



REPUBLIC OF KENYA



**Mureithi v Mwangangi (Civil Appeal 252 of 2018)  
[2024] KEHC 7814 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7814 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 252 OF 2018**

**DAS MAJANJA, J**

**JUNE 27, 2024**

**BETWEEN**

**JULIUS MUREITHI ..... APPELLANT**

**AND**

**PAUL MUNYAO MWANGANGI ..... RESPONDENT**

*(Being an appeal from judgment and decree of Hon. Lesootia A. S  
(SRM) dated 15th November 2018 in Mombasa CMCC No. 403 of 2013)*

**JUDGMENT**

1. The Appellant was the Plaintiff in the suit before the Subordinate Court where he sued the Respondent for a refund of Kshs. 540,000.00. In his Complaint dated 21.02.2013, he averred that he had entered a verbal agreement with the Respondent whereby the Respondent was to clear for the Appellant a container of goods within the Port of Mombasa that the Appellant had imported from India for which he paid Kshs. 540,000.00 to the Respondent to enable him clear it. The Respondent failed to clear the container causing it to be actioned by the Kenya Ports Authority. He thus demanded a refund of the Kshs. 540,000.00 since the Respondent failed to deliver on the terms of the verbal agreement. Out of the Kshs. 540,000.00, the Appellant stated in his witness statement that Kshs. 300,000.00 was for clearing the bills at the Port and Kshs. 240,000.00 was for meant for the container deposit at MAERSK Line Company Limited since his goods were to be transported using their container. The Kshs. 240,000.00 was to be refunded after returning the container to MAERSK. Mr. Samuel Odera in his statement dated 21.02.2013 stated that he was instructed by the Appellant to procure the services of the Respondent to help secure a waiver on demurrage fees from MAERSK whereupon the Respondent promised to get between 80% - 90% waiver.
2. In his defence, the Respondent stated that the money advanced to him was meant as a bribe to shipping officials to facilitate the waiver of demurrage charges. He stated that the entire deal was an illegality as the money was paid out as a bribe to corrupt shipping officials. He averred that at the time the



Appellant approached him, the demurrage charges were USD 28,000 and that the Kshs. 540,000.00 was part of a bribe to facilitate reduction/ waiver of the same. In his witness statement, he stated that the appellant had agreed to pay KShs. 600,000.00 as a bribe to facilitate the process together with container fees of Kshs. 240,000.00. That the Appellant failed to pay the full bribe required together with the container fees in good time to facilitate the entire process. As a result, the container was taken to auction.

3. The Respondent further stated that by the time the container was going for auction, the charges had gone up to 42,000 USD which was waived to 16,000 USD but the Appellant was unable to pay but rather demanded for the refund of Kshs. 540,000.00. As such, the Respondent stated that it was the Appellant who frustrated the entire process of the waiver. He stated that he expended the money towards facilitating the waiver and thus the same could not be recovered. In a nutshell, the Respondent's defence was that the money paid by the Appellant was towards facilitation of waiver of demurrage charges, which was a corruption deal meant to bribe shipping officials to waive the charges. That such an arrangement is illegal and thus cannot be enforced through the court.
4. In its judgment rendered on 15.11.2018, the Subordinate Court dismissed the suit. It observed that from its evaluation of the evidence and testimony of the parties, the deal was a social arrangement and not a contract that could be enforced. It stated that the Respondent's role and obligation in the entire deal was not clearly defined for the court to hold him liable. That the Appellant contributed to his own woes when he pulled out of the deal before it was concluded thus rendering the work of the Respondent obsolete. Further, that the money received by the Respondent from the Appellant was deposit for the container which could have been refunded if the container was cleared. In the Court's view, the Respondent did not retain the Kshs. 300,000.00 but paid to MAERSK and thus the Appellant ought to have pursued MAERSK if he was serious about recovering his money.
5. The Appellant was dissatisfied by the judgment of the court and thus preferred the present appeal raising the following grounds:
  - a. The learned magistrate erred in law and facts by making a finding that the appellant did not prove his case on a balance of probability.
  - b. The learned magistrate erred in law and facts by terming the payment made to the respondent amounting to Kshs. 540,000.00 as a social and not contractual.
  - c. The learned magistrate erred in law and facts by making a finding that the appellant ought to have sued Maersk for the recovery of Kshs. 300,000.00 and not the Respondent.
  - d. The learned magistrate erred in law and fact by failing to critically analyse the evidence before the Honourable Court and thereby arriving at a wrong conclusion.
6. This being a first appeal, I am under a duty as the first appellate court to review the evidence afresh and reach my own conclusion; bearing in mind that the court of first instance had the chance to interact with witnesses first hand and thus had the benefit of observing their demeanor (see *Selle v. Associated Motor Boat Co.* [1968] EA 123).
7. From the facts I have set out and the record, the Appellant sought the help of the Respondent through one Mr. Odera to help in clearing his cargo at the Port of Mombasa. Whereas the Appellant stated that the Respondent's role was to clear the cargo, both Mr. Odera and the Respondent stated that the role of the Respondent was to help get a waiver on the demurrage charges. The entire transaction was based on faith. The Appellant had in fact failed to get his desired waiver which necessitated the involvement of the Respondent. The Respondent was engaged to obtain a waiver on the basis that he had contacts at MAESK having previously worked there. How was the Respondent going to obtain the waiver?



The Respondent in his witness statement stated expressly that he was meant to bribe shipping officials with Kshs. 600,000.00 and that the Appellant agreed to pay half the amount in order to kickstart the process. He later paid container fees of Kshs. 240,000.00 which would be refunded upon clearing and returning the container.

8. The Appellant maintained that the Kshs. 300,000.00 was paid as clearance fees which would have gone towards payment of demurrage charges. He did not demonstrate that the demurrage charges were reduced to Kshs. 600,000.00 out of which the Appellant paid Kshs. 300,000.00. The Appellant indeed acknowledged that he was informed about reduction of demurrage charges from USD 42,000 to USD 16,000. What then was the purpose of the Kshs. 300,000? I have reviewed the evidence and testimony of parties and I am convinced that the money was meant as a bribe to facilitate waiver of the demurrage charges.
9. From my own assessment, the Appellant having failed to get a favourable waiver on demurrage fees, initiated a back door process through one Mr. Odera to have the same waived. He secured the services of the Respondent who promised to secure the waiver. The Respondent expressly stated that the entire deal was meant to circumvent payment of demurrage charges. Is such an agreement enforceable? Such an agreement to pay a bribe to shipping officials cannot by any stretch of imagination be sanitized into a contractual obligation enforceable in court. It is in fact punishable. In *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR, the Court of Appeal quoted with approval the case of *Heptulla v Noormohamed* [1984] KLR where it was held 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.” This finding and position is founded in the latin maxim, “*ex turpi causa non oritur actio.*”
10. In conclusion, I find that the agreement the Appellant relies on was tainted with illegality hence I decline to aid the Appellant in enforcing obligations under a such a dishonourable engagement.
11. The appeal is dismissed. Each party shall bear their own costs in this appeal.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF JUNE 2024.**

**OLGA SEWE**

**JUDGE**

