



**Weru v Nderitu (Civil Appeal E024 of 2022)
[2023] KEHC 20678 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20678 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E024 OF 2022
LM NJUGUNA, J
JULY 21, 2023**

BETWEEN

JANE MUMBI WERU APPELLANT

AND

JOSEPH WAIRAGU NDERITU RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgment of Hon. E.M. Gaithuma (R.M) delivered on 25.04.22, in PM’S Court at Nyeri PMCC No. E010 of 2022, in which suit, the appellant sued the respondent for breach of contract.
2. The cause of action was premised on the fact that the appellant and the respondent entered into an agreement dated 17.09. 2021 wherein she supplied cows to the defendant for slaughtering. That the defendant only paid for 526Kgs of meat totaling to Kes. 173,580/= instead of 580 Kgs amounting to Kes. 198,000.00. She averred that the defendant paid her less money compared to the kilos of meat supplied and therefore, she demanded that the respondent be compelled to make good the balance for the supplied meat. In the same breadth, the appellant conceded to the fact that she signed an agreement with the defendant at the police station albeit under duress and /or coercion. She contended that the agreement did not include all the monies owed by the defendant.
3. Being dissatisfied with the said judgment, the appellant filed the appeal herein in which he has listed five (5) grounds of appeal in the memorandum of appeal dated 28.04.2022. A perusal of the grounds of appeal reveals that the appellant faults the trial court for failing to find that she was entitled to the prayers as sought for the reason that she did not prove her case on a balance of probabilities.
4. The appeal proceeded by way of written submissions. In her submission’s, the appellant reiterated her grounds of appeal faulting the finding of the trial magistrate for dismissing her case.



5. The respondent on the other hand submitted that the record of appeal as filed by the appellant is incomplete as the decree was not annexed therewith. Further, it was stated that some pages of the proceedings were missing and therefore, the appeal herein is one that was ripe for dismissal. Reliance was placed on the case of *Rentworks East Africa Limited Vs Jeniffer Kinya Simon*, High Court at Chuka Civil Appeal E10 of 2020 [2022] eKLR. The respondent contended that the judgment by the trial court was well reasoned and therefore, the appellant's allegations faulting the finding of the trial court was unfounded. That a cursory look at the plaint showed that the appellant was not sure of her claim as there existed glaring inconsistencies that were not justified nor substantiated.
6. The respondent stated that the alleged debt had been settled and that, the same had been acknowledged by the appellant and therefore, the change of mind that she was coerced and/or was under duress when she signed the agreement was just an afterthought. That the appellant is the one who took the respondent to the police station and pursuant to her complaint, they reached an agreement whereby a figure of Kes. 278,045 was arrived at. The respondent submitted that parties are bound by their pleadings which offers some level of certainty on the part of the adversary on what they are being called to answer to. Reliance to support this proposition was placed on the case of *Malawi Railways Ltd Vs Nyasulu* [1998] MWSC 3 wherein it was reiterated that it was not open for the appellant to plead one thing and testify on another. Further, that it was not open to the appellant to open her case on what was not pleaded to introduce the issue of coercion by police as she was unable to explain the agreement away. In the end, this court was urged to dismiss the appeal as the same is in want of merit.
7. This being a first appeal, the court relies on a number of principles as set out in *Peters Vs Sunday Post* 1958 (EA) 424.
8. The court has considered the pleadings, evidence adduced at trial, and submissions in the lower court and on appeal in support of the grounds of appeal. The sole issue for determination is whether the Appeal herein has merits. The court will address its mind as to whether the appellant proved her case on a balance of probabilities.
9. The applicable law as to the burden of proof is found in Section 107 (1) of the [Evidence Act](#) which states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
10. The appellant challenged the determination by the trial court in dismissing her suit against the respondent. It therefore follows that the circumstances under which this court can upset such a determination have been previously laid down by the Court of Appeal in the case of *Mbogo & Another Vs Shah* [1968] EA where it was held:

“.....that this court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
11. But before determining the appeal herein, the respondent has raised an important issue urging this court to dismiss the appeal for the reason that the record of appeal is incomplete and that the decree being appealed against is missing.



11. To answer the respondent’s argument, I am guided by the finding of the Court of Appeal in the Case of Emmanuel Ngade Nyoka Vs Kitheka Mutisya Ngata Civil Appeal No. 63 of 2016 [2017] eKLR where it was held:

“Starting with the first issue, it is true that the record of appeal before the first appellant court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 Rule 2 of the Civil Procedure Rules...

...the Respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The Appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:

“The word “decree” has been defined by the *Civil Procedure Act* Cap 21 to include judgment. Infact the *Civil Procedure Act* as provided at Section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up”.

This is the essence of the proviso to the definition of the term “decree”. According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court; consequently, he reasoned the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon court to go for substantive justice as opposed to technicalities. Further, holding otherwise would have run counter to the overriding objective as captured in section 1A and 1B of the *Civil Procedure Act*. Finally, one would ask what prejudice the Appellant suffered with the omission of the certified copy of the decree in the record of appeal. We do not discern any.”

[Also See Kenya Women Micro Finance Ltd Vs Martha Wangari Kamau[2020].

13. Whereas it is true that the appellant failed to annex a certified copy of the decree, she did attach a certified copy of the proceedings and the judgment being appealed against which in my humble view was sufficient even in the absence of a certified copy of the decree. Further, it has not been shown what prejudice the respondent suffered by the failure of the appellant to annex a certified copy of the decree being appealed against. I therefore find that the appellant’s failure to annex the certified copy of the decree cannot be a basis for striking out of the appeal herein.
14. And on to the substantive issues of the appeal herein, I will endeavour to determine whether there existed a contract between the appellant and the respondent and whether the verbal statements by the appellant had any effect on the said agreement.
15. According to Black’s Law Dictionary, 8th Edition –

“The term “contract” has been used indifferently to refer to three different things –

- i. the series of operative acts by the parties resulting in new legal relations;



- ii. the physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself;
- iii. the legal relations resulting from the operative acts, consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers, privileges, and communities. The sum of these legal relations is often called “obligation” William R. Anson – Principles of the Law of Contract”
 - 1. These attributes may be found in “oral contract”, also called “parole contract”, or “simple contract”, which is a contract or modification which is not in writing, or is only partially in writing. A parole contract is subject to the common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, a contract in writing. This rule usually operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced.

“The basic principle is often called the parole evidence rule, and according to this rule evidence is not admissible to contract or qualify a complete contract. This rule is usually stated as a rule of evidence, but it probably best regarded as a rule of substantive law. The question is not really whether evidence can be admitted which might vary the written document, but whether if the evidence is admitted, it will have the legal effect of varying the document.” Per P.S. Atiyah – an Introduction to the Law of Contract 3rd Edition 1981.

- 17. The appellant herein has faulted the trial court for failing to find that the defendant owed her money for supplies made on 13.08.2021 and 18.08.2021. That the defendant only paid for 526Kgs of meat totaling to Kes. 173,580 instead of 580 Kgs amounting to Kes. 198,000.00. She averred that the defendant paid her less money compared to the kilos of meat supplied. However, she conceded to the fact that she signed an agreement with the defendant at the police station which resulted to her being paid an amount of Kes. 278,045/= . Her main contention was that the agreement did not include everything she is owed as she was forced to sign the alleged agreement.
- 18. I find guidance in the Court of Appeal decision in Civil Appeal No. 61 of 2013, Fidelity Commercial Bank Limited Vs Kenya Grange Vehicle Industries Limited (eKLR) where the Court also cited with approval decision in Civil Appeal No. 23 of 2005, Prudential Assurance Company of Kenya Limited Vs Sukhwender Singh Jutney and Another, the Court of Appeal expressed itself in the following manner:

“So that where the intention of parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed



intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

19. In *Prudential Assurance Company of Kenya Limited Vs Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005 the Court citing a passage in *Odgers Construction of Deeds and Statutes* (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

“It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.”

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing.”

20. In *Fidelity Commercial Bank Limited Vs Kenya Grange Vehicle Industries Limited* eKLR went on to posit:

“The principle undergirding this rule flows from the notion of freedom of contract that is central to the law of contract; that it would be perverse and directly inconsistent with the intention of the parties after reaching a bargain and choosing to record that bargain in writing, for any court to resort to the prior history of exchanges and negotiations in order to resolve a dispute arising from the interpretation of the terms of the written bargain; and that the parties by consensus have themselves chosen not to give their prior negotiations contractual force and instead they have reached an agreement, and documented it.”

21. On consideration of the evidence at hand, it is not controverted that the impugned agreement was arrived at and signed by the parties herein. Further, both parties produced the said agreement as evidence in their respective cases. Having noted the above, I am not convinced that this case is an exception to the rule above for the reason that the parties in the agreement in the suit herein and specifically the appellant, could have addressed all her concerns in the said agreement. Having failed to do so, the appellant is thus estopped from trying to vary the already signed agreement.
22. On whether the appellant was coerced to sign the alleged agreement between herself and the respondent, the appellant stated that out of the payment that she received for 526 Kgs of supplied meat, there was an outstanding arrears of Kes. 198,000.00 for unpaid 580 Kgs of meat supplied between 13.08.2021 and 18.08.2021.
23. The respondent conceded that the appellant supplied him only four cows which he fully paid for after the appellant reported the matter to the police. He thus denied owing the appellant any balance for the reason that he had honoured the agreement between herself and the appellant.



24. Turning to the Appellants' case, it must be recalled that under Order 2 rule 10(1) of the Civil Procedure Rules, a party who relies on duress, coercion, undue influence and like defences must plead them with particularity. It provides as follows:

Subject to sub rule 2, every pleading shall contain necessary particulars of every claim, defence or other matter pleading including, without prejudice to the generality of the foregoing-

Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; [Emphasis mine]

25. In the case herein, the appellant made bare statements of having been coerced to sign the agreement she is currently distancing herself from without setting out the facts upon which the defence of coercion was founded. Even assuming that the parties proceeded on the basis that the defence was properly pleaded in line with the principle in *Odd Jobs Vs Mubia* [1974] EA 476 where it was held that the court may base a decision on an unpleaded issue where it appears that the parties proceeded on the basis that the matter was pleaded, it was still incumbent upon the appellant to prove her case. Section 107 (2) of the *Evidence Act* provides that "When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

26. In the case herein, the appellant submitted that she used to buy cows alongside the respondent and that her cows were marked as 'V' while the defendant's cows were marked as 'F'. That after the signing of the agreement, she did not give the respondent any more cows. She averred that the respondent took advantage of her illiteracy. Apart from that, there was no evidence presented before the court to support the allegations by the appellant herein.

27. The Court of Appeal in *Mohamed Ahmed Abdul & another v Mini Bakeries (MSA) Limited* MSA CA Civil Appeal No. 88 of 2018 [2019] eKLR went at length to explain the meaning of duress and / or coercion as follows:

.....

28. 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."

29. Transposing the principles I have outlined above to this case, I do not find any evidence of duress, coercion, unreasonable and oppressive conduct on the Respondent's part or from any party that could have made the appellant act contrarily to what she has testified on. My review of the evidence on record shows that there is no evidence that the appellant was subjected to any coercion or duress, that she protested the alleged duress, coercion or intimidation or that she took any legal recourse or remedy to arrest the threats or that she took any steps after signing the agreement herein.



30. In light of the clear and unequivocal admission by the appellant that the respondent had settled the amount of Kes. 278,045/= as per the agreement, I cannot fault the trial magistrate for concluding that the appellant failed to prove her case that the respondent ought to settle the alleged balance of Kes. 198,000.00 for the unpaid meat allegedly supplied.
31. For the reasons set out above, it is my finding that the decision of the trial court was well grounded on proper evidence and law. As a consequence of the above, I find that the appeal herein lacks merit and is accordingly dismissed with no orders as to costs.
32. It is so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

.....For the Appellant

.....For the Respondent

