

THE ROLE OF ESTATE AGENTS IN
KENYAN SOCIETY

by

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of the requirements for the Bachelor of
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DEDICATION

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To my father, mother ,brother
and Mutua who know the reasons
why.

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3. Bentall, Horsley & Baldry v. Vicars (1931) 1 K.B. 253
4. **I am indebted to Mr. Willy Mutunga, my**
Boardman v Phipps (1967) A.C. 46
5. **first supervisor without whose counsel and cons-**
... (1957) 22 Q.B.D. 300.
6. **tructive criticism I could not have written this**
... (1957) 22 Q.B.D. 300.
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8. **and to Mr. Waruhiu of Lloyd & Masika without whose**
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9. **invaluable help this paper would be a total failure.**
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10. **invaluable help this paper would be a total failure.**
... (1950) 1 All ER 114
11. Habib Devji v. Tarmohamed & Prince Juko (1960) E.A. 102
12. Hippisley v. Knee (1905) 1 KB 1
13. Jones v Lowe (1945) 1 All ER 194.
14. Keen v Mear (1920) 2 CH 577
15. Lee Cooper Limited v CHH. Jenkins & Sons Limited
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16. Luxor (Eastborne) Limited v. Cooper (1941) A.C. 108
17. McCallum v. Hicks (1956) 1 All ER 864.
18. McPherson v Watt (1877) 3 App Cas 254.
19. Murdoch Kownie Limited v. Newman (1949) 1 All ER 194
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4. Boardman v Phipps (1967) A.C. 46
5. Cohen v. Kittel (1889) 22 Q.B.D. 680.
6. Ebrahim v. Prodger 25 KLR 29
7. E.P. Nelson & Co. v. Rolfe (1949) 2 All 584.
8. Fisher v. Drewett (1879) 48 LJ QB 332
9. Fowler v Brall (1950) 1 All ER 114
10. Fullwood v. Hurley (1928) 1 KB 498
11. Habib Devji v. Tarmohamed & Prince Juko (1960) E.A. 1022
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13. Jones v Lowe (1945) 1 All ER 194.
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15. Lee Cooper Limited v. CHH. Jenkins & Sons Limited (1967) Lloyd Rep. 396.
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24. Way v Latilla (1937) 2 All E.R. 662
25. Wilkinson v Cover dale (1793) 1 Esp. 74.

TABLE OF STATUTES

1. The Court Brokers Act'Chapter 527 ,Laws of Kenya.
2. The Judicature Act'Chapter 8 Laws of Kenya
3. The Law of Contract Act,Chapter 23,Laws of Kenya.
4. The Registration of Business Act Chapter 499
Laws of Kenya.
5. The Registered Land Act, Chapter 300, Laws of
Kenya.
6. The Sale of Goods Act, Chapter 31, Laws of Kenya.

INTRODUCTION

many international organisations and a number of
 ' The true nature of the relationship
 between vendors of property and estate
 agents has never, so far as the authors
 can discover received adequate consideration.
 That it should be so is surprising as
 careful investigation shows that a full
 understanding of the implications of
 that relationship is essential to the
 solution of the many problems which arise in
 relation to estate agents commission.
 It is equally true that many of the
 false impressions which are current
 to-day concerning this branch of the law
 arise from the failure to appreciate the
 true nature of the estate agents' contract
 of employment'. 1

I fully agree with the above words and this paper is
 an attempt to portray the legal implications and the socio-
 economic roles of estate agents in the Kenyan society.
 Only recently an article appeared in the Weekly Review²
 titled ' No Controls, Crooked Agencies fleece house-
 hunters ' and the writer lamented, that:

interested in the property market. There has been

' Real estate agency has become big
 business in Nairobi and to a lesser
 extent in Mombasa and other big towns.
 So have the tribulations of property
 seekers, especially those seeking
 houses or flats to rent; I was shown
 the same house by two different agents
 and each charged me for taking me there,
 said one rate house hunter'.

Various factors have facilitated the growth of estate
 agency especially in Nairobi and some big towns in Kenya.
 Nairobi the capital of Kenya has attracted many commercial
 enterprises, local as well as foreign . It also houses
 relationship arising from estate agency. The law of

many international organisations and a number of foreign diplomatic missions. The above provide employment facilities for the indigenous people as well as foreigners. The land problem has pushed many people from the rural to the urban areas in search of better means and ways of living. This exodus from the rural to the urban areas has brought with it housing problems. These are a result of the increasing population growth in the towns which is not simultaneous with the increasing housing facilities.

reads:

Estate agency is a creation of the problems posed by increasing population in the towns. The object of this study is to bring awareness to those interested in the property market. There has been for a long time a controversy as to rules of law which apply to this commercial relationship. One prominent member of a very large estate agency firm in Nairobi said in 1977³:

' We are brokers and not estate agents' implying that the Court Brokers Act⁴ applied to them. This however is not the position as the common law rules of agency are applied to regulate the legal relationship arising from estate agency. The law of

circumstances of Kenya and its inhabitants permit and subject to such modifications as the circumstances may render necessary'. Agency law is a special branch of the law of contract and Powell⁵ observed that 'the law of agency has been tied to the apron strings of contract'. The law of contract an invention of the commercial world was developed to create certainty in conducting business. It makes the contracting parties aware of their rights and liabilities. The law of contract in Kenya is derived from the English Law of Contract and its application is facilitated by Section 2 of the Law of Contract Act⁶ which reads;

'save as may be provided by any written law for the time being in force, the Common Law of England relating to contract as modified by the doctrines of equity shall extend and apply to Kenya'.

This assurance is further strengthened by section 3 of the Judicature Act⁷, which extends the jurisdiction of the High Court and all subordinate courts to cover matters which are subject to:

'the doctrines of equity, the substance of the common law and the statutes of general application in force in England on the 12th August 1897 and the procedure and practice to be observed in courts of justice in England at that date. Provided the said common law doctrines of equity and statutes of general application shall apply so far only as the

circumstances of Kenya and its inhabitants permit and subject to such qualifications as the circumstances may render necessary'.

The circumstances as to application of the above rules were made possible through the policy of divide and rule. A class which was far much assimilated in the English way of life was created and the post independence period would not change their ideas. This class fortunately or unfortunately found its way into the legislative body and at times has manipulated it to serve its interests. Law in a society is a measure of human conduct that is possible and desirable. It should reflect the norms of the particular society. The historical school has at least even if in a most confusing manner grasped the important truth that law is not an abstract set of rules, simply imposed on society, but it is an intergral part of that society having deep roots in the socio and economic habits and attitudes of its past and present members. The common law of agency and even contract is not rooted in the African society and as such its application should be based on the qualifications in the Judicature Act. Kenya is a progressive society and as such an application of the rudimentary rules of agency and contract would defect this progress. A progressive society has to keep adapting the law to fresh social and economic conditions and legislation has proved

in modern times the essential means of attaining this end however imperfect. The law of agency as applied to estate agency does not achieve the desired end, infact it vitiates the process.

The motives of this paper are, four fold.

Firstly, an attempt has been made to show the close similarity between the ordinary agents and estate agents. This similarity is based on the application of the same rules governing the creation, duties and legal implications of both areas of study. The law of contract is applied to both the studies. Secondly the paper deals with those duties and obligations which arise as a result of estate agency relationship. These are based wholly on the common law rules of agency and attempt has been made to lay down the fundamental principles involved. Emphasis has been made in dealing with estate agents commission, one of the most controversial and sensitive areas which the courts have tried to remedy by laying guidelines as to how it should be earned.⁸ Thirdly, an account of the roles of the estate agent in the socio-economic perspective in the Kenyan society is discussed. The basis of the discussion here is consistent with the capitalist mode of production which Kenya has accepted and follows very strictly. It has been said:

Footnotes ' Once it is decided that any particular economic system is to be preferred it is obviously desirable that the set of institutions in existence should be compatible with and favourable to that particular type of economy. In other words there is one optimum set of social and legal institutions to every type of economic system, be it feudalism, competitive capitalism, communism or fascism'. 9

1. The East African Standard, November 10, 1967, letter to The Editor, p.6.

2. This is very true as is seen clearly in this paper.

3. The lack of legislative control over estate agents dealings prompted me to look at the proposed Estate

4. Agents and Valuers Bill which was drafted in 1977

5. but was shelved. There has been a rumour,¹⁰ that

6. the bill has been re-drafted but I did not have a chance to look at it. The 1977 Bill is used in

7. Modern Law Review, at p. 217.
8. Daily Nation, Monday, January 4, 1982 p.3.
9. this paper as a basis for recommending the set

of rules which should be included in any proposed

Estate Agents Act. These recommendations are based

on particular sections of the Bill and criticisms

of the Bill gathered during my research. There

might be invaluable to those parties concerned with estate agency.

