IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 256 OF 2011.

PRAFULCHAND BHARMAL SHAH.....1ST APPELLANT

MRS. RENUKA PRAFUL SHAH .....2ND APPELLANT

AND

SHURISH CHANDRA BHARMAL SHAH.....1ST RESPONDENT

MRS. NILAM SHURISH SHAH.....2ND RESPONDENT

BANK OF INDIA FINANCE KENYA LTD.....3RD RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (**L. Kimaru, J**.) dated 22nd October, 2010*

in

H.C.C.C. No. 422 of 2002)

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JUDGMENT OF THE COURT

The appellants who are husband and wife instituted a suit against the 1st and 2nd respondents who too are husband and wife. The 1st appellant and the 1st respondent are brothers, whereas the 2nd appellant and 2nd respondent are wives to 1st appellant and 1st respondent respectively. The brothers ran a business known as Praful's Ltd which operated a shop situate on Prudential Building, along Mama Ngina Street in Nairobi. The shop was fronted as a curio shop but in essence the brothers ran an illegal business of foreign currency exchange at a time when such business was controlled and regulated by the Central Bank of Kenya. Under the regime, only licensed persons under the Exchange Control Act (Cap. 113) (now repealed) and the Banking Act could operate such a business. It is an admitted fact that the brothers being unlicensed carried on the business illegally. The business, which is said to have been lucrative, was established in 1981 by the 1st appellant according to his testimony.

In 1991, the appellants, relocated to the United Kingdom (U.K) and the 1st and 2nd respondents were left behind to manage the business locally while the appellants ran the business in the United Kingdom. The 1st appellant would visit Nairobi several times in a year to inspect the books of accounts. During that

time, the 1st respondent donated to the 1st appellant a power of attorney over the bank accounts in the UK and Switzerland held in the joint names of the respondents, to allow the former to make certain payments out of the said accounts. The 1st respondent on the other hand operated the business's account held in the joint names with the 1st appellant in a local bank, Bank of India Finance Kenya Limited, the 3rd respondent. The business appears to have been going on smoothly until 1996 or thereabouts, when a dispute arose between the appellants and 1st and 2nd respondents. The dispute was in regard to one of their customer, referred to as Pinto, against who they had schemed for a while. Upon discovery by the customer of their fraud, the 1st appellant and 1st respondent agreed to make good the money they had schemed from him by each contributing equally to the sum of USD 2, 795,000. The 1st appellant blamed 1st respondent for the losses that had been occasioned through Pinto's account and so he demanded of him to make good the loss. Until then, the good filial relations that had persisted up to that point between the parties soured, with the 1st respondent claiming that he paid too much while the 1st appellant alleged that what was repaid was not enough. Subsequently, a tit for tat war ensued. The 1st appellant as a consequence drained the account held by the respondents with the Bank of Ireland in the UK using the powers of attorney previously donated to him by the 1st respondent. Using the same power of attorney, the 1st appellant managed to create a bank overdraft, which the 1st respondent denied he had authority to create, in an account held in respondent's names in Switzerland to the tune of USD 351, 401.53. The 1st respondent thereafter revoked the power of attorney granted to the 1st appellant to operate the accounts and demanded of 1st appellant to pay off the overdraft or suffer the loss of his monies held by the 1st respondent from their foreign currency exchange business operated locally. The 1st appellant in 1997 allegedly refunded USD 373,111, which included interest to the respondents in settlement of the bank overdraft.

Following the customer's debacle that soured the appellants and respondents hitherto good relations, the 1st respondent wrote to the 1st appellant informing him of his intention to instruct the bank to remove him from the joint accounts and to henceforth operate the accounts solely with the 3rd respondent. The appellants did not object to the said intention and so when the deposits matured, the name of the 1st appellant was duly removed and the deposits reverted to the sole ownership of the respondents. Sometime after the revocation of the power of attorney, the 1st appellant fraudulently tried to create an overdraft amounting to 565,000 sterling pounds held in a Switzerland bank in the 1st respondent's name but was turned away by the bank after it confirmed that the 1st respondent had not given any such instructions.

Further, following that attempt to access the funds, the 1st appellant wrote to the 1st respondent on 14th November 1999 claiming USD 1,580,000 but was willing to settle for USD 500,000 as settlement thereof. The parties thereafter agreed to refer the dispute among them to arbitration by persons acceptable to them. Pursuant thereto, on 9th December 1999, nine (9) family members of the parties gathered at the home of the 1st and 2nd respondents to arbitrate the business and financial dispute between the parties. At the end of the arbitral process, the arbitrators awarded the appellants 140,000 sterling pounds. The said amount was paid by the 1st respondent in full and final settlement of all the claims that the appellants had against the 1st and 2nd respondents as at that time.

However, on 8th April 2002, the appellants instituted a suit in the High Court at Nairobi against the 1st and 2nd respondents. The 3rd respondent was named as a party to the suit since the appellants also sought an injunction restraining the 1st and 2nd respondents jointly from dealing with Kshs. 62,052, 771 held in a fixed deposit account in their names and that of the appellants. In the suit, the appellant averred that pursuant to a family arrangement in December 1999, Kshs. 11,360,233 was deposited with the 3rd respondent in a fixed deposit account in the names of both parties. That however, upon maturity of the same, the 1st and 2nd respondents, without any due notice or consent, express or implied, withdrew the said deposit to the appellants' detriment. The appellants therefore claimed half of the deposited amount, that is, Kshs. 5,860,165.50 with interest from the date of withdrawal until payment in full. Further, the appellants averred that another Kshs. 62,052,771 had been deposited with the 3rd respondent in fixed

deposit account but the 1st and 2nd respondents without consent or notice removed the 1st appellant's name and transferred the amount in their sole names when the deposit matured. The appellants therefore laid claim to half of that amount being Kshs. 31,026,385.50 with interest thereon from the date when their names were removed, till payment in full.

The appellants further claimed USD 373, 311 which they said was money they had paid on behalf of the 1st and 2nd respondents in Geneva, Switzerland on 25th March 1997, which amount had in fact been admitted as a debt by the respondents in writing. Finally, the appellants claimed from the respondents a sum of 60,000 Sterling Pounds, together with accrued interest, allegedly advanced to the latter and which they claimed had also been acknowledged.

Those allegations were, of course, denied by the respondents. Specifically, they alleged that the debt of 60,000 Sterling Pounds was statutorily barred. Most relevant to this suit, they stated that the business and financial claims between the parties had been resolved and settled once and for all through the arbitration held on 9th December 1999. That the appellants were therefore estopped from denying that the arbitral award was in full and final settlement of all the claims between them. They accused the appellants of violating the power of attorney donated to them by using their fixed deposit account in Switzerland as collateral for overdrafts they obtained for their personal use and benefit and for making unlawful payments from the said account. According to the 1st and 2nd respondents since the appellants had transferred large amounts of money without their consent or knowledge from their accounts overseas, they removed their names from the fixed deposit account held locally. This is especially since the two had not given any valuable consideration to warrant their interest in the fixed deposit. All said and done, they averred all these issues had been settled through the arbitration. In the alternative, they averred that the claims laid by the appellants originated from the illegal business they operated and were therefore not legally enforceable. They went further to counter claim for the arbitral sum of 140,000/- Sterling Pounds in the event that the court found that the arbitration award was not binding since, and according to them, that money would have been obtained by false pretence.

Faced with the above set of facts, the High Court (**Kimaru, J.**) found and held that the financial and business dispute between the parties were finally settled following the arbitration held on 9th December 1999 and therefore dismissed the appellants' suit.

