Kivaya v Kingele (Civil Miscellaneous E203 of 2021)
[2022] KEHC 13112 (KLR) (26 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13112 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL MISCELLANEOUS E203 OF 2021

MW MUIGAI, J

SEPTEMBER 26, 2022

BETWEEN

DICKSON MBITHI KIVAYA ..... APPELLANT

AND

BETHWEL MUTINDA KINGELE ..... RESPONDENT

JUDGMENT

TRIAL COURT RECORD

1. This suit was commenced by a plaint dated November 27, 2019 in which the plaintiff alleged that on February 20, 2019 they entered into an agreement with the defendant in which he was to settle a debt of Kshs 150000 by March 31, 2019. He contended that on April 2019, he had paid Kshs 60,0000 and agreed to pay the balance of Kshs 90,0000 on or before June 14, 2019. The plaintiff opines that the defendant refused to pay the balance prompting him to go to an advocate and on July 19, 2019, the defendant committed to pay the balance of Kshs 90,000/- by 19 October, 2019.

2. He averred that the defendant was in breach of contract particularized a failing to honour the agreement, making empty and unfulfilled promises to the plaintiff and acting contrary to the agreement. He said his efforts to persuade the defendant to pay have been futile. As a result, the plaintiff sought the following orders;

    a. An order for payment of Kshs 90,000/- (Kenya Shillings Ninety Thousand only with interest from date of judgement till payment in full.

    b. Cost of suit

    c. Any other relief that this hon court may deem fit to grant.

DEFENCE

3. The defendant filed his statement of defence dated December 20, 2019 in which he stated that he was given Kshs 150,000 to handover to the then deputy county commissioner and he did not know what the money was for, but later learnt that it was meant to influence the deputy county commissioner to help the plaintiff join public service as an assistant chief. The plaintiff did not get the position and started demanding the money from the defendant and not the deputy commissioner. The defendant avers that he was summoned to the directorate of criminal investigations who coerced him together with the plaintiff into signing the purported contract. He contends that the police officers threatened him with dire consequences including detaining him. He particularized the coercion as being threatened with specific consequences by the plaintiff and police officers forcing him to sign the agreement and summoning him severally to the offices of the directorate investigations with view of intimidating him to execute an agreement to repay money advanced to a third party.

4. He averred that he has always been threatened by the plaintiff and officers of the directorate of criminal investigations and more specifically on 12th of April 2019, a Friday when he was summoned and threatened with being locked up the whole weekend and made him to involuntary pay the defendant Kshs 60,000 pursuant to the impugned agreement.

5. He averred that on July 19, 2019 he was summoned by the plaintiff at the offices of the DCI but failed to honor the summons after being advised by the firm of Priscar Kioko & Associates as the matter was said to be civil in nature and not criminal. He contends that the agreement was based on an illegality.

COUNTER CLAIM

6. The defendant averred that the contract was based in an illegality and was null and void *ab initio*. He sought to have the money refunded as he never used it. He prayed for a refund of Kshs 60,000, costs and interest from the court.

REPLY TO DEFENCE AND COUNTERCLAIM

7. In response, the plaintiff reiterated the contents of the plaint and denied the contents of the counterclaim. He averred that the defendant is engaging in a chancing game as he does not seem to know whether the amount owed is Kshs 60,000 or Kshs 90,000 and asked the court to dismiss the counterclaim.

HEARING

8. The plaintiff was the only witness for his case. He stated that gave the defendant the money, Kshs 150,000/- He was to refund within 3 months and has tried to get the defendant to do so in vain. He reported to the police and the DCI and he promised to pay. He stated that he has paid Kshs 60,0000 at the DCI offices and promised to pay the balance of Kshs 90,000. He produced an agreement dated February 20, 2019 that they signed and was witnessed by Magdalene Memo which he signed with his own hand. It was his testimony that the defendant was to pay by March 31, 2019. He said he did not harass the defendant and at the office of the advocate, that the defendant also promised 90 days to pay the balance. He produced a demand letter. He also asked the court for costs of the suit and interest.

9. Upon cross examination he stated that at first they did not sign any agreement. He indicated knowing the defendant for many years and that he was paid at the deputy county commissioner's office. He said it was not a bribe and he did not have a witness when he was giving the money.

10. In re-examination, he stated that he trusted the defendant as he had known him for long and that the defendant was not forced to go to the county commissioner. It was his testimony that he was told by the defendant that he needed the money for school fees.

11. On the part of the defendant, he was the only witness. He adopted his witness statement filed on September 16, 2020 in which he sated that he met the plaintiff who was a stranger to him and informed him that he had a debt with the DCC and wanted him to take the money to him. When they later met, he was given Kshs 150,0000 to take to the DCC Kangundo which he later confirmed had been received by the DCC, Kangundo. In his statement, he said that he later learnt that the money he was given was to help him secure employment as an assistanct chief of Ngumuti. Interviews were done, repeated and someone else got the job. He said that it is then that the plaintiff went to DCI who summoned and forced to sign a document that he would refund Kshs 150,0000 which he never used nor knew the purpose for which it was.

12. He opined that he was forced to commit himself despite being a messanger and not being privy to the agreement between the plaintiff and the DCC.

13. He testified that he is a senior chief Isinga location, Kangundo division stated that in 2019 he was called by one Muchiri who said the plaintiff has an interest of being assistant chief of Ngomeli sub location Kivaani and they had made arrangements that he be assisted. It was his contention that the plaintiff brought him Kshs 150,000 to be passed for his facilitation and he took the money to DCC Madam Malima.

15. He opined that the plaintiff did not tell him the purpose of the money and he later learnt that it was to facilitate his appointment. He claimed that he was just a messenger. The post was advertised and interview done. He said the plaintiff went to him saying that the interview was cancelled, that the plaintiff went to Harambee House and caused the interview to be cancelled. The interview was one a 2nd time and he still did not succeed. He said he was not incharge of recruitment.

16. As regards the agreement, he said he was aware of it. He received a called from CPL Kamanu of someone alleging to have loaned and the arrangement was he be detained over weekend and be taken to court. He said he was forced to deposit Kshs 60,000 to be released. He said he was compelled to sign the agreement and the police did not tell him that the money was to be given to the plaintiff. It was his testimony that he obtained the money by false pretense. He said the plaintiff paid Kshs 50,000 to get the post, he did not take any loan. He said he is I service and able to pay school fees for his children.

17. Upon cross examination, he denied knowing the plaintiff and he was called by Mr Muchiri who introduced him to Dickson and said that he would come and bring money. He said he has evidence that the plaintiff was interviewed. He said he had documents. It was his testimony that he was called by CPL Kamau that someone has reported that he had received money by false pretenses. He said he was not given the receipt for Kshs 60,000. He opined that the intention was to detain him and charge him and he said that he was compelled to pay. It was his position that he did not receive the money.

18. In re-examination, he said the advertisement was done and the interview conducted twice. He reiterated that he was forced to sign and the police told him to pay. He said he did not know the purpose of the money and asked for a refund of Kshs 60,000 and dismissal of the case. He said he wished the money was for bribery as he would not have agreed to be used.

TRIAL COURT JUDGMENT

19. The trial court delivered judgement on September 18, 2021.

20. The trial court found that it is not in dispute that the defendant was summoned to the office of the director of criminal investigation offices at Kangundo where the defendant paid Kshs 60,0000 to the plaintiff. It found that it was not in dispute that the defendant signed an agreement agreeing to pay a balance of Kshs 90,0000 to the plaintiff; that he was summoned to the advocates office in Tala where he signed another agreement to pay.

21. The trial court relied on the case of *Wilson v Carnlet* (1908) 1kb 729 where the court stated that ;

> " the doctrine by which contracts are held to be void on the ground of public policy is based upon the necessity in certain cases of preferring the good of the general public to an absolute and unfettered freedom of contract on the part of individuals.

