Gichuhi & another v Kilundo (Environment and Land Appeal E005 of 2023) [2024] KEELC 1272 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1272 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E005 OF 2023

A NYUKURI, J

MARCH 6, 2024

BETWEEN

SAMUEL MUGO GICHUHI ..... 1ST APPELLANT

CATHERINE WANGUI WAWERU ..... 2ND APPELLANT

AND

EVANS YOHANA KILUNDO ..... RESPONDENT

(Being an appeal from the judgment and decree delivered in the Chief Magistrate's Court at Machakos by Honourable C. N. Ondieki dated 8th December, 2022 in Chief Magistrate's Court Environment and Land Court Case No. 4 of 2021)

JUDGMENT

Introduction

1. This appeal is against the judgment of Honourable C. N. Ondieki, Principal Magistrate delivered on 8th December 2022 in Machakos Magistrate's Court Environment and Land Court Case No. 4 of 2021. In the impugned judgment, the trial court dismissed the appellants (defendants') counterclaim and allowed the respondent's (plaintiff's) claim as prayed in the plaint. The trial court granted the respondent orders of specific performance compelling the appellants to transfer to the respondent Apartment Number A3MAB6-2 on Block B erected on L.R. No. 10426/252 situated in Athi River, Machakos County (hereinafter referred to as the suit property). The trial court also issued orders of permanent injunction restraining the appellants herein from transferring the suit property to any other person apart from the respondent or in any way interfering with the respondent's rights over the suit property. The appellants were ordered to pay costs.

Background

2. By a plaint dated 4th January 2021 and filed on 8th January 2021, Evans Yohana Kilundo the plaintiff, averred that on 7th Novemver 2019, he entered into a sale agreement with the defendants for sale of the suit property at a consideration of Kshs. 2,000,000/-, which the plaintiff paid in full but the defendants declined to complete the transaction. He stated that although the defendants gave him vacant possession initially, he later took over the suit property from the defendants who had regained possession. He sought for the following orders;

    a. Specific performance of the sale agreement dated 7th November 2019 and entered into between the plaintiff and the defendants.

    b. A permanent injunction to issue restraining the defendants whether by themselves, servants, agents and or otherwise from disposing off in or any way interfering with the plaintiff's rights to Apartment No. A3MAB6-2 on Block B and erected on L.R. No. 10426/252 situated in Athi River Machakos County.

    c. Costs of this suit.

    d. Any other just and equitable relief as this Honourable Court may deem appropriate.

3. Responding to the suit, the defendants filed a statement of defence and a counterclaim dated 20th December 2021. They denied the plaintiff's claim and stated that although they entered into the agreement dated 7th November 2019, the agreement was by duress. In particularizing duress, they stated that the 2nd defendant had been indebted to the plaintiff's mother one Purity Mukami Njuki in the sum of Kshs. 500,000/- and that due to the pressure to pay the said amount, the 1st defendant agreed to sell the suit property to keep the 2nd defendant who is his wife, from criminal prosecution and harm from the plaintiff and his mother.

4. The defendants further denied ever having given the plaintiff vacant possession of the suit property at any point and stated that they repaid the money borrowed from the plaintiff through two banker's cheques in December 2020 and that therefore the agreement could not be enforced as the consideration had been refunded.

5. In the counterclaim, the defendants averred that having refunded the consideration, there is no agreement, between the parties. They sought the following orders;

    a. A declaration that the sale agreement dated 7th November 2019 is unconscionable.

    b. A declaration that the sale agreement dated 7th November 2019 is null and avoid as it was based on duress.

    c. A declaration that the sale agreement dated 7th November 2019 is unenforceable since the consideration was refunded to the plaintiff by the defendants.

6. In a rejoinder, the plaintiff filed reply to amended defence and counterclaim dated 19th January 2022. He stated that Purity Mukami Njuki is neither his biological nor foster mother and that his mother was Serah Kilundo. He denied ever reporting a criminal offence against the 2nd defendant; and stated that the suit property was co-owned by the defendants and that they jointly decided to sell the same. He further denied entering into a loan agreement with the defendants and stated that the impugned agreement was entered into willfully, knowingly and without any form of coercion. His position was that the defendants' intentions were to deny the plaintiff the fruits of an enforceable agreement.

7. On close of pleadings, the suit proceeded for hearing by way of viva voce evidence. The plaintiff presented one witness while the defendants presented three witnesses.

Plaintiff's evidence

8. PW1 was Evans Yohana Kilundo, the plaintiff before the trial court, who testified on 20th April 2022 by adopting the contents of his witness statement dated 3rd April 2021 as his evidence in chief. In the said statement, he stated that on 7th November 2019, he entered into a sale agreement with the defendant for purchase of the suit property at a consideration of Kshs. 2,000,000/-. He stated that after part payment, the defendants surrendered the keys of the apartment to the plaintiff pending transfer to his name. He stated that on 8th November 2019, the defendants informed the initial vendor of the impugned agreement and that they consented to have the completion documents released to the plaintiff, which prompted him to complete payment and perform all his obligations under the contract.

