



REPUBLIC OF KENYA



KENYA LAW
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**Mwasame & another v Barasa (Civil Appeal 67 of 2019)
[2023] KEHC 424 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 67 OF 2019
DK KEMEL, J
JANUARY 20, 2023**

BETWEEN

ELIAKIM CHIMAKILE MWASAME 1ST APPELLANT

PETER BARASA 2ND APPELLANT

AND

JANE EDEL BARASA RESPONDENT

*(Being an appeal from the Judgement of the Senior Resident
Magistrate Hon. N. Barasa in Webuye Senior Principal Magistrate's
Court Civil Case No. 126 of 2013 delivered on 15th April 2019)*

JUDGMENT

1. The 1st and 2nd Appellants who were the 1st and 2nd Plaintiffs in the lower Court had sued the Respondent (the Defendant) seeking for judgement to be entered against her for the following reliefs:
 - a. Kshs 151,500/=
 - b. Costs
 - c. Interest
2. On April 15, 2019, the trial Court entered judgment for the Defendant/Respondent to the effect that: there existed an initial agreement for leasing of land measuring two acres that had sugarcane at a consideration of Kshs 90,000/-; there was something sinister about the agreement dated July 9, 2012 for the Court to believe the same was signed by the Respondent under duress and that the contents of the agreement and lack of explanations from the respective Appellants on the background of the same agreement was reason enough to find that the agreement was entered into involuntarily by



the Respondent thus an illegality under law. Consequently, the learned trial magistrate dismissed the appellants' suit against the respondent with costs.

3. Being aggrieved by the said judgment, the Appellants filed this appeal. The grounds of appeal are:
 - a. That the learned trial magistrate erred in law and fact when he dismissed the Appellants case when there was evidence that the Respondent owed the Appellants the sum of Kshs 150,000/=.
 - b. That the learned trial magistrate erred in law and fact when he failed to appreciate that the Respondent had made part payment of a debt leaving the balance which was not paid.
 - c. That the learned trial magistrate erred in law and fact when he held that the Respondent signed an agreement dated 9th July 2012 which was made under duress as there was no such evidence before the Court.
 - d. That the learned trial magistrate failed to appreciate the fact that if indeed the agreement dated July 9, 2012 was an illegality then the Respondent ought to have filed a counter-claim for the refund of Kshs 50,000/= which had been paid by the Respondent.
 - e. That the learned trial magistrate failed to appreciate that each of the Appellants paid to the Respondent the sum of Kshs 45,000/= being lease consideration and which sum has not been paid to the Appellants given that the Appellants did not utilize the land.
 - f. That the learned trial magistrate failed to understand the evidence on record and that he was hell-bent on helping the Respondent in not paying the money.
 - g. That the learned trial magistrate erred in law in failing to appreciate the authorities cited by the Appellants.
 - h. That the findings of the learned trial Magistrate were against the weight of the available evidence.
4. The Appellants prayed for the appeal to be allowed and judgement be entered for the Appellants with costs here and in the lower Court.
5. The appeal was strenuously opposed by the Respondent through the submissions of her advocates, M/S Athung'a & Co Advocates.

Case for the Plaintiffs/ Appellants:

6. PW1, Eliakim Chimakile Mwasame, adopted his witness statement as his evidence in chief. The 1st Appellant told the Court that he was a teacher by profession and together with the 2nd Appellant they invested in the leasing of a piece of land from the Respondent a fellow teacher and that they agreed that the Respondent would compensate them Kshs 200,000/=. According to him the deal was for leasing land in the year 2011 and that the Respondent breached the same. After interventions from friends, the Respondent paid them on July 9, 2012 so as to terminate the agreement. He availed a copy of the agreement in Court as PEX1 and that the Respondent only paid them Kshs 50,000/= as per the bank statement produced in Court as PEX2, out of the agreed Kshs 200,000/=. He told the Court that the Respondent still owes them a balance of Kshs 150,000/=. He told the Court that the Respondent is lying that she signed the agreement under duress before a police officer and that no fraud was used to secure her signature. He told the Court that Kshs 50,000/= was not the only money that they were to receive from the Respondent and that the agreement was made in the Respondent's house in her presence, their presence, the presence of her husband and that of fellow teachers.



