REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 179 OF 2011

SAMUEL KINUTHIA NGUGI.....APPELLANT

VERSUS

1. GEORGE KAMAU GATHIAKA ….....1ST RESPONDENT

2. ISAAC KING'U WARUI.....2ND RESPONDENT

3. DAMARIS WANJIRU GITAU.....3RD RESPONDENT

(Appeal from the of Judgment of D.N. Musyoka, Resident-Magistrate in Nyahururu PMCC NO. 270 OF 2009 delivered on 23rd September 2011.

JUDGMENT

1. The Appellant **Samuel Kinuthia Ngugi** brought this appeal against the trial court's judgment delivered on the 23rd September 2011. The Respondents had sued the appellant for a sum of Kshs.168,876/= plus interest and costs. Upon full hearing, the suit was dismissed giving rise to the appeal. Eight grounds were preferred:

(1) The Learned Resident Magistrate erred in fact and in law in holding that there were no vitiating factors that would render the contract dated 18.12.2005 unenforceable, while in fact there was ample evidence that the appellant was forced, coerced, threatened and intimidated into signing the agreement by the respondents who acted in collusion with Provincial Administration Officers and his brothers.

(2) The Learned Resident Magistrate erred in fact and in law in finding that the appellant signed the agreement dated 28.12.2005 willingly, while in fact he was at the material time suffering from cerebral malaria and pneumonia and was not in a position to exercise his free will.

(3) The Learned Resident Magistrate erred in fact and in law in finding that the appellant did not complain about the agreement that he was forced to execute, while in fact there is evidence that he complained to the area District Officer immediately after he saw the agreement dated 28.12.2005.

(4) The Learned Magistrate erred in failing to appreciate that the respondents, the four Provincial Administrators and the appellant's bothers were all acting in collusion to deprive the appellant of his future inheritance, even before a Certificate of Confirmation of Grant was

issued in Nyahururu Principal Magistrate Succession Cause No. 62 of 2007 and before distribution of the appellant's father's estate had been made.

(5) The Learned Resident Magistrate erred in fact and in law in holding that the appellant reneged on the land sale agreement while the same was not valid in law and was not enforceable.

(6) The Learned Resident Magistrate erred in fact and in law in entering judgment for the respondents against the appellant for Kshs.168,476/= plus interests and costs thereon from 28.12.2005 while the suit in the Lodwar Court was filed on 9.9.2009 while there is no evidence how that sum was arrived at.

(7) The Learned Resident Magistrate erred in fact and in law in awarding costs of the suit to the respondents.

(8) The decision of the learned Resident Magistrate was against the weight of evidence.

On those grounds, the appellant prays that the appeal be allowed and judgment and decree of the trial court be set aside and costs of the appeal and in the lower court be awarded to the appellant.

2. The respondents claim in the trial court was premised on an agreement executed by all the parties on the 28th December 2005 in the presence of several witnesses including three of the appellants brothers and his uncle and the respondents. Among the witnesses to the agreement was the area chief in whose offices the agreement was prepared and two Assistant Chiefs who happened to have been in the Chief's offices when the parties approached the Chief's offices.

In settlement of the debt of Kshs. 164,876/= owed by the appellant to the respondents, the parties agreed that the appellant would sell one Acre of his inheritance from his father's land **NYANDARUA/KIPIPIRI/1132** which would be excised and registered in the respondents name after succession process was over, but in the meantime, the respondents would take immediate possession and work on the same without disturbance. The parties to the agreement set the value of the one acre at Kshs.180,000/=, and after transfer, a sum of Kshs.15,000/= being amount over and above the claim would be refunded to the appellants. The Appellant had obtained a loan from OlKalou Farmers Sacco and guaranteed by the Respondents but he failed to pay occasioning the respondents property being attached for sale by the Sacco. It was at this time that they opted to pay the sums outstanding to the Sacco to forestall sale of their properties. It was their evidence as adduced by the first Respondent that they jointly and severally paid the sum of Kshs.164,876/= as pleaded in the plaint.

3. It was the respondents evidence that on the 28th December 2005 the appellant arranged for a meeting with the respondents and invited his three brothers and his uncle to meet at the chief's office to agree on the mode of payment of the said sum, that the parties negotiated a settlement leading to the preparation of the agreement at the Chiefs office and subsequent execution by the appellant, the respondents and the appellants three brothers and uncle, and the chief being witness to the same.

4. Two years down the line, the appellant changed his mind sent away the respondents from the land they had occupied and cultivated upon, and failed to refund the money prompting filing of the suit in the lower court.

5. In his defence, the appellant stated that the said agreement was reached upon by use of threats and coercion, and collusion between the Respondents, the area chief, his brothers and uncle, and that he was forced to sign the already prepared agreement while he was suffering from cerebral malaria and pneumonia. He prayed for dismissal of the suit. According to the agreement, the two parties agreed to share survey fees for the subdivision of the land. The respondents paid Kshs.4,000/= to the surveyor who after survey moved into the land, occupied and worked thereon for two years when the appellant objected to the occupation, and sent them away.

6. In the said agreement, there was a default cause that in breach of the terms of the agreement by the appellant, he would refund the money received.

The appellant breached the agreement, failed to refund the money hence the primary suit. The trial court found in favour of the respondents and ordered payment of the sum of Kshs.168,476/= plus interest at court rates from the date of the agreement and costs of the suit.

7. The issues as framed by both counsel for the courts determinations are four fold:

1. Whether the agreement dated 28th December 2008 was entered into freely or by exertion by the Respondents and their witnesses of undue influence, threats, coercion or intimidation.

2. Whether the Respondents proved their case on a balance of probabilities so as to entitle them to Kshs.168,476 interest and costs.

3. Whether the judgment of the lower court should be set aside.

8. This being a first appeal, this court is obligated to re-evaluate the evidence adduced and come up with its own findings, taking into consideration that it neither heard or saw the witnesses testify. In doing so, the court will not necessary be bound by the trial courts findings of fact. This was held in the case **Selle -vs- Associated Motor Boat Co. Ltd & Others (1968)EA 123 and** followed in numerous other decisions.

9. Execution of the agreement dated 28th December 2005 by the parties is not in dispute nor are the terms of the agreement. The only issue raised by the appellant, after four years, was that he was threatened, coerced and forced to sign the agreement dated 28th December 2005.

Justice Emukule J, in **Nakuru HCCC No 188 of 2005 – Davit Bet Biwott -vs- Zakayo Kimbet Chemisnet** faced with a similar situation, and quoting Nyamu, J. (as he then was) held

> ***"where the intention of parties has been reduced into writing it is in general permissible to adduce extrinsic-evidence contained in writing either to show that the intention or to contradict, vary add to the terms of the document.***

10. I have considered the appellants evidence as adduced before the trial court. It was his testimony that after signing of the agreement, he relocated to a place known as Shamata. In terms of the agreement, the respondents took possession of the land parcel and starting working thereon. The appellant testified that he had no grudges with his three brothers, his uncle or the chief. He even admitted that the respondents had stood guarantors for him but denied ever consenting to sale one acre to the respondents, and interestingly denies ever being given a copy of the agreement until after two years when he returned from Shamata. He blames his brothers and the chief for colluding with the respondents to deprive him of the father's inheritance of one acre. It is also on record that when he applied for Letters of Administration of his fathers estate, he included the first respondent, on behalf of the other two, as beneficiaries of one acre out of his share of inheritance. In my considered view, these are not acts of someone who claims to have been forced or coerced and threatened to sign the agreement.

11. If indeed the agreement was obtained through fraud and intimidation as he would wish the court to believe, he had an opportunity to challenge the same. He did not tell the court why he waited for over four years to bring up these issues. It was an after thought having been faced with the respondents case, had to fabricate a defence.

In its judgment, the trial court found that there was no evidence tendered by the appellant to demonstrate intimidation, undue influence or coercion into signing the agreement on the 28th December 2005. Having considered the evidence I am pursuaded that the appellant, signed the agreement voluntarily and having been party to arriving at the terms, I find no illegality, undue influence, coercion or intimidation of

whatever nature.

12. In **Chitty on Contracts, 26th Edition Vol 1, Paragraph 504**, the words "Duress of a person" is defined as follows:

> ***"Duress of the person may consist in violence to the person or threats of violence, or imprisonment whether actual or threatened. It is further stated that duress does not literally deprive the person affected of all choice, it leaves him with a choice --- Duress prevents the law from accepting what has happened as a contract valid in law."***

Allegations that the appellant was suffering from cerebral malaria and pneumonia, was arrested and brought to the chief's office were not proved. They remain as mere allegations. I see **Section 107, 108, 109 of the Evidence** that he who alleges must prove. No medical records were produced to prove the ailments or even a report of arrest made to the police. No action was taken and as stated, four years after, did the appellant decide to claim that he signed the agreement under duress. It cannot be possible that even for the two years the respondents occupied and worked on the land the appellant had no such knowledge. The court is a court of equity, and equity does not aid the indolent, or he who approaches it with unclean hands.

13. Unlike in the case **Samson Munikah Practicing as Munikah & co. Advocates -vs- Webube Estates Ltd C.A No. 126 of 2005,** undue influence, coercion and illegalities were executed upon the advocate when the suit was already in court using court process. In the present appeal, there was no case in court – the case was filed four years after the appellant breached the terms of the agreement. He had an option to challenge the agreement but waited until the respondents resorted to court action.

It is important to state that courts cannot rewrite an agreement or a contract between parties. Its duty is to enforce the agreement and/or contract.

In the case **Kenya Commercial Bank Ltd -vs- Harunani (2002) 2 KLR**, the court held that in commercial dealings, there is freedom of contract which should be respected. The courts can only intervene when there are vitiating factors in a transaction – where it is plain that there was fraud when the contracts were entered into or where one party uses its superior position to force another into contractual obligations which were oppressive. This court finds no evidence, even remotely, to suggest that the respondents forced the appellant into signing the agreement. It is on record that the appellant stated that he had no problems with his brothers and uncle and the chief hence one would wonder, why they would have colluded to force their brother to enter into the agreement. It is the courts finding that the agreement dated 28th December 2005 was voluntarily executed by all the parties, that there is no evidence of use of threats, coercion and intimidation, upon the appellant.

14. On whether the Respondents proved their case on a balance of probabilities, the evidence adduced as detail by the first respondent on behalf of the other two respondents is sufficient and persuasive. Having stated that the agreement of 28th December 2005 was freely and voluntarily executed, and there having been a default clause, that in the event of a breach of the agreement, by the appellant, he would refund the money in the sum of Kshs.168,876/= plus interest at court rates as stated in the plaint. The trial court was justified when it ordered refund of the sum of Kshs.168,876/= plus interest and costs.

15. However, this court finds that the trial courts order that interest on the said sum be paid from the date of the agreement as harsh. The suit in the lower court was filed on the 9th September 2009. A court has discretion to award costs or not, but such discretion ought to be judiciously exercised, and circumstances of each case ought to be considered on its peculiarity.

Section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya gives discretion to the court to determine by whom and to what extent costs are to be paid. It allows the court to give interest on costs at any rate not exceeding fourteen percent per annum.

Section 26(1) of the Act states that:

> ***"Where and in so far as a decree is for the payment of money, the court may in the decree order interest at such rate as the court deems reasonable to be paid on the principle sum adjudged from the date of the suit to the date of the decree, in addition to any interest at such rate as the court deems reasonable on the aggregate sum so adjudged to the date pf payment or to such earlier date as the court thinks fit."***

16. A court has discretion to order payment of interest even before filing of a suit, at rates as it may determine, but not more than 14% per annum. While taking issue with the order of interest by the trial court, I am minded that for two years the respondents took possession and used the appellants land. No doubt they must have been making profits of sorts from the use and occupation thereof. I am of the considered view that interest ought not have been imposed upon the appellant from the date of the agreement for the above reason.

I therefore set aside and vary the order on interest by the trial court, and substitute it with an order that interest on the sum of Kshs.168,476/= shall accrue interest at court rates from the date of filing of the suit.

For the above reasons, the appeal is dismissed save for the order on the payment of interest that has been substituted. The appellant shall pay costs of the appeal.

Dated, signed and delivered in open court this 17th day of March 2016

JANET MULWA

JUDGE