



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 111 OF 2016

OCRA REALTORS LTD.....PLAINTIFF

VERSUS

ABDULGHANI KIPKEMBOI KOMEN.....1ST DEFENDANT

ABULD KHALID KIPKEMEI KOMEN.....2ND DEFENDANT

ABDUL KHADIR KIPLAGAT KOMEN.....3RD DEFENDANT

JUDGMENT

(Plaintiff filing suit to enforce an estate agency agreement that he had with the defendants; defendants having been bequeathed some land through a succession cause; plaintiff being engaged to seek buyers for the said land; plaintiff contending that she sought buyers who purchased part of the land; plaintiff filing suit in order to enforce these sale agreements; plaintiff not holding any power of attorney on behalf of the purchasers thus lacking capacity to sue on their behalf and lacking capacity to enforce any sale agreement entered into by these purchasers; Estate Agents Act requiring that an estate agent be duly registered and making it an offence to practice as an estate agent without such registration; plaintiff not being a registered estate agent and the contract that she entered into was an illegal contract which cannot be enforced; also wrong for the plaintiff to purport to execute sale agreements on behalf of the land owners in absence of a power of attorney; sale agreement over land being a contract between the land owner and the purchaser; without a power of attorney, agent lacking capacity to enter into a sale agreement on behalf of the land owner; plaintiff's suit dismissed with costs)

1. This suit was commenced through a plaint which was filed on 8 April 2016. The plaintiff is a limited liability company and has averred in the plaint that on 21 April 2011, the 1st and 2nd defendants through a written agreement, contracted her to plan, subdivide and sell 66.6 acres to be excised/hived from the property LR No. 10013/4 Njoro Ngata, which was their share of entitlement of 100 acres bequeathed to them through a succession matter of the estate of the late Kibowen Komen. It is averred further that on 14 November 2011, the 3rd defendant through another written agreement, contracted the plaintiff as sole agent for purposes of planning, surveying and selling 33.3 acres being his share of the aforementioned 100 acres. The plaintiff has pleaded that on the basis of the two agreements, she engaged the services of planners and surveyors who proceeded to plan and survey the land of the defendants totalling 100 acres and offered various portions of the same for sale to various purchasers. It is pleaded that the plaintiff sold the 66.6 acres belonging to the 1st and 2nd defendants to the following persons :-

(i) 15 acres to Sally Cherop Chelimo, Marton Kiptoo Cheluget and Grace Tamsta Kelelelwet at the rate of Kshs. 600,000/= per acre, totalling Kshs. 6,000,000/=.

(ii) 7 acres to Jesse Muchina Njoroge at Kshs. 400,000/= per acre totalling Kshs. 2,800,000/=.

(iii) 10 acres to Emmanuel Otondi Otieno/Hellen Nyansiaboka Otondi at Kshs. 500,000/= per acre totalling Kshs. 5,500,000/=.

(iv) 29 acres sold to Smartline Sacco at Kshs. 475,000/= per acre totalling Kshs. 13,775,000/=.

2. The plaintiff further avers that she sold 15 acres of the 3rd defendant's 33.3 acres to the following persons :-

(i) 10 acres sold to Njoro Head Teachers Association at Kshs. 600,000/= per acre totalling Kshs. 6,000,000/=.

(ii) 2 acres to Enock Gichaba Otara at Kshs. 600,000/= per acre totalling Kshs. 1,200,000/=.

(iii) 2 acres to Ruth Anyango Odhiambo at Kshs. 540,000/= per acre, totalling Kshs. 1,080,000/=.

(iv) 1 acre to Nicholas Wasonga Orago at Kshs. 500,000/=.

3. It is pleaded that the above mentioned purchasers paid the purchase price in full through the plaintiff's bank account save for Smartline Sacco who have an outstanding balance of Kshs. 3,785,000/=.

4. The plaintiff avers that she paid to the defendants the proceeds of sale of their land through bank transfer, cash payments and purchase of various moveable assets being a combine harvester valued at Kshs. 2,664,000=, a tractor valued at Kshs. 1,100,000/=, a pick up valued at Kshs. 400,000/=, a Land Cruiser valued at Kshs. 800,000/=, and one vehicle valued at Kshs. 400,000/=. These it is said were deducted from the sales account of the defendants individually.

