

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2015/HP/0058

BETWEEN:



DAVIES KEBBY NYIRONGO

PLAINTIFF

AND

ROCKSTONE INDUSTRY COMPANY LIMITED

DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE M. CHANDA THIS 26TH
DAY OF JUNE, 2018**

APPEARANCES:

For Plaintiff : Mr. M. Mulenga from A.M.C Legal
Practitioners

For Defendant : Mr. N. Sampa from Norman Sampa
Advocates

JUDGMENT

LEGISLATION REFERRED TO:

THE ESTATE AGENTS ACT, NUMBER 21 of 2000

AUTHORITIES REFERRED TO:

THE BLACK'S LAW DICTIONARY (2004) 8TH EDITION USA: THOMSON WEST

The plaintiff commenced this matter against the defendant by writ of summons on 19th January, 2018. The plaintiff's contention was that the defendant's director requested him to look for a piece of land at a commission but that he later refused to pay him. The reliefs sought by the plaintiff were as follows:

1. Payment of the sum of US\$25,000.00 being commission payable to the plaintiff by the defendant on lot 4767, Lusaka;
2. Interest on the said sum of US\$25,000.00 at the Commercial Bank lending rate from the date of Writ till full payment;
3. Any other relief the court may deem fit; and
4. Costs of incidental to this action.

The plaintiff in his statement of claim indicated that he worked as a Management Information Systems Controller for Lions Group Quarries Limited. He related that in or about 2011, the defendant instructed him to look for a suitable piece of land suitable for quarry mining. The defendant agreed with the plaintiff that upon completion of the assignment, the defendant would pay the plaintiff 10% of the purchase price of the land he found. He stated that pursuant to the verbal agreement, the plaintiff diligently and successfully completed the task by finding lot 4767 situated in Lusaka West. The plaintiff asserted that the said property was valued and sold to the defendant at US\$250,000 entitling the plaintiff to US\$25,000 commission as per their agreement. The plaintiff stated that upon change of title from the vendor to the defendant, he served the defendant with a statement of request for payment dated 20th November, 2012 but the defendant did not

settle the bill. The plaintiff said by reason of the foregoing, he had suffered loss and damage.

The defendant in its defence denied having entered into any agency agreement with the plaintiff and contended that it therefore did not owe the plaintiff any commission. The defendant stated that it had executed a contract of sale with Farouk Ismail Nosarka for the sale of the remaining extent of Farm No. 4767 Lusaka and that there was no reference therein to any payment due to a third party except for the advocates' legal fees. It was contended that the plaintiff had not suffered any loss or damage and was not entitled to any of the reliefs sought.

The matter came up for hearing on 21st October, 2015 and both parties were before court. The plaintiff called two witnesses while the defendant opted not to field any witness. The plaintiff himself was the first witness (PW1). He testified that the defendant's director, a Mr Wan instructed him to look for a piece of land on the defendant's behalf. He said they agreed that upon finding the land, the plaintiff would be entitled to a commission of 10% of the purchase price. He told the court that their agreement was an oral one. The plaintiff went on to narrate that he accompanied Mr Wan to some prospective sellers and also engaged Lackwell Mtonga (PW2) to assist him with finding suitable land for the defendant. He told the court that Mr Mtonga eventually gave him information that a Mr Farouk was selling suitable land. The plaintiff testified that he met with Mr Farouk who confirmed that he was selling 96 hectares

of land at US\$350,000. He stated that when he informed Mr Farouk that he was asking on behalf of a prospective buyer, he offered to also give the plaintiff an additional 3% of the purchase price as commission if the transaction was successful.

The plaintiff narrated that he proceeded to introduce Mr Farouk to Mr Wan and after a survey of the land was conducted, it was discovered that the extent was 57 hectares, not 96 hectares. He said it was for this reason that the purchase price was reduced to US\$250,000. It was the plaintiff's testimony that when Mr Wan paid Mr Farouk towards the purchase price, Mr Farouk advanced him the agreed commission. He said when he queried Mr Wan about the 10% commission, he was assured that payment would be made as soon as the title to the land was issued in the defendant's name. He stated that he carried out some other tasks for the defendant including introducing Mr Wan to a Mr Eddie Phiri who helped with obtaining a mining licence. He said that when he requested for payment from Mr Wan, he refused and claimed that it was the seller who owed the plaintiff commission. The plaintiff said even after reminding Mr Wan that he personally engaged him to look for land on his behalf, he insisted that he would not pay.

