



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 27 OF 2013

LUCAS OTIENO OJWANG.....APPELLANT

VERSUS

THOMAS MBOYA OLUOCH

SIMON OJWANG.....RESPONDENTS

[Being an appeal from the Judgment and Decree of Hon. D. Chepkwony (Senior Principal Magistrate) delivered on the 20th March 2013 in the original Nyando SPMCC No. 151 of 2010]

JUDGMENT

The Appellant's claim in the lower court was for Kshs.84,000/= with interest at court rates with effect from 15th January 2010 and costs of the suit. The claim arose from alleged breach of an agreement between the appellant and the respondents to pay the said sum in equal instalments of Kshs.28,000/= per month from 15th January 2010 until payment in full.

The Respondents denied the claim and further stated that if there was any agreement the same was tainted by undue influence, duress and misrepresentation.

After hearing evidence and submissions from both sides the trial magistrate dismissed the appellant's claim. She found that whereas there was an agreement between the parties the same was not enforceable on grounds that -

- **That the agreement did not disclose the registration number of the motor cycle for which compensation was sought.**
- **That the value of the motor cycle was not indicated in the agreement and hence no basis for the sum sought.**
- **No evidence was led in cross-examination in regard to the circumstances leading to the agreement although in the pleadings and examination in-chief it was stated.**
- **That there was an element of undue influence and duress as the agreement was intended to secure the release from custody of relatives of the respondents held in regard to the motor cycle.**
- **That the agreement was also tainted with illegality as the same amounted to compounding a felony which is an offence under Section 118 and 119 of the Penal Code.”**

Being aggrieved the appellant appealed. As the first appellate Court I have reconsidered and evaluated the evidence before the trial court. I have done so bearing in mind that I did not see the witnesses give evidence. I have also considered the grounds of appeal and the submissions made before me.

The appellant's case was that on 23rd December 2009 he agreed with the respondents that they would pay him 84,000/= for his motor cycle which got lost in the hands of their relatives. He had reported the matter to Katito Police Patrol Base and the said relatives Victor and Vincent had been arrested. He testified that the Respondents had freely entered into the agreement but did not expressly state why they entered into the agreement. The agreement which was in writing was written and witnessed by the Chief of North East Nyakach Location who testified as PW2.

The Respondents while confirming that they were not forced to execute the agreement stated that they did so to secure the release of their relatives. They stated that they did so only as surety for their relatives and that the said relatives were released the next day. They seemed to deny that they agreed to pay compensation for the motor cycle and according to the 2nd Respondent complained to the Chief who was the author of the agreement. They also seemed to dispute that the appellant owned the motor cycle.

Whereas I appreciate that a court of law cannot rewrite an agreement freely entered into by the parties, it is my finding, just like the trial court that the agreement in this case is unenforceable. Both parties avoided disclosing to the court the real reason they entered into the agreement. On his part the appellant merely stated that the respondents agreed to compensate them while the respondents denied that they were aware of the contents of the agreement they signed and stated that they merely signed the place indicated to them by the Chief their intention being to stand surety for their arrested relatives. I do not find this convincing. To the contrary it is my finding that they were very much aware of what they were getting into and that they agreed to compensate the appellant for the motor cycle so that their relatives could be released or so that he could forebear their being charged in a court of law. If indeed their intention was to stand surety they would have done this at the police post where the relatives were held. As for the appellant why else would he have crafted such an agreement other than to forego his complaint against the arrested persons? There can be no other explanation other than this. It is clear from the evidence that upon entering the agreement the arrested persons were released from custody. There is nothing to demonstrate that they were charged. The appellant's conduct therefore amounted to compounding a felony which is an offence under Sections 118 and 119 of the Penal Code. As such the agreement was illegal. An illegal agreement is not enforceable. The same is a nullity and cannot form the basis of a claim of right. See – **Hertulla Versus Noor Mohamed [1984]KLR 580** where the court cited with approval a passage in **Mistry Amar Singh V. Kulubya [1963] EA 408** at **Page 414, letter D** that -

“Ex Turpi Causa non Oritur actio. This old and well known maxim is founded in good sense and expresses clear and well – recognized legal principle which is not confided to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him.”

The Respondents may not have by themselves disclosed the illegality but it is my finding that taken as a whole the evidence in this case discloses the illegality in the agreement. Moreover one would ask why the appellant would have taken the respondents to a Chief for the purpose of this agreement? The only logical conclusion, to any reasonable man, would be that in addition to giving the agreement a false force of law he also wanted to intimidate them and this is duress which would also render the agreement unenforceable. I have perused the authorities cited by Counsel for the appellant but my finding is that none goes to his aid. Accordingly I find no merit in this appeal and dismiss it with costs to the respondents.

Signed, dated and delivered at Kisumu this 30th day of May 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Nakyeyune for the Appellant (holding brief for Mr. Ogutu Mboya Advocate)

Mr. Onsongo for the Respondents

Serah Sidera Interpreter