Kubai v Ochwangi (Civil Suit E018 of 2020)
[2023] KEHC 27254 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27254 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E018 OF 2020

DKN MAGARE, J

DECEMBER 15, 2023

BETWEEN

JOY KENDI KUBAI ..... PLAINTIFF

AND

HELLEN OCHWANGI ..... DEFENDANT

JUDGMENT

1. In the Plaint dated 10th November 2020, the Plaintiff pleaded among others that:
    i. On diverse dates between September 2016 and March 2020, the Defendant requested the Plaintiff to lend her various sums of money to finance her business operations.
    ii. On 18th November 2019, the Defendant acknowledged by email that she was in arrears of Kshs. 13,224,86.
    iii. The Defendant undertook to repay Kshs. 5,000,000/- in November 2019, Kshs. 5,000,000/- in December 2019 and the balance in January 2020.
    iv. The Defendant however failed to honour the undertaking.
2. The Plaintiff therefore prayed for reliefs as follows:
    a. Kshs. 20,330,682.75
    b. Interest at court rates from November 2020.
    c. Cost
3. The Defendant filed her Statement of Defence dated 7th December 2020 in which it substantially denied the claim.

Evidence

4. At the hearing, the Plaintiff adopted her witness Statement and Bundle of Documents dated 10th November 2020.

5. It was her case that the Defendant brought an LPO and requested Kshs. 2,000,000/- which was formalized vide a Personal Loan Agreement dated 23rd September 2016 and signed by the Defendant and the Plaintiff's husband, one Eric Shigoli. They stated that the interest that was agreed upon was 20% per month.

6. It was also her confirmed case that some of the purported agreements filed in Court were not signed.

7. The witness testified that further in February 2017, the Defendant requested for Kshs. 2,000,000/= to finance an LPO that was awarded to her company, Pambazuko Investment Limited whose terms were as in the case of the agreement dated 23rd September 2016.

8. The Plaintiff further testified that she subsequently lent the Defendant a further Kshs. 380,000/- in February 2017, Kshs. 2,547,159/- in October 2017, Kshs. 9,180,000/- in June 2019 and Kshs. 1,000,000/- on 6th March 2020.

9. It was her case that due to the amiable relationship, the advancements would be done despite the owing arrears, in good faith, and on 18th November 2019, the Defendant acknowledged owing Kshs. 13,224,886 which she would settle in 3 installments.

10. However, it was her case that the Defendant had since declined to pay the arrears hence this suit. On her part, the Defendant relied on her witness statement and Bundle of Documents dated 7th December 2020 and testified that the Plaintiff never explained the emails to her.

11. It was her case that the agreements were unconscionable and were vitiated by economic duress and undue influence on the part of the Plaintiff. She further testified that she had since paid Kshs. 3,000,000/= and that the alleged agreements had exorbitant interest rates which were illegal. It was her testimony that she had paid more than she owed. That she was coerced to pay.

12. DW2, one Maryanne Mwikali also testified for the Defendant. She stated that she was not a beneficiary. That she knew the Plaintiff as doing shylock business.

Submissions

13. The Plaintiff reiterated the averments in its pleadings and submitted that the Defendant had breached the contact by failing to pay the agreed total loaned amount.

Analysis

14. The Court has reviewed and considered the pleadings, testimonies, and evidence produced by parties together with the submissions and authorities in support and opposition to their respective cases.

15. The main issue for determination, in this case, is whether the Defendant breached the contract to entitle the Plaintiff to the damages pleaded in the Plaint.

16. In this case, the Plaintiff's case is that the Defendant acknowledged that she was in arrears of Kshs. 13,224,886 which she promised to pay and settle by way of installments. I note, however, that the Plaintiff seeks to recover Kshs. 20,330,682.75.

17. On the part of the 1st Defendant, it is her case that she had fully paid the Plaintiff Kshs. 3,000,000/=. I understand her to postulate that the loan was illegal and based on unconscionable terms and should be so declared.

18. I have perused the various agreements. I note that indeed the Plaintiff's Bundle of Documents contained agreements that were not executed by either party. The only agreements produced in court that were executed by both parties are the ones dated 14th February 2017 for the loan amount of Kshs. 2,000,000/- repayable with Kshs. 400,000/- interest at the rate of 20% and a second one dated 5th October 2017 for Kshs. 2,547,159.00 repayable with Kshs. 509,431.80 at interest rate of 20%.

19. The Defendant issued an email dated 18th November 2023 acknowledging a debt of Kshs. 13,224,886 and stipulating a repayment plan of Kshs. 5,000,000/-, Kshs. 5,000,000/- for November and December and then the balance in January.

20. I suppose this was January 2020. There is also a corresponding Acknowledgment of Debt dated 20th November 2019 rebounding the terms of the stated email. It is signed by both parties and witnessed by an Advocate.

21. In its Defense, the Defendant largely employed economic duress as a result of undue influence and asserted that the Plaintiff took advantage of her need for the funds to nurture her business. The concept of economic duress was recently considered in depth in *Medscheme Holdings (Pty) Limited & Another v Bhamjee* SCA Case 214/04 (judgment of Nugent JA handed down on 27 May 200 which explained it as follows: -

> " in general terms, an undertaking that is extracted by an unlawful or unconscionable threat of some considerable harm, is voidable. Economic duress (or business compulsion) may broadly be described as imposition, oppression or taking undue advantage of the business or financial stress or extreme necessity or weakness of another. To put it differently, economic duress is constituted by illegitimate commercial pressure exerted on a party to a contract, which induces him to enter into the contract, and which amounts to a coercion of the will which vitiates his consent.

22. Similarly, Mr. Justice Mativo (as he then was) in the case 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) set out vividly the applicability of the doctrine of duress and undue influence as vitiating factor to contacts. He propounded himself as follows:

> " Unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and an improvident transaction. In cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both.
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> A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed. Unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances, for example, almost any agreement would be an improvement over the status quo. In those circumstances, the emphasis in assessing improvidence ought to have been whether the stronger party had been unduly enriched.

That could occur when the price of goods or services departed significantly from the usual market price.

Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable to adequately protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they had equal bargaining power.

An undertaking that was extracted by an unlawful or unconscionable threat of some considerable harm, was voidable. Economic duress (or business compulsion) could broadly be described as an imposition, oppression, or taking undue advantage of the business or financial stress or extreme necessity or weakness of another. Economic duress was constituted by illegitimate commercial pressure exerted on a party to a contract, which induced him to enter into the contract, and which amounted to the coercion of the will which vitiated his consent.

The party relying on duress had to prove a threat of considerable evil to the person concerned; that the fear was reasonable; that the threat was of an imminent or inevitable evil and induced fear; that the threat or intimidation was unlawful or contra bonos mores; and that the contract was concluded as a result of the duress. On the other hand, a party wishing to rely on undue influence had to prove that the other party had influence over him or her; the influence weakened his or her resistance; the other party used his influence unscrupulously towards the innocent party; the transaction which was concluded was prejudicial; and exercising a normal and free will, the innocent party would not have entered into the jural act or transaction. The court should have regard to the person complaining of the duress and the circumstances in which he found himself at the time and then decide, in the light of all the relevant factors, whether it was reasonable for the person concerned to have suffered fear and to have succumbed.

According to the principle of, perceptive restraint a court had to exercise perceptive restraint when approaching the task of invalidating, or refusing to enforce, contractual terms. A court would use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases. Contracts, freely and voluntarily entered into, should be honoured.

23. Based on the established principles of unconscionability as a vitiating factor to the canonical free will of contracts, the Defendant's invitation to this court to find that the Agreement was unconscionable is not supported by evidence. None of the considerations illuminated in the above jurisprudence has been alleged or proved. No evidence was submitted to demonstrate imbalance of bargaining power. Nothing was said of a compelling business or pressure say deriving from a collapsing business enterprise or other form of economic pressure that would have left the Defendant vulnerable and deserving the protection of this court.

24. I also proceed to make projections on the unsigned contracts. Even where one party has not signed, courts tend to invalidate such contract. See *Castro Momanyi Ondieki v Kenya Methodist University* [2021] eKLR where the court stated as follows: The claimant also exhibited another unsigned contract dated 21/11/2016 and 45 hours to reach comparative politics. Due to lack of signature by COD on behalf of the respondent, I would disregard this contract.

25. Further, there is no performance of the unsigned contract that was proved in evidence as to infer an implied contract on the part of the Defendant. I say so because Section 3(1) *Law of Contract Act* does not make all contracts void and unenforceable if they are not reduced into writing.

26. On the question of interest of 20% per month, whereas it is not for the court to rewrite a contract for the parties, where a contract between parties is exploitative, courts have not been shy to interfere as held by the Court of Appeal in the case of *National Bank of Kenya Ltd v Pipeplastic Sankolit (K)Ltd* Civil Appeal No.95 of 1999. The court held as follows:

> " a court of law cannot rewrite a contract with regard to interest as parties are bound by the terms of their contract. Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case."

27. I hold the view that whereas the parties are bound by their agreements and terms thereto, such terms should apply in accordance with the law and where it is determined to be unfair, unconscionable and oppressive, we should not hesitate to re-state the law so as to protect the interest of the parties and by extension advance the public interest.

28. Consequently, I note that the Plaintiff charged interest was 20%. It is not stated in the agreement whether it was per annum or per month. The Plaintiff testified that it was intended to be charged per month because the loan was payable in 30 days. On the face of it, this would translate to 240% per annum. Without doubt, this was excessive and unconscionable as it is uncertain the nature of the business the Defendant would have engaged in to raise such profits as to meet the interest.

29. I therefore find that the interest chargeable on the face of it was without clarity on time limit upon the determination and was unconscionable in the circumstances. This Court thus will interfere even where parties have agreed on a rate of interest as long as it is shown that the rate is illegal, unconscionable or oppressive as in this case.

30. I now proceed to establish whether the Plaintiff is entitled to the reliefs sought. The Plaintiff prayed for Kshs. 20,330,682. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham *Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177), where he that:

> [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.
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> in *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

31. Further, in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party

the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

32. Further, in *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

33. I am unable to discern from the facts and evidence in court how Kshs. 20,330,682.75 that the Plaintiff pleaded was arrived at. A party must plead and proof pecuniary damages. The Plaintiff also prayed for the amount without particularizing how it arose. The evidence tendered was inconsistent and highly obscured by unsigned agreements which would not be relied upon.

34. The parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
> >
> > ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

35. Similarly, in the case of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by *Sir Jack Jacob entitled*

"The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

36. In respect to the essence of pleadings, the Supreme Court of Kenya in its Ruling on *inter alia* scrutiny in the case of *Raila Amolo Odinga & Another v IEBC & 2 others* (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings..."

37. Therefore, it is trite law that the court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in *Peter Gregory Obi & another v Senator Bola Ahmed Tinubu &INEC & 3 others* consolidated with petitions no. 4 and 5 both of 2023, stated as doth: -

> " In *Belgore v Ahmed* (2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable (sic), omnibus and general in terms. The Apex court specifically held as follows: -
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> > "Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent."

38. In the circumstances on the balance of probabilities, the Plaintiff failed to prove her case to the required standard.

Determination

39. The upshot is that I dismiss the suit with costs.

40. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF DECEMBER, 2023. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Mugambi for Mrs Kiptoo for the Plaintiff

Chege Kamau for Defendant