22. The court also referred to the case of *Egerton v Brownlow* (1853) 4HK CAS where it was stated that

> " Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good which may be termed the policy of the law or public policy in relation to the law"

23. The court while making reference to the case of *Patel vs Sighn* (No 2) (1987) klr 585 and that of *Sunders v Edward* (1987) 1 WLR 116,1134 – RECHECK JD

24. The trial court went on to say that;

One of the local cases in which this question of enforcement of illegal contracts has been addressed is the case of *Patel v Singh* (No2) (1987) KLR 585. In this case, the appellant and the respondent while resident in Kenya entered into a contract of lending money in foreign currency in India. The respondent failed to repay the amount, prompting the appellant to file a suit in the High Court. The High Court dismissed the suit on the ground that the claim was unenforceable as it was tainted with illegality as being in contravention of the *Exchange Control Act* (Cap. 113).

The appellant appealed on the ground that the funds invested in India by residents in Kenya were exempted from the operation of the Exchange Control Act and therefore the contract was not tainted with illegality.

The Court of appeal (Nyarangi, Gachuhi and Apaloo JJA) dismissed the appeal and held that the contract entered into by the appellant and the respondent was illegal and contrary to the provisions of section 3(1) of the *Exchange Control Act* and was therefore illegal ab initio and it was unenforceable.

25. The trial court also relied on the case of *Saunders v Edward*(1987) 1WLR 116, 1134 where it was held that;

> Where issues of illegality are raised, the courts have . . to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.'

26. The court also made reference to the case of *Nevile v Wilkinson* (1782) 1BRO CC 543 where it was held that;

> "In all cases where money was paid for an unlawful purpose, the party, though particeps criminis, might recover at law; and that the reason was, that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before"

27. The trial court found that the defendant denied getting into an agreement with the plaintiff , but was just a mere messenger that though he received the money it was not for his use. That he was therefore not in possession and cannot be compelled to refund.

28. It was found that the plaintiff failed to prove his case on a balance of probability and on the counterclaim, it was found that the defendant had proven his claim and the plaintiff was ordered To refund him Kshs 60,0000 received at the offices of the director of criminal investigation offices, Kangundo.

THE APPEAL

29. Being dissatisfied by this decision, the appellant filed this appeal seeking the following orders;

    a. The decision of the trial court be set aside and vacated

    b. Such other just relief a this honourable court may deem fit

    c. Costs of the appeal and interest

30. The appeal is founded on the grounds that;

    a. The learned trial magistrate erred in fact and law in arriving at a conclusion that the appellant had not proved his case on a balance of probability, when the appellant annexed documents to the pleadings in the trial court and his express evidence in court brought it out clear that the respondent indeed borrowed Ksh 150,000 from him.

    b. The learned trial magistrate erred in fact and law by agreeing that there was no legal binding agreement between the appellant and the respondent when the respondent had actually agreed to settle the debt out of court and paid part payment of Kshs 60,000 as a commitment and vide and agreement, he committed to clear the balance by March 31, 2019.

    c. The learned trial magistrate erred in fact and law by failing to appreciate that the respondent's testimony was marred with inconsistencies in the circumstances, on when and why money was lead to the respondent.

    d. The learned trial magistrate erred in fact and law by ignoring the express testimony of the appellant that the money lent to the respondent was intended for the respondent's child and not for corruption purposes .

    e. The learned trial magistrate erred in fact and law by taking into consideration of the respondent's statement of defence and counterclaim that he did not receive any money from the appellant and that the respondent was just and intermediary to transfer money which was meant for corruption, allegations which are not supported with any evidence.

f. The learned trial magistrate erred in fact and law in taking into consideration the respondent's statement of defence and counter claim, that the money paid was paid under duress and threats, allegations which were not supported with any evidence

g. The learned trial magistrate erred in fact and law by failing to appreciate and interrogate the documents filed in support of the appellant's case and testimony by the witness that the respondent had borrowed money through an express agreement and he actually admitted liability and agreed to refund which agreement to refund was reduced into writing

h. The learned trial magistrate erred in fact and law by failing to appreciate that liability against the respondent had been proved to the required standard by the appellant.

i. The learned trial magistrate erred in fact and law in relying on conjecture, supposition and on extraneous matters.

31. The appeal was canvassed by way of written submissions.

APPLICANT SUBMISSIONS

32. The appellant filed submissions on 17th of February 2022 in which he submitted that the appellant had testified on oath that he advanced some money to the respondent which was intended for school fees of his child and when he failed to honour the agreement, he reported to he police station as well as to an advocate in Tala. He submitted that he produced evidence in the trial court that was not considered.

