



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 961 of 2004**

**JAMES MAINGI..... APPELLANT**

**VERSUS**

**SAMUEL MUKURIA)**

**MOSES MURIU)**

**DANIEL NJEHU GAKUMA)**

**(Suing as officials of Rumwe Water Project).....RESPONDENTS**

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

The appellant James Maingi was the defendant in the Resident magistrate's court at Kikuyu where he was sued by the respondents Samuel Mukuria, Moses Muriu and Daniel Njehu Gakuma, the chairman, treasurer and secretary of Rumwe Water Project. In the suit the respondents sought judgment against the appellant for Kshs.119,758.50 together with interest from 16<sup>th</sup> March, 2000 until payment in full. The respondent's claim was in respect of monies allegedly held by the appellant as treasurer of the project which the appellant failed to account for. It was contended that the appellant had by a letter dated 16<sup>th</sup> March, 2000 admitted the debt and proposed to pay the same in monthly installments of Kshs.3,000/=.

In his defence, the appellant denied being indebted to the respondents or being the treasurer of the project in the year 2000. The appellant further denied having admitted the debt or proposing to pay the debt in installments. Without prejudice to that denial, the appellant pleaded that the letter of admission was written under coercion and or duress, and that, the admission was retracted by the appellant through his advocate by a letter dated 4<sup>th</sup> May, 2001. The appellant further contended that if he was indebted to the respondents that claim is statute barred.

At the hearing of the suit, three witnesses testified for the respondents. These were: Samuel Ngugi Gukuna, who was at the time of testifying the chairman of the project; Daniel A. Kimani, an accountant; and Geoffrey Mbugua Mutura, a senior chief. The respondents' evidence was that the appellant who was the former treasurer of the Rumwe Water Project, was unable to account for monies he had received as treasurer. Daniel Kimani, an accountant, was instructed by the management committee to audit the respondents' books of accounts. He found some discrepancies and a shortfall of Kshs.281,297.50. He also noted that some receipt books were missing amounts received in respect of receipts. He recommended that the person who was maintaining the books of account should either account for the receipts, or otherwise, the money would be concluded as having been misappropriated. Geoffrey Mbugua Mutura was the Senior Chief, Kikuyu. He was present at a handing over involving Rumwe Water Project. There was an argument over a sum of Kshs.281,000/= which the treasurer was alleged not to have accounted for. The Senior Chief invited the old and new members to his house. They checked the documents and finally arrived at the sum of Kshs.119,758.50 as the amount unaccounted for. On the 16<sup>th</sup> march, 2000, the treasurer (appellant), voluntarily, signed a letter acknowledging that he owed the money to the project and promising to pay the money by monthly installments of Kshs.3,000/=. On the 3<sup>rd</sup> July, 2000, the appellant was again summoned by the Chief and he wrote another letter promising to pay the money after disposing off his land. The appellant did not however pay the money. Instead his advocate wrote to the respondents denying liability for the debt.

Two witnesses testified for the appellant. These were the appellant, and George Stephen Kimani. Their evidence was as

follows: Between March, 1998 and November, 1999, the appellant was treasurer and George Stephen Kimani Secretary of the project. At the time the appellant stopped being treasurer, he was not holding any money. There was no annual general meeting held to discuss money alleged to have been lost when he was treasurer, nor was there any meeting authorizing the suit against him. During the time appellant was treasurer there were no accounts taken. The person who is purported to have done the accounts never consulted the appellant. There was no handing over when the appellant left but the new officials only asked the appellant for documents. The appellant gave them receipts books, vouchers and invoices, and explained that his house was broken into, on 31<sup>st</sup> March, 1999 and that some documents were stolen from his document wallet. The appellant had reported the theft at Muguga Police Station and also informed the secretary and the chairman of the project. The appellant was summoned to the chief's office and was asked about the money which it was claimed he had not accounted for. The appellant produced his pay slips but could not remember all the expenditures off-head because some documents had been stolen. The appellant was given credit for computer printout. The appellant asked for time, but he was threatened that he would be taken to the police. His hands were handcuffed. The appellant agreed to acknowledge the debt in writing that is when the handcuffs were removed. The appellant then committed himself that he would pay. Subsequently, the appellant instructed his advocate who wrote a letter retracting the acknowledgement. The appellant attributed his problems to his relationship with one of the new officials, Samuel Mukuria who had a grudge against the appellant arising from an illegal connection of water which Samuel Mukuria had made but was disconnected.

Counsel for the parties each filed written submissions urging the court to find in favour of their client.

In her judgment the trial magistrate found that there was contradiction in the evidence adduced in support of the respondents' claim. She however found that the contradictions were immaterial as there was sufficient evidence that the appellant had acknowledged the debt and only disowned it about a year later. She therefore found the respondents' case proved on a balance of probability and gave judgment in favour of the respondents.

Being aggrieved, the appellant filed a memorandum of appeal raising 10 grounds as follows: -

- (1) *The learned magistrate erred in both law and fact in not considering the issues raised in the appellant's defence.*
- (2) *The learned magistrate erred in both law and fact in entering judgment for the plaintiff against the weight of the appellant's submissions and the evidence adduced.*
- (3) *The learned magistrate erred in both law and fact in not finding that the alleged admission of the debt was signed under duress and coercion.*
- (4) *The learned magistrate erred in both law and fact in not finding that the alleged admission of debt was subsequently revoked for reasons in paragraph 4 above.*
- (5) *The learned magistrate erred in both law and fact in failing to appreciate that there was theft at the appellant's premises from which vital documents belonging to the respondent's organization were lost/stolen.*
- (6) *The learned magistrate erred in both law and fact in failing to appreciate the fact that the appellant could not withdraw any money from the respondent's account without the consent, approval and authority of the area C.D.A.*
- (7) *The learned magistrate erred in both law and fact in not appreciating the fact that the respondent's project never stopped at any time when the appellant was an office bearer for lack of funds.*
- (8) *The learned magistrate erred in law and fact in not finding that the appellant was not even an official of the respondent at the point in time when the alleged debt is alleged to have been incurred.*
- (9) *The learned magistrate erred in both law and fact in not finding that the respondent had not proved their case to the required standards in the light of glaring irregularities and contradiction.*
- (10) *The learned magistrate erred in both law and fact in not finding that the entire alleged debt was actually framed.*

In support of the appeal, it was submitted that the trial magistrate failed to consider the appellant's defence that he was not the treasurer of the respondents at the time of the alleged loss. It was submitted that the alleged admission of the debt was done under duress and that there was sufficient evidence that some documents had got lost. It was submitted that the respondents' claim was not proved as there was evidence that the appellant disowned the claim even during the trial.

For the respondents it was submitted that the trial magistrate considered all the issues. It was maintained that there was sufficient evidence that the appellant who was treasurer up to 1999 did not hand over the books of accounts but

continued to be in office up to the year 2000. It was further submitted that the appellant had acknowledged the debt in his own handwriting and that the lower court dealt with the retraction of that acknowledgment and rightly rejected the same. It was contended that no defence of frame up was raised during the trial. The court was therefore urged to uphold the judgment of the lower court and dismiss the appeal.

I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. The respondents' claim against the appellant as pleaded was "for the sum of Kshs.119,758/50 being the sum the defendant received on or about March 2000 while holding the office of treasurer and failed to account for to the project."

The respondent was therefore under an obligation to establish that the appellant received the sum of Kshs.119,758/50 in March, 2000 as treasurer and that he failed to account for the money. While the appellant did not deny having been treasurer of the project between 1998, and 1999, he denied having been treasurer in the year 2000. It is however apparent from the evidence of Daniel K. Kimani, Geoffrey Mbugua Mutura and the appellant, that the appellant ceased being treasurer sometime in the year 1999 but that there was no proper handing over done. This prompted the officials of the project to commission David Kimani to audit the books sometime in January, 2000. I find that it was pursuant to that audit, and the meeting at the house of the Chief which was held in February, 2000, that the respondents established the exact amount which was not accounted for by the appellant. It is clear that the appellant did not receive the money in the year 2000 as pleaded but received the money between March 1998 and November, 1999 when he was treasurer.

I find that the respondent failed to prove the claim as pleaded in paragraph 3 of the plaint. Nevertheless, paragraph 4 of the plaint pleaded an acknowledgement of the debt made by the appellant on 16<sup>th</sup> March, 2000. That acknowledgement was an admission of the respondent's claim, and thus if proved, provided a new cause of action to the respondent.

The question therefore is whether that acknowledgement was made voluntarily or whether it was made under coercion and further whether the acknowledgement was properly retracted.

I have noted that although the respondent pleaded that the acknowledgment was made on the 16<sup>th</sup> March, 2000, the evidence tendered showed that there were two written acknowledgments made on the 28<sup>th</sup> February, 2000 and 3<sup>rd</sup> July, 2000. The appellant has not denied having written and signed the two acknowledgments. His only complaint is that the acknowledgments were procured through duress and coercion, and that the same were retracted. The inconsistency regarding the date is therefore immaterial. It is clear from the evidence that the first acknowledgement was made following a meeting and discussions between the old officials and the new officials in the presence of the chief. The second acknowledgement was made about four months later again in the presence of the chief. The appellant did not raise any complaint regarding the acknowledgments until after a year later. I find that the allegations of coercion and duress have not been established as there is no reason why the appellant signed the second acknowledgement or waited for one full year before purporting to retract the acknowledgement. I find that there was sufficient evidence that the acknowledgments were made voluntarily and the purported retraction was only an attempt to avoid making the promised payment. The respondent's claim was therefore established to the required standard. Accordingly, I find no merit in this appeal and do therefore dismiss it with costs.

Those shall be the orders of this court.

Dated and delivered this 9<sup>th</sup> day of October, 2008

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Langi H/B for Kaburu for the appellant

Advocate for the respondent absent