



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 18 OF 2002**

**DAVID MUTUKU SILU .....APPELLANT**

**VERSUS**

**KYANIA THUKA ..... RESPONDENTS**

*(Being an appeal from the Judgment of the Hon. S.S. Pareno Senior Magistrate's Court at Machakos Chief Magistrate's Court Civil Case No. 1297 of 2000 dated 28<sup>th</sup> January 2002)*

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*(Before B. Thurania Jaden J)*

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

1. By a plaint dated 6/10/2000, the Appellant filed a suit in the lower court claiming Kshs.12,000/= together with costs and interest from the Respondent. The claim was based on a written acknowledgement dated 22/1/2000 which was signed by the Respondent.
2. The claim was denied. The defence dated 13/10/2000 denied owing the Appellant the Kshs.12,000/= and stated that the written acknowledgement was signed due to use of force by the police.
3. After the trial, the trial magistrate dismissed the Appellant's case with costs.
4. The Appellant was dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:-
  - a. *That the judgment was against the weight of the evidence.*
  - b. *That the Respondent's defence lacked in material particulars.*
  - c. *That the trial magistrate's judgment lacks the necessary ratio decidendi.*
5. The appeal was canvassed by way of written submissions which I have duly considered.
6. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. See for example **Selle –vs- Associated Boat Co. Ltd (1968) EA 123**.
7. The Appellant/Plaintiff, **David Mutuku Silu** (PW1) testified as the only witness. His evidence is that he was ploughing using a tractor when his brother the Respondent removed the tractor keys (from the tractor). The two then made an agreement that the Respondent would compensate the Appellant with a sum of Kshs.12,000/=.
8. The Respondent/Defendant, **Kyania Thuku** (DW1) was also the only witness in his case. His evidence was that they had a dispute over the family land left behind by their late father. That while the land dispute was pending before the D.O's office and parties were to maintain the *status quo*, the Appellant came to the land with the tractor. The Respondent then informed the Appellant of the issue of maintenance of the *status quo* and the tractor left. The following day the

- Respondent was asked by a police officer to sign the agreement in question before he could be released. The Respondent signed the document and he was released.
9. It is not in dispute that the tractor the Appellant brought to plough the land did not proceed with its work due to the pending land dispute. It is also not in dispute that the Respondent is the one who intervened and the ploughing work did not go on. From the scanty evidence adduced by the Appellant, it is not clear how the question of compensation came about. However, the Respondent's evidence shows that there was a dispute over the family land.
  10. The Appellant's case is based on a written agreement that the Respondent was to compensate him with Kshs.12,000/=. The agreement was produced as an exhibit. The agreement stated that the Respondent will compensate the Appellant with Kshs.12,000/=. The agreement does not go into any other details.
  11. The Respondent in his statement of defence denied the agreement and stated that he was forced by the police to sign the same. This pleading satisfied the requirements of **Order VI rule 4** of the **Civil Procedure Rules (repealed)** which stated as follows:-
    4. (1) ***"A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, released, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality-***
      - a. *Which he alleges makes any claim or defence of the opposite party not maintainable; or*
      - b. *Which, if not specifically pleaded, might take the opposite party by surprise; or*
      - c. *Which raises issues of fact not arising out of the preceding pleading."*
  12. The Respondent gave evidence in support of the claim that force was used to obtain his signature. Indeed during cross-examination the Appellant admitted that the Respondent was taken to the police station and that the agreement was written by a police officer by the name **Juma**. Being in police custody and being presented with a document to sign before one is released cannot be equated to free will. The agreement was therefore not voluntarily entered into by the Respondent. It appears there was lack of consensus.
  13. With the foregoing, I find that the Appellant failed to prove his case on a balance of probability. The appeal has no merits and is dismissed with costs.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 20<sup>th</sup> day of May, 2015**

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**B. THURANIRA JADEN**

**JUDGE**