

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E460 OF 2023**

**MAUREEN NYAMBURA NJUGUNA.....APPELLANT**  
**VERSUS**  
**SANI EXTRA REPOSSESSION CO. LIMITED.....**  
**RESPONDENT**

**(Appeal from the judgement and decree of Hon. B. Cheloti,  
Principal Magistrate, PM, of 5<sup>th</sup> March 2023, in Milimani  
CMCCC No. 169 of 2020)**

**JUDGEMENT**

1. The suit, at the primary court, was by the appellant, against the respondent, for Kshs. 5,212,400.00, being an amount due to her under an agreement, dated 26<sup>th</sup> July 2019. The 2 parties had allegedly reached agreement, that the respondent would pay to the appellant, a sum of Kshs. 7,800,000.00, as consideration for leaving the company, which amount was to be paid in monthly instalments, with penalties for default. The respondent allegedly paid only part of the agreed amount, and defaulted on the balance.
2. The respondent resisted the claim, and filed a defence, and counterclaimed, for a declaration that the said agreement, of 26<sup>th</sup> July 2019, had been executed through undue influence, and was unconscionable, oppressive, unenforceable, null and void.
3. A trial was conducted. Each side called 1 witness. Judgement was delivered, on 5<sup>th</sup> May 2023. The suit was dismissed.
4. The appellant was aggrieved, hence the instant appeal, on grounds that there was overwhelming evidence to support the suit; filling gaps in the evidence left out by the

respondent, and deciding the matter on issues that had already been determined; and failing to consider the evidence tendered by the appellant.

5. Directions were given, on 8<sup>th</sup> May 2024, for disposal of the appeal by way of written submissions. I only see written submissions by the appellant.
6. I do not comprehend the only issue identified by the appellant, in her written submissions, that is whether the trial court erred in holding that the appellant was a director and shareholder of the respondent when she instituted the suit. The issue arising, from the memorandum of appeal, in my view, is whether the trial court erred in dismissing the suit.
7. From the pleadings, it would appear to me that the suit turned around a payment, that was to be made to a person who was retiring or withdrawing from a limited liability company, as both a shareholder and director. The parties entered into an agreement, which set out the terms of that withdrawal. The agreement was dated 26<sup>th</sup> July 2019. It was executed by both sides. It would appear to me, from the official stamps of the Advocates involved, embossed on the agreement, against the signatures, both sides were represented, at the making or execution of the agreement, by the same Advocates who represented them at the trial. The principal terms were, that the appellant was to voluntarily resign from directorship, upon being paid a sum of Kshs. 7,800,000.00; the amount was to be paid in monthly instalments, over a period of 12 months; the completion date was set for 10<sup>th</sup> August 2020; and the appellant was to cease being a director of the respondent once the full amount was paid, whereupon she was to transfer or assign all her shares to the respondent.

8. The agreement was acknowledged in the defence and counterclaim. It was, however, denounced as having been entered into in a hurry, and the amount payable to the appellant as being excessive, unconscionable and unaffordable. The appellant was accused of ripping off the respondent, and of using undue influence and pressure, holding on to certain credentials of the company, and threatening to cripple its operations. There was a counterclaim, for declaration of the agreement as having been executed through undue influence, and being unconscionable, oppressive, unenforceable, null and void.
  
9. The matter was fairly straightforward, as there was a valid agreement between the parties. Both sides agreed, in their pleadings and oral testimonies, that there was a valid agreement, signed willingly by them. The respondent did not contest the amount that the appellant was claiming, but challenged the agreement on grounds that it was obtained by undue influence and pressure, and it was oppressive and unconscionable, and sought its invalidation on that basis. Once the respondent conceded to the agreement, the only issue that the trial court was called upon to determine was whether it had been vitiated by undue influence and pressure, and whether it was oppressive, unconscionable and unenforceable.
  
10. Did the trial court do that? It did not. The trial court properly determined that parties are bound by the terms of their agreement, and that the courts could not re-write agreements properly entered into by the parties. However, it proceeded to determine the matter on an issue that had not been raised at all, that as the appellant was still a director of the respondent, she could not maintain a suit against the respondent, and therefore, the suit was not properly before the court, an issue that had not been raised in the defence.

11. The appellant and the respondent had between them an agreement, which was to facilitate the exit of the appellant from the respondent company. The respondent did not fulfil the obligations under the agreement, and the appellant sued, based on that agreement, which the trial court had found to be valid and binding on the parties. The suit was not about the governance of the company; it was about settling a debt owed to a party who was on her way out of the company. The agreement itself allowed the parties to seek court relief, at clause 13.2 thereof. There was no clause providing that it had to be resolved within company channels or structures, to require board resolution, or a derivative suit. There was, therefore, no basis for the trial court faulting the appellant on that account
  
12. The respondent did not lead any evidence, to demonstrate what it had alleged in its defence and counterclaim, about undue influence and pressure, and the agreement being unconscionable, oppressive, unenforceable, null and void. It did not contest, nor lead evidence, that it had paid some moneys towards compliance with the terms of the agreement, nor challenge the amount sought to be recovered. Rather than completing compliance with the terms of the agreement, or seeking more time to enable it comply, it sought to have the agreement nullified.
  
13. The appellant had led sufficient evidence, on a balance of probability, to establish that there was a valid agreement between her and the respondent, which had only been partially complied with. As indicated above, once the respondent conceded the agreement, and did not contest what was being claimed, the burden of proof shifted to it, to establish what it was alleging, undue influence and pressure, and the agreement being unconscionable, oppressive, unenforceable, unaffordable, null and void. It did not discharge that burden, for it led no evidence, which established that.

14. Consequently, I find merit, in the instant appeal, and I hereby allow it, with costs. The result shall be that the order, made by the trial court, on 5<sup>th</sup> May 2023, dismissing the suit herein, is hereby vacated, and it is substituted with an order allowing the claim in the plaint, as prayed. Orders accordingly.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN  
CHAMBERS, AT BUSIA, ON THIS 3<sup>RD</sup> DAY OF OCTOBER 2025.**

**WM MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant, Busia.**

**Ms. Carolyn Oyuse, Court Assistant, Milimani, Nairobi.**

**Advocates**

**Mr. Korir, instructed by Chege Kibathi & Company Advocates LLP, Advocates for the appellant.**

**Ms. Waweru, instructed by Bikundo Associates & Company Advocates, Advocates for the respondent.**