

NOEL MUCHIMBA
MATHEW SHAWA
v
IDAH NKHOMA

HIGH COURT
KAJIMANGA, J.,
9th DECEMBER, 2011.
2009/HPC/0330

[1] Contract - Commission - Conditions to be fulfilled in order to earn a commission.

The plaintiff issued a writ of summons endorsed with a claim for:

1. K45,000,000.00, being commission or services rendered in securing a buyer for the defendant's house at Number 30 Omelo Mumba Road, Rhodes Park, Lusaka;
2. Damages;
3. Any relief that the Court deems fit;
4. Interest; and
5. Costs.

Held:

1. It is a well settled principle of law that in order to earn his commission, the agent must be the *causa causans* of the transaction going through. In other words, the agent can only earn commission if he caused the transaction to come to fruition.

2. It is trite law that an agent can only be entitled to commission if he was authorized by his principal to perform the act for which he seeks remuneration.

3. The 2nd plaintiff was never authorized by the defendant to secure her a buyer.

4. The sale of the defendant's house was caused by the 1st plaintiff.

Case referred to:

1. *Coles v Enoch* [1939] 3 ALL E.R. 327.

For the plaintiff: In person.

Musho of Messrs Musho and Company for the defendant.

KAJIMANGA, J.: The plaintiffs contended that between July and August, 2006, the defendant approached them to secure her a buyer for her property situate at No. 30 Omelo Mumba Road, Rhodes

Park Lusaka. It was agreed that 5% of the sale price would be paid to the plaintiffs as commission. Pursuant to the aforesaid instructions, the defendant found Dr. Patrick Nkhoma of ECU University in Kabulonga, Lusaka, as a buyer for the property. They took him to the property, and he subsequently bought it. After the sale of the property, the defendant has neglected and willfully refused to pay commission to the plaintiffs as agreed between the parties. By reason of this act, the defendant is in breach of the said contract and the plaintiffs have suffered loss and damage.

The defendant contended that she never approached the plaintiffs to secure a buyer for her property, and averred that there was an open mandate so far as the sale of her property was concerned. The plaintiffs did not secure any purchaser for her property, and denied having agreed with them on 5% commission. If there was any such agreement of 5% commission, the same ought to have been evidenced in writing.

The defendant also contended that the plaintiffs neither found Dr. Patrick Nkhoma as a buyer, nor took him to her property. The buyer visited the property on his own, and found the defendant's caretaker who directed him to her home where they negotiated the terms. It was long after the conclusion of the sale between the defendant and the buyer that the plaintiffs appeared seeking a commission. The plaintiffs never played any part or role in either finding or introducing the buyer to the defendant. There was no agreement alleged by the plaintiffs, and the defendant denied that they have suffered damages, or are entitled to any relief.

PW1 was Noel Muchimba, the 1st plaintiff. His witness statement disclosed that some time in March or April, 2006, a Mrs. Munalula approached him to find out if he had any house for sale between K300,000,000.00 to K500,000,000.00, as she had a client looking for such properties, and he told her he had two houses he was marketing in that range. At this point Mrs. Munalula phoned her client so that she could see the two properties, and they drove to Woodlands where he showed them the first property. Among Mrs. Munalula's clients, one was the defendant but he could not recall the other's name. The following day they went to view the house along Great East Road. It was during this time that the defendant asked for his phone number saying that she would call him the following day so that he could also sell her house located at No. 30 Omelo Mumba road, in Rhodes Park. On a date agreed, the defendant phoned PW1 to wait for her at Engen Service Station along Cha Cha Cha road, southend and she came in a taxi. At the time the defendant phoned him, he was with his colleague, the 2nd plaintiff, and he asked him to accompany him. When they went to the service station, they found the defendant in a taxi, and after introducing her to the 2nd plaintiff, they drove to Rhodes Park where they were shown the rooms of the house including the main bedroom upstairs.

The witness statement of PW1 also disclosed that after inspecting the house, the defendant asked him what he thought could be its value and he told her that the starting point should be K1,000,000,000.00. She told him that he was mad because she was actually looking for K1,500,000,000.00, or negotiable to at least K1,300,000,000.00. After agreeing on the price she asked him how much he could charge her. He told her that his office charges 10% of the total sale but she rejected it on account of being too high. After discussions, the defendant agreed to pay 5% commission

of the sale price. PW1 was then introduced to the caretaker by the name of Patrick, and he was given the authority to start taking clients to the house. Among the notable clients he took was Mr. Findlay of Auto World; Mr. Phiri the owner of Simba Milling, but they could not agree on the price, and they tirelessly marketed the house for seven months.

