



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 224 OF 2002**

**JAMES FRANCIS KARIUKI ..... APPELLANT**

**AND**

**MATHEW NDAU KANYI ..... RESPONDENT**

***(An appeal from the judgment, order and decree of the High Court of Kenya***

***Nairobi (Mr. Justice D. K. S. Aganyanya) dated 14<sup>th</sup> March, 2002***

**in**

**H.C.C.A. NO. 342 OF 1998)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal from the judgment of Mr. Justice D.K.S. Aganyanya J (as he then was) dated 14<sup>th</sup> March 2002 in High Court Civil Appeal No. 342 of 1998 which was in turn an appeal from the decision of the Senior Principal Magistrate, Miss. F.M. Muchemi in her judgment and order delivered on 18th September, 1998 in Civil Case No. 1467 of 1996 in the Senior Principal Magistrate's Court at Kiambu.

In the appeal before us the appellant, James Francis Kariuki, was an Auctioneer trading under the name *Ndarugu* Merchant Auctioneers hereinafter "*Ndarugu*" while the respondent, who was also an Auctioneer, was Mathew Ndaу Kanyi trading as *Panama* Rovers Auctioneers hereinafter "*Panama*". Both *Ndarugu* and *Panama* were licensed auctioneers.

The relevant paragraphs of the ***plaint*** filed by *Panama* in Civil Case No. 1467 of 1996 read as follows:-

***3. On or about the 23<sup>rd</sup> of June 1995 the Receivers of Kenya Fibre Corporation Ltd. gave the plaintiff and the defendant instructions to jointly sell by public auction all the machinery belonging to the Moribund Company. The terms and conditions for the said sale were expressly stated in the aforesaid instructions letter.***

This paragraph was admitted in the defence dated 29<sup>th</sup> July 1996. The instructions referred to were in a letter dated 23<sup>rd</sup> June 1995 from the Receiver and addressed to both *Ndarugu* and to *Panama*. This letter set out the modalities "*as agreed with yourselves*" in the following terms.

***"a) M/s Ndarugu Merchants will be the leading auctioneer and all advertisements will carry that***

*firm's name, so as to avoid confusion by both firms advertising.*

*b) All proceeds from the sale at the site will be receipted by Receiver's staff who will also bank the cash into the receiver's bank account in Nanyuki. The balance of the proceeds payable by the customers later will be in form of banker's cheques payable to Kenya Fibre Corporation Ltd. (in Receivership)". In this connection, you undertake to inform the customers to prepare the cheques in that name.*

*c) No item will be collected by the customer(s) from the KFC premises until the customer(s) has paid for the items in full and proceeds banked into the Receiver's bank account.*

*(d) Your commissions and expenses will be paid promptly by the Receiver upon receipt of the sale proceeds and will be in the form of cheques payable to yourselves as all cash sales must be banked intact without any deduction for commission or expenses.*

*(e) You will share the single commission payable to the auctioneer in accordance with the maximum prescribed scale of fees for the sale of the items through auction. Hence there will be no double commission payable to yourselves as commission will be paid as if one auctioneer was retained.*

*(f) You will be responsible for co-ordination of your services to ensure maximum efficiency in the conduct of the entire exercise. Moreover the sharing of the auctioneer's commissions will be determined jointly by yourselves which decision will be communicated to the Receivers for the purpose of paying the commission as instructed by yourselves.*

*4. Pursuant to these instructions the plaintiff and the defendant jointly sold by auction the Equipment and Machinery for Kshs. 13,834,500/-.....*

This paragraph was not denied in the defence.

*5. As per the agreement with the joint Receiver Manager of Kenya Fibre Corporation the plaintiff and the defendant were entitled to be paid 5% of the proceeds of the sale and to be re-imbursed for expenses. The commission payable was Kshs.691, 725/= which was to be shared equally between the two firms.*

This paragraph was denied in the defence and it was pleaded that "the plaintiff is non suited as he was supposed to be paid his commission, if any, by the said joint Receiver/Manager of Kenya Fibre Corporation **AND NOT** the defendant." This was in effect a pleading that there was no privity of contract between **Ndarugu** and **Panama** as to payment of the share of the commission to **Panama** so that each of the two Auctioneers should look separately to the Receiver for payment.

*6. The defendant retained Kshs. 687,000/- from the proceeds of the sale which amount reflected the commission earned by the two firms but the defendant refused to share the aforesaid amount with the plaintiff.*

This paragraph was denied in the defence and it was expressly denied that the plaintiff was entitled to any commissions or that he incurred any expenses to be reimbursed.

*7. The plaintiff's claim against the defendant is therefore for Kshs. 365,862/= being the amount that the defendant is unlawfully withholding.*

This paragraph was denied in the defence.

*8. Despite demand and Notice to sue the defendant has failed, refused and/or neglected to make good the plaintiff's claim.*

This paragraph was denied in the defence.