9. He further averred that on 24th December 2020 while he was away, the defendants broke into the apartment, removed the main door and replaced it with a new one, thereby denying the plaintiff access thereto. He testified that on his return to the apartment on 30th December 2020, he was shocked with the defendants' actions and reported the matter at Athi River Police Station. He stated that in the letter dated 21st January 2020, his advocates issued a demand notice to the defendants requesting them to provide the plaintiff with completion documents in vain. He maintained that his mother is called Sarah Kilundo.

10. He produced documents listed in his list of documents dated 4th January 2021 and his supplementary list dated 19th January 2022. He produced the sale agreement dated 7th November 2019; payment slips dated 7th November 2019; acknowledgment note dated 7th November 2019; letter by the defendants dated 8th November 2019; copy of OB dated 30th December 2019; completion notice dated 17th March 2020; email forwarding completion notice; payment slip dated 4th January 2021; and plaintiff's birth certificate.

11. On cross examination, he denied having been refunded money in form of a banker's cheque. He denied receiving the banker's cheque. He stated that he paid a sum of Kshs. 927,000/- in cash before an advocate and that he also went to Family Bank with the 1st defendant and one Aggrey and deposited Kshs. 300,000/-. He asserted that he later deposited Kshs. 728,000/- into the bank account of the 1st defendant. He maintained that he did not receive cheques for Kshs. 728,000/- and Kshs. 300,000/-. He insisted that the defendants voluntarily signed the impugned agreement. He stated that he knew Purity Mukami Njuki as they do business together. That marked the close of the plaintiff's case.

Defendants' evidence

12. DW1 was Samuel Mugo Gichuhi, the 1st defendant before the trial court. He adopted his witness statement as his evidence in chief. His testimony was that on 2019, his wife, the 2nd defendant obtained a loan from a shylock one Purity Mukami Njuki in the sum of Kshs. 500,000/- which she was unable to pay. He stated that the latter charged unconscionable interest rates which increased the owed amount to Kshs. 970,000/-. He maintained that they had never exchanged money with the plaintiff who was only used as a front by the shylock Purity Mukami Njuki to defraud them of their house.

13. According to this witness, on 24th December 2020, he refunded the plaintiff all the monies paid to his wife by the said shylock Purity Mukami Njuki and that they do not owe the two persons. He stated that he paid the said amount through two bankers cheques of Kshs. 728,000/- and Kshs. 300,000/-

respectively forwarded by a process server. He insisted that the sale agreement relied upon by the plaintiff was based on duress so as to defraud him and his wife.

14. DW2 was Catherine Wangui Waweru the 2nd defendant who also adopted her witness statement as her evidence in chief. In the statement, she stated that in 2019 she borrowed Kshs. 500,000/- from a shylock named Purity Mukami Njuki but was unable to pay the same. She stated that on 7th November 2019, she was invited in the offices of Purity's lawyers in Nairobi and she was told that if she could not pay the sum of Kshs. 970,000/- to cover the loan, she should transfer her house to Purity. That therefore, she was requested to admit having already received Kshs. 970,000/-. She maintained that her signature on the agreement was obtained through duress. She stated that on 24th December 2020, her husband the 1st defendant refunded the money received from Purity.

15. She produced documents attached to her list of documents dated 20th December 2021; namely a valuation report dated 3rd September 2021 and a letter dated 5th January 2021. She stated that she was not required to pay for the sale agreement and that they were the registered owners of the suit property. Further that she met the plaintiff for the first time at the advocate's office.

16. In cross examination, she stated that she signed the agreement because she was forced although no gun or machete was used to force her. She stated that at the time of the agreement, she owed Purity, whose name is also in the agreement. She stated that on the date of the agreement, they were paid Kshs. 300,000/- by the plaintiff. She stated that although she lived in the suit property, she moved out after the agreement and that they returned to the house after one and a half years. She averred that Kshs. 728,000/- was paid. She said she had no written agreement with Purity.

17. DW3 was Zacharia Ndeti, a valuer operating Zan Consult Valuers and Management Co. Ltd. He stated that he prepared the valuation report produced by DW2. He stated that the value of the suit property was Kshs. 4,400,000/-; the cost of alterative accommodation for 22 months was Kshs. 605,000/- and service charge was Kshs. 84,930/- making a total of Kshs. 5,089,930/-.

18. On cross examination, he stated that he valued the house without getting inside any apartment in the same area and that he used the building plans from the caretaker. He stated that he compared rent paid within the same estate. That marked the close of the defendants' case.

19. On considering the pleadings, evidence and submissions, the trial court found that there was no credibility in the appellant's evidence. It also found that parties entered into a valid and enforceable contract, in regard to the purchase of the suit property and that the plaintiff had met the threshold for grant of orders of specific performance. Therefore the court dismissed the defendants' counterclaim and allowed the plaintiff's claim by granting orders of specific performance compelling the defendants to transfer the suit property to the plaintiff in 60 days and in default the court administrator to effect the said transfer. The trial court also granted a permanent injunction restraining the defendants from transferring the suit property to any other person apart from the plaintiff. Costs were awarded to the plaintiff.

20. Being aggrieved with the trial court's finding and determination, the appellants filed this appeal vide a Memorandum of Appeal dated 3rd February 2023 citing the following grounds;

    a. The learned magistrate erred in law and in fact in finding that the agreement for sale dated 7th November 2019 (the agreement for sale) in respect of Apartment No. A3MAB6-2 on Block B erected on Land Reference Number 10426/252 (the Apartment) was valid and enforceable.

    b. The learned magistrate erred in law and in fact in finding that the appellants did not sign the agreement for sale under duress.

c. The learned magistrate erred in law and in fact in finding that the demand by the respondent and his business associate to the 2nd appellant to pay the debt owed immediately or sign the agreement for sale and/or sale the apartment to the respondent was a legitimate demand and did not amount to duress.

d. The learned magistrate erred in law and fact in finding that the respondent's case met the requisite threshold for an order of specific performance.

e. The learned magistrate erred in law and fact in granting an order of specific performance.

Even if the agreement for sale were to be valid and enforceable, which it was not.

f. The learned magistrate erred in law and fact in finding the respondent fulfilled all his obligations in the agreement for sale.

g. The learned magistrate failed to consider the terms of the agreement for sale vis a vis the evidence provided by the respondent and confirm whether the respondent performed his obligations in accordance with the terms of the agreement for sale before issuing an order of specific performance.

h. The learned magistrate failed to note from the terms of the agreement and the evidence provided that the respondent was in breach of certain terms of the agreement for sale and was therefore not legible for an order of specific performance.

i. The learned magistrate erred in law and fact in finding that full purchase price was paid and that there was no evidence of rescission of the agreement for sale to entitle the appellants to refund the purchase price.

j. The learned magistrate erred in law and in fact in issuing an order of specific performance when the evidence provided pointed out that the appellants were beneficial owners of the apartment and not legal owners and did not therefore have legal title to the apartment and an order of specific performance to transfer the apartment within sixty (60) days would therefore be in vain.

k. The learned magistrate erred in law and fact in finding that damages would not be an adequate remedy for the respondents.

l. The learned magistrate erred in law and in fact in finding that the appellants did not provide particulars of duress in their pleadings in accordance with Order 2 of the Civil Procedure Rules.

m. The learned magistrate relied on misleading evidence in arriving at the decision.

21. Consequently, the appellants sought the following orders;

a. This appeal be allowed.

b. The judgment delivered on 8th December 2022 in Machakos Principal Magistrate Environment and Land Court Case No. 4 of 2021 be set aside and all the prayers in the counterclaim be allowed.

c. The respondent vacate the Apartment and grant vacant possession to the appellants.

d. The cost of the appeal be awarded to the appellant.

22. On 12th April 2023, this court directed that the appeal be disposed by way of written submissions. On record are the appellants' submissions and supplementary submissions dated 18th May 2023 and 15th November 2023 respectively; together with the respondent's submissions dated 6th November 2023.

Appellants' submissions

23. Counsel for the appellant submitted that the disputed agreement was not valid and that the same was vitiated by duress. Counsel argued that although the recitals of the disputed agreement stated that the appellants were legal owners of the disputed apartment, that was not true as the apartment has not been transferred to the appellants todate. Counsel submitted that the appellants are merely beneficial owners of the apartment and cannot effect transfer of the same to a third party.

24. Counsel argued that as the disputed agreement lacked a completion date but made reference to the Law Society of Kenya conditions of sale 2015, therefore the completion date was 90 days from the date of the agreement of sale. Further, counsel contended that Kshs. 1,000,000/- was to be paid within 7 days of the date of execution of the agreement but that no letter of offer was produced in evidence. Counsel submitted that as the balance of the purchase price was to be paid in 21 days from the date of signing the letter of offer, and the latter having been unavailable, the 21 days ought to have run from the date of execution of the disputed agreement which was not complied with by the respondent.

25. It was further submitted that under the disputed agreement, the respondent was to take possession of the apartment in 14 days after paying the purchase price in full, which term the respondent breached. Further that disputes from the agreement were to be referred to arbitration and that time was of essence.

26. Counsel submitted that it was not true that on the date of the disputed agreement the respondent paid Kshs. 972,000/- in cash and Kshs. 300,000/- by cheque as there is no reason why the amount would be split. Counsel also pointed out that the payment of Kshs. 728,000/- on 4th January 2021 which was over a year from the date of the disputed agreement was in breach thereof. Counsel submitted that the agreement was rescinded vide the appellants' lawyer's letter dated 5th January 2021 with a banker's cheque No. 036972 which was received by the respondent's lawyer on 7th January 2021. Counsel argued that the appellants only signed the sale agreement and not the letter dated 8th November 2019 or the acknowledgment note dated 7th November 2019. Counsel argued that signatures on the three documents were different.

27. Placing reliance on the cases of Madhupaper International Ltd & Another v. Kenya Commercial Bank Ltd & 2 Others [2003] eKLR and Medscheme Holdings (Pty) Limited & Another v. Bhamjee, counsel argued that there are different categories of duress including economic duress which involve taking undue advantage of the financial stress of another person. It was submitted for the appellants that the respondent and his business associate took advantage of the appellants' inability to repay their debt and that the appellants were not allowed to seek independent legal advice before signing the disputed agreement.

28. Counsel argued that where there is inequality in bargaining power due to poverty and ignorance, an agreement resulting from such inequality would be oppressive as there would be no consensus due to duress. Counsel cited the case of Clifford Davis Management Limited v. Wea Records Limited [1975] 1 ALL Er 274 for the proposition that an agreement entered into without a free will on the part of one party is tainted with duress.

29. Regarding the finding by the trial court that the appellants evidence was full of inconsistencies, counsel relied on the case of MTG v. Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) for the proposition that trivial contradictions in evidence do not affect the credibility

of a witness. Counsel faulted the finding of the trial court that the demand on the appellants to pay their debt was not an illegitimate threat and argued that harassing a debtor is wrongful and amounts to duress.

30. It was argued for the appellants that as the disputed agreement was marred by duress, the trial court erred in granting orders of specific performance. Counsel referred to the case of Reliable Electrical Engineers (K) Ltd v. Mantrac Kenya Limited [2006] eKLR and argued that the respondent having not complied with the terms of the disputed agreement, the relief of specific performance could not be available to him.

31. It was further submitted that the dispute between the parties was to be referred to arbitration as provided in the agreement and that therefore the order of specific performance was not available to the respondent. Counsel argued that the available remedy was an award of damages but that the same could not be awarded as the appellants had refunded the owed amount.

Respondent's submissions

32. Counsel for the respondent submitted that the appeal herein was filed out of time without leave of court contrary to Section 79G of the *Civil Procedure Act*, having been filed after 30 days from the date of the impugned judgment. It was argued that the impugned judgment was entered on 8th December 2022 while this appeal was filed on 6th February 2023 which was outside the 30 day period.

33. Further, counsel submitted that submissions made in terms of paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 25, 26, 27 and 33 amounted to introduction of new evidence from the bar and that therefore the same ought to be struck out.

34. On whether the appeal had merit, counsel submitted that all the appellants' complaints could be summed up into only one issue; namely, whether the impugned agreement dated 7th November 2019 was executed under duress. Counsel argued that throughout the trial upto the appeal stage, the appellants affirmed that they owned the apartment.

35. Counsel argued that although the appellants mentioned Purity Mukami Njuki severally there was no evidence given to support her role in the sale; as no loan agreement, and form of transaction was produced to support the alleged loan between the appellants and the said Purity Mukami Njuki. Further that the latter was never joined to these proceedings. Counsel contended that debts do not amount to criminal prosecution and that if indeed there existed a threat of such imminent prosecution, no OB or summons were produced to prove such threat.

36. It was also submitted that the 1st appellant misled the court in denying having signed the agreement. Counsel argued that if the threat could have existed, the appellants did not report to the police or seek redress in court even after vacating the suit property. Counsel contended that the 1st appellant confirmed his email address which was the address that received the completion notice on 17th March 2020 and that he did not bother to respond.

37. Counsel maintained that at page 124 of the record, the 2nd appellant admits signing the impugned agreement and having been paid by the respondent and subsequently moving out of the apartment to allow the respondent's possession. Counsel argued that in contradiction, the 1st appellant in his statement at page 55 of the record stated that they never had an exchange of money with the respondent, yet they state that they refunded the respondent.

38. In addition, counsel submitted that when the argument of duress failed, the appellants changed their narrative and argued that the property was under valued, which evidence was presented through DW3

who testified that he did not enter the house he valued and did not produce plans or architectural drawings used in the valuation. That he never saw a similar house for comparison and did not talk to any tenant or landlord of similar property in the area. Counsel concluded that allowing this appeal would amount to authenticating greediness and dishonesty as the appellants intention is to evade the responsibility in regard to the impugned agreement. Counsel emphasized that the respondent demonstrated that there was a valid agreement deserving enforcement and that the trial court was justified in the findings and determination made.

39. In a rejoinder, the appellants filed supplementary submissions dated 15th November 2023. They argued that they sought leave to file appeal out of time vide ELC Application No. 006 of 2023 and the same was granted on 30th January 2023, which order is at page 159 of the record of appeal. They maintained that they had not introduced any new evidence in the appeal.

Analysis and determination

40. The court has carefully considered the appeal, the entire record and the submissions filed. It is clear that the issues raised for determination in this appeal are three, namely;

    a. Whether the instant appeal was filed out of time without leave of court.

    b. Whether the agreement dated 7th November 2019 was vitiated by duress.

    c. Whether the relief of specific performance was available for the respondent.

41. The question of whether the appeal was filed out of time without leave of court is a question of both law and fact and which must be determined before the merit of the appeal can be addressed as the court cannot have jurisdiction to determine an appeal filed out of time without leave of court.

42. An appeal from subordinate courts to this court must be filed in 30 days, unless the period is extended by court. Section 79G of the *Civil Procedure Act* provides as follows;

> Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> > Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time

43. For purposes of computing time, in law, time does not run from 21st December in one year upto the 13th January of the following year; unless the matter is in respect of a temporary injunction. Order 50 Rule 4 of the Civil Procedure Rules provides as follows;

> Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:
>
> > Provided that this rule shall not apply to any application in respect of a temporary injunction.

44. In the instant matter, the judgment appealed against was delivered on 8th December 2022, while this appeal was filed on 6th February 2023. In view of the provisions of Order 50 Rule 4 of the Civil

Procedure Rules, from 8th December 2022, 30 days lapsed on 31st January 2023, and therefore the appellants having filed their appeal on 6th February 2023, delayed by 7 days and indeed filed the same out of time. Was the appeal filed out of time with leave of court? The appellants pointed out that leave of court was issued by this court on 30th January 2023 vide Machakos ELC Miscellaneous Application No. E006 of 2023, which order is part of the record of appeal at page 159 thereof. This factual position was not challenged in any way by the respondent. I have perused the record, and it is correct that on 30th January 2023, this court granted the appellants 7 days leave from the said date to appeal against the trial court's judgment. There is no evidence that that order was reviewed or set aside and therefore the same remains in force. The appeal was filed on 6th February 2023, which was the seventh and last day from the date of the order of 30th January 2023. For the above reasons, I find and hold that the appeal herein was properly filed out of time with leave of court.

45. The next issue that this court shall proceed to address is the merit of the appeal; and more particularly whether the impugned agreement was procured by duress and whether the respondent deserved the relief of specific performance.

46. The duty of this court as a first appellate court is to re-evaluate, re-consider and re-analyse the evidence before the trial court and make its own independent findings and conclusions, keeping in mind that it had no opportunity to see or hear witnesses and give due allowance for that.

47. In the case of Kiruga v. Kiruga & Another [1988] KLR 348, the court stated as follows;

> 2. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.
>
> 3. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.
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> 4. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed.

48. Similarly, in the case of Kenya Ports Authority v. Kuston (Kenya) Limited [2009] 2 EA 212 the Court of Appeal stated as follows;

> On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in evidence.

49. At the onset, I must point out that the appellants' counsel extensively introduced factual averments that did not feature in the pleadings or evidence before the trial court, which include allegations that in 2018, Karibu Parktel Limited were the first developers in Kenya to construct low cost houses; that the appellants obtained a loan for purposes of purchasing the suit property; that on 16th November 2018, the appellants purchased the suit property at a consideration of Kshs. 3,900,000/-; and that the 2nd appellant is a composer and singer of Gospel music and lacked funds to produce her album. In their submissions, the respondent's counsel objected to this introduction of new matters. In my view, my position on the same is that since submissions are merely a persuasive tool, akin to a marketing strategy, applied upon close of evidence in a trial, the same cannot be a platform for presenting new evidence.

Consequently, this court will not address new factual allegations raised in the parties' submissions which were never raised in the pleadings or evidence. They are not matters in dispute herein because at this stage, the mandate and jurisdiction of this court is to decide based on the pleadings and evidence on record.

50. Ultimately, this appeal turns on whether the agreement of 7th November 2019 was procured by duress and whether the trial court was justified in granting the orders sought by the respondent.

51. Duress is a threat of harm to force another person to act against their free will in a transaction. The Black's Law Dictionary 11th Edition defines "duress" as follows;

> Broadly, a threat to harm made to compel a person to do something against his or her will or judgment; especially a wrongful threat made by one person to compel a manifestation of seeming assent by another person to a transaction without real volition. Duress practically destroys a person's free agency, causing non volitional conduct because of the wrongful external pressure. The use or threatened use of unlawful force usually that a reasonable person cannot resist to compel someone to commit an unlawful act. Duress is a recognized defence to a crime, contractual breach, or tort.

52. Therefore in any transaction where one party places unlawful pressure of exigent and extraordinary situations on the other party, which pressure would cause a person of reasonable firmness not be able to resist, then such transaction would be said to have been procured by duress (See Thomas Mora Wetz in "Necessity" in Encyclopedia of Crime and Justice 957, 959, (Sanford H. Kadish. E.d., 1983). The unlawful pressure ought to demonstrate compulsion, non voluntary, lack of choice and unconscionable coercion.

53. In the case of Madhupaper International Limited & Another v. Kenya Commercial Bank Limited & 2 Others [2003] eKLR, the court held as follows;

> The core feature of duress is illegitimate threats pressurizing the plaintiff into conferring a benefit on the defendant. While it must be stressed that the categories of duress (compulsion) are not closed, at present the main heads are (1) duress of the person; (2) duress of goods; (3) illegitimate threats (other than by a public authority ultra vires) made to support a demand for payment above what is statutorily permitted; (4) economic duress; (5) illegitimate threats to prosecute or sue or publish information; and (6) illegitimate threats by public authorities made to support ultra vires demands.

54. Where a threat is made with intend to abuse one's rights or for an illegitimate purpose even where one is entitled to do, that would amount to duress. Therefore harassing a debtor is wrongful and amounts to duress if a person with the intent of coercing another to pay a debt harasses the debtor with demands for payment in the frequency or manner calculated to subject the debtor or their family member to humiliation or distress (See Norweb PLC v. Dixon [1995] 3 ALL E R 952).

55. Duress may be manifested in different forms; among them and relevant in this matter, is economic duress. Economic duress is a threat of financial injury compelling a person to act against their volition. The Black's Law Dictionary defined economic duress as;

> An unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will – Also termed business compulsion.

56. In the instant matter, the pleadings and evidence show that the agreement dated 7th November 2019 was duly signed by both appellants and the respondent. The appellants however alleged that the

agreement was procured by duress and stated particulars thereof in paragraph 3 of their defence as follows;

a. The 2nd defendant was indebted to the plaintiff's mother one Purity Mukami Njuki to the tune of Kshs. 500,000/- and was under a lot of pressure to pay the money immediately or face unspecified consequences.

b. The 1st defendant agreed to sell Apartment Number A3MAB6-2 (hereinafter referred to as the suit property) to save his wife from criminal prosecution and harm from the plaintiff and his aforesaid mother.

57. Since it is the appellants who raised the defence of duress, the burden of proving that the agreement of 7th November 2019 was procured by duress was to be fully discharged by them. This is because Section 107 of the *Evidence Act* places the burden of proof of a claim on the one making the claim. It is not enough to allege. Allegations must be accompanied with proof for them to count.

58. To demonstrate and prove duress, the 1st appellant testified that in 2019, she borrowed Kshs. 500,000/- from one Purity Mukami Njuki, a Shyrock, which she was unable to repay. She also stated that on the afternoon of 7th November 2019, Purity invited her to the latter's lawyer's office in Nairobi and that she demanded that she refunds the money owed and in default, she would have to transfer her house. She stated that Purity requested her to admit having already received Kshs. 970,000/- which included, what according to her, was an unconscionable interest of Kshs. 470,000/-. She insisted that she has never received a penny from the respondent who was only fronted by Purity to defraud her of her house. She also said that on 24th December 2020, her husband repaid the loan obtained from Purity. Besides, the 1st appellant's testimony rehashed the 2nd appellants evidence and stated that there had never been any exchange of money between the respondent and the appellants and that he refunded the loaned amount through two bankers cheques, sent to the respondent's advocates.

59. Therefore the appellants position is that they were compelled to sign the impugned agreement by threats of prosecution on account of a loan of Kshs. 500,000/- given to the 2nd appellant by Purity. Having considered the appellants' evidence, apart from their allegations of obtaining a loan from Purity and being forced to sign the agreement on account of their failure to pay the debt owed to Purity, there was no evidence tendered, and no attempt made to prove that the 2nd appellant obtained a loan from Purity. In addition, no evidence was presented by the appellants to show any demand for immediate payment of the loan made by the said Purity, or any manner of threats in any form whatsoever, whether by letter, phone call, phone text message or by any other means. Even the two banker's cheques issued by Family Bank are not addressed to the said Purity. In view of the above reasons, it is my finding that the appellants failed to create the nexus between the agreement dated 7th November 2019 and their dealings, if any with the said Purity. Therefore I am not convinced that indeed the 2nd appellant obtained a loan of Kshs. 500,000/- from Purity or that the appellants received threats of any kind or economic duress from Purity for the immediate payment of the loan amount and interest thereon, forcing them to sign the impugned agreement. Allegations that two of the respondent's documents were forged, was not proved by any expert evidence showing that the signatures thereon were not theirs. Consequently, I find and hold that there was no evidence to demonstrate that the appellants signed the agreement dated 7th November 2019 under duress.

60. Besides, it is not lost on this court that the appellants' narration of what transpired is materially inconsistent. This is because the appellants insisted that there was no exchange of money between the respondent and themselves, yet the 2nd respondent in cross examination confirmed receiving Kshs. 300,000/- from the respondent on the date of the agreement. Moreover, they stated that the 1st appellant issued two bankers cheques for Kshs. 300,000/- and Kshs. 728,000/- respectively to pay the

loan given by Purity, yet this amount totals to Kshs. 1,028,000/- and not the sum of Kshs. 972,000/- allegedly owed to Purity. The two figures are irreconcilable. From the evidence, apart from Kshs. 972,000/- paid in cash to the appellants, the respondent deposited in the 1st appellant's bank account Family Bank, Kshs. 300,000/- and Kshs. 728,000/- respectively. Therefore the allegation that there was no exchange of money between the appellants and the respondent is not true.

61. In addition, the appellants' conduct raised more questions in view of their allegation that at the time of signing the agreement dated 7th November 2019, they were not accorded an opportunity to seek independent legal advice, yet for over one year and until this suit was filed in 2021, they did not deem it necessary to seek the legal advice they purportedly craved. Consequently, the inescapable conclusion that this court makes is that there is no credibility in the appellants' testimony and allegations of duress. Although this court had no opportunity to see or hear the witnesses, the record which is not faulted in any manner, paints a picture of the appellants as a dishonest couple whose intend is to apply all means whatsoever to walk away from the consequences of the agreement dated 7th November 2019. I agree with the trial courts' finding that the appellants credibility was wanting. As the appellants failed to prove that they signed the impugned agreement due to threats from Purity, the question as to whether the alleged threats from Purity amounted to illegitimate pressure, becomes moot and I need not address it.

62. Having found that the appellants failed to prove that the agreement of 7th November 2019 was entered into by any illegitimate pressure, I find and hold that the said agreement was not vitiated by duress.

63. The next issue is whether the remedy for specific performance was available to the respondent. Specific performance is a discretionary and equitable remedy requiring compliance with contractual obligations where grant of damages is an inadequate remedy.

64. The Black's Law Dictionary defines specific performance as follows;

> The rendering, as nearly as practicable of a promised performance through a judgment or decree; specifically, a court-ordered remedy that requires precise fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved. Specific performance is an equitable remedy that lies within the court's discretion to award whenever the common law remedy is insufficient, either because damages would be inadequate or because the damages could not possibly be established.

65. It is now settled in law that specific performance is an equitable and discretionary relief which is only granted where damages would not constitute an adequate remedy. A party seeking specific performance must show that he or she has performed or is willing to perform all the terms of the contract and that he or she has not violated the fundamental terms of such contract. In the case of Gurder Birdi & Another v. Abubakar Mdhubuti CA No. 165 of 1996, the Court of Appeal held as follows;

> It cannot be gains aid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.

66. Similarly, in Thrift Homes Ltd v. Kenya Investment Ltd [2015] eKLR the court stated as follows;

> Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy.

67. Specific performance being an equitable relief, the same can only be granted where damages would be inadequate. In the instant case, the parties entered into a sale agreement in respect of the suit property at a consideration of Kshs. 2,000,000/-. On the date of the agreement, the appellants were paid Kshs. 1,272,000/-. On 17th March 2020, the respondent's counsel sent a completion notice to the 1st appellant via email stating that the appellants had refused to provide completion documents or receive the balance of the purchase price. They were asked to collect the cheque for the balance and release completion documents in 7 days of the date of the email. There was no response to the completion notice and subsequently the respondent paid a sum of Kshs. 728,000/- in the 1st appellant's Family Bank Account No. 071xxxxxxx21 on 4th January 2021. Thereafter, the appellants counsel wrote a letter dated 5th January 2021 which was served on counsel for the respondent indicating that the impugned agreement had been entered into under duress and that the appellants had cancelled the alleged illegal transaction. They also enclosed cheques of Kshs. 728,000/- and Kshs. 300,000/- allegedly being refund in respect thereof.

68. It is therefore clear that the respondent indicated as early as 17th March 2020, his intention of completing the transaction and sought for the appellants to receive the balance in 7 days which was not done. As the evidence shows that the respondent paid the entire purchase price, it is clear that the respondent complied with the terms of the impugned agreement and the allegation of non compliance with timelines are immaterial as it is the appellants who had declined to receive the balance. I therefore find and hold that the impugned agreement is enforceable.

69. Paragraph 14 of the impugned agreement provided that in the event the purchaser failed to complete the transaction for reasons other than the default of the vendor, the vendor was at liberty to issue a 21 days completion notice to the purchaser requiring remedy of the same and in default, on expiry of the notice, then the vendor would be entitled to either extend the completion period or rescind the agreement by notice in writing to the purchasers.

70. Rescinding an agreement is to annul, abrogate or cancel a contract. (See Black's Law Dictionary 11th Edition). In this case, the appellants purported to rescind the impugned agreement vide their letter dated 5th January 2021. This letter was not in compliance with paragraph 14 of the impugned agreement as no completion notice had been issued as required. In any event, there is no evidence of non compliance of the terms of the impugned agreement by the respondent. I therefore find that the appellants' letter of 5th January 2021 did not rescind the agreement of 7th November 2019. Although the appellants alleged to have refunded the cheques the sums of Kshs. 728,000/- and Kshs. 300,000/-, there was no evidence that the said amount was debited from their accounts and they did not tender in evidence their bank statements. I therefore find and hold that the agreement of 7th November 2019 was not rescinded. I further find that the respondent having invested in the suit property and being in possession thereof, he deserves an order of specific performance.

71. The appellants also raised the issue that they were merely beneficial owners of the suit property but not registered owners thereof and therefore cannot transfer the same to the respondent hence an order of specific performance should not issue.

72. Ownership of property may be manifested in different categories including legal ownership, beneficial or equitable ownership, contingent ownership, imperfect ownership, perfect ownership, joint ownership and corporeal ownership. An owner of property is one who has the right to the exclusion of others to use, possess or convey it because he or she has a lawful interest in it. The Black's Law Dictionary describes an owner as follows;

Someone who has the right to possess, use, and convey something; a person in whom one or more interests are vested. An owner may have complete property in the thing or may have parted with some interests in tit (as by granting an easement or making a lease).

73. Article 40 (1) and (6) of *the Constitution* of Kenya provides protection of the right to property only to the extend of the property lawfully acquired. It is therefore clear that while registration of property is important, the law is keen on the legality of the acquisition of property, so that whether or not a property is registered, the law only protects the real owner thereof as it expects that the owner thereof must demonstrate lawful acquisition, for him or her to claim ownership. It is clear therefore that ownership of property is not only restricted to registration thereof.

74. Can a remedy for specific performance be defeated merely because a defendant is a beneficial or equitable owner and not the registered owner? I do not think so. This is because an equitable owner is still an owner although the ownership is yet to be registered. In the present case, the appellants do not suggest that their ownership of the suit property is in question. Indeed, although the suit property is registered in the name of Karibu Homes Parktel Limited as demonstrated in the search produced by the appellants, the real owners thereof are the appellants and there is no dispute about that. Even at the time of sale, the appellants were the ones in possession awaiting title from the registered proprietor. I therefore take the view that as the appellants are equitable owners of the suit property and having sold the same, the law expects them to transfer that which they have and nothing more; and in this case what they have is equitable ownership.

75. The evidence shows that the appellants wrote a letter dated 8th November 2019 to Karibu Homes Parktel Limited informing them that they had sold the suit property to the respondent and granted them possession and asked the former to forward the lease agreement to the respondent and to deal with the respondent in respect of the title, going forward. As earlier stated in this judgment, although the appellant alleged that the said letter was forged and denied signing it, no evidence was presented to support that allegation. In the premises, I find and hold that both parties knew that the appellants were beneficial owners of the suit property and that the respondent took upon himself the obligation to pursue registration of the title with Karibu Homes Parktel Limited.

76. Would damages be sufficient for the respondent? In this matter, the appellant sold the suit property in 2019 and gave the respondent vacant possession thereof. The respondent paid the entire consideration. In paragraph 15 (b) of the impugned agreement, the respondent is entitled to sue for specific performance. The evidence showed that since the property was sold in 2019, the appellants have not been paying service charges or any other charges in relation thereto. In view of the above circumstances, I find and hold that the respondent is entitled to the benefits of the impugned agreement and in these circumstances, damages shall not be adequate as they have already taken possession of the suit property for several years. Therefore a grant of specific performance would be an adequate remedy. In the premises, I find and hold that the trial court was right to allow the respondent's claim.

77. On the counterclaim, the appellants sought for a declaration that the impugned agreement was unconscionable, null and void and unenforceable because it was entered into by duress and that there was a refund of the purchase price. This court has already found that there was no duress and that there was no evidence that the refund of the consideration happened, as there is no evidence that Kshs.

2,000,000/- was debited from the appellants' accounts to the respondent's account. In any event, the court has also found that the impugned agreement was not rescinded and therefore the same is valid and enforceable. In the premises, the appellants did not prove their counterclaim which was predicated on allegations of duress; and therefore the trial court was right in dismissing the same.

78. Ultimately, I find no merit in the appeal and the same is hereby dismissed with costs.

79. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Mogotu for appellants

Mr. Mwalo for respondent

Josephine – Court Assistant