IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SHAH, AKIWUMI & GICHERU J.A)

CIVIL APPEAL 77 OF 1994

BETWEEN

GILBERT KABAGE ……...1ST APPELLANT

PATA COMMERCIAL ENTERPRISES………..........2ND APPELLANT

AND

J. NJENGA GICHUKI…………………..............…...1ST RESPONDENT

NJENGA COMMERCIAL……………....….... …….2ND RESPONDENT

WAHOME GICHACHI……….....................……....3RD RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nakuru (Justice D. M. Rimita) dated 23rd November, 1993

IN

H. C. C.C. NO. 251 OF 1991)

****

JUDGMENT OF THE COURT:

The appellant Mr. Gilbert Kabage trades as an estate agent under the firm name of Pata Commercial Agencies, hereinafter referred to as "the sub-agent".

The first respondent Mr. J. Njenga Gichuki trades under the firm name of Njenga Commercial, hereinafter referred to as "the agent".

The second respondent Mr. Wahome Gichahi was at all material times the registered proprietor of a parcel of land comprising of 560 acres, and known as Ndurumo Farm in Laikipia District. We will refer to him as "the vendor".

On 22nd February, 1991, the vendor appointed the agent as his agent to sell and dispose of the said

Ndurumo Farm at an agreed commission of Kshs. 2,000/= per acre.

The "irremovable authority to sell" given on 22nd February, 1991 can only mean "irrevocable authority to sell". That authority was however subject to revocation after seven days notice.

The agent then approached the sub-agent in Nakuru and it was agreed between the agent and the sub-agent that they would share any commission earned in the ratio of 45% to the sub-agent and 55% to the agent.

As the learned judge in the superior court (Rimita J.) has pointed out in his judgement, as luck would have it, the sub-agent secured an able and willing buyer within a very short time. We would emphasis the use of the words "able and willing buyer" by the learned judge. The buyer was The Catholic Diocese of Nakuru. The said Diocese agreed to pay Kshs. 7,000/= per acre.

It was then not in dispute as between the agent and the sub-agent that the sub-agent was to sell the Farm at Kshs. 5,000/= per acre and that any price obtained over and above the said sum of Kshs.5,000/= per acre would be the agent's commission. That would make it a figure of Kshs. 1,120,000/= as commission payable by the vendor to the agent.

It would therefore mean, as things then stood that the sub-agent was to get a sum of Kshs. 504, 000/= and the agent was to get a sum of Kshs.516,000/=. This was as between the agent and the sub-agent. The vendor was not a party (directly) to the agreement between the agent and the sub-agent.

After the Catholic Diocese had agreed to purchase the land, the vendor changed his mind about paying Kshs. 1,120,000/= to the agent as allegedly his family intervened and said that that sum was too much and they (the family) would agree to the sale only if the commission figure was reduced to Kshs.613,040/=. How this sum of kshs.613,040/= was arrived at is not clear from the proceedings.

The agent's evidence before the superior court does not show in what manner, if at all, the vendor was involved in the deal between the agent and the sub-agent. The sub-agent said that as the vendor is the principal of he agent the vendor is liable to him. We cannot accept the argument to the effect that the vendor automatically becomes liable to the sub-agent when the vendor is a total stranger to the sub-agent.

The sub-agent clearly said in the course of his cross-examination that the first time he ever saw the vendor was when he was in court. He confirmed also that there was no agreement between him and the vendor.

So the situation obtaining as at the date of trial was clear. The sub-agent was appointed purely and simply by the agent to do the job. This is the principle of a delegated authority not being capable of being delegated. The latin maxim is "delagata potestas non potest delegare".

The sub-agent cannot therefore claim any commission from the vendor directly. His privity of contract however is with the agent who employed him. The agent's agreement was to pay the sub-agent 45% of what the purchaser paid over and above the sum of kshs.5,000/= per acre for the said farm.

