



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 343 OF 2012

JACKSON KAROKI GICHUHI PLAINTIFF

VERSUS

LUCY SOMPET MURERO 1ST DEFENDANT

VISHURA DEVELOPERS LTD. 2ND DEFENDANT

DR. HASMUKH DAWDA 3RD DEFENDANT

IMRAN DHANJI 4TH DEFENDANT

JOAKIM KIARIE KAMERE 5TH DEFENDANT

J U D G M E N T

1. On or about 6th May 2011 Lucy Sompert Murero (herein after called Lucy, was successful in her tender bid to purchase, from Kenya Reinsurance Corporation Limited (herein after Kenya Re) property L.R. NO. 209/11154 Nairobi known as Kenya Re South C sports complex (herein after referred to as the Property). Lucy's successful bid was for Kshs. 457,000,000.
2. The claim before Court is brought by Jackson Karoki Gichuhi (herein after referred to as Jackson). By his Plaint Jackson seeks declaration that the sale of the property was an agency contract between Lucy and himself; declaration that the 4th Defendant, Imran Dhanji, and Joakim Kiarie Kamere (herein after referred to as Kamere) the 5th Defendant were constructive trustees for the purpose of the agency free in respect to the sale of the property; declation that Jackson is entitled to the agency fee; declaration that Lucy breached her agency contract; an order that 4th Defendant and Kamere do pay Jackson Kshs. 25 Million; and an order that Vishura Developers Ltd, the 2nd Defendant, (herein after referred to as Vishura) and Dr. Hasmukh Dawda, the 3rd Defendant, (herein after referred to as Dawda) do pay Jackson Kshs. 3,888,000.

BRIEF BACK GROUND

3. As stated before Lucy successfully bid for the purchase of the property. It does seem that her intention was to immediately, on winning her bid, to look for purchasers for that property for a price higher than her bid and thereby make a profit. For the purpose of looking for a buyer and giving her legal counsel during the sale transaction she retained Kamere as her Advocate.
4. It is not denied that Kamere immediately he was instructed by Lucy began to look for prospective buyers.

5. Accordingly to the evidence of Jackson, and as pleaded in this claim, Kamere engaged Jackson to look for prospective buyer for the property. According to Kamere's evidence he stated that he instructed Jackson alongside many other agents to look for buyers of the property.
6. It needs however to be stated that Kamere, by his defence, pleaded that Jackson was appointed by Lucy to look for a buyer of the property.
7. Jackson's case is that he, on being instructed by Kamere on behalf of Lucy, proceeded and obtained Dawda as a buyer of the property. Jackson also pleaded that to convince Dawda to purchase the property, alongside other prospective buyers, using his skills as an Architect he produced a housing development project. That on convincing Dawda to purchase the property that Dawda instructed him to modify the Architectural drawings of the housing project, which he did. It is on that basis he claims Kshs.3,888,000 from Dawda and Vishura. It should however be noted that the property was eventually purchased by Vishura.
8. Jackson's claim for commission Kshs.25 Million is based on the fact that he obtained a buyer for the property, as instructed by Kamere.
9. Jackson by Notice dated 19th July and filed on 21st July 2014 withdrew this suit against the 4th Defendant.

ANALYSIS AND DETERMINATION

10. Having considered the parties pleadings, evidence, documents and written submissions I formed the view that there are only three broad issues for consideration, which are:
 - (a) *Was Jackson appointed to act as agent or Architect in respect to the property?*
 - (b) *If so what are the legal ramification of such appointment.*
 - (c) *Who bears the costs.*
11. On issue (a) above it will be necessary to consider the parties pleadings their documents and the evidence.
12. Before considering those I wish to state that although the Plaintiff's Learned Advocate, by his written submission, repeatedly stated that Jackson offered Lucy and Kamere consultancy services that submission is not supported by Jackson's own pleadings and evidence.
13. I will begin by considering whether Jackson was appointed as an agent to sell the property.
14. When Lucy succeeded in her bid to buy the property she had limited time within which to look for buyer who would offer much more money than that she had put in her bid so that she could use that buyers money to pay Kenya Re and she would be left with the difference as her profit. Acknowledgment of that back ground will assist one understand the amount of pressure on all the parties to clinch that deal, so to speak.
15. Jackson stated that at first Kamere, on behalf of Lucy offered him Kshs. 20 Million, as commission, for finding a buyer for the property. That offer was oral. When Jackson, or any other agent commissioned by Kamere to look for a buyer, failed to find a buyer Kamere

made an offer to Jackson in writing for commission of 50% of what Lucy would get as a Profit, minus the expenses.

16. The subject letter is dated 4th May 2011 and is as follows:

“Our Ref: JKK/TRR/L/020/11 4th May, 2011

Your Ref: KL/01/SC-11/1

JACKSON KAROKI GICHUHI

C/O ACE DESIGN CONSULTANTS

NAIROBI

Dear Sir,

RE: COMMISSION FOR SALE OF LR:209/11154 (SOUTH C SPORTS CLUB).

The above matter refers.

The commission payable by our client is generally 50% of whatever sum that shall be over and above the sum quoted in the tender document. Hence kindly endeavour to procure the highest price for the property. The commission shall be paid on successful completion of the sale.

Yours faithfully

J.K. KAMERE

FOR: KIARIE KAMERE & CO ADVOCATES”

17. Jackson responded to that letter by his which was dated 6th May 2011 which reads as follows:

“6/5/2011

KIARIE KAMERE CO. ADVOCATES

P O BOX 64455-00620

NAIROBI

RE: COMMISSION FOR SALE OF LR 209/11154 (SOUTH C SPORTS CLUB

The above refers,

We are in receipt of your letter as discussed in the prior meeting at your offices.

We have not received any communication from any of the earlier prospective clients we introduced to you but we shall endeavour to procure the buyer.

Yours faithfully

JACKSON K. GICHUHI

ACE DESIGN CONSULTANTS'

18. Lucy by her evidence in chief stated that she had instructed Kamere to look and find an agent who would secure a buyer for the property and for that she paid Kamere Kshs.2,790,000 as the agent's fee. Lucy therefore denied the claim of Jackson that she was bound by Kamere her agent to pay him, Jackson, 50% of the profit she made minus the costs.
19. Kamere on the other hand in his testimony said that Lucy instructed him to get an agent to look for a buyer and confirmed that she would pay such an agent 50% of the profit minus costs.
20. I had an opportunity to observe both Lucy and Kamere when they testified before me. I found Lucy to be truthful in her testimony and I believed her. I did not believe the testimony of Kamere. I found that he was not a truthful witness and more particularly he was not truthful when he testified in his dealings with Jackson. The letter of Kamere reproduced above, stated 4th May 2011, addressed to Jackson make it very clear that he offered Jackson commission for finding a buyer of the property. In that letter Kamere did not make the offer on behalf of Lucy. This is because by then Lucy had paid him Kshs.2,790,000 to pay the agent who would successfully get a buyer.
21. I therefore make a finding that Kamere offered to appoint Jackson, as an agent, to get a buyer for the property. That offer was accepted by Jackson by his letter dated 6th May 2011. It is clear from the evidence, and Jackson specifically confirmed this, that he, Jackson, at the initial stages and until Dawda agreed to buy the property, he did not personally know Lucy. Both Jackson and Lucy confirmed that they first met at the Kenya Airport Authority when they were both seeking approval for development on the property. That approval was necessary because the property is near the Wilson Airport. Dawda had made it a condition that before his purchase of the property that approval be obtained.
22. From the above it becomes clear that Kamere did not engage Jackson on behalf of Lucy. Kamere more than anyone else seemed more anxious to get a buyer of the property before the period given by Kenya Re had expired. No wonder that he gave such a generous offer of 50% of the profit, minus costs, which was beyond the scope of the authority Lucy had given him.
23. Getting back to what I had alluded to before, Jackson confirmed in his pleadings and in evidence that he was appointed as an Estate Agent. In his evidence in chief he confirmed that he had been contracted "to look for a buyer." Further, again in his evidence in chief, he stated, "In addition to serving as an Architect, I also serve as an Estate Agent."
24. On being cross examined Jackson more than once confirmed that in this case he acted as an Estate Agent. He also stated:

"I am an Estate Agent... I said I serve as Estate Agent. I am not licenced Estate Agent... I don't have a licence of Estate Agent."
25. From the above and also from the plaint it is clear that Jackson's claim against the 1st and 5th Defendant is for commission earned by him when acting as an Estate Agent. Even if Jackson's case is that he was consulting to find a buyer- that act of finding a buyer falls within definition of Estate Agent. See Section 2, Interpretation Section of Estate Agents Act Cap 533.

26. I therefore make a finding that Jackson was appointed by Kamere to act as an Estate Agent to find a buyer for the property.
27. Jackson's other claim, which falls under issue (a) above, is that he was appointed by Dawda to modify Architectural drawings he had present previously. It is on that basis that Jackson seeks judgment against Vishura and Dawda of Kshs. 3,888,000 for those Architectural drawings. The issue to determine is, is there evidence of Jackson being appointed to carry out work of Architecture for Dawda or for that matter Vishura.
28. Jackson stated that because more often than not people do not realize the potential of a property it makes it easier to sell a property if as an Architect, like himself, one could draw Architectural drawings for such a property. Jackson said with that realization he draw up a housing project to show to prospective buyers to entice them to buy. Jackson stated that it was his drawing which convinced Dawda to make an offer to purchase the property. Jackson confirmed this when he was cross examined, when he said:
- “The 2nd (Vishura) and 3rd (Dawda) Defendants did not initiate the housing project. They (sic) I used the housing project to get them to buy the property.”***
- Further he said when Dawda was convinced to purchase the property he requested Jackson to make modification to his drawings, which he did.
29. Dawda denied instructing Jackson to make such modification. Dawda stated that he noted that the drawings relied upon by Jackson in this case were different from the drawings he was shown by Jackson. Dawda denied having instructed Jackson.
30. Jackson, from the evidence he presented before Court is that he approached Dawda, together with other consultants, to convince Dawda to buy the property. That meeting, going by the evidence before Court seems to have been one meeting at Dawda's home in Hurlingham Nairobi.
31. The allegation that Dawda engaged Jackson as an Architect was hotly contested by Dawda. Jackson says that he met Dawda alongside other consultants he worked with. The question is, since that engagement was denied, why did Jackson not call those consultants to confirm he was so engaged. In my view Jackson could not rely on the letter written by Bell Associates Limited, which was not signed, to prove his engagement as an Architect. If anything what that letter proves is that it was Bell Associates Limited who carried out revision of the drawings Jackson used to entice Dawda.
32. In my view and a balance of probability there is no evidence of Dawda's engagement of Jackson as an Architect. Just as Dawda stated, appointment of an Architect cannot be so casual without any formality as Jackson would want this Court believe.
33. Having reached the determination of issue (a), that Kamere did appoint Jackson as an Estate Agent to find a buyer of the property and having determined that Jackson was not appointed to act as an Architecture I will proceed to consider issue (b). In that issue I am to determine to legal ramnification of such appointments, if any.
34. The 1st Defendant's Learned Advocate got the law, with regard to appointment of Estate Agent, very correct. The law is found in Section 18 of the Estate Agent Act, Cap 533, which provides:

“Unregistered persons not to practice as Estate Agents

(1) After the expiration of six months form 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 persons -

(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 parties whose activities include the doing of acts by way of such practice are registered Estate Agents.

(c) No body corporate shall practice as an Estate Agent unless all the directors thereof whose duties include the doing of acts by way of such practice are registered Estate Agents.