Footnotes - Introduction

1. Grattan-Doyle, The Law on the Remuneration of Auctioneers and Estate Agents (Sweet and Maxwell) P.1^v11
2. January 8, 1982 p.32.
3. The East African Standard, November 10, 1967, letters to the Editor, p.6.
4. Laws of Kenya, Chapter 527.
5. The Law of Agency (1st Ed.) at p. 3.
6. Laws of Kenya, chapter 23.
7. Laws of Kenya, Chapter 8.
8. Reed v Goody (1950) 1 All Er 919.
9. H.W. Robinson, Law and Economics, 11., Modern Law Review, at p. 257.
10. Daily Nation, Monday , January 4, 1982 p.3.

CHAPTER ONEA: AN INTRODUCTION TO THE LAW OF AGENCY

The term 'agent' is a very general one and is often used to describe a person who acts on behalf of another. It has however been employed to describe persons who in the legal sense are not agents. Dealers in motor cars, turf commission agents and others who act entirely for themselves have often been called agents. The strict sense in which it is employed in this paper is that of a person who acts for, or in the place of another in pursuance of some contract or authority from that other. Friedman¹ gives a very good working definition which illustrates the above contention. He defines agency as,

' the relationship that exists between two persons when one called the agent is considered in law to represent the other called the principal in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship of making of contracts or the disposition of property'. 2

The law of agency encompasses all contractual agents since its purpose is not only the relations between the agents and his principal but also to regulate the agents powers in the creation of contractual relations between the principal and third parties. In pursuing the contract or authority the agent is entrusted with

with the business of his principal and acts as his deputy. If he does so within the scope of his authority he binds the principal just as if the principal had done the business himself.

Agency relationships arise in various forms. The most common form is through contracts i.e. expressly in which case the essentials of a valid and binding contractual relationship must be present. These are offer, acceptance and consideration. If the agent and principal relationship is created this way, the terms of the agreement must be read very well. If the agent does what he has no authority to do, nobody is bound. If the rules are not read, then one of the parties (most likely the one who fails to read) is to blame as he is presumed to know its contents through the doctrine of constructive notice. In Jacobs Morris v. Leslie & Anor², the plaintiff who was the owner of a business in Melbourne appointed his brother Leslie his business agent in London. He was given the power of Attorney which spelled his duties. He was prohibited from borrowing money from any source. The Morris firm sold cigars in London and had for a long time dealt with the plaintiff's firm. Leslie notwithstanding the prohibition in the power of Attorney went ahead and borrowed some £4,000 from the Morris's firm, which money was loaned at an interest

of 4% and secured on some bills of exchange. The money was not paid and the Morris's firm tried to cash the Bills. The plaintiff sued the Morris's firm demanding the return of the Bills arguing that the latter had failed to peruse the powers of Attorney conferred on Leslie. It was held that Leslie had no power to borrow money and the firm was not entitled to the £4,000.

Implied contracts also create agency relationship. This arises when the conduct of the parties is such as to lead any reasonable person to infer the existence of such a relationship. In Essak v High Commissioner for Transport,³ the Cargo Manager of Mombasa claimed from the plaintiffs a sum of money for underpaid wharfage charges and penalties for not cleaning goods within a reasonable period. He proceeded to detain the goods. The plaintiffs paid the amount demanded without admitting liability and later sued the manager for the amount paid. Evidence was adduced to the effect that two employees of the plaintiff's were clearing clerks in Mombasa. The issue that arose was whether these persons were agents of the plaintiff or independent contractors. The court held the plaintiff liable as the clerks were his agents and had been paid to clear the goods by the plaintiff and from this an inference would be made. Agency relationship as a result of

ratification arises when the principal accepts an unauthorised act of his agent just as if there had been prior authorization.⁴ However, there are some legal requirements to be considered before ratification is effected. Firstly, the act which is sought to be ratified must be lawful and the agent whose act has to be ratified must have purported to act for the principal. Such an agent must have a competent principal, who must have been in existence at the time the case was done, could be ascertained at the time of the contract, was aware of all the material facts and had the capacity to ratify the act when he did so. The case of Dalgety v Cluer⁵ seems to suggest that in East Africa, a principal need not be in existence at the time the contract is made. Ratification can be proved by express acts and by implication. Once the principal ratifies the agent's act the contract becomes valid and the agent is entitled to remuneration. It is however only past acts which can be ratified. Ratification is based on effective business. It gives the principal a chance to look at the work of the agent. The profit motive is very important and any breach of authority which is beneficial to the principal

is not harmful and therefore should be ratified.

Agency relations at times arise as a result of operation of law. Here no consent is needed from the parties. This is an issue of estoppel. This type of agency is subdivided into agency of necessity and agency by cohabitation⁶. For the agent to work effectively he has to have authority from his principal. Various types of authority have strengthened the principal /agent relationship. Express authority the most important and forms the bulwork of agency relationship is associated with the creation of contracts. It is given by a principal to an agent orally or in writing and may be under hand or under seal. The construction of a written authority is governed by the normal construction of rules. Where ambiguous instructions are given to the agent, he is not to be held liable and the principal will be bound if the agent acted in accordance with a reasonable construction of his instruction. Implied authority arises when the agent has authority to do everything that is necessary for or incidental to the execution of his authority.⁷ Usual authority of an agent links up neatly with his implied authority because it forms part of the implied authority unless restricted. This arises when an agent has a particular trade or calling as is supposed to do what is usual in his trade, profession or business for the purpose of

carrying out his obligations. Thus a person employed to sell a horse is impliedly authorised to warrant its soundness. Apparent authority is that which negatives the existence of actual authority and is merely a form of estoppel. It is not given by the principal to the agent but the law regards the agent as possessing it notwithstanding the principal's lack of consent to his exercising such authority. The reason for this is that the principal by his conduct has allowed the agent to appear to have authority. Presumed authority does not depend upon any express consent on the principal that the agent should act on his behalf in a particular manner. It arises by operation of the law and since it is an authority presumed by law to exist, it is automatically possessed by the agent.

The so-called agency of the estate agent is assumed to be a particular species of the genus of agency. Though the nature of the arrangements commonly made between estate agents and their principals have much in common with contracts of agency made between other principals and agents, a vital difference has been said to exist which

distinguishes them from others. This distinction has been based on the definition of estate agent given by Gratton-Doyle. He defines the term as:

' Not an agent in the real sense but as an independent businessman taking advantage of an opportunity given him by another, miscalled the principal in the hope of obtaining a contract in the future which will bind that other to pay a stated reward, called by analogy a commission'.

I do not fully agree with this statement, but before discussing it, I will proceed and look at the development of agency law.

B: HISTORICAL DEVELOPMENT OF AGENCY LAW.

Any approach to this branch of law has to have a strong base of legal rules. The law of agency should not be seen in isolation of the Law of Contract, Sale of Goods, Hire Purchase, Shipping Law, Banking Law and Insurance Law. The fundamental point is that every legal rule should give expression to some social social economic factor, and thus in dealing with the development of agency law emphasis should be laid on the modern law of agency . This is based on the assumption that from times immemorial there has always been in existence rudimentary law of

agency which is inborn in man.

