

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPELLETE DIVISION
HIGH COURT SMALL CLAIM APPEAL NO. E099 OF
2025

**METUSELA KIBOTOK KIBOR T/A REWARDS
AGENCIES.....**

...APPELLANT

-VERSUS-

SAMWEL TURERE OLE MARIMA.....1ST

RESPONDENT

PAULINE WANJIRU MARIMA.....2ND

RESPONDENT

JUDGMENT

Background

1. The Appellant's case before the trial court was that sometime in March 2023 the Respondents appointed him as an estate agent to source a purchaser for land parcel NGONG/NGONG/60650 at an agreed commission of Kshs. 975,000.
2. An Agency Agreement dated 7th April 2023 was prepared providing for commission of Kshs. 975,000 tax inclusive. The Appellant asserts that he sourced a purchaser, one Hon. Salim Mvurya, who purchased the property for Kshs. 32,500,000. The full purchase price was paid on 20th February 2024.

3. The Respondents denied instructing the Appellant and denied liability for the claimed commission. They contended that the purchaser independently saw an online advertisement and purchased the property without involvement of the Appellant. The Respondent further contended that the Appellant lacked a valid practising licence in 2023 and could not therefore enforce any alleged agreement.
4. The trial court dismissed the Appellant's claim on grounds that there was no legally enforceable agency agreement and that the failed to demonstrate possession of a valid annual practising licence for 2023.

The Appeal

5. Aggrieved by the said decision, the Appellant initiated the instant appeal and listed the following grounds of appeal in the Memorandum of Appeal: -
 - a) ***The Learned Magistrate erred in law in holding that there is no legally enforceable Agency Agreement between the Claimant and the Respondents.***
 - b) ***The Honourable Learned Magistrate erred in law in holding that the Claimant had no valid practicing license in the practice of an estate agent.***
 - c) ***The Learned Magistrate erred in law in holding that the Contract between the Claimant and the Respondents was contrary to the law.***

- d) ***The Learned Magistrate erred in law in failing to appreciate that commission agreement consumed in the year 2024.***
- e) ***The Learned Magistrate erred in law by misdirecting herself on the legal principles on the creation of a contract and thereby arrived at a wrong decision and finding.***

6. The Appeal was canvassed by way of written submissions which I have considered.

The Appellant's Submissions

7. The Appellant submitted that the trial court erred in finding that there was no legally binding agreement. He contended that the 1st Respondent admitted to the contents of the agreement and only requested inclusion of his wife's name. He added that the Respondents did not dispute the commission amount of Kshs. 975,000 and in an email dated 12th February 2024 admitted owing the amount and requested more time to settle. The Appellant faulted the trial court for finding that he had not tendered any other evidence that the Respondent had admitted the debt and argued that this was a misdirection in light of the admission contained in the email.
8. As regards the issue of the Practising License and absence of proof of a 2023 annual practising certificate, the Appellant contended that the agency contract was consummated in 2024 when the full purchase price was paid. He

9. He produced a valid 2024 practising certificate authorizing him to practise between 1st January 2024 to 31st December 2024 and argued that the commission became due in 2024 upon completion of the sale. Reference was made to the case of ***National Bank of Kenya Limited vs. Warehousing Limited (2025) eKLR***, where the Supreme Court stated that: -

“The Court’s obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010, Article 48), and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practicing certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution: ‘justice shall be administered without undue regard to procedural technicalities’.”

The Court further stated:

“[67] To invalidate an otherwise binding contractual obligation on the basis of a

precedent, or rule of common law even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person's property of any description), 20 (3) (a) and (b) (interpretation that favours the development and enforcement of fundamental rights and freedoms) and 10 of the same."

- 10.** The Appellant argued that similarly, a technical deficiency regarding a practising certificate should not defeat clear contractual intention.
- 11.** On the doctrine of estoppel, the Appellant relied on ***Serah Njeri Mwobi vs. John Kimani Njoroge (2013) eKLR***, where the Court stated that the the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.
- 12.** The Appellant submitted that since the Respondents admitted owing the commission and sought more time to pay, they are estopped from relying on the absence of a 2023 practising certificate to avoid payment. It was therefore the Appellant's case that the trial court misdirected itself by relying on a technicality and for failing to consider contractual intention and admissions.

13. On the challenge over the competence of the appeal on account of lack of a Record of Appeal, the Appellant contended that procedural lapses should not defeat substantive justice.

The Respondent's Submissions

14. On the issue of competence of the appeal and the lack of a Record of Appeal, the Respondents submitted that despite directions issued on 28th October 2024 and subsequent mentions, the Appellant failed to file a Record of Appeal. They relied on **Section 65(1)(b) of the Civil Procedure Act**, which provides:

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court-(b) from original decree or part of a decree of a subordinate court, on a question of law or fact.”

15. They further relied on ***Bwana Mohamed Bwana vs. Silvano Buko Bonaya & 2 others* [2015] eKLR**, (paragraph 41) where it was held: -

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers

conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

16. The Respondents urged the Court to find that failure to file a Record of Appeal renders the appeal incompetent.

17. On whether there was a legally binding enforceable agency agreement, the Respondents submitted that the Appellant failed to demonstrate that he was a registered estate agent at the time of the alleged agreement. They relied on **Sections 107 and 108 of the Evidence Act**, which provide that:

“107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

18. The Respondents contended that the Appellant failed to discharge the evidentiary burden.

19. On whether the Appellant had a valid Practising License, the Respondents submitted that the Learned Magistrate correctly found that the Appellant lacked a valid practising licence for 2023 and therefore could not lawfully enforce the contract. They relied on the doctrine *ex turpi causa non oritur actio* (no cause of action arises from an illegal act).

20. They cited **Section 8(4) of the Estate Agents Act**, which provides that:

“A certificate of registration issued by the registrar shall be valid and shall remain in force for one year, but shall be renewable on the payment of the prescribed fee; and if the prescribed fee has been paid before the renewal date and there is no order for the name of the holder of the certificate to be removed from the register, the certificate shall remain in force until it is renewed.”

21. They further relied on **Section 18 of the Estate Agents Act**, which provides:

**“(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.”

22. The Respondents submitted that neither the Appellant nor his partner were registered estate agents in 2023, as evidenced by a Kenya Gazette search.

23. Reference was made to the following cases: -

1. *Livingstone Gitonga Muchungi & 2 Others vs. ICEA Lion Life Assurance Company Limited (2021) eKLR*

Paragraph 55:

“The Plaintiffs cannot seek to benefit from their own wrongdoing. Having engaged in practice as Estate Agents contrary to the law they cannot file a suit and expect to be awarded commission arising from their illegal

activities. Accordingly, I find that this suit has no merit and is for dismissal. I therefore dismiss in its entirety the Plaintiffs suit and award cost to the Defendant.”

2. *Mapis Investment (K) Limited vs. Kenya Railways Corporation (2006) eKLR*

The Court stated:

“...it is clear that contract to perform estate agency services can only be legal if entered into with a registered Estate Agent.”

24. The Respondents submitted that the Appellant cannot demand commission founded on illegality.

Issues for determination

25. Having considered the pleadings, the judgment of the trial court and the parties’ submissions, the issues that arise for determination are:

- a) *Whether the appeal is competent in light of the complaint that no Record of Appeal was filed.***
- b) *Whether there existed a legally enforceable Agency Agreement between the parties.***
- c) *Whether the Appellant had a valid annual practising licence/registration to lawfully practise as an estate agent at the material time and, if not, the legal effect on enforcement of the alleged contract.***

- d) ***Whether the commission became due in 2024 so as to cure the alleged deficiency relating to the 2023 practising licence.***

Analysis and Determination

26. This Court is guided by the settled principles on the duty of a first appellate court. As captured in the material placed before Court, in ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others (1968) EA 123*** and ***Peters vs. Sunday Post Limited (1958) EA 424*** (as cited in ***Mursal & Another vs. Manese (2022) eKLR***), it was stated that: -

“An appeal to this Court from a trial by the High Court is by way of retrial... The Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses...”

27. On the competence of the appeal, it is trite that a Record of Appeal (or at minimum, the primary documents necessary to enable the Court to re-evaluate the matter) is not a cosmetic requirement. This is the material upon which the appellate court reconsiders the case. Without it, the Court is deprived of the tools needed to perform its duty as a first appellate court.

28. In the present case, it was not disputed that a record of appeal was not filed, Accordingly, and guided by the

above holding, I find that the objection on the competence of the appeal is well taken. A determination on the competence of the appeal would have been sufficient to dispose of the appeal but I am still minded to address the substantive questions and to avoid any doubt, I will also pronounce myself on the merits of the appeal assuming that the necessary material was otherwise available for the Court's consideration.

