

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJAIDO
HIGH COURT CIVIL APPEAL NUMBER E008 OF 2023
PETER MWANGI MUTONYA & DANIEL KARANJA NJOROGE
T/A Pepisam Properties & Agencies
APPELLANT

VERSUS

LUCY GATHONI KUSERO
RESPONDENT

JUDGEMENT

(Being an appeal from the Judgement of the Small Claims Court at Kajiado, by Hon.R.Kinyatta signed on 27th October 2022 but delivered on 8th November, 2022 in Kajiado SCC No E105 of 2022)

The appellant (Claimant) before the magistrate court filed a suit against the respondent vide statement of claim dated 22nd august 2022 seeking judgement against the respondent for ksh. 825,000 plus cost and interest. The appellant contend that he had entered into an agency agreement with the respondent where the appellants were to advertise and sell her parcel of land known as NGONG/NGONG/39315 on her behalf at an agreed commission of 5 % of the purchase price. It was a term of the Agency Contract that upon securing a buyer for the said property, the claimants would be entitled to the agreed commission.

The claimant avers that upon introduction of the would-be buyer, one Hampton Construction Company Limited to the respondent, the respondent went behind the claimant back and sold the property to the said company at 16,500,000 and failed to remunerate the claimant for the work done.

The respondent denied the claim contending that she never signed the contract/agreement dated 11th January 2021 admitting though that the claimant had approached her and

offered to sell the property on her behalf to potential buyer which offer she accepted. The respondent stated that the claimant introduced one Leila Abdi and not Hampton Construction Company Limited. That the company was introduced by **Joram Mwangi** who in turn was introduced to the respondent by **David Kanene Kiniti**.

The matter proceeded before the trial court who found no evidence to support the claimant claim and dismissed the suit with cost.

Dissatisfied with the decision of the court, the claimant filed the present appeal setting out the following grounds;

- 1 THAT the learned Magistrate erred in law and in fact by concluding that the appellants have not proved their case on a balance of probabilities despite uncontroverted evidence on the same*
- 2 THAT the Learned trial magistrate erred in law and fact by disregarding the totality of the appellants pleadings, submissions and thus arrived at a materially unsupported findings of fact and law.*
- 3 THAT the Learned trial Magistrate erred in law and fact by failing to discredit the respondent witnesses as they were not credible and committed perjury*
- 4 THAT the learned Magistrate erred in law and in fact in failing to find that the appellants had a good claim which raised triable issues.*
- 5 THAT the Learned Magistrate erred in law and in fact by addressing herself to issues that were not part of the pleadings.*
- 6 THAT the Learned Magistrate erred in law and in fact in failing to hold that one has to be an estate Agent to enter into an enforceable agreement for sale of property.*
- 7 THAT the trial magistrate erred in law and in fact in only narrowing the issues for determination to two against the submitted issues for determination.*

The appellant therefore prays that the appeal be allowed and the judgement of the Small Clam Court be set aside and

substituted thereof with judgment in favour of the appellant plus cost and interest.

Claimant evidence in brief

According to the evidence on record and the statement of the claimant adopted as evidence in chief, the claimant on 11th January 2021 entered into an agency agreement with the respondent to sell her parcel of land known as Ngong/Ngong/39315 on her behalf for a commission of 5% of the purchase price. The evidence before the adjudicator shows that the claimant introduced the respondent to one Leila Abdi as the would-be purchaser but later found out that the land had been sold out to Hampton Construction Company Limited. Her investigations established that the director of the company was one Mohamed Abdulrahim Hassan allegedly the husband of Leila Abdi.

In cross-examination, the witness told the court that he introduced Leila Abdi to the respondent and that Hampton Constructors is not known to her nor is Mohamed Hassan. That the agency agreement was signed at the respondent house after the parties agreed on the purchase price of 16,500,000. He admitted that he was a registered estate agent.

Claimant witness number 2 Daniel Karanja Njoroge testified and told the adjudicator that the respondent had visited pepisam property limited offices and asked them to look for a buyer and sell the property on her behalf. An authority to sell the property was drawn, signed and witnessed at a negotiated price of 16,500,000 with a 5% commission on the purchase price. A buyer Leila Abdi was identified and introduced to the respondent. The witness later found out that the property had been sold to a company known as Hampton Construction Company Limited whose directors were Abdirahim Hassan and one Njoroge

Claimant witness number 3 Ezekiel Muchiri Wanjohi also testified and his evidence in similar in material particulars to the testimonies of the other witnesses. It would serve no purpose to repeat the same.

Respondents evidence

The respondent testified before the Adjudicator and adopted her written statements dated 8th September as her evidence in chief. In the statement and the testimony before the court, the respondent stated that the claimant had visited her in her home and informed her that they had been told her and the land that she wanted to sell. After a week the claimant is said to have visited again and told her that they had identified a potential buyer, one Leila Abdi who was interested in buying the land. She met with them severally with the potential buyer but never agreed on the purchase price. As regards the authority to sell, the witness denied ever signing the same nor appointing the claimants as her agent or sole agent.

The witness in her statement told the court that she had talked to one David Kaniti an old friend and told him if he knows someone who can buy the property. David Kaniti later introduced Joram Mwangi as a purchaser. She met and had discussion with him and settled on the purchase price of Ksh. 16,000,000. An agreement dated 12th April 2021 was later entered into between Hampton Construction Company Limited and the respondent. The respondent denies ever selling the land at Ksh 16.5 M as alleged by the claimant nor was she ever introduced to the directors of Hampton Construction Company Limited. Further that Leila Abdi is not a Director of the said company.

In cross examination, the respondent told the court that the claimants had introduced to her one Leila whom she met with the claimants and that it is indeed true that she signed the authority to sell and filled in her name and ID number. That she sold the property to Joram and not Leila although the agreement between her and Joram is not dated. She told the court that she entered into an agreement with Hampton Construction company dated 12th April 2021 and that Joram Mwangi bought the land through the said company. She was however not able to prove any nexus between the said Joram and Hampton Company either as a director or a purchaser of the land. She further told the court that she paid Ksh.700,000 to one Kiniti a person not registered as an estate agent who introduced the buyer to her the buyer.

David Kanene Kiniti told the adjudicator that he was engaged by the respondent to look for a purchaser for her property known as Ngong/Ngong/39315 and through his efforts he managed to get Joram Mwangi and introduced him to the respondent thereafter he was paid ksh 700,000 although he produced no evidence of such payment.

Joram Mwangi Njoroge adopted his written statement as evidence in chief. In cross examination, he told the court he purchased parcel of land number Ngong/Ngong 39315 from the respondent and had it transferred to his business associate Mohamed Hassan under Hampton Construction Company Limited. The witness was however not able to establish his relationship with Hampton company or that he was the one who made the payments. He was also not able to prove the assertion that he was the one who paid a commission of ksh 500,000 to Kiniti through cash and mpesa.

Analysis and determination

I have re-evaluated the evidence tendered before the adjudicator as required of the 1st appellate court and considered the submissions of both counsel and the authorities supplied which I found useful in determination of this case. As stated in the case of **Ephantus Mwangi vs Duncan Mwangi Wambugu (1984) eklr** referred to by counsel for the appellant, “ a court of appeal will not normally interfere with the finding of fact by the trial court, unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown, demonstrably, to have acted on wrong principles in reaching the findings he did” while making reference to the case of **Peters vs Sunday post Ltd (1958)EA** that held;

“it is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has the advantage of seeing and hearing the witnesses. But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion”

To successfully claim for a commission for introducing a buyer, there must be an express agreement with the seller for the commission and prove that the introduction is the effective cause of the sale. The claimant needs to show and prove that it was the introduction that directly led to the final sale. The commission would normally be due and payable upon successful completion of the sale and from the proceeds of the sale unless expressed otherwise.

The appellant/ claimant, before the adjudicator tendered evidence and produced a document titled “authority to sell letter” dated 11th January 2021 as proof that the appellant and the respondent had entered into an agreement where the appellant was to identify and introduce a potential buyer and once the property is sold, a 5% of the purchase price is paid as commission to the claimant. The appellant contend that he introduced one Leila to the respondent but later the respondent went behind his back and sold the property to Hampton Construction Company Limited whose director is husband to Leila Abdi.

