REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 19 OF 2016

STANLEY KARIUKI NJUGUNA……..... APPELLANT

VERSUS

DAVID MUSYOKI SYANDA …….……RESPONDENT

JUDGMENT

1. On 23rd February, 2016, the appellant filed a memorandum of appeal raising the following grounds of appeal:-

(i) The Learned Magistrate erred in failing to appreciate the plaintiff's claim as filed vis a vis the defence as filed hence arrived at a wrong conclusion;

(ii) The Learned Magistrate erred in holding that it was admitted by the plaintiff and the defendant that during the execution of the agreement produced as P. exh1, police officers were present when there was no evidence adduced to that effect by the plaintiff;

(iii) The Learned Magistrate erred in finding that the agreement produced as P. exh1 was signed under duress when indeed there was contradicting evidence from the defendant on its signing;

(iv) The Learned Magistrate erred in holding that it was the burden of the plaintiff to prove that the agreement produced as P.exh1 was free and voluntary for it to form a basis for his claim;

(v) The Learned Magistrate erred in taking into account circumstances not supported by any evidence hence arriving at a wrong conclusion;

(vi) The Learned Magistrate erred in failing to appreciate that parties were indeed negotiating the matter, a fact which was admitted by the defendant and defendant's counsel who even admitted to having correspondences in respect of the negotiations and that the defendant had even given a proposal to have interest waived and for him to be allowed to pay Kshs. 610,815/= all inclusive by monthly instalments of Kshs. 30,000/= from 30th July, 2015;

(vii) The Learned Magistrate erred in failing to appreciate that it was indeed not the defendant who stopped the cheque of Kshs. 50,000/= but that the same as per the bank advise slip was returned as the account was closed;

(viii) The Learned Magistrate erred in failing to appreciate that the defendant did not comply with Order 11 of the Civil Procedure Rules and that his evidence was not in tandem with the defence filed;

(ix) The Learned Magistrate erred in failing to take into account the conduct of the defendant throughout the proceedings.

2. Directions were thereafter taken and the Counsel for the parties hereto filed their written submissions and highlighted the same as ordered by the court.

APPELLANT'S SUBMISSIONS

3. Ms. Ngugi, Learned Counsel for the appellant submitted that the appellant's claim is for the sum of Kshs. 536,000/= being the amount of rent collected on his behalf by the respondent. She informed the court that the appellant also seeks interest on the said amount from 10th June, 2010 until payment in full, plus costs. Counsel stated that the respondent denied owing the appellant anything and having signed the agreement produced as plaintiff exhibit 1 (plf. exh 1), voluntarily. Counsel submitted that production of the said agreement was not objected to and it forms the basis of the appeal. In addition, the respondent's evidence was at variance with the defence as the respondent in his defence stated that he had a balance of Kshs. 50,000/= for which judgment was entered including interest and costs. Ms. Ngugi argued that the said decision was erroneous as no defence statement had been filed to admit that the respondent owed such an amount of money. She added that a party is bound by his pleadings.

4. As regards the agreement in issue, Counsel submitted that evidence was adduced to show that it was made in Matthew Nyabena's office. She contended that there were no police officers present and the said agreement was signed willingly. She drew the court's attention to the respondent's evidence that the agreement was signed in Ambalal building in the presence of police officers thus he was under duress. Ms. Ngugi further argued that the court went on to hold that the appellant ought to have called the police officers to controvert the respondent's allegation that the agreement was signed under duress. She asserted that he who alleges must prove and it was the respondent who was obliged to prove. She prayed for the appeal to be allowed.

RESPONDENT'S SUBMISSIONS

5. Mr. Bosire, Learned Counsel for the respondent stated that the judgment by the lower court was arrived at after examination of the documents produced before her and the evidence. In his view, the agreement in issue was signed under duress after the respondent was arrested and could only secure his release after signing the agreement which was plucked from the air.

6. The court was referred to plf. exh.4 being a demand letter dated 30th October, 2012 which sought payment of an amount of Kshs. 536,000. Counsel informed the court that in response thereto, they forwarded their letter dated 25th October, 2012 and demonstrated that the demand the respondent had received was for Kshs. 232,000/=. Mr. Bosire submitted that the demand came after the agreement was made.

7. Counsel for the respondent further stated that his client paid Kshs. 27,000/= and that the Kshs. 50,000/= he was ordered to pay by the court was the amount that was drawn on a dishonoured cheque presented to the appellant by the respondent. Counsel argued that the appellant did not give a statement of how he arrived at the figure of Kshs. 536,000/=. He cited the case of **Benedict Ngula Nguli vs Gideon Nduva Mwendo & Another** [2009] eKLR where the court cited Chesire, Fifoot and Furmstoms Law of Contract, at page 280 where the authors state that since agreement depends on consent, it should follow that agreement obtained by threats or undue persuasion is insufficient. Both common law with a limited doctrine of duress and equity with a much wider doctrine of undue influence have acted in this area.

8. Counsel contended that letters were written on a **"without prejudice"** basis hence cannot be relied upon in evidence. He cited the case of **Geoloy Investments Ltd. vs Behal t/a Krishna Behal & Sons** [2002] 2 KLR 447 to solidify his argument. He submitted that the documents on pages 76 – 79 of the Record of Appeal were not produced in evidence and should be struck out.

APPELLANT'S RESPONSE

9. Ms. Ngugi responded that the documents at pages 76 – 79 of the Record of Appeal may not be evidence but they were copied to the court and they do not bear the words **"without prejudice"**.

DUTY OF THE FIRST APPELLATE COURT

10. It is trite law that the role of an appellate court is to re-evaluate and analyse the evidence that was adduced before the lower court and come to its own independent decision on the matter. In the case of **Epantus Mwangi and Geoffrey Ngatia vs Duncan Mwangi Wambugu** [1982 – 88] 1 KAR 278, the court stated as follows:-

> ***"the principle is that a court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles."***

This court will analyse and consider the evidence adduced before the trial court and reach its own conclusion on the matters in issue.

ANALYSIS AND DETERMINATION

The issue for determination is if the Hon. Magistrate should have entered judgment in favour of the appellant for the sum of Kshs. 536,000/= or Kshs. 50,000/= as he did.

11. The appellant testified as PW1. He stated that the respondent used to collect rent from his tenants in the years 2008, 2009 and 2010. He had collected Kshs. 536,000/= and they agreed before Munyithya & Matthew Nyabena on 31st May, 2010, on how he was to pay the appellant. He agreed to pay by 10th June, 2010 and continue paying on every 10th day of the succeeding month. An agreement to that effect was produced as plf. exh.1. The respondent gave the appellant a cheque dated 8th May, 2010 for Kshs. 50,000/= which was dishonoured. The cheque was produced as plf. Exh. 2, advise slip dated 17th May, 2010 as plf. exh. 3, a demand letter dated 3rd October, 2012 was produced as plf. exh. 4, a response by the respondent's Advocates Mutisya Bosire dated 25th October, 2012 was produced as plf. exh.5 and the reply to defence as plf. exh. 6.

12. The appellant informed the court that he had not been paid the money. He prayed for the said payment and costs. He stated that the agreement was prepared by Matthew Nyabena Advocate.

13. On cross-examination, the appellant maintained that the respondent gave him a cheque for Kshs.50,000/= which bounced. The sum of Kshs. 12,000/= monthly payment was to be made to Nyabena advocate.

14. On re-examination, the appellant stated that they had agreed on the accounts prior to the agreement for Kshs. 536,000/=. There was no police officer in the office and that the agreement was not signed under duress.

15. The respondent testified as DW1. He admitted knowing the appellant who was his friend and workmate. He denied owing the appellant Kshs. 536,000/=. The respondent testified that on 31st May, 2010 at 4:00 p.m., the appellant went with the police and arrested him for a claim of Kshs. 50,000/=. He wrote a cheque for the same but it bounced and he was arrested.

16. The respondent admitted he was the appellant's collecting agent and he used to give him the money. He informed the court that he facilitated the sale of a home near Coast bus area to the appellant for a goodwill of Kshs. 800,000/=. The commission agreed on was Kshs. 300,000/=. The owner, was one Abdalla, whom the respondent said was deceased as at the time of hearing of the lower court case. The respondent stated that he was never paid his commission. Later on before Cheruiyot Advocate, the

appellant claimed Kshs. 77,000/=. The respondent wrote a cheque for Kshs. 50,000/= and made a cash payment of Ksh. 27,000/=. The respondent admitted stopping payment of the cheque. He stated that he was arrested at Mwembe Tayari for issuing a bad cheque for Kshs. 50,000/= and taken to Central Police Station. The respondent further testified of how the appellant went into an office and they told him that they were headed to Ambalal. He was left at the parking. They went upstairs (the others) with one police officer and came down with the Advocate and they intimidated him to sign the document which he did and they left him. He referred to a letter dated 25th October, 2012 where he sought to know the amount that was being claimed.

17. On cross-examination, the respondent reiterated that the appellant owes him Kshs. 300,000/= and he owes the appellant Kshs. 50,000/=. He admitted having stopped the cheque after the appellant introduced a new agent to his clients. He saw that the appellant did not want to pay him. He stated that he had a written agreement with the respondent for his collection agency. He asserted that he was intimidated to sign the agreement.

18. The Hon. Magistrate after considering what constitutes duress found that the respondent was intimidated, coerced and threatened with detention and prosecution for the bad cheque and signed the agreement to secure his freedom. Although the Hon. Magistrate correctly directed himself on what constitutes coercion, he misdirected himself by introducing matters that were not adduced in evidence, by finding that the respondent signed the agreement due to the threat of detention and prosecution over the bad cheque he had issued for Kshs. 50,000/=. Nowhere in the court record did the respondent give the foregoing information. All the respondent said was that he was intimidated to sign an agreement by an unnamed police officer. This court deduces from the evidence of the appellant that the agreement was signed in Mr. Nyabena Advocate's office. The appellant however denied that the respondent was intimidated by police officers. According to him, the agreement was willingly entered into by both parties.

19. In paragraph 5 of the defence, filed on 10th January, 2013, the respondent avers that if any agreement was made the same was at the police station under duress and is null and void and not enforceable.

20. Section 107 (2) of the Evidence Act provides as follows:-

> ***"When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

In this instance, other than making an allegation, the respondent did not call any evidence to prove that the agreement in issue was obtained through coercion or duress. It is therefore my finding that the appellant did prove that the agreement dated 31st May, 2010 was not obtained through coercion or duress. As such, I am satisfied that the said agreement was willingly signed by the parties in the presence of Mr. Matthew Nyabena Advocate.

21. It is clear that prior to the date of signing of the agreement, the respondent had on 8th May, 2010 issued a cheque to the appellant that bounced. The feedback that was given to the appellant on 17th May, 2010 by the bank where he deposited the cheque was that the account (respondent's) was closed. It is therefore apparent that the respondent issued a cheque for the sum of Kshs. 50,000/= with no intention of having the effects cleared in favour of the appellant. It was after that incident that the agreement of 31st May, 2010 was entered into. There was nothing untoward about the demand notice being issued after the agreement was entered into, as it is clear that the respondent failed to honour the same.

22. Mr. Bosire argued that the correspondence between his law firm and the appellant's law firm with regard to the demand letters were on a ***"without prejudice"*** basis. This court notes that two letters were produced in evidence, one is dated 3rd October, 2012, it was produced as plf. exh. 4 and the other one dated 25th October, 2012 was produced as plf. exh. 5. The latter was a response by the respondent's Advocate to the letter dated 3rd October, 2012. The said letters did not bear inscription of the words ***"without prejudice"***. They are therefore admissible in evidence. The holding in **Geoloy Investments**

Ltd. (supra) is not applicable to this case. The demand letter dated 3rd October, 2012 was for the claim of Kshs. 536,000/= and not Kshs. 50,000/=. The other correspondence was not produced as evidence and therefore this court cannot pay any heed to the same.

23. The plaint dated 30th October, 2012 has a claim for the sum of Kshs. 536,000/= as the sum total owing from 10th June, 2010 being the date of the agreement, until payment in full.

24. Section 33 (1) of the Law of Contract Act, Cap 23 Laws of Kenya provides as follows:-

> ***"No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."***

The agreement that was produced as plf. exh.1 was signed by the respondent and the appellant. The said agreement is therefore binding on the respondent and is enforceable as the court has determined that it was not obtained through duress or coercion.

25. In the case of **D.T. Dobie & Co. Ltd. vs Wanyonyi Wafula Chebukati** [2014] eKLR, Kasango J. cited with approval the case of **Miller vs Minister of Pensions** [1947] 2 ALL ER 372, where Denning J. had this to say:-

> ***"The degree is well settled. It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say; we think that it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case where a tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

26. In conclusion, after considering all the evidence adduced before the lower court, it is my finding that the appellant discharged his burden of proof on a balance of probabilities. I therefore set aside the judgment dated 5th February, 2016 and hereby enter judgment in favour of the appellant for the sum of Kshs. 536,000/= and interest at court rates from 10th June, 2010 until payment in full. Costs of the lower court and this appeal are awarded to the appellant.

It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **21st** day of **February, 2017**.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Ngugi for the appellant

Mr. Bosire for the respondent

Oliver Musundi - Court Assistant