9. *The cause of action arose in Nairobi within the jurisdiction of this honourable court.*

**REASONS WHEREFORE the plaintiff prays for judgment against the defendant for:**

**(a) Kshs. 365,862.50 with interest at 20% P.A. from 1st July 1995 until payment in full.**

**(b) Costs of the suit.**

**(c) Interest on (a) and (b) at court rates.”**

An application for Summary judgment under **Order 35 rules 1, 2 and 3** of the Civil Procedure Rules was filed on 3<sup>rd</sup> September 1996 by the plaintiff **Panama** seeking an order that summary judgment be entered against the defendant **Ndarugu**.

Senior Principal Magistrate Miss F.N. Muchemi, in her lengthy judgment, stated as follows:-

**“The defendant submitted that there was no contractual relationship between the plaintiff and the defendant and that for lack of privity of contract between the parties the claim of the defendant ought to be dismissed.**

She further referred to the submissions of the plaintiff, **Panama**, thus:-

**“The plaintiff in his submissions argues that the commission which was to be shared by the parties was payable upon the Principal receiving the proceeds of sale. The defendant however, retained Kshs. 687,000/-”**

The Learned Senior Principal Magistrate went on to conclude her judgment in these terms:-

**“I am satisfied that the plaintiff has proved that he worked together with the defendant as instructed by the official receiver. The plaintiff is therefore entitled to half of the commission payable to the two auctioneers jointly. The plaintiff claims Kshs. 365,862 .50”**

The latter sum was made up of Kshs.345,862 being 50% of the total commission due of Kshs.691,725/- plus 20,000/- for expenses incurred by the plaintiff.

We consider that this finding by the Senior Principal Magistrate was correct and that there was no merit in the claim by the respondent **Ndarugu** to the effect that there was no privity of contract between the appellant **Ndarugu** and the plaintiff **Panama**.

We are satisfied that the effect of the tripartite agreement reached between the Receiver and the plaintiff **Panama** and the defendant **Ndarugu** was that the Receiver was obliged to pay by way of commission to the plaintiff and the defendant jointly a total of Kshs.5% of the auction sale proceeds of Kshs.13, 834,500/- being Kshs.691,725/- plus, in the case of the plaintiff **Panama**, expenses of Kshs.20,000/- .

It was clearly stipulated in the letter dated 23<sup>rd</sup> June 1995 from Kenya Fibre Corporation Limited addressed to **Ndarugu** and **Panama** in paragraph (e) and (f) that:-

**“You will share the single commission payable to the auctioneer in accordance with the maximum prescribed scale of fees for the sale of the items through auction. Hence there will be no double commission payable to yourselves as commission will be paid as if one auctioneer was retained.**

**.....Moreover the sharing of the auctioneers’ commissions will be determined jointly by yourselves which decision will be communicated to the Receivers for the purpose of paying the commission as instructed by yourselves.”**

There is no evidence before us that any agreement was ever reached between the parties as to how the commission was to be shared between the two auctioneers and no instructions as to this were communicated to the Receiver. In these circumstances we consider that there must be implied an intention that the commission was to be shared equally between the two auctioneers.

It was further stipulated by the Receiver at the outset in the said letter dated 23<sup>rd</sup> June 1995 that “*all proceeds of sale at the site will be receipted by Receivers staff who will also bank the cash into the Receiver’s Bank account in Nanyuki.*” The balance of the proceeds payable by the customers later will be in form of Banker’s cheque payable to “*Kenya Fibre Corporation Ltd. (In receivership)*”

***“No item will be collected by the customer from the KFC premises until the customers have paid for the item in full and proceeds banked into the Receiver’s bank Account.”***

In breach of these provisions *Ndarugu* wrongfully retained Kshs. 687, 000/- from the proceeds of the auction sale.

We have come to the following conclusions as to how this appeal should be resolved.

*Ndarugu* was under a contractual obligation vis a vis *Panama* to share the commission payable by KFC to the two auctioneers amounting to a total of 15% of the proceeds of sale of the items to be sold at auction. These proceeds totalled Kshs.13,834,500/- 15% of which amounts to Kshs. 691,725/- This is the sum of total commission to be shared equally between *Ndarugu* and *Panama*.

It was originally envisaged that the payment of Kshs. 691,725/- would be by KFC to *Ndarugu* who would pay to *Panama* *Panama*’s 50% share. However *Ndarugu* pre-empted that procedure by wrongfully retaining Kshs.687,000/- out of the proceeds of sale instead of paying the whole of the proceeds of sale to the Receiver. This was a clear breach of contract by *Ndarugu* vis a vis KFC and resulted in *Ndarugu* becoming contractually liable to pay *Panama*’s 50% share of the total commission payable by the Receiver.

We therefore hereby dismiss the appeal with costs and uphold both the judgment and the order of Aganyanya J (as he then was), delivered on 27<sup>th</sup> February 2002 and on 14<sup>th</sup> March, 2002 respectively. *Ndarugu* shall pay interest to *Panama* at Court rates from the date of this judgment until payment in full.

***Dated and delivered at Nairobi this 15<sup>th</sup> day of February, 2008.***

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**