



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO 506 OF 2013**

FIVE FORTY AVIATION LIMITED.....APPELLANT

VERSUS

CAPTAIN RICHARD OLOKA.....RESPONDENT

*(Being an appeal from the judgment and decree delivered, at Nairobi on 11<sup>th</sup> September 2013 by Hon. F Andayi SPM in CMCC Suit No 6684 of 2008)*

CAPTAIN RICHARD OLOKA.....PLAINTIFF

VERSUS

FIVE FORTY AVIATION LIMITED.....DEFENDANT

**J U D G M E N T**

1. This is an appeal from the judgment and decree delivered on 11<sup>th</sup> September 2013 by Hon. Andayi, SPM in Nairobi CMCC Suit No 6684 of 2008. The Appellant, being aggrieved by the said judgment and decree has preferred this appeal and has raised eighteen (18) grounds that: -
1. **The Learned Magistrate erred in law and fact by holding that the Appellant had repudiated its contract with the Respondent when such an allegation was not made in the pleading or any evidence given by the Respondent to that effect;**
2. **The Learned Magistrate erred in law and in fact by holding that the Respondent was entitled in the circumstances not to give the requisite notice of 3 months;**
3. **The Learned Magistrate erred in law and in fact by re-writing the contract between the Appellant and the Respondent in respect of the period of notice of termination of the employment contract;**
4. **The Learned Magistrate erred in law by upholding an (sic) contract that had not fulfilled the terms of the laws of Kenya and thereby illegal;**
5. **The Learned Magistrate erred in law and in fact by failing to take into consideration the**

evidence of the Appellant's witness;

6. **The Learned Magistrate erred in law and in fact by picking and choosing only those facts that would lead to him making findings in favour of the Respondent while ignoring all the facts that would lead to the dismissal of the suit;**
7. **The Learned Magistrate erred in law by not summing up the case of the parties and argument of counsel and thereby leading to a miscarriage of justice;**
8. **The Learned Magistrate erred in law and in fact by holding that the Appellant did not reply to the defence to the counterclaim while such a reply was not mandatory under the law and therefore formed an adverse opinion against the Appellant without in basis in law;**
9. **The Learned Magistrate erred in law and in fact by misinterpreting the contract between the Appellant and the Respondent;**
10. **The Learned Magistrate erred in law and in fact by filling the gaps left out by the Respondent without any basis in law;**
11. **The Learned Magistrate erred in law by failing to appreciate the known and accepted rules of pleadings thereby leading to a wrong conclusion and a miscarriage of justice;**
12. **The Learned Magistrate erred in law and in fact by drawing wrong conclusions that were not supported by any evidence or principles of law;**
13. **The Learned Magistrate erred in law by failing to formulate issues arising in the case and analyzing those issues to come to a reasoned and correct decision;**
14. **The Learned Magistrate erred in law and in fact by writing a shallow and not reasoned judgment not supported by the evidence given by the parties or by principles of law;**
15. **The Learned Magistrate erred in law and in fact by dismissing the counter-claim without any cogent reasons and against the weight of the evidence;**
16. **The Learned Magistrate erred in law and in fact by holding that the Appellant was in breach of its agreement with the Respondent by failing to issue a requisite notice when no such notice was necessary;**
17. **The Learned Magistrate erred in law and in fact by entering judgment for the Respondent; and**
18. **The Learned Magistrate erred in law and in fact by dismissing the counter claim.**

2. This being a first appeal this court is obligated to re-evaluate the evidence afresh and come to its own independent findings and conclusions (see Selle & Anor –vs- Associated Motor Boat Company & Others (1968) EA 123. However, in so doing the court must always have in mind that did not see the witnesses testify (See the case of Peter –vs- Sunday Post Ltd (1958) EA 424).

