



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI**

**CORAM: OMOLO, O’KUBASU & DEVERELL, J.J.A.**

**CIVIL APPEAL 14 OF 2005**

**BETWEEN**

**MAPIS INVESTMENT (K) LTD ..... APPELLANT**

**AND**

**KENYA RAILWAYS CORPORATION ..... RESPONDENT**

***(Appeal from the judgment of the High Court of Kenya at  
Milimani Commercial Courts, Nairobi (Kasango Ag. J) dated  
10th November, 2004***

**in**

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

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

**RULING OF THE COURT**

This is a Ruling on an application by way of preliminary objection arising in a first appeal from the decision of the superior court (Lady Justice **Mary Kasango Ag.J** as she then was) delivered on 10th November 2004 in the Milimani Commercial Court in which she dismissed the claim of the Plaintiff (the Appellant herein) for Shs 17.5 million plus interest at 34% plus costs against the Kenya Railways Corporation (the Respondent herein). The Plaintiff’s claim was for commission on the sale by the Respondent to the Japanese Embassy of L.R. No.209/6524 Nairobi in 1998.

The appeal came for hearing on 7th July 2005. On that day the Court heard the whole of the submissions in support of the appeal by **Mr. Muriithi**, learned counsel for the appellant Mapis Investments Kenya Ltd. This was followed by the submissions of **Mr. Amoko** learned counsel for the respondent Kenya Railways Corporation. By the end of the time available that day **Mr. Amoko** had not concluded his submissions on the appeal on behalf of the respondent. He had not touched in any detail upon the Grounds for Affirming the decision under **rule 91 (1)** of the Court of Appeal Rules (“the Rules”).

The appeal was in due course fixed for resumption of the hearing on 18th October 2005. On that day **Mr. Amoko**, informed the Court that he had been served with a preliminary objection to the points raised in the Grounds for Affirming the decision.

No such formal preliminary objection was filed but **Mr. Muriithi** submitted that it was not required to be filed and it was agreed by both Counsel and the Court that **Mr. Muriithi's** preliminary points could be taken up by him as part of his response to the appellant's submissions on the appeal.

The Grounds for Affirming the decision to which the respondent was objecting were those grounds seeking to rely upon the illegality and unenforceability of the following: -

1. The alleged agreement as pleaded in paragraphs 3 and 4 of the Plaintiff;
2. The alleged agreement by the Respondent to pay the appellant any sum in excess of Shs. 95 million;
3. The alleged and/or purported performance of the said agreement;
4. The alleged agreement as pleaded in paragraphs 3 and 4 of the Plaintiff.

Paragraphs 3 and 4 of the Plaintiff were as follows:-

*3 On or about the 15th of January, 1998 the defendant duly appointed the plaintiff as its sole selling agent to sell defendant's property known as Land Reference Number 209/6524, Nairobi for a price of K.Shs. 95 million.*

*4 It was agreed that the plaintiff's commission for selling the defendant's property would be the difference between the defendant's asking price of K.Shs. 95 million and the actual sale price the plaintiff would be able to obtain in the then depressed property market.*

The illegality and unenforceability of the matters listed in Grounds 1 to 3 above were claimed in the Grounds for Affirming filed on 31st May 2005, to be consequent upon violations of the **Estate Agents Act** cap 533 of the Laws of Kenya.

The illegality and unenforceability of the matters referred to in Ground 4 above were claimed in the Grounds for Affirming to be consequent upon the agreement being in direct violation of the **Kenya Railways Act** Cap 397 of the Laws of Kenya. There does not appear to be anything in that Act to support the proposition that that Act rendered the agreement referred to in Ground 4 for Affirming No. 4 illegal.

In addition to the above, paragraph 5 in the Grounds for Affirming the decision claimed that "*On the evidence before the Superior Court, the arrangements entered into between 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.*"

The sixth and final Ground for Affirming the decision was that, on the evidence before the superior court, the appellant was not entitled to any payment as it was not **the effective cause** of the sale of the land to the Embassy of Japan.

The objection put forward by the appellant to these grounds was primarily that these issues had never been raised in the Agreed Issues in the superior court set out in Part II of the Summons for Directions in the superior court which are as follows:-

**1. Did the defendant appoint the plaintiff as its sole selling agent to sell the defendant's property known as Land Reference No. 209/6254 for the price of Kshs. 95 million?**

**2. Was the plaintiff entitled to the commission of the difference between the defendant's price of Kshs. 95 million and the actual selling price the plaintiff was able to find in the then depressed property market?**

**3. Was the plaintiff able to sell and did sell the defendants said property to the Japanese embassy for Kshs. 120 million?**

**4. If so, was the plaintiff therefore entitled to the sum of Kshs. 25 million being the difference from (sic) Kshs. 120 million and Kshs. 95 million?**

**5. Did the defendant only pay the sum of Kshs 7.5 million to the plaintiff and refused to pay the balance of Kshs. 17.5 million to the plaintiff.**

**6. Is the plaintiff entitled to the sum of 17.5 million?**

**7. Was the plaintiff entitled to commission based on percentage and if so what percentage?**

**8. Does the defendant owe the plaintiff the sum of Kshs 17.5 million?**

The appellant further objected that none of the issues as to illegality, unenforceability, breach of public policy or the applicant not being the effective cause of the sale were expressed in the **defence** filed on 26th August 1998.

