



**Earl v Mbirika (Civil Appeal E914 of 2023)
[2024] KEHC 10847 (KLR) (Civ) (12 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E914 OF 2023

CJ KENDAGOR, J

SEPTEMBER 12, 2024

BETWEEN

BALLENGER BARRY EARL APPELLANT

AND

TOM AKOYO MBIRIKA RESPONDENT

*(Hon. Brenda J. Ofisi, Senior Resident Magistrate delivered on 11th August, 2023
at the Small Claims Court at Nairobi, in SCC. COMM. NO. E2796 OF 2023.)*

JUDGMENT

1. This Judgment relates to a decision of Hon. Brenda J. Ofisi, Senior Resident Magistrate delivered on 11th August, 2023 at the Small Claims Court at Nairobi, in SCC. COMM. No. E2796 of 2023. The court ruled in favour of the Respondent, allowing a claim of Kshs.400,000/= against the Appellant. Additionally, the court dismissed the counterclaim that was filed by the Appellant in that case.
2. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 28th August, 2023. He listed nine grounds of appeal, which are as follows;
 - I. The learned trial Magistrate erred in law and in fact by failing to properly scrutinize and evaluate the pleadings and submissions tendered by the Appellant and correctly relate the same to the case cited therein and thereby failing to arrive at a fair and just decision.
 - II. The learned trial Magistrate erred in law and in fact by failing to consider that the contract was void ab initio as the Appellant is not the registered owner of the motor vehicle in question or the agent/servant of the registered owner hence no privity of contract.
 - III. The learned trial Magistrate erred in law and in fact by failing to consider that the contract was signed under undue influence, duress, and coercion as the contract clearly indicates the case



would be withdrawn from the police and the vehicle would remain at the police station for two weeks thus undue influence and coercion was more probable than not as it was indicated in the contract at paragraph D, H, and I.

- IV. The learned trial Magistrate erred in law and in fact by failing to consider that the evidence supposedly supporting the contract and what gave rise to the contract was founded on fraudulent misrepresentation and false receipts.
- V. The learned trial Magistrate erred in law and in fact by failing to consider that it was a key term of the contract that evidence of the supposed loan or money advancement be produced which the Respondent only produced at trial and the evidence was marred with forgery.
- VI. The learned trial Magistrate erred in law and in fact by failing to consider that there was no evidence of Kshs.250,000/= being advanced to the Appellant.
- VII. The learned trial Magistrate erred in law and in fact by failing to consider that the counterclaim was warranted and was sufficient proof that the Respondent had not fulfilled any contractual obligation as claimed.
- VIII. The learned trial Magistrate erred in law and in fact by finding that the Respondent was entitled to holding the motor vehicle as security while no such agreement was entered into or implied by either of the parties and therefore the Respondent had no ground of reporting the vehicle as missing while he could have clearly reported the Appellant on a personal level.
- IX. The learned trial Magistrate erred in law and in fact by failing to consider that the contract was void ab initio as circumstances that supposedly gave rise to the contract were shrouded in mystery, ambiguity, and lots of lies accompanied by forged receipts.
- X. He prayed that the Appeal be allowed and the trial court's Judgment be set aside.

Background

3. The Respondent instituted the Small Claims Court Case through a Statement of Claim dated 19th April, 2023. He sought the prayers granted premised on the averments that the Appellant was indebted to him to the tune of Kshs. 400, 000/=, relating to money advanced for the repair of motor vehicle registration number KDD 045Z (hereinafter referred to as “the motor vehicle”). The breakdown of the sum is Kshs. 250,000/= being repair costs and the remainder interest.
4. According to the Respondent, the vehicle was repaired and confirmed by the Appellant. It was then returned for safekeeping at the church compound, awaiting the Appellant's settlement of the money advanced to him. The motor vehicle is stated to have disappeared from the church compound two weeks later and the Appellant went missing, necessitating the Respondent's report of the subject motor vehicle's disappearance at Lucky Summer Police Station vide OB No. 11/ 05/2022 and also to the Director of Criminal Investigations (DCI) at Pangani Police Station. The DCI found the Appellant in possession of the subject motor vehicle, which led to the parties entering into a Debt Settlement Agreement dated 17th June, 2022, thus, signalling the parties' agreement to settle the matter amicably and the Respondent's withdrawal of the complaint at the DCI – Pangani Police Station.
5. In the agreement, the Appellant acknowledged that he was indebted to the Respondent to the tune of Kshs 400,000/= and promised to clear the debt. One of the terms of the agreement was that the Appellant was to pay 70% of the debt as a first instalment within the first two weeks of the agreement, and the balance of the principal debt was to be paid within 30 days after payment of the first instalment.



The Respondent accused the Appellant of failing to meet this contractual obligation per the debt settlement agreement.

6. Vide response to the statement of claim and counterclaim dated 26th May, 2023, the Appellant averred inter alia that he does not owe the Respondent any money and that there was no contract for repair of the subject motor vehicle. According to the Appellant, he took the subject motor vehicle from the church compound with the full knowledge of one Bishop Patroba, who had introduced the two parties to one another and passed through the security gate in everyone's full view. The Appellant contended at the Small Claims Court that the Respondent and others were colluding to dispose of the subject motor vehicle, hence the claim of Kshs.400, 000/= is an extortion. The Appellant pleaded that the Debt Settlement Agreement dated 17th June, 2022 was forced and entered into through harassment and duress. To wit, he was to either sign it or face arrest and confinement in the police cells.
7. The Appellant's counterclaim asked the Small Claims Court to dismiss the Respondent's claim and enter judgment in his favour for damages due to harassment, inconvenience, character assassination, fraud, and forgery. Additionally, the counterclaim asked for an order restraining the Respondent from harassing or threatening the Appellant, as well as the costs of the suit and interest on all the above.
8. The parties at the lower court proceeded under Section 30 of the Small Claims Court Act, which allows the Court to determine any claim on the basis of documents, written submissions, statements, or other submissions presented to it.
9. The appeal was canvassed through written submissions.

The Appellant's Submissions

10. The Appellant submitted that the lower court erred because it based its indebtedness on the Debt Settlement Agreement without considering all the factors, circumstances, and evidence adduced in court. He also submitted that the lower court reached the wrong conclusion because nothing was adduced to show that, indeed, such money was advanced to the Appellant. He contended that the receipts produced in court to justify the claim were not authentic and were forgeries.
11. The Appellant also submitted that the lower court should not have relied on the Debt Settlement Agreement because he entered into the agreement under coercion, intimidation, and threats. He submitted that the Appellant was particularly threatened in the sense that if he did not enter into the Debt Settlement Agreement, the vehicle would remain at the police station. He relied on the case of *Murtaza Hassan & Another v Ahmed Slad Kulmiye* [2020] eKLR.

The Respondent's Submissions

12. The Respondent submitted that the Appellant was not coerced into signing the Debt Settlement Agreement because the Appellant's Advocate drafted the agreement, and it was signed two days after the Appellant had been released from the police station. According to the Respondent, the Appellant's coercion claims are unfounded because the Appellant signed the agreement in the presence of his advocate and at a hotel away from the police station.
13. He submitted that the appeal lacked merit as there is no legal basis for reaching a different conclusion than the one the trial court reached. He relied on the case of *Amesnet Enterprises Limited & 22 others v Susan Wanjiru Wangendo* [2021] and *Mohamed Ahmed Abdun & Another v Mini Bakeries (MSA) Limited* MSA CA Civil Appeal No. 88 of 2018 [2019] eKLR.
14. I have carefully considered the grounds of appeal, the record of appeal and the rival submissions by the parties before this court.



15. The role of this court as the first appellate court was explained by the Court of Appeal in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR;

“.... to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.....”

Issues for Determination

16. There is no dispute about the parties' connection in this case. The witness statements confirm that they were introduced to each other by a mutual friend regarding the subject motor vehicle. From the statements, the Appellant controlled and utilized the subject motor vehicle as the owner, although it was registered under a different person. The main issues to be determined are whether a valid claim arose from the relationship and whether the Appellant signed the Debt Settlement Agreement under coercion.
17. The Appellant acknowledged that the subject motor vehicle had mechanical issues in his witness statement. He further acknowledged that the respondent herein handled the repairs issue. The bone of contention from this is that there were no repairs done by the Respondent that would warrant any payment. The Appellant's case was that if the turbo replacement had been done, the motor vehicle would not have been faulty shortly after that leading to subsequent repair expenses on his part.
18. I have reviewed the supporting documents on record in support of the claim, as well as the receipts from the auto shops. They directly correspond to the spare parts documented in court and are from the relevant period. The Respondent also curved out a case showing that he took a loan with the SACCO as proof of source of funds that gave rise to the claim before the court. The document indicates that the loan accrues interest. I find nothing unscrupulous about the supporting documents filed alongside the statement of claim.
19. The main point of reference for the claim is a debt settlement agreement (hereinafter referred to as 'the Agreement') dated 17th June, 2022. I have perused the record before me and confirmed that the agreement related to the claim of monies advanced for repairs of the subject motor vehicle. The debt settlement agreement dated 17th June, 2022 stated inter alia that;
- “(A). The creditor took a loan facility from his SACCO to finance Motor Vehicle repair for M/V Ford Ranger, White in colour, Registration Number KDD 045Z for a sum of Kenya Shillings Two Hundred and Fifty-Thousand (Kshs. 250,000/-) ON 3rd February, 2022.
 - (B). The parties had not agreed within which period the monies borrowed will be refunded by the debtor.
 - (C). The monies borrowed by the creditor has and continues to accrue interest and penalties.
 - (D). The creditor reported the matter to Pangani Police Station vide OB Number 11/11/5/2022 Lucky Summer Police Station which was later transferred to Pangani Police Station.
 - (E). The parties have negotiated and agreed to fix the total indebtedness at Kshs.400, 000/= as the amount to be paid by the debtor.



- (F). Parties have agreed that interest and penalties will stop running and final debt will be fixed at Kshs. 400, 000/= on condition that the debtor pays strictly on the dates the payments fall due.
- (G). In default of any instalment, the whole debt together with interest and penalties, if any, will become immediately due and owing upon the happening of such default and the creditor to be at liberty to seek legal redress for recovery without reference to the debtor.
- (J). During the two-week period, the debtor will pay 70% of the principal sum and interest and penalties of Kshs.400,000/= to wit Kshs.280, 000/= and the balance of the debt within 30 days from the end of the first two-week period.
- (1.1). It is hereby agreed between the parties that the total indebtedness amounting to Kshs.400, 000/= shall be repaid back to the Creditor at 70% as first instalment within the first two weeks after execution of this agreement and the balance of the principal debt will be paid within thirty days after payment of the 70% aforesaid.
- (2.1). In the event of non – payment within the payment period, the interim settlement amount shall constitute an admitted sum in respect of which the creditor shall be entitled to summary judgment and to execute it as a decree...”

20. The Appellant admitted this fact in his Witness Statement dated 16th June, 2023, where he confirmed that he signed the agreement albeit under duress. He says;

“I consequently had to sign the agreement under duress.”

21. The agreement also shows that the Appellant had a witness to attest to his signing, Phoebe Musembi. Phoebe, in her statement, refers to the same agreement;

“The total sum of money lost due to the claimant’s actions are..... Kshs.55,000 for the forced agreement.”

Based on the above analysis, it is clear that the Appellant signed the Debt Settlement Agreement.

22. To rebut the Appellant’s coercion claims, the Respondent emphasized the argument that the Appellant’s advocate was the initiator and drafter of the agreement. The agreement was drawn by the firm of Ogwaka Ndege & Co Advocates. It also shows that Dismas Ogwoka Ndege, Advocate and Commissioner for Oaths, witnessed the agreement. From the statements, there was no consensus between the parties about the relationship between the Advocate, the Appellant and the Respondent.

23. The Appellant signed the Debt Settlement Agreement on 17th June, 2022. It is noteworthy that the Appellant first made the coercion and duress claims eleven (110 months later, on 26th May, 2023, when this matter went to court. The Appellant did not take any legal steps to avoid the contract between the signing of the agreement and the commencement of the suit at the lower court.

24. The Court is guided by the Court of Appeal decision in Mohamed Ahmed Abdun & Another v Mini Bakeries (MSA) Limited MSA CA Civil Appeal No. 88 of 2018 [2019] eKLR, where the court held as follows;



29. In the recent decision in *John Mburu vs. Consolidated Bank of Kenya* [2018] eKLR this Court echoed the words of the Privy Council in *Pao On vs. Lau Yiu Long* (above) that in determining whether duress is established, “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 and be regarded as coercion of his will so as to vitiate his consent...In determining whether there was coercion of will such that there was no true consent it is material to enquire 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.”
25. The court is also guided by the decision of the court in *Ahmed Mohamed Noor versus Abdi Aziz Osman* [2019] eKLR, where the court observed as follows;
18. There is one main issue for determination in this appeal. It is whether the Debt Acknowledgement Agreement was procured by undue influence or fraud.
54. Third, even if the police officers were present during the signing of the agreement, would that be tantamount to undue influence? The Respondent did not state why the police officers were at the hotel. Further, he did not say what that the police officers did. It was DW2 who said ‘... Perhaps the words made him to sign.....’ Which words? By who? DW2 was purely speculative.
55. Fourth, what did the Respondent do after signing the Agreement? The Agreement was executed on 11/12/2016. A demand letter was served upon the Respondent in May 2017. The suit was filed in June 2017. The Respondent simply did not do anything to challenge his signing of the Agreement. No report to the police oversight body was made. The Respondent did not even instruct his Counsel to repudiate the Agreement.
26. Parties are entitled to use alternative dispute resolution mechanisms. They may withdraw a case from the criminal justice system and or pursue it through the civil system as long as they are within the permitted legal parameters. In this case, there was nothing untoward in the withdrawal of the complaint lodged at the Police Station. From the facts of this case, the Respondent’s actions do not indicate any intention to exert undue influence. He was rightfully entitled to file the civil claim after the Appellant failed to fulfil his contractual obligation as per the debt settlement agreement.
27. Section 107 (2) of the Evidence Act provides that where a person is bound to prove the existence of any fact, the burden of proof lies on that person.
- Upon re-evaluating the evidence before the court and applying the cited authorities, I find that the Respondent proved his case on the required threshold. The Appellant failed to demonstrate that he executed the agreement under coercion. The coercion claims are misplaced, and the Appellant was not entitled to the orders sought in the counterclaim. The trial court duly arrived at the correct findings, and I see no reason to disturb the Judgment.
28. The upshot is that this appeal lacks merit and is hereby dismissed with costs to the Respondent.
29. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 12TH DAY OF SEPTEMBER, 2024.



.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Dalphin

Advocate for Appellant: Ms. Musau

Advocate for Respondent: Mr. Wetaba

