



**Otieno v Omondi (Environment and Land Appeal E031 of 2022)  
[2023] KEELC 17110 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17110 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E031 OF 2022**

**AY KOROSS, J**

**APRIL 27, 2023**

**BETWEEN**

**MERCELYNE ACHIENG OTIENO ..... APPELLANT**

**AND**

**MILLICENT ADHIAMBO OMONDI ..... RESPONDENT**

*(Being an appeal from the judgment of Principal Magistrate Hon. J.P.  
Nandi given on 15/07/2021 in Bondo PM ELC Case Number E5 of 2020)*

**JUDGMENT**

**Background of the appeal**

1. By a plaint dated 1/10/2020, the respondent instituted suit against the appellant for breach of an agreement for sale over a portion of land measuring 31 meters by 17 meters or thereabouts that was to be hived off land parcel No North Sakwa/Nyawita/2096 ('suit property'). The agreement is dated 3/02/2020.
2. The appellant, who was acting in person, filed her defence dated 2/11/2020. She denied the allegations made in the plaint. She averred the agreement was cloaked with coercion and she did not have the legal capacity to sign the agreement. She was a stranger to the consideration alluded to in the agreement. There was no outstanding balance to speak of. She urged the trial court to dismiss the case.
3. In his judgment, the trial magistrate analysed the defences of non est factum and undue influence. After applying the facts of the case to these defences, the trial magistrate stated the doctrine was closely related to the defence of undue influence and found such defences had not been established. He found the appellant was bound by the terms of the agreement and entered judgment as prayed for in the respondent's plaint.



## Appeal to this court

4. Dissatisfied by the lower court judgment, the appellant preferred an appeal to this court. In her memorandum of appeal dated 1/08/2022 that was filed by her counsel Okello Adipo & Co. Advocates, she raised four grounds of appeal. She consolidated them into two grounds:-
  - a) That the honourable trial magistrate failed to consider the glaring evidence of coercion.
  - b) That the honourable trial magistrate erred in finding the respondent proved her case on a balance of probabilities.
5. The appellant sought for the appeal to be allowed with costs.

## Parties' submissions

6. As directed by the court, parties disposed of the appeal by way of written submissions.
7. Mr. Okello, counsel for the appellant, filed his written submissions dated 26/01/2023. On the 1<sup>st</sup> ground, counsel contended that once the ingredients of a contract had been met which entailed the intention of the parties, consideration and execution, then the existence of such a contract would have been proved except on a defence of fraud, misrepresentation, illegality or duress. Counsel placed reliance on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR where the Court of Appeal stated;

‘A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.’

He also cited *Kabansora Millers Ltd v New Salama Wholesalers & 2 others* [2002] eKLR where in a persuasive decision, the court stated: -

‘To execute a guarantee in order to secure the release of a person being held by the police for questioning on allegation of obtaining goods by deception and to forestall the arrest again of such a person and another for the same reason appears to me to be to compound a felony by the police. That cannot but be contrary to public policy.’

8. On the 2<sup>nd</sup> ground, counsel asserted the appellant’s testimony and those of her witnesses were not controverted and the respondent did not prove her case.
9. M/s Akinyi, counsel for the respondent, filed her written submissions dated 20/02/2023. Counsel identified 3 issues for determination; (a) whether the parties were bound by the terms of the agreement (b) whether the agreement was marred with fraud, coercion and undue influence and, (c) what about costs.
10. On the 1<sup>st</sup> and 2<sup>nd</sup> issues, counsel asserted the agreement spoke for itself. Counsel asserted the appellant’s submissions were broad and appeared she was alleging the respondent had unduly influenced her to execute the agreement. Counsel placed reliance on the Court of Appeal decision of *Nabro Properties*



*Limited v Sky Structures Limited (Z.R. Shah ) Southfork Investments Limited* [1986] eKLR where the court expressed itself as follows:-

“...coercion and /or before “duress” in their defences which term I would regard as included the equitable doctrine of undue influence, which is stated by Lindley L J in *All Card v Skinner*, [1887] 36 Ch D 145 at p 181 as follows: -

“The doctrine relied upon by the appellant is the doctrine of undue influence expounded in *Huguenin v Baseley* and other cases of that class. These cases may be subdivided into two groups, which, however, often overlap. First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor...The second group consists of cases in which the position of the donor to the donee has been such that it has been duty of the donee to advise the donor, or even to manage his property for him.’

11. Counsel contended that contrary to the provisions of Order 2 Rule 10 (1) of the *Civil Procedure Rules*, the appellant did not specifically plead undue influence or fraud and that in any case, this was not proved. Further, counsel asserted the trial magistrate adequately addressed himself on the issue of coercion.

#### **Analysis and determination**

12. As a first appeal, I am enjoined to revisit the evidence that was before the lower court afresh, analyse it, evaluate it and arrive at my own independent conclusion but always bearing in mind that the trial magistrate had the benefit of seeing the witnesses, hearing them, observing their demeanour and I shall give allowance for that – see the case of *Selle v Associated Motor Boat Company Ltd*, [1968] EA 123. I will proceed to address the two grounds of appeal simultaneously.

#### **a) That the honourable trial magistrate failed to consider the glaring evidence of coercion.**

13. Order 2 Rule 10 (1)(a) of the *Civil Procedure Rules* provides that pleadings on misrepresentation, fraud, breach of trust, wilful default or undue influence must be specifically pleaded.
14. Notwithstanding the appellant’s defence is bereft of these specific words of misrepresentation, fraud, breach of trust, wilful default or undue influence, the appellant who was acting in person pleaded in paragraph 3 (I) of her defence ‘the defendant was compelled to sign as a condition to release the items of Madam Jackline Achieng Obonyo of which the plaintiff through her agents took items from her house having been my loan guarantor with the plaintiff organization -Millicent Commercial services.’
15. The *Black’s Law Dictionary*, 11<sup>th</sup> edition, has defined the word ‘compel’ as follows: -  
‘To cause or bring about by force, threats, or overwhelming pressure.’
16. Bearing this definition in mind and that of *Nabro Properties Limited v Sky Structures Limited* (*supra*), I am satisfied the appellant’s pleadings pleaded the defense of coercion. It falls within the category of defences to a contract which are coercion, undue influence, fraud, misrepresentation and non est factum.
17. Turning to the impugned judgment, I respectfully disagree with the appellant that the trial magistrate did not consider her claim of coercion. The trial magistrate applied Lindley L J in *All Card v Skinner*,



[1887] 36 Ch D 145 that was cited with approval in *Nabro Properties Limited v Sky Structures Limited* (*supra*). At paragraphs 25 and 27 of his judgment, he stated as follows: -

‘...the defendant alleged she was forced to sign the agreement which term I regard as included the term undue influence...in our instant case the defendant does tell the court the force that was (sic) in forcing her to sign the said agreement...In conclusion I find that the defendant has not been able to prove that she was forced to sign the agreement.’

18. The standard of proof in such defences are higher than a balance of probabilities but below reasonable doubt. This was held so in a recent Court of Appeal decision of *Patel & another v MJC & another* (*Suing as the guardians of PIP*) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR) (4 February 2022) (Judgment) which stated:-

‘It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has to specifically proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Prove has to be higher than on the balance of probabilities but slightly lower than prove beyond reasonable doubt.’

19. From the evidence on record, the appellant merely asserted that she was forced to sign the agreement without leading specific cogent evidence on the nature of the force. In the absence of proving such evidence, her claim crumbled. This ground of appeal fails.

**b) That the honourable trial magistrate erred in finding the respondent proved her case on a balance of probabilities.**

20. Having admitted that she signed the agreement and her defence of coercion having collapsed, the appellant was bound to comply with the terms of the agreement. See *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 that was cited with approval in the persuasive decision of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling).
21. The terms of the agreement were clear and as rightfully posited by the appellant’s counsel, the court could not rewrite the contract for the parties. I find the trial magistrate did not err when he asserted the parties were bound by their agreement. This ground similarly fails.
22. It is my ultimate finding that the trial magistrate exercised his discretion properly and arrived at a proper determination and this court finds no reason to upset it.
23. For the reasons stated above, the upshot is that the appellant’s appeal is not merited and accordingly, the appeal herein is disallowed and dismissed entirely and the judgment of the trial court is upheld. I award costs of the appeal to the respondent.

**DELIVERED AND DATED AT SIAYA THIS 27<sup>TH</sup> DAY OF APRIL 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**27/04/2023**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Okello for the appellant

Ms. Akinyi for the respondent



Court assistant: Ishmael Orwa

