



**Haile Menkerios v Mureithi & another; Wina Trading Company
Limited & another (Third party) (Civil Suit 197 of 2018)
[2024] KEHC 13993 (KLR) (Commercial and Tax) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 197 OF 2018
FG MUGAMBI, J
NOVEMBER 8, 2024**

BETWEEN

HAILE MENKERIOS PLAINTIFF

AND

FRANCIS MUREITHI 1ST DEFENDANT

DOC FIND COMPANY LIMITED 2ND DEFENDANT

AND

WINA TRADING COMPANY LIMITED THIRD PARTY

NEW RESEARCH PATH COMPANY LIMITED THIRD PARTY

JUDGMENT

Background and Introduction

1. The plaintiff is described in the plaint dated 21st May 2018 as an adult residing and working in Addis Ababa in Ethiopia. The 1st defendant is a director and shareholder of the 2nd defendant company.
2. The plaintiff's claim against the defendants is that in the year 2016, the 1st defendant induced him to enter into a series of agreements with 2nd defendant and other third parties for the investment of certain sums in the 2nd defendant. This was on the strength of a promise of a return on that investment within a certain agreed period of time. On the basis of the agreements dated 27th April 2016, 17th May 2016, 17th June 2016, 5th August 2016, 21st October 2016 and an additional undated agreement, the plaintiff contends that he transmitted monies as requested by the defendants.



3. The plaintiff contends that he sent the monies through the 1st third party for purposes of transmission to the 2nd defendant. He further contends that the 1st and 2nd defendants assured him that the sums had been invested in the manner agreed and that the returns would be paid to the plaintiff as agreed.
4. The plaintiff further contends that despite the defendants admitting liability through various ways including the letter dated 24th August 2017, they had failed to pay the monies owing to the plaintiff. This is what precipitated the suit herein, in which the plaintiff claims the sum of USD\$ 4,921,500 made up of the initial investment and profit due, interest at 18% per month from 24th August 2017 until payment in full together with the costs of the suit. In support of its case the plaintiff testified as PW1 and reiterated the contents of his witness statement. PW2 was one Abeba Abay, an acquaintance of the plaintiff, who allegedly introduced the 1st defendant to the plaintiff.
5. The defendants opposed the suit through their statements of defense. By way of written submissions, the 1st defendant contends that while the plaintiff alleges that monies were sent to the 1st third party and eventually transmitted to the 2nd defendant, he did not provide any proof of payments made by the 1st third party to any of the defendants. That despite the plaintiff claiming that he was investing in tenders awarded to the 2nd defendant by the Government of Kenya, he was not able to provide the tender documents that he was investing in.
6. It is also the 1st defendant's case that there was no nexus between USD 4,921,500 claimed by the plaintiff and the amount of Kshs. 244,017,000/= allegedly transferred by the 1st third party to the 2nd defendant.
7. The defendants presented two witnesses. The first witness, DW1, was Francis Mureithi, a businessman. He testified that he had previously acted as an agent for the 2nd defendant company but had resigned from that role in 2016.
8. DW1 expressly disassociated himself from any knowledge of the plaintiff or the transactions between the plaintiff and the 2nd defendant company. Additionally, he denied any involvement with the letter dated 24th August 2017, asserting that the letter was neither authored nor signed by him.
9. The witness stated that the plaintiff came into the country and needed help with transferring money into Kenya. He stated that no funds were directly sent to him or to the 2nd defendant by the plaintiff. Instead, the funds were first transferred to the 1st third party, after which they were forwarded to the 2nd defendant company, where he served as a director. He explained that, as a broker, he would deduct his commission before transferring the remaining funds in accordance with instructions he was given.
10. The witness also confirmed that there were no legitimate transactions taking place, stating that the purported contractual transactions were fabricated to facilitate the plaintiff's scheme. He acknowledged signing some of the agreements before his resignation in 2016 and admitted that he had been aware of the transactions at that time.
11. Despite being allowed two adjournments with mention dates in between to confirm the procurement of a court interpreter and to confirm further hearing dates for the matter, the 2nd defendant's witness did not appear in court to testify. As such, and following the orders made by court on 6th March 2024, the 2nd defendant's case was deemed as closed.
12. By consent of the parties it was agreed that in order to expedite the matter, the testimonies by the third parties would be taken by court and would only come in once the court had determined the liability as between the plaintiff and the defendants. For this reason, I propose to deal with the liability first before I can consider the pleadings and submissions filed by the third parties.



Analysis and determination

13. I have carefully considered the totality of the pleadings, submissions, and evidence presented by the parties. A key issue before the court is the legality of the agreements purportedly entered into by the parties. It is a well-settled principle in law that a court cannot enforce rights arising out of an illegal contract. Before examining the obligations of the parties or the remedies sought, it is therefore necessary to determine whether the underlying agreements are lawful. Should the contracts be found to be illegal, it follows that the remaining claims will be dismissed without further consideration as was held in *Patel V Singh*, (1987) eKLR.
14. The Court expounded on the effect of an illegal contract in this case, and stated as follows:

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is and 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 in order 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 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.”
15. In buttressing the decision in *Patel V Singh supra*, the court, in *Kenya Airways Limited V Satwant Singh Flora*, [2013] eKLR the had the following to say about the legal maxim ‘*ex turpi causa non oritur actio*’, on which the defense is premised:

“*Ex turpi causa non oritur action*. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indicate 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 the 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 not to assist him.”
16. Turning to the case at hand, PW1 vehemently disputed the defendants’ assertion that the transactions involving the parties were fictitious and illegal. The plaintiff contends that the 1st defendant was actively seeking financiers to execute tenders purportedly awarded to the 2nd defendant for the supply of foodstuffs to the Department of Defense.
17. Despite the plaintiff’s claim that he met with the 1st defendant to discuss the investment and the tenders, there is a conspicuous absence of documentary evidence to substantiate what, precisely, he was investing in. A close look at the purported agreements presented by the plaintiff shows that his obligation was to raise or contribute capital to be utilized in financing LPO obligations by the 2nd defendant company. While the contracts appear to be properly executed, there is doubt as to the transactions.



18. Section 107 of the *Evidence Act* places the burden of proof on any party who asserts a fact, requiring that party to prove the existence of such a fact. It states:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

19. It is unreasonable to believe that a prudent investor would inject such a substantial amount of capital without clear documentation or understanding of the venture’s nature and the business opportunity. The plaintiff does not explain why no other accompanying documents such as tender applications, LPOs, invoices or delivery notes have been provided to the Court neither does he address the serious allegations of illegality.

20. The 1st defendant’s testimony, which suggests that the plaintiff intended to use these transactions as a front for money laundering activities, appears credible given the vague and incomplete information provided by the plaintiff. This also raises legitimate concerns about the true nature of the alleged investment. PW1 testified as follows:

“There were no goods being supplied. I was just approached to prepare documents ... I received some money so as to facilitate the transfer of money between the first 3rd party and the plaintiff ... I received a commission ... I would receive instructions on how to distribute the money through RTGS.”

21. A review of the bank statements provided by the plaintiff at pages 37 through to page 43 reveals transactions relating to Wina Trading Company Limited, the 1st third party. No clear connection is established between these transactions and any legitimate business arrangement involving the defendants. Although some RTGS debits were directed to the 2nd defendant, no supporting documents for these payments were provided.

22. In the absence of compelling evidence to the contrary, it appears more likely than not that the transactions were tainted by illegality. Consequently, the letter of undertaking associated with these transactions is also rendered unenforceable, regardless of whether it was executed by the defendants.

23. In summary, the evidence overwhelmingly suggests that the agreements at issue were a mere façade, lacking any legitimate commercial purpose. The court cannot, and will not, lend its authority to enforce a contract grounded in illegality, regardless of the parties’ intentions or the plaintiff’s claims.

24. Given the finding of illegality, it serves no purpose to delve further into the plaintiff’s substantive claims. The court will not assist any party in benefiting from an illegal transaction, and thus, all other prayers sought by the plaintiff are dismissed as they are anchored on illegal agreements.

Disposition

25. Accordingly, the plaintiff’s case is dismissed in its entirety. Regarding costs, I find that it would be unjust to award costs to the defendants, as they knowingly entered into an arrangement that was neither valid nor enforceable. Therefore, in the interest of fairness, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

F. MUGAMBI



JUDGE