The defence in paragraphs 3, 4 and 5 consisted of a denial of the existence of any agency agreement between the plaintiff and the defendant and a plea in the alternative that, if there was any such contract, then the plaintiff was only entitled to a commission calculatable (sic) on a percentage of the sale price and cannot possibly be an open-ended commission.

This is not a defence directly raising any assertion that such a contract, if it existed, was illegal or unenforceable.

In considering the preliminary objection by the appellant as to the admissibility of the Grounds of Affirming we have come to the conclusion that those Grounds which are founded on allegations of illegality can be relied on by the respondent and should not be struck out as requested by the appellant objector. We reach this conclusion on the basis of the decision of the Privy Council in **Mistry Amar Singh v. Serwano Wofunira Kulubya**, [1963] EA 408 on appeal from a judgment and order of the East African Court of Appeal at page 414 of the report. In his speech Lord Morris of Borthy- Guest quoted with approval the following passage 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 action. This old and wellknown legal maxim is founded in good sense, and expresses a clear and well recognised 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.”***

On this basis we dismiss the objection by the appellant to Grounds for Affirming numbers 1, 2, 3 and 4. Those Grounds will not be struck out and will be considered on their merits by us in reaching our decision on the appeal before us. This leaves us with the objection to Grounds for affirming numbers 5 and 6 neither of which are based on illegality.

Paragraph 5 in the Grounds for Affirming the decision claimed that *“On the evidence before the superior court, the arrangements entered into between 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.”*

The 6th and final Ground for Affirming the decision was that, on the evidence before the superior court, the plaintiff /appellant was not entitled to any payment as it was not ***the effective cause*** of the sale of the land to the Embassy of Japan. We consider that there is a distinction between a contract being illegal and a contract being unenforceable as being contrary to public policy.

Grounds 5 and 6 do not raise any issue alleging illegality so that the passage cited above from the case of ***Mistry Amar Singh v. Serwano Wofunira Kulubya 1963 EA 408*** is not applicable to these two Grounds. Neither of these two grounds were pleaded in the defence and nor were they raised in the agreed issues in the superior court. They were not considered by the superior court. No evidence was led by either party in the superior court as to the existence and details of the alleged public policy nor as to how such public policy was breached. No evidence was led as to whether or not the appellant was the effective cause of the selling of the land by the respondent to the Japanese Embassy.

Mr. C. Muriithi relied on, amongst others, the case of ***Securicor (Kenya) Ltd v. E.A. Drapers Ltd. & another [1987] KLR 338*** in which this Court (Platt, Apaloo JJA & Masime Ag.JA) had this to say at page 344 when dealing with an application to amend a Memorandum of Appeal: -

***“The general principle is that expressed in the Connecticut Fire Insurance Co v. Kavanagh (1882) 61 LJ PC 60.***

*“ When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts admitted or proved beyond controversy, it is not only competent but expedient to entertain the plea; but this course ought not to be followed unless the Court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts fully investigated would support the plea.”*

*That statement of principle has been accepted in all the cases we have been referred to.”*

Mr.Muriithi also relied upon ***Visram & Karsan v. Bhatt 1965 EA 789 at 793*** (Newbold V-P) in which the

predecessor of this Court said: -

*“I am quite satisfied that this issue of an election should have been raised in pleading and canvassed before the trial judge. I am not satisfied that the evidence on which this court is asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the point now raised for the first time by the defendants. Unless a court of appeal is so satisfied leave to raise the new issue should not be granted (see **United Marketing Co v. Hasham (1) and Warehousing & Forwarding Co v. Jafferli & Sons Limited (2)**). Accordingly, I would not grant leave to the defendants to raise on this appeal this new issue of an election and it thus becomes unnecessary to consider the matter further.”*

At this stage we are only dealing with the objection to the grounds for affirming. If any grounds are permitted to stand we will then hear the submission of counsel on whether or not the grounds so permitted have been established.

We consider that, given the oral evidence of Mr. Shompa to the effect that he and his company were involved in the estate agency business when the appellant entered into the agreement sued upon and given that **section 18(1)** of the Estate Agent’s Act makes it an offence to practice as an estate agent unless registered as an Estate Agent under the Act. Here there are statements made in the documents produced by Mr. Shompa in evidence in support of his claim to the effect that neither he nor the appellant were so registered. The appellant has not denied lack of registration.

We think that this is sufficient for us to permit the respondent to canvass before us Grounds 1, 2, 3, and 4 for affirming the decision in the peculiar circumstances of this case in which there was no appearance for the respondent at the hearing in the superior court.

We therefore decline to sustain the objection to grounds 1, 2, 3 and 4. The costs of the hearing on the objections shall be in the appeal.

***Dated and delivered at Nairobi this 18th day of November, 2005.***

**R. S. C. OMOLO**

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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**

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