



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, J.J.A.)

CIVIL APPEAL NO. 4 OF 1991

BETWEEN

RAJDIP HOUSING DEVELOPMENT LIMITED APPELLANT

VERSUS

WACIRA WAMBUGU carrying on business as

WAMBUGU & COMPANYRESPONDENT

(Appeal from the Order of the High Court of Kenya at Nairobi (Mr. Justice Bosire) given on the 14th day of November, 1990

in

MISC. CIVIL CASE NO. 651 OF 1990 (O.S.)

JUDGMENT OF TUNOI, J.A.

Rajdip Housing Development Limited (hereinafter referred to as "the appellant") entered into a Sale Agreement dated March 30th, 1990 to sell to Ufundi Co-operative Savings and Credit Society Limited (hereinafter referred to as "the Society") the property known as L.R.No.209/10567, situate along Uhuru Highway, Nairobi, at a consideration of Shs.225,000,000/=. Mr. Wacira Wambugu, advocate of Messrs. Wambugu & Company (hereinafter referred to as "Wambugu") acted as advocate for the appellant while Mr. Sutish Gautama acted for the Society.

It was a term of the Sale Agreement that Shs.125,000,000/= represented the developments and expenses and the balance of the purchase price of Shs.100,000,000/= would be paid by instalments as stipulated in the Agreement. The Agreement further provided that the Society would procure Shs.100,000,000/= from the Co-operative Bank of Kenya Limited who would create a charge over the said property. The loan was to be released as follows:

- 1.The first K.shs.50m. would be released in two tranches within an interval of two weeks; and;
2. The balance of K.Shs.50m. would be released in stages against Architectural certificates of work done.

The first instalment of Shs.25,000,000/= was remitted to Wambugu who received it, deducted his fees

and passed over the balance to the appellant. The second instalment of Shs.25,000,000/= was sent to him soon thereafter and he retained it. He has declined to pay it over to the appellant alleging that it formed part of Shs.40,000,000/= to be paid to various firms, namely, Lobi Firm Limited, Town Properties Limited and Interconsult Engineers as commissions and/or fees pursuant to his firm's professional undertaking.

It was the appellant's case in the superior court that it never employed or sought services nor had any dealings whatsoever with Lobi Firm Limited or any firm or at all regarding commissions and/or fees other than in terms of the Agreement. Its relationship between it and Wambugu has been that of Advocate and Client only in respect of which only Advocate and Client fees are recoverable. It asserted that it gave no authority to Wambugu to appoint Lobi Firm Limited as its commission agent nor was it consulted before the said appointment. The appellant further contended that Wambugu had no authority to negotiate the sale of its property L.R.No.209/10567 or to bind it in any way without its agreement, nor had it held them out as having such authority.

The learned judge Bosire, J. identified the issue he had to grapple with as: Did the appellant authorise or approbate in the appointment of Lobi Firm Limited as commission agent for the purposes of securing a purchaser and negotiating on the purchase price for the subject property? The learned judge, in a ruling where documentary evidence is fully and carefully discussed, answered the issue in the affirmative. He also held that the willingness on the part of the appellant to negotiate and to make an offer of Shs.6,000,000/=, and later Shs.6,500,000/= to Lobi Firm Limited was not without consideration as it was not intending to make an ex gratia payment. He found it a firm offer made, and in writing, for payment of a designated sum for services it knew it had received. The learned judge stated:-

"Although the sale agreement talks about fees for professional services which had been and would be rendered, it is silent on other expenses. As I said earlier they would not properly be included in the agreement as they did not concern the purchaser. The agreement cannot, therefore, be relied upon as a basis for holding that because the commission the defendant says was payable to Lobi Firm Ltd was not provided for, then it is not payable."

The upshot of the foregoing holding was that the learned dismissed the application by way of Origination Summons under Order 52 Rule 4 (1)(b) of the Civil Procedure Rules whereby the appellant had sought orders against Wambugu to deliver and pay to it Shs.25,000,000/=, interest thereon at 19% p.a. from July 4th, 1990 and costs of the proceedings. From this ruling, the appellant appeals.

At the hearing of this appeal, Mr. Nagpal, who appeared for the appellant, made various submissions as regards grounds 1 to 4 of the grounds of appeal. He submitted that the learned judge was in error in failing to appreciate that in interpreting the Agreement for Sale he could not call or rely on any extrinsic evidence to add to or detract from the terms of the Agreement and that he could not imply into the said Agreement a term for payment of commission of Shs.25,000,000/= when the agreement was silent with regard thereto. He averred that the purchase price could not and did not include any element of commission and Wambugu could only disburse sums of money as stipulated in the Sale Agreement and not otherwise.

In all fairness to the learned judge, he appreciated that the Sale Agreement spelled the contractual relationship between the appellant and the Society. Wambugu and Lobi Firm Limited were strangers to the transaction; and, that the commission which the appellant would pay a third party which did not affect or touch on that relationship would be irrelevant in the Sale Agreement. However, in agreement with Mr. Nagpal, I find, with respect, that the learned judge was in error and did misdirect himself when he considered the appellant's conduct subsequent to the signing of the Sale Agreement, V. M. Patel's letter and surrounding circumstances as material for the conclusion that "it (the appellant) was aware of, was consulted about and approbated in the appointment of Lobi Firm Limited to secure and negotiate with the purchaser the price of the subject property." Since the Agreement of Sale was unambiguous, it was wrong to hold that it should have been construed in the light of surrounding circumstances. However, it is possible, where a contract is ambiguous, to adduce evidence to show a mistake (Cheleta Coffee Plantations Ltd. v. Mehlsen) [1966] E.A. 203) but evidence is not admissible, where a contract is

unambiguous, to show the intentions of the parties during the negotiations. As I have said, the Sale Agreement, in this instance, was quite unambiguous and the point of there being a mistake was not taken.

At least so far as the present case is concerned, nothing would have been easier, had it been the intention, than to have added a few clauses or words to the Sale Agreement indicating that various named firms were to receive commissions and fees of Shs. 40,000,000/=. In my view, Wambugu has been unable to show that the Sale Agreement is not a complete record of the contract or that other contractual terms additional to those in the Sale Agreement were agreed upon and intended by the appellant, the society and himself to form part of the contract. Grounds 1 to 5 of the appeal must, therefore, succeed.

The other main ground of appeal is that the learned judge erred in receiving the file in respect of another case for perusal for a better appreciation of the matters in controversy in the instant case. There is, really, no substance in this ground because the Plaintiff's advocate did not object to the request of Wambugu for the production of the said file.

As far as grounds 6 and 7 are concerned, there is no dispute that Wambugu was the appellant's advocate in the sale of the subject property. It is clearly stated so in Clause 8 of the Sale Agreement. There is no evidence whatsoever to suggest that he was authorised to employ commission agents or other persons in the sale transaction. His letter dated August 21, 1989 appears to be totally without the authority or knowledge of the appellant. In normal circumstances it was expected to have been copied to the appellant, but surprisingly it was not. These grounds of appeal must succeed.

Generally, an instrument must be read most strongly against the party who prepares it and offers it for execution. This is the rule which is expressed in the maxim verba fortius accipiuntur contra preferentem. See Halsbury's Laws of England, 3rd Edn. at page 394. Also unless otherwise shown the presumption is that the advocates for the vendor prepare the Agreement of Sale. In the circumstances Wambugu is presumed to have prepared the agreement of sale of the subject property and, even if not, he must have been an active participant in its preparation. Could he have forgotten to safeguard his own interests and those of the named firms, especially Lobi Firm Limited to whom, eight months before the execution of the Agreement of Sale, he had given his irrevocable instructions to sell the subject property and confirmed payment of its commissions and fees? I think it would have been very unlikely if the issue of commissions ever existed. So, Wambugu ought to have inserted clear words in the Sale Agreement in order to shield himself. This, he did not do and the maxim must come into operation.

Before concluding, I wish to make one observation. My close reading of H.C.C.C. No. 4628 of 1990 (O.S.) between Lobi Firm Limited, as Plaintiff, and Wambugu & Company, as defendant, shows that Wambugu induced Lobi Firm Limited to sue him and his firm so as to enforce payment by the appellant by means of Third Party Proceedings. That was done in anticipation of the results of the suit, the subject matter of this appeal.

In my view, Wambugu has no basis in law or otherwise to hold onto the sum of Shs. 25,000,000/= and he must release it to the appellant.

For these reasons, I would allow this appeal. There will be an order in the terms proposed by Gicheru, J.A.

Dated and delivered at Nairobi this 15th day of March, 1996.

P. K. TUNOI

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR