Singo'ei v Bosek (Commercial Suit E290 of 2024) [2025] KEHC 2986 (KLR) (Commercial and Tax) (14 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL SUIT E290 OF 2024

BM MUSYOKI, J

MARCH 14, 2025

BETWEEN

FELIX LIMO SINGO'EI ..... PLAINTIFF

AND

JOEL KIMUTAI BOSEK ..... DEFENDANT

JUDGMENT

1. By an originating summons dated 20th May 2024, the plaintiff prays for determination of the following questions;

    a. Whether the defendant is in breach of the settlement agreement dated 27th March 2024.

    b. Whether this Honourable Court should issue an order of specific performance against the defendant to pay the plaintiff herein the sum of Kshs 24,000,000.00 in accordance with the settlement.

    c. Whether the court should award interest on the aforesaid sum from the date of breach until full payment.

    d. Whether the costs of this suit should be borne by the defendant.

2. The evidence in support of the originating summons is contained in the plaintiff's supporting affidavit dated 28-05-2024 and supplementary affidavit dated 26th July 2024. According to the said affidavits, the parties herein had agreed to jointly purchase LR No 13544/2 (IR No 82726) where the plaintiff contributed a sum of Kshs 24,000,000.00 but the deal did not materialise and the parties entered into a written agreement that the defendant unconditionally refunds the said sum of Kshs 24,000,000.00. The said agreement has been produced as annexure FLS-1. It is averred that the defendant was to refund Kshs 13,500,000.00 on or before 15th April 2024 and the balance of Kshs 10,500,000.00 within ninety

days from the said 15th April 2024. The plaintiff avers that despite these clear terms, the defendant has failed to pay the said amount. The plaintiff has produced a notification of breach and screenshots of some WhatsApp communication between the parties in which the defendant had promised to pay.

3. In response to the originating summons, the respondent filed an application by way of chamber summons dated 19th June 2024 praying that several paragraphs of the supporting affidavit be struck out for being scandalous, frivolous, vexatious, abuse of the court process and malicious. He also filed a replying affidavit dated 19th June 2024, grounds of opposition dated 19th June 2024, further affidavits dated 13th September 2024 and preliminary objection dated 17th September 2024.

4. In the replying affidavit, the defendant avers that this court lacks jurisdiction to entertain the matter. He adds that in 2020, he bought the subject property from one Elijah Kamau Mbombo and in 2021 the plaintiff, his wife, the defendant's wife and the defendant agreed to make contributions to jointly own the property. Following this agreement, the four incorporated a company known as Alfa Jollin Group Limited through which they were to develop the property by erecting business structures for leasing out.

5. The defendant adds that, since the property was valued at Kshs 46,000,000.00, the plaintiff and his wife were to contribute Kshs 23,000,000.00 being half shares of the company. The defendant depones further that he never received Kshs 24,000,000.00 but admits receiving Kshs 920,000.00 which he claims was half share of stamp duty for transfer of the property to the company. It is the defendant's position that, since the company has equitable interest in the property, he only holds a quarter of shares of the property although it is still in his name.

6. According to the defendant, the agreement between him and the plaintiff is null and void because the same was drawn by an advocate who has taken sides despite having acted for both of them and therefore barred from testifying against him by virtue of Section 134 of the *Evidence Act*; it provided for completion date of 15th July 2024 yet the suit was brought on 20th May 2024 and the originating summons is brought out of malice and the court is being asked to rewrite the agreement for the parties. The defendant has argued further that the suit is on ownership of LR number 13544/22 and how a director of the company ought to sell their shares.

7. The defendant's grounds of opposition contend that the suit is unfounded, untenable, bad in law, vexatious and frivolous and the plaintiff is barred from relying on direct privileged information between the defendant and their advocate. The same grounds are repeated in the preliminary objection dated 17th September 2024.

8. In the further affidavit, the defendant depones that the plaintiff has not proved that he paid the Kshs 24,000,000.00 and denies owing the plaintiff any money. He maintains that the suit involves a land transaction and in proof thereof, he has exhibited correspondence between the parties in respect of the land transaction.

9. According to him, for refund to be discussed, the company should be involved or dissolved first yet no step has been taken along those lines. He adds that the parties had intention of disposing the property but they did not get a suitable buyer and had the sale gone through, they would have collapsed the company and shared the proceeds based on the shareholding. He adds that the plaintiff took away his (defendant's) motor vehicle registration number KCS 801B in exchange of his motor vehicle and the defendant paid the plaintiff a further Kshs 3,949,480.00 but several ethical issues arose and as a result, the arrangement collapsed. For this combination of facts, the defendant argues that this matter is not suitable for an originating summons and the plaintiff should file normal suit in form of a plaint to enable the defendant plead an appropriate counter claim or set off. It is also his position that the debt

acknowledgement agreement was made under duress and undue influence because the advocate who was acting for both parties decided to take sides with the plaintiff and fixed him (the defendant) in a corner where the only option for him was to sign the acknowledgement.

10. When this matter came before me on 8-10-2024, I directed that the originating summons and the preliminary objection shall be heard together and parties should file submissions on both. The plaintiff had filed submissions dated 8-08-2024 while the defendant filed his submissions dated 29th October 2024. Having read through the documents and submissions filed by the parties as indicated above, I have formed opinion that the following issues call for determination;

    a. Whether this court has jurisdiction over the matter.

    b. Whether the matter is suitable for an originating summons.

    c. Whether Shadrack Kipkorir advocate is professionally and ethically competent to appear in this matter.

    d. Whether the defendant signed the agreement dated 27th March 2024 under duress or/and undue influence.

    e. Whether the agreement is enforceable.

    f. What orders should this court grant.

Jurisdiction

21. The respondent has not clearly expressed himself on the problem he has with jurisdiction of this court but from his averments, I discern that the argument is that the matter should have been filed in the environment and land court. This is because the respondent states that the issue herein involves ownership and purchase of land parcel number LR No. 13544/22 (IR No. 82726). Article 162(2)(b) of the *Constitution* provides as follows;

> Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.'

22. Pursuant to the above Article, the Parliament enacted the Environment and Lands Court Act Chapter 8D of the Laws of Kenya which provides at Section 13(2) that;

> In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—
>
> a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> b. relating to compulsory acquisition of land;
>
> c. relating to land administration and management;
>
> d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> e. any other dispute relating to environment and land.'

23. It is indisputable that the jurisdiction of the environment and land court is limited to matters which involve management and use of environment and use and occupation and title to land. In my

considered view, this matter does not fit in any of the areas mentioned in the have cited section. The plaintiff has not claimed entitlement or interest in the mentioned land. The cause of action emanates from a contract for refund of money. The title which has been exhibited is clear that the land is still registered to the defendant. At no time was the intention to buy the land actualised. Parties entered into a contract for refund of the money received by the defendant from the plaintiff and that is what the plaintiff is seeking to enforce. In view of these facts, I see no merit in the argument that this court lacks jurisdiction over the matter.

The originating summons

24. Originating summons are meant for matters which are straight forward and do not need so much litigation. In Kibutiri v Kibutiri (1983) KECA 74 (KLR)

> The procedure by way of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way. The procedure is, however, not meant to determine matters which involve serious and complex questions of law and fact (Re Giles (2) [1890] 43 Ch D 391 and Kulsumbhai v Abdulhussein [1957] EA 699). 2. In cases where complex issues and contentious questions of fact and law are raised, the judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.'

25. The plaintiff has taken out this originating summons pursuant to Order 37 Rule 3 of the Civil Procedure Rules seeking enforcement of the aforesaid contract. The Rule provides that;

> A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).'

26. There is no dispute that the contract pleaded by the parties existed and in my view the matter clearly qualifies to be prosecuted under this Rule. The respondent has claimed that there are complex and protracted issues which are not suitable for an originating summons. It is notable that the defendant's defence in this matter is mainly that the agreement was signed under duress and undue influence. Based on the material placed before me, I am of the opinion that the issues raised by the defendant can be determined by way of affidavit evidence.

27. The defendant also claims that he has a counterclaim and set off against the plaintiff but has not given details of his claim. In my opinion, there was nothing stopping the defendant from pleading the counterclaim in his replying affidavit to enable this court appreciate his cause of action and proceed to give directions under Rules 18 and 19 of Order 37 of the Civil Procedure Rules. I find and hold that the matter is suitable for disposal through an originating summons.

The advocate

28. The defendant has argued that the claim is not sustainable because Kipkorir Shadrack, the advocate who acted for both parties during the transaction has turned against him in breach of professional ethics and conduct by representing or testifying for the plaintiff. He contends that having acted for him, the said advocate should be barred from representing or testifying for the plaintiff.

29. The suit herein has been filed through the law firm of Kipkorir & Wanyama LLP whereas the agreement between the parties was drawn by the law firm of S. Kipkorir & Komen Law and attested by Kipkorir Shadrack. It should be noted that the defendant has not made an application for disqualification of the law firm of Kipkorir & Wanyama LLP from representing the plaintiff. It is not clear to this court and there is no material placed before me to show that Kipkorir Shadrack who attested the agreement or the firm of S. Kipkorir & Komen Law which drew the agreement have any relationship with Kipkorir & Wanyama LLP. The counsel who has been appearing before this court as representing the plaintiff is Mr. Wanyama. My search from the Law Society of Kenya search engine shows that Kipkorir Shadrack Advocate works in the firm of Muturi S K & Co. Advocates. Based on these facts, this court cannot say with any degree of certainty that the advocate who drew the agreement is the same advocate who is acting for the plaintiff in this matter. The party who seeks to have an advocate disqualified has the duty to present enough material to support their claim.

30. In addition to the above, there is nothing in the documents filed herein that shows that the advocate who drew and/or attested to it was acting for the defendant. The screenshots of the WhatsApp communications exhibited by the plaintiff as annexure 'FLS-2' which have not been denied, are clear that the defendant was referring to the advocate as the plaintiff's lawyer and not their joint lawyer. Again, there is nothing in the agreement that would suggest that the advocate who drew and attested it was acting for both parties. The plaintiff has not proved to me that there was any privileged communication between the said advocate and him which would prejudice him in this matter. In any event the said advocates have not been called as witnesses in this matter or sworn any affidavit. In that case, the allegations by the defendant that they should be barred from testifying against him pursuant to Section 134 of the *Evidence Act* are not merited.

Duress/undue influence

31. The defendant has claimed that the agreement was signed under duress and undue influence. In his words, the advocate drawing the agreement roped in various separate transactions to pressurise him and in the process, he felt cornered and ended up signing the agreement. Admittedly, the defendant is an advocate of the High Court of Kenya of 30 years standing who would be expected to understand and appreciate implications of appending his signature on instruments and documents. Clause 7 of the agreement indicates that the parties willingly entered into the agreement without undue influence or representation or warranty and that the parties had intention of binding themselves. The defendant has not claimed that he did not understand this part of the agreement.

32. If the defendant was not comfortable with the circumstances under or environment in which the agreement was drawn, he had the liberty to seek legal assistance from another advocate. I see nothing in the agreement and the whole process that would suggest or manifest environment of undue influence or duress. The agreement is drawn in clear and certain terms and clear simple language. It is not indicated that the defendant was trading his signature for some favour or other consideration. It is not enough for a party to plead undue influence or duress and expect the court to find in its favour. The party must go further and demonstrate that their signature was obtained through pressure or other external factors default of free will. No particulars of duress or undue influence have been specifically stated in any of the defendant's papers filed in response to the originating summons. In Nakuru Industries Limited v Shah & 2 Others (Suing in their Representative Capacities as Trustees of Shree Visa Oshwal Community - Nakuru (2024) KECA 1783 (KLR), the Court of Appeal held that;

> Under Order 10 rule 2(1)(a) of the Civil Procedure Rules, every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which

the party pleading relies. The appellant, despite alleging duress, never set out any particulars beyond stating that the duress was exerted by the former State House Comptroller.'

33. On what constitutes duress, the Court of Appeal held in John Mburu v Consolidated Bank of Kenya (2018) KECA 796 (KLR) as follows;

> Which leads us to the second issue: was he under duress or coercion to negotiate? The definition of duress was given in the case of Ghandhi & Another vs Ruda (1986) KLR 556, as follows:
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> > " Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm. The threat must be illegal in the sense that it must be a threat to commit a crime or tort."
>
> A threat to sue for a civil wrong, for example, is not as a general rule, voidable for duress.
>
> But there is also economic duress which was discussed by this Court in Kenya Commercial Bank Limited & Another vs Samuel Kamau Macharia & 2 Others [2008] eKLR. The court cited with approval the decision of the Privy Council in Pao & Others vs Lau Yiu & Another [1979] 3 ALL E.R. 65, stating thus:
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> > Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree...that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent.....In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it".

Enforceability

34. I have already held that the agreement was entered between the parties on voluntary basis. The role of the court in matters of contract is to enforce the terms of the contract and remedy breaches in order to put all parties in a position they would have been had the breach not occurred. In this matter, the performance of the contract would have been complete had the defendant refunded the Kshs 24,000,000.00 in question.

35. The defendant has argued that the agreement is not enforceable because the plaintiff has not laid the basis or disclosed to the court the basis of and how the money was to be paid. He claims that the property in question was to be bought and registered to their jointly owned company. There is no evidence produced to show that the company had interest in the land. The title is admittedly still in the name of the defendant. In the agreement which I find to have been properly and lawfully signed, there was no indication or even mention that the company was involved in it. I find it interesting that the defendant states that he was looking for a buyer for the property then share the proceeds from the sale with the plaintiff and other directors of the company. If indeed the defendant did not receive the money, what then, would be the basis for sharing the proceeds of sale with the plaintiff? In my opinion, the defendant is in this matter blowing hot and cold at the same.

36. The moment the parties put their agreement into writing, all the previous arrangements which are not captured in the agreement become moot and are considered as extraneous unless they are shown to have been intended to form part of the contract. Claude 9 of the agreement stated that;

> This agreement contains the whole agreement and understanding between the parties relating to the transaction provided for in this agreement and supersedes all previous agreement (if any) whether written/oral between the parties in respect of such matters.'

37. This court cannot go beyond and behind what is in writing neither can it rewrite the contract for the parties. The defendant has not convinced this court why the plaintiff should not be put in the position he would have been had the said sum been paid. In view of this, it is my finding that the defendant owes and is bound to pay the plaintiff a sum of Kshs 24,000,000.00.

Orders

38. The defendant has argued that the suit was filed prematurely and as such the same is incompetent. It is true that the agreement provided for completion date of 15-07-2024. The plaintiff started demanding payments after the first installment was defaulted. The agreement did not provide that upon default of the first installment, the whole of the debt was to become due and payable. It is my position that the plaintiff should have waited for the completion period to end. I consequently find that the suit was filed prematurely.

39. However, the above does not mean that the plaintiff's right to recover the money has dissipated and since I have found that the defendant is liable to pay and noting that the completion period came and passed and the defendant has resisted to pay, I am of the view that the remedy for the premature filing is to deny the plaintiff the costs of the suit. For similar reason, I hold that the plaintiff is not entitled to interest from the time of default. I will order that interest shall run from the date of this judgement at court rates until payment in full.

40. In conclusion, the originating summons succeeds to the above extent and I proceed to give the following orders;

    a. Judgment is entered for the plaintiff against the defendant for a sum of Kshs 24,000,000.00.

    b. The above sum shall attract interest at court rates from the date of this judgment until payment in full.

    c. Each party shall bear their costs of the suit.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Masakhalia holding brief for Mr. Wanyama for the plaintiff and Miss Kituyi for the defendant.