



**Kamau v Maina (Civil Appeal E022 of 2021)
[2024] KEHC 14223 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E022 OF 2021
MA ODERO, J
NOVEMBER 15, 2024**

BETWEEN

CECILIA WAIRIMU KAMAU APPELLANT

AND

SAMUEL MAINA RESPONDENT

JUDGMENT

1. Before this Court for determination is the Memorandum of Appeal dated 8th June 2021 by which the Appellant Cecilia Wairimu Kamau seeks the following orders:-
 - (a) The appeal be allowed.
 - (b) The judgment and consequent decree delivered by the Hon. James Macharia Muriuki on 12th day of May 2021 in Nyeri Civil Suit No. 401 of 2017 be set aside in its entirety and the plaintiff's suit be dismissed with costs."
 - (c) The Appellant be awarded the costs of this Appeal and costs of this suit in the trial court."
2. The Respondent Samuel Maina opposed the Appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 13th June 2024, whilst the Respondent relied upon his written submissions dated 22nd July 2024.

Background

3. The facts of the case before the trial court were that on 21st November 2013 the Appellant accompanied by her sister 'Agnes' went to the Respondents office and requested to be advanced a sum of Kshs. 225,000 as a friendly loan.



4. The Respondent gave her the amount in cash whereupon the Appellant executed a 'Deed of Acknowledgement' and also deposited with the Respondent a logbook in her husband's name as security. The loan was to be repaid at 3% interest in event of default.
5. The loan was not repaid as agreed.
6. Later on 8th September 2014 the Appellant went back to the Respondent with her sister Agnes and requested yet another loan of Kshs. 1.0 million.
7. The parties executed a second Agreement indicating that the loan would be repaid at 50% interest. The Respondent returned the logbook to the Appellant as the Appellant indicated that she intended to sell the lorry after which she would repay the entire loan within one month.
8. Once again the loan was not repaid. The Respondent wrote a demand letter dated 1st October 2014 to the Appellant which demand was not honoured.
9. On her part the Appellant told the trial court that she intended to start a business for which she needed finances. That her sister 'Agnes' introduced her to the Respondent as a person who could advance her the necessary finance.
10. The Appellant admits having been advanced Kshs. 225,000/= by the Respondent. She admits having signed the Receipt Acknowledgement for this amount.
11. However the Appellant denies having received Kshs. 1.0 million from the Respondent.
12. The Appellant further claims that it was her sister not herself who signed the second Agreement. She states that she is only ready to repay the Respondent only Kshs. 225,000.
13. The Respondent then filed in the Nyeri Chief Magistrates Court Civil Suit No. 401 of 2017 seeking judgment against the defendant for:-
 - “(a) Kshs. 1,725,000/= and interest thereon from the date of filing suit.
 - (b) Costs of the suit and interest thereon at court rates”
14. The suit was heard interpartes and vide a judgment delivered on 12th May 2021, the learned Senior Principal Magistrate found in favour of the Respondent and entered judgment as follows:-
 - “(a) A sum of Kshs. 1,225,000/=
 - (b) Costs and interest at Court rates on (a)
 - (c) Interest from the date of filing the suit.”
15. Being aggrieved by this judgment the Appellant filed the Memorandum of Appeal dated 8th June 2021 which Memorandum was premised upon the following grounds:-
 - “(1) That the learned trial magistrate erred in law and in fact in allowing the Respondent's suit.
 - (2) That the learned trial Magistrate erred in law and in fact when he upheld the deed dated 08/09/2014 despite evidence tendered and supporting a different conclusion.



- (3) That the learned trial magistrate erred in law and in fact in disregarding the submissions by the Appellant’s Advocate.”

16. As stated earlier the appeal was opposed.

Analysis And Determination

17. I have carefully considered this Appeal the Response filed thereto as well as the written submissions filed by both parties.

18. This being a first appeal it is the duty of this court to examine the evidence adduced during the trial and to draw its own conclusions on the same. In *Selle & Another -vs- Associated Motor Boat Company Ltd & Others* [1968] E.A 123 the court held as follows:

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions through it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of facts if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally....”

19. Likewise in the case of *ABok James Patrick Machira I/a Machira & Co Advocates* [2013] eKLR the Court of Appeal stated as follows:-

“This being a first appeal we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give the reasons either way.”

20. Only one issue arises for determination in this appeal – whether there existed a valid and legally enforceable agreement between the Appellant and the Respondent.

21. The Appellant submitted that the learned trial magistrate erred in raising the bar of the standard of proof to the criminal standard being beyond reasonable doubt rather than civil standard of a balance of probabilities.

22. The Respondent submitted that he had proved his case on a balance of probability. That both Agreements had been voluntarily executed by the parties. That the allegations of duress and fraud had not been proved.

23. The first question is whether the Respondent did in fact advance to the Appellant the sum of Kshs. 225,000 and Kshs. 1.0 million as alleged. In order to merit judgment in his favour the Respondent was required to prove the claim on a balance of probability. In the case of *William Kabogo Gitau -vs- George Thuo & 2 Others* [2010] eKLR, Hon. Justice Kimaru (as he then was) stated as follows:-

“In ordinary Civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of



probabilities. He has established that it is more probable than not that the allegations that he made occurred.”

24. The Appellant told the court that she was introduced to the Respondent by her sister Agnes who accompanied her to the Respondents office. The Appellant readily concedes to the fact that she did receive a sum of Kshs. 225,000 from the Respondent.
25. The Respondent produced as evidence of this first agreement a ‘Receipt acknowledgement’ dated 21st November 2013 as well as a copy of the log-book for a motor vehicle Registration No. KAR 220E.
26. The Receipt acknowledgement dated 21st November 2013 appears at page 12 of the Record of Appeal. The same is duly thumb-printed by the Appellant and bears her identity card numbers. The copy of the log-book appears at Page 13 of the Record.
27. As stated earlier the Appellant readily admitted that she received this money from the Respondent. The Appellant further admitted that she did not repay this money. The Appellant stated that sometime in the year 2014 accompanied by her sister she went back to the Respondents office with cash Kshs. 225,000 intending to refund the money borrowed. That the Respondent declined to accept the money and instead compelled the Appellant to sign another document, indicating that she had received from him a loan of Kshs. 1.0 million.
28. Therefore I find that the Respondent did prove on a balance of probability the debt of Kshs. 225,000 owed to him by the Appellant.
29. Regarding the second loan of Kshs. 1.0 million the Appellant categorically denies having ever received this amount from the Respondent.
30. In support of his claim the Respondent produced a “Debit Payment” dated 8th September 2014 which appears at Page 11 of the Record of Appeal. The document indicates that the Appellant Cecilia Wairimu Kamau of ID Number 11412970 owes the Respondent Samuel Maina of ID Number 9095943 a sum of Kshs. 1.0 million. The amount was to be refunded upon the sale of the motor vehicle Registration KAR 220E. The Respondent stated that in order to facilitate the sale of the vehicle he returned the log book to the Appellant.
31. This ‘Debit Payment’ is signed by the Appellant and is also signed by her witness Agnes Njeri Koge of ID Number 0237629 who is the Appellants sister.
32. The Appellant in her submissions questioned why the Respondent failed to call ‘Agnes Njeri’ as a witness. However this ‘Agnes Njeri’ was the sister of the Appellant who signed the documents as a witness for the Appellant. Thus if anyone ought to have called this Agnes Njeri as a witness it ought to have been the Appellant herself.
33. The Appellant does not appear to deny that she signed the second agreement for the loan of Kshs. 1.0 million. However the Appellant claims that she was compelled to sign the said document under duress. That the Respondent declined to receive the refund of the Kshs. 225,000, refused to handback the logbook to the Appellant and instead compelled the Appellant to sign a document acknowledging having received a further loan of Kshs. 1.0 million.
34. It is trite law that “he who alleges must prove.” In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the [Evidence Act](#) Cap 80, Law of Kenya provides as follows:-

“Burden of Proof



“107

- (1) Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact is said that the burden of proof lies on that person.”

35. Therefore party who seeks to rely on a defence of coercion, duress and/or misrepresentation is required to provide specific particulars of the same. It therefore incumbent on the Appellant to state with specificity the exact manner of coercion and/or duress employed by the Respondent. A bare statement without particulars will not suffice.

36. In the case of Mohammed Ahmed Aboun & Another -vs- Mini Bakeries (MSA) Limited [2017] eKLR, the court of Appeal in defining duress stated as follows

The editors of Chitty on Contracts, 13th edition, volume 1 note at paragraph 7-003, that a contract which has been entered as a result of duress may be avoided by the party who was threatened. Duress is broadly defined in Black’s Law Dictionary, 8th edition as: “a threat of harm made to compel a person to do something against her will or judgment” and strictly, as” “the physical confinement of a person or the detention of a contracting party’s property.”

In Nabro Properties Limited –vs- Sky Structures Ltd (above) this court adopted an extract from Chesire & Fifoot’s law of Contract, 8th edition is a correct statement of legal duress sufficient to vitiate an agreement, that:

‘Duress of 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 or loss of life or real harm.’

In Pao on vs. Lau Yiu Long [1980] A. C. 614 to which counsel on both sides referred, the Privy Council while accepting that economic duress might be recognized in principle in law insisted:

“.....that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that payment made or the contract entered into was not a voluntary act.” [own emphasis]

37. In a recent decision in John Mburu vs. Consolidated Bank of Kenya [2018] eKLR the Court of Appeal in determining whether duress has been established, stated as follows:-

“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 fact 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 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.” [own emphasis]



38. This second Agreement was signed by the Appellant in September 2014 allegedly under duress yet the Appellant took no action such as reporting the alleged duress/coercion to any authority or even by filing a suit to vitiate the agreement. She merely sat pretty until the Respondent filed his suit in November 2017 (almost three (3) years later) to recover the monies owed to him. It was only at this point that the Appellant apparently ‘remembered’ that she had signed the Agreement under duress. The fact that it took this long for the Appellant to raise the issue of duress leads this court to conclude that this allegation is a fabrication and a mere afterthought.
39. No evidence of duress/coercion was presented by the Appellant in support of her claims. The Appellant did not deny having signed the second loan Agreement. There was no evidence or even suggestion that her signature on that document had been forged.
40. The evidence reveals that having obtained a loan of Kshs. 225,000/= the Appellant returned to the Respondent nine (9) months later and obtained another loan of Kshs 1.0 million. The Appellant has not availed any evidence to prove that she repaid any amount at monies at all to the Respondent. I therefore concur with the finding of the learned trial Magistrate that he Appellant was indebted to the Respondent in the amount of Kshs. 1,225,000.
41. Finally I find no merit whatsoever in this appeal. The same is dismissed in its entirety. The judgment and orders of the trial court in the judgment delivered on 12th May 2021 are hereby confirmed.
42. Costs of this Appeal will be met by the Appellant.

DATED IN NYERI THIS 15TH DAY OF NOVEMBER 2024.

MAUREEN A. ODERO

JUDGE

