



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 599 OF 2014

VINCENT M. KIMWELE.....PLAINTIFF

- VERSUS -

DIAMOND SHIELD INTERNATIONAL LIMITED...DEFENDANT

JUDGMENT

1. The plaintiff, **Vincent M. Kimwele**, sued **Diamond Shield International Limited**, the defendant seeking orders for general and aggravated damages for breach of contract. The defendant was served with summons and plaint through registered post. Interlocutory Judgment in default of appearance was entered in favour of the plaintiff. The case was formally proved before **Justice Ochieng** when the plaintiff and his witness **Titus Munyithya** testified. The case was closed before **Justice Ochieng** but the responsibility of writing this judgment fell on me because **Justice Ochieng** was transferred from this court.

PLAINTIFF'S CASE

2. The plaintiff relied on his witness statement as his evidence in chief. That evidence was that on or about **21st June, 2013**, the plaintiff received a call from a lady called **Rosemary Njeri Kamanga (Rose)** who inquired from the plaintiff whether he was in a position to supply Norton Antivirus version 5, 3 user, to the defendant. The plaintiff requested for time to source the anti-virus. In his written statement, the plaintiff stated:

*“On or about **22nd June, 2013**, I went around sourcing for anti-virus and upon confirming that I could find the same, I **confirmed to Rose** that I was able to deliver the anti-virus. She said that she was satisfied, and I believe she went ahead to inform **Diamond Shield (defendant)**”.*

3. The plaintiff testified that he obtained confirmation from a company called **Invent Computer Technologies Ltd (Invent)** that he could collect from them the anti-virus within 24 hours of receiving the local purchase order (LPO).

4. The plaintiff testified that **Rose** delivered to him the defendant's LPO addressed to the plaintiff and that delivery occurred at the bus stage of Ambassador Hotel in Nairobi.

5. The plaintiff stated that he yet again obtained confirmation from Invent that they could supply him with the anti-virus. The plaintiff also stated that he telephoned the defendant's procurement manager by the name of **Jane**, who gave him a go-ahead to make delivery.

6. However, the plaintiff stated that it was on attending the defendant's premises on **28th June, 2013**, in the company of **Paul Macharia**, when the defendant's procurement officer, **Jane**, requested that he return the LPO. The plaintiff declined. According to the plaintiff, **Jane** did confirm to him that the LPO he had in his possession was valid.

7. In his evidence, the plaintiff stated that he was shocked by the defendant's email of **3rd July 2013**, by which the defendant attached a letter dated **26th June, 2013** which letter purported to cancel the LPO in his possession. By his evidence, the plaintiff stated that the letter attached to that email was backdated.

8. The plaintiff denied the content of that letter and denied that he had a meeting with the defendant on that date when a discussion on cancellation of the LPO took place.

9. The plaintiff stated that the alleged cancellation by the defendant destabilized and damaged him emotionally, psychologically, financially

and physically. That the cancellation painted him in bad light in that it spoiled his business reputation amongst the people he had involved in the transaction. The plaintiff also stated that he had abandoned all that he was doing for a living and had lost business opportunities because of the time he spent in pursuing the defendant's transaction. That in particular the plaintiff lost a land agency transaction, a school feeding supply tender and his usual business.

10. The plaintiff witness **Titus Muniyithya** in evidence, stated that he had known the plaintiff for about 3 years during which period they had both transacted in various business transactions.

11. The witness stated that in **2013** he contacted the plaintiff with a view to both of them collaborating in the sale of properties Castle Plots No. 291 and 296 at a total sale price of **ksh. 5,000,000**; and a property at Githurai 4 which had the sale price of **Ksh 30,000,000**. The witness stated that the plaintiff's **commission** for those transactions was **ksh 4,100,000**. In his evidence, this witness further stated:

*“the transaction with **Vincent Kimwele** did not proceed because he appeared to be too engaged elsewhere. He lost out on opportunities of earning the commission stated above”.*

ANALYSIS

12. The plaintiff's claim is that he entered into a contract with the defendant to supply the defendant anti-virus for the value of **Ksh 15,800,000** as per the defendant's LPO dated **25th June, 2013**. That the defendant in breach of that contract cancelled the LPO.

13. Was there a contract between the plaintiff and the defendant?

14. The very rudimentary law of contract provides that there must be an offer and acceptance for the formation of a legally binding contract.

15. The author **H. G. Beale, W. D. Bishop and M. P. Furmston** in the book entitled **Contract Cases and Materials** state that:

“the traditional method of determining whether the parties have in fact agreed to be bound by a contract is to ask whether one party had made ‘offer’ and the other has ‘accepted’.”

16. The plaintiff's evidence is that a lady called **Rose** telephoned him and inquired whether he could supply an anti-virus. He requested for time to confirm. When he confirmed that he could, he met **Rose** at a bus stage and was given an LPO of the defendant. That LPO was addressed to him.

17. It is clear that upto this stage the plaintiff had not met the defendant. It is for this reason that I find that there was no meeting of the mind between the plaintiff and the defendant. In other words there was no consensus **ad idem**. The defendant made an offer to **Rose**, and it seems that **Rose** requested the defendant's LPO to be addressed to the plaintiff. **Rose** was the go-between person, between the plaintiff and the defendant.

18. It is for that reason that I find the contract failed to have the offer and acceptance. The American Jurist **Oliver Wendell Holmes Jr.** wrote on the meeting of minds as follows:

“We talk about a contract as a meeting of the minds of the parties, and hence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing.”

19. In the decision **Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ** it was held:

“One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English Law – I say nothing about the laws of other countries – to make a contract.”

20. In this case, at the Bar, there is no meeting of the minds of the plaintiff and the defendant. Therefore, no contract was formed.

21. A closer examination of the documents relied upon by the plaintiff reveals that the plaintiff, even if there was an offer, failed to communicate his acceptance as required under the defendant's LPO. The defendant's LPO produced as an exhibit by the plaintiff has the following statements at the bottom thereof:

“purchase order comments 1. if you have any questions about this order, please 1. contact the address above. 2. Confirm receipt of this

order in writing to the address above not later than 3 days after receipt of this order. 3. Furnish us (the defendant) with a delivery schedule not later than 7 days of this order.”

22. The plaintiff did not show to this court that he complied with no. 2 & 3 of the defendants conditions on the LPO. In other words the plaintiff did not prove to this court that he accepted the defendant’s offer to supply anti-virus. Such confirmation would have been important to prove acceptance of the offer, if, as stated by the plaintiff, the LPO although in the plaintiff’s name was sourced by a lady called **Rose** who delivered it to the plaintiff at a bus stop.

23. It follows from the above that no contract existed between the plaintiff and the defendant because the plaintiff did not prove his acceptance of the contract.

24. The plaintiff witness testified that he and the plaintiff were transacting sale of land from which they were expecting to earn a commission, but that the plaintiff lost on that commission because of his engagement in supplying the anti-virus to the defendant.

25. The plaintiff’s witness essentially testified that he and the plaintiff acted as estate agents. In acting as an estate agent, no proof was shown to the court that they were authorised under the Estate Agents Act Cap 533. Such engagement as Estate Agents without registration is illegal as provided under **Section 18 of Cap 533**. That section 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 persons –

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

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

(c) No body corporate shall practise 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.

26. The Court of Appeal in the case ***Mapis Investment (K) Limited vs Kenya Railways Corporation [2006]eKLR*** was faced with facts where a party was claiming fees due to him as an estate agent, and that party failing to prove he was registered under Cap 533 led to the court reaching the following holding:

“After careful consideration we have decided that it is clear from the evidence before the superior court and the provisions of Section 18 of Cap 533 that, if the contract alleged by Mapis and Mr. Shompa to exist, did in fact exist, the conduct of Mr. Shompa and the appellant company was in breach of express provisions of the statute and illegal. In view of this we are not prepared to countenance the award of a further sum of Kshs.17.5 million plus interest at 34% to the appellant as claimed in the memorandum of appeal read with the plaint.”

27. The court in that case, proceeded to state as follows:

*“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 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.”

28. Similarly, in this case the evidence that the plaintiff lost a lucrative transaction of selling land will not be considered when the plaintiff has not proved he was registered under Cap 533.

29. On the whole the plaintiff failed to prove his case on a balance of probability and the same is dismissed with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of June, 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant