REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 31 OF 2014

JOEL PHENEHAS NYAGA

JOSEPH NYAGA NZAU (suing as the Chairperson and

Treasurer of Kemagui Electrification Self Help group).....APPELLANTS

VERSUS

ALOYSIUS NYAGA KANYUA.....1ST RESPONDENT

JULIA GICUKU NYAGA.....2ND RESPONDENT

(Being an Appeal from the whole of the judgment of Senior Resident Magistrate, Hon. J.P Nandi dated 18th September 2014 and the consequential order in Civil Suit Number 51 of 2010)

J U D G M E N T

A. Introduction

1. The appellant herein instituted this appeal vide a memorandum of appeal dated 13.10.2014 and raised five (5) grounds which may be summarized thus: -

> ***1)*** *That the learned magistrate erred in law by failing to consider the pleadings vis-a-viz the evidence thus arriving at the wrong judgment.*
>
> ***2)*** *That the learned trial magistrate erred in law by applying the wrong principles of law.*

2. The appellant urged this court to find in his favour and set aside the judgment of the Senior Resident Magistrate, Runyenjes.

3. The parties agreed to have the appeal canvassed by way of written submissions.

B. Submissions by the Appellant

4. In their submissions, the appellant submitted that the trial court erred and misdirected itself when it found that the agreement between the parties dated 18/09/2013 was null and void for the reasons that it was executed at Runyenjes Police Station notwithstanding that a police station is a public venue. Further that the Respondents did not offer tangible evidence to lead to the conclusion that there was coercion, intimidation, duress and/ or undue influence at the time of execution of the agreement and further that there was no evidence that the agreement was signed in court. Reliance was made on **Pao & Others –vs- Lau Yiu & Another (1979) 3 ALL ER 65**. It was further submitted that the trial court failed to consider the Appellant's evidence to wit the agreements and the withdrawal voucher and which exhibits were sufficient evidence.

5. The Respondents did not file their written submissions within the timeframes given to them when they sought for leave to do so and as such the court ought to disregard them.

C. Re-evaluation of evidence

6. The role of the first appellate court in appeal as was stated in **Selle & another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123** is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof and taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.

Further this court ought not to interfere with the exercise of the discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion (See **Ephantus Mwangi and Another –vs- Duncan Mwangi Wambugu (1982) – 88) IKAR 278).**

7. However, in the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court. What matters in the analysis is the substance and not its length. I am guided by the Supreme Court of Uganda's decision in **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634** and **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR).**

8. The facts of the case before the trial court was that the appellants sought orders of performance of an agreement between the appellant and the 2nd respondent in which the 2nd respondent undertook to pay a sum of Kshs.72,000/= on behalf of the 1st respondent. When the matter came for hearing, the appellants produced in the trial court a withdrawal voucher of Kshs. 72,000/= dated 8th April 2008 from Embu Farmers Sacco Branch showing that the said amount was withdrawn for refund of Kshs. 72,000/= in two installments and the demand letter in support of their case. The evidence was that the 1st respondent disappeared with the money after the withdrawal. The respondent was arrested and the 2nd respondent secured his release upon signing an agreement to refund the case to the society. On the strength of the agreement, the 1st respondent was released from the police cells.

9. The respondents opposed the claim and pleaded that if there was any agreement then the same was obtained through misrepresentation and/or undue influence and as such incapable of enforcement. The particulars of misrepresentation and/or undue influence were pleaded in their defense and that the 1st respondent never consented to the 2nd respondent signing the agreement. The 1st respondent (DW1) and the 2nd respondent (DW2) gave evidence to that effect and so submitted on appeal. The respondents further called DW3 as a witness in support of their case.

D. Issues for determination

10. I have considered and analyzed the pleadings and the evidence tendered before the trial court by the parties to this appeal and the submissions in this appeal. In my view the main issue for determination is the appellant has established the grounds of appeal to justify allowing the appeal on its merits.

E. Determination of the issue

11. An agreement will be deemed duly formed and binding where consideration exists and has been as accepted. Where therefore parties reach an agreement on all the terms of contract they regard or the law requires as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract; the intention to create legal obligations and consideration. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain. The court will not seek re-write the contract for the parties as was held in the case of **National Bank of Kenya Ltd *v* Pipe Plastic Samkolit (K) Ltd & Another [2002] EA 503 and Margaret Njeri Muiruri -V- Bank of Baroda (Kenya) Limited (2014) eKLR).**

12. In **RTS Flexible Systems Ltd *v* Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14** the Supreme Court of the United Kingdom held as follows: -

> ***"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.***

13. When a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not (see *L'Estrange v. F Graucob Ltd [1934] 2 KB 394*). A person who signs a lawful contractual document may not dispute his or her agreement to the terms which it contains, unless he or she can establish one of five defences; fraud, misrepresentation, duress, undue influence or *non est factum*.

14. From the analysis of the memorandum of appeal and the submissions, it is clear that the appellant's appeal is based on allegations of failure by the trial court to consider the agreement between the appellant and the 2nd respondent and holding that the same was executed under misrepresentation and/or undue influence and further holding that the same was unenforceable. As such, it is not in dispute that there was an agreement between the appellant and the 2nd respondent. The 2nd respondent did not dispute the signature on the said agreement or signing of the same.

15. The agreement in issue was executed by the 2nd Respondent herein and Joel Phenehas Nyaga on behalf of Kegamui Electrification Self-help Group. I have perused the said agreement and to me, the terms herein do not appear ambiguous as claimed. The terms are mere undertaking by the 2nd Respondent to refund the money which was withdrawn by the treasurer-the 1st Respondent herein. The agreement is well executed and the signatures were never denied.

16. It is trite law that once a signature is admitted the plaintiff has discharged his or her burden and the burden is then on the Defendant to prove fraud, misrepresentation, illegality, duress or whatever defence he or she might have. This is in consonance with the burden of proof under **Section 107 of the Evidence Act** which provides that: -

"Whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist. When a person is required to prove the existence of any fact it is said that the burden of proof lies on that person."

17. The question which needs to be answered therefore is whether the respondents were able to prove the same.

18. "*Undue influence"* is described in Black's Law Dictionary as:

"persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party."

19. In **All Card v Skinner, [1887] 36 Ch D 145** which decision was quoted with approval by the Court of Appeal in In **Nabro Properties Limited Vs Sky Structures Limited (Z.R. Shah) Southfork Investments Limited)[1986] eKLR**, Lindley L J held that undue influence can be classified into two groups and the first group being 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.

20. 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 (thus a person abusing his position). These two classes were discussed in **Bank of Credit and Commerce International SA v. Aboody [1992] 4 All ER 955,** the court classified the doctrine of undue influence into two types: actual and presumed.

21. In her testimony, the 2nd respondent (DW2) testified that she committed to pay the money because her husband (DW1) was in custody and had been diagnosed with malaria and further was supposed to take school children to Mombasa. That she asked the police to release him but they refused and that's when she entered into the agreement and that she signed it fearing for the 1st defendant who was sick and was supposed to go to Mombasa. Further that she was not allowed to talk to 1st defendant when he was in custody or even at the time of signing the agreement.

22. From the evidence on record, the 2nd respondent was arrested for stealing Kshs. 72,000/= and had been at Runyenjes police station overnight when his wife the 1st respondent approached PW1 and DW2 and offered to pay the money stolen by her husband in two installments. After the discussion the parties agreed to reduce the agreement in writing and they all signed. The Runyenjes police officers were never involved in the agreement affair except perhaps to release the 2nd respondent after the parties had reconciled. The police station was used as the place where the parties executed the agreement. There is no evidence that the agreement was initiated by the police or by the appellants.

23. I have perused the evidence of the 1st respondent and noted that she admits initiating the process of entering into and signing the agreement by calling the other parties up. If the 1st respondent did not call up the 1st appellant and give an offer, the matter would have been left in the hands of the police who would have preferred charges against the 2nd respondent in the event that investigations revealed evidence. In her evidence, the 1st respondent did not allege undue influence or coercion on part of the 1st appellant or the police.

24. I have perused the pleadings and proceedings and note that the respondents were represented by an advocate. Although undue influence was pleaded in the defence none of the respondents alleged coercion by any person. During cross-examination, the respondents did not ask any question related to coercion or undue influence. If it was true that the 1st respondent executed the agreement through coercion, this subject would have formed a good part of cross-examination of the 1st appellant.

25. The question is where the trial magistrate got this thing of coercion and undue influence while the parties adduced no evidence to that effect. He relied on the case of **Kabansora Millers Vs New Salama Wholesalers & 2 Others 2001 1 KLR 451** where a director of a company had executed a guarantee under coercion to secure his release. the court held that such an act and offer of a guarantee was contrary to public policy and was void.

26. In the case before me, the 2nd respondent was locked in at the police station and was not a party to the agreement which only involved and bound the 1st respondent and the 1st appellant. The 2nd respondent was in custody for allegedly stealing money from his principal. The Kabansora case relied on by the respondent was a civil case involving a company where one director without the authority of the other directors secured his release by executing a guarantee under coercion. As I have said earlier, there is no evidence of coercion in this case and the facts are not similar with the Kabansora case. The magistrate relied on a civil case and applied it to a criminal case which in my view was incorrect.

27. It is my finding that the learned magistrate misdirected himself in law and facts in finding that there was coercion or undue influence in execution of the agreement. This finding was not supported by any evidence.

28. The 1st appellant gave evidence that he was the chairman of Kamagui Electrification Self-help group and that the committee which he was a member in his capacity as chairman resolved to withdraw Kshs. 72,000/= from the group account whereas the chairman, treasurer and secretary were mandated as signatories. The withdrawal form was filled in and signed by the three officials. The 2nd respondent entered the banking hall and withdrew the case and did not hand it over to the office for payment of members. He disappeared with it and left the 1st appellant waiting for him in the car outside. He also testified that the 2nd respondent was allowed time to refund the money but failed to do so. The matter was reported to Runyenjes police station and the 2nd respondent was arrested.

29. An agreement between two officials of the complainant including the 1st appellant and the 1st respondent was executed on repayment of the case through two installments. The withdraw voucher shows that Kshs. 72,000/= was withdrawn from account No. 22-181991-11-01 in the name of Kemagui Electrification Self-help Group. The agreement executed by the 1st appellant, the 1st respondent and one Hesbon Ndwiga Kinyua DW2 the secretary of the group showing their identity card numbers was produced in evidence.

30. The respondents did not controvert the existence or the authenticity of the agreement, and the withdrawal voucher. The defence of the 2nd respondent was that he gave the money to the chairman of the group. Except that allegation no evidence was adduced to that effect. The other defence which this court has overruled for lack of evidence was that that of coercion or undue influence.

31. The agreement which is not denied is a contract that binds the parties. The 1st respondent who executed the agreement and the 2nd respondent who does not deny effecting the withdraw of the cash Kshs. 72,000/= that was not handed over to Kemagui Electrification Self-help Group's authorized representatives are both liable to make good the loss. The 2nd respondent was the treasurer of the group and bears a great responsibility in the safe keeping and proper use of the group funds.

32. I find that the evidence of the 1st appellant proved his case on the balance of probabilities against the respondents. I hereby enter judgment in favour of the appellants against the respondents jointly and severally for Kshs. 72,000/= together with interests from the time of filing the suit.

33. The costs of this appeal and those of the court below will be borne by the respondents.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF NOVEMBER, 2020.

F. MUCHEMI

JUDGE

In the presence of: -