



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 139 OF 2018**

**FRANKLIN MBURA WASHE.....APPELLANT**

**VERSUS**

**GORDON MWATATA MWARINGA.....RESPONDENT**

**J U D G M E N T**

1. The judgment sought to be challenged in this appeal is that dated 13/07/2018 when the trial court in finding and entering judgment for the Respondent against the Appellant by dismissing the suit delivered itself as follows:-

**“I have considered the pleadings and the evidence tendered by the parties. I have also considered the submissions by the counsels. I find the following facts are no disputed. Firstly that the Plaintiff premises caught fire. Secondly that the fire was started by the Defendant’s servant. Thirdly that the Plaintiff and the Defendant entered into an agreement for the defendant to compensate the Plaintiff in the sum of Kshs.1,200,000/=. That agreement was entered in the Plaintiff’s house.**

**The disputed issue is whether the Defendant signed the said agreement under duress as pleaded. The Defendant testified that he signed the agreement so that the youngman who was his servant should not be arrested and charged.**

**The question to be posed is whether the agreement herein was entered freely and therefore binding in the parties.**

**Law of Contract at page 280, the author states this:-**

**“Since agreement depends on consent it should follow that agreement attained by threats or undue persuasion is insufficient” in the present case attaining the agreement is said to have been signed in the plaintiff house, I find that it was not of the free will of the parties. The Defendant signed the agreement to save his servant from being arrested. That cannot be said to have been by consensus of the party. I uphold the plea by the Defendant that the agreement was entered into under duress and undue influence and the same cannot form basis of the claim herein”.**

2. From the above excerpt it is overly clear that the only reason the suit was dismissed was the finding by the trial court that the subject agreement was never executed out of freewill of the parties.

3. That finding was in effect acceding to the Respondents pleading at paragraph 6 & 7 of the statement where it was pleaded that:-

**“Paragraph 6: The Defendant admits the contents of paragraph 6 of the Plaintiff and that he did admit liability to the Plaintiff and on or about the 6<sup>th</sup> November 2016 or thereabouts, the Plaintiff and Defendant entered into an agreement in which the Defendant agreed to pay the Plaintiff Kshs.1,200,000.00 in damages with the first installment of Kshs.100,000.00 to be paid on or before the 6<sup>th</sup> of December 2016 SAVE THAT the Defendant avers that he was coerced and forced to sign the agreement at the police station and in circumstances under duress of which he signed and not of his own free will.**

**Paragraph 7: Further to the foregoing the Defendant avers that the agreement entered was null and void in that the same was entered under duress, coercion and intimidation from the Plaintiff and with the aid of the police.**

4. These two paragraphs state repeatedly and affirmatively that the coercion, duress and intimidation was visited upon the Respondent courtesy of the police.

5. However in evidence both the plaintiff and the defendant, the two parties to the agreement, were affirmative that the agreement was

drafted and signed in the Appellants house and not at the police station. The evidence by the Respondent was to this effect:-

**“we did the agreement in the plaintiff house....”**

**“I was forced by stress to sign this agreement. I signed this agreement because the person alleged to have burnt the house is me who was taking care of him. The Plaintiff wanted me to pay 1,200,000/=. I have not paid the same for the reason that the Plaintiff did not withdraw the case from the police”**

6. With that evidence what was due for determination by the trial court for which the issue was clearly captured by the trial court was whether the agreement was voluntary or vitiated by coercion, duress or intimidation.

7. The starting point is that the law under Order 1 Rule 4 and 9 mandates that any matter that makes the claim of the plaintiff or the defence of the defendant untenable must be specifically pleaded and particulars thereof given. In the suit giving rise to the appeal, even though coercion, duress and intimidation were pleaded; no particulars thereof were given. That defence was therefore had for failure to provide the particulars and therefore needed further and better particulars to comply with the law. Without the particulars it would not have been fair to the plaintiff to adequately answer to the defence and therefore the purpose of the rule was affronted.

8. The second point why the finding cannot be sustained on the face of the pleading and evidence is that parties are bound by their pleadings and it is not permissible for a party to depart from his pleading by asserting a fact at variance with the pleading unless by an amendment. The Respondent having pleaded that the coercion and duress was exerted upon him by the Appellant at the police station and with the aid of the police, it was not open for the same party to lead evidence to the effect that the agreement was in fact crafted and executed away from the police station and in the house of the Appellant and in the company of some five civilian witnesses. To this court the fact that the agreement having been executed in the house of the Appellant who was the neighbours of the Respondent, no circumstances could amount to duress or coercion. No evidence was led.

9. But what constitutes coercion or duress even on the merits? In common law, duress or coercion means and connotes actual violence or threat to violence to the person like threat calculated to produce fear of loss of life or bodily harm which gives to the threatened no option but to enter into the impugned agreement”<sup>[1]</sup>. So that a threat to sue ordinarily does not qualify as duress and I think a threat or actual lodging of a Criminal Complaint would not amount to duress unless it be proved that the complaint itself was a scheme hatched to premise the execution of an agreement under duress. In the matter before me, the evidence led did not allude to any threat to the Respondent’s person or life instead it was alleged that the agreement was executed so that a person under the plaintiff’s employment could be spared of prosecution. The Respondent in fact said that he did not pay the same because the Appellant did not withdraw the case from the police. To this court the purpose for which the Respondent entered the agreement cannot be termed coercive or duress. I do find that his will was not coerced so as to vitiate the resultant agreement.

10. In sum I do find that the finding by the trial court that the agreement was not out of freewill of the parties was never supported by evidence but was contrary to the evidence led. It was in fact not in line with the evidence led and presents a clear case where an appellate court would interfere with a finding of the trial court even if it be purported to be based on facts. In *John Mburu vs Consolidated Bank Ltd [2018] eKLR*, the Court of Appeal while citing the decision in *Mwagi vs Wambugu [1984] KLR 457* said:-

**“On authority we should respect the findings of facts made by the trial court especially when they are based on the credibility of witnesses since that court had the added advantage of seeing and hearing them testify not so, however, where such findings are based on no evidence or are based in a perverted appreciation of the evidence or it is clearly shown that the court was wrong in principle”.**

11. I do find that the trial court wholly mis-apprehended the evidence led and in effect perverted the facts as led in evidence. The court also committed an error of principle in holding that the need to save a servant from lawful prosecution was enough evidence of coercion and duress.

12. The upshot is that the appeal succeeds, the finding and judgement at trial is set aside and in its place substituted a judgment in favour of the Appellant in the sum of Kshs.1,200,000/= with interests at court rates from the date of the suit till payment in full.

13. I also award to the Appellant the costs of this appeal together with those at trial.

**Dated and delivered at Mombasa on this 26<sup>th</sup> day of November 2019.**

**P.J.O. OTIENO**

**JUDGE**

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<sup>[1]</sup> Ghandi A & Another vs Ruda [1986] KLR 556