



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL CASE 449 OF 1994**

- 1. LIFTING EQUIPMENT CO. LTD ..... FIRST PLAINTIFF**  
**2. MATERIAL HANDLING EQUIPMENT..... SECOND PLAINTIFF**

**VERSUS**

- 1. GREGORY PRAGASSA ..... FIRST DEFENDANT**  
**2. STOCKCARD INVENTORY LTD ..... SECOND DEFENDANT**

**RULING**

The main suit was fixed for hearing at the annual call-over in February 1996 for 15.5.96. There was however a "Notice of Preliminary Objection" to the Plaintiffs' suit filed on 8.2.96.

It was in these words:-

"TAKE NOTICE that the hearing of this suit on 12th February, 1996 (sic) the Defendants shall raise a preliminary objection in terms of paragraph 17 of the Defendant's defence that is to say the Plaintiffs' claim herein is not legally enforceable the same having arisen from an illegal transaction and is against public policy".

Paragraph 17 of the defence referred to is however wider than stated.

I will reproduce it.

"17. Without Prejudice to the foregoing and

in the alternative the Defendants aver that' the business transactions of the Plaintiff giving rise to the claim herein were carried out illegally and the enforcement of the Plaintiffs' claim herein would be contrary to public policy in that at all material times the Plaintiffs did not have the appropriate license to trade and/or otherwise import or deal with the goods the subject matter of the claim herein contrary to, inter alia, the Trade Licencing Act (Cap.497) Laws of Kenya and further the Plaintiffs never paid income tax or submitted the income tax returns and/or the Plaintiffs evaded customs and/or excise duties and other taxes payable in respect of the said business contrary to the relevant 'provisions of the Law".

That was the point raised and argued before me by Sureta Chana

for the Defendants and opposed by Mr. Waiyaki for the Plaintiffs

on 15.5.96.

A recap of the background to this objection is pertinent. It is derived from the pleadings and some affidavit material on record since the case is yet to be heard.

Lifting Equipment Company Ltd. (LEC), the 1st Plaintiff is a Kenyan company carrying on business in Mombasa. What business

they do is not clear. But they say they "sell goods". And the nature of the "goods" is not specified. The Directors of LEC in their individual capacities are also trading. They do so through the 2<sup>nd</sup> Plaintiff, MATERIAL HANDLING EQUIPMENT (MHE) which is a business name. It is described as a registered firm carrying on business in Nairobi and other places. Their licensed business is "IMPORT" and they carried it on in Plot No.209/8181, Masaba Road, Nairobi. It is to these Nairobi offices that LEC says it forwarded goods to MHE for sale on behalf of the two of them. The person given the responsibility of handling these goods at the Nairobi end was the 1st Defendant, Gregory Pragassa (Pragassa). He is said to have been an employee earning a salary and in addition a commission based on sales. His position was Senior Sales Officer and was the only employee in the Nairobi office, save for a typist. LEC would send goods to him; he would sell to LEC's customers at specified prices and then account for these sales to LEC and MHE less his commission monthly.

At some point before 24.6.1994 (for this is when Pragassasays his services were terminated but I.E.C says he deserted) Pragassaformed a Limited Liability Company in which he was the controllingshareholder. This is the 2nd Defendant, Stockcard Inventory Ltd.,(SIL). It is then alleged that Pragassa, deceitfully and fraudulentlystarted diverting the goods forwarded by LEC for sale to LEC'scustomers, and instead sold them to SIL at throw-away prices. Thiscaused loss to LEC and MHE to the tune of Kshs. 1,262,383.10 whichthey seek to recover from Pragassa and SIL. They have other claimsof a general nature. LEC and MHE do not state the period overwhich the deceit and fraud was committed. But they remembersending Pragassa to Nairobi in early 1991. He deserted the officesin June 1994 after committing the said frauds. So the relevant periodis between early 1991 and mid 1994.

Pragassa on his part denies most of the above allegations including the allegation that he knows SIL or that SIL knows or has anything to do with him. They are mutual strangers but share the same advocate. He however admits that he was an employee of LEC as a sales officer and was deployed to Nairobi to work for LEC. He denies the sales commission allegation, as he, does the allegation that there were specific customers or specific prices. The goods, he says, were forwarded to MHE for sale to the general public and all he was supposed to do was to make monthly returns accounting for the sales and the moneys realised. These goods according to Pragassa belonged to MHE and not LEC who had no interest, title or property in them.

In a apparent about face, Pragassa says in his amended defence that the terms of his employment did not prevent him from incorporating any company or carry on any other business. This would appear to be an admission that he incorporated SIL and was carrying on business through it. There would otherwise be no need of Pragassa pleading that he was ready to return the goods said to have been fraudulently sold on condition that LEC and MHE purchase them at the same prices he sold them at.

Pragassa then drops his bombshell at paragraph 17 cited above. In essence he says even if I sold these goods to SIL as you allege at throw-away prices, you cannot recover the money because MHE did not have a Trade "Licence authorising them to do business when I sold the said goods. He is making reference to the period 1.1.93 to 30.6.94 (half years) over which the Miscellaneous Occupation

Licence under Section 7 of the Trading Licensing Act and the General Trade Licence under the same section were not obtained. These two had been obtained from early 1991 when Pragassa was deployed to open the MHE office and were renewed the following year upto 31.12.92.

Further licences were obtained after June 1994 when LEC discovered that they had not been taken out. Pragassa seems to be the only one who knew that the transactions took place over the period when there were no licences, hence the plea of illegality. LEC and MHE can only suspect this as they do not plead the period, and all they

see is a deliberate scheme by Pragassa to neglect the renewal of

licences which was his duty, so that he could defraud them and make this plea. He is relying on an illegality, if such it was that he committed himself in order to enrich himself at their expense. As for other alleged non-payments of taxes, LEC and MHE swear that they have *no* outstanding unpaid taxes or duties and if any they continue to, be paid and will be paid in future for all goods dealt with by them.

Such is the background of conflicting averments on which

I am asked to draw inferences of fact and hold that the suit is bad for illegality.

Ms. Chana submitted that it is trite law that a transaction which emanates from an illegal source is void and any rights thereto

are unenforceable. She cited"THE LAW OF CONTRACTS IN EAST AFRICA

by R.W. Hodgkin for this proposition. The illegality relied on is one

created by Statute and not under Common Law.

The latter is said tooffend public Policy. That is a point taken in the preliminary

objection but is not supported in the submissions of counsel. As I

understand it, the sole point is that the transactions in issue were

carried on by someone who had contravened the Trade Licensing Act

and cannot therefore seek the assistance of the courts on that score.

That is why there was heavy reliance by Ms. Chana on the case of

HAMED BIN AWATHI BAALI & ANOR VS. HAMED BIN SAID BATWAHSAFF,

MSA HCCC.21/1936. This concerned The Stock Traders Ordinance (Cap.59)

where there was a requirement of obtaining a Stock Traders Licence

Which the Plaintiff for a period of time did not obtain. It was held

that he could not recover money for the goats he had sold over the

period. The Judge rejected the submission that this was a purely

Revenue Ordinance and found that the Ordinance:-

“..... Cap.59 was enacted for many other purposes than the mere collection of revenue”.

He found Public Policy and protection of the public “ as the purposes

for which the ordinance was directed at. He did not have the benefit of the objects and reasons for which the Ordinance was enacted. This appears in the Editorial Note to the report on that case however:

“The purpose of the above Bill is two-fold -Firstly to raise some additional revenue and secondly to keep some control by means of licences over stock trading, which at present is largely in the hands of Somalis”.Of "course we have come a long way since 1936 when the Judges findings may have been correct within the context of that Act at the time. It is not binding on me.The section alleged to have been transgressed in this case is S.5 (l) of the Trade Licensing Act, Cap.497. It says no person shall conduct any business without a current license. It has punitive measures for that transgression. But still, transactions carried out over the period without a license cannot be enforced. Ms. Chana cited Cope -v- Rowlands (1836) 2 M & W 149 which was cited with approval in the Hamed Baali case. Even if there were accounts stated, in Ms. Chana's submission, no money would be recoverable under such contract and the loss shall remain where it lies. In support of this she cited Issa and Suleman -v- Macheol & Co., 23(1) KLR 12 decided in 1948.

In her final submission, there can only be one exception as stated in the Hodgin book. That is where one party can show that he was not as guilty as the other, that he was not in pari delicto, the court may assist him.

And this is where Mr. Waiyaki took the matter up. He submitted that the duty of obtaining the Trade Licences was on Pragassa who was the sole or main employee in that office. Indeed he obtained the licences for the first 1 1/2 . Years or so. Why would he not renew the licences from January 1993? And why would he incorporate his own company over this period to which he then sold the goods and banked the money Asked Mr. Waiyaki. He submitted that Pragassa is the one who committed the illegality and is now turning round to take advantage of it. He should not be assisted by the court. How can Pragassa also make wild allegations of non-payment of taxes and duties without offering any evidence to prove it? All that his clients want is a refund of money pilfered by their employee which is a simple debt. An employee ought to account to his employer. On all these accounts it cannot be said that the parties were in pari delicto.

The Plaintiffs were not aware of any illegality until Pragassa deserted their employment.

At any rate, it does not follow that just because there were no licences, then the property in the goods sold over the period did not pass to the purchasers. Bona fide purchasers for value are protected. He cited Chitty on Contracts, Vol.1, 22nd Edn. Paragraphs 880, 881, 882, 883 and 884 and also Halsbury's Laws of England, 4<sup>th</sup> Edn. Vol.9 in support of these submissions. He also cited Singh -vs- Ali, [1960] A.C. 167 where the general rule applicable was formulated thus:-

“In our opinion a man's right to possess his own chattels will as a general rule be enforced as against one who, without any claim of right, is detaining them or has converted them to his own use, even though it may appear either from the pleadings or in the course of the trial, that the chattels came into the Defendant's possession by reason of an illegal contract between himself and the Plaintiff, provided that the Plaintiff does not seek and is not forced either to found his claim on the illegal contract or to plead its illegality in order to support its claim”.

This principle also accords with the decision in Bow makers Ltd -v- Barnet Instruments Ltd., (1945) K.B. 65. So that, in Mr. Waiyaki's view, the parties were not in pari delicto as the Plaintiffs were not blameworthy and even if they were, they are still entitled to recover as they are not relying on the illegality to recover that which was undeniably their property before it passed on to the Defendants jointly and severally.

My sympathies are with the Plaintiffs' advocates' counsel

and I agree with the Law Lords in the Bowmakers Ltd Case that:-

" Prima facie a man is entitled to his own property and it is not a general principle of law that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action".

If this were not the case many a person would be able to rely on illegalities to enable them to keep both the property and the money received for it. This would be against any sense of justice or public policy.

Take this case. Although Pragassa has relied on illegality to defeat the claim of the Plaintiffs, he has filed a counter-claim to recover the value of some goods, commissions earned and loss of income for termination of employment. He even seems to have obtained default judgment for his liquidated claim since there is no indication that the ex-parte judgment recorded on 11.12.95 has been set aside. If these claims were valid during the period when it is alleged that licences were lacking, why shouldn't other claims?

At all events there is no clear evidence as to whether the parties were in pari delicto as regards the omission to take out licences and whether or not the Plaintiffs paid any taxes and duties. These are obvious issues which have to await evidence and cannot be tried on a preliminary objection. Indeed there are clear issues framed by both parties, under the Summons for Directions and these very issues were clearly for trial.

I overrule the objection and award the costs to the Plaintiff in any event.

Order accordingly.

Dated at Mombasa this 26th day of June 1996.

**P.N. WAKI**  
**JUDGE**