

for a buyer for the Plaintiff's house. However the said agreement was suspended when the parties settled for a tenancy for which the Plaintiff was duly paid his commission which signified the end of the agreement.

Three issues were framed for determination:-

- (1) Whether the Defendant contracted the Plaintiff to sell his property at Plot 36 Luthuli Drive for a commission.
- (2) Whether the Plaintiff sold the said property for a commission.
- (3) Whether the Plaintiff is entitled to the remedies sought.

To resolve the above issues, the Plaintiff adduced the evidence of one witness, Anthony Nsibirwa Serwagi PW1, who testified inter alia, that he was working for the Plaintiff as its Managing Director since 1983. His evidence briefly was that he knew the Defendant very well as they were friends and members of KAMPALA CLUB. In 1994 the Defendant approached him in Kampala Club and requested him to find for him a buyer for his property at Plot 36 Luthuli Rise Bugolobi. They agreed on payment of a commission on sale. No documents were signed because the Defendant was his friend and a Permanent Secretary. From there he started looking for a purchaser. He approached the Netherland Development Organisation (SNVO) from Diamond Trust. SNVO was then not interested in buying the property but only wanted to rent. SNVO wanted to rent the same for one year but it reserved the option to purchase the property at the expiration of the rental period. The offer to rent first instead of purchase was communicated to the Defendant. There followed further negotiations between the Plaintiff in consultation with the Defendant on the one hand and SNVO on the other. During the negotiations, correspondences were exchanged over and above verbal communications. The correspondences were tendered in evidence as exhibit P1, P2, P3, P4 and P5. The end result of these exchanges was a tenancy agreement by the terms of which SNVO rented Plot 36 Luthuli Rise at US Dollars 1,500 per month with an option to purchase the property at the expiration of the tenancy. The purchase price when the option was exercised, was to be US Dollars 200,000 less whatever sum was paid by way of the one year rental. The property was let out as per the agreement and a year's rent paid in advance. The Plaintiff was paid a commission of US Dollars 1,500 on the tenancy. Afterwards the

option to purchase was exercised, but the defendant refused to pay the Plaintiff commission on account of the same. Hence this suit.

Counsel for the Plaintiff closed its case but the defence case was delayed until 25th September, 2005 when Mr. Paul Katende Counsel for the Defendant applied to have the Plaintiff recalled for cross-examination. The Plaintiff still maintained that the transaction was for sale or rent of property with option to purchase it.

The Defence opened their case on 6th October, 2005 by calling his witness.

ADDY Ssebugwao DW1 testified inter alia that he had been a chartered surveyor for close to 30 years now. As such he considered himself a professional surveyor. He told court that under the scale of surveyors of Uganda, fees chargeable was 8% of the amount realised under the sale. For letting purposes it was 8% of the gross rental for one year. He testified that in practice the first transaction of letting is taken as a substantial transaction which is payable unless there is another agreement of sale. He concluded that arrangement to rent and sale of property can be made but if one of them is done then the next arrangement is nullified i.e. if property is rented then the sale part of the arrangement is nullified.

Paul Bakashabaruhanga DW2 testified that the Plaintiff was very well known to him because he had rented his property on Plot 36 Luthuli Rise to the French Embassy in 1992 and again to SNVO in 1994. That he told the Plaintiff to find for him either a buyer or a tenant. The Plaintiff managed to get a tenant. The Plaintiff came with a letter from SNVO giving him terms of the tenancy. In that letter dated 1/2/1994 SNVO stated that they were not yet ready to buy the property but opted to rent with option to purchase at a later date. Upon getting the said letter he took it to his lawyers whereupon he paid the Plaintiff his commission of US \$ 1,500 which was equivalent of one month's rent. Later on he took the letter to his lawyers to prepare a tenancy agreement which was done and dated 11/2/1994 (Exhibit D1). The terms of the tenancy was from 1st May 1994 and was for three years. After that he did not have any further dealings with the Plaintiff apart from receiving his letter in May 1994 for renovation of the house. The tenants remained in his house for about one year. In October 1994 he received a letter from his lawyers that the tenants were interested in buying the house. The said letter was written by Mugerwa Matovu Advocates (exhibit D2). Upon getting that letter he wrote to his lawyers directly informing them that he was willing to sell the house to the

tenants (SNVO). By that time the house was under mortgage, so he removed the mortgage and started negotiation for the price and other things. During the negotiations he did not have contact with the Plaintiff at all because his mandate stopped at the tenant negotiation. He testified that he did not have any written agreement with the Plaintiff on the issue of sale. He wrote a letter to his lawyers accepting the sale of the house on 5/12/1994 (exhibit D3). The sale was done in May 1995. He signed the transfer documents. The sale agreement was dated 9th May 1995 (Exhibit D4). He emphasized that the Plaintiff did not participate in the negotiation for the purchase of the house apart from getting for him a tenant. He accordingly concluded that the Plaintiff was not entitled to any commission for the sale of the house.

RESOLUTION OF ISSUES

Issue No.1, *whether the Defendant contracted the Plaintiff to sell his property at Plot 36 Luthuli Rise for a commission.*

The Plaintiff through its Managing Director Mr. Addy Seruwagi testified that the Defendant contacted him to look for someone to buy his house. The contract was not in writing because Mr. Seruwagi and the Defendant were great friends and were members of an elite club – Kampala Club. Following the said assignment the Plaintiff wrote a letter (Exhibit P1) to SNVO. The said letter dated 31st January 1994 clearly shows that there was a verbal contract between the Plaintiff and the Defendant by the terms of which the Plaintiff was to look for a buyer for the Defendant’s house. In effect the said letter constituted an offer to sell the Defendant’s suit property to SNVO. The said offer was also communicated to the Defendant. The offer to sell the property is shown in the opening paragraph of the letter:

“This is to offer your organisation to buy the property on Plot 36 Luthuli Rise Bugolobi. You are aware of the size and structure of this property detailed in technical plan forwarded to you sometime ago.”

The rest of the letter spells out the terms to govern the sale price of US \$ 250,000. It is clear from the tone of the letter that the Plaintiff had received clear instructions from the Defendant to sell the said house and indeed took up the instructions with professional zeal as can be seen below.

SNVO responded to the offer to buy the said house in their letter dated 1/2/1995 addressed to the Plaintiff (Exhibit P2). It counter-offered to rent the property with an option to buy the same in the future at a price of US \$ 150,000. The counter offer stated as follows:

“In reply to your letter dated 31st January 1994 this is to inform you that at the moment we are not in a position to buy the property on Plot 36 Luthuli Rise, Bugolobi.

We would like to offer the following however:

- (a) ***We will be renting the property with effect from 1st June 1994 at a rent of US Dollars 1,500 per month, payable one year in advance, with the option of buying the premises at a price of US\$ 150,000.***
- (b) ***As soon as we know we are in a position to buy the building the “unused” rent will be taken as an advance payment for the sale of the building.”***

The above counteroffer to rent with an option to buy was accepted with modifications in a letter from the Plaintiff to SNVO dated 7th February, 1994 (exhibit P3) in paragraph b:

“The tenant shall exercise the option to buy the property at a price of US\$ 200,000 payable in one lump sum.”

The rest of the counteroffer remained intact and were accepted. Finally the suit property was sold to SNVO in the exercise of their option to buy. The Defendant in their statement of Defence admitted that the property was eventually sold but contended that the Plaintiff did not play any further role apart from securing SNVO as a tenant.

I have studied the evidence on record. It is not in dispute that the Plaintiff’s instructions from the Defendant was to secure a buyer for the suit property. Pursuant to the said instructions, the Plaintiff contacted SNVO. Several correspondences were exchanged – Exhibit P1, P2 and P3. SNVO decided to rent the house with an option to buy the same at a later time. The purchase price was agreed at 200,000 \$. SNVO later communicated their interest to exercise their option to purchase. In my opinion, it was wrong for the Defendant to ignore the Plaintiff when SNVO decided to exercise their right to purchase the house because that option had already been sealed by the Plaintiff in that it had become part of the tenancy

agreement which the Plaintiff had secured. That agreement went further by stating that the total rents paid by the tenant up to the date of purchase was to be deemed to be part of the purchase price if the option to purchase was exercised by the tenant during the tenancy. The above terms clearly show that the objective of the parties was to find a buyer which the Plaintiff had done. There were no new negotiations on the above transaction. This is so because the said house was sold at the price which had already been set by the Plaintiff as agreed in the Tenancy Agreement. In short therefore, there was only one transaction to find a buyer for the Defendant's house. In the premises it was wrong for the Defendant to ignore the Plaintiff in favour of their lawyers Mugerwa-Matovu when SNVO communicated their interest to purchase the suit property. Even then, M/s Mugerwa-Matovu Advocates made the Plaintiff's case stronger in that in their letter they stated that the earlier agreement was for rent first and there was an option to purchase.

A leading authority canvassing a similar situation is the case of **MILLER V RADFORD [1903] 19 TIMES L.R. 576** where **COLLINS MR** held inter alia that a house agent who is employed to let or sell a house is entitled to be paid a commission on the introduction of a person who subsequently becomes a tenant or a purchaser as the case may be.

In conclusion therefore, it was the Plaintiff who introduced SNVO to be a tenant and later on purchaser as per the Tenancy Agreement. The option to purchase was at US \$ 200,000 which had earlier been negotiated by the Plaintiff. I accordingly hold that the Defendant did contract the Plaintiff to sell his property at Plot 36 Luthuli Rise for a commission.

Issue No.2, *whether the Plaintiff sold the said property for a commission.*

It is trite law that if an agent is instructed to sell or let with an option to purchase and the option to purchase is exercised, such agent would be entitled to a commission. See: **LUXOR (EAST BOURNE) LTD VS COOPER [1941] A.C. 108 OR [1944] 1 ALLER 33, 43:S**

See also Halsbury Laws of England 4th Edition Paragraph 118.

In the instant case the Plaintiff was instructed by the Defendant to sell. He however got a tenant who took up the property with option to let. The Plaintiff negotiated the Tenancy

Agreement and the purchase price and mode of payment in case of option to purchase. In those circumstances, the Plaintiff was entitled to be paid a commission by the Defendant.

Issue 3, *whether the Plaintiff is entitled to the remedies sought.*

It was held by Manyindo DCJ (as he then was) in **Alfa Insurance Consultants Limited v Empire Insurance Group, Supreme Court CA No.9 of 1995** that an agent who does his assignment is entitled to a commission. It was the Plaintiff's case that he was entitled to commission in the tune of 10% less Dollars 1,500 he had earlier been paid. The Plaintiff has proved that he is entitled to claim the said sum and it is awarded accordingly, i.e. Dollars 19,500.

The Plaintiff further claimed general damages for breach of contract. In the case of **Hajji Mutekanga v Equator Growers (U) Limited SC Civil Appeal No.7 of 1995**, it was held that where there is a breach, general damages would be presumed.

The learned Counsel for the Plaintiff invited court to award general damages of Shs.3,000,000/= to the Plaintiff arguing that the Plaintiff had been deprived of his remuneration for long which they should have put to good use. That the Plaintiff suffered great inconvenience upon the said breach. The Plaintiff spent a lot of time on the matter and must have incurred expenses that were not easy to quantify. In the instant case the contract was between close friends both of whom were in the same profession. Therefore the act of the Defendant must have shocked the Plaintiff so much and put them in great inconvenience and anxiety of putting things in order through the court of law. In the circumstances I feel this is a matter where general damages should be awarded. I would award the Plaintiff general damages of Shs.2,500,000/=.

The Plaintiff also claimed costs of the suit. It is trite law that a successful litigant has to be fairly reimbursed for costs he or she incurred in the suit: See **AKISOFERI OGOLA VS AKIKA OTHIENO & ANOTHER [1997] HCB 53**.

See also **Section 26 of the Civil Procedure Act**.

For the above reasons I do award the Plaintiff costs of the suit. The Plaintiff is also entitled to interest on both special and general damages at court rate from the date of this judgement until payment in full.

In conclusion, judgement is entered for the Plaintiff for:

- (1) US \$ 19,500 as Special Damages.
- (2) General Damages of Shs.2,500,000/=.
- (3) Interest at court rate on special and general damages from the date of judgement till payment in full.
- (4) Costs of the suit.

**HON. JUSTICE RUBBY AWERI OPIO
JUDGE**

02/06/2009

10/06/2009

Namulindwa present for Defendant.

Plaintiff and Counsel absent.

Judgement read in Chambers as in Open Court

**HON. JUSTICE RUBBY AWERI OPIO
JUDGE**

10/06/2009