

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

LUKYAMUZI JAMES:::::::::::::::::::::::::::::::::::: PLAINIFF

**AKRIGHT PROJECT LTD &
ANATOLI KAMUGISHA:..... DEFENDANT**

JUDGMENT:

1

He even alleges that the 1st Defendant issued him a false cheque of Shs.300, 000- in an attempt to pay the commission.

The Defendants denied being indebted to the Plaintiff at all and contend that they never had any brokerage or understanding with the Plaintiff as alleged at all. That as far as the sale of the land in question is concerned; they know only one Abdalla Tifu Semujju as the broker who is entitled to the Shs.5m commission under the agreement.

In the alternative, but without prejudice to the foregoing denial, the Defendants plead that even if the Plaintiff was ever entitled to any commission or agency fee at all, it was not due to him alone as an individual, but in a group under the chairmanship of the known broker Abdulla Tifu Semujju. The 2nd Defendant also raised a p.o to the effect that he was improperly joined as a party to the suit since the acts complained of were allegedly those of the 1st Defendant, a company and therefore a separate legal entity from its Directors. I reserved the ruling on this point.

The following points were agreed upon:

1. The 1st Defendant purchased plot 321 Mutungo from Zaverio Kasawuli at Shs.55m by an agreement dated 24/9/2001.
2. Under the said agreement, (clause 2) the 1st Defendant (buyer) retained Shs.5m to be paid to brokers.

The following points were disagreed and issues were framed there from:

1. Whether the 2nd Defendant instructed the Plaintiff to look for the land for the 1st Defendant or not.

2. Whether the Plaintiff is the one who found plot 321 at Mutungo for the 1st Defendant.
3. Whether any commission was due to the Plaintiff.
4. If so, how much.
5. Whether the Plaintiff is entitled to the Shs.5m he is claiming.

Three documents were agreed and tendered, they are:

1. The sale agreement (Exh. P1).
2. The Brokers agreement (Exh. D1).
3. The cheque (Exh. P11).

Mr. Musisi Mike of Muwanguzi, Zziwa & Musisi Advocates represented the Plaintiff, while Mr. Mugabi Enos appeared for the Defendants. The Plaintiff called two other witnesses in a bid to prove his case. His witnesses were:

1. James Lukyamuzi (PW1) the Plaintiff himself.
2. Mweizuka Polly (PW2).
3. Lutu David (PW3).

The Defence called three witnesses as well. They were:

1. Abdallatifu Semujju (DW1).
2. Zaverlo Kasawuli (DW2).
3. Kamugisha Anatoli (DW3).

Written submissions were filed by both sides.

Before dealing with the issues framed, I must first deal with the legal point of objection raised by the Defence counsel in respect of the locus of the 2nd Defendant in this case. Counsel raised the question whether there is a cause of action against the second Defendant, Mr. Anatoli Kamugisha, since the agreement of sale (Exhibit P1) relates to the company (the 1st Defendant) and it has nothing to do with the 2nd Defendant. Secondly, the 2nd Defendant is not privy to the agreement between the 1st Defendant company and the vendor, neither is the Plaintiff. The 2nd Defendant is the Managing Director of the 1st Defendant. He shouldn't be sued at all in his personal capacity. His name should therefore be struck off from the pleadings with costs. Counsel relied on: Chitty on Contracts paragraphs 1321 and 1323 and the celebrated case of Salmon —V- Salmon [1897] AC 22.

Mr. Musisi opposed the application on the grounds that the plaint disclosed a cause of action against the 2nd Defendant and he is therefore equally liable in that:

1. He personally instructed the Plaintiff to look for the land.
2. The act of retaining money and refusal to pay was done by the second Defendant, not the 1st Defendant.

I reserved a ruling on this point because there was no evidence on record at that stage to assist me in reaching a decision on it. I have now got all the evidence from both sides. It is clear that whatever the 2nd Defendant did in respect of the sale transaction he did in the company name and not in his name. He signed the sale Agreement (Exhibit P1) "For Akright Projects Ltd". He also issued the cheque (Exhibit P11) on a DCFCL A/C No. 2501573700 belonging to Akright Project Ltd, and not his personal account. In Uganda, there is a misnomer used to describe a person as the owner of a company. This is borne out from the Plaintiff's testimony where he stated that:

“I know the 2nd Defendant. (Anatoli Kamugisha) as the owner of a company called Akright Projects Ltd.”

This is legally wrong, of course; because, once a company is registered as a limited liability company, it acquires a legal personality, capable of suing and being sued in its own right; or as Lord Macnaghten put it in the Solomon —Vs-Solomon case (supra page 49).

“The company is at law a different person a/together from the subscribers ...; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are subscribers, as members, in any shape or form, except to the extent and in the manner provided by the Act.”

It follows from the above authority that the 2nd Defendant as a director of the 1st Defendant, is not liable for any acts or omissions of the 1st Defendant. He is therefore a wrong party to the suit and his name is accordingly struck out, with costs.

Turning to the issues framed, the first issue, that is, whether the Plaintiff was ever instructed by the 2nd Defendant to look for land. This is a question of fact. The Plaintiff says he was and the 2nd Defendant maintains that he wasn't. It is the Plaintiff's word against his. Learned counsel for Defendant quoted the provisions of section 100 and 101 of the Evidence Act (Cap 43) where the law is stated thus:

“He who alleges must prove his allegations” and Cross On Evidence 7th Edition Butterworths 1990 at page 303 that:

“Any matter upon which it is proposed to contradict the evidence in chief given by a witness must normally be put to him so that he may have the opportunity of

explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence in chief”

Counsel then submitted that from the evidence adduced by the Plaintiff and his witnesses, no nexus or relation has been established to show unequivocally that the Plaintiff was entitled to any brokerage, commission or agency fee, or that his pleadings disclose any cause of action against the Defendants at all. He then referred to the testimony of Anatoly Kamugisha (DW3), Zaverio Kasawuli (DW2) and Mwijukye Polly (PW2) and invited the Court to answer the first issue in the negative.