The respondent on the other hand argued that the property was not sold to Leila Abdi, the would-be buyer introduced by the appellant, but to Hampton Construction Company Limited whose director Mohamed Hassan had no relation with Leila Abdi and none was established. The respondent claims that the company that eventually bought the property was introduced by one David Kaniti who introduced Joram as director of the said company. An agreement for sale dated 12th April 2021 between Lucy Gathoni Kusero and Hampton Construction Company Limited was produced in evidence. There is no evidence whatsoever that the Joram Mwangi Njoroge is a director of Hampton Construction Company Limited or that he purchased the property from the respondent. The observation by counsel for the appellant that the respondent and Joram Mwangi Njoroge were not truthful in their dealings was correct.

There is however evidence that three months after authority to sell was entered into, between the appellant and the respondent, the respondent on 12th April 2021 executed an

agreement with Hampton Construction Company Limited for the sale of land parcel number Ngong/Ngong/39315.

The authority to sale or the agency agreement dated 11th January 2021 was not time bound. That is to say, there was no time frame restriction within which the appellant was to identify a buyer and thus barring the respondent from engaging another agent or buyer (s). The respondent was therefore at liberty as she did to source and engage another person to look for a potential buyer.

The question then is whether, the above company that eventually bought the parcel of land Ngong/Ngong/39315 was introduced by the appellant herein as to be entitled to a commission agreed at 5% of the purchase price? There is no dispute that the appellant introduced Leila Ali to the respondent. The evidence before the Adjudicator confirms this. However, there is no evidence that Leila Ali is a director of Hampton Construction Company Limited that eventually purchased the property, neither is the assertion by the appellant that Leila Ali is wife of Mohamed Hassan one of the directors of the company been established. There no evidence that Leila Ali had a role in sourcing for Hampton Construction Company Limited the ultimate purchaser of the property.

As stated earlier in this judgement, for the appellant to successfully claim a commission based on introduction of a purchaser, it must be shown that the introduction was effective and resulted in the closing of a deal.

In the instant case, the evidence before the magistrate court was diametrically opposed. On one hand, the appellant argued that the purchase of the property was as a result of his efforts in directly introducing the buyer. While on the other hand, the respondent stated that the eventual purchaser was introduced by David Kaniti. Faced with the evidence before it, the court, as one with the advantage of seeing and hearing the witnesses was in a better position to assess and observe the witness demeanour and arrive at a finding of fact which this court cannot interfered with unless it can be shown that the court acted on wrong principles in reaching the findings. The court

was entitled to believe one set of facts as against the other based on her own evaluation of the evidence presented by the parties.

It is submitted that the Learned adjudicator was wrong in holding that the appellant was not a registered estate agent and therefore not entitled to a commission under the Estate Agents Act. The finding of the court is supported by the respondent who submitted that for the appellant to be able to enforce an agreement with the respondent in a court of law, while not being registered as estate agents will “*ex turpi Causa Non Oritur Action*” ... that is no action can arise from an illegal act. The respondent produced gazette notices to show that the appellant does not appear as an estate agent. Section **18** of the **Estates Agents Act Cap 533, Laws of Kenya** 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 person: -

(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 partners whose activities include the doing of acts by way of such practice are registered estate agents;

(c) ...

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

The respondent submitted that just like section 31 and 33 of the Advocates Act, an unregistered estate Agent cannot purport to enforce an action for commission fees in such a manner as a person who is not an Advocate cannot tax a bill of cost.

My view is that although it is clear that the Estate Agent act prohibits persons not registered and recognized in the Act from practising or holding themselves out as such, the law prescribes a criminal sanction but does not necessary render invalid all agreements entered into by such persons. In **Patel vs Singh (1987) klr 585** the court held that;

A contract made by an unregistered estate agent was not necessarily void but was unenforceable by the agent in seeking commission, due to statutory illegality”

Similarly, in the case of **Alfred Munene vs Barclays Bank of Kenya & Another (2002) eKLR**, it was observed that the Act is intended to regulate the profession and protect the public from unqualified persons, not to invalidate every transaction involving unregistered agent.

In the instant case however, I am not satisfied that it was the appellants’ efforts that led to the ultimate sale of the property to Hampton Construction Company Limited as to entitle him to a commission. There is also no nexus established between Leila Abdi and the above company or its directors.

There is therefore no material placed before me on appeal to warrant interfering with the finding of the Adjudicator.

In the circumstances, the Appeal herein is without Merit and the same is dismissed with cost.

**DATED AND DELIVERED AT KAJIADO THIS 2ND DAY OF
DECEMBER 2025**

**JOHN T LOLWATAN
JUDGE**