

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI
CIVIL APPELLATE DIVISION
HCCA E1483 OF 2023

BIRAJ BHUNDIA1ST
APPELLANT

HANSMUKH RANJI BHUNDIA.....2ND
APPELLANT

BHAVITA HASMUKHU BHUNDIA.....3RD
APPELLANT

VERSUS

CREATIVE INNOVATION LIMITED.....
RESPONDENT

JUDGMENT

1. This is an Appeal against the decision of the lower Court in which the Plaintiff was awarded Ksh 1,565,070. The brief history of this matter is that the Appellant was employed by the Respondent as a sales manager but allegedly misappropriated funds leading to this Suit. When misappropriation was discovered, the Appellant was arrested and he proceeded to commit himself to pay the loss to the Respondent by signing a deed of settlement which he subsequently failed to honor necessitating this Appeal.

2. At the time of filing this suit, the Appellant had made part payment of Ksh 300,000 only. In his Response, the 1st Defendant averred that the Deed of settlement was procured through intimidation, duress and coercion among other reasons. The matter was fully heard with the Appellant and the Respondent testifying. I have read the proceedings and wish to itemize issues for determination as follows;

Validity of deed of settlement;

3. The deed of settlement is at page 14 of the Records of Appeal. This deed was produced as an exhibit and is not in contention by either of the Parties. The only issue raised by the 1st Respondent was that it was procured through Coercion and extreme intimidation. Jurisprudence on agreements obtained through intimidation has travelled far and wide. Agreements surrounded by intimidations have always been frowned by Courts because they offend the cardinal rule of engagement between parties which is to enter agreements freely and willingly. This principle of mutuality is key in expression of the will to engage as per worded terms. When Courts sit to determine whether an agreement was bedeviled with intimidation or coercion, there are key things that must be taken into consideration which I list as follows;

The agreement

4. Courts have a duty to read the entire agreement in order to identify indicators of intimidation. For example, the wording of the agreement, the form it is prepared and the contents may give a clue on any possibility of intimidation. A very brief agreement that has a "scary" threat may give a hint. For example, an agreement where a debtor is threatened to be jailed if he defaults may give a clue of intimidation because jail is a product or end results of a due process which is conducted by a different forum. The same applies in cases where agreements are made in police stations or other "intimidating places".
5. The agreement here is comprehensive and legal. The default clause is not intimidating but rather refers to a normal legal recourse. In fact, at paragraph 4, page 7, the parties have confirmed that the deed was executed under free will.

Other parties in the deed

6. The second consideration is other parties in the deed apart from the debtor and the creditor. An agreement may signal signs of intimidation if the debtor/ defaulter was the only one involved in execution of the deed while on the creditors side are several witnesses. This may not always be the case but it can be where there is evidence that the many creditors' witnesses exerted pressure upon the Debtor who was lonely and helpless.

7. The deed herein was between the Appellant with his two witnesses/ Guarantors. The two guarantors executed the deed and none of them testified to support the allegations of intimidation. The relationship between guarantors and a person being guaranteed is special and one would not really guarantee an innocent man under coercion to admit a debt he does not owe because the man is not obliged to pay something he does not owe the creditor. In most cases, guarantors come in good faith to bail out, to allow those in debts to clear their debts over a period of time but not to promote an illegality. In circumstances where the guarantors witness instances of coercion, it is incumbent upon them to participate as witnesses in instances like this. When they chose to stay out, one may be caused to believe that there was no intimidation.
8. The Appellant here said that his family was threatened but none came to testify on the contents of the alleged threats and besides what was the point of threatening his family over an issue between him and the Respondent? The Appellant did not pinpoint exact family member who was threatened and specific threats. No formal report was made on this and so they remain allegations. The burden of proving intimidation does not leave the Appellant at any time.

Amount in the contract

9. The other factor to consider is part payment of the subject matter or the amount in the contract. This as in this case may demonstrate that the agreement was bereft of intimidation. Why would one start paying for an agreement he was forced to sign and if part payment was done under duress why did he file a counter claim four years later to request for a refund of the part payment instead of having included it in his first defence? The Appellant said that he was forced to sign the deed agreement yet he paid the ksh 300 000 Voluntarily through his guarantors. There is no evidence that the said amount was paid under duress.

Unlawful detention and lack of payment.

10. There is no suit filed in ELRC by the 1st Defendant nor any case for unlawful imprisonment. This being the case, doubts start falling from the Defendant's allegations that he was forced to sign the agreement.

Interest in the deed of settlement

11. In most cases where parties are coerced to sign agreements committing themselves to paying what they do not owe, it is rare to charge interest as in this deed of agreement. I do not mean that this cannot happen but it is rear given that there is no debt in the first place. This though is subject to a flurry of opinions other than mine.

Arrest and impending criminal case

12. The Appellant was arrested and subjected to a due process which is criminal in nature. Why didn't he agree to go through this process because after all those who were going to decide his fate are people other than the Appellant? If indeed the Appellant was innocent, he would have been vindicated by the Court.

Standard of prove;

13. The standard of prove that someone was forced to sign a written agreement is slightly beyond the balance of probability because Courts must protect the integrity of agreements so as to avert disasters in doing business or economy in general. There is no doubt that in everyday life agreements are the fulcrums which rotates business and economy in general and so certainty must be maintained for prosperity. The Appellant's allegations herein castigating the agreement are not supported by evidence to tilt the balance and set a precedence on the standard of prove of intimidation or coercion in deed agreements.

14. Having found that the deed of settlement is valid and binding upon both parties, there is nothing much left but to uphold it. Consequently, it overrides the Counter Claim

Conclusion

15. The Lower Court decision is upheld. The Respondent shall have costs.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 2ND DAY OF DECEMBER 2025.

**HON L P KASSAN
JUDGE**

In the presence of;

Karanja for Appellant

No appearance for Respondent

Carol - Court Assistant

ORIGINAL