The Plaintiff’s counsel on his part insisted that the 2nd Defendant instructed the Plaintiff to find a large piece of land for his business and as a result, the Plaintiff embarked on the exercise. He relied on the testimony of the Plaintiff, Polly Mwijukye (PW2) and Abdalla Tifu (DW1).

I have carefully evaluated the evidence on record on this issue. I find as a fact that the Plaintiff and the 2nd Defendant were known to each other. They both operated their business on Kirumira Towers, plot 14. The 2nd Defendant told Court thus:

“I know the Plaintiff Our office is located on Floor 3 Room 7 and his is floor 2 Room 2, Kirumira Towers. Plot 14, William Street”

During cross-examination he stated thus:

“I knew him in 2001.”

DW3 however denied ever working with the Plaintiff in the same office.

The Plaintiff on his part testified that:

‘In September 2001, I was working with Nazarine Consult as an Office Manager... I know the 2nd Defendant (Anatoli Kamugisha). He was brought to our office by his brother so that we could work together with him. That time he was not employed, so he was based in our office while looking for employment elsewhere. I don’t know when he left our office, but after he had left our office, he told me to look for land he wanted a bi’ chunk of land. I approached Polly Mwejuka (PW2)... he brought me a man called Atugonza... he told me the land was located at Ndejje Lugugumu. We got a vehicle and went to see the said land. I told Kamugisha that I had seen the land.... I also told him that I would first talk to the owners of the land and then introduce them to him. He accepted.’

Thereafter the Plaintiff stated that Atugonza brought the owners of the land, i.e Zaverio (DW2) and his two sons David Lutu (PW2) and Vicent Kigonya. He told them that he was going to sell their land and his portion would be Shs.5m with his fellow brokers. They agreed. He then told them that his portion should remain with Kamugisha. He then told Atugonza to take the trio to Kamugisha’s office. From Kamugisha’s office the trio came back to him and thanked him and said one Latif (PW1) was to be sent to see the land as well. Latif went and saw the land and told the Plaintiff that he had seen it and it was good and that he actually knew the owner of the land. Kamugisha also told the Plaintiff that the land was good and that they would take it.

It is apparent that from then on the Plaintiff was kept out of the deal. Latif (DW1) took over the deal as he the “go between”. He also confirmed the Plaintiff story where he said:

“I knew Zaverlo before. We reside in the same area and he knows that I am a land dealer.”

They eventually signed the agreement without the Plaintiff's involvement.

Naturally, all the Defence witnesses denied the Plaintiff because they took over the deal and have since shared the commission.

Having seen the demeanor of the Plaintiff and that of the 2nd Defendant and his witnesses in Court, I came to a conclusion that they deliberately told lies before the Court to deny the Plaintiff's participation in the deal. On the whole, I find that the Plaintiff was indeed instructed by Kamugisha to get him a land.

The second issue is whether he was the one who found plot 321 Block 231 at Mutungo. From the discussion in the first issue, this answer is in the affirmative. He did so through Paul Mwijuke (PW2) and Atugonza. He then told Kamugisha (DW3) about it. DW3 sent Latif one of his employees (DW1) to confirm. Latif confirmed that the land was good. Thereafter DW3 also went and saw the land and liked it.

There is also evidence on record that the 2nd Defendant attempted to pay Shs.300, 000- as part of the Plaintiff's commission. The cheque was however falsified and the 2nd Defendant refused to correct it. The 2nd Defendant's explanation about the reason for issuing the cheque is a lie, and I have disregarded it. He told Court for instance that he was paying for the repair of his computers and yet he stated in the same breath that the Plaintiff was not a computer expert. If he had to pay a 3rd party to whom the Plaintiff had taken the computers for repair then he did not bother to explain why he issued the cheque in the Plaintiff's name and not that of the 3rd party. The cheque (Exhibit P11) is in the Plaintiff's name.

David Lutu's evidence was clear. He participated in the sale of the land, and he knew the broker was Jimmy Lukyamuzi the Plaintiff. He also testified that Atugonza was his brother and he was the one who introduced the Plaintiff to the family. This corroborates the Plaintiff's own testimony that Mwijuke (PW2) introduced him to Atugonza with whom they went and

saw the land the first time. Thereafter Atugonza introduced him to the owners of the land.

There was an attempt by the defence witness to deny the Plaintiff. Latif Ssemujju (DW1) claimed to have found the land himself but all the evidence points to the fact that he is an employee of the 1st Defendant although he also attempted to deny that fact as well.

All in all, I believe the evidence of the Plaintiff and his witnesses that he did find the land in question through Mwijuke and Atugonza. I accordingly answer the 2nd issue in the affirmative.

The last issue is whether any commission is due to the Plaintiff and how much. The first part is answered in the affirmative. He was instructed to find land, he found land and the 1st Defendant bought the land. He is therefore entitled to commission. The answer to the second question is Shs.5m as per agreement. How the Plaintiff shares it with his other friends is his business.

In the result, I find that the Plaintiff has proved his case on the balance of probabilities. I accordingly enter Judgment in his favour against the 1st Defendant for:

1. Shs.5m.
2. Interest thereon at 18% p.a from date of filing this suit till payment in full.
3. Costs.

M.S. Arach — Amoko

24/8/2004