



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL 14 OF 2005

MAPIS INVESTMENT (K) LIMITED APPELLANT

AND

KENYA RAILWAYS CORPORATIONRESPONDENT

(Appeal from the judgment of the High Court Kenya at Milimani Commercial Courts, Nairobi (Hon. Lady Justice Mary Kasango,

Ag. J.) dated 10th November, 2004

in

H.C. C. C. NO. 335 OF 1998)

JUDGMENT OF THE COURT

This appeal arises from the judgment in *HCCC No 335 of 1998* of Mary Kasango Ag. J (as she then was) dated 10th November 2004 sitting in the Milimani Commercial Court Nairobi. The plaintiff in the superior court was Mapis Investments (K) Ltd. (hereinafter called **Mapis**) which company is the appellant herein. The defendant was Kenya Railways Corporation (hereinafter called **KRC**) which is the respondent to this appeal.

The key paragraphs in the plaint filed on 13th July 1998 by Mapis were as follows:-

3. ***“On or about the 15th day of January 1998 the defendant duly appointed the plaintiff as its sole selling agent to sell the defendant’s property known as Land Reference No. 209/6524 Nairobi for a price of Kshs. 95 million.***
4. ***It was agreed that the plaintiff’s commission for selling the defendant’s said property would be the difference between the defendant’s asking price of Kshs 95 million and the actual sale price the plaintiff would be able to obtain in the then depressed property market.***
5. ***The plaintiff was able to sell the property to the Japanese Embassy for the sum of Kshs 120 million and the defendant was supposed to pay the sum of Kshs 25 million to the plaintiff being the difference between the defendant’s price of Kshs 95 million and the actual selling price of Kshs 120***

million.

6. The defendant has paid to the plaintiff the sum of Kshs. 7.5 million and has refused or neglected to pay to the plaintiff the balance of Kshs 17.5 million and persist in such refusal.

Reasons wherefore the plaintiff prays for judgment for:-

(a) Kshs. 17.5 million:

(b) Costs of this suit:

(c) Interest at commercial rate of 34% from the date the transaction was completed to the date of actual payment:

(d) Any other or further relief deemed appropriate.”

The superior court dismissed the case of *Mapis*, in a judgment which was described, not unfairly, by Mr Amoko, learned counsel for *KRC*, in his submission as being far from perfect. *KRC* filed a *Notice of Cross Appeal* under *rule 90 (1)* of the Court of Appeal Rules (hereinafter “*the Rules*”) which reads as follows:-

“A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order he proposes to ask the Court to make in that event, as the case may be.”

The Notice of Cross Appeal contained the following grounds:-

1. The learned Judge erred in holding that “.....”

PW1 said that the agreement was that the plaintiff was entitled to anything over Kshs 95 million realised in the sale. There was no clear documentary evidence to this but the court has no reason to disbelieve the evidence of PW1 on this account.”

2. The learned Judge erred in failing to find and hold that by the documentary evidence tendered by P.W.1 himself, there was every reason to disbelieve the testimony of PW1.

3. The learned Judge failed to take into account and fully consider the cumulative weight of the evidence before her.

4. In particular, the learned judge failed to take account and fully consider the purport and effect of the following documents:

(a) The respondent’s two letters of 6th January 1998 addressed to Messrs. Oraro & Rachier, Advocates whose contents are materially inconsistent with each other;

(b) The respondent’s letter of 24th February 1998 addressed to Messrs Oraro & Rachier;

(c) Messrs Oraro & Rachier’s letter of 16th June 1998 and copies of the two cheques both dated 16th June 1998.

(d) Copy of the respondent’s letter dated 15th November 2002.

The Notice of Cross Appeal further stated:-

IT IS PROPOSED to ask the court for **ORDERS** that:-

- (A) **The appeal be dismissed with costs in any event.**
- (B) **This cross appeal be allowed with costs to the respondent;**
- (C) **The judgment of the superior court be reversed and varied to the extent that the learned Judge held that the appellant had proven the agreements alleged in paragraphs 3 and 4 of the plaint.**
- (D) **Such other orders as this Honourable Court may deem just and equitable.**

KRC also filed a **Notice of Grounds for affirming** the decision under **rule 91(1)** of the Rules which reads as follows:-

“A respondent who desires to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those relied upon by that court shall give notice to that effect, specifying the grounds of his contention.”