Before and under feudal Britain the law of agency was embryonic. This was so because of the fact that Britain did not have a national market. It could not boast of any national economy and whatever trade there was, was localized, until the merchants, the ancestors of the bourgeoisie came into existence. They traded beyond their local provinces and provided a platform for the development of agency law. During the industrial and the agrarian revolution in the seventeenth century and onwards the law of agency grew in importance and extent and eventually emerged as a separate entity distinct from the master/servant relationship. This period is characterised by the rise of competitive capitalism. During this period Britain had a national market and production stepped up because of the inventions and innovations, creatures of capitalism. The need for agents is clear, as goods are produced for their exchange values and they must reach their ultimate consumers. The capitalist cannot produce and at the same time distribute his goods. The law has to provide loop holes to the nemo dat principle in Sale of Goods, a protective measure of private property. The Sale of Goods Act⁸

Section 26(3) exempts the application of the principle in the case of sale by mercantile agents. At the same time markets have to be found for the disposition of the finished products and the production of raw materials for further production. The development of agency during this period is very fast and it is further strengthened by the introduction of both equitable and civil rules. The scramble for colonies is at its zenith at this particular period, and international boundaries are broken by capital thus extending and refining the law of agency. This is when Kenya comes in.

The Law of Agency was imposed upon Kenya by British imperialism, to serve the neo-colonial roles. This law as pointed out before is an extension of the law of contract. The law of contract in Kenya is the law of contract as it is in Britain and was imported into Kenya during the colonial period to serve the interests of our colonial masters. It was first applied in Kenya as the Indian Law of Contract Act 1872 which was in reality a codification of the English Law of Contract. This Act was however repealed by the Law of Contract Act ⁹ 1961, which provides that the English Law

of Contract is part and parcel of our law.¹⁰ The Law of Agency, a creation of the Common law should be looked at on the same context. Its application in Kenya has been facilitated by Section 3(1) of the Judicature Act which extends the jurisdiction of the High Court all subordinate courts to cover matters which are subject to the substance of the common law, doctrines of equity and statutes of general application in force in England on the 12th August 1897. After independence there was a belief held by most of the Kenyan population that the position as to the application of English law would change. This position has never changed and the law of contract and agency is still English law. A class of persons much assimilated within the western ideas and had been created during the colonial period, and believed and still do in the superiority of English law. These people found their way into the political arena and with both economic and political power have been able to maintain the status quo. The imperialist still command and the independent Kenya, tied with foreign finance capital, through her bourgeois leaders follow these commands.

C. AGENCY VIS-A- VIS ESTATE AGENCY

The law of agency in most cases is part of

the general law of contract and a contract of agency is a good example of a contract. The general rules of contract apply according to the needs of the principal and agent. These rules are applicable to the arrangement between estate agent and principal. However, there seems to exist a difference between the contracts entered into by estate agents and their principals and these ordinary agent/principal contract. It has been argued that the arrangement between an estate agent and his principal at the initial stages is not one of contract at all. A distinction has been drawn between contract on the one hand and agreement on the other. A contract according to English law is an agreement which results in an obligation on the part of one or both parties. An enforceable contract is an agreement in due form which is supported by consideration and results in legal obligations. A contract is not in any way synonymous with the term agreement. The ordinary principal /agent relationship is a true contract as it fulfills the above qualifications. In the case of estate agents the argument contents as it was pointed out in the House of Lords in the case of Luxor (Eastborne) Limited v Cooper¹¹ that he is not:

' employed' in the sense in which a man is employed to build a house, or to drive a car, or to negotiate a contract with the liability to pay

damages for delay or want of skill. No obligation is imposed on the agent to do anything. The agent is not employed to do anything'.

From the above it can be inferred that no breach is committed by either the agent or principal if any of them fail to honour terms of the agreement. There is no binding contract between the parties, what exists is only a mere agreement contemplating the creation of a binding obligation in future. This ~~is~~ fallacious because it does not incorporate the doctrine of part performance. It seems to imply that the principal can pull out in any manner notwithstanding that the agent has in reliance of the agreement incurred expenses and wasted time on his behalf (the principal). The difference does exist but not to the extent of being harsh to any of the parties. If the estate agent relies on the principals representation and, incurs any expenses, the principal should remunerate him on quantum meruit basis. The agent too should remunerate his principal if the latter is disadvantaged ⁱⁿ many ways by the formers breach of agreement without reasonable cause.

The only difference which in reality exists between the ordinary agency relationship and estate

agency is in the area of remuneration. In the ordinary agency relationship it is immaterial to the payment of remuneration that the principal has derived on benefit from the agents acts. As long as the agent has performed what he was employed to do and has not been at fault in failing to benefit his principal, the later will be bound to pay the agreed remuneration¹². In the case of estate agents the general principle is that in the absence of express binding terms in the contract, the courts have been unwilling to make the principal pay commission to the estate agent when the sale of the principals property has been affected by the principal even if the agent had purported to perform the contract. In Dennis Reed Limited v Goody¹³ the agents were instructed to find a person ready, able and willing to purchase the principal's property. The agent introduced a third party who agreed to buy subject to the principal agreeing to indemnify him against future road charges. The agreement failed due to delays and when the agents claimed their commission, the principals rejected their claim. Lord Denning laid down six principles on the law estate agents commission. They are as follows:

- (i) that agent is only to receive commission if he succeeds in effecting a sale;
- (ii) any language used in a contract will have this effect as long as it shows that the agent is to introduce a purchaser;
- (iii) if the agent is to be paid commission on offers only, clear and unequivocal language to this effect should be used;
- (iv) the normal arrangement, the common understanding is that the agents commission is payable out of the purchase price;
- (v) if the principal repudiates the agreement after a binding contract of purchase has been signed by a third party, he is still under an obligation to pay commission to the agent;
- (vi) no commission is payable if it is the third party and not the principal who repudiates the contract. However, if the principal sues for specific performance and it is granted the agent is entitled to commission.

Footnotes - Chapter One

1. The Law of Agency, Butterworths, London, 3rd edition.p.
2. (1901) L 1 Ch. 261.
3. (1972) E.A. 42.
4. Habib Devji v Chator Tormohamed & Prince Juko
(1960) E.A. 1022
5. (1961) E.A. 179
6. Nanyuki General Trading Stores v Mrs Peterson
(1948) 15 E.A.C.A. 28
7. Wattleau v. Fenwick (1893) 1 QBD 346.
8. Laws of Kenya, Chapter 31.
9. Laws of Kenya, Chapter 23.
10. Above section 2.
11. Luxor / Eastborne / Limited v Cooper / 1941/ A.C.108
12. Fisher v. Drewett (1879) 48 LJ QB 32
13. /1950_ / 1 ALL ER 919

CHAPTER TWOESTATE AGENCYA. (1) Definition and Scope of Estate Agency

A definition of the term 'estate agent' cannot be fully attempted without first looking at what the term 'estate' means. When we think of the term 'estate' we relate it generally to the condition or circumstances in which a person stands with regard to property and mostly with regard to what is termed 'real property' and this extends to the concept of land and its various interests. 'Land' as defined in section 3 of the Registered Land Act ¹ means:

'Land', includes land covered with water, all things growing on land and buildings and other things permanently affixed to land'.

This definition is exhaustive as it does not only define land as meaning only the soil but it also includes any interests in land i.e. buildings, leaseholds, easements and covenants all of which are recognized by the Registered Land Act. The term agency has been defined else where in this paper, but in sum, agency is the

relationship that exists between two persons whereas one known as the agent agrees to act on behalf of another known as the principal. Coining a definition from the above, an estate agent can therefore be thought of as merely being someone who acts either for the seller of property (a house in most cases) or for a landlord in the process of acquiring tenants or a tenant. He deals with real property and as such much skill and care is needed. However, this is not the position in Kenya as there is no statutory control over the dealings of estate agents. The scope of estate agency is not clearly defined, a result of lack of statutory regulations and partially ignorance of the parties involved. In this paper however I will limit myself to what is generally referred to as an house agent who fits in the definition of estate agent given earlier.

2. Business Formation

As any other business the estate agent business is regulated by the Registration of Business Act² which makes provision for the registration of firms, individuals and corporations wishing to carry on business

in Kenya under a business name. It provides for all the matters which are incidental to the carrying on of an registered business. For the formation to be valid the business has to be registered and a prospective proprietor has to furnish the registrar with ' the statement of particulars ' a prescribed form which contains the following:

- a) the home of the business
- b) the general nature of the business
- c) the address of the place of business.

After considering the particulars, and being satisfied that the formalities of registration have been complied with , the registrar enters the name of the firm, individual or corporation into a register and registration becomes complete after payment of the prescribed registration fee which is alterable as provided by section 22 of the Act.³ A certificate of registration is issued by the Registrar which is in the form of another prescribed form known as Form BN/3. The business after award of certificate is recognised by law.

The position as thus, it is easy for any person who has the means and stamina to enter into the estate agency business. As was said earlier ⁴ estate agency has become big business in Nairobi and to a lesser extent in the big towns in Kenya and associated with this are the tribulations of property seekers. The problems have virtually arisen due to the fact that there is no legal limitation as to who can enter into the business. Recent developments however are towards the restriction of entry in the real estate business to those persons who have some qualifications in the property market. The estate agents themselves face a lot of problems and this can be illustrated to their turning of business in dingy offices and the charging of exorbitant fees to make ends meet. These problems will be looked at in a later chapter. The easy entry into the business has encouraged many people. Some have managed quite well, others have failed miserably, mostly due to lack of funds to oil the machinery for running the business smoothly. The rise in most cases of the estate agency business is rhetoric but the fall is usually catastrophic and it leaves one wondering why such should have been the case especially in a capitalist economy (Kenya) where property has become big business and therefore the demand for such people.

3. Creation of Estate Agency Relationship

The consent of the parties is an essential element to the establishment of the relationship. However, this in itself is not the only way of creating agency relationship. Agency relationship's can arise in various circumstances. The relationship between the principal and agent is governed by the extent of the authority granted to the agency. Agency can be created in various ways:-

- (a) Expressly, in which case the duties and contents can be discovered from reading the actual words used by the principal, whether orally or in writing. (Standard form contracts)
- (b) Impliedly, in which case though not done expressly the conduct of the principal has led the agent to reasonably believe that what he is doing is with the consent of the principal and whatever he has done is incidental to and necessary for the exercise of his powers; Keen v Mear (1)
- (c) Apparently, in which case a person appears to a third party to be an agent as a result of a representation by the principal to such third party.

- (d) Usually in which case a person has authority which he only possesses in certain circumstances to act on behalf of another person, whether or not he is authorised to do so.

The basic criterion thus in deciding whether an estate agency relationship exists is not only based on the consent of the parties but whether by his activities the estate agent can bind his principal. This can clearly be illustrated by the fifth way of creating agency relationship which is ratification in which case although the agent does something which had not been authorised by his principal, the latter accepts the former's acts and adopts it just as if there had been prior authorization,⁵ to do exactly what the agent did. This is well illustrated in Habib Devji v Tormohamed and Prince Juko⁶. In this case Prince Juko asked a friend C to find a purchaser for land which he wished to sell. C went to the first defendant and after negotiations the first defendant agreed that he would take leasehold of the land for 49 years at a premium of ₹5,000/-. C informed the Prince who approved the arrangement. The first defendant went to the plaintiff's son and offered to negotiate a lease for the same piece of land for a premium of ₹12,500/-. The first defendant

presented himself as Prince Juko's agent and asked for \$1,000/= commission. The draft lease was sent to the Prince who though he noticed the change of premium amount refused to sign it and demanded the whole amount from the plaintiff who claimed he had paid part of it to the first defendant. He sued both the first and second defendants. It was held that the Prince had ratified the contract and the first defendant had become an agent by ratification.

B. DUTIES

These may arise due to the contractual relationship of the parties. However, where no such contract exists they are regulated by the rules of law which are applicable to the relationship of principal and agent. Once there is an agreement which gives rise to any agency relationship, in the absence of any express terms the agent as well as the principal owe each other certain duties.

DUTIES OF THE AGENT

An estate agent like any other kind of agent has a duty to perform that he has undertaken to perform if there has been a contractual relationship between him and his principal. The agent undertakes to perform

anything except that which is illegal. This is illustrated best by the case of Cohen v Kittel ⁷ where the principal employed a turf commission agent to place certain bets, which the agent failed to do. The principal then sued the agent claiming the loss of money he would have won on the bets if they had been made. It was however held that the agent was not in any way liable. If the agreement is gratuitous the agent cannot in any way be held liable for failure to undertake the performance of the agreement. He can however be made liable for negligent performance of the undertaking as in Wilkinson v Coverdale ⁸. Powell in his book ⁹ argues that the agent even if gratuitous, has an obligation to undertake the performance of the agreement.

The agent in all circumstances should be obedient to his principal. He must act always within the scope of his authority and must obey those instructions in the express-terms of the agreement and if such do not exist according to the general nature of his business. The paramount consideration should always be the benefit to his principal. The general rule is that an agent must perform his duties personally because the duty conferred to him is confidential in

nature. (Delegatus non potest delegare). The agent can only delegate his duties if the principal permits him to do so, where he does so without the consent of the principal he is liable to any breaches of duty by the sub-agent. Delegation does not in any way create any priority of contract between the principal and the sub-agent and problems arise where there has been a breach by the sub-agent. Thus the sub-agent can only be sued by the agent and not by the principal . However, an action in tort can arise as in Lee Cooper Limited v CH. Jenkins and Son Limited ¹⁰ where the court held that the sub-agent was liable to the principal for loss of goods intransit due to his negligence.

The agent in performing the undertaking should exercise due care and skill. Thus duty is owed to the principal whether the agency is contractual or gratuitous. There are however standards to be observed by the contractual agents which are higher than those to be observed by gratuitous agents. In the case of contractual agents they must act according to the skills which they usually possess. He must have regard to the nature of his business and act in a reasonable manner. A gratuitous agent must exercise the

care that any reasonable man would exercise in the performance of his own affairs or the case which is necessary in any undertaking he has agreed to perform. A principal will always blame himself if unless misled by the agent he has chosen an incompetent careless person to act for him gratuitously. One of the most important duties of the agent to the principal is that of respecting the principal's title in respect of goods, money and land. However, at times the agent can plead jus tertii in favour of a third party who is the actual owner of the property, goods or land. If the agent knows about an adverse claim of a third party, he can challenge the principal's title. If however, he receives money from his principal which may in law or in equity belong to a third party unless he is guilty of any wrongful act with regard to that money, he cannot be held to be accountable for it. The agent must always account for every penny he receives on behalf of the principal and pay anything that he receives to his principal. This duty exists even if the contract upon which the money is being paid was illegal or void. The agent is thus required to keep the principal's property and money apart from his and to produce the account for the principal's inspection when demanded.

Apart from the above duties there are others which arise due to the fiduciary nature of the agency relationship. The relationship between agent and principal is one of trust. These duties are equitable in character and can be summarised in one sentence, that the agent should not let his personal interests conflict with those of his duties. If the agent has to work for a third party, he must disclose this to his principal. If the agent fails to do this, the principal may rescind the transaction and demand any profits made. In Fullwood v. Hurley¹¹ the agent was employed by the owner of a hotel to sell on behalf of him. The purchaser of the hotel, it was alleged by the agent had agreed to pay commission if the agent bought the hotel on behalf of him (t). The court held on a petition by the agent for the alleged commission that there had been no contract between the agent and T because this was not disclosed to the owner of the hotel for whom the agent was also acting for. If the agent has a personal interest in the disposal or acquiring of property land or goods he should make a full disclosure of this. In McPherson v Watt¹² the agent of two ladies who was to sell their house sold it to himself on the pretext that he had sold it to his brother. When the ladies repudiated the contract

the agent sued them and asked the court to order specific performance of the contract. Specific performance was refused because the agent had not disclosed his interest to the ladies.