3. The Respondents case in the trial court as set out in the Amended Plaintiff was that, on or about 1<sup>st</sup> April, 2008, he entered into a written contract of service with the Appellant whereby the Respondent was engaged as a pilot for a net salary of US\$ 5000 per month. He was also entitled to overtime payable pro rata. That the Respondent worked for the Appellant until August, 2008 when he gave notice of intention to terminate his services with the Appellant. That on giving such notice, the Appellant withheld the Respondents salary. He, therefore, claimed US\$ 24,948 as salary and overtime. At the trial, he reiterated the foregoing and told the court that upon joining the Appellant in April, 2008, he was first taken for training in France and first flew for the

Appellant in July, 2008.

4. In its Amended Defence and Counter-Claim, the Appellant admitted having engaged the services of the Respondent as pleaded but denied owing the amounts claimed. The Appellant contended that the Respondent had wrongly terminated his services with the Appellant without giving adequate notice, that it had expended on the Respondent on his training a sum of US\$ 16,000 and Euros 5000 which it counter-claimed. The Appellant further claimed a sum of Ksh.100,000/- it had expended to obtain a work permit for the Respondent and a further US \$ 15,000 for the notice period.
5. At the trial, the Appellants witness told the court that when the Respondent was engaged by the Appellant, he had no training and qualification to fly the Appellant's ATR 42 AIRCRAFT. That he had to be trained on that aircraft and obtain a work permit during the training. That in the aviation industry, the contract becomes effective upon a pilot obtaining the KCAA Licence; that the Respondent failed to obtain a work permit before he left the Appellant's employment. The witness denied that the Appellant had undertaken to obtain a work permit for the Respondent. He admitted however, that in the aviation industry it is the employer who obtains a work permit for its foreign employees.
6. On the basis of the foregoing, the learned trial magistrate entered judgment against the Appellant for US \$ 24,948 and dismissed the Appellants counter-claim. It is this judgment that is the subject of this appeal.
7. At the hearing of the appeal, the Appellant relied on its submissions in the trial court and argued that the Respondent being a foreigner, was required under the law to have a work permit and clearance from the Kenya Civil Aviation Authority, (hereinafter "KCAA") in order to engage in any employment services with the Appellant. It was contended that the Respondent also had to first undergo training in France in order to fly the particular aircraft, which training was conducted at the expense of the Appellant; that it was an offence for a person to fly without the requisite approval of the KCAA. It was, therefore, submitted that being a foreigner, the Respondent was obligated to first obtain a work permit before his contract of service could become effective and hence the lower court arrived at an erroneous decision by sanctioning a contract that was for all intents and purposes illegal.
8. Mr. Mungu learned counsel for the Appellant submitted that the contract was a dollar contract, and the rate of interest applied by the lower court was not applicable in the instance case. He relied on the case of **Nairobi HCCC No 1508 of 1994 Charles Thys v Herman Steyn (UR)** wherein it was held that if a party elects to retain the decree in foreign currency, the US Dollar LIBOR rate is to apply. Counsel further submitted that the trial court ignored vital and relevant facts admitted by the Respondent and the fact that the contract was invalid for non-compliance with the law. In this regard, counsel referred to the case of **Kenya Airways Limited v Satwant Singh Flora (2013) eKLR** wherein it was held that an illegal contract could not be enforced by the court.
9. In response, Mr. Wabuyabo learned counsel for the Respondent submitted that it was the duty of the Appellant to provide the Respondent with a work permit and that IT had indeed facilitated to have the same issued by the relevant authorities on behalf of the Respondent. That the issue of illegality of the contract was not raised in the Defence, and that in any event, the illegality did not render the entire contract unenforceable. He urged that the court could sever the illegal portions and enforce the rest. He further submitted that the Respondent was engaged in the employment under the contract of service and subjecting him to work without pay would be tantamount to advocating for slavery which is unconstitutional. With regard to the issue of interest, Mr. Wabuyabo relied on Section 26 of the Civil Procedure Act and submitted that the same does not distinguish THE rate of interest applicable between Kenya shillings and convertible currency.
10. Having considered the record and oral arguments as canvassed by the Counsels, this court's view is that the eighteen (18) grounds set out in the Memorandum of Appeal could be compressed into

two (2) grounds which the parties extensively and exhaustively argued. These are; (1) whether the trial court directed its mind to the issues at hand and arrived at an informed determination, and (2) whether there was an illegality of the contract of service dated 1<sup>st</sup> April 2008. The other issue which was argued but was not part of the Memorandum of Appeal was that of interest. However, since the parties argued the same and Mr. Wabuyabo did not object to the same being raised at this stage, the court shall make a determination on the same.

11. The Appellant argued that the trial court failed to formulate issues for determination and disregarded the Appellant's evidence thereby arriving at a wrong conclusion. I have looked at the Judgment of the trial court. At page 4 thereof the trial court stated: -

***“Learned counsels for the parties filed written submissions urging their positions of the case. I have carefully considered the evidence by the parties and submissions by learned counsels. I may not explicitly put down the arguments put forward by learned counsels in their submissions but in evaluating the pleadings and the evidence, I have those arguments in mind.”***

12. From the foregoing, it can be reasonably inferred that the trial court considered all the facts, pleadings and evidence before coming to its conclusion. It was for the Appellant to show which evidence that the court failed to consider. Since the Appellant did not discharge this onus, that ground is rejected.

13. On the issue of the rate of interest applicable, Section 26(1) of the Civil Procedure Act provides that:-

***“(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”***

14. This provision does not state that different rates of interest are to be applied to different currencies. The provision only confer upon the court the discretionary power to award interest on the principal sum and the period from when such interest would be applicable.

15. I have looked at case of **Charles Thys v Herman Steyn** (Supra) relied on to by the Appellant. In that case, in the context that the judgment creditor sought interest in both Kenya shillings and dollars whereby, the court gave the option of either converting the currency into Kenya shillings and applying the interest rate applicable, or applying the LIBOR rate applicable as at that time to the dollar award. The relied upon the case of **Maliangos v George Frank (Textiles) Ltd (No 2) [1976] 3 All ER 599** wherein Bristow, J held *inter alia*;

***“While the law under which the contract had been made determined whether the Plaintiff had a right to recover interest by way of damages, any sum to be awarded in respect thereof should be quantified in accordance with the lex fori.”***

In resolving the issue of the rate of interest applicable Ojwang J (as he then was) held in **Charles Thys Vs Herman Steyn Case** that:

***“I think the above stated principle represents the common sense position that should be taken to guide legal practice in this country. The lex fori is the country whose legal system is being invoked in the resolution of a dispute. Consequently it is the substantive law as well as the adjectival law of the lex fori that will govern the mode of the resolution of the dispute in question. Now as such resolution of the dispute will***

**invariably translate into a financial award, it must be accepted as a general principle that the currency of the financial award will be the local currency, and in the case of Kenya, this will be the Kenya shilling.”**

16. On the foregoing, I hold that when an award is in foreign currency, at the time of execution, the same has to be converted to Kenya Shillings first at the then prevailing exchange rate before applying the rate of interest applicable under the law. In this regard, the award of USD 24,984/- should first be converted into the local currency, being Kenyan shillings, at the foreign currency exchange rate applicable at the time of execution and thereupon apply the rate of 12% to the converted amount.
17. On legality of the contract, the Appellant did not plead the same in its defence. However, the issue was raised both in the evidence of DW 1 and in the submissions filed in the lower court at paragraph 5.1. In those submissions, counsel cited Sections 5 and 6 of the Immigration Act and submitted that the law did not allow a person to engage in employment without a work permit. The Appellant's witness was cross examined on this issue but the Respondent failed to address it in his submissions before the trial court. Before this court however, the Respondent submitted that the Sections of the law relied on had not been provided only mere assertions had been made by the Appellant. In its judgment, although the trial court made reference to the issue of the Respondent's lack of work permit, it did not make any specific finding on the same. It only held that it was the Appellant who was under an obligation to obtain the same.
18. Sections 5 and 13 (2) of the **Immigration Act Cap 172 Laws of Kenya (Now repealed)** provided that: -

***“5(2) Where a person, other than a prohibited immigrant, has made application in the prescribed manner for an entry permit on a particular class, has satisfied an immigration officer that he belongs to that class and that the conditions specified in the Schedule in relation to that class are fulfilled, the immigration officer may, in his discretion, issue an entry permit of that class to that person.***

***13 (2) (f) A person not being a citizen of Kenya, engages in any employment, occupation, trade, business or profession whether or not for profit or reward, without being authorized to do so by an entry permit, or exempted from this provision by regulations made under that Act; or***

***(g) employs any person (whether or not for reward) whom he know or has reasonable cause to believe is committing an offence under paragraph (f) by engaging in that employment shall be guilty of an offence and liable to a fine not exceeding twenty Thousand shillings or to imprisonment for a term not exceeding one year or to both;”***

19. **Blacks Law Dictionary, 9<sup>th</sup> Edn, 2009** defines an illegal contract as: -

***“A promise that is prohibited because the performance, formation or object of the agreement is against the law. Technically speaking an illegal contract is not a contract at all because it cannot be enforced, so the phrase is a misnomer”.***

20. In the Law of Contracts **by Cheshire, Fifoot and Furmston 8<sup>th</sup> Edn at page 334** the learned writers have observed that: -

***“No person can claim any right or remedy whatsoever under an illegal transaction in which it has participated. The court is bound to veto the enforcement of a contract once it knows that it is illegal, whether knowledge comes from the statement of the guilty party or from outside sources.”***

21. In **Mistry Amar Singh Vs Serwano Wofunira Kulubya (1963) EA** the Privy Council at page

414 quoted with approval the holding in **Scott Vs Brown Doering Mc Nab & Co. (3) 1892) 2QB 724 Lindley J** at page 728: -

*“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 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.”*

Further, in **Heptulla Vs Noor Mohammed (1984) KLR 580**, it was held at page 581 that: -

*“No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.”*

22.The foregoing position was upheld by the Court of Appeal in the case cited by Mr. Mungu for the Appellant of **Kenya Airways Ltd Vs Satwant Sigh Flora (2013) eKLR**.

23.In the present case, when the parties executed the contract of service produced as P Exhibit 1, that contract was to commence on 1<sup>st</sup> April, 2008. It is not in dispute that throughout the period of engagement by the Appellant, that is between April, 2008 and August, 2008, the Respondent did not have a work permit. Although the trial court found that it was the Appellant responsible to procure the work permit and that the contract of service between the parties did not refer to the issue of procuring the work permit, that did not stop the contract from falling foul of the Immigration Act. To my mind, it does not matter that it was the Appellant who was obligated to procure the work permit or not. The moment the contract was against the law, it became illegal and therefore unenforceable.

24.It was submitted for the Respondent that the illegality of the contract had not been raised in the defence and that the contract was severable. That the court could sever the illegal part and enforce the legal portion of the contract. It is true that the defence did not raise the issue of the illegality of the contract. However, Mr. Wabuyabo did not object to the evidence of DW1 in relation to that issue. Indeed, he cross-examined him on the same. To my mind, it was open to the Respondent to object to that piece of evidence instead of allowing DW1 to give lengthy evidence on the same and seek to challenge it on appeal. My view is, once the evidence was tendered and the matter raised as an issue in the submissions, the issue squarely fell for determination in terms of Order 21 Rule 4 of the Civil Procedure Rules. As regards the severability of the contract, I am doubtful if this is possible with the contract in question. Reading Sections 5 and 13 (2) and (g) of the Immigration Act; Cap 172 Laws of Kenya (Now repealed), the contract of service between the Appellant and the Respondent was not severable.

25.Accordingly, I have come to the regrettable conclusion, that the judgment of the trial court sanctioned an illegal contract. It cannot stand. The Appeal, therefore, succeeds and the same is hereby allowed. In the circumstances, of this case, the Appellant was not without fault. I will, therefore not make any orders as to costs both in the appeal and the court below.

It is so decreed.

Dated and delivered at Nairobi, this 6<sup>th</sup> day of March, 2015.

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**A MABEYA**

**JUDGE**