33. It was submitted that the respondent signed the agreements on his free will and this bound by the document. This point was buttressed by the case of *Josphine Mwikali Kikenya vs Omar Abdalla Kombo & another* (2018) eklr.

34. It was submitted that the allegations made by the respondents was never evidenced nor did ne produce any witness to prove brive nor coercion and threats. It was his submission that the burden of proof shifted to the respondent to prove that he did not receive the money form the appellant and adduce some evidence which was never done and the evidence in court did not meet the threshold of section 107 of the *evidence Act*. reliance was placed on the case of *Levi Simiyu Makali v Koyi John Walukwe & 2 others* (2018) eklr.

35. As to whether the debt recovery agreements were recorded under duress, while relying on the case of *Lole v Butcher*, (1949) AER 1107, it was submitted that the agreement remains valid until it is set aside. It was the appellants contention that when the respondent failed to honour the oral agreement, he has to seek justice through all avenues inclusive of visiting the police for advice.

36. The appellant made reference to the case of *Benson Owenga Ajare vs Kivati Ndoto & Another* (2013) eklr and *Nabro Properties Limited vs Sky Structures Limited* (1986) eklr and submitted that the case at hand is a civil liability as well as a criminal Act. He contended that the respondent was summoned to the DCI offices where the parties had a long dialogue and thereafter DCI being the mediator, he agreed to execute and agreement. He opined that there was no threat at all nor coercion. Further that no such evidence had been produced. To support his point, he relied on the case of *Kuria Kiarie & 2 others v Sammy Magera* (2018) eklr.

RESPONDENT SUBMISSIONS

37. The respondent filed submissions on May 10, 2022 and while relying on section 107,108 and 109 of the *Evidence Act* and the case of *FKT v GI* (2020) EKLR,It was submitted that he did not instruct

the firm of Ms Priscillar Kioko and Asoociated and only consulted them and they advised him not to honour the summons.

38. It was submitted that the appellant testimony contradicts itself as he says that there as an agreement for refund within 3 months yet in cross examination, he confirms that he never signed the agreement with the respondent . it was submitted that the fact that the money was a bribe was a contravention of the *Anti-Corruption and Economic Crimes Act* and the court should not be an instrument of enforcing an illegality. It was submitted that the respondent was just a messenger and the appellant has failed to prove that there was a legally binding contract between the two.

39. The second issue that was raised was whether the appellant is entitled to specific performance of the agreement. It was submitted that a contract signed under duress is not a valid contact and is void and this one is not entitled to specific performance. To buttress this point, reliance was placed on the cases of *Thrift Homes Limited v Kays Investment Limited* (2015) eklr , *Pius Kimaiyp Langat vs Co-operative Bank of Kenya Limited* (2017)eklr and *Lti Kisii Dafari Inns Limited & 2 otehrs v Deutsche Investitions-Und Enwicklungsgellchaft (Deg)* 7 others (2011) eklr

40. He relied on *Chitty on contracts*, 26th Edition Vol 1 paragraph 504 where he submitted that duress is defined as " .duress of the person may consist in violence to the person or threats of violence or imprisonment whether actual or threatened...duress prevents the law from accepting what has happened as a contract valid in law."

41. it was submitted that the appellant had implicated himself in court. He opined that being a public figure, he agreed to sign the agreement to save his reputation and job and this proves that he was under duress given that the appellant knew he would agree to sign the agreement to save his reputation. He contends that the contract for refund was unenforceable and illegal. Further that no agreement was produced to show how the money exchanged hands. He wonders why the agreement had to be signed at the DCI offices with threats of being locked up over the weekend to the respondent

DETERMINATION

42. This being an appeal, it is important to note that this court did not have the opportunity to listen to the witnesses and see their demeanor so as to arrive at a just conclusion and therefore its determination will be pegged on the facts and the law that is before it as espoused in section 78 of the *Civil Procedure Act*. The role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. This was also observed in the case of *Selle v Associated Motor Boat Co* [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

43. This was also observed in the case of *Peters v Sunday Post Limited* [1958] EA 424.

44. This court has had the chance to consider the Memorandum of appeal, the Trial court record and the submissions of parties herein.

45. It is not in contention that the appellant Kshs 150,000 and that the respondent paid Kshs 60,000 to the appellant leaving an alleged balance of Kshs 90,000. What is in contention is the purpose of the money; the appellant contends that it was a loan for school fees for the respondent's children whereas the respondent denies this claim saying he is capable of paying his children's school fees and says that the money was a bribe for getting the appellant a job as the Assistant Chief of Ngomeli sub-location Kivaani.

46. The trial court found that the nature of the agreement was that of an illegal contract but proceeded to ask that the appellant refund Kshs 60,000. I find that improper, if the agreement was illegal then the Court cannot enforce an illegal contract. The Supreme Court of the United Kingdom in the case of *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC14 held as follows: -

> " The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.

47. On record is an agreement between the parties dated February 20, 2019 which is witnessed by Magdalene Mumo Paul. In the agreement, the respondent admits to having paid Kshs 60,000 and agreeing to pay the balance of Kshs 90,000 on 14th of June 2019.

48. In a letter dated July 19, 2019 addressed to the appellant written by the respondent's alleged advocate, he admits to being unable to pay the balance of Kshs 90,000 due to financial constraints and commits to paying the balance within 90 days from the date thereof pegged on payment from a parcel he is disposing. His alleged counsel, Priscillar Kioko & Advocates demands that the appellant stops harassing and intimidating the respondent by summoning him to DCI offices as the dispute is civil in nature.

49. It is trite law that once a signature is admitted the plaintiff has discharged his or her burden and the burden is then on the defendant to prove fraud, misrepresentation, duress, undue influence or non est factum. This is in consonance with the burden of proof under section 107 of the *Evidence Act* which provides that:

> " Whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist. When a person is required to prove the existence of any fact it is said that the burden of proof lies on that person."

50. On the face of it is a contract that has been signed by two parties in which there is consideration of Kshs 150,000. The respondent goes on further to admit that indeed he has a debt and says that he will meet his end of the bargain. The respondent does not disown the letter from the advocate but only sneaks in that argument at the appeal in his submissions when he brings up the issue of him not instructing the firm of Priscillar Kioko & Advocates. This court can only deal with the matters and facts that were presented before the trial court and not new facts brought in at the appeal stage. If indeed this was the case, then he should have brought it up at the right forum.

51. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR where court held;

> "It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence however strong, which tends to be at variance with the pleadings must be disregarded"

52. The circumstances under which the initial contract was made has been brought into question. The respondent contends that the money was used as a bribe and since the appellant did not get the position, he used the officers at the DCI to harass and intimidate him, that he was threatened with being jailed over the weekend and he signed the agreement and gave out Kshs 60,000. The respondent maintains the position that he was coerced into signing the agreement.

53. According to the *Black's Law Dictionary*, 2nd Edition, Coercion is defined as;

> "Compulsion; force; duress. It may be either actual, (direct or positive.) where physical force Is put upon a man to compel him to do an act against his will, or implied, (legal or constructive.) where the relation of the parties is such that one is under subjection to the other, and is thereby constrained to do what his free will would refuse"

54. In the case of *Ghandi A & another vs Ruda [1986] KLR 556*, the Court of appeal observed that;

> "It is perfectly true that duress at common law is confined to violence to the person, or threats of violence, and I am content to adopt, the following extract from Chesire & Fifoot's Law of Contract, 8th Edition at page 281 as a correct statement of legal duress; sufficient to vitiate an agreement one side:-
>
> > 'Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm. It is a part of the law which nowadays seldom raises an issue. That a contract should be procured by actual violence is difficult to conceive, and a more probable means of inducement is threat of violence. The rule here is that the threat must be illegal in the sense that it must be threat to commit a crime or a tort. Thus to threaten an imprisonment that would be unlawful if enforced constitutes duress, but not if the imprisonment would be lawful. Again a contract procured by a threat to prosecute for a crime that has actually been committed, or to sue for a civil wrong, or to put the member of a trade association on a stop list, is not as a general voidable for duress."

55. In his statement of defence, the respondent particularized the coercion being threatened with specific consequences by the plaintiff and police officers forcing him to sign the agreement and summoning him severally to the offices of the directorate investigations with view of intimidating him to execute an agreement to repay money advanced to a third party yet he was just a messenger.

56. The respondent did not provide any evidence other than alleging that the money was for a third party and he was not privy to the arrangement. In addition, I note that none of the parties called their crucial witnesses to testify including Magdalene Mumo Paul ,Priscillar Kioko & Advocates , one Muchiri and Madam Malima referred to by the respondent. The officers from the directorate of

criminal investigations were also not called to shed light on the circumstances under which the contract was written. As has rightly been said by both parties, he who alleges must prove. This is trite law.

57. I also note that the respondent stated that " I was forced to deposit Kshs 60,000/- to be released" and in re-examination stated that "I was not given a receipt for the Kshs 60,000/-"

58. To my mind, this amounts to duress on the part of the respondent and thus would have vitiated the contract between the parties. However, the respondent did not deny the contents of the letter dated July 19, 2019 whose subject is;

> " RE; AGREEMENT BETWEEN YOURSELF AND OUR CLIENT BETHWEL KINGELE
>
> Duly instructed by our above mentioned client, we have instructions to address you hereunder,
>
> Reference is made to contract dated February 20, 2019 and acknowledgement sated April 12, 2019
>
> Our client had been unable to pay the balance of Kshs 90,000 (Kenya Shillings ninety thousand) on June 14, 2019 owing to financial constraints.
>
> Our client is committed to paying the balance of Kshs 90,000 (Kenya Shillings Ninety thousand) 90 days from the date hereof the balance pegged upon land payment from a parcel he is disposing.
>
> Further we are informed by our client that tou have been summoning him to DCI offices in Kangundo knowing very well that this is a civil dispute. Our Instructions are therefore to demand that you cease and desist from intimidating our client"

59. In paragraph 9 of the statement of defence, the respondent stated that

> " On July 19, 2019 he was summoned by the plaintiff at the offices of the DCI but failed to honor the summons after being advised by the firm of Priscillar Kioko & Associates as the matter was said to be civil in nature and not criminal. He contends that the agreement was based on an illegality ."

60. It appears that the contents of the letter are in sync with what the respondent stated in his defence and that he actually had a conversation with the firm of Priscilar Kioko & Associates .The respondent did not deny the contents of this letter in this testimony until submissions were filed in this court. This leads to the circumstances being brought into question as on one hand he says he was under duress and on another, admits to owing the appellant money and undertaking to pay the same. The burden tilts in favour of the appellant at this point.

61. The next issue is whether the contract was illegal. There are two contracts in this case. One contract where the appellant gave the respondent Kshs 150,000 and the second contract where the respondent pays Kshs 60,000 and later admits to the balance.

62. The general rule is that Courts do not enforce contracts which are in contravention with statutes. In Nairobi Civil Appeal No 165 of 2007 *D Njogu & Company Advocates v National Bank of Kenya Limited* (2016) eKLR the Court of Appeal stated as follows:

> " Likewise we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable."

63. In the case of Mohamed versus Attorney General (1990) KLR 146 and Nyeri Civil Appeal No 40 of 2001, Nyeri County Council versus Monicah M Mwangi held that no court ought to enforce an illegal contract or allow itself to be made instrument of reinforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality.

64. In the case of *Root Capital Incorporated v Tekangu Farmers Co-operative Society Ltd & another* [2016] eKLR the court held that;

> An aspect in the contracts considered illegal is that of being contrary to public policy. Ordinarily, and based on the doctrine of laisser faire, when entered into freely and voluntarily, contracts must be held sacred and enforced by courts which, ordinarily, would proceed on the assumption that their duty is to implement the reasonable expectations of the parties. (See the Law of Contract by GC Cheshire and CHS Fifoot, 5th Edition, at page 278); however, because of public welfare considerations, not every contract that has been freely and voluntarily entered into is enforceable. According to Fifoot and Cheshire (page 278), public policy will be served not by enforcing but by denouncing such contracts. The particular aspects of public welfare to which the Courts have paid attention in this regard are the safety of the state, the economic and social well-being of the state and its people as a whole, and the administration of justice. Any contract which injures or which has a direct tendency to injure any one of these public interests is deemed illegal and void. (See Fender v John-Mildman (1938) AC 1 at pages 12-13.)
>
> "The doctrine by which contracts are held to be void on the ground of public policy is based upon the necessity in certain cases of preferring the good of the general public to an absolute and unfettered freedom of contract on the part of individuals." (As per Farrel LJ in Wilson v Carnley (1908) 1KB 729 at pages 739-40).
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> The principal was again captured by Lord Truro in Egerton v Brownlow (1853) 4HL Cas at page 196 where he stated:-
>
> > "Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good-which may be termed the policy of the law, or public policy in relation to the law"
>
> These passages have been cited by Cheshire and Fifoot in their book at page 279. According to these authors illegal contracts are usually divided into two classes-those illegal at common law and those prohibited by statute; both offend public policy and there is a bit of literature on this classification but the category we are most concerned with at the moment is that class of contracts prohibited by statute, having come to the conclusion that the contract in issue appears to be contrary to certain provisions in the *Co-operative Societies Act*.
>
> According to Halsbury's Laws of England (Contract) Volume 9(1) (Reissue) at paragraph 867 many contracts are affected by statutory provisions, (and for this purpose statutory

provisions would include regulations made under statutory powers) but the effect of such provisions varies from one statute to another.

In some cases, the statute may on its proper construction prohibit the creation or enforcement of rights under the contract; in other cases the statute may not directly prohibit the contract, but may affect it indirectly by virtue of the principle that a contract with a criminal purpose (including criminality by statute) is illegal at common law; and in some cases statute expressly makes a contract 'void'.

65. The respondent contends that the money was used for a bribe which the applicant has not expressly denied. He says the money was for school fees which the respondent has denied. If the Kshs 150,000 was indeed a bribe, then that contract was illegal.

66. Nyarangi JA in the case of *Patel v Sighn* (No 2) (1987) KLR 585 cited with approval Devlin LJ in Archbolds (*Freightage Ltd v S Spanglett Ltd* (1961) 1QB 374 where he said at page 388 that:-

> " The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if inorder to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy."

67. The Court in *Trans Mara Sugar Co Ltd & another v Ben Kangwaya Ayiemba & another* [2020] eKLR stated as follows;

> " The Court of Appeal in David Taylor & Son v Barnett Trading Co [1953] 1 WLR was illustrative on the fate of contracts that are deemed illegal at formation. In that case, Barnet Trading Co agreed to sell steak to David Taylor for a period of 4 months at a particular price. The company failed to deliver and David sued for damages. At the date of entering in into the contract there was in place an order preventing the buying or selling of meat over a certain price. The contract exceeded that particular set price. The court held that the contract was illegal at its formation and as such could not be enforced.
>
> 51. There are however exceptions to the general rule. In determining the consequences of the illegality, courts will distinguish between those contracts that are illegal at formation and those that are illegal through performance.
>
> 52. According to Chitty on Contracts Thirty-Second Edition Vol 1, General Principles Sweet & Maxwell Thomson Reuters publishers at pages 1335-1339 as a general rule a contract will be considered illegal at its formation when it is outrightly based on an illegal act. Contracts falling under this category cannot be enforced. Where a contract is illegal at formation neither party will acquire rights under that contract regardless of whether there was any intention to break the law. The contract will be void ab initio and it will be treated as if it was never entered into.

68. In *Reynolds v Kinsey 1959* (4) SA 50 the court stated as follows: -

...where the contract is not unlawful on its face and is capable of performance in a lawful way and the parties merely contemplate that it will be performed in a particular way which would be unlawful, the parties, through ignorance of the law, failing to appreciate that fact, the contract may be enforced on the ground that there was never a Fixed intention to do that which was later discovered to be lawful and that while the parties contemplated such unlawful act, they did not intend to do it. In other words, knowledge of the law is of evidential significance with respect to the parties intended mode of performance. It is important in this situation that at least the party seeking to enforce the contract can carry it out in a legal manner.

69. I note that the advocate on record for the appellant is the one who wrote the demand notice to the respondent thus bringing up the issue of conflict of interest. I am persuaded by the case of *Tom Kusienya & others v Kenya Railways Corporation & others [2013] eKLR*, where Mumbi Ngugi J. held that: -

> " ...19. The legal basis of the petitioner's application in this matter is rule 9 of the Advocates (Practice Rules) which is in the following terms:
>
> 'No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.'
>
> 20. From the text of this rule, it is clear that an advocate can only be barred from acting if he or she would be required to give evidence in a matter, whether orally or by way of affidavit. In determining the circumstances under which this Rule would apply, the Court of Appeal in Delphis Bank Limited v Channan Singh Chatthe and 6 Others (supra) observed as follows:
>
> "The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases, however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness.
>
> 21. The court noted, however, that:
>
> 'There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this court is whether real mischief or real prejudice will in all human probability result.'
>
> 22. The court referred to these authorities as comprising King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) and Galot

Industries Ltd –vs- Kaplan and Stratton Advocates (supra). In this case, in restraining Mr. Keith and any partner of the firm of Kaplan and Stratton Advocates from acting for the defendant in the matter or in any litigation arising from the loan transactions in question, the court applied the test established in England in the case of Supasave Retail Ltd v Coward Chance (a firm) and others; David Lee & Co (Lincoln) Ltd v Coward Chance (a firm) and others (1991) 1 ALL ER where the court had observed that

> The English law on the matter has been laid down for a considerable period by the decision of the Court of Appeal in Rakusen v Ellis Munday and Clarke (1912) 1 Ch 831 (1911 -1913) ALL ER Rep 813... The Law is laid down that each case must be considered as a matter of substance on the facts of each case. It was also laid down that the court will only intervene to stop such a practice if satisfied that the continued acting of one partner in the firm against a former client of another partner is likely to cause (and I use the word "likely" loosely at the moment) real prejudice to the former client. Unhappily, the standard to be satisfied is expressed in numerous different forms in Rakusen's case itself. Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act.....As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated." (Emphasis added)

23. The decision of O'Kubasu, JA in William Audi Odode & another v John Yier & another Court of Appeal Civil Application No NAI 360 of 2004 (KSM33/04) is also instructive with regard to rule 9 of the *Advocates Act*. In declining to bar an advocate from acting for some of the parties in the matter, O'Kubasu J stated at page 3 of his ruling states as follows;

> 'I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.' (Emphasis added)

24. The learned judge of appeal also dealt with the issue of legal representation as a constitutional right. After reviewing past decisions including the Delphis Bank and King Woolen Mill cases, O'Kubasu J observed at page 7 of his decision as follows:

> The '*Constitution* of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. Accordingly for a court to deprive a litigant of that right, there must

be a clear and valid reason for so doing. I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.' (Emphasis added)

25. I wholly agree with the sentiments expressed by the honourable judge in the above matter. Like the provisions of section 77 of the former constitution, the words used in article 50(2)(g) of the *the Constitution* make it clear that the provision relates to criminal matters:

> '(2) Every accused person has the right to a fair trial, which includes the right—
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;'

26. However, I believe that the right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly articles 48, 50 (1) and 159(2) (a) of the *Constitution*, and it is only in exceptional circumstances that this right should be taken away."

70. The firm of Priscillar Kioko & Associates should have handled the matter differently as they knew that there was a chance that they were potential witnesses in this case.

71. In the circumstances, I find that the appellant has proven that there was an agreement between the parties and I direct that the respondent meets his end of the bargain.

72. As regards the counterclaim, I find that the claim has not been supported by any evidence. No evidence of the recruitment and someone else getting the job as well nor any evidence to support all the allegations raised has not been provided. The Counterclaim thus fails.

DISPOSITION

73. In the end, the appeal succeeds and the judgment of the trial court is set aside.

74. I hereby issue the following orders;

a. The respondent is directed to pay the appellant Kshs 90,000 with interest from the date of judgment until payment in full.

b. Costs of the appeal are awarded to the appellant.

DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 26TH SEPTEMBER 2022. (PHYSICAL/ONLINE CONFERENCE)

M.W. MUIGAI

JUDGE