In cross-examination, the plaintiff told the court that at the time of the agreement, he was not a registered estate agent and neither was he registered at present. He asserted that there was no document to show that he was engaged as the defendant's agent. He stated that the defendant's director refused to pay him 10% commission as

agreed. When PW1 was referred to the contract of sale that was executed by the defendant's director and Mr Farouk, he conceded that the purchase price indicated was US\$65,000 and not US\$250,000 as he earlier claimed.

In further cross-examination, the plaintiff also confirmed that the extent of the land indicated therein was 96 hectares and not the 56 hectares he alluded to. When referred to the special conditions in the contract, the plaintiff further conceded that they did not stipulate that he was to be paid 10% of the purchase price as commission.

In re-examination, the plaintiff clarified that he had not been engaged as an estate agent but his task was to look for land on the defendant's behalf. He further explained that he had not been party to the negotiations for the sale of the land and that was the reason he was not mentioned in the special conditions. He added that Mr Farouk paid him a commission of K12,500.

The second plaintiff's witness (PW2) was **Lackwell Mtonga**. It was PW2's evidence that in 2011, the plaintiff informed him that he had a client who needed land on which to commence quarrying activities. He narrated that he later introduced the plaintiff to Mr Farouk as a prospective vendor. PW2 said that he was not present when the plaintiff went to negotiate for the purchase of the land with Mr Farouk. He said he was sent to serve summons on the

defendant's but when he refused to accept service he left the Court documents at the gate.

In cross examination, PW2 told the court that he was not present when the plaintiff was having discussions with Mr Farouk. This is the evidence I received in this case.

From the evidence on record, it is not in dispute that the Defendant executed a contract of sale with a Mr Farouk Ismail Nosarka for the sale of 96.0980 hectares being the remaining extent of Farm No. 4767 Lusaka West. What is in contention is whether or not the defendant had engaged the plaintiff to assist him look for land suitable for quarry mining at a commission.

I have considered the evidence in this matter and a perusal of the contract of sale exhibited in the defendant's bundle of documents reveals some discrepancies between the plaintiff's evidence and the contents of the contract. The plaintiff claimed that the extent of the land bought by the defendant was 56 hectares which was not the position. In addition, he stated that the purchase price was US\$250,000 which is far from the price of US\$65,000 indicated in the contract of sale. On this score, I find the plaintiff's testimony questionable and not convincing.

It is also my observation that the plaintiff in his testimony equally alluded to the fact that he received a commission of K12,500 from the vendor who alerted him to the payment made by Mr Wan for the

land in question. I find it astonishing that the plaintiff did not call the said vendor as his witness to buttress his claim. The plaintiff however elected to call PW2 who basically attested to serving process on the defendant's director and added no probative value to his claims.

Taking this matter further, the plaintiff in cross examination conceded that he was not an estate agent but was simply engaged to look for land on behalf of the defendant at a fee. It is apparent therefore, that the plaintiff alleges to have represented Mr Wan in the land negotiations but refuses to be classified as an agent.

In my understanding, an agent is simply a person who acts on behalf of another in a transaction with a third party. In this instance, the transaction involved land or in other words 'real estate'. The plaintiff's evidence suggests that he took steps to bring together Mr Wan and Mr Farouk for the purpose of the sale of land to the defendant. In my considered view, the plaintiff's conduct is tantamount to carrying on business as a real estate agent. According to **Black's Law Dictionary, 8th edition**, a real estate agent is defined as:

An agent who represents a buyer or seller (or both, with proper disclosures) in the sale or lease of real property.

In casu, there is no doubt from the plaintiff's evidence that he clearly held himself out to be an estate agent in the purported transaction between him and Mr Wan.

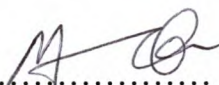
Having classified the plaintiff as an estate agent, I draw guidance from *The Estate Agents Act, 2000* which came into operation in 2010 and governs all estate agents in this jurisdiction. **Section 36** of the Act stipulates the following:

A person who is not registered as an estate agent or an estate agent who is on suspension from practice shall not –

(a) practice or offer to practice as, or hold oneself out to be, an estate agent.

It is clear that the above section proscribes an agent from carrying on business without registering. In this matter, the plaintiff conceded that he was not registered as an agent and in my firm opinion, this was the reason he conveniently did not refer to himself as one. From his evidence it can however, be inferred that the plaintiff was operating as an agent without registration. He therefore cannot seek any redress for his illegal actions. In view of the foregoing the plaintiff's entire action is hereby dismissed.

Dated at Lusaka this 26th day of June, 2018.

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M. Chanda
High Court Judge