The contract as between the agent and the sub-agent is not rendered void by the maxim "delegata protestas non potest delegare" because the agent was in asking the sub-agent to look for a buyer entering into a direct contract with the sub-agent. The sub-agent was in fact paid a sum of Kshs. 275,718/= which is 45% of the sum of Kshs.613,040/=. It is apparent therefore that the agent kept his

bargain of 45% of what he was paid to the sub-agent and the sub-agent accepted and banked a cheque in respect of that payment.

As per evidence on record, the sub-agent was a total stranger to the vendor. So whatever transpired between the vendor and the agent does not affect the sub-agent. Exhibit 1 (agency agreement) (not exhibited) clearly provided that any sum over and above Kshs. 5,000/= per acre was to go to the agent as agent's commission. That makes it a sum of Kshs. 1,120,000/=. Having had no privity of contract with the vendor the sub-agent cannot claim the suit sum from the vendor.

The agent has not taken out any third party proceedings, as the record of appeal indicates, against the vendor for indemnity. Not having done so he cannot claim such indemnity now in this suit. The position therefore as we find it is that the sub-agent's claim if any is only against the agent.

Counsel for the respondents (the agent and the vendor respectively), argued that the sub-agent was not entitled to claim any sum at all as the agent consented to the reduction of the sum of Kshs. 1,120,000/= to Kshs. 613,040/= and that the sub-agent eventually concurred therewith. It was urged by Mr. Gitau that the agent's evidence that he had accepted the said reduction and that the sub-agent had also agreed thereto puts an end to the sub-agent's claim. Yes, if that evidence is acceptable the sub-agent's claim is defeated. The sub-agent denied such further agreement. The agent in his evidence says:

" I informed the plaintiff (sub-agent) who asked a lot of question but later agreed to take the new offer."

It would be difficult to resist the argument (on evidence) that the sub-agent was not aware of the reduction in the commission figure. None of the exhibits produced before the superior court are in the record of appeal. These are important exhibits. Exhibit 1 produced by the sub-agent showed his authority to sell. See page 28, lines 15 and 16 of the record. Exhibit 2 is the agreement between the agent and the sub-agent. See page 28 line 21 of the record. Exhibit 3 is the banking slip produced by the sub-agent (see page 29 lines 10 & 11 of the record. The agent in his evidence at page 34 of the record produced as Exhibit A the letter of 2nd April 1991 allegedly written to the agent by the vendor which letter purports to change the commission figure. Exhibit C is a letter allegedly to the vendor by the agent (dated 4th April 1991) accepting the revised offer. Exhibit B is the receipt for Kshs. 613,040/= . These exhibits upon which the case in the superior court hinged are not in the record of appeal as observed earlier in this judgement. Without the benefit of these exhibits it is not possible to decide where the truth lies.

It is obligatory upon the party preparing the record of appeal to include in that record all relevant documents put in evidence at the hearing pursuant to the provisions of Rule 85(1) (f) of the Rules of this court. Rule 85 (2A) of the Rules of this court does not enable, even with leave, the appellant to file a supplementary record of appeal in this regard.

The learned judge did not believe the sub-agent. He believed the agent. The agent clearly stated that the sub-agent agreed to accept the lesser sum and did in fact accept the same and banked the cheque without demur. We can find no fault with the reasoning of the learned judge when he says that the agent did not wish to take chances on whatever he was earning by way of commission and that the sub-agent must also have so agreed.

In end result we dismiss this appeal but would disagree with the learned judge's orders as regards costs. Costs follow the event. There was no reason to deprive the successful defendants in the court below of their costs. The costs of this appeal and those occasioned by the appellant's suit in the superior court shall be payable to the respondents by the appellant.

Dated and delivered at Nakuru this 24th day of November, 1995.

J. E. GICHERU

……………………….

JUDGE OF APPEAL

A. M. AKIWUMI

…………………..

JUDGE OF APPEAL

A. B. SHAH

………………….

JUDGE OF APPEAL

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions.
Read our Privacy Policy | Disclaimer