The witness statement of PW1 further disclosed that estate agents compare notes and a freelancer estate agent by the name of Edward Mukoboto had a client by the name of Dr. Nkhoma who was looking for a place to buy in Rhodes Park for his University. Mr. Mukoboto phoned Dr. Nkhoma who arranged with them to meet at Longacres. The 2nd plaintiff, Mr. Mukoboto, and Dr. Nkhoma then drove to the house. Upon arrival, the 2nd plaintiff phoned him that he should speak to the caretaker so that they could have access to the house. PW1 spoke to Patrick on the phone, and he gave them access. What followed is explained by his two colleagues who were physically at the house.

In cross-examination, PW1 testified that the defendant engaged him personally but he had some other people he was working with. He told the Court that he agreed with the defendant on 5% of the purchase price as commission after the sale of the house. He denied that she asked him to come up with the market price before agreeing on the commission.

The 1st plaintiff also testified that the 2nd plaintiff was also searching for a buyer for the property, and he was to report to him if he found one. He said that the 2nd plaintiff later came to tell him that he had found a buyer, Dr. Nkhoma. He told the Court that he did not report to the defendant because Dr. Nkhoma had not yet decided whether to buy the house or not. He said that the caretaker told him that Dr. Nkhoma went to the house the following day, and after three months he was told that he had bought the house. The 1st plaintiff told the Court that there was no logic in suing Dr. Nkhoma, because he was supposed to be paid commission by the defendant.

It was also his evidence that there was no direct contract between the 2nd plaintiff and the defendant. He told the Court that he was claiming K45,000,000.00 being 5% of K900,000,000.00. He said that he learnt of this purchase price from PW3.

PW2 was Mathew Shawa, the 2nd plaintiff. His witness statement disclosed that the 1st plaintiff and himself operated as property consultants in the name of Concrete Property Consultants of Lusaka. They were engaged to sell the defendant's house between August and September, 2006. They were taken to the property by the defendant during the same period for introduction to the caretaker by the name of Patrick, when the house was vacant. After the introduction, the defendant asked the plaintiffs to give her a skeleton valuation report as she really wanted to sell, or lease the property. The plaintiffs told her that the house would fetch K6,000,000.00 rent, and could be sold at K1,000,000,000.00.

The witness statement PW2, also disclosed that defendant wanted to find out the plaintiffs' conditions for finding a buyer and tenant and they advised her as follows:

- (a) Rent: If a client pays for 6 months they would request for one month rent; and
- (b) Sale: If the house was bought the standard charge of 10% commission would apply.

The defendant agreed to the rental of one month, but disagreed to 10% commission, and counter proposed 5% which the plaintiffs accepted. The reason why the plaintiff's are asking for K45,000,000.00 commission is because the defendant told them that the last price she could accept for the house to be sold was K900,000,000.00, as she even refused one client who offered K800,000,000.00.

In cross-examination, PW2 testified that he knew the defendant having been introduced to him by the 1st plaintiff. He said that the defendant never engaged him as an agent, but he had an understanding with the 1st plaintiff who was engaged by her. He told the Court that he sued the defendant because he felt cheated by her. The 2nd defendant testified that he found the buyer for the house, Dr. Nkhoma through PW3. He told the Court that when Dr. Nkhoma saw the house, he was interested but could not make a decision until he came back with the wife and that he would call them. He said that he was told by DW2 that Dr. Nkhoma went to the house the following day. It was his testimony that when he followed up the matter with him, he started avoiding them. The 2nd plaintiff told the Court that they wrote the defendant a letter of demand after she had refused to accept that the 1st plaintiff found Dr. Nkhoma.

PW3 was Edward Mukoboto, an estate agent. His witness statement disclosed that between August and November, 2006, Dr. Nkhoma contacted him that she wanted a house in Rhodes Park, and gave him his business card so that he could get in touch if he found the property. He then found a property through a fellow estate agent, Mathews Shawa, at No. 30 Omelo Mumba road in Rhodes Park. He informed Dr. Nkhoma and they went to view the house. Upon seeing the property, Dr. Nkhoma requested them to talk to the caretaker to allow him to come back later with his wife so that she could also have look, and the caretaker agreed. They then told Dr. Nkhoma that if he was interested, he should get in touch with them so that they could lead him to the owner of the property. It was later discovered by PW2 that the property had been bought by Dr. Nkhoma. This information was given to PW2 by the caretaker. When Dr. Nkhoma was contacted to verify whether he was the one who bought the property, he never responded, and there has been no response to the letter which was left with his secretary.

In cross-examination, PW3 told the Court that he did not know the defendant, but he knew the house in issue through PW2. He said that Dr. Nkhoma was his client and the 2nd plaintiff and himself took him to the house. The witness told the Court that after viewing the house, Dr. Nkhoma asked them to talk to the caretaker if he could allow him to view the house with his wife. He said that he did not know if Dr. Nkhoma went back to view the house. The witness testified that he did not know exactly when the house was sold to Dr. Nkhoma and the purchase price. He denied telling the 2nd plaintiff that the house was sold for K900,000,000.00. PW3 told the Court that they were informed by the caretaker that Dr. Nkhoma brought the house.

DW1 was the defendant. Her witness statement disclosed that she met the 1st plaintiff through Mrs. Munalula, who had been engaged by Mrs. Siame to look for a house for her to purchase. In the

process of looking for Mrs. Siame's house, Mrs. Munalula and the 1st plaintiff learnt about her property on Omelo Mumba road which she was renovating to turn into a business centre. The 1st plaintiff convinced him that selling the house was a better option than leasing it out. The 1st plaintiff offered to find her a buyer for the property between K700,000,000.00, and K1,000,000,000.00, but she felt that K1,000,000,000.00 was a bit excessive.

The defendant's witness statement also disclosed that when the 1st plaintiff raised the issue of commission, she told him that they would discuss this when there was a concrete indication of the most likely price for the house. She agreed with the 1st plaintiff that she would only deal with him; there were to be no newspaper advertisements; they would only meet if he had a serious offer; and the house would be viewed in the presence of her caretaker, Patrick Mwale. Six months later, she learned that a number of persons claiming to be working with the 1st plaintiff were having access to the house in his absence. She was disappointed and told him not to take any one to view the property without her express permission. From all indications, the 1st plaintiff was working alone, and she was therefore surprised to get a demand note from three people written under his name almost a year after she had sold the house, two of whom she had no dealings with.

The defendant's witness statement also disclosed that to the best of her recollection, the 1st plaintiff personally brought two clients of Asian origin. She refused to see two other prospective buyers who included Mr. Findlay and another Asian because he had scanty information regarding their interest in the property. The 1st plaintiff later brought a client of Greek origin, and this was the only time they discussed a possible commission because he convinced her that the sale was a done deal and the price of K900,000,000.00 had been indicated to the client. They agreed a commission of K30,000,000.00 if the sale went through for K900,000,000.00, and that it would be pro rata in the event of a price variation. The 1st plaintiff later informed her about a "serious" buyer who she could not meet. He also told her about another serious client at BP Zambia whom he failed to produce despite several assurances. None of these clients answered to the name of Nkhoma.

The defendant's witness statement further disclosed that there was no contact with the 1st plaintiff for close to three months when some time in October, 2007, her caretaker told her, a Mrs. Nkhoma wanted to see the house. She asked Mrs. Nkhoma how she came to know about the house and she told her that a friend of hers informed her about a house for sale on Omelo Mumba road. She gave her permission, and later the caretaker phoned her that Mrs. Nkhoma liked the house and wanted to meet with her to negotiate the sale. That is how she came to meet and eventually sold the house to Mrs. Nkhoma in October, 2007. Some time later in 2007, the 1st plaintiff phoned her to confirm if she had sold the property to the Nkhoma's. She confirmed and joked about the coincidence of selling to some one who had the same sir name as herself, and the fact that he had missed a commission because he had not persevered with the sale. She later met the 1st plaintiff in the company of his "Partner" whom he introduced as Mr. Shawa (2nd plaintiff). They told her that Mrs. Nkhoma, the buyer was their client, and therefore some commission was due to them and she told them to confirm that fact with her. A couple of days later, the 2nd plaintiff came to her house alone and told her he was having difficulties contacting the Nkhoma's and requested her to assist since the Nkhoma's were the ones who

owed them commission, and not her. She told the 2nd plaintiff to fight his own battle with the Nkhoma's and leave her out of it.

