



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 32 OF 2003

ROBERTO LOSURDO.....PLAINTIFF

VERSUS

TIPMADHU.....1ST DEFENDANT

SEASIDE CHALETS LTD.....2ND DEFENDANT

JUDGMENT

1. This is one of the oldest cases in this court. It was partly heard before Omondi J. my predecessor, and I took it over upon her transfer from this court in 2011.

2. The undisputed background to the suit is as follows. The defendant company was in the years leading up to 1997 constructing a holiday resort in Malindi known as Kilimandogo Le Residenze. At the time, the directors of the defendant were Vittorio Villa (DW1), Maurizio Tranconi (PW2) and Paolo Francesconi. The trio were also the majority shareholders. Early in 1998 the plaintiff, previously a hotelier in Italy was closely associating with the said directors and the ongoing residence works. He travelled in and out of Malindi from Italy. At some point he was resident at the resort and carried out some activities in connection with the project, although the scope and nature thereof is disputed.

3. Late in 1998 the plaintiff was in Italy when he received a letter from the defendant. The letter (P.exh.2a) dated 30th September, 1998 accused the plaintiff of causing the delay of the Kilimandogo project completion through purchase of material at exorbitant prices and other mismanagement allegedly leading to a loss amounting to Shs. 500,000 to the defendant. The letter informed him that his services and presence were no longer required at the resort.

THE PLAINTIFF'S CLAIM

4. After a period of five years the plaintiff filed this suit to enforce the contract of employment which he claims to have been entered into between himself and the defendant. His claim is for Italian Lira 111,200 being unpaid salary for the year 1998, payment in lieu of notice and reimbursement of air tickets and accommodation expenses incurred while in the service of the defendant.

5. The plaintiff gave evidence and called Maurizio Tranconi who coincidentally had resigned in 1998 as director of the defendant, as a witness. In brief, the plaintiff's case is that he entered into an agreement with the defendant appointing him as a manager of the upcoming resort, for the year w.e.f. 1st January to 31st December, 1998 and that he diligently carried out his duties on site in Malindi but also in Italy where

he marketed the resort. He complains that the defendant did not pay his salary and eventually terminated his services without due notice, in breach of the agreement. He also states that the defendant failed to reimburse his expenses as stipulated in the agreement.

THE DEFENDANT'S CASE

6. The defendant denied having engaged the plaintiff or entering into any contract with him and rejected the plaintiff's claim.

The defendant also raised the defence of *ex turpi causa*, which at the close of the case appears to have become the focal point of contention, as the submissions clearly indicate. The defendant stated that the plaintiff did not have a valid work permit and therefore his claim cannot succeed by virtue of the fact that the contract violated immigration statute. The defendant cited the case of **Kenya Airways Ltd v Satwant Singh Flora [2013] eKLR** to bolster their arguments.

7. The plaintiff's response to this objection was that under the impugned contract the defendant bound itself to "take care of, and shall be our burden, to obtain your work permit" (sic). They contended that the defendant breached that obligation, forcing the plaintiff to use his own initiative to obtain a special pass from 27th May 1998, which pass authorized him to work in Kenya.

ANALYSIS

8. After carefully reviewing the pleadings, the evidence of the parties and respective submissions, it appears to me that the plaintiff's claim stands or falls on the question of the legality of the contract, the original of which is in Italian. In other words whether the principle of *ex turpi causa* applies in the circumstances of this case. During his testimony the plaintiff was hard pressed to explain how two different supposed translations of the agreement occurred and the identity translators, none of whom testified. His responses are difficult to follow but it is clear that he was dissatisfied with the one English translation headed "COOPERATION AGREEMENT" hence the procurement of the later translation headed "EMPLOYMENT AGREEMENT"

9. Two key clauses that were altered in the second English translation relate to notice and procurement of the work permit. What is not in doubt, looking at the two is that the plaintiff was engaged by the defendant as a "general manager" of their resort for the period commencing 1st January to 31st December, 1998. The denials by DW1 are difficult to believe in light of his admission that he authorized the "termination" letter (P.exh.2A). It is striking however, that the duties referred to in P.exh.2A have little relation to the hiring contract P.Exh. 1A.

10. The former seems to indicate that the plaintiff was hired as a project manager responsible for overseeing the construction project rather than a general manager responsible for relations with owners, guests, employment of resort staff etc. as stated in the agreement (Exh.1A, B). From the plaintiff's bundle of documents tendered to prove his employment, he was carrying out multiple functions including overseeing the construction of the not yet completed resort, purchasing materials, communicating with the owners/guests etc.

11. It is the plaintiff's case that the defendant did not procure a work permit for him and that he obtained a special pass in May 1998. By his own admission, he had travelled to and stayed in Malindi on at least four occasions in the material period as follows:

31st December, 1997 to 14th January, 1998

10th February, 1998 to 29th February, 1998

5th April, 1998 to 29th April, 1998

1st July 1998 to 4th September, 1998.

12. These were work related trips hence his claim for reimbursement of attendant costs by the defendant. Whether, as the plaintiff's advocates have argued, he additionally performed other tasks (marketing) in Italy, prior to May, 1998, it does not change the fact that he was doing so as an employee of the defendant. There is no doubt, and the plaintiff's advocate conceded this point ultimately, that, the plaintiff's "employment activities" prior to 27th May, 1998 contravened statute, namely Section 13(2)f of the repealed Immigration Act. What of the period after 27th May, 1998? For this period, the plaintiff relied on the special pass No. 050651 issued to him on 27th May, 1998.

13. The pass states inter alia that:

"The holder of this pass, is permitted to enter Kenya and remain therein for a period of THREE MONTHS from the date of issue of this pass for the purpose of INVESTIGATING SETTLEMENT...This pass may be cancelled at any time and is issued subject to the following conditions:

"ALLOWED TO WORK"

14. Clearly this pass has no reference to the employer of the pass holder or the sort of duties the plaintiff was engaged in while employed by the defendant. There is no mention in the plaintiff's evidence of any investigation that he was conducting in the material period for the defendant. Secondly, the pass had long expired when the plaintiff's employment was terminated in September, 1998.

15. It is true as submitted by the plaintiff's advocate that unlike Satwant's Case, there was no express clause in the subject agreement making the agreement between the parties subject to procurement of the work permit. That however does not take away the force of law concerning the requirement of work permit by aliens, which is indirectly recognized by the parties in their agreement. And of course, it is always the legal obligation of the employer to obtain the work permit on behalf of its employee. The employer does not issue work permits and therefore cannot give guarantees regarding what is strictly a function and prerogative of Immigration Department. It is also true that the contract between the parties were terminated for reasons other than the work permit unlike in Satwant's Case and moreover the object of the transaction itself was not illegal or prohibited by statute. Because, the plaintiff was being hired to do perfectly legal work namely the management of a holiday resort.

16. In resisting the defence of illegality the plaintiff called to his aid the test derived from Hall vs Woolston Hall leisure Limited EATRF/1998/0297 and other English decisions as applied in Satwant's Case by the Court of Appeal as follows;

"In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge of that illegal performance and participation in it by the other party to the contract."

Lord Justice Peter Gibson stated inter alia in the Hall Case:

"In cases where the contract of employment is neither entered into for an illegal purpose nor prohibited by statute, the illegal performance of the contract will not render the contract unenforceable unless in addition to knowledge of the facts which make the contract illegal, the employee actively participates in the illegal performance."

17. Justice Gibson also distinguished between claims for instance for unfair dismissal brought by employees which are founded on such impugned contracts, and those based on "statutory employment rights conferred on an employee", and questioned whether the latter type should be defeated by illegality in the performance of the contract of employment. He proceeded to state further that:

“It is a question of fact in each case whether there has been a sufficient degree of participation by the employee. And as Coral Leisure Group (Coral Leisure Group Ltd v Barnett [1981] I.C. R 503) shows, even if the employee has in the course of his employment done illegal acts he may nevertheless be able subsequently to rely on his contract of employment to enforce his statutory rights”

(As for example against discrimination based on race or sex)

18. I have no doubt in my mind that the case before us falls in the category of illegal performance of a contract whose object is otherwise lawful. It seemed to me that the plaintiff’s advocate in their reply to defence submission were relying on the decision of **Coral Leisure Group Ltd** cited in **Hall’s Case** by urging the court to sever the first part of the contract, tainted by illegality, and enforce the untainted portion i.e after 27th May, 1998. The facts of this case do not support such an approach. Firstly, there is no doubt that the plaintiff had knowledge and participated in the illegal performance of the contract until May 1998. For the rest of the period, he has relied on what is patently a false work permit which fact must be in his knowledge. The pass did not specifically authorize him to work for the defendant as a manager, much less a project manager. Both the parties must know this but proceeded nevertheless. This knowledge in my view could be one plausible explanation for the spirited denial, against all odds, by DW1 that he signed the impugned contract of employment. The evidence before me establishes that there was wilful illegal performance of the subject contract by the plaintiff with the knowledge and participation by the defendant.

19. The *ex turpi causa* rule is based on the public policy consideration that courts ought not to condone illegality by lending themselves to enforce obligations alleged to be based on illegal transactions, in which the claimant himself was a wilful participant. I am persuaded that the rule constitutes a complete defence in the circumstances of this case. The plaintiff’s case is accordingly dismissed. In light of the proven complicit conduct of both parties herein, I shall order each to bear their own costs.

Delivered and signed at Malindi this **9th** day of **June, 2014** in the presence of: Mr. Mwadilo for the defendant. No appearance for plaintiff.

Court clerk - Samwel

C. W. Meoli

JUDGE