



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 100 OF 2015

ADEN ISMAIL HASSAN.....1ST PLAINTIFF

MUGWERU JOSEPH MWEA.....2ND PLAINTIFF

KAHAMBI KALUMBE KADZAA.....3RD PLAINTIFF

ALPHONCE KYALO MUNYANGI.....4TH PLAINTIFF

DOUGLAS MWAFUNDO DZOMBO.....5TH PLAINTIFF

HISH BUNO KARANE.....6TH PLAINTIFF

VERSUS

MOHAMED AMADA ISAAC.....1ST DEFENDANT

AMIDA ISAAC NIZAMDIN.....2ND DEFENDANT

OMAR ISAAC NIZAMDIN.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Complaint dated and filed on 25th June 2015 as amended on 15th September 2015 (and filed on 5th October 2015), the six Plaintiffs urge this Court to issue an order of mandatory injunction compelling the Defendants to pay the Plaintiffs their 10% Commission as agreed in an agreement dated 14th August 2014. They also pray for the costs of this suit as well as interest at Court rates.
2. The Plaintiffs aver that at all material times, they were commissioned agents contracted by the Defendants to scout for and obtain prospective buyers for their parcel of land on Plot No. Mgumo Patsa/Mazeras/456. On or about 14th August 2014, Mohamed Amada Isaac (the 1st Defendant) did enter into a written agreement on behalf of himself and the 2nd and 3rd Defendants wherein he contracted the Plaintiffs to look for prospective buyers of the said Plot at an agreed Commission of 10% of the Purchase price.
3. Thereafter the Plaintiffs presented the prospective buyers and an agreement was reached whereupon the subject parcel of land was bought at Kshs 27,000,000/-. The Defendants have however since declined to pay the 10% Commission to the Plaintiffs and hence this suit.
4. In his Written Submissions of Defence dated 5th October 2015 and filed herein on 8th October 2015, the 1st Defendant denies that the Plaintiffs were commissioned agents who were contracted to scout for and obtain buyers for the parcel of land known as Mgumo Patsa/Mazeras/456. He denies that he has ever met any of the Plaintiffs and/or that he entered into any written agreement with them as alleged or at all.
5. On their part in a joint Written Statement of Defence Amida Isaack Nizamdin (the 2nd Defendant) and Omar Isaack Nizamdin (the 3rd Defendant) also deny that the Plaintiffs were commissioned agents and/or that they were contracted to scout for buyers for the stated parcel of land or at all. The two also deny that they executed any agreement with the Plaintiffs as alleged or at all. It is their case that as at 14th August 2014, they had no interest in the said parcel of land and could not therefore have entered into any agreement in respect thereon.

The Plaintiffs Case

6. At the trial herein the Plaintiffs called three witnesses in Support of their case.

7. PW1-Douglas Mwafungo Dzombo is the 5th Plaintiff herein. He told the Court that he is a "Land Dealer". He produced an authority signed by his co-Plaintiff dated 25th June 2015 in which his colleagues gave him authority to testify on their behalf.

8. PW1 testified that he knew the 1st Defendant who has all along been his neighbour. The 2nd and 3rd Defendant are a sister and brother respectively to the 1st Defendant. Sometime around 5th August 2014, PW1 met the 1st Defendant who in turn asked him to scout for buyers for their parcel of land No. Mgumo Patsa/Mazeras/456. The 1st Defendant asked for Kshs 28 Million and PW1 and his co-Plaintiffs immediately started looking for a buyer.

9. After they got a buyer, they went to an Advocate on 14th August 2014 together with the three Defendants. At the said Advocates office, they executed an agreement for their Commission. The buyers were directors of a company known as Amana Petroleum Co. Ltd and had come from Nairobi. The buyers came with their Advocate and a Surveyor and the Plaintiffs took them to Uwanja wa Ndege where they saw the Plot of land in the presence of the Defendants.

10. After the buyers and the Defendants agreed on a purchase price of Kshs 27 Million, the parties went away and the Plaintiffs waited for their payment but they never got any. PW1 testified that after waiting for sometime, they saw the parcel of land being developed. When they acquired from their Advocate what was going on, he told them he had no idea.

11. On 24th February 2015, PW1 and his colleagues carried out an official search on the land. The same revealed that the land had changed hands from the name of the Defendants' father to Amana Petroleum Ltd, the same buyers they had introduced to the Defendants. Efforts to get payment from the 1st Defendant failed and they subsequently came to Court seeking payment of their Commission.

12. PW2- Shimaka Leonard Nechesa is an Advocate of the High Court. He recalled that on 14th August 2014, the 1st Defendant retained him to act as the Vendors Advocate towards the sale of their family property known as Mgumo Pasta/Mazeras 456. On that date the 1st Defendant went to his office with the six Plaintiffs who were a team of agents.

13. PW2 testified that the 1st Defendant instructed him to prepare an instruction note indicating that he would pay the agents a Commission of the purchase price. Thereafter, he prepared a Sale Agreement in which the Defendants were the Vendors while Amana Petroleum Ltd were shown as the purchasers. The said purchasers were sourced by the team of agents.

14. PW2 further told the Court that the transaction was however never completed through his office. He came to learn that it was completed in the offices of Mokaya Ogutu & Company Advocates. He later came to learn that the transaction went through and the property was transferred to Amana Petroleum Ltd.

15. PW3- Aden Ismail Hassan is the 1st Plaintiff herein. He told the Court that he sells properties and largely repeated the evidence of PW1 on how they met the Defendants and secured a buyer to their property. He reiterated that the Defendants failed to pay them their Commission despite there being an agreement in writing to that effect.

The Defendants' Case

16. The Defendants called one witness in support of their case.

17. Dw1- Mohamed Amada Isaac is the 1st Defendant herein. He told the Court that he knew the 1st and 5th Plaintiffs herein. The other Defendants were respectively his sister and brother. DW1 testified that the land in question was formerly registered in the name of their father- Isaac. Their father died and the three of them inherited the property through a Succession Process.

18. DW1 told the Court that it was true he had asked the 1st and 5th Plaintiffs to help him secure a buyer for the said property. They signed an Agreement on 14th August 2014 which required them to get a buyer within thirty days. The agents however failed to do so within the agreed time. They only brought one more than a month later.

19. DW1 told the Court that they initially failed to agree as the family asked for Kshs 30,000,000/- while the prospective buyers had only Kshs 26,000,000/-. Later on in December of 2014, one Yassin of Amana Petroleum called DW1 and they were able to agree. They executed an Agreement of Sale on 17th January 2015.

Analysis and Determination

20. I have considered the pleadings, the testimonies of the witnesses herein as well as the evidence placed before me. I have in the same vein perused and considered both the Written Submissions and List of Authorities to which I was referred by the Learned Advocates for the parties.

21. The Plaintiffs aver at paragraph 3 of the Plaintiff that at all times material to this suit, they were commissioned agents contracted by the Defendants to scout for and obtain prospective buyers for their Parcel of land on Plot No. Mgumo Patsa/Mazeras/456. As such commissioned agents, they entered into a contract with the Defendants to look for prospective buyers for the said parcel of land at an agreed

Commission of 10% of the Purchase Price.

22. According to the Plaintiffs, they carried out their responsibilities under the Agreement and the Defendants sold the land to an entity known as Amana Petroleum (K) Ltd for a sum of Kshs 27 Million. As per their Commission Agreement, the Plaintiffs demanded from the Defendants payment of the sum of Kshs 2.7 million being 10% of the purchase price as agreed but the Defendants have to-date refused to pay the same.

23. In support of their position, the Plaintiff produced (as Pexh 1) an Instruction Note and/or Authority executed by the 1st Defendant and themselves wherein the 1st Defendant instructed Messrs Marende Birir & Company Advocates to pay them 10% of the Purchase price if they deliver the buyer within 30 days from the date of the Note which is shown therein as 14th August 2014.

24. In their pleadings and at the trial hereof the 1st Defendant did not seriously contest the fact that he had given such instructions. It was however his case and that of the other Defendants that the 2nd and 3rd Defendants did not execute any agreement to that effect with the Plaintiffs. It was further his case that the Plaintiffs did not produce a buyer within 30 days as stipulated in the Instruction Note.

25. From the material placed before me, it was apparent to me that the Plaintiffs played a role in introducing the eventual buyer of the property to the 1st Defendant. While the Sale transaction was certainly not concluded within 30 days, the 1st Defendant was at pains during cross-examination herein to explain how he came to be contacted by a director of the said Amana Petroleum(K) Ltd as a result whereof they concluded the Sale Transaction and sold the land at Kshs 27 Million.

26. Be that as it may, the Defendants in their pleadings and at the trial herein also disputed the Plaintiffs entitlement to the sum of Kshs 2.7 Million as Commission on another basis, that the Plaintiffs were not registered Commission agents at the time of executing the Instruction Notes pursuant to which they sought to be paid the 10% Commission.

27. The Estate Agents Act, Cap 533 of the Laws of Kenya provides for the registration of persons who, by way of business, negotiate for or otherwise act in relation to the selling, purchasing or letting of land and buildings erected thereon. Section 2 thereof provides that a person shall be treated as being a practicing agent if he or a partnership of which he is a member:-

a. Receives payment for acts done by way of practice as an estate agent by him, or by a partner of his, or by an employee of his or of the partnership or by any person acting on his behalf, or

b. Holds himself or itself out as being prepared, in return for payment to undertake the doing by any such person of acts by way of practice as an estate agent.

28. The reference "practice as an estate agent" is defined at Section 1 of the Act to mean:-

"The doing in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, or any of the following acts:-

a. Bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower, or

b. Negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals."

29. From the material placed before me the acts said to have been performed by the Plaintiffs herein and for which they demand payment from the Defendants are consistent with those of an estate agent as defined under the Act. The Plaintiffs did not however place any evidence before me to show that they are registered as such even after it became clear from the pleadings that the Defendants were challenging their claim to be such agents.

30. It is to be noted that under Section 18(1) and (2) of the Estate Agents Act aforesaid no individual is permitted to practice as an estate agent unless he is registered as so and anyone who does so is guilty of an offence and liable to a fine and/or imprisonment.

31. In the circumstances, if it was to be established that the Plaintiffs were in actual fact engaged in the practice of an estate agent without registration, their conduct would not only be in breach of the express provisions of Section 18 but also illegal.

32. As it were, 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 involving the aid of the Court is himself implicated in the illegality. And 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 (see *Mistry Amar Singh -vs- Servano Wofumina Kulubya (1963) EA 408*).

33. Accordingly, while I was prepared to accept that the Plaintiffs executed some sort of agreement with the 1st Defendant, I do not think the same is enforceable in the absence of proof by the Plaintiffs that they were registered as estate agents as required under Section 18 of the Estate Agents Act.

34. The upshot is that this suit cannot succeed. The same is dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 24th day of January, 2019.

J.O. OLOLA

JUDGE