The defendant's witness statement further disclosed that the next day her pastor phoned her that three gentlemen had called on him asking to impress upon her as a christian to pay them commission as agreed and that they would be back for her response in a day or two. She felt that she was being harassed. She later received a demand notice to pay dated 15th October, 2007, which was served by the 1st and 2nd plaintiffs. She told them to serve the notice on her lawyer. She called Mrs. Nkhoma and told her what had been happening to her, and asked her again if she had dealt with the plaintiffs but she denied. The next time she met the plaintiffs and for the first time, PW3, was at the mediation of this matter.

In cross-examination, DW1 told the Court that she contracted the 1st plaintiff to find a buyer for her house but she denied that there was an agreement that he could be paid 5% of the purchase price as commission. She conceded that the 1st plaintiff brought more than four prospective buyers. It was her evidence that she informed the 1st plaintiff that she would not give him commission, because she had no proof that Dr. Nkhoma came through him.

The defendant also told the Court that she came to know about Dr. Nkhoma in the process of selling the house, but that Mrs. Nkhoma is the one who purchased the house. She said that she did not know that it was the plaintiffs who took Dr. Nkhoma to the house, and that Mrs. Nkhoma knew about the sale of the house from her husband.

The defendant also told the Court that the figure of 5% was never discussed. She said that she sold the property to Mrs. Nkhoma at K850,000,000.00 DW2 was Patrick Mwale. His witness statement disclosed that he used to be the caretaker of the defendant's house at 30 Omelo Mumba Road Lusaka, the subject of these proceedings. The house was being sold and by virtue of being a caretaker, and employee of the defendant, so many people came to view the house. The defendant told him only to allow the 1st plaintiff to bring people to view the house. The 1st plaintiff came several times with the 2nd plaintiff, who was introduced to him as his working partner, and after about two months he introduced PW3 as his partner too.

The witness statement of DW2 also disclosed that after some time the 2nd plaintiff and PW3 came in the company of Dr. P. Nkhoma to view the house. After viewing the house, Dr. P. Nkhoma asked if he could be allowed to view the house with his wife to which he agreed, but he did not come back with her. The 2nd plaintiff and PW3 never met Mrs. Lillian Nkhoma in his presence. After three to four months, Mrs. L. Nkhoma came to view the house on her own. When she showed interest, she asked for the defendant's phone number. They communicated, and the house was sold.

In cross-examination, DW2 testified that Mrs. Lillian Nkhoma told him that she had heard about the house being on sale from some Indians. He told the Court that the 2nd plaintiff and PW3 came to the house by virtue of being partners with the 1st plaintiff. The witness testified that eventually Mrs. L.

Nkhoma bought the house through the husband.

DW3 was L. Nkhoma. Her witness statement disclosed that she bought the property from the defendant, and there were no agents involved. She came to know about the property through friends who were talking about the same property which was being sold by the defendant. She went to the property and found a caretaker who gave her the telephone number of the defendant. She contacted her, and they agreed to meet the following day at the property. Thereafter, DW3 and the defendant concluded the sale.

In cross-examination, DW3 testified that when she was going to Air Masters to buy a ticket, she saw three Indians at the house in issue, and that two ladies were selling groundnuts and bananas outside. She said that one of the ladies who was selling bananas told her that the property was for sale. The witness told the Court that she saw the caretaker who could not allow her into the house unless she talked to the owner. She testified that the caretaker phoned the defendant, and she talked to her but they could not meet that day. DW3 said that although her witness statement indicated that she came to know about the sale of the house through friends, they were just people she found at the gate.

It was also her testimony that she was not aware that her husband went to the house before she went there. She told the Court that her husband denied that he was taken to the house by the 2nd plaintiff and PW3.

Both parties did not file written submissions as they told the Court that they would rely on the evidence on record. It is a well settled principle of law that in order to earn his commission, the agent must be the causa causans of the transaction going through. See for example, the case of Coles v Enoch (1). In other words, the agent can only earn commission if he caused the transaction to come to fruition. Therefore, the question to be determined by the Court in this case is whether the plaintiffs were the causal link in facilitating the sale of the house by the defendant to DW3.

Let me first deal with the issue whether the 2nd plaintiff is a proper party to these proceedings. It is trite that an agent can only be entitled to commission if he was authorized by his principal to perform the act for which he seeks remuneration. The evidence of the 1st plaintiff, 2nd plaintiff and the defendant clearly shows that only the 1st plaintiff was authorized by the defendant to find a buyer for her house. The 2nd plaintiff was never authorized by the defendant, but he was involved in the process of looking for a buyer because he was the 1st plaintiff's partner in Concrete Property Consultants. According to the 1st plaintiff's evidence, the 2nd plaintiff was to report to him if he found a buyer. This was a purely private arrangement between the 1st and 2nd plaintiffs. For the foregoing reasons, I conclude that the 2nd plaintiff lacks the requisite interest, or locus standi to sue the defendant in his individual capacity.

There is no dispute, as alluded to above, that the 1st plaintiff was authorized by the defendant to find a buyer for her house. He was with his partner (2nd plaintiff) when the defendant took them to

her house. Through their network, DW3 told the plaintiffs that he had a client, Dr. Nkhoma who was looking for a house to buy in Rhodes Park. The evidence of the 2nd plaintiff, and DW3 was that they took Dr. Nkhoma to the house. They called the 1st plaintiff to talk to the caretaker (DW2) so that he could allow them access to the house which he did, and Dr. Nkhoma was able to view the house. This evidence was corroborated by DW2 when he stated that the 2nd plaintiff and PW3 came to view the house in the company of Dr. Nkhoma. He also told the Court in cross-examination, "that eventually Mrs. L. Nkhoma bought the house through the husband."

From the foregoing, it is plain to me that the sale of the defendant's house was caused by the involvement of the plaintiff through the 2nd plaintiff and PW3. The defendant and DW3 contrived in their conspiracy to tell lies to the Court that the 1st plaintiff was not involved in the sale of the house. For example, I find the evidence of DW3 that she was not aware that her husband went to the house before she went there as extremely untruthful. This evidence contradicts the credible evidence of DW2 that the husband of DW3 came to view the house in the company of the 2nd plaintiff and PW3. DW3 also contradicted herself when she stated in her witness statement that she came to know about the property being sold from friends, but in cross-examination she testified that she learned about it from women who were selling bananas outside the house. Her evidence further contradicts that of DW2 when he stated under cross-examination that DW3 told him that she had heard about the house being sold from some Indians. The truth of the matter is that she heard about the house from her husband, who was taken to the property by the 2nd plaintiff and PW3. I therefore, conclude that the 1st plaintiff was the causa causans of the sale of the defendant's house to DW3, and he is therefore entitled to remuneration in form of commission.

The evidence of the defendant was that although she contracted the plaintiff to find a buyer for her house there was no agreement that he could be paid 5% commission. As the case with DW3, I also find the defendant's testimony on this issue to be untruthful. Under cross-examination, she contradicted herself by saying that she informed the 1st plaintiff that she would not give him commission, because she had no proof that Dr. Dkhoma came through him. According to the evidence of the 1st plaintiff and the 2nd plaintiff, which I find to be more credible, the defendant agreed to a reduction of the commission from 10% to 5% of the purchase price after which she introduced him to the caretaker (DW2) and he was given authority to start taking clients to the house. The 1st plaintiff also testified that he tirelessly marketed the house for seven months. In my judgment, it is inconceivable that the plaintiff could have spent several months marketing the defendant's house if there was no agreement on the commission he would earn if he succeeded in finding a buyer. I am of the firm opinion that the evidence of the 1st plaintiff that they had agreed on a commission of 5% of the purchase price appears to be more credible than the defendant's evidence that there was no agreement on commission.

The sum of K45,000,000.00 being claimed by the 1st plaintiff is based on 5% of the purchase price of K900,000,000.00. According to the 2nd plaintiff, he was told by PW3 that the house was sold to DW3 at K900,000,000.00. However, PW3 denied under cross-examination telling the 2nd plaintiff that the house was sold for that amount. According to the defendant's evidence, the house was sold for

K850,000,000.00. 5% of this amount is K42,500,000.00. This is the sum I find to be due to the 1st plaintiff as commission, given the inconsistent evidence of the 2nd plaintiff, and PW3 regarding the purchase price.

In the result, I conclude that the 1st plaintiff has proved his case on a balance of probabilities. I accordingly enter judgment in favour of the plaintiff in the sum of K42,500,000.00, with simple interest at the short term bank deposit rate from 6th November, 2007, being the date of the writ up to the date of judgment; thereafter, at the bank lending rate as determined by the Bank of Zambia from time to time until full payment.

Costs shall be for the 1st plaintiff, and will be taxed in default of agreement. Leave to appeal to the Supreme Court is granted.

Plaintiff's claim succeeded.