An agent is not supposed to make any secret profits out of the relationship between himself and the principal. In Reading v A.G.¹³, Reading a sergeant in Cairo during the second world war used his position to escort illicit transport and for this he received £20,000 in form of bribe. On discovery the money was seized and the court argued that since he was a servant of the crown, then the money did not belong to him as he had used his position to earn it. However, in Ebrahim v Astrid Prodger¹⁴ it was held that money paid to an advocate was not a secret profit. A secret profit in this respect is any financial advantage which an agent receives over and above what he is entitled to receive from his principal by way of remuneration and this includes bribes.¹⁵ The case of Boordman v Phipps¹⁶ discusses the position of agents who make secret profits and in this case Lord Denning sitting in the Court of Appeal made it clear that it did not matter how an agent obtained advantage for himself for the end, result was always the same. If the principal however is aware of the secret profits being made by the agent, then the agent is entitled to such profits

and the principal cannot be heard to complain about them.¹⁷

2. THE PRINCIPAL'S DUTIES (SPECIAL REFERENCE TO ESTATE AGENTS COMMISSION).

The principal has the most important duty of remunerating the agent for what he has done and in the case of estate agents, he is entitled to commission as soon as the purchase or leasehold is made complete. The obligation to pay commission arises only where there are express terms and unequivocal language to that effect has been used in drafting the agreement. The parties must make it very clear whether the agent is working gratuitously or for a consideration. At times the payment of such can be implied in the agreement and this depends upon what is reasonable in the circumstances Lord Atkin in dealing with the case of Way v Latilla¹⁸ said:

" While there is no concluded contract as to the remuneration , it is plain that there existed . . . a contract of employment . . . in circumstances which clearly indicated that the work was not to be gratuitous."

In such circumstances payment is made on quantum meruit . The language used in the agreement may bring about problems especially with estate agents commission.

In Jones v Lowe ¹⁹ the agent was to be paid commission on the event of 'introducing a purchaser'. It was held that the words used meant that and only that the agent was entitled to commission if he introduced such a person who was not only ready and willing to purchase but also willing to sign a legal contract. The principle in Luxor ²⁰ case was applied in the above case. This was further stressed in Murdoch Lawrence Limited v Newman ²¹. In E.P. Nelson & Co. v. Rolfe ²² the agents were to receive commission on their introduction of 'a person, able, ready and willing to purchase the principals property. They did this, but before completion of the negotiations the principal granted on option to X to purchase the property. X had been introduced to him by other agents. The property was subsequently sold to X. On demand for remuneration by the agents for introduction of a purchaser, the principal refused to pay and the agents sued him. The court held that the agents had fulfilled their part of the bargain by introducing a purchaser and as such were entitled to commission. The principles enunciated in the above cases were ~~was~~ discussed and stressed in a series of cases. ²³ In McCallum v Hicks ²³ Lord Denning said that whether the contract with the agents said find a purchaser 'or someone' willing to purchase. meant the same. All the agent had to do was to find a person who had given irrevocable proof of his willingness to purchase. ²⁵ In Dennis Reed Limited v Goody ²⁶

the same was applied and in this case Lord Denning laid down six rules governing the payment of commission to estate agents which are as follows:

- (a) The agent is only to receive commission if he succeeds in effecting a sale.
- (b) Any language used in a contract will have this effect as long as it shows that the agent is to introduce a purchaser.
- (c) If the agent is to be paid commission in offers only, he must use a clear and unequivocal language.
- (iv) The normal arrangement, the common understanding of men is that the agents commission is payable out of the purchase price.
- (v) If a binding contract of purchase is signed by the principal and third party if the principal repudiates the contract, he is still liable to pay commission.
- (vi) No commission is payable if it is the third party and not the principal who repudiates the contract. However, if the principal sues for specific

performance and damages and he succeeds, commission can be paid to the agent from such damages.

Even after enunciating the above rules, there are still many anomalies as to the remuneration of estate agents. In Sheggia v Gradwall²⁷ the principal was entitled to damages for breach of contract by the prospective purchaser and as such the agent was entitled to commission. However, Lord Justice Salmon in Al Wilkinston Limited v Brown²⁸ said that the scope of Sheggia's case ought not to be extended. The harshness of the law in respect to the issue of commission will remain unsolved if the courts do not arrive at a solution and agreement when deciding whether commission will be paid or not. Professor Gower²⁹ suggests that justice can only be done if an estate agent is appointed 'sole agent' for the property owner. This would be protection against sale through another agent. This in itself is not satisfactory and there still remains a lot of room for some kind of general scheme to protect both estate agents and principals in the performance of the duties and to avoid complicated litigation which ends up in doing an injustice to either of the parties. Some protection has been given to agents

and principals and it will suffice here to talk of such protection briefly.

Whether or not the principal has derived any benefit from the agents act he is liable to pay the agreed sum of the agent has done what he was supposed to do. In Fisher v Drewett³⁰ the agent who was employed to mortgage the plaintiff's property did so and found a third party willing to advance the money. However, the mortgage could not be completed because the principal had no title. It was held that though the principal had not benefitted from the agents work, he was still liable to pay commission to him. If the principal interferes with the execution of the agreement the agent is entitled to such remuneration as was agreed on. Where the agent spends time and money in trying to dispose the principals property unsuccessfully he is entitled to something. Thus in order to protect himself against the loss of commission the agent must make sure that he obtains a commission contract containing special terms which impose obligations on the vendor actually to sell through him only. The agent can also get the principal to agree that whether or not he affects the agreement he is still entitled to commission.

entitled to commission. The principal on the other hand must make sure that he is only bound to pay commission if the estate agent finds a purchaser for the property.³¹

INDEMNITY:

The principal has a duty to indemnify his agent against losses, liabilities and expenses incurred while trying to effect the terms of the undertaking.

The duties of the agent and principal thus discussed enables the relationship between them to be understood much more clearly especially with the duty to remunerate the agent, though this part of the law is ridiculed with complexities and uncertainties.

Chapter 2 Footnotes

- 27 [1963] 3 All ER 114.
1. Laws of Kenya, Chapter 300.
 2. Laws of Kenya, Chapter 499
 3. Op.cit., above.
 4. Weekly Review, January 8, 1982, p.30.
 - 5a. [1920] 2 Ch. 577
 - 5b. Friedman, Law of Agency.
 6. [1960] EA 1022.
 7. (1889) 22 QBD 680.
 8. (1793) 1 ESP. 74
 9. Law of Agency 2nd. Edn. pp. 302-303.
 10. [1967] Lloyd Rep. 396.
 11. [1928] 1 KB 498
 12. (1877) 3 App. Cas.254
 13. [1951] A.C. 507.
 14. 52 KLR 29
 15. Above, footnote No.5.
 - 16.[1967] 2 A.C. 46
 17. Hippisley v. Knee [1905] 1 KB 1 - for the authority that if no fraud has been ~~used~~ used on the principal to obtain secret profits the agent is entitled to it.
 - 18 [1937] 2 All ER 759 at 762.
 - 19 [1945] 1 All ER. 194
 20. op.cit. chapter I
 21. [1949] 2 All. ER. 783
 22. [1949] 2 All. E R. 584.
 - 23 Fowler v Brall [1950] 1 All. ER 662, Jones v Lowe above
Graham & Scott Limited v Oxdale [1950] 1 All ER 850.
 24. [1950] 1 All. ER. 864.
 - 25 Above p. 866.
 - 26 [1950] 1 All. ER. 919

CHAPTER THREE

27 [1963] 3 All ER 114.

28 [1966] 1 All ER 509 THE ECONOMIC ROLES OF ESTATE AGENTS

29 13 MLR 491 p.497.