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

35. As the title of that section show, an unregistered Estate Agent is not permitted to act as such. To act as such when one is not registered is to commit an offence: see Section 18 (2) of Cap 533. It follows that since to act as an Estate Agent when one is not registered is outlawed any contract that one would enter into would be illegal contract which contract would be unenforceable. This was so stated by the Court of Appeal in the case **MAPIS INVESTMENT (K) LIMITED V KENYA RAILWAYS CORPORATION [2006] eKLR:**

“In the case of *Mistry Amar Singh V Serwano Wofunira Kulubya* 1963 EA 408 the Privy Council, on appeal from a judgment and order of the East African Court of Appeal at page 414 of the report, of Lord Morris of Borth-y-Guest in his speech quoted with approval the following quotation from the judgment in *Scott V Brown, Doering, McNab & Co* (3), [1892] 2 QB 724 Lindley LJ at P.728:-

“*Ex turpi causa non oritur actio.*” This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. 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 to 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.”

“In the letter dated 20th November 2002 in which it was stated that the Appellant and Mr. Shompa were nor registered, was produced in evidence by Mr. Shompa, a Director of the Appellant without any denial of the non registration. This was in our view tantamount to an admission of the facts giving rise to the illegality. That being the case it was then a matter of law as to whether the non registration resulted in the illegality of the contract; it is clear that a contract to perform estate agency services can only be legal if entered into with a registered Estate Agent.”

36. From the above it is clear, beyond peradventure, that Jackson is not entitled to the declaration or order he seeks in respect to his alleged commission as an Estate Agent, having himself admitted that he was not a registered Estate Agent, as the law requires.

37. Although I earlier on made finding that Jackson failed to prove he was engaged by Dawda as an Architect. Even if Jackson had proved he was so engaged his claim would have failed, because although his status as an Architect was denied by all the Defendants, he did not prove he is, or in respect to the relevant period was, registered to practice as an Architect. The Legal requirement for registration is found in Section 3 of the Architects and Quantity Surveyors Act Cap 525. It provides:

“Registration on use of titles

Section 3 (1) Subject to the provisions of this Act, no person shall practice under any name, title or style containing any of the words or phrases “Architect”, “Architecture”, “Architectural”, “quantity surveyor” or “quantity surveying” unless he is registered under this Act as an Architect or a quantity surveyor, as the case may be:

Provided that-

(i) Nothing in this Act shall apply to any person in the service of the Government or of the community, or to any person who, for the purpose of preparing any particular piece of work for the Government, is exempted by the Minister from the provisions of this Act;

(ii) A member of an approved professional institution who is entitled under the constitution thereof to display after his name any affix which includes the word “Architect”, “Architecture” or “Architectural” or any abbreviation thereof, may use such affix whether he is so registered or not.”

Section 3 (2) of Cap 525 criminalizes contravention of Section 3 (1) above.

38. Jackson would also fail, in respect to his claim for payment of his alleged Architecture drawing because he did not produce before Court evidence of his compliance to Section 3(1) of Cap 522.

39. There is also need to state that there were contradictions in Jackson’s pleadings which remained unexplained. On the alleged commission for agency fee Jackson interchangeably claimed that amount sometimes from the 4th Defendant and Kamere and at another time he claimed it from Lucy. For example paragraph 18 of the Plaintiff Jackson claimed Kshs.34 Million from Lucy. At paragraph 22 of the Plaintiff he claimed Kshs.18 Million from Lucy. At paragraph 24 he claimed 50% commission from Lucy 4th Defendant and Kamere. At the final prayers of the plaintiff, paragraph 27 (e), Jackson claimed Kshs.25 Million from the 4th Defendant and Kamere. Those inconsistencies defeat Jackson’s claim.

40. Jackson having entirely failed to prove his case costs of the suit will follow the event. The event being the dismissal of his suit. Because no evidence was placed before me to make me depart from the provisions of Section 27 of Civil Procedure Act, the cost will follow the event.

41. In the end this case is hereby dismissed with costs to all the Defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 8TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE 1ST DEFENDANT**

..... **FOR THE 2ND DEFENDANT**

..... **FOR THE 3RD DEFENDANT**

..... **FOR THE 4TH DEFENDANT**

..... **FOR THE 5TH DEFENDANT**