5. It is pleaded that when the defendants contracted the plaintiff to sell their land, the original title deed of LR No. 10013/4 Njoro Ngata, which is land measuring 418 acres, was deposited with the law firm of M/s Sheth & Wathigo Advocates for safe custody. It is pleaded further that it was agreed that this title be surrendered to one Mohammed Komen, the father of the defendants, so that the defendants' 100 acres can be hived off, but the title for 100 acres in the name of the defendants was nullified on account of an irregular transfer.

6. It is pleaded that the purchasers took possession of their portions and remained in quiet possession until March 2016, when the defendants blocked their access to their portions and invaded the land hence interrupting their occupation. It is further averred that the defendants are now purporting to cancel the sale agreements with the various purchasers and are offering the land for sale to other persons. The plaintiff has contended that the defendants owe him Kshs. 597,200/= on account of fees paid to the planner, Kshs. 347,200/= being fees to the surveyor, and Kshs. 250,000/= paid to the firm of Odhiambo & Odhiambo Advocates being a refund of deposit of purchase price for a rescinded sale.

7. In the suit, the plaintiff has asked for orders to have the defendants permanently restrained from interfering with the parcels of land already sold to the purchasers outlined in the pleadings; a declaration that the purchasers who have already purchased the various portions are the right owners by way of purchase; an order directing the defendants to surrender the original title for LR No. 10013/3 for purposes of giving effect to the sale agreements; and costs of the suit.

8. The defendants filed a joint statement of defence through the law firm of M/s Kabiru & Company Advocates. Later however, after the close of pleadings, the 3rd defendant appointed a separate counsel, M/s B.O Akang'o & Company. In the joint defence, it is averred that the agreements dated 21 April 2011 and 14 November 2011, were premised on a condition precedent that the title document of the suit land was to be obtained by the plaintiff which document was never obtained. They aver that no planning or surveying could have taken place devoid of the title document and they contend that the plaintiff did perpetrate a fraud and illegality in engaging the services of the officers and proceeding to purport to sell land which was not ascertained and not surveyed and for which no documents of ownership existed. The defendants averred that they are strangers to the persons said to have purchased the various portions of land and further pleaded that should there have been any sale, the same was not in consonance with the agreement entered into with the plaintiff, and that the plaintiff acted out of authority. They contended that the agreement that they had with the plaintiff was terminated on 1 March 2014 due to the plaintiff's irregularity. In the alternative, in response to the alleged sale to Smartline Sacco, they did aver that the same was terminated due to non-performance by the said Sacco. They pleaded that if the plaintiff purported to place the title in the law firm M/s Sheth & Wathigo Advocates, then the same is a fraud as the said title was declared illegal in High Court Succession Cause No. 500 of 1997 and that no title has ever been processed. They asked that the suit be dismissed with costs.

9. PW-1 was Joseph Muchina Njoroge, a director of the plaintiff company. He testified that the defendants, who are brothers, approached him in the year 2011 and informed him that they were beneficiaries of 100 acres out of the land parcel LR No.10013/4 which in total measured 418 acres. Each defendant was entitled to 1/3rd share of the 100 acres. They met in his office with the defendants and their father. The defendants are sons of Mohammed Komen, who in turn is son of Kibowen Komen (deceased), meaning that the deceased was their grandfather. He was given a photocopy of the title document and a certificate of a confirmed grant in Nakuru High Court Succession Cause No. 500 of 1997 in respect of the Estate of Kibowen Komen. He testified that it was thus agreed that the plaintiff would hive off 100 acres out of the 418 acres and that he would subdivide and sell the same. After three days, the defendants and their father took him to the ground where he came accompanied by a surveyor and planner. He stated that Mohamed Komen showed them the location of the 100 acres to be hived off, and under instructions from the defendants and their father, he formally engaged the surveyor and planner. He stated that both surveying and planning took place, the latter being done in the course of March 2011 and that he had four meetings jointly with the surveyor, planner, and the defendants. At this time, his engagement was verbal, but he entered into a written agreement first with the 1st and 2nd defendants on 21 April 2011 for their combined share of 66 acres. He testified that he was engaged as a sole sales agent. He testified that the plaintiff company discharged its part of the agreement in that it planned the land and did the subdivision by placing beacons and numbering the subdivided plots. He mentioned that the 66 acres was subdivided into five portions, of 7 acres, 15 acres, 10 acres, 29 acres and the last portion being the remainder.

10. He testified that he engaged Nakuplan Consultants (planners) who gave him a quote dated 8 April 2011 of Kshs. 48,850/= and Government levies of Kshs. 50,000/=. On the same day, the surveyor, M/s Landline Surveyors, gave him a quote of Kshs. 182,850/=. He paid Kshs. 96,050/= on 4 August 2011 for survey.

11. In November 2011, the 3rd defendant formally engaged him and they entered into the agreement dated 14 November 2011. This agreement was prepared by M/s Sheth & Wathigo Advocates who acted jointly for the plaintiff and the 3rd defendant. He had earlier on 26 August 2011, entered into a more or less similar agreement with their father, Mohamed Komen.

12. He testified that they agreed on the selling price of a minimum of Kshs. 400,000/= per acre. He did a search on 8 November 2011 but the results contradicted the information in the copy of title that had been given to him. He sought advice from his lawyers who advised him to proceed as his authority was derived from the confirmed grant.

13. He stated that he proceeded to make sale agreements pursuant to the agency agreement. He personally purchased 7 acres at Kshs. 400,000/= directly from the 1st defendant which he said he fully paid and they had a written agreement dated 10 June 2011. There was also a sale to Grace and Marton who purchased 15 acres on 9 May 2011. Another sale was to Emmanuel Otondi and Hellen Nyansiaboka Otondi entered into on 22 June 2011 for sale of 10 acres at the rate of Kshs. 500,000/= per acre and he stated that for this sale, payments were made to M/s Odhiambo & Odhiambo Advocates. On 26 November 2011, 29 acres were sold to Smartline Sacco at a total of Kshs. 13,775,000/= through a sale agreement prepared by M/s Sheth & Wathigo Advocates. Another sale was to Ruth Anyango Odhiambo, dated 20 February 2012 for sale of 2 acres at Kshs. 1,080,000/=.

14. In respect of the land of the 3rd defendant, he testified that 10 acres was sold to Njoro Headteachers Association through a sale agreement dated 27 February 2012 prepared by M/s Sheth & Wathigo Advocates, the selling price being Kshs. 600,000/= per acre totalling Kshs. 6,000,000/=. One acre was sold to Nicholas Wasonga Orago by the 3rd defendant in an agreement prepared by M/s Odhiambo & Odhiambo Advocates. Another sale was to Enock Otara, for 2 acres at Kshs. 600,000/= per acre, through an agreement dated 31 January 2012 the sale agreement being prepared by M/s Sheth & Wathigo Advocates.

15. He testified that some purchase price money passed through the plaintiff's account and some through the accounts of M/s Odhiambo & Odhiambo and M/s Sheth & Wathigo Advocates. He opened bank accounts at NIC Bank for the 1st and 2nd defendants where he deposited their money. Some money was also paid directly in cash to them. Some money received in cash was also handed over directly to the defendants without the same being banked. On 24 April 2013, he said he paid to the 3rd defendant Kshs. 1,700,000/= through the account of M/s Odhiambo & Odhiambo Advocates, as directed by the 3rd defendant. On 23 February 2012, he deposited Kshs. 47,000/= into the account of the 1st defendant and Kshs. 300,000/= into the account of the 2nd defendant.

16. He testified that on 1 September 2011, he held a meeting with the 1st and 2nd defendants for reconciliation of accounts, and also a document indicating whose portion had been sold and to which purchaser, and he had a document signed by them on the same. He had previously on 27 July 2011 held a meeting with the 1st and 2nd defendants where he informed them of the amounts paid to the planner and surveyor and where the 1st defendant acknowledged receipt of Kshs. 200,000/=. He also paid Kshs. 1,200,000/= on account of the 1st defendant for the purchase of a tractor by the 1st defendant. The 1st defendant also purchased a combine harvester from the family of Marton and Grace, for Kshs. 2,500,000/= and he explained this was set off from the 15 acres that they purchased, the family only adding Kshs. 150,000/= which the plaintiff received and remitted it immediately to the 1st and 2nd defendants and the same was acknowledged. The 1st defendant also bought from PW-1 a Subaru pick-up at Kshs. 400,000/= (set off by PW-1 giving him a lorry valued at Kshs. 800,000/= and PW-1 paying him the difference of Kshs. 400,000/=), a Toyota Land Cruiser at Kshs. 800,000/= and a Nissan B13 at Kshs. 400,000/=. The sum of Kshs. 1,200,000/= due for the Land Cruiser and the Nissan B13 were set off by PW-1 getting 3 acres of land, which he stated is part of the 7 acres that he purchased. The plaintiff later resold his 7 acres to third parties. He sold 5 acres to one Njenga Muna, and 2 acres to Peter Gituba. He produced an acknowledgement of Kshs. 50,000/= by the 1st defendant dated 9 June 2011, and another for Kshs. 673,000/= dated 1 September 2011.

17. He mentioned that Smartline Sacco have a balance of Kshs. 3,785,000/= but the rest of the purchasers have paid in full. He stated that the case was filed because the defendants started evicting the purchasers claiming that they never sold any land to them. However this was done selectively as the Kelelelwet Family, Emmanuel Otondi, were not affected. Nicholas Wasonga and Enock Otara were only shifted on the ground. Those affected were Smartline Sacco, his two purchasers, and Njoro Headteachers Association.

18. He testified that the defendants' father obtained consent to subdivide on 1 November 2011. He also produced copies of the proposed subdivision of the land.

19. Cross-examined, he testified inter alia that the plaintiff company is not registered as a real estate agency. He further stated that he believed that the agency agreement gave the plaintiff company powers to sue on behalf of the purchasers. He acknowledged that the agency agreement had a clause requiring that the original title deed be deposited but none was deposited to him. Instead, there was deposited a title deed with M/s Sheth & Wathigo Advocates, but the validity of this title deed was questionable, and was declared not genuine by the courts in a separate suit. He stated that his prayer in the plaint for release of title deed, is for release of the genuine original title deed. He testified that the copy of title deed given to him is the false title as it contradicted the search that he later conducted. What was given to him showed a transfer to Mohamed Tanui Komen (the defendants' father) which was not in the search, the latter showing that the land is registered in the joint names of Recho Chepngeno Komen and Kibowen Komen (deceased) being an entry dated 21 June 1993.

20. He stated that the defendants were to procure a title for their 100 acres and he would then proceed from there. He acknowledged that he could not proceed without the defendants first having a title for their 100 acres. He further acknowledged that the title is yet to be subdivided and the subdivision done is only on the ground. He did mention that consent to subdivide the 418 acres into 35 portions was obtained and one of the portions was the 100 acre portion of the defendants. What he paid to the surveyor and planner were not attributable to subdivision of the 418 acres but to subdivision of the 100 acres of the defendants. He stated that he has so far paid Kshs. 436,462.50/= to the surveyor and planner and he owes them Kshs. 100,487.50/=. He expected the planner to get approvals and for the surveyor to act on production of the deed plans but this is yet to be done. He acknowledged that the agency agreement had a time frame for obtaining consent and the deed plans but this could not be done as the defendants did not avail the title to their 100 acres. He also mentioned that in the process of executing the agreement, other disputes arose regarding boundaries, and who was to bear the financial obligations though it was put to him that the agency agreement required the plaintiff to pay for survey fees. He acknowledged that the agency agreement with the 1st and 2nd defendants had a time frame of 8 months and was to terminate on 30 October 2011. He also acknowledged that the agency agreement required payments to be made to M/s Sheth & Wathigo Advocates but this was not always done. He agreed that the sales were done in a way that did not follow the agency agreement. On the individual sale agreements, he did agree that they provided that possession would be given after completion but possession was given contrary to these agreements. He admitted that the plaintiff did not purchase any land but stated that it has an interest as she contracted the purchasers and also advanced money to the defendants which is yet to be reimbursed. He stated that final accounts are yet to be done and what he has is provisional.

21. He testified that on account of the sales by the 3rd defendant, that Ruth Adhiambo did not pay any money but was given land in lieu of

payment for legal services. Mr. Nicholas Wasonga, who purchased one acre, paid directly to M/s Odhiambo & Odhiambo Advocates. These two have no complaints. He stated that it is Enock Otara and Njoro Headteachers who complained to the plaintiff but he agreed that they have not instructed the plaintiff to file any suit on their behalf. He acknowledged that the sale agreement with Njoro Headteachers was not signed by the 3rd defendant but by the plaintiff on behalf of the 3rd defendant his explanation being that this was an interim agreement between the plaintiff and the purchaser. He denied that the 3rd defendant was not aware of this agreement and stated that he was present when it was signed. He added that the money was paid first before the agreement was signed. The purchase price was Kshs. 6,000,000/= which was paid to the plaintiff contrary to the terms of agreement which required payment to the vendor's advocates. He stated that out of this amount, Kshs. 600,000/= being 10% was paid to the plaintiff as agent; Kshs. 1,700,000/= was remitted to M/s Odhiambo & Odhiambo upon the instructions of the 3rd defendant; he paid Kshs. 46,000/= to the surveyor. He also paid Kshs. 500,000/= to the officials of Njoro Headteachers as "commission" explaining that in actual fact, the negotiated selling price was Kshs 5,500,000/=. He mentioned that officials of groups make some money for themselves in such transactions. He reimbursed himself Kshs. 273,000/= leaving a balance of Kshs. 2,361,000/= which he acknowledged the plaintiff was holding but he explained that the 3rd defendant owes the plaintiff for the total budget of producing his titles was Kshs. 3,100,000/=. None of this money was paid directly to the 3rd defendant. He admitted never having done any reconciliation of accounts with the 3rd defendant. He did not deny receiving some money from the 3rd defendant as survey fees but agreed that the agency agreement provided that he was to be responsible for subdivision and marketing. He declined that this suit was filed to enable him hold on to the money in the plaintiff's accounts and mentioned that the defendants have not demanded payment of their dues. He denied receiving a letter dated 6 April 2014 terminating the agency agreement.

22. DW-1 was the 3rd defendant. He stated that each of the defendants was entitled to a 1/3rd share out of 100 acres of the suit land upon distribution of their grandfather's estate. He testified that so far, his share is yet to be established on the ground and he has not got title. He acknowledged entering into the agreement dated 14 November 2011 with the plaintiff, where he gave the plaintiff the work of surveying and planning for his share and of getting buyers. He however stated that he only authorized sale of 12 acres of his share for purposes of getting money to pay his advocate's bill in the succession matter, for survey, and for his upkeep. He stated that the administrators of the estate of his late grandfather were to point out the 100 acres of the defendants but this has never been done. He testified that he personally paid PW-1 Kshs. 108,000/= for survey and paid an advocate legal fees for the sale of land to Mr. Enock Otara. He also paid PW-1 a further Kshs. 70,000/= and Kshs. 67,500/= through Mpesa, as survey fees. He stated that despite making payment, survey and planning was never done and that PW-1 has never given him any receipt for payment to the surveyor or planner. He mentioned that each brother was to pay his own share for survey and planning. He testified that of the authority to sell 12 acres, the plaintiff was to introduce to him the buyers so that he can enter into sale agreements with them and added that the plaintiff was not to sign any sale agreement. He acknowledged selling land to Nicholas Wesonga and Enock Otara who paid in full. He had a sale of two acres to Ruth Anyango, but she later opted out and he had to refund her. For this, he borrowed Kshs. 287,000/= from PW-1 which he later refunded. He personally dealt with the three purchasers after the plaintiff introduced them to him and had sale agreements with them which he signed without there being another sale agreement between the buyers and the plaintiff. He denied selling any land to Njoro Head Teachers Association. He pointed out that he never executed the sale agreement of 10 acres to the said entity. He was later told by PW-1 that he has received some money from them and he instructed him to take it back.

23. Cross-examined, he stated that the original title for 418 acres is with the administrators of the estate of his grandfather. He denied having gone to the ground with the plaintiff and a surveyor and planner to point out his share. He acknowledged signing the agency agreement with the plaintiff and further acknowledged that it did not indicate that what was to be sold was 12 acres. He mentioned that his share on the ground was not clear and that it was in 2015 that he got a surveyor to point out his entitlement. After this survey, Mr. Wesonga had to be moved and he stated that he has no issue with him. He also has no issue with the sale to Enock Gichaba. He denied having gone contrary to the agency agreement as he had given land to those who he acknowledged to be genuine buyers.

24. DW-2 was the 1st defendant who testified on his own behalf and on behalf of the 2nd defendant. He admitted that they did enter into the agency agreement dated 21 April 2011 with the plaintiff. He stated however that there was no title to LR No. 10013/4. They nevertheless agreed that the plaintiff could be engaged to ensure that they get their title to 100 acres and for each brother to get title to his share. There was also to be a further subdivision into smaller portions. He stated that this had a time limit of 8 months and the agreement gave a deadline of 30 October 2011. He testified that it was agreed that any money out of sale of their portion was to first pass through the plaintiff's lawyers, M/s Sheth & Wathigo Advocates, who would then transfer the money to M/s Odhiambo & Odhiambo Advocates who acted as the defendants' lawyers. He admitted selling 7 acres to PW-1 but stated that he is yet to be fully paid. He admitted selling 15 acres to Sally Cherop Chelimo who paid in full and there was no issue (this being the same sale to Marton Kiptoo and Grace or the Kelelelwet Family). He also admitted selling land to Emmanuel Otondi and Hellen Otondi who paid in full. He admitted the sale agreement to Smartline Sacco but denied that they ever paid them any money. He also mentioned difficulty in knowing what the plaintiff had sold and what he had received as they did not reconcile accounts. Due to this, they terminated the contract through the letter dated 2 April 2014. He mentioned that nowhere in their agreement is there a clause that the plaintiff can sue them on behalf of purchasers. He stated that they believed that the plaintiff was a registered land agent but they have since realized that she is not. He testified that the plaintiff purported to procure a title to 100 acres but this was realized to be a fraudulent title.

25. Cross-examined by counsel for the plaintiff, he denied having gone to the ground with PW-1 and a surveyor. He stated that the 418 acres has boundary issues. He denied signing any acknowledgment documents before an advocate and stated that PW-1 used to give him several documents to sign which he did. 26. He acknowledged signing the agreement with Smartline Sacco but stated that the money paid to them is less than Kshs.2 Million.

27. With the above evidence, the parties closed their respective cases.

28. I invited counsel to file written submissions which they duly did. I have taken these into account in arriving at my decision.

29. Much has been said about the rather frosty relationship that now exists between the plaintiff and the defendants each accusing the other of not abiding by their bargain as contained in the two agency agreements. However, to me, the accusations and counter-accusations are not critical in the determination of the issues that are before me. At the outset, I need to assert that parties are bound by their pleadings and this court is similarly bound to determine this suit as presented by the parties. In that spirit, I will confine myself to the issues as raised by the

pleadings of the parties before me. It will be recalled that what the plaintiff seeks to have in this suit are principally orders that are in essence going to vest rights upon persons who are not parties to this suit. The first prayer that the plaintiff has sought is for the defendants to be permanently restrained from interfering with parcels of land that the plaintiff sold to the various purchasers mentioned in the pleadings and evidence. The second prayer is for a declaration that these purchasers are the rightful owners of the portions that they have purchased. The key question to ask is whether the plaintiff has capacity to sue on behalf of these purchasers. My answer is in the negative.

30. I am not aware of any law, and none has been pointed out to me, which allows a person such as the plaintiff, to sue on behalf of an individual who claims to have purchased land. My knowledge of the law, is that if such a person is to sue, then he requires to have a power of attorney donated by the purchaser. This is because, the rights passed by virtue of purchase of land vest in the purchaser and not on any other person and it is such purchaser who is empowered to sue and to be sued. None of the authorities that were preferred to me by Mr. Ndubi, learned counsel for the plaintiff, address this basic but significant legal position. In his submissions, Mr. Ndubi attempted to argue that the sales to the purchasers created an implied or constructive trust in their favour. Well, if that is what is argued to be the case, then it is these purchasers to come to court and try and present that position after which the court can then determine whether they actually qualify to have such orders granted to them. It is not for the plaintiff in this case to sue on their behalf unless he holds their power of attorney. For that reason alone, this suit by the plaintiff is a non-starter and must fail.

31. Apart from the foregoing, I have serious issues about the agency agreement that the parties entered into. PW-1 admitted that the plaintiff is not a registered estate agent. That being the case, the plaintiff company could not have entered into the sort of agency agreement that it entered into with the defendants, for this would be a contravention of Section 18 of the Estate Agents Act, Chapter 533, Laws of Kenya, which provides as follows :-

18. *Unregistered persons not to practice as estate agents*

(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.

32. The Estate Agents Act, entered into force on 9 April 1985, meaning that six months after this period, no person who is unregistered was supposed to practice as an estate agent. In fact, under Section 18 (2) above, it is an offence for a person to practise as an estate agent without being duly licenced. The activities that the plaintiff engaged in were certainly activities of an estate agent as defined in Section 2 of the Estate Agent Act, which provides inter alia as follows :-

“practice as an estate agent” means 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, of 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;

33. The agency agreement that the plaintiff and the defendant entered into inter alia allowed the plaintiff to sell and negotiate the terms of sale and thus the plaintiff needed to be registered as an estate agent under the Estate Agent Act, before getting into such activities. A contract such as the one presented in this case is an illegal contract and cannot be enforced. This indeed is what transpired in the case of **Mapis Investment (K) Limited vs Kenya Railways Corporation (2006) KLR** cited by both Mr. Kabiru, learned counsel for the 1st and 2nd defendants, and Mr. Akang’o, learned counsel for the 3rd defendant, in their submissions. In the said case, the appellant was appointed by the respondent as sole selling agent to sell one of the respondent’s properties and the parties agreed at a commission. It turned out that the appellant was not registered as an estate agent and the question that the Court of Appeal sought to answer was what was the legal effect of this. The Court stated as follows :-

*“After careful consideration we have decided that it is clear from the evidence before the superior court and the provisions of Section 18 of Cap 533 that, if the contract alleged by Mapis and Mr. Shompa (the director of the appellant company) to exist, did in fact exist, the conduct of Mr. Shompa and the appellant company was in breach of express provisions of the statute and illegal... That being the case it was then a matter of law as to whether the non registration resulted in the illegality of the contract; it is clear that a contract to perform estate agency services can only be legal if entered into with a **registered** estate agent.”*

34. It follows that the contract relied upon by the plaintiff is an illegal contract which cannot be enforced by this court. The plaintiff has claimed capacity to sue as an agent based on the agency agreement that he had with the defendants. Given that this contract is illegal, it follows that the plaintiff cannot derive any strength from it, including the strength to sue on the terms thereof, for such agreement is not

worth the paper that it is written on, and is null and void, incapable of vesting any rights upon the plaintiff.

35. The above demonstrates further that the plaintiff cannot succeed in this suit.

36. There is however another issue that arose which I feel that it is important for me to address. It did emerge that the plaintiff, did directly enter into sale agreements with some of the purchasers. That is utterly out of place. Even assuming that the plaintiff was a duly registered agent, she had no capacity to enter into sales agreements with purchasers for land that it did not own. The role of an agent is look for customers, in this case, buyers of the suit land. Once an agent gets a buyer, what the agent is supposed to do is to refer that buyer to the seller, so that the buyer and seller can now enter into a written sale agreement for the property being sold. The agent has no capacity to purport to enter into a sale agreement with a purchaser unless such agent holds a power of attorney that allows him to deal with the seller's land. It was completely wrong for the plaintiff to purport to execute sale agreements on behalf of the defendants without holding any power of attorney. It is critical that agents understand and stick to their roles, and an agent should never attempt to elevate himself to the position of the owner of the land.

37. It is apparent from the foregoing that I am not persuaded that the plaintiff's case is merited. It is hereby dismissed with costs.

38. One may ask, what then happens to the various purchasers? It is upon them to see for themselves whether they have any rights, and if they feel that they do, they are free to sue on their own behalf and the court will make a determination on the same.

39. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Tanga holding brief for Mr. Ndubi for the plaintiff.

Ms. Wangari holding brief for Mr. Kabiru for 1st and 2nd defendants.

Ms. Kabalika holding brief for Mr. Akang'o for 3rd defendant.

Court Assistants: Nancy Bor/Alfred Cheron.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU