated **21st November 2014** to the Plaintiffs Demand Letter the Vice Chancellor of **JKUAT** denied that the University ever dealt with the Plaintiffs regarding the purchase of the suit property. In their written submissions the Plaintiffs concede that it was **Mr. Samoei (DW3)** of **Knight Frank Properties** who availed to the Plaintiffs the schedule of tenants for **ICEA Building**. In his evidence **PW1** suggested that the Plaintiffs were working together with **Knight Frank**. It would appear that it was **Knight Frank** who assigned the Plaintiffs to source for buyers in which case the Plaintiffs recourse would be with **Knight Frank**.

(41) According to **PW1** the Plaintiffs entered into an Agency Agreement with the Defendants as early as **2009**. **PW1** states that the Plaintiffs introduced potential purchasers to the Defendants including **KRA Pension Fund** and **Jamia Mosque** in **2012**. However from the evidence on record **JKUAT** only came on board as potential purchasers in the year **2013** after the request by the University to lease the suit property was declined. **DW4** the Director of the **JKUAT CBD Campus** told the Court that she went to inspect the property accompanied by **PW3** the Property Manager of **Knight Frank** and a **MR. Otachi** the caretaker of the building. **DW4** made no mention at all of any involvement of the Plaintiffs.

(42) The evidence reveals that upon approval for the purchase by the University Council **JKUAT** vide their letter dated **18th September 2013** (Annexure at page **3** of Defendants Bundle filed on **29th April 2013**) expressed their interest to purchase the property. Thereafter the Defendant through **Knight Frank** submitted an offer to **JKUAT** through **DW3** the Property Manager of **Knight Frank** vide the letter dated **20th September 2013** (page **4** of Defendants Bundle).

(43) The Plaintiffs through **PW1** claim that the Chairman of the Defendant instructed them in the matter. However this is denied by **DW5 Mr. Ndegwa** the Chairman of the Defendant who under cross-examination states: -

“I did not personally instruct anyone to solicit buyers for ICEA. I had no role whatsoever in the sale of ICEA Building. At all times our agents were Knight Frank who handle all property matters for our company ...”

I find no evidence of any involvement by the Plaintiffs in the dealings between **JKUAT** and the Defendant over the sale.

(44) In law an Agreement consists of an offer and acceptance. There is no evidence of an offer made by the Defendant to the Plaintiffs to take up the role of Agent in the sale of the suit property. Likewise I find no evidence of an acceptance by the Plaintiffs of an offer to act as the Defendants agent in the sale. In short there is no evidence of a meeting of minds between the parties over this matter and certainly I find no evidence of Agency Agreement between the Plaintiff and the Defendant. Therefore I find and hold that there existed no legally enforceable Agency Agreement between the Plaintiffs and the Defendant.

(ii) Are the Plaintiffs entitled to the prayers claimed in the suit.

(45) The Plaintiffs have in their Plaint sought Judgment in their favour for **Kshs. 46,250,000.00**. This represents the **2.5%** commission which the Plaintiffs claim was payable to them upon the sale of the suit property to **JKUAT**. This claim was denied by the Defendants. This Court has already found that no legally enforceable contract existed between the Plaintiff and the Defendant. However even if there did exist a valid Agreement between the parties the Plaintiffs claim would still run into head winds for the following reasons.

(46) **Section 18** of the **Estates Agents Act Cap 533, Laws of Kenya** provides as follows:-

“1. After the expiration of six months from the commencement of this Act or such further period as the Minister may, by notice in the Gazette, allow either generally or in respect of any particular person or class of person:-

(a) No individual shall practice as an estate agent unless he is a registered estate agent;

(b) No partnership shall practice as estate agents unless all the partners whose activities include the doing of acts by way of such practice are registered estate agents;

(c) ...

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding two years or to both.” [own emphasis]

(47) **PW1** admitted that he was **not** registered as an Estate Agent. Likewise the 3rd Partner **Samwel Njagah Mungai** was also **not** a Registered Estate Agent. It is only the 2nd Partner **Duncan Mwangi Gichungi (PW2)** who claimed that he was a Registered Estate Agent and a Registered Valuer. It is clear then that the Plaintiffs were operating their Partnership contrary to the provisions of **Section 18(1) (b)** of the **Act** which provides that **ALL** the Partners must be registered as Estate Agents.

(48) Moreover despite the claim by **PW2** that he was registered as an Estate Agent at the material time, this claim is controverted by the evidence of **DW2 Norah Agina Nyakora** who was the Registrar of Estate Agents. **DW2** told the Court that in response to an enquiry from the firm of **Hamilton Harrison & Mathews Advocates** (who act for the Defendant in this matter). She wrote the letter dated **29th March 2016** confirming that neither **PW1** nor **Samwel Njagah Mungai (3rd Plaintiff)** have **never been registered** as an Estate Agents.

(49) **DW2** conceded that **PW2 Duncan Mwangi Gichungi** had registered with the Board as an Estate Agent in the year **1987**. However she specifies that during the period **2012-2016** being the period when this transaction occurred, **PW2** was **not** registered and had **not** paid the requisite annual fees. **DW2** produced copies of the gazette notices for the period in question (pages **30-57** of Defendants Supplementary List of Documents filed on **22nd June 2017**).

(50) Upon cross-examination by Counsel for the Defendants **PW2** readily concedes that neither **PW1** nor the 3rd Plaintiff have ever been registered as Estate Agents but he denies the claim by the Registrar (**DW2**) that he had failed to renew his registration by paying the requisite annual fees. **PW2** insists that he did pay the annual fees for the period **2012-2016**.

(51) However **PW2** was unable to show the Court his licences for the years in question claiming that the same had been stolen. **PW2** was unable to prove that he had been robbed of his professional licences which are in fact his tools of trade. He apparently did not make any report to the police regarding the alleged theft of his vital licences nor did **PW2** seek to obtain replacement copies of his licenses from the relevant Board.

(52) I was able to observe the demeanour of **PW2** as he testified before the court. He appeared unsure about his evidence. In my opinion he was not an honest witness. I find that it has been proved through the evidence of the Registrar that **DW2** was **not** licenced to practice as an Estate Agent during the material time. In the circumstances, the claim by the Plaintiffs that they were acting as Estate Agents for the Defendant falls flat on its face. Indeed **Section 18(2)** of the **Estate Agents Act** makes it an offence for one to practice as an Estate Agent without the requisite licence.

(53) It is trite that no Court will condone an illegality. In the case of **MIKE MUNGA MBUVI –VS- KENYA AIRWAYS LIMITED [2017]eKLR**, the Court citing the decision in **SCOTT –VS- BROWN DOERING, MCNAB & CO. (3) [1992] 2 QB 724** held that:-

“No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not, if the evidence adduced by the Plaintiff proves the illegality the Court ought not to assist him.” [own emphasis]

(54) Likewise in the case of **HUSSEIN LADHA –VS- HARESH SONI [2017]eKLR Hon. Justice PJO Otieno** held as follows:-

“17. Put in the context of what the Plaintiff says he did in relation to the transaction leading to this claim, it is beyond peradventures that the Plaintiff facilitated the introduction and negotiations between the parties that led to the sale. He, for that reason, engaged in the practice of an estate agent. It is not in dispute that he was never a licensed estate agent and therefore in so doing he affronted the provisions of the Act at Section 18 of the Act.

18. Being so prohibited by the Statute this Court is itself, being a Court and creature of the law, prohibited from enforcing a

contract that is contrary to the provisions of a statute. A contract founded upon breach, violation or circumvention of a statutory provision cannot be enforced by the Court. Indeed in this matter, the Plaintiff seeks to be rewarded for having engaged in the practice of an Estate Agent when he was not registered under the law. To enforce such a contract would not only beat the very purpose of the law but the entire purpose of a Judicial system which is to act as a bastion for the observance of the law. To enforce the agreement sued upon would be to throw out the entire architecture and purposes put in place by Parliament in its Constitutional legislative mandate regarding the prohibition placed against unregistered persons from engage in the practice of Estate Agents. This is a clear case for the Court to say the cause of action arose exturpi causa and this Court has no otherwise but to declare that it has no ability or authority to assist the Plaintiff benefit from his actions in violation of a positive provision of the Kenya Law.” [own emphasis]

(55) The Plaintiffs cannot seek to benefit from their own wrongdoing. Having engaged in practice as Estate Agents contrary to the law they cannot file a suit and expect to be awarded commission arising from their illegal activities. Accordingly I find that this suit has no merit and is for dismissal. I therefore dismiss in its entirety the Plaintiffs suit and award costs to the Defendant.

Dated in **Nairobi** this 2nd day of **JULY, 2021**.

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MAUREEN A. ODERO

JUDGE