30 (1879) 48 LJ QB 32 beginning on this chapter which

31 Per Lord Russel in Luxor's case p.126 estate agent, it

will suffice here if I mention a few things as to the present state of things in the business. Estate agency is a term that conceals as much as it reveals. When one thinks of estate agency, one automatically thinks of property and this is not wrong as estate agents deal with real property. Land is an important aspect of property. One learned writer said:

' The profession of the land suffers from careless nomenclature which is at least one reason why its derived status as a learned profession on an equal footing with those of law, accountancy and architecture has proved elusive'. 1

I concur with the above quotation. Most of Kenya's building code and its land tenure system is part of our colonial heritage from Britain and so it is natural that the local education is a reflection of that in the United Kingdom. In England the relevant qualification for entry in the estate agency business is a Bsc in estate management. 'Estate' here is used in its archaic form thus introducing a phrase less accurate than ' Land Economics' which is the

CHAPTER THREEA: THE SOCIO-ECONOMIC ROLES OF ESTATE AGENTS

Before embarking on this chapter which is dealing with the roles of the estate agent, it will suffice here if I mention a few things as to the present state of things in the business. Estate agency is a term that conceals as much as it reveals. When one thinks of estate agency, one automatically thinks of property and this is not wrong as estate agents deal with real property. Land is an important aspect of property. One learned writer said:

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Nairobi University style degree. The above qualifications are accepted in Kenya and are essential for registration with the Institute of Surveyors of Kenya, which is the recognised local professional body, which includes land surveyors and quantity surveyors. For security reasons the letters MISK are used by members as an indication of professional competence and the acceptance of ethical standards.

The above however may be something of the future. The business is carried on by people who do not possess the above stated qualifications. Many people, of all characters and disciplines have been attracted to the real estate business by the prospects of quick money. These are the non-professionals. To many, it looks as if one does not require any capital, but when one gets down to the real thing, one finds that in order to attract business, one needs some form of capital. Sooner or later some find it pretty hard to cope with the demands of the business and close down. Others try and cling and in so doing learn the tricks of survival. These includes the numerous estate agents who operate from dingy one room offices with only a table and a telephone and charge the house seeker a registration fee even before they take him/her

to see a property.² The rise of these type of real estate businesses is meteoric . Their fall is equally meteoric.

Kenya's rapid development and economic expansion has created a need for detailed and regular information as to the prevailing state of the property market. The involvement however in this market is dominated by the bourgeoisie who comprise a small section of Kenya's total population and includes foreigners, the African bourgeoisie and the Asian bourgeoisie. However, the majority of the Kenyan population is some how directly or indirectly involved with property (real estate), even a squatter is involved as he is seeking an interest in land just like an international bourgeoisie. There is the desire to maximise the benefits from this interest and this requires the help of a professional in the field. Buying of a house to any individual may represent the largest private transaction and might obviously (in most cases) amount to his/her largest single asset. This is not any easy task and a person well versed in the technicalities and has experience in real estate (on estate agent) is indispensable. This brings me to the purpose of this chapter, the socio-economic roles of the estate agent, -

(1) Finding Purchaser, Sellers, Tenants and Landlords

This constitutes about three quarters of the estate agents work load. An estate agent is always thought of as a person who acts for the seller or landlord, but there is no reason why a purchaser or tenant cannot make use of the expertise of an estate agent. In achieving the objects of this lucrative role, the estate agent uses various methods of which advertising is the most important and to some extent the most effective though a bit too expensive.³ In cases of finding a purchaser or tenant the potential vendor or landlord should engage an estate agent who will do the job for him. Many people who have property do not have time to go around looking for tenants or purchasers and as such the services of a qualified estate agent are an asset. Buying a house for many people may be the largest single acquisition made in a lifetime. This entails that the selection of the house be made carefully with the advice of an estate agent. The following should be had in mind when looking for a house:

- (a) The design of the house, as an attractive external appearance may enhance the value of a house or maisonette. However the

internal layout is the most important.

- (b) The structure of the house should be excellent as no purchaser wants to buy a house which will require his further spending on repair bills. Structure quality and its condition is also an essential factor as it affects the potential for the granting of a mortgage. In cases where the property has to comply with city council specifications the potential purchase should seek the advice of an estate agent as rectification to such specifications can be a heavy job.

- (c) The plot and location of a house to a considerable degree determines the value of a house. This is based on whether the land is held on freehold or leasehold and on the site of the building. A busy executive does not have time to go inquiring about this, but an estate agent can easily do this for him.⁴

- (d) Other subsidiary factors such as access to roads, schools, shops, and avoidance of noisy or undesirable adjacent developments e.g. slums. Other less obvious factors which a purchaser would find difficult to

establish and where the expertise of an estate agent is forthcoming are possible rezoning by the local authorities, road realignment, changes in water reticulation and the possible liability of paying charges for sewage and road user. Buying of a house should not be done hurriedly and the purchase should be able to get what he really needs if he consults a well established estate agent.

An estate agent acting in the capacity mentioned has no authority to sign a binding contract for a sale or lease. He in this aspect lacks the essential work of an agent. His role is only to obtain offers and to submit them to his principal.⁵ In seeking for tenants or landlords an estate agent has an upper hand and it is his duty to use his utmost skill and knowledge. The landlord's demands from a tenant are very simple and include the payment of rent on a regular basis (one month rent in advance) and the tenant's co-operation in maintaining the house and grounds. It is very obvious that once an unsatisfactory tenant has gained possession of a property it is very hard to get rid of him⁶ and as such a reputable estate agent can be of

great help as he has a wide range of contacts with first class tenants. A tenant on the other hand in looking for a house or flat needs assurance for privacy in enjoyment of the property and his money's worth in renting the property. An estate agent is a necessity here.

(ii) Management of Houses

Many owners of property especially residential, feel that they are capable of dealing with the problems that may arise during the period of leasehold and also the tenants problems. But a time comes when a property owner is faced with the problems of a leaking roof, blocked drains, tenants evading to pay rent on time, all these requiring his immediate action. Most of the property owners in Kenya are persons with long chains of properties and if not so they have other responsibilities and cannot be able to deal with such 'petty' problems without causing inconvenience else where. The estate agent comes into the picture here and relieves the property owner. On being appointed as manager of a house, a reputable estate agent prepares a proper inventory of condition of the house furniture before occupation(if any) and a schedule of the condition of the house and at the commencement of the tenancy

these documents must be read and agreed with the tenant and countersigned by both. This minimises disagreements at the end of the lease. The estate agent during the period of leasehold ensures that repairs are carried out satisfactorily and collects rent monthly for the tenant. In most cases the landlord agrees to have rent collected by the estate agent to be handed to him for only three months. This the clever landlord does to avoid the earning of a profit by an estate agent through a fixed deposit account if allowed to hand over rent annually or half yearly.

The estate agent sees to it that repairs are paid for by the tenant or landlord as the case may be. The estate agent in cases of repairs to be paid for by the landlord (which in most cases involve substantial expenditure) must consult contractors who will estimate the costs and this should be presented to the landlord before anything is done. Where a purchaser fails to repay the loan owned to a society or bank, an estate agent so managing the property may be called upon to manage the property on behalf of such society or bank when it exercises its right of receivership. The

charges of managing property vary according to the type of property. In cases of flats which have a multiplication of tenants, leading to more time being consumed in management, a higher percentage of about 10% of the gross rent is collected whilst a smaller percentage of about 7% is collected for single houses. The estate agent should and does provide the landlord with accounts of expenditure and costs and pay the rent in accordance with the principals instructions.

(iii) Valuation of property.

Any well established and competent firm of estate agency should have a valuer or valuers. Property valuation in most cases is required for market purposes between a willing buyer and seller. Instances however arise when a valuer has to take into account special factors which will have a bearing on his advice for example a situation may arise when a client wishes to purchase land adjacent to an area he owns with the object of expanding a business or launching a development scheme. Another good example where a valuer should give conservative valuation arises when the purchaser of a property has approached a bank or any financial institution for funds and as such a modern valuation should be provided to ensure that the bank

or financial institution is well covered . The increased demand in residential property in Kenya has placed a premium on houses and flats within vacant possession and it is obvious that as soon as the property becomes vacant , its value increases considerably. A professional firm can give guidance in the development of residential land and the financing of such development. In the field of commerce and industry, property plays a very vital role in the balance sheet of any company. Land and buildings being the primary factors of production imposes on the valuer an immense responsibility since any progressive company should be made aware of its assets and any possibilities of their improving the value of the property. The agriculturist also needs to be informed of the value of his land in the market so as to ensure maximum utilisation of investment in the land. In the last few years , inflation has led to a dramatic increase in the replacement cost of buildings and as such majority of the property owners may be under insured. Owners as such should give a serious consideration to the object of valuation for purchases of insurance. The market mechanisms of supply and demand can be very well be explained to a property owner by a professional.²

(iv) Advice on the Improvement of Property Value

A property owner has a variety of ways of improving the value of their properties. These improvements can be divided into three broad categories i.e. structural alterations and extensions, modernisation and making the garden or grounds more attractive. These modifications are expensive modifications and a property owner needs the advice of a good estate agent as to whether such proposed modifications will enhance the value of the property in the market.

(v) Miscellaneous Roles

The role of the estate agent is not only limited to the above mentioned. The real estate agent does not only arrange for the selling, leasing, management of houses, he also advises clients in property investment, development of projects etc. His role as a businessman is very important and as a qualified estate agent he is able to advise on various factors which may affect in general property, a good example being the capital gains tax imposed on property transactions.⁸ He also is out to enlighten the people on the various laws that govern their property e.g. tenure system. He also endeavours to educate people on maximum utilisation of their property for example

using such property as security to get a loan. Many property owners are ignorant of this and a good estate agent can be of great assistance.

The estate agent in his campaign to fulfil the desired objects of the society like any other business man is confronted by many hazards which in most cases are partly his own making and partly the economic atmosphere prevailing at particular periods. I will briefly look at this in my next sub-section.

B. FACTORS AFFECTING THE ESTATE AGENCY BUSINESS

The property market is bedridden with problems which in one way or another affect estate agency firms. There is need for extensive advertisement in order to reach the ultimate consumers. This is a very expensive process as indicated by the Property Column⁹ especially if the agent has to do it continuously for may be a week or two. The greatest problem arises when after the agent has undergone all this expense, then the principal repudiates the contract. Though he may be compensated, this does not really help him alot as the time wasted cannot be recovered. Telephone bills are another headache to the estate agent. Using a telephone is cheaper than going out in search of landlords, purchasers, tenants or vendors and as such there is a continuous flow of

telephone calls in an estate agents' office. For the small businessman who only deals with 'small property' this can cause a lot of problems even to the extent of the telephone being disconnected.

' This happens (telephones disconnected), but we have to survive. We have to make a living , and so we try to make ends meet. ' 10

This has led to improper practices by some estate agents even reputable ones. Only recently a Nairobi Estate Agency firm locally owned practising under the business name of Kendent Limited was under fire by the recently formed Kenya Association of Real Estate Agents for charging house seekers a non-refundable registration fee for uninhabitable or incomplete houses.¹¹ In response the firm manager said :

' that he needed the money to pay the wages of the youths who acted as his field agents'. 12

This has led to another problem, the lack of public confidence. Some of the so called estate agents do ' backstreet business ' leading to exploitation of the innocent party. The shortage of good properties in the country especially in Nairobi has been a blessing to these unscrupulous estate agents. There are those who acquire the jargon of the trade within a matter of months and go out to trap unsuspecting clients. Their

only aim is to maximise their commission and can make up to \$50,000 on a transaction involving a dwelling house worth \$300,000 or more. They make use of the current inflation in the country and in so doing sell a property at an inflated price (not the one agreed with the owner of the property) and pocket the difference. Some well established estate agents have deteriorated the situation by resorting to these unethical practices. Cases of overcharging by estate agents are not a new phenomena but the blame is usually placed on the unqualified estate agents. Other 'estate agents' have been known to set up offices for about a week or two and later disappear with the clients money. The case of Sorrel & Anor v Finch¹³ is very clear on this.

The agency business has much been affected by the lack of sole agency. Property owners have been known to approach several estate agents for the sale of only one piece of property. This in itself is not very economical as it is only one estate agent who will benefit or even at times none at all, for the property owner may get a purchaser for himself. The principal if he does so is not liable to anyone

as was stated in Bentall, Harsley & Baldry v Vicary¹⁴ even if it is a sole agency. The estate agents will only be entitled to damages if another estate agent effects a sale and such damages must be estimated with reference to the probability that the sole agent would have earned his commission.

Problems have arisen with the legal firms as when a person wishes to dispose of property he has to see a lawyer who will advise him on the procedure to follow. It is common knowledge that the legal profession in Kenya is dominated by Asians and also most of the property owners belong to this same class. It is normal in such circumstances for the lawyer who in most cases is a family lawyer to introduce the owner of property to another person most likely an Asian estate agent to deal with the property. This is a problem faced by the African estate agents. An Asian will not trust an African with his property unless he knows him personally or has been introduced by a friend. The case of Razizamali H Ebrahim v Prodger¹⁵ is a good illustration of this problem. When the capital Gains Tax was introduced in 1975 and later incorporated under the Income Tax Department in 1976, there was a slackening in the property market which affected many estate agents. This tax is a levy chargeable on any property and it

really discourages property owners from selling their property. One estate agent working with citizen Homes one of a score of real estate agencies said about the effect of the tax;

' When the tax was introduced, one of a score of real estate agencies set up in the past few years by indigenous Kenyans property sales plummeted almost to zero'. 16

This tax wipes away any profit that would have been made and as such the doubling of prices which is a recent phenomena.

The socio-economic roles of the estate agent so far outlined are not in any way directed towards sealing the gap between the haves and have nots. The estate agent in most cases deals with houses which can only be afforded by those^e, so called 'cream of the society' who have formed a clan of their own. These will include the Kenyan bourgeoisie and the international bourgeoisies. Thus the gap between the haves and have nots is further perpetuated. A Mr. Lucas Kuriaa^{17a} argued that for one to buy an expensive house meant he could afford it and was capable of raising a bigger part of the purchase price and as such the person who needed help was the one who would barely afford an average house^{17b}

But how they can do so without a security raises a problem. Most of the mortgage firms are foreign owned and this itself is a drawback. The Government has always encouraged Kenyans to own property, but this can only be achieved if there is a financial climate which will make it easier for mortgage firms to give loans to potential buyers of private property at lowered interest charges. These mortgage firms if foreign owned still leave us economically dependent on foreign capital which is even worse than colonial imperialism. Property management continues to be left in the hands of foreigners and this reflects a situation where we are politically independent but economically still dependent on foreigners. This form of foreign domination is a bar towards the achievement of the much talked of Africanisation.

Attached herein is a questionnaire which I used to write this Chapter. I interviewed Mr. Waruhiu of Lloyd and Masika and another estate agent who pleaded anonymity.

QUESTIONNAIRE: THE SOCIO-ECONOMIC ROLES OF ESTATE AGENTS

1. Which Act regulates the registration of your business?
2. Do you encounter any problems in registration?
3. When did you start operating this business?
4. What qualifications do you think are essential for entry into this kind of business?
5. Much has been said about the unscrupulous nature of estate agents, do you have anything to say about this?
6. What problems do you encounter in trying to fulfil the objects of your profession?
7. There is a rumour that the ' Estate Agents and Valuers Bill 1977, has been redrafted, how true is this rumour?
8. Would a limit based on academic qualifications be detrimental to the current estate agents or could it be more advantageous to the future of the estate agency business.
9. If the Bill was passed , do you think it would solve all your problems?
10. How far as the newly formed Kenya Association of Estate Agents gone in its search for the establishment of a code of ethics in the Estate

agency business?

11. What regulations do you think would lead to success and support in Estate agency ?
12. How do you earn your commission?
The law as to commission is very harsh what do you think should be done to remove this harshness?
13. Do you favour written contracts as compared to verbal contracts?
14. What particular roles do you play in the Kenyan society and do you think you cater adequately for them?
15. Is there any foreign impact on this type of business?
16. On financial operation,s do you get any help from banks, financial institutions etc?
17. Who are the dominant clients i.e. are they individuals, firms etc.
18. What safeguards do you think are necessary to your interests as well as your clients which could be included in any statute regulating the business?
19. What criticisms do you have if any towards the present structure of the business.
Do you think there is need for partial or

reform?

20. What are your comments as to the ' Estate Agents and Values Bill ' which was enacted in 1977. Do you think it would have solved the existing problems?