7. on cross-examination, he told the Court that he leased land from the Respondent which had sugarcane growing on it and that he was leasing the sugarcane also as one could not separate the two. According to him, they wrote an agreement and that he was aware that the sugarcane was contracted to West Kenya Sugar Company from the agreement. He also told the Court that he was aware that West Kenya was to deduct its expenses before paying a farmer and understood that both the 1st and 2nd Appellants could not harvest in their names. He told the Court that they incurred expenses harvesting the sugarcane and that the Respondent did the harvesting in open. The West Sugar Company did address the Respondent noting the total amount was Kshs 255,000/= and the total deductions was Kshs 168,000.70/= leaving her net payment at Kshs 86, 198.30/=. The net balance was to be divided into three with each person getting around Kshs 27,000/=. He told the Court that prior to July 9, 2012, the Respondent was arrested and that he was the complainant but could not recall if she was charged.
8. PW2, Peter Barasa Mwangi, adopted his witness statement as his evidence in Chief. He told the Court that he was a farmer and that together with the 1st Appellant they leased sugarcane from the Respondent in 2011. The price was duly paid and before they could harvest the sugarcane, the Respondent changed her mind and refused to lease the sugarcane. On July 9, 2012 they entered into an agreement where the Respondent consented to refund the sum of Kshs 200,000/= on or before July 14, 2012. The Respondent only deposited Kshs 50,000/= leaving a balance of Kshs 150,000/=.
9. On cross-examination, he told the court that he was aware the sugarcane was harvested by West Kenya Sugar Company and that the cane they lease had been contracted with West Kenya Sugar Company Ltd.

Case for the Defendant/Respondent

10. DW1, Jane Edel Nyongesa, told the Court that she was a teacher and knew both the Appellants as they were her neighbours. She adopted her recorded witness statement as her evidence in chief and further told the Court that she leased her sugarcane and they went into a written agreement. The agreement was that each person was to pay Kshs 45,000/= per acre and that she received Kshs 90,000/=. The cane was already planted and was contracted to West Kenya Sugar Company who planted it. The land was hers and that the company gave her farm inputs and that during the harvest, they were to deduct their expenses and the balance was to be hers. The Appellants did not have authority to harvest as she was to cut the already planted sugarcane and take it to the factory and give them money according to the value of cane. The cane was harvested and after taking it to West Kenya the whole cane amounted to Kshs 255,000/=. The company took Kshs 168,001/= and she was left with a balance of Kshs 86, 183/= . She availed a copy of the statement as D exhibit 1. She proceeded to hand the Plaintiffs Kshs 50,000/= through a bank deposit to the 1st Appellant. She availed the deposit slip copy as D exhibit 2 and she kept the 36,000/=. She told the Court that the Appellants' claim for Kshs 151,000/= is not justified and the alleged Kshs 200,000/= allegedly owed to them has no basis. She told the Court that she was arrested and placed in police cells and the agreement dated July 9, 2012 was done while in custody under duress. She was never arraigned in Court and was told that the signing of the document will earn her freedom. She was later charged in Kimilili vide CR 13356/12 where the charge sheet indicated that she owes each of them Kshs. 45,000/= and that no claim of Kshs 200,000/= was made. She produced in Court a copy of the charge sheet and witness statements as D exhibit 2(a) and (b). She stated that the criminal case was later dismissed and that the Appellant's were aware that the cane was contracted to West Kenya Sugar company ltd.
11. On cross-examination, she told the court that she signed the agreement dated July 9, 2012 in the OCS office and that she never complained anywhere about the same. She told the Court that she was to pay for the cane according to what was to come not as profit and that the 2nd agreement did not indicate



that the cane was contracted. The 1st ratoon was to be taken over by the Plaintiffs and that they were to cut up to 2nd ratoon but did not. She told the Court that she did not pay them as they expected profits that they did not get.

12. On re-examination, she told the Court that the initial agreement disclosed that the sugar cane was under West Kenya Sugar Company and that the Appellants were aware of the same. She stated the witnesses in the subsequent coerced agreement were all for the creditors, Appellants and none for her. She noted that agreement did not talk about sugarcane but just payment of a debt and that she never blocked them from coming for the 1st and 2nd ratoons.

Judgement of the trial Court

13. The trial Court found that there was a lease agreement in place between the Appellants and the Respondent for lease of two acres of land for a consideration of Kshs 90,000/=.
14. The Court found that the Appellants did not allude to the basis of the agreement entered on July 9, 2012 as they did not testify that the Respondent breached the primary agreement of lease in any way and how she breached it. No term of lease agreement was pointed out to this Court that led them to prepare a second agreement. The subsequent arrest of the Respondent and coercion to execute the agreement dated July 9, 2012 for her freedom made the Court believe that the Respondent was intimidated and was pressured to sign the said document. The same agreement failed to mention the genesis of the debt and given the timing, the Court was convinced that the silence of the Appellants in explaining the background of the agreement dated July 9, 2019 was enough reason to find the same had been obtained involuntarily and hence an illegality under the law.

Submissions

15. The Appellants submitted that the agreement dated July 9, 2019 was very clear and nowhere in the same agreement did it indicate that it was made before the OCS or any police officer. The same agreement was witnessed by civilians and it was made in the Respondent's house. The agreement was made on July 9, 2011 and the case was filed in Court in 2013 two years after the agreement. The Respondent did not complain anywhere about the same agreement neither did she file a case.
16. It was submitted that based on the evidence of the Appellants, they expected to make profits out of the lease as they incurred expenses in preparing the land only for the sugar cane to be harvested by the Respondent. The Respondent was to pay the Appellants as soon as she was settled. Counsel relied on the cases of *Amesnet Enterprises Limited & 2 others v Susan Wanjiru Wangend* Civil Appeal No E024 of 2020 at Nairobi and *Franklin Mbura Washe v Gordon Mwatat Mwaringa* Civil Appeal No 139 of 2018 at Mombasa.
17. Opposing the appeal, the Respondent filed her submissions contending that the appeal lacks merit and that the same should be dismissed with costs.
18. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & another v Associated Motor Boat Co Ltd* (1968) EA 123). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & another* (1988) KLR 348).



19. I have carefully perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.
20. I will henceforth deal with the issues as follows: -
- a. Whether the agreement dated July 9, 2012 was valid?
 - b. Whether the Respondent owes the Appellants any money?
 - c. Who is to bear the costs?
21. It was alleged that the agreement dated July 9, 2012 was only signed by the Respondent at the Police station which made it certain that it was the only pre-requisite condition for her release from police custody. The respondent told the Court that she was arrested and held without being presented to Court. The agreement, not aware of who drafted it, was placed before her for signing with the Appellants availing witnesses but she did not have any to witness the same. All this occurred at the police station where she was being held and that she was later granted a free bond.
22. The Appellants on the other hand claim that the same agreement was valid as it was executed in her house in the presence of other teachers and the husband of the Respondent. The Appellants did not venture into the background of the agreement and how this debt accrued but insisted that the Respondent did admit through her execution of the agreement that she owed them Kshs 200,000/= but has only paid Kshs 50,000/=
23. Section 108 of the *Evidence Act* states that:
- “ The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all is given on either side”.
24. The Appellants alleged that the agreement dated July 9, 2012 was valid but failed to avail sufficient evidence in exception of them, for instance the other independent witness who was present when they executed the agreement which is to the effect that the Respondent had admitted owing them Kshs 200,000/=. My perusal of the same agreement did not in any way stipulate how exactly did the debt accrue. The burden of proof was on the Appellants to prove that the same agreement was not made under duress or involuntarily. The Appellants ought to have called witnesses to validate the same but they failed to adduce probable evidence to convince the Court that the agreement made on July 9, 2012 was not made under duress considering the circumstances with the avoidance of the Appellants as to how the Respondent ended up consenting that she owed them Kshs 200,000/= yet the initial agreement indicated that the lease agreement was subject to payment of consideration of Kshs 90,000/= . I concur with the reasoning of the trial Court that the agreement dated July 9, 2012 was executed by the Respondent involuntarily and it is an illegality under law. I find the said agreement was not valid.
25. On the second issue, it was clear from the lease agreement that the sugarcane on the Respondent’s land was contracted to West Sugar Company Limited. The Respondent made it clear that payment was subject to the amount she would get from the sugar company and not profits. I still fail to comprehend how the Appellants knowing fully well West Sugar Company was contracted to harvest the same still proceeded to incur expenses on themselves on a product contracted and to be harvested by another company. The agreement was at a consideration of Kshs 90,000/= and was subject to the payments by West Sugar Company. It was also clear that if the same was not sufficient, the Appellants were allowed to make subsequent harvests in the subsequent ratoons. It is clear that the Respondent paid Kshs 50,000/= based on what she got from the sale. The Appellants have failed to establish before this Court the genesis of the debt amounting to Kshs 200,000/=. The criminal case instituted by



the Appellants clearly show that she was charged with obtaining Kshs 45,000/= respectively by false pretense of leasing two acres of planted sugarcane. The failure to explain the claimed debt by the Appellants is more reason for this Court to uphold the holding of the trial Court. It is only clear that the Respondent paid them according to the lease agreement. It is not the function/role of this Court to re-write a contract as parties are bound by the terms of their contract. A court cannot read into a contract a different intent and meaning other than what is plainly disclosed by the express terms of the contract. See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another*, Civil Appeal No 95 of 1999.

26. In Kisii Civil Appeal 72 of 2008 *Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deg') & others* [2011] eKLR the Court of Appeal considered instances where an illegal contract at formation may still be enforced. Referring to the decision in *Nathalal Raghavji Lakhani v HJ Vaitha & another* [1965] EA 452 the court observed as follows: -

“.... a plaintiff is not entitled to relief in a court of equity on the ground of illegality of his own conduct. In order to obtain relief, he must prove, not only that the transaction was illegal, but something more: he must prove either pressure or undue influence. If all he proves is an illegal agreement, he is not entitled to relief...”

It is clear that the initial agreement entered into by the parties in 2011 was that the appellants were to be paid once the West Kenya Sugar Company Ltd had harvested the sugar and deducted its expenses. Indeed, the respondent received a balance of about Kshs 86000/ and gave out Kshs 50,000/ to the appellants and who were to wait for the development of the subsequent ratoons. It is also true that the appellants did not incur any expenses on the crop before it was harvested by West Sugar Company Ltd and since the crop had been contracted to it then it was to deduct its expenses before giving the balance to the respondent. The company ranked first and it was unfair for the appellants to cajole the respondent to give what she did not have. The appellants seemed impatient in waiting to develop the subsequent ratoons and pinned down the respondent unfairly. On the basis of the earlier agreement, it is my view that the respondent did not owe the appellants money but she was to allow the appellants develop the subsequent ratoons from where they were to get their profits. This explains why the appellants rubbished that agreement and used the police to coerce the respondent to write the second agreement dated July 9, 2012 which has been found to have been illegally obtained. The appellants remedy lies in them developing the subsequent ratoons. It is telling that the appellants opted not to dwell on the initial agreement but concentrated on the one obtained unlawfully from the respondent and therein lies the appellants' bad faith in the whole transaction from which it would be unconscionable for them to benefit therefrom.

27. Consequently, for the reasons stated above, this Appeal is without merit. It is dismissed with costs.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF JANUARY, 2023.

D. KEMEI

JUDGE

In the presence of :

Miss Munialo for Appellants

No appearance for Athung'a for Respondent

Kizito Court Assistant

