



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CIVIL APPEAL NO. 43 OF 2019**

**BETWEEN**

**BOARD OF MANAGEMENT OBERA BOYS HIGH SCHOOL.....APPELLANT**

**AND**

**NANCY ACHIENG ODHIAMBO T/A FLOVIN GENERAL MERCHANTS.....RESPONDENT**

*(Being an Appeal from the judgment and decree in Homa Bay Chief Magistrate's*

*CMCC No. 90 of 2017 by Hon. T Obutu –Senior Principal Magistrate).*

**JUDGMENT**

1. The appellant was the defendant in Homa Bay Chief Magistrate's CMCC No. 90 of 2017. The Board had been sued for a claim of Kshs.1,058,00/= being unpaid balance for goods delivered. Judgment was entered in favour of the respondent for a sum of Kshs.837,000/= with interest and costs.
2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Omonde Kisera & Company Advocates. Four grounds of appeal were raised as follows:
  - a. That the learned trial magistrate erred in law and in fact in failing to find that the suit is anchored in contract and/or transaction which is statute barred thus illegal pursuant to the provisions of the Public Procurement and Asset Disposal Act and Article 227(2) of the Constitution of Kenya.
  - b. That the learned trial magistrate erred in law and in fact in failing to appreciate that no court of law ought to enforce an illegal contract and/or allow itself to be made an instrument of enforcing obligations alleged to arise out of such a contract.
  - c. That the learned trial magistrate erred in law and in fact in finding the appellant liable out of illegal transaction or contract.
  - d. That the learned trial magistrate erred in law and in fact in failing to appreciate the clear legal issues which related to the suit thereby arriving at biased conclusion and failing to dismiss the entire suit.
3. The appeal was opposed by the respondent through the firm of Owiti Mwallo Odhiambo & Associate Advocates. The respondent contended that it never emerged in evidence that the appellant was a public entity.
4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. The respondent conceded that the appellant was a public institution during cross examination. This is what she said:

**I was dealing with a public institution. The institution is shielded by the Procurement Act. There was no bidding. I am not aware it was illegal. They are the ones who requested for the supply. My husband was never a chair of the Board. There are instances where [sic] I was paid in cash. I have not shown how much cash I was given. I will give receipts for cash payments. I have a witness who collected the cash.**

6. Martin Omondi Oyuga (DW1) was the Principal of Obera Boys High School as at the time he testified. He denied that the respondent had ever won a tender to supply the school with maize. He said hers could have been a case of collusion for her husband was a former Board of Management chair.

7. Among the exhibits produced by the respondent, there was no document of tender. She conceded that there was no bidding. This would have established a basis on which the respondent would have supplied the said maize. A tender is awarded after competitive bidding thus ensuring compliance with Article 227(1) of the Constitution and Part IV of the Public Procurement and Asset Disposal Act.

8. Article 227 of the Constitution provides:

**(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.**

**(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—**

**(a) categories of preference in the allocation of contracts;**

**(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;**

**(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and**

**(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.**

9. The Public Procurement and Asset Disposal Act which was an enactment to give Article 227(1) of the Constitution efficacy provides at Part VI for general procurement and asset disposal principles. These principles were not complied with in this case. This therefore means that the transaction was an illegality.

10. Courts have pronounced themselves where contracts are tainted with illegality. One such a decision is by the Court of Appeal in the case of **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** quoted with approval the following passage from the judgment in **Scott vs. Brown, Doering, McNab & Co, (3), [1892] 2 QB 724 Lindley LJ at p. 728:**

*i. “Ex turpi causa non oritur actio. 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 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 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 ought not to assist him.”*

11. The respondent’s contract is therefore unenforceable due to the illegalities cited. I therefore set aside the award of the learned trial magistrate and allow the appeal with costs.

**DELIVERED and SIGNED at HOMA BAY this 14<sup>th</sup> day of June, 2021**

**KIARIE WAWERU KIARIE**

**JUDGE**