



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.361 OF 2014

DIPAK TANK.....PLAINTIFF

VERSUS

PRIDE INN HOTELS & CONFERENCE LIMITED.....DEFENDANT

R U L I N G

1. The Notice of Motion dated 22nd April 2015 seeks orders that the Plaintiff's suit be struck out with costs to the Defendant, and that the costs of the application be provided for. The Defendant contends that the Plaintiff discloses no reasonable cause of action against the Defendant as it is premised on an illegal contract; and that there is therefore no privity of contract between the parties.

2. The application is expressed to have been filed pursuant to Order 2 Rule 2(a) Order 51 Rule 1 of the Civil Procedure Rules, 2010, but since Order 2 Rule 2(a) Civil procedure Rules in non-existent, I take it that the application was intended to be brought under Order 2 Rule 15(1)(a) of the Civil Procedure Rules.

3. The application was opposed by the Plaintiff in terms of his Replying Affidavit sworn on 27th July 2015. His contention is that he was appointed in writing by the Defendant as one of its agents in respect of the sale of the Defendant's property known as LR No. 209/2252/3 located in Parklands. Their Agency Agreement provided that he would be paid a commission of 3% upon successful completion of the transaction. Thus, it was the Plaintiff's contention that having performed his side of the bargain, he is entitled to the sum claimed herein. He believes therefore that he has a good case that should proceed to hearing and disposal on the merits.

4. I have carefully considered the application in the light of the pleadings and the written submissions filed herein by the parties. The Defendant's chief contention is that the suit is premised on an illegal contract, from the standpoint of Section 18 of the Estate Agents Act, Chapter 533 of the Laws of Kenya which provision reads:

“.....No individual shall practice as an estate agent unless he is a registered estate agent.”

5. The Defendant's posturing is therefore that, since there is nothing in the Plaintiff's pleading to show that he was a registered estate agent at the material time, he cannot be heard to claim a commission when it is evident that he acted in contravention of the law. To buttress this argument, the Defendant relied on the case of **MAPIS INVESTMENT (K) LIMITED VS KENYA RAILWAYS CORPORATION**

[2006] eKLR in which the Court of Appeal declined to award the Appellant a sum of Kshs. 17.5 Million on the ground that it was not a registered agent and held that the alleged contract forming the basis of the claim was illegal.

6. The Plaintiff, on the other hand urged the Court, on the basis of the provisions of Article 48 of the Constitution of Kenya, to be allowed his day in Court. He relied on the following authorities in support of this argument:

(a) Savings & Loans (K) Lt v Kanyenje Karangata Gakombe & Another [2015] e KLR

(b) Metro Petroleum Ltd vs Wamco petroleum Ltd [2006] eKLR

(c) Equatorial Commercial Bank Ltd vs Jodam Engineering Works ltd 7&2 others [2014] eKLR.

(d) Saudi Arabian Airlines Corporation vs Express Services Ltd [2014] eKLR

(e) DT Dobie & Co. (K) Ltd v. Muchina [1982] KLR 1.

7. In response to the argument that his suit is premised on an illegal contract, the Defendant cited the case of **Asaph Gathugu Mati vs Kenya Finance Corporation & Another HCCC NO. 199 of 2003** and contended that having made the representations in the Agency agreement, the Defendant is estopped from denying the existence of those facts, and that the “without prejudice” rule is not absolute. Thus, he urged that all these are issues worth canvassing at the hearing, and not by way of affidavits as has been proposed by the Defendant.

8. The function of the Court is to hear parties for a determination on the merits, reasons wherefore it ought to act with abundant caution before striking out a pleading pursuant to Order 2 Rule 15 of the Civil Procedure Rules. This is not only a constitutional imperative but has also been well articulated in case law, such as the case of **DT Dobie Vs Muchina [1982] KLR1** in which Madan JA (as he then was) stated:

“The Court ought to act very cautiously and carefully and consider all facts without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage the Court ought not to deal with any merit of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually informed so as to deal with the merits....”

9. It is also noteworthy that the application, having been filed under Rule 15(1) (a) of Order 2, Civil Procedure Rules, no evidence is admissible in support thereof by dint of Rule 15(2) thereof. Yet it is the argument of the Defendant in its submissions that:

(a) There is no documentary evidence from the plaintiff that proves that the Defendant was the registered owner of **LR 209/2252/3** as at the time of the alleged sale to give it the legal capacity to sell the same on its behalf.

(b) That the Plaintiff has only attached an annexure marked as **DP 2** from the purported purchaser to confirm the purchase but had not availed any evidence of payment.

(c) That there is nothing from the Plaintiffs’ pleading to show that he was a registered agent.

10. From the foregoing it is plain that issues have been raised in the Plaintiff’s claim that require proof by way of evidence for the Court to satisfy itself as to the merits or otherwise of the Plaintiff’s claim. Indeed it would require evidence for the Court to make determination as to whether or not the alleged contract between the parties is illegal. The case of **MAPIS INVESTMENT (K) LTD VS KENYA RAILWAYS CORPORATION** that was relied on by the Defendant was taken through full hearing, and the Court of

Appeal relied on the evidence adduced before the lower Court in making its findings and conclusions. It cited with approval the case of **Scott v. Brown, Doering, McNab & Co. (3) (1982) 2 QB 724** in which Lindley LJ stated:

“... If the evidence adduced by the Plaintiff proves the illegality the Court ought not to assist him.”

11. It remains to be proved that the Plaintiff was practising as an estate agent for purposes of section 18 of the Estate Agent Act. Accordingly, I am satisfied that the issue of illegality, including whether or not the letter dated 4th April 2012 is precluded from evidence on account of the “without prejudice” rule, are issues that ought to be determined at the hearing of the substantive suit. Indeed, in the **DT Dobie** case, the Court of Appeal expressed the view that the Court should aim at sustaining rather than terminating a suit unless the suit is so weak that it is beyond redemption, and in the case of **Lynette B. Oyier & Others vs Savings & Loan Kenya Limited**, the court held that:

“... the function of the Court in its jurisdiction of striking out pleading ... is not to determine whether the action or Defence as framed will or will not succeed at the trial. That is the function of the trial Court after hearing evidence and legal submissions. The function of the court under that jurisdiction is to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose appropriate sanctions if they have not been so formulated.”

12. In the premises, I find no merit in the Notice of Motion dated 22nd

April 2015 and would, accordingly, dismiss it with costs.

It is so ordered.

Dated, signed and delivered at Nairobi this 8th day of July 2016.

.....

OLGA SEWE

JUDGE