



REPUBLIC OF KENYA



**Kurgat & another v Boit (Civil Case E001 of 2023)
[2024] KEHC 7798 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 7798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E001 OF 2023
JRA WANANDA, J
MAY 31, 2024**

BETWEEN

EVANS KIPTOO KURGAT 1ST PLAINTIFF

GEOFFREY KIPSANG BIWOTT 2ND PLAINTIFF

AND

SARAH CHELEL BOIT DEFENDANT

RULING

1. Before the Court for determination is a Preliminary Objection and an Application both filed by the Defendant seeking the striking out of this suit.
2. The background of the matter is that by the Plaint filed herein on 18/01/2023 through Messrs Limo R.K. Co. Advocates, the Plaintiffs have sought Judgment against the Defendant for a sum of Kshs 37,900,000/- being allegedly unpaid commission due to the Plaintiff for sale of a parcel of land.
3. In the Preliminary Objection filed on 16/02/2023 through Messrs Kenei & Associates Advocates LLP, the Defendant contends that the suit is founded on an illegal contract/claim hence bad in law pursuant to the provisions of Section 18 of the *Estate Agents Act* and that the Plaintiffs are divested of the requisite locus standi to make the claim in the instant suit hence the suit does not disclose any reasonable/legitimate cause of action.
4. The Application is the Defendant's Notice of Motion dated 25/07/2023 and which seeks the following orders:
 - i. The Plaint and the entire suit be and is hereby struck out for want of a reasonable cause of action and being bad in law with costs to the Defendant.
 - ii. The costs of the application are awarded to the Defendant/Applicant.



5. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Defendant.
6. In the Affidavit, the Defendant deponed that Plaintiff is seeking enforcement of a contract pursuant to a letter dated 19/05/2022 from the law firm of M/S Kamau Lagat & Co., that there is no contract executed between the parties hence there is no reasonable cause of action, that the contract is not executed hence it is void, that the suit does not disclose the nexus between the purported offer by the said law firm and the Defendant, that the letter does not indicate that the law firm was making the offer specifically on the Defendant's behalf, that she has never given any instructions to the law firm to seek the services of the Plaintiffs' as her agents, that the letter is not addressed to the Plaintiffs, and that the purported contract is invalid for want of mandatory components of a contract and in particular the failure to accept the offer.
7. She added that the purported contract is illegal and void to the extent that it breaches the provisions of Section 18 of the Estate Agents Act hence unenforceable, that the Plaintiffs are not registered Estate Agents hence had no capacity to enter into the purported contract, that the letter indicated that the offer was valid for 14 days from 19/05/2022 hence the same lapsed by effluxion of time on 2/06/2022, that it is evident that as at 10/10/2022 when the parcel of land was purportedly sold, the purported agency contract had been terminated hence not binding, that it will be a waste of judicial time for the Defendant and the Court to be subjected to a rigorous judicial process on a suit founded on an illegality and which does not disclose a reasonable cause of action.

Plaintiffs' Replying Affidavit

8. The Plaintiffs opposed the Application vide the Replying Affidavit sworn by the 1st Plaintiff, Evans Kiptoo Kurgat and filed on 1/02/2024. He deponed that the Defendant as the owner of property L.R. No. 9401/1, through her Advocates instructed the Plaintiffs to market and procure a purchaser for the property at an agreed commission of 5% of the purchase price on condition that the minimum purchase price per acre was Kshs 2,000,000/- and that the said amount was paid upon completion of the transaction, that it is the Plaintiffs who sought and sourced for potential purchasers and sourced Siret-Outgrowers Empowerment Project Company (the Purchaser), that the Plaintiffs kept on appraising the Defendant and her Advocate of the negotiations until eventually the Purchaser confirmed an offer for Kshs 758,000,000/-.
9. The 1st Plaintiff deponed further that on 10/10/2022, the Defendant and the Purchaser entered into the formal agreement wherein the property was sold at the said price and the Plaintiffs' commission translated to Kshs 37,900,000/-. He then stated that however, efforts to seek audience with the Defendant and her Advocate after the transaction were futile, that the negotiations on the purchase price went beyond the timelines under the letter of instructions but the Defendant went ahead to approve the transaction and it is therefore dishonest for her to claim that the agreement had terminated at the time of entry the agreement yet time was not of essence. In conclusion, she deponed that the issues whether the Plaintiffs were appointed as agents, whether there is a formal contract between the parties, whether time was of essence and whether the transaction is governed under the Estate Agents Act are issues which can only be resolved through a trial.