The **grounds for affirming** were stated to be:-

1. **The alleged agreement as pleaded in paragraphs 3 and 4 upon which the appellant sought relief of the plaint (sic) was , and is, illegal and unenforceable as contrary to the mandatory provisions of sections 8, 8A, and 18 of the Estate Agents Act, Cap 533 of the Laws of Kenya.**
2. **The alleged agreement to pay to the appellant fees of any sums in excess of the sum of Shs.95 million was, and is illegal and unenforceable as direct violations of the mandatory provisions of rule 2 of the Estate Agents (Remuneration) Rules, 1987.**
3. **The alleged and/or purported performance of the aforesaid agreement as pleaded in paragraph 5 of the plaint would have been illegal and hence unenforceable as it would be in direct violation of the Estate Agents Act.**
4. **The alleged agreement as pleaded in paragraphs 3 and 4 upon which the plaintiff sought relief of the plaint was, and is, illegal and unenforceable as it was not within the powers conferred upon the respondent by the Kenya Railways Act, Cap 397 of the Laws of Kenya.**
5. **On the evidence before the superior court the arrangements entered into between the Appellant and the then officials of the Respondent pursuant to which the plaintiff would purportedly receive some payment for the sale of the land to the Embassy of Japan was, and is contrary to public policy and therefore unenforceable.**
6. **In any event, even if the alleged agreement was legal and valid and enforceable, on the evidence before the superior court, the plaintiff was not entitled to any payment as it was not the effective cause of the sale of the land to the Embassy of Japan.**

Mapis objected to these grounds on the basis that these issues had not been raised in the agreed issues in the superior court but this Court dismissed the objection to grounds for affirming Nos.1, 2, 3 and 4 in a ruling dated 18th November, 2005 with the result that **KRC** were permitted to rely on these four grounds for affirming at the hearing of the substantive appeal now before us which we said we would consider on their merits when the hearing of the appeal resumed.

The position with regard to ground for affirming No. 4 can be dealt with quickly. In our view there is nothing in **Kenya Railways Act, Cap 397** to support the proposition that that Act rendered the agreement relied on by **Mapis**, if it existed, illegal. Mr. Amoko at the beginning of the renewed hearing on 2nd May, 2006 rightly stated that he was not pursuing ground for affirming No. 4.

Grounds for affirming Nos. 1 and 3 both relied on the proposition that the agreement alleged to exist by Mapis, if it existed, which was denied, was an illegal contract having been entered into in contravention of **sections 8, 8A, and 18** of the **Estate Agents Act, Cap 533** of the Laws of Kenya of which **section 18** is the most pertinent. It is set out in full later in this judgment.

Ground for affirming No. 2 relied on the alleged contract being in direct violation of the mandatory provisions of **rule 2** of the **Estate Agents (Remuneration) Rules, 1987** which, in so far as is relevant reads:-

2. The estate agent's remuneration shall be calculated in accordance with the scale of fees set out in the Schedule.

SCHEDULE

Scale of Fees

5. A special fee or commission may be agreed for sole agency instructions and numerous transactions in one estate or building.

One other fact that was before the superior court at the hearing was contained in a letter dated **15th November 2002** from Mr. Andrew A. Wanyandeh the then Managing Director of KRC addressed to Mr. Sammy P.M. Kyungu SS the Permanent Secretary, the Ministry of Transport & Communication.

In that letter it is stated, *inter alia*:-

“After completion of sale, Mr. Shompa apparently had made representation to higher authorities seeking some payment on what could best be described as on compassionate grounds citing the fact that he had at least introduced the eventual purchaser to the Corporation. The Corporation's lawyer and the then Managing Director was consequently summoned to the Office of the President for a meeting with the then Head of Public Service. After this meeting the firm of Oraro & Rachier Advocates acting for the Corporation was instructed to pay Kshs. 7.5 million to Mr. Shompa purely on an ex gratia basis as there was no contractual reason for paying him any money. If he were an estate agent he would have been paid no more than Kshs. 1,260,000 under the Estate Agents Act.”

The last sentence of the above quotation raises two pertinent issues. One is whether Mr. Shompa was an estate agent and the second is whether, if he was an estate agent, his fee could have exceeded Kshs.1,200,000 under the Act. Taking the latter issue first, it is clear from paragraph 5 of the Schedule to the Estate Agents Act that “A special fee or commission may be agreed for sole agency instructions

The instructions given to the appellant were in a letter dated 15th January 1998 from the respondent's then advocates Oraro & Rachier in which letter it was clearly stated that “We hereby confirm that the Kenya Railways Corporation has appointed you the sole selling agents of the above mentioned property on their behalf.”

These instructions were therefore clearly “sole agency instructions” and therefore a special fee or commission could be legally agreed. We consider that in these circumstances it was not a breach of the **Estate Agents (Remuneration) Rules 1987** for the respondent, if it did so, to agree a fee in excess of the scale fee with a registered Estate Agent.

The next question for us to consider is whether the appellant or Mr. Shompa were **registered** as Estate Agents and, if they were not, what is the legal effect of such non registration?

In the letter dated **20th November 2002** from the respondent to the Permanent Secretary above referred to, Mr. Wanyandeh categorically states that neither Mr. Shompa nor the appellant were registered as Estate Agents in accordance with the Act. This was not contradicted by Mr. Shompa in his evidence or through

his counsel in submissions. The appellant did not plead in the plaint that it or Mr. Shompa were registered.

Mr. Shompa did however state categorically in his evidence as follows:-

“I was a shareholder and Managing Director. We have brought the defendant to court because of a pending claim not paid to date. The claim arose from sale of property they had retained us to sell for them. Mapis Investment Limited is involved in estate agency and valuation. That includes selling properties. When we sell we charge commission.”

Section 18 of the Estate Agents Act Cap.533 provides as follows:-

“18(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 an estate agent unless all of the partners whose activities include the doing of acts by way of such practise are registered as estate agents,***
 - (c) No body corporate shall practise as an estate agent unless all of 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 20,000 shillings or to imprisonment for a term not exceeding two years or to both.”***

In the peculiar circumstances of this case, there being no representation of the respondent in the superior court, and the trial judge not having had this issue ventilated before her, we do not have the benefit of her views on the issue. But as we have already pointed out we allowed KRC to argue the point before us although it was not raised in the superior court.

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 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. In view of this we are not prepared to countenance the award of a further sum of Kshs. 17.5 million plus interest at 34% to the appellant as claimed in the memorandum of appeal read with the plaint.

This is despite the fact that the illegality of the contract between the appellant and KRC was not pleaded in the superior court and was not raised until the grounds for affirming the decision were filed on 31st May 2005 by the respondent’s new advocates, Messrs Inamdar & Inamdar.

In the case of ***Mistry Amar Singh v. Serwano Wofunira Kulubya 1963 EA 408*** the Privy Council, on appeal from a judgment and order of the East African Court of Appeal at page 414 of the report, of Lord Morris of Borth-y-Guest in his speech quoted with approval the following quotation from the judgment in ***Scott v. Brown, Doering, McNab & Co (3), [1892] 2 QB 724 Lindley LJ at p.728:-***

“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. 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 invoking the aid of the court is himself implicated in the illegality. 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.”

In the letter dated **20th November 2002** in which it was stated that the appellant and Mr. Shompa were not registered, was produced in evidence by Mr. Shompa, a director of the appellant without any denial of the non registration. This was in our view tantamount to an admission of the facts giving rise to the illegality. 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.

We make no finding on paragraphs 5 and 6 of the Grounds for Affirming the decision as this is no longer necessary having come to the above conclusion and also because the facts available are insufficient to enable a decision to be made by us.

For the above reasons we make the following orders:-

1. ***The appeal be and is hereby dismissed with costs;***
2. ***The cross appeal be and is hereby allowed but with no orders as to costs since the grounds on which the cross appeal are being allowed were never raised in the superior court.***
3. ***The judgment of the superior court is sustained but for different reasons stated herein.***

Dated and delivered at Nairobi this 9th day of June, 2006.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

E. O. O’KUBASU

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR