REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.343 OF 2011

LAWRENCE C. NJERU..PLAINTIFF

VERSUS

HON. DANSON BUYA MUNGATANA................DEFENDANT

JUDGMENT

The Plaintiff herein filed this suit on the 23rd June, 2011 claiming a sum of US$ 193,000.00 together with interest thereon at 15%p.a. with effect from 26th April, 2011 until payment in full plus the costs of the suit.

In the plaint, it is pleaded that, by an oral agreement made on or about 20th April, 2011, the plaintiff loaned the Defendant the sum of US$ 193,000 which the Defendant agreed to repay on or before 26th April 2011 but which he failed to, despite several verbal requests from the plaintiff.

The plaintiff avers that he has lost the money and the profit he would have made on the same and has therefore suffered loss and damages which he has claimed as set out in paragraph 1 hereinabove.

The defendant filed a statement of Defence on the 26th September 2011 in which he avers that the allegations leveled by the plaintiff against him are false and baseless. In the alternative and without prejudice, the defendant avers that, if there was any agreement between the parties herein, oral or otherwise, the same was tainted with mistake and misrepresentation of fundamental facts that were to be agreed on by the parties. The Defendant stated that the alleged agreement and/or the terms thereof are against public policy, unconscionable and unforceable and that any undertaking by the Defendant to settle the debt was made under duress and that the parties were not *ad idem*.

Further, in the alternative and without prejudice, the Defendant averred that, if any monies were ever owed to the plaintiff as alleged or at all, but which is denied, the same has been paid back in full and final settlement. The Defendant therefore denies being indebted to the plaintiff and avers that the demand by the plaintiff of interest of the alleged debt at the rate of 15% is illegal and cannot lie and has asked the court to dismiss the plaintiff's suit with costs.

The plaintiff's attempt to have the Defendant's defence struck out by the court vide an application dated the 9th November 2011 failed when the court dismissed the said Application and therefore, the matter was substantively heard.

At the hearing, both the plaintiff and the Defendant testified as the only witnesses in support of their respective cases but none of them called any witnesses. They both adopted their witness statements in addition to the evidence that they tendered in court.

In his evidence, the plaintiff testified that, by an oral agreement made on or about the 20th day of April, 2011, he loaned the Defendant the sum of US$ 193,000/- which the defendant agreed to repay on or before the 26th April, 2011. That he gave him the money in cash and he referred to a letter dated the 20th day of April, 2011 in which the Defendant acknowledged the debt and undertook in writing to repay the same on or before the 26th April, 2011. He further stated that the defendant failed to repay the money despite several verbal requests by him and as a consequence of that failure, the plaintiff has lost the money and the profit that he would have made on the same and he has therefore suffered loss and damages.

The Defendant on his part testified that the plaintiff was introduced to him by a certain Mr. Njuguna Thiaka after which both of them ventured into an investment opportunity. That though the said Mr. Njuguna also knew of the investment he was not in a position to invest as he did not have the money at the material time. He stated that though the plaintiff was quick to declare his reserve monies for his business as a coffee dealer and how he was desirous to be part of the venture and upon enquiring on the returns, the Defendant advised him to expect about US$193,000 out of an investment of US$ 96,500 to which the plaintiff agreed. He told him that the investors would put the money in

the oil market for a period of 6 months after which both the plaintiff and the Defendant would get back their money with profit.

It was his evidence that he took the money to the international investors and it did not even get to his account as they wanted to get the returns the soonest possible. He told the court that the agreement was not reduced into writing because there was a lot of trust in the whole transaction and both of them agreed to put their money together.

It was his further evidence that soon after the investment was made, he received a call from Mr. Njuguna Thiaka who spoke on behalf of the plaintiff and informed him that the plaintiff was apprehensive as the contract was by word of mouth and that, no assurances were in writing. That the plaintiff further informed him the monies he had invested were not his, but was from the coffee dealing company in which he was a Director and that his co-directors were agitated by his actions and by lack of written assurance of return in the investment. It was his evidence that the plaintiff requested him to write for him a letter so that his father and other business partners do not consider him a fraud and following that request, he wrote the letter dated 20th April 2011. He averred that the letter was written under duress from the plaintiff and that it was not meant to be used in evidence. He stated that he signed the letter to protect the plaintiff from his business partners and family members.

After considering the pleadings and laying out the evidence adduced by both parties as hereinabove, I now proceed to set out the issues for determination, which in my view are as follows:-

1. Whether there was an agreement between the plaintiff and the Defendant for a loan of US$ 193,000.

2. Whether the Defendant is indebted to the plaintiff in the sum of US$ 193,000/-.

3. Whether the plaintiff is entitled to the reliefs sought in the plaint.

4. Who is to bear the costs of the suit.

The court has considered the evidence on record and the submissions by the respective parties, together with the authorities relied on. I now proceed to consider the issues as set out hereinabove:

Whether there was an agreement between the plaintiff and the Defendant for a loan of US$ 193,000.

In his plaint dated the 6th June, 2011 the plaintiff has alluded to an oral agreement made on or about the 20th April, 2011 and in support of the same, he relied on a letter dated the 26th April, 2011 from the Defendant as a written acknowledgment of the debt and a promise to repay the same. The letter was made on the official letter head of the Defendant and it's signed by himself a fact which he did not also deny. Infact, he admitted having signed the letter though he alleges that he signed it under duress. The Defendant on the other hand denied that there was an oral agreement between them but in the alternative and without prejudice, pleaded that if there was any agreement, oral or otherwise, the same was tainted with mistake and misrepresentation of fundamental facts that were to be agreed on, by the parties.

What then is a contract?

According to the Black's Law Dictionary, 8th Edition, a contract is defined as:

> ***"An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable, at law"***

The legal dictionary define a contract as:-

> ***"An agreement with specific terms between two or more persons or entities in which there is a promise to do something, in return for a valuable benefit know as consideration."***

Drawing from the above definition, it is clear that a contract comprises a specific agreement that is not only binding upon the parties but also enforceable.

And what are the Elements required for an Agreement to give rise to a contract?

(i) A valid offer must be made and which offer should be validly accepted. The offer must be communicated to the offeror and the terms of the offer must be certain. In the same manner, the acceptance must be communicated to the offeror; and this can occur in any form; whether in writing, words or conduct. In addition the acceptance must be unconditional.

(ii) There must be a consideration, in that, both parties are bound to give "something" to each other such as an act, forbearance, or a return promise bargained for and received by a promisor from a promise that which motivates a person to do something. This term has been severally defined for example in the case of **Dunlop Vs. Selfridge (1915) URHL** wherein the court stated the following in relation to consideration:-

> **"An act of forbearance or the promise thereof is the price for which the promise of the other is brought and the promise thus given for value is enforceable"**

(iii) There must also exist an intention by the parties to be legally bound by the terms of the Agreement. According to **Chris Turner in "Contract Law" (2010),** an arrangement entered into, in the context of business relations is intended to be legally binding unless otherwise proven.

In the **Modern Law of contract, 9th Edition by Richard Stone**, the question of the intention of the parties is to be inferred from their language and the circumstances.

(iv) In certain instances, there ought to be formalities in the sense that the agreement ought to be in writing.

(v) Parties must have the legal capacity to contract in terms of age and the soundness of the mind.

From the above analysis, it is clear that for an Agreement to be binding, it does not have to be in a written form but the intention of the parties can be inferred from their language and the circumstances. In the case of **RTS Flexible Systems Limited Vs. Molkerei Alois Muller GmbH & Co. KG (2010) UKSC 14,** the Supreme Court of the United Kingdom held that; whether or not there was binding contract in place could be established by considering the communication by words and by conduct between the parties and assessing whether it led to the objective conclusion that the parties intended to create legal relations and whether the parties had agreed on all terms essential to form a contract.

How does the court then determine the intention of the parties? In this regard the court in the case of **Storer Vs. Manchester City Council (1974) 1 W.L.R. 1403** had this to say: -

"In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: I did not intend to contract" if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough".

So what does the conduct of the parties in this matter indicate?

The evidence adduced by the plaintiff clearly demonstrates that there was a contract between him and the Defendant which was oral. In paragraph 5 of the defence, the Defendant has pleaded in the alternative and without prejudice that, if there was any agreement between the parties, oral or otherwise, the same was tainted with mistake and misrepresentation of fundamental facts that were to be agreed on by the parties and that the defendant is therefore entitled to set aside such an agreement and does hereby reserve the right to do so." The defendant admitted that there was an oral agreement which parties did not reduce into writing as the transaction was based on trust. What the court can deduce from the conduct of the parties is that they both had intention of being bound by the terms of the oral agreement between them and both had legal capacity to enter into an agreement.

The next issue that the court has to determine is whether the defendant owes the plaintiff the sum of US$ 193,000. The Defendant has denied owing the money to the Plaintiff. In support of his case, the plaintiff has relied on the letter dated 20th April, 2011, which was produced as Plaintiff's exhibit 1. In my view, the contents of this letter forms the gist of the matter herein and it's important for the court to reproduce them verbatim. The letter was done by the Defendant to the plaintiff and its contents are as follows;

"*Re: repayment of USD 193,000*

Refer to the above.

I hereby irrevocably undertake to repay your USD 193,000 borrowed from you on various dates on or before the 26th April, 2011.

Failure to repay on that date, I shall submit myself to you and to your appointed Lawyer to proceed with the recovery process without any objection. I shall fully co-operate and execute all documents that shall be presented to ensure quick recovery of any repayment of the above amount at my expense.

Yours faithfully,

Hon. Danson Buya Mungatana

MGH, MP

According to the Defendant, the sum of USD 193,000 was to include the plaintiff's investment and returns after he agreed to put his USD 96,500/- in an investment that the Defendant introduced him to, the nature of the business being that the money would be put in the oil market until after six months where he and the plaintiff would get back their money that each had invested together with profit. The Defendant stated that the Agreement was not put down in writing because there was a lot of trust in the whole transaction.

With regard to the letter dated 20th April, 2011, the Defendant stated that he signed the same under duress.

Under the law, a contract can be set aside on the following grounds;-

(1) Misrepresentation

(2) Mistake

(3) Illegality

(4) Duress and (5) undue influence.

In his defence, the Defendant avers that the alleged agreement and/or the terms thereof are against public policy, unconscionable and unenforceable and that any undertaking by him to settle the debt was made under duress and that, parties were not *ad idem.*

What then is Duress? The definition of duress was given in the case of **Ghandhi & Another Vs. Ruda (1986) KLR 556** as follows;

> **"Duress at Common law or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e. threats calculated to produce fear of life or bodily harm; The threat must be illegal in the sense that it must be a threat to commit a crime or tort"**

Apart from the legal duress, there is also economic duress. The Court of Appeal shed more light on this in the case of **Kenya Commercial Bank Limited & Another Vs. Samuel Kamau Macharia & others (2008) eKLR** in which the court cited with approval the decision of the Privy Council in **Pao & others Vs. Lav Yiu & Another (1979) 3 A II E.R. 65** stating thus;-

> **"Duress, whatever form it takes is a coercion of the will so as to vitiate consent. Their Lordships agree that in a contractual situation, commercial pressure is not enough. There must be present some fact which could in law be regarded as coercion of his will, so as to vitiate his consent. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest. Whether at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it".**

In law, contracts made under duress are voidable rather than void and the available remedy is normally rescission of the contract in which case, the contract is set aside.

Has the Defendant succeeded in proving duress in this case? It was his evidence that he signed the letter because the plaintiff was under pressure from the people he was doing business with, as he had taken some money from them which he invested in the business venture between him and the Defendant. He requested the Defendant to write for him a letter so that his father and other business partners do not consider him a fraud. The Defendant asked him to draft the letter which was put on the Defendant's letter head and he signed the same.

The Defendant further stated that the letter was useful because it enabled the plaintiff to shed off the pressure that he was under, and that is why he signed the letter to protect his friend, the plaintiff, from his business partners and family members. It was his further evidence that the plaintiff gave a total of USD96,500 which could have entitled him to a total of USD 193,000 after six months. In cross-examination, he stated that the letter was to cover the plaintiff because he was being pushed by his father. He admitted that as an Advocate of the High Court of Kenya he knew the legal effect of signing the letter, though he was quick to add that he did not sign the letter, as an advocate. The defendant stated that the deal was between him and the plaintiff and not the plaintiff's father and therefore, the threats were not direct threats.

From the foregoing, can the Defendant be said to have signed the aforesaid letter under duress? In my humble view, I do not think so and the following are the reasons for stating so,

> (1) First, nowhere in the defence does the defendant plead that he received any money from the plaintiff for a business venture in which both were entering into, with an international company.
>
> (2) Considering the evidence adduced by the Defendant on the alleged duress, there were no threats and/or pressure that was directed at the Defendant by the plaintiff's father who is said to have been the source of the threats
>
> (3) The pressure, if any, that the plaintiff may have exerted on the Defendant was not sufficient to amount to duress so to cause the Defendant to write the letter dated 20th April, 2011, undertaking to pay the sum of USD 193,000/-
>
> (4) If indeed, what the Defendant told the court is true that he took a sum of USD 96,500 from the plaintiff and forwarded the same to the international investors and that the money did not even get to his account, why would he undertake to pay back the money to the plaintiff with or without any duress?

This court makes the finding that the plaintiff wrote the letter voluntarily and it was not written under duress as alleged or at all. The court notes that the defendant did not have any interest in the company where the money was to be invested and therefore, the court would see no reason why he would be willing to undertake to pay the money to the plaintiff yet he had no control over the running of the business so as to guarantee the plaintiff his money plus the returns, all amounting to USD 193,000.

In the letter, the defendant irrevocably undertook to pay the money which he states was borrowed from the plaintiff on various dates on or before the 26th April 2011 thus admitting that he borrowed the same from the plaintiff. This means that he was not being truthful in his evidence when he told the court that the money was for investment.

Having listened to the evidence of both the plaintiff and the Defendant the court finds that the plaintiff was more truthful and that there was an oral agreement between them through which the plaintiff loaned the defendant a sum of USD 193,000. The court is not persuaded by the Defendant's contention that the money was for investment.

In his defence the Defendant states that if any moneys were ever owed by him to the plaintiff as alleged or at all, which is denied, the same has been paid to the plaintiff in full and final settlement. He denied receiving any funds from the plaintiff and in the alternative pleaded that, if any indebtedness to the plaintiff existed, it had been fully and finally settled. As rightly observed by Justice Onyancha in the case of **Moses Masika Wetangula Vs. Danson Buya Mungatana (2015) eKLR,** the two possible defences are clearly combative and not mutually inclusive and one defence. They cannot co-exist.

The court has perused the defence on record. The defendant has not pleaded anywhere in it that the money was for investment though, he adduced evidence to support that contention. His evidence did not support his pleadings but rather it was at variance with the defence. It is a trite principle of 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. See the case of **Adetoun Oladeji (Nig) Ltd Vs. Nigeria Breweries Plc S.C. 91/2002.**

The same principle was also expounded in the case of **Malawi Railways Limited Vs. Nyasulu (1998) MWSC 3** where the court stated;

> **"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 or 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 of the 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 their 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...."**

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.

In the end, the court finds that the defendant owes the plaintiff a sum of US$193,000/- and I enter judgment for the plaintiff against the defendant for the said amount.

With regard to the claim on interest at 15%, per annum with effect from 26th April, 2011 until payment in full, the court finds that there is no evidence offered by the plaintiff to justify the interest. However, the awarded sum of US$ 193,000 shall at tract interest at court rate from the date of this judgment.

The plaintiff is awarded the costs of the suit.

Dated, Signed and Delivered at Nairobi this 28th day of January, 2019

....

L. NJUGUNA

JUDGE

In the presence of:-

... For the Plaintiff

.......................................For the Defendant