Hearing of the Application

10. It was agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Defendant filed her Submissions on 21/02/2024. As for the Plaintiffs, up to the date of concluding this Ruling, I had not come across any Submissions filed on their behalf.



Defendant's Submissions

11. Regarding whether the *Estate Agents Act* is applicable in the instant case, Counsel for the Defendant submitted that the claim in this suit is for payment of a sum of money being a commission for estate agency services in selling a parcel of land, that estate agency refers to the business of facilitating sale, purchase or leasing of landed properties and the Act was enacted to provide for registration of persons who, by way of business, negotiate for or otherwise act in relation to the selling, purchasing or letting of land and buildings erected thereon, for the regulation and control of the professional conduct of such persons and for connected purposes. He cited the preamble to the *Act* and also Section 2 thereof and submitted that juxtaposing the Plaintiff and the purported letter of instructions with the provisions of the Act, it is clear that the alleged contract was for the Plaintiffs to connect the Vendor with potential buyers and which service falls within the purview of the Act. He therefore urged the Court to find that the Act is applicable to this suit.
12. On whether the contract is illegal, Counsel submitted that the Defendant holds the view that there is no contract between the parties but nonetheless, the Plaintiffs have founded their claim on an alleged contract which is illegal to the extent that it offends the *Estate Agents Act*. He cited Section 18 thereof and submitted that the Plaintiffs are not registered as estate agents under the Act and that the Plaintiffs have not rebutted this fact in their Replying Affidavit and have not supplied any evidence of capacity to practice as such. He cited the case of *Hussein Ladha v Hareesh Soni* [2017] eKLR, the case of *Scott v Brown Doering, MCNAB & Co. (3)* [1992] 2 QB 724 and also the case of *Livingstone Gitonga Muchungi & 2 Others v ICEA Lion Life Assurance Company Limited* [2021] eKLR.
13. On whether the suit discloses a reasonable cause of action, Counsel cited the case of *DT Dobie & Co. (K) Ltd v Muchina* [1982] KLR and several others and submitted that the cause of action presupposes that there exists a valid contract capable of being enforced, that a claim for breach cannot be sustained where the contract itself does not exist. He submitted further that the Plaintiffs have founded their claim on the letter dated 19/05/2022 but a cursory look at the letter confirms that it is basically an offer and nothing more, that there is no indication that there was an acceptance of the offer and that the contract does not meet the requisite threshold of a contract. He contended further that even if the letter were a valid contract, it would still stand terminated by effluxion of time since the letter expressly indicates that the offer was to remain valid for 14 days from 19/05/2022, that the Plaintiffs allege that the sale occurred on 10/10/2022 which is way after the timeline set in the letter.
14. In conclusion, Counsel prayed that the suit be struck out or dismissed with costs.

Determination

15. The issue in this Application is “whether this suit should be struck out or dismissed for being in breach of the provisions of the *Estate Agents Act* and/or for want of disclosure of a reasonable cause of action”.
16. Striking out of pleadings has been discussed extensively in various decisions over time. For instance, the Court of Appeal in the case of *Blue Shield Insurance company Limited v Joseph Mboya Ogutu* [2009] eKLR stated as follows,

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd v Muchina* [1982] KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out of a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in



effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of *Cail Zeiss Stiftung v Ranjuer & Keeler Ltd and others (No.3)* [1970] ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

17. On whether the Plaintiff herein discloses a reasonable cause of action, in the case of *D.T. Dobie & Co (K) Ltd v Muchina*, [1982] KLR, the Court of Appeal defined the term “reasonable cause of action” in the following terms;

“reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ...” .
18. It is therefore clear that under Order 2 Rule 15(2) of the *Civil Procedure Rules*, applications seeking to strike out pleadings for not disclosing a reasonable cause of action should not be supported by any evidence. The Court should only look at the pleadings in order to ascertain whether the impugned pleading raises a reasonable cause of action. For this reason, and since the Defendant’s arguments are all based on evidence and scrutiny of documents, the limb of the Defendant’s argument to the effect that the Plaintiff does not disclose a “reasonable cause of action” cannot be entertained.
19. On the separate ground touching on the provisions of the *Estate Agents Act*, in this case, the Defendant has denied the existence of any commission agency contract between her and the Plaintiffs as alleged in the Plaintiff. She then took the position that even if the contract were to be proved to exist, the Plaintiffs are not registered as estate agents under the *Estate Agents Act* and therefore had no capacity to enter into the purported contract. According to the Plaintiff, the Plaintiffs were given instructions by the Defendant to advertise, market and source for purchasers of the subject parcel of land on her behalf at an agency commission of 5%. It is then pleaded that the instructions were given vide the letter dated 19/05/2022 and that the agreement between the Defendant and the Purchaser sourced by the Plaintiffs was then executed on 10/10/2022.
20. The question is therefore whether the *Estate Agents Act* applies to the dispute herein.



21. Regarding the applicability of the Act, I observe that the date of commencement of the Act was 9/04/1985 and the preamble thereto is crafted in the following terms:

“An Act of Parliament to provide for the registration of persons who, by way of business, negotiate for or otherwise act in relation to the selling, purchasing or letting of land and buildings erected thereon; for the regulation and control of the professional conduct of such persons and for connected purposes”.

22. In interpretation at Section 2, the Act defines the term “practice of an estate agent” to mean:

“... the doing, in connection with the selling, mortgaging, charging, renting 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 prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or
- b) negotiating the terms of the sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principle”

23. In this suit, I observe that the claim is for payment of a sum of money as commission for estate agency for the Plaintiffs’ services of identifying, sourcing and bringing on board the purchaser who eventually bought the parcel of land from the Defendant. From the above provisions of the Act, I agree with the Defendant’s Counsel that the alleged contract was clearly for the Plaintiffs to connect the Plaintiff, as vendor, with potential purchasers. I cannot find any argument that can persuade this Court to reach any other conclusion that that the service alleged in the Plaintiff falls within the purview of the Act. The Act is therefore clearly applicable to this suit.

24. Having found as above, the question now is whether the Plaintiffs had the legal capacity to enter into the contract and/or render the services of estate agency as they purport to have done. In regard thereto, Section 18 of the Act provides as follows:

“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 practice as an estate agent unless he is a registered estate agent;
 - b. no partnership shall practice 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 practice 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.”



25. Regarding these provisions, the Court of Appeal in the case [Mapis Investment \(K\) Limited v Kenya Railways Corporation](#) [2006] eKLR stated as follows:

“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.”

26. The above holding of the Court of Appeal has been religiously followed in many other subsequent cases, including in [Hussein Ladha v Haresb Soni](#) [2017] eKLR (PJ Otieno J), [Ocra Realtors Ltd v Abdulghani Kipkemboi Komen & 2 others](#) [2019] eKLR (Sila Munyao J), [Vincent M. Kimwele v Diamond Shield International Limited](#) [2018] eKLR (M. Kasango J), [Njuguna t/a Propensity Properties Consultants v Githunguri & Another](#) (Civil Suit 129 of 2010) [2023] KEHC 26582 (KLR) (Commercial & Admiralty) (8 December 2023) (Judgment) (A. Mshila J), [Eric Omuodo Ounga v Kenya Commercial Bank Limited](#) [2017] eKLR (Majanja J), and also [Livingstone Gitonga Muchungi & 2 others v ICEA Lion Life Assurance Company Limited](#) [2021] eKLR (M. Odero J) among many others.
27. In regard to the position taken by the Defendant that the Plaintiffs are not registered as estate agents under the Act and that they therefore had no capacity to enter into the purported contract, I observe that the Plaintiffs have said nothing in response in their Replying Affidavit and have opted to remain silent about it. They have not also supplied any evidence to demonstrate that they are registered under the Act. They have therefore not rebutted the Defendant’s allegation. In view thereof and considering the foregoing holding made by the Court of Appeal whose declarations are binding on this Court, I agree with the Defendant’s Counsel that the alleged contract, even if genuine or proved, is illegal. The Plaintiffs not being registered, licenced or authorized to carry out the work of real estate agents, their claim is illegal.
28. I therefore agree and find that the Plaintiffs have founded their claim on an alleged contract which is void and illegal to the extent that it offends the mandatory provisions of Section 18 of the [Estate Agents Act](#). The contract is accordingly unenforceable as the Plaintiffs were not registered Estate Agents and



therefore had no capacity to enter into the purported contract. In the circumstances, it will be a waste of judicial time for the Defendant and the Court to be subjected to a judicial process on a suit founded on an illegality and which does not therefore disclose a reasonable cause of action.

Final Orders

29. The upshot of my findings above is as follows:
- i. The Defendant’s Preliminary Objection dated 10th February 2023 is upheld.
 - ii. The Defendant’s Notice of Motion dated 28/06/2023 is also allowed.
 - iii. Consequently, the Plaint filed herein and dated 18/01/2023 is hereby struck out together with this suit in its entirety, with costs to the Defendant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF MAY 2024

.....
WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Ms. Chelgoi for Defendant

N/A for Plaintiff