29. On whether there was a legally enforceable Agency Agreement, while the Appellant claimed that he was appointed as an estate agent, the Respondents denied instructing the Appellant and denied liability, contending that the purchaser independently saw an online advertisement and purchased the property without involvement of the Appellant.

30. On proof, I find that the Respondents correctly invoked Sections 107 and 108 of the Evidence Act as set out in their submissions, I find that even if the Court were to accept that a written document titled "Agency Agreement" existed, the question remains whether such agreement was legally enforceable in light of the statutory framework regulating estate agency practice.

31. The above finding leads me to the next issue of practise license/registration and its effect on enforceability. The trial court dismissed the claim on, among other grounds, that the Appellant failed to demonstrate possession of a valid annual practising licence for 2023.

- 32.** The Respondents anchored their argument on the Estate Agents Act, including Sections 8(4) and 18 thereof which I have already highlighted elsewhere in this judgment.
- 33.** The Respondents further relied on authorities which speak directly to enforceability of estate agency commission claims where the claimant practised contrary to the Act such as; ***Livingstone Gitonga Muchungi & 2 Others vs. ICEA Lion Life Assurance Company Limited*** (supra) and ***Mapis Investment (K) Limited vs. Kenya Railways Corporation*** (supra).
- 34.** This court agrees with the reasoning of these decisions. I find that the Estate Agents Act is not merely procedural as it goes to the legality of practising and the legality of earning commission from such practice. Where the practice is prohibited by statute and criminalised, the Court cannot lend its aid to enforce a claim that is founded on that prohibited practice. The Respondents' reliance on the principle ***ex turpi causa non oritur actio*** is therefore applicable on the facts as found by the trial court.
- 35.** On the Appellant's reliance on ***National Bank of Kenya Limited vs. Warehousing Limited*** (supra), I find that the same is distinguishable from the case at hand as the said case concerned the effect of an advocate's practising certificate on an otherwise valid commercial transaction and the intention of contracting parties, in a context where the transaction itself was not criminalised. The present dispute concerns statutorily prohibited

practice as an estate agent, with express penal consequences under Section 18 of the Estate Agents Act. The two contexts are not the same.

- 36.** Accordingly, I find no basis for disturbing the trial court's conclusion that, in the absence of proof of lawful qualification/licensing/registration at the material time, the alleged agency arrangement was not enforceable for purposes of claiming commission.
- 37.** On whether the commission "crystallised" in 2024 thus curing the 2023 deficiency, the Appellant argued that the contract was actualised in 2024 when the full purchase price was paid. He produced a 2024 practising certificate authorizing him to practise between 1st January 2024 to 31st December 2024.
- 38.** My finding is that the relevant inquiry is however not only when the purchase price was paid, but when the estate agency services were undertaken and the alleged agency relationship formed. The Appellant's own case is that the appointment was in March 2023 and the agreement was dated 7th April 2023. The sourcing/marketing activities would, on that pleading, have been carried out during that period. I find that a 2024 certificate cannot retroactively legalise or validate acts done in 2023 in contravention of the statute.
- 39.** The Appellant's argument that the trial court "failed to appreciate that commission agreement consumed in the year 2024" therefore does not avail him on legality.

40. On the doctrine of estoppel and the alleged admission of debt, I find that even assuming that there was an admission or request for time to pay, estoppel cannot be used to defeat a statute or to make lawful that which the law expressly prohibits. My take is that parties cannot, by conduct or admission, confer legality upon an illegal practice, nor can they, by estoppel, confer upon the Court jurisdiction to enforce an illegal bargain.

Disposition

41. For the foregoing reasons, I find that the appeal is incompetent for want of a Record of Appeal and is hereby struck out.

42. In any event, on the merits, the appeal would still fail as the Appellant did not demonstrate lawful capacity to practise as an estate agent at the material time, rendering the claim for commission unenforceable.

The appeal is dismissed/struck out with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2026.

HON. W. A. OKWANY

JUDGE

20/02/2026

FOR APPELLANT No appearance

FOR THE RESPONDENT Ngaira for E.K Njagi Obiri
COURT ASSISTANT Abdraziki

ORIGINAL