



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NUMBER 34 OF 2018

MULOVI MWANGANGI.....APPELLANT/APPLICANT

VERSUS

KALOVWE MUNYALO.....RESPONDENT

(Being an appeal from the Judgement of Hon.SK.Ngii- Senior Resident Magistrate

in Civil Suit No.102 of 2016 in the Principal Magistrate's Court

delivered on 17th July, 2018)

J U D G M E N T

1. This is an appeal lodged by **Kalovwe Munyalo**, the **Appellant** herein who is appealing against the decision made in **Mutomo PM's Court Civil Case No.102 of 2016** delivered on 17th July, 2018.
2. In that suit, the **Appellant** had been sued by the **Respondent, Mulovi Mwangangi** for breach of contract. The **Respondent** had claimed that the **Appellant's** cows trespassed onto his farm and caused damage assessed at Ksh.25,000/= (twenty five thousand shillings only).
3. The **Respondent** had further claimed that following the damage occasioned to his crops when the **Appellant's** cows trespassed, they reached a formal agreement whereby the **Appellant** in writing said that he would pay Ksh.25,000/= in damages.
4. The **Respondent** on the other claimed that he signed the agreement under duress and intimidation and further claimed that he did not get to read or understand the contents of the impugned agreement.
5. The trial court upon evaluation of evidence trial reached a conclusion that the **Respondent** had proved his case on a balance of probabilities and found the **Appellant's** defence unconvincing.
6. Aggrieved by the decision reached by the trial court, the **Appellant** preferred this appeal and raised the following grounds namely:-

a) That the learned magistrate erred in law

and misdirected himself on the fact that there was no lawful Elders Arbitration.

b) That the learned magistrate erred by

holding that the Appellant was party to the alleged arbitration when the available evidence suggested the contrary.

c) That the learned trial Magistrate erred by

holding that the Respondent had proved his claim when the case had not met the threshold.

d) That the learned trail magistrate erred by

failing to appreciate that the alleged award was made through duress by armed Kenya Forest Service Guards.

e) That the learned trial magistrate was

biased against the Appellant.

7. In his written submissions through counsel, the **Appellant** has submitted that he did not participate in any elders arbitration to determine crop damage. According to him, the dispute between him and the **Respondent** related to boundary. He faults the **Respondent** for using the police and Forest Rangers to intimidate him.

8. He further contends that the **Respondent** never pleaded when the crop damage occurred and did not call any witness who saw his cows causing the damage.

9. The **Appellant** further submits that the agreement was authored at the **Respondent's** butchery and the author was not called to testify. The **Appellant** contends that the people who witnessed the agreement were not elder and that in normal circumstances it is the elders who call the parties with their witnesses adding that the meeting at the **Respondent's** butchery was not an elders meeting.

10. The **Appellant** contends that the **Respondent's** case did not meet the threshold of proof. He submits that he had contested the **Respondent's** claim in his defense and that it was incumbent upon the **Respondent** to prove his claim to the required standard. He avers that the **Respondent** did not prove ownership of the land upon which the crops were destroyed. In his view trespass was not established. He has relied in the case of **Ziporah Naiparol Ndunda –Versus- Peter Mwanja Maundu (Kitui HCCA No.217 of 2015)**.

11. The **Appellant** further contends that the initial agreement on liability was not tendered in evidence. He opines that the exhibit tendered on P.Exh.1 was not an elders award based on my arbitration.

12. He points out that the stated amount of ksh.5,000/= allegedly paid on the date of the agreement was not captured in the agreement and that he denies paying the said amount. It is his contention that the animals that caused the damage were not his and he could not have agreed to compensate the **Respondent** on what he had not caused.

13. He faults the trial court for reaching a conclusion that was devoid of facts.

14. The **Respondent** has opposed this appeal through written submissions done through counsel. It is the **Respondent's** case that his claim at the trial was based on a claim that the **Appellant's** animals had trespassed and damaged his crops of green grams, cowpeas, maize and millet. He submits that the two parties met and agree that the **Appellant** was to compensate the **Respondent** with Ksh.25,000/= and that on the date of the agreement, he paid Ksh.5,000/= and left a balance of Ksh.20,000/=. He avers that the **Appellant** was in the company of **Simon Mwikwa** at the time of agreement and that the **Respondent** had 2 friends **Pw2 and Pw3** who also witnessed the agreement.

15. He further insists that the **Appellant** defaulted in payment and that is why he sued him. He claims that he signed the agreement willingly and was not forced or intimidated.

16. He submits that the trial court evaluated the evidence tendered and in his view correctly found that there was no duress used against the **Appellant**. The **Respondent** argues that the ID particulars of the **Appellant** were well captured and he thumb printed the agreement which means he was a party to the agreement and cannot therefore run away from the obligations therein.

17. The **Respondent** contends that he proved his case to the required standard and that the defence adopted was an after thought and a sham. He avers the claim of duress stating that the **Appellant** was not arrested at any time to indicate that he was forced to sign the agreement. He contends that the Forest Rangers who witnessed the agreement did so in their capacity as his friends but not as Forest Rangers. He submits that there is nothing unlawful in them witnessing the agreement.

18. The **Respondent** further contends that there was no bias exhibited by the trial court against the **Appellant** and supports the trial Magistrates for analyzing well the evidence tendered before him.

19. This court has considered this appeal and the submissions made by both the **Appellant** and the **Respondent**. The main issue for determination here is whether the agreement tendered at the lower court as P.Ex.1 was obtained through coercion/duress or free will and whether the same was binding to the parties in the agreement.

20. There is no doubt that the said agreement was the subject of the suit filed by the **Respondent** against the **Appellant** and the entire claim significantly rested on that document. It is trite that an agreement entered between two parties when lawful and written is intended to be binding to the parties and parties to such agreement are obligated to be bound by the terms unless a party in breach can establish or prove either of the following:

a) That the agreement was obtained by means of fraud or misinformation.

b) That undue influence was exerted on him.

This includes use of force, duress blackmail or alcohol drugs etc.

c) That the agreement was illegal or calculated to foster an illegality or crime.

21. In this appeal, the **Appellant** has attacked the agreement relied on by the Respondent which bound him to pay Ksh.20,000/= to the **Respondent** as compensation. To him the same was obtained by force or intimidation. He faults the trial court for failing to take the same into consideration.

22. This court has perused at the Judgment of the trial court and finds that the trial court actually addressed its mind on the allegation of duress by the **Appellant** but found the same wanting because of insufficient evidence.

23. This court concurs with the trial court that a party alleging that duress or any other under influence was used against him in a written agreement, has the burden of proof to prove the allegation. The question posed is whether the allegations made by the **Appellant** in this instance were proved.

24. I have keenly gone through the evidence tendered before

the trial court and in particular the evidence relating to the agreement tendered to the **Respondent**, the **Appellants** cattle trespassed into his land and damaged his crops to wit green grams, Cow peas, maize and millet. He told the trial court that the **Appellant** undertook to pay compensation of Ksh.25,000 on 19/10/2016 but on that date he only paid Ksh.5,000/= and agreed in writing that he would pay the balance of Ksh.20,000 on 20th November, 2016 but failed to pay.

25. The **Appellant** in his defence denied the **Respondent's** claim stating that he was arrested by 3 Forest Rangers and forcibly taken to **Respondent's** butchery at Mutomo where he was forced to sign a document. He also denied that the doc.(P.Exh.1) is the one he signed and that the document he signed was another document which was not produced as he did sign documents by thumb printing.

26. The issue for the determination at the trial was whether the agreement tendered was binding to the **Appellant**. The trial court found that on a balance of probabilities the **Respondent** had proved his case.

27. There are two issues however which the trial court appears to have missed while evaluation the evidence tendered before him. These two significant issues in my view were namely:-

(i) The involvement of County Rangers in the drafting and witnessing the agreement and what roles they played in the whole agreement.

(ii) Whether the people witnessing the agreement were elders and the circumstances surrounding the agreement.

28. This court finds that had the trial court addressed its mind on the above issues its conclusion would have perhaps been different why do I say so? The witness who authored the agreement as per the proceedings was **Silvester Makau (PW2)**. He stated in his evidence in chief that he was a County Ranger (Askari) and that he was called by his colleague one **Peter Juma Kineene** who was a Constable and that he was told there was an incident which required him to "participate in solving". He further stated that on arrival at the agreed place (possibly at the **Respondent's** butchery) and found the **Respondent** and **Michael Nguvu** a Kenya Forest Service Officer).

29. The evidence tendered clearly show that there was unexplained involvement of a Forest Ranger and two County guards commonly referred to as "Askaris". The fourth witness **Simon Mwikya** said to be **Appellant's** witness was not called to testify and the **Appellant** denied knowledge of him. The question posed is why would the **Respondent** involve a Forest Ranger and County Askaris as local elders when they were obviously the local elders? I have looked at the pleadings and the **Respondent** clearly pleaded that the agreement was as result of arbitration by local elders. The **Appellant** pleaded in his defence that he was forcibly taken to **Respondent's** butchery by uniformed forest officers and forced to sign a document. I have looked at the agreement (P.Ex.1) and the same is actually more of an undertaking to pay rather than an agreement but that is not the issue. The issue in my view is whether duress was used whether perceived or actual. It is my considered view that agreement signed in the presence of armed or uniformed officers is voidable, if a claim of intimidation or duress is made.

30. The **Respondent** had no other possible reason to use his friends who happened to be County "Askaris" and a Forest Ranger in the locality other than to intimidate and influence the free will of the **Appellant**. It should not be lost on the fact that Mutomo is situate in a remote area (and I take Judicial Notice) where a word from a forest ranger or County Askari is law and one would not dare cross their paths without risking severe punishment and/or beating. The trial court was well placed to take judicial notice of that fact but failed which was a misdirection.

31. There is also a possibility that there was more to the dispute than merely Ksh.20,000/=. Both parties have engaged Senior Counsels both in this appeal and the trial and that shows that the **Appellant's** claim that there is a boundary dispute between the parties in this appeal can explain why the dispute ended up in lower court and eventually this court. This observation is however made in obiter.

32. The main finding of this court is that the trial court fell into error by failing to note the context and the atmosphere under which the agreement or the subject of the suit was entered between the **Appellant** and the **Respondent**. The involvement of County Askaris and Forest Ranger whether uniformed or not rendered the agreement void and unenforceable because the freewill of the **Appellant** was prejudiced. In the end this court finds merit in this appeal. The Judgment of the lower court dated 17th July, 2018 is reversed and set aside. In its place an order is entered dismissing the **Respondent's** suit with costs to the **Appellant**. The **Appellant** will also have the costs of this appeal to be copied or taxed.

Dated, Signed and Delivered at Kitui this 4th day of November, 2020.

R. K. LIMO

JUDGE