CHAPTER THREE - FOOTNOTES

1. Sunday Nation, 1977 January Property Column.
2. Daily Nation, Saturday March 13, 1982, ' Firm is accused - we were conned - Home Seekers'.
3. Nation's Property Column.
4. A house in Muthaiga and the same house put up on the slopes of Mount Kenya, the values are quite different, and explaining this to a property owner leaves sweat as most are very ignorant of the market value of property.
5. Sorrel & Anor v Finch (1976) 2 WLR 883.
6. Kenya 's situation quite a contrast to this theory as it is common that tenants are effected without even reasonable cause.
7. Baxter v F W Gapp & Co. Limited (1939) 2 KB 271.
8. Mr. Waruhiu of Lloyd & Masika informed me of this.
9. Daily Nation - Nation clarified Ad Rates.
 Small ads per line
 1 - 5 insertions per line 13
 6-15 insertions per line 12
 16 - insertions 11.
10. Anonymous estate agent.
11. Daily Nation, Tuesday March, 16 1982, Local news page.
12. Daily Nation, Saturday March 13, 1982.
13. (1976) 2 WLR 883 see also (1970) EA 620.
14. (1931) 1 KB 253.
15. 1952 25 KLR 29.
16. Weekly Review, January 24, 1977, p.26.
- 17a. The then General Manager of Savings and Loan in 1977.
- 17b. Op.cit. above, footnote 16.

CHAPTER FOURRECOMMENDATIONS AND CONCLUSIONS

The property market has in the past few years been facing a very difficult situation. This has in some ways encouraged and also discouraged existing real estate agents and also potential ones. At present there is no barrier to entry into the profession and virtually anybody can practice as an estate agent. The lack of any legislative control governing the operations of estate agents has largely been the reason why many crooked estate agents have been able to fleece unsuspecting victims of huge sums of money. The newly formed Kenya Association of Real Estate Agents has tried to change the situation by making it clear that would be tenants or purchasers were not required to pay anything to see the property to be bought or let. It wishes to submit recommendations to the government which will be aimed at establishing a code of ethics in the estate agency business. The Advocates Remuneration (Aimed) Act 1972 governs the amount of commission an estate agent can charge, but this has been flouted many times as illustrated by the varying amounts charged. The registered agencies with the Institute of Surveyors claim that they charge a fixed amount fixed by the

Institute, but the truth of this is doubtful.

The Estate Agents Bill¹ sought to establish the code of ethics right now badly needed. The preamble of the Bill reads:

'An Act of Parliament to make provision for the registration of persons who by way of business negotiate for or otherwise act in relation to the selling, purchasing or letting of land and buildings erected thereon; for the regulation and control of the professional conduct of such persons; and for matters connected with; and incidental to the foregoing.'

This Bill aimed at limiting the number of persons who could join the business and also regulate the conduct and competence of such persons. It is a well drafted bill, though it needs reform in some areas. Section 2(2) of this Bill defines an estate agent as follows;

' For the purpose of this Act, practice as an estate agent means the doing, in connection with the selling or letting of land, or of any house, shop, or other building or part of any house, shop or building of any of the following acts .'

- (a) bringing together or taking any steps to bring together, a prospect or vendor or lessor and any prospective purchaser or lessee.

- (b) acting as an auctioneer.
- (c) negotiating as an intermediary between or on behalf of either of, the principals, the terms of any such selling or letting.

This in itself is a common law approach which I feel is not befitting to the Kenyan situation. The role of the agent is restricted and I feel it should have been expanded to include surveyors, valuers and property managers. Section 5 deals with the functions of the Estate Agents Registration Board.² These functions if carried forward will usurp the functions of the Registration of Business Act.³ The functions of the Board should be limited to ensuring the competence and conduct of existing agents. It should be given power to determine those who are qualified and competent to join the business and recommend such persons to the Registrar of businesses. The most controversial section in this Bill is section 19 which deals with indemnity requirements. Section 19(2) reads as follows:

' For the purposes of subsection (1) of this section the required limit shall be:

- (a) in the case of a business carried on by a single individual, the sum of one hundred thousand shillings.
- (b) in the case of a business carried on by two or more individuals, the sum multiplied by the number of such individuals.

- (c) in the case of a business carried on by a body corporate, the said sum multiplied by the number of directors whose duties include the doing of acts by way of practice as an estate agent. '

This money has to be deposited to the Attorney-General and any person who fails to do this is guilty of an offence punishable by a fine not exceeding ten thousand shillings. The amount of money required is alot and it is only those who have been in the business for long who can afford and these include those firms closely tied up with foreign capital. The Bill stipulates that ⁴ a holder of a University degree or diploma or member of a recognised institution with sufficient knowledge and experience as an estate agent is legible for entry into the business. Such persons we all know are not capable of being in possession of such huge sums of money and the probability of a loan to such persons is almost zero. This thus introduces a barrier in introducing new and young blood into the business. The old firms will continue to dominate the property market and there is no way we can do away with foreign domination in this field of economic development. The section should be scrapped or amended.

Mr. Mwai ⁵ feels that if the Bill had been enacted it would have led to the loss of practising certificates by those persons who are not qualified as valuers or surveyors. He feels that a University degree is not a guarantee and said:-

' It should be understood that land economists, land surveyors and land valuers have not been able to concentrate effectively on the selling, letting and buying aspects of the housing market. It is here where we come in '.

Mr. Mwai seems to have been misled as the Bill did not in any way stipulate this. It catered for people of this category under S 14 (11) and Section 14 (2). Section 14 (11) reads:

' has had the qualifications of the Board, practical post qualification experience in such practice of not less than two years of which not less than six months shall have been in Kenya '.

The Bill would have been a success except for the undesirable sections discussed. There is need for a law to regulate the functions of the so called estate agent. There is a rumour that the Bill has been redrafted and if it is passed this time, it will obviously bring the to an end almost a century of uncertainty and misunderstanding of the role of the estate agent. The Kenyan economy is at the present time committed to doing things the capitalist way, but this does not in any way

license shoddy dealings by some estate agents. The public needs protection from such people. An estate agent who pockets deposits and is jailed is in no way barred from opening his business once he is out of jail. Statutory control of the profession is long overdue and I highly recommend it in this paper. In the mean time the existing estate agents should try and refrain from unethical conduct and as such gain public sympathy and support.

Throughout this paper I have used the common law principles of agency. These rules are applied in Kenya by virtue of section 3(1) of the Judicature. Lord Denning commented early in 1956⁶ that:

' It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. . . It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over, but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shorts must be cut away. In these far off lands the people must have a law which they understand and which they will respect'.

These words are a challenge to our legislators

Any laws enacted should reflect the Kenyan reality.

The common law falls short of this. The law as it stands

has facilitated the exploitation of the masses. Estate agents who are a creation of the property market have used this law to help and also exploit property seekers. Lack of legislative control has even enhanced their situation. Land has always been a controversial issue in Kenya ever since legislation changed the position of land ownership from communal to sole proprietorship. This has affected the property market evidently through escalated prices and rents. The property seeker who has in most cases no knowledge about the property market requires the skill of a professional in the field and this is where the estate agent comes in. He takes advantage of the situation and makes a living out of his skills. If he does not have any he makes use of his wits. Both envisage a situation where one has to survive and as such it does not matter how he survives. This calls for statutory control which Kenya lacks.

The capitalist continues to dominate the property market but this does not mean that any Act to be enacted regulating estate agency should aim at protecting his interest only. All persons should be protected by it irrespective of their economic viability.

CHAPTER FOUR - FOOTNOTES

1. Published in 1977, but was shelved.
2. Established under section 4 of the Bill
3. Op.cit.
4. Section 14 (a) (b) (1)
5. Chairman of the Kenya Association of Real Estate Agents.
6. Nyali Limited v A.G. (1956) 1 Q.B. 1.

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4. Robinson, H.W. Law and Economics, 11 Modern Law Review ,257.

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1. The Daily Nation.
2. The East African Standard.
3. The Weekly Review.