



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 10 OF 2002**

**MAGDALINE WANJIRU GITONGA.....1<sup>ST</sup> APPELLANT**  
**LAWRENCE NDUHIU GITONGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHARLES MATHENGE NJOGO.....RESPONDENT**

*(Being appeal against the judgment of W. K. Korir, Senior Resident Magistrate in Nyeri Chief Magistrate's Civil Case No. 23 of 2000 delivered on 14<sup>th</sup> December 2001 at Nyeri)*

**JUDGMENT**

This judgment is the offshoot of the Appeal against the judgment of W. K. Korir, the then learned Senior Resident Magistrate delivered on 14<sup>th</sup> December 2001 vide **Nyeri C.M.C.C. No. 25 of 2000**. The record shows that **Charles Mathenge Njogo**, the Respondent herein, had sued **Magdaline Wanjiru Gitonga** and **Lawrence Nduhiu Gitonga**, being the 1<sup>st</sup> and 2<sup>nd</sup> Appellants herein, by way of the Plaint dated 19<sup>th</sup> January 2000, claiming to be paid Ksh.70,625/= plus costs. The Appellants filed a defence to deny the Respondent's claim. The suit was heard by Hon. W. K. Korir who in turn gave the Respondent judgment in the sum of Ksh.65,000/= plus cost and interest. The Appellants being aggrieved, filed this Appeal.

On appeal, the Appellants put forward the following grounds in their Memorandum of Appeal:

1. ***The Learned Trial Magistrate erred in law and fact when he held that the Respondent had paid a sum of Kshs.65,000/= on behalf of the Appellants to a third party in respect of Motor Vehicle KAH 642 or***
2. ***Further that the Learned Trial Magistrate erred in law when he held that "the circumstances surrounding the signing of the letter of commitment will determine the outcome of the case," when the Learned Trial magistrate erred in law when he misconstrued the effect of the so called letter of commitment.***
3. ***That upon the simple analysis of the evidence, there was no consideration flowing from the Respondent to create a legal obligation on the Appellants.***

When this appeal came up for hearing, learned counsels recorded a consent order to have it disposed of by written submissions. Before going into the merits or otherwise of the appeal, let me set out in brief the case that was before the trial court. The record shows that the Respondent testified alone in support of his case. He told the trial court that in year 1999 he paid a sum of Ksh.61,892/15 to Associated Motors, Meru

on behalf of the Appellants herein. He said that in the month of November 1996, he stood as a guarantor of the Appellant enabling them to purchase motor vehicle registration No. KAH 642 N Isuzu Lorry using loan facilities advanced by C.F.C. Bank. The Respondent claimed that the aforesaid motor vehicle was registered in his name. The Respondent further averred that when the motor vehicle was released to the Appellants, they brought with them transfer forms which he duly executed thus transferring the lorry into their names. The Respondent averred that he had agreed with the Appellants that he would release to them the log book upon them servicing the loan facility with C.F.C. Bank. It is alleged that the Appellants repaid the loan but defaulted midstream thus prompting the Respondent to step in and settle the outstanding sum upon receiving demand notices from Associated Motor's advocates. The Respondent stated that between the year 1998 and 1999, he received a demand notice from Associated Motors, requiring him to settle with it the outstanding sum of Ksh.51,815/=. It is said the Respondent brought to the attention of Magdaline Gitonga, the 1<sup>st</sup> Appellant, the contents of the aforesaid demand letter. The 1<sup>st</sup> Appellant is said to have told the Respondent that she had no money to settle the sum demanded. The Respondent said he decided to repay the sum demanded plus Ksh.10,000/= being the advocate's fees. The Respondent claimed that he was to be paid a sum of Ksh.3,107/85 to cover travelling expenses he incurred when he visited Meru on two occasions. The Respondent did not produce in evidence copies of the acknowledgement receipt for Ksh.40,000/= and a post dated cheque for Ksh.21,892/15. The Respondent, however, produced in evidence a copy of a letter dated 13<sup>th</sup> May 1999 in which it is alleged that the Appellants acknowledged owing the Respondent a sum of Ksh.65,000/=. It is said the Appellants' Advocate, one Mrs Mbijiwe wrote the letter of commitment on behalf of the parties. The Respondent said he was forced to sue for payment when the Appellants refused to honour their pledge.

The Appellants each testified in support of their defences. In her evidence in chief – Magdaline Gitonga (D.W.1) admitted before the trial court that the letter of commitment dated 13<sup>th</sup> May 1999 was brought to them to sign to enable the Respondent transfer to them motor vehicle registration KAH 642N. She denied having been given copies of receipts showing the Respondent paid Ksh.40,000 to Associated Motors on their behalf. D.W.1 also admitted that she signed the letter of commitment dated 13<sup>th</sup> May 1999 to entice the Respondent sign the transfer form. D.W. 1 claimed that the lorry has not been registered in their names having been taken away by Associated Motors and the bank. D.W. admitted in cross-examination that the Appellants have not paid Ksh.65,000/= to the Respondent because the lorry has not been transferred to her. She also claimed that she could not pay the money because she did not owe anybody money. Lawrence Gitonga (D.W.2) told the trial court that the family lawyer advised them to execute the letter of commitment dated 13<sup>th</sup> May 1999 indicating that the Appellants owed the Respondent Ksh.65,000/= to entice the Respondent sign the transfer forms relating to motor vehicle registration No. KAH 642N. He denied owing any money to the Respondent. D.W.2 further averred that the Respondent did not give them copies of receipts acknowledging any payments made to Associated Motors, Meru on their behalf. D.W. 2 admitted that the Respondent signed the transfer form after they executed the letter of commitment. D.W.2 also admitted that the Respondent stood for them as the guarantor.

The trial magistrate considered the evidence tendered by both sides. He came to the conclusion that the letter of commitment was not signed by duress hence the same was found to be binding to the parties. The trial magistrate proceeded to give judgment in favour of the Respondent.

On appeal the Appellants put forward three main grounds:

- (i) That there was no evidence to show that the Respondent paid Ksh.65,000/= on behalf of the Appellants.**
- (ii) That the trial magistrate misconstrued the effect of the letter of commitment.**
- (iii) That there was no consideration flowing from the Respondent to create a legal obligation on the Appellants.**

Looking at the above grounds, it is obvious that those grounds are intertwined hence it is difficult to deal with them distinctly. I will deal with grounds (i) and (iii) together. It is the submission of the Appellants that even though the letter dated 13<sup>th</sup> May 1999 was an obligation or pledge to carry out some action,

there was no evidence that the Respondent paid Ksh.65,000/= on their behalf. The Respondent was of the view that he presented to the Appellants evidence of payments totaling to Ksh.61,892/15 before them appending their signatures on the letter of commitment. I have carefully reconsidered the evidence that was tendered before the trial court. The Respondent told the trial Magistrate that in years 1998 and 1999, he received a demand letter from Associated Motors asking him to pay Ksh.5,815/=. The Respondent went to see the 1<sup>st</sup> Appellant to discuss the issue. The 1<sup>st</sup> Appellant is said to have told the Respondent she had no money to pay the amount demanded. The Respondent averred that the 1<sup>st</sup> Appellant requested him to pay the money on her behalf promising to refund him. On this promise the Respondent said he proceeded to pay the money. The Respondent said he gave the 1<sup>st</sup> Appellant copies of the acknowledgment receipt for Ksh.40,000/= and a copy of the post dated cheque for Ksh.21,892/15. When testifying in chief, the Respondent stated that he had copies of the acknowledgment receipt for Ksh.40,000/= and the post dated cheque for Ksh.21,892/15. For reasons best known to the Respondent and his legal advisers, the acknowledgement receipt and the post dated cheque were not produced in evidence. It would appear the Respondents heavily relied on the letter of commitment. It was incumbent upon the Respondent to tender such crucial evidence to buttress the evidence of the letter of commitment. With respect, I agree with the Appellants that the Respondent had failed to establish on a balance of probabilities that he actually paid Ksh.51,892/15. He claimed he had in his possession a copy of the acknowledgment receipt for Ksh.40,000/= and a copy of a post dated cheque for Ksh.21,892/15. The question is, why didn't he tender in evidence copies of those documents? This court, in the circumstances is entitled to infer that the Respondent did not have such documents. The trial learned Senior Resident Magistrate did not address his mind over the issue despite having been raised in the evidence.

Having disposed of the (i) and (iii) grounds of appeal, let me now address my mind to ground (ii). It is argued that the learned Senior Resident Magistrate misconstrued the effect of the letter of commitment. The Appellants are of the view that the letter of commitment talked of payments made by the Respondent on behalf of the Appellants to be fulfilled until the date of transfer of the lorry. The Appellants are of the view that the lorry was never transferred as it was sold by public auction for non-payment of the installments. The Respondent was of the view that the Appellants duly agreed that they owed the Respondent a sum of Ksh.65,000/= in the letter of commitment drafted by their advocate. It is not in dispute that the Appellants signed the hand written letter dated 13<sup>th</sup> May 1999. The issue in dispute is what was the purpose of that letter? According to the Respondent, the Appellants were simply acknowledging that they owed him money he had paid on their behalf. The 1<sup>st</sup> Appellant is of the view that they were coerced to sign the letter of commitment so that the Respondent could sign the transfer forms in respect of the lorry. The 2<sup>nd</sup> Appellant on his part was of the view that they too signed the letter of commitment because the money at stake was over Ksh.2.5 Million being the value of the lorry, otherwise they did not owe the Respondent any money. It is unfortunate that neither the Appellants nor the respondent summoned the Advocate who drafted the letter of commitment to testify. The parties executed the letter of commitment before Mrs Mbiyiwe, learned advocate for the Appellants. There is no evidence that the Appellants signed the letter under duress. It would appear they willfully bound themselves. To me, the letter of commitment is clear in its terms. The Appellants simply acknowledged that they were indebted to the Respondent in the sum of Ksh.65,000/= which the Respondent had paid to Associated Motors, Meru Branch on behalf of the Appellants on account of motor vehicle registration No. KAH 642N. The Appellants went further to bind themselves to pay the Respondent the aforesaid sum on or before 15<sup>th</sup> July 1999. With respect, the learned Senior Resident Magistrate cannot be faulted in his findings. The letter of commitment dated 13<sup>th</sup> May 1999 was willfully executed. The same is unambiguous on its contents. The court cannot read anything beyond what is stated therein. In the circumstances of this case there is no need to support the letter of commitment by any other document. If the Appellants intended to show this court that the contents therein were meant for other purposes other than what is expressed therein, then they should have tendered the evidence of their advocate who drafted and witnessed the execution of the letter of commitment. It is not the role of the court to re-write the agreement for the parties. The court's role is to give effect to the terms of the agreement. I find no merit in the appeal on this ground.

In the final analysis and for the reasons advanced hereinabove, the appeal lacks merit. The same

is hereby ordered dismissed with costs to the Respondent.

*Dated and delivered at Nyeri this 20<sup>th</sup> day of May 2011.*

**J. K. SERGON**  
**JUDGE**