Dissatisfied, the appellants have now appealed against the said decision on grounds that the Judge erred in failing to address the issues placed before him and in stating that the arbitration award settled all issues between the parties. They also seek to impugn the finding of the learned Judge on the basis that he failed to appreciate that the arbitration was restricted to the business they operated together and that other financial dealings were not covered so as to decree judgment in their favour as prayed. The appellants complained that the judge failed to appraise the evidence placed before him; failed to consider their written submissions and therefore misdirected himself in law. Finally, they complained that the learned Judge made a determination against the weight of evidence adduced.

The parties opted to canvass the appeal by way of written submissions. The appellants in their submissions stated that the trial court failed to address such issues as whether or not there was an arrangement made in December 1999 confirming that the 1st and 2nd respondents would continue to invest monies held jointly with the appellants; whether or not the 1st and 2nd respondents were indebted to the appellants in the sum of USD 373,311 plus interest and if such debt had been acknowledged; whether there was a debt of 60,000 Sterling Pounds advanced to the 1st and 2nd respondents and whether the appellants forged the letter dated 27th March 1997 and the agreement dated 10th December 1999.

According to the appellants, in order for the Judge to reach a fair determination, he ought to have considered and addressed all the issues raised by each party to the suit. The appellants cited the case of **Kisumu Water & Sewerage Co. Ltd v St. Luke Medical Centre (2014) eKLR** where an appeal was allowed by the High Court when it was found that the trial court had dwelt on irrelevant though important issues in reaching its decision. Further, the appellants denied that the arbitration award resolved all financial and business disputes between them. As such, it denied that the same should be taken as a final

settlement of all the issues since that would prejudice the appellants by hindering them from recovering any monies owed after the award was rendered. The appellants submitted that according to the arbitral award, it dealt with disputes from the day they began operations until the day of the award. It could therefore be inferred that all matters and disputes that arose after the award date were new matters that had not been settled in the arbitration. That by lumping all disputes together the Judge had erred and exercised his discretion wrongly thus warranting this Court's interference with the exercise of that discretion. This is especially since the evidence of correspondence and acts placed before the Judge were after the arbitral award. The appellants in the premises pleaded this Court to re-examine and consider the evidence placed before the trial court that they allege was not considered. They relied on the case of **Josephat Murage Miano & Anor v Samuel Mwangi Miano (1977) eKLR** where the Court of Appeal set aside an arbitration award where material evidence was not considered by the arbitrator.

The appellants further submitted that the judgment ought to be set aside on the basis that it had the effect of summarizing a claim that was more complex than had been tackled in the arbitration and in doing so, barred the appellant from recovering any debt that had accrued after the arbitration. The appellants also complained that the financial statements relating to the business they operated had been produced as evidence before the trial Judge, which evidence was not appraised by the Judge. Further, that the Judge failed to analyse the evidence and in particular, the inability of the respondents to explain the discrepancies in their evidence in relation to the funds deposited in their account in the bank of Ireland and their admission of having received a loan of 60,000 Sterling Pounds from the appellants. The appellants further faulted the Judge for failing to take into account the discrepancies in the evidence thus drawing a wrong conclusion which was an error in law. It was also the appellants' submissions that the trial judge ignored or failed to take into consideration their written submissions.

The appellant relied on the case of **Selle & Another v Associated Motor Boat Company Ltd & Ors (1968) EA 123** where Court held that an appeal from the High Court was by way of a retrial and this Court is not bound to follow the trial judge's findings of fact where it appears he failed to take into account particular circumstances or probabilities or the demeanor of the witness was inconsistent with the evidence generally. The appellant also cited the authorities of **Martha Wanjiru Kimata &Another (2015) eKLR** and **Peters v Sunday Posts Ltd (1958) EA 424** for similar propositions.

The 1st and 2nd respondents on their part remained categorical that all the business and financial disputes between them had been settled in full by the arbitration award since there had been no challenge to the same. That by the appellants accepting the award, they discharged the 1st and 2nd respondents from each and every claim which they had prior to the arbitration. The 1st and 2nd respondents submitted that by the parties appending their signatures on the award, they intended that the award acts as a bar to any further or any other claim whatsoever, notwithstanding its origin or basis. They submitted that the appellants accepted the payment of 140,000 Sterling pounds without preconditions and made no reference to any further or other sums of monies which may have been outstanding or which they intended to claim. That though the appellants had demanded 500,000 sterling pounds as final settlement for all the claims they had against the 1st and 2nd respondents, they accepted 140,000 sterling pounds in full payment thereof and thereafter maintained their peace till 2002, two years and four months later, when out of the blues, they filed the suit. That in the suit, the appellants raised claims which pre-dated the arbitration.

It was also submitted that the appellants could not claim not to have known that the 1st and 2nd respondents had withdrawn or converted the deposits to their sole ownership since a notice to that effect had been sent or delivered to them. That since the 1st appellant routinely came to Nairobi for three to four times a year, he would undoubtedly have gone to the bank to check on the status of the deposits in December 1999 if he disputed the right of the 1st and 2nd respondents to the exclusive ownership of the deposits. This is especially so since he stayed two to three weeks when he came for the arbitration proceedings in December 1999. The 1st and 2nd respondents further submitted that letters alleging or showing the appellants to have lent money to the 1st and 2nd respondents after the arbitration award, were forgeries as the original documents had not been produced. According to the 1st and 2nd respondents, the claims by the appellants in the suit arose from the process of settling the accounts following the Pinto's debacle and were all settled by the arbitration award. The respondents also submitted that in any case, the

claims by the appellants could not be enforced by court since they arose from an illegal business. As such, they contended that the doctrine of *ex turpi causa non oritur causa* (no action may be founded on illegal or immoral conduct) applied. For that proposition, they cited the case of **Mapis Investment (K) Ltd v Kenya Railways Cooperation (2006) eKLR** where the court held that a court ought not to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations that arose out of contract or transaction which is illegal.

During the oral highlighting, Mr. Amoko, Mr. Rebelo and Mr. Ng'ang'a learned counsel appeared for the appellants, 1st and 2nd respondents and the 3rd respondent respectively. Mr. Amoko opted to rely entirely on his written submissions. On the other hand, **Mr. Rebelo** orally highlighted that the arbitration award had resolved all the issues that persisted between the parties, the appellants later came up with two (2) documents in which he claimed that the 1st and 2nd respondents owed him some money. The purported documents showed that the claims by the appellants were post the award. The documents and the signatures were however denied by the respondents and thereafter the appellants undertook to avail an expert from the U.K. though this was never done. As such there was no proof of the claims. **Mr. Nganga,** submitted that pursuant to the now impugned judgment of the High Court, the funds held by the 3rd respondent on behalf of the 1st and 2nd respondents were released to them. Counsel however opposed the appeal and wished to rely on the respondents' submissions.

This being a first appeal, this Court should be alive to jurisdiction under rule **29 (1)** of the Court of Appeals rules. It is required to reappraise, reanalyze and evaluate the evidence that was tendered before the trial court so as to reach or draw its own conclusions. This jurisdiction has been elucidated in many cases and is well appreciated. Pursuant to that mandate, this Court will not ordinarily interfere with findings of fact by the trial court unless they are based on no evidence at all, or on a misapprehension of it, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. See **Mwanasokoni v Kenya Bus Services Limited (1982-88) 1 KAR 278.**

In our view, the following germane issues arise for discussion and are disposive of this appeal;

> (i) Whether the arbitration award of 9th December 1999 resolved all financial disputes between the parties,
>
> (ii) The legality or lack of it of the business that precipitated the dispute and the ensuing consequences.

It is clear that the parties enjoyed good relations prior to Mr. Pinto's debacle in 1996. This must have been both in business and in their financial dealings in general.

After all, when the appellants left for the U.K in 1991, the 1st and 2nd respondents were left to run the money exchange business. The 1st and 2nd respondents in turn donated powers of attorney to the appellants to enable them exercise control on their behalf over their accounts held in the UK and in Switzerland. Prior to 1996 when it was alleged that Mr. Pinto found out the fraud committed on him by the appellants and 1st and 2nd respondents, there was no misunderstanding at all regarding the business or finances between them. However, after Pinto's entry into the scene, the filial relations between the parties soured based on the agreement to refund the money they had schemed from Pinto.

The 1st and 2nd respondents in 1996 added the appellants' names to a fixed deposit account they held with the bank as security for the losses they stood to make good on the account of Pinto. In the meantime, the appellants withdrew the monies held in the 1st and 2nd respondents' accounts in the UK and converted them to their own use. When the 1st and 2nd respondents found out about the withdrawals, they in turn gave instructions to the 3rd respondent to remove the names of the appellants from the fixed deposit account and converted Kshs. 11,360,233 therein to their sole control when the deposit matured.

It is this state of affairs of claims and counter-claims between the brothers in their business and financial

dealings that culminated in the arbitration meeting of 9th December, 1999. The claims between them were varied and the basis for some of them unexplained and or unsupported by evidence. Indeed in its determination the trial court remarked on the issue as follows: -

> *"**Due to the illegal nature of the business that was being undertaken by Shurish and Praful", records were kept in a certain black book known as "Hara pheri". This book was however, for obvious reasons, not produced in evidence. This court was therefore not able to ascertain the amount the business earned in terms of profits during the period of its existence. The evidence adduced by Praful and Shurish did not illuminate the amounts that were due to each of them on account of the said business...… Some crucial documents such as documents evidencing the actual transactions were concealed from the court. The documentary evidence produced either constituted bank statements or correspondence exchanged between Praful and Shurish. No documentary evidence was produced in regard to the actual foreign exchange transactions that took place. On a balance of probabilities, and upon assessing the evidence adduced, it was clear to this court that the settlement reached by the parties to the suit (excluding the 2nd defendant) on 9th December 1999 resolved all financial and business dispute between the plaintiffs and the 1st defendants."***

As a build up to the arbitration meeting, the appellants sent a long fax message to the 1st and 2nd respondents on 14th November 1999 and set out various claims totaling about USD 1,580,000. The claims went as far back as 1995 and covered the period when their relationship hit the rock bottom, to the time of writing the fax. He stated in the said communication that they were willing to accept USD. 500,000 in full and final settlement of the amount they claimed. In the message, they went further to state in pertinent paragraph that;

> ***"THERE ARE OTHERS FIGURES TO COLLECT***
>
> ***£ 60,000 SENT TO YOUR CBA BANK INJAN 1995 FOR WHICH YOU NEVER CREDITED IN DAY TO DAY ACCOUNT BOOK.***
>
> ***£ 112,000 PAID FOR YOUR AND YOUR FAMILIES INSURANCE FROM 1984 TO 1995***
>
> ***PLUS INTEREST FROM 1995 TILL NOW***
>
> ***PLUS OTHER AMOUNTS WHICH ARE IN DAY TO DAY ACCOUNTS***
>
> ***WHICH I WILL SHOW WHEN PRESENT ALL THIS PAPERS" (sic)***

A reading of the correspondences between the parties shows an intention by them to raise all the various financial claims they held against each other over the years in the arbitration proceedings and finally bring to an amicable closure the dispute. That arbitration took place on 9th December 1999 before nine (9) family arbitrators. The parties laid out all the claims they held against each other, not always supported by evidence as remarked by the arbitration panel, and it was resolved that the respondents pays 140,000 sterling pounds to the appellants as full and final settlement of the dispute. Both parties accepted the outcome of the arbitration and appended their signatures to the award to signal their intention to be bound by the award. The upshot is that the arbitration must be taken to have settled all the business and/or financial matters between the parties. The appellant cannot be heard to fault the trial Judge for rightly holding so.

A reading of the appellants' submissions seems to infer, imply or suggest that there were certain claims or transactions that arose after the arbitration award or which were not covered by the arbitration award and which the High Court failed to consider and appreciate. Pursuant to our earlier finding that all business or financial dealings prior to the arbitration were laid to rest in the said arbitration award, then the only claims arising for consideration by this Court and or ought to have been considered by the High Court would be those that arose after the 9th December 1999 arbitration award. It must be borne in mind that by

the time of the arbitration, the business between the appellants and 1st and 2nd respondents had been wound up due to bad relations and it did not come out clearly whether the appellants and 1st and 2nd respondents continued with either business or other financial relations after the arbitration award. In its Memorandum of Appeal and submissions, the appellants specifically allude to the sum of 60,000 sterling pounds and USD 373,311 respectively.

The 1st and 2nd respondents in their Defence averred that the sum of 60,000 sterling pounds was statute barred but did not pursue that defence further in the High Court. Similarly, in its submissions before this Court, the appellants do not submit or delve into how the claimed sums were not covered in the arbitration. However, in the fax from the appellants to the 1st and 2nd respondents prior to the arbitration, the appellants state that they intend to raise a claim of *"£ 60,000 sent to your CBA bank in Jan 1995 for which you never credited in day to day account book***"** in the looming arbitration. That claim must then be taken to have been factored into the arbitration award and resolved with finality.

Considering the other sum of USD 373,311, the appellant claimed the amount on the basis that they paid the money on behalf of the 1st and 2nd respondents in Geneva, Switzerland on 25th March 1997. If that be so, then the claim must suffer the same fate as the other claims that had been covered and settled in the arbitration award. After all, the arbitral proceedings were conducted on 9th December, 1999. The evidence adduced before the trial court does not prove any claims by the appellants that came after the arbitration award so as to fall for consideration by the High Court.

As proof of those claims, the 1st appellant exhibited a certain document ostensibly signed by 1st respondent admitting his indebtedness to him in the sum 60,000 sterling pounds. However, that document was contested by the 1st respondent as being a forgery. During the trial, the documents were not produced so as to prove their veracity, with the 1st appellant claiming that the original documents were misplaced or lost. An expert witness, a forensic document examiner, was however called to testify on behalf of the 1st appellant to a report the examiner had prepared of the said documents. The 1st respondent submitted that the witness did not produce the documents or copies thereof and his evidence was limited to a mere recitation of his report. In his testimony before the trial court, **Michael Handy**, the forensic examiner did testify that he did not have adequate material to come to a definitive conclusion in regard to the documents. As it was, the appellants did not tender irrefutable and or tangible evidence to prove that indeed there were other claims between the brothers that were not settled in the arbitration or which came after the arbitration. In his determination, the learned trial Judge came to the same conclusion when he observed that the appellants had failed to prove their claims to the required standard of proof; on a balance of probabilities.

The 1st respondent has also submitted that pursuant to the doctrine that no action may be founded on illegal and immoral conduct, then the courts do not have the jurisdiction to entertain such actions. The doctrine is expressed through the Latin maxim-*ex turpicausa non oriturcausa*. According to the 1st respondent, the appellants cannot find an action based on their illegal or immoral conduct. After all, it is an admitted fact that the claims or financial dealings between the brothers originated from their illegal foreign exchange business. This Court has previously quoted with approval a passage from the case of **Cott v Brown, Doering, McNAB & Co, (3), [1892] 2 QB 724 Lindley LJ** at p. 728 in **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** expounding on the doctrine as follows,

> *"**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**."*

As a court of law, we cannot just shut our eyes to the fact that we are being asked to adjudicate upon obligations that arose from an illegal transaction. Both parties agree that the dispute arose from monies received from illicit trade in foreign currencies. To entertain the claim as the High Court did would be inimical to the business of courts that is always geared towards upholding the rule of law and/or legality. As was held in **Mapis Investment (K) Ltd v Kenya Railways Cooperation (2006) eKLR**, courts ought not to pronounce themselves on obligations that are founded on illegal business or allow itself to be made the instrument of enforcing obligations arising from illegal business.

The upshot is that this appeal fails and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 15th day of December 2017.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

…….……..…….

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

…….…..…….

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR