Mwaringa v Waashe (Civil Appeal E012 of 2022)
[2025] KECA 297 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 297 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E012 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

FEBRUARY 21, 2025

BETWEEN

GORDON MWATATA MWARINGA ..... APPELLANT

AND

FRANKLIN MBURA WAASHE ..... RESPONDENT

(Being an appeal from the Judgement and Decree of the High Court of Kenya at Mombasa (P. J. Otieno, J.) delivered on 26th November 2019 in Civil Appeal No. 139 of 2018)

JUDGMENT

1. This is a second appeal in which the appellant, Gordon Mwatata Mwaringa, is challenging the decision of the Judgement and Decree of the High Court at Mombasa (P. J. Otieno, J.) dated 26th November 2019.

2. The respondent, Franklin Mbura (the respondent) filed suit by way of a plaint dated 13th December 2016 before the Chief Magistrate's Court at Mombasa. He pleaded that he is the owner and operator of a bar business in the name of Rock Solid situated in Kadzandani area in Kisauni sub-county in Mombasa County (the suit premises); that, on 5th November 2016, the appellant allegedly instructed his employees to burn rubbish at the parcel of land adjacent to his property despite warning of the imminent danger the fire would cause to the suit premises.

3. As fate would have it, the suit premises became engulfed by fire, causing the respondent to incur an alleged loss of Kshs. 1,200,000; that the appellant admitted liability and, by an agreement entered on or about 6th November 2016, the appellant agreed to pay the respondent Kshs. 1,200,000 in damages; and that the first instalment of Kshs. 100,000 was to be paid by the appellant on or before 6th December 2016, which agreement the appellant failed to honour, triggering the suit before the trial court. The respondent prayed for judgement against the appellant for Kshs. 1,200,000, costs of the suit and interest.

4. Opposing the suit, the appellant filed a statement of defence dated 10th February 2017. He denied instructing his employees to burn the rubbish, and that the respondent's premises were engulfed with fire. He conceded that he admitted liability and signed the agreement of 6th November 2016 for the payment of Kshs. 1,200,000, but that he was coerced and forced to sign it; and that, since there was coercion, duress and intimidation from the respondent and the police, the agreement was null and void.

5. The appellant averred that the respondent could only attribute the fire to his own negligence, which he particularised, inter alia, as: constructing a business premises next to a dumpsite; failing to provide adequate firefighting equipment; failing to educate staff on firefighting skills; deliberately storing inflammable goods; and failing to mitigate the loss. The appellant prayed that the respondent's suit to be dismissed with costs.

6. The suit proceeded by way of viva voce evidence. A summary of the evidence adduced by the respondent is that he was the owner of the suit premises operating a bar and restaurant; that after the fire incidence, the appellant agreed to compensate him to the tune of Kshs. 1,200,000 pursuant to which they signed an agreement dated 6th November 2016; and that the agreement was not signed at the police station but in his house with witnesses present.

7. In cross examination, the respondent stated that the young men who were culpable were arrested and charged on 30th December 2016; that he did not have the receipts to prove the cost and value of the stock that was destroyed by the fire since they were burnt in the suit premises; and that he was not present when the premises caught fire, but that those who were present tried to warn the young men not to light the fire.

8. In re-examination, the respondent stated that the agreement was for the appellant to pay him for the damage incurred, but not for the young men to be released from the police station. He denied that the appellant was forced to sign the agreement.

9. The appellant testified and denied that there was a fire which burnt the respondent's suit premises; that he received a call that there was a fire which was allegedly started by his workers; that the agreement was for him not to have his workers taken to court; and that, according to the charge sheet, the complainant was named as one Zinzi Wangari Kaloki, and, he thus could not tell whether the respondent was the owner of the suit premises.

10. In cross examination, the appellant stated that the agreement was signed in the respondent's house in the presence of some witnesses. He confirmed that there were no police officers present, but that he was forced to sign the agreement due to stress; that he had to sign the agreement since the person who was arrested was an orphan of whom he was taking care; that the primary reason for signing the agreement was to have his worker released from police custody; and that the reason for not paying the Kshs. 1,200,000 was because the respondent did not withdraw the police case.

11. After considering the evidence on record, the learned Magistrate (Hon. Francis Kyambia, SPM) rendered judgement in favour of the appellant, dismissing the suit with costs. The learned Magistrate opined that the issue before him was primarily on whether the signed agreement was entered into voluntarily or under duress thus:

> " In the present case attaining the agreement is said to have been signed in the plaintiff's house. I find that it was not of the free will of the parties. The defendant signed the agreement to save his servant from being arrested. That cannot be said to have been by consensus of the

parties. I uphold the plea by the defendant that the agreement was entered into under duress and undue influence and the same cannot form basis of the claim herein."

12. Dissatisfied with the trial court judgement, the respondent filed an appeal to the High Court in Mombasa, and in determination of which the learned Judge (P. J. Otieno J.) re-evaluated the evidence and differed with the findings of the trial court, consequent to which he allowed the respondent's appeal. He held that the appellant's defence of coercion, duress and intimidation, although pleaded, no particulars thereof were given; and that the particulars of coercion, duress and intimidation ought to have been pleaded pursuant to Order 2 Rule 10(a) of the Civil Procedure Rules, 2010.

13. The learned Judge also held that the defence proffered by the appellant could not be sustained since parties are bound by their pleadings, and that a party cannot depart from them. In so finding, the learned Judge observed thus:

> "The respondent having pleaded that the coercion and duress was exerted upon him by the appellant at the police station and with the aid of the police, it was not open for the same party to lead evidence to the effect that the agreement was in fact crafted and executed away from the police station and in the house of the appellant and in the company of some five civilian witnesses. To this court the fact that the agreement having been executed in the house of the appellant who was the neighbour of the respondent, no circumstances could amount to duress or coercion. No evidence was led."

14. The learned Judge went on to hold that a threat to sue would not qualify as duress, and neither could a threat or actual lodging of a criminal complaint also qualify as threat or duress; that duress would only be deduced if it is proved that the complaint itself was a scheme hatched to premise the execution of an agreement under duress; that the evidence led did not allude to any threat to the person of the respondent or life; and that the appellant, in fact, said that he did not pay the agreed amount of compensation in the agreement because the respondent did not withdraw the case from the police. The learned Judge was not convinced that the appellant entered into the agreement through undue coercion or duress.

15. In the end, the learned Judge entered judgment in favour of the respondent in the sum of Kshs. 1,200,000 with interest at court rates from the date of filing suit until payment in full. The costs of the appeal and of the suit in the trial court were awarded to the respondent.

16. The appellant was dissatisfied with the decision of the High Court, prompting him to file the instant appeal vide a Notice of Appeal dated 27th November 2019. He raised nine grounds of appeal which we have condensed into the following seven grounds, that:

    a. The learned Judge erred in law and in fact in finding that there was no evidence of duress/or coercion or to the person of the appellant;

    b. The learned Judge erred in law and in fact in finding that the respondent had proved his case on a balance of probabilities notwithstanding that the respondent had pleaded for specific damages yet he did not prove them;

    c. The learned Judge erred in law and in fact in finding that the written contract was enforceable yet the same was void for lack of performance by both parties;

    d. The learned Judge erred in law and in fact in finding that there was performance of the contract when there was none;

e. The learned Judge failed to recognize duress visited on the appellant by the respondent who caused the brother-in-law to be arrested for the dire incident thereby forcing the appellant to enter into the voidable contract;

f. The learned Judge failed to recognise that the respondent failed to honour his part of the contract and not cause the appellant's brother- in-law arrested; and

g. The learned Judge failed to acknowledge that the amount pleaded by the plaintiff was never specifically proved and so could not be awardable.

17. We heard the appeal virtually on 14th October 2024. Learned counsel for the appellant Mr. Matheka relied on written submissions dated 9th October 2024, which he orally highlighted. Counsel submitted that the issue in dispute was a contractual one premised on non-payment of money; and that the reason why the appellant failed to pay the Kshs. 1,200,000 is because the respondent did not fulfil his part of the bargain. It was the counsel's view that the learned Judge took a different trajectory in holding that the appellant's defence failed to state the particulars of coercion and duress that informed the appellant not to pay the money.

18. According to the appellant, the High Court wrongly placed a higher burden of proof on the appellant to prove that he was coerced or intimidated; that, to the contrary, a lower standard of burden of proof was placed upon the respondent who it was alleged was only required to demonstrate that he prepared a contract for compensation while his (the appellant's) brother-in- law was incarcerated.

19. It was submitted that the fulfilment of the contract was conditional to the release of the arrested person in exchange of payment of the balance, both of which were not met; and that, for this reason, the contract was unenforceable.

20. Further, according to the appellant, the learned Judge ought to have applied similar principles in deciding whether the appellant's defence was wanting for failure to plead the particulars of coercion and duress; and that this principle ought to have been applied to find that the respondent did not plead the damage suffered.

21. On his part, learned counsel for the respondent, Mr. Gambo, relied on written submissions dated 9th October 2024. Highlighting the same, counsel submitted that the particulars of the appellant's defence of duress, coercion, undue influence should have been pleaded with particularity as required under Order 2 Rule 10(1) (a) of the Civil Procedure Rules, 2010, but which provision was not complied with.

22. The respondent placed reliance on the decisions of this Court, in LTI Kisii Safari Inns Ltd & 2 Others vs. Deutsche Investitions Und Enwicklungsgellschaft ('Deg') & Others (2011) KECA 1 (KLR); and Mohamed Ahmed Abdun & Ali Ahmed Dahman vs. Mini Bakeries (MSA) Limited (2019) KECA 341 (KLR) to buttress the submission that particulars of duress and coercion must be proved by a party claiming the same.

23. It was submitted that the appellant failed to show that the issue of his servant being arrested or not was not a term of the contract; that, furthermore, the appellant did not controvert the existence or the authenticity of the agreement; that no evidence was tendered to demonstrate that the agreement was signed under coercion or undue influence; that, it was the appellant's servant who was charged in court with arson and that, in any event, he was not a party to the agreement; and that, the mere urge to save a servant from prosecution is not of itself sufficient proof of coercion and duress.

24. On the assertion that the respondent should also have proved specific damages, it was submitted that this was not an issue which the respondent pleaded and that, therefore, he did not have to prove it; that

the dispute revolved around the money to be paid under a contract; and that a court cannot rewrite a contract for parties. In this regard, reliance was placed on the cases of National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another (2001) KECA 362 (KLR); and Margaret Njeri Muiruri (Being The Administrator of The Estate of The Late Joseph Muiruri Gachoka (Deceased) vs. Bank of Baroda (Kenya) Limited (2014) KECA 319 (KLR).

25. The respondent submitted that the only instance where a court may interfere with a contract between parties is when evidence had been led that the contract was illegal, void or voidable as was held in the High Court's decision in Stanley Kamere & 26 Others vs. National Housing Corporation & 2 Others (2015) eKLR, but that none of these factors were ever proved by the appellant. We were accordingly urged to find that the respondent proved his case on a balance of probabilities; that the judgment of the superior court be upheld; and that this appeal be dismissed with costs.

26. This is a second appeal in which our limited jurisdiction is hinged on section 72(1) of the *Civil Procedure Act* (Cap 21) which provides on the circumstances under which a second appeal shall lie from the High Court, primarily, it must be on matters of law. It states:

> 1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-
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> a. the decision being contrary to law or to some usage having the force of law;
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> b. the decision having failed to determine some material issue of law or usage having the force of law;
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> c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

27. In Kenya Breweries Ltd vs. Godfrey Odoyo (2010) KECA 498 (KLR), it was succinctly put as follows on the role of a second appellate court:

> " In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA
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> 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

28. We have considered the record of appeal, the respective parties' submissions and the law. In our view, we discern only one issue for determination, namely whether the appellant was coerced into entering into an agreement to pay Kshs. 1,200,000 as compensation for the respondent's premises that was destroyed by fire. We come to this conclusion taking to mind that it is common ground that an agreement was entered into between the appellant and the respondent for the payment of Kshs. 1,200,000 as compensation for damages incurred by the respondent following the fire that burnt the suit premises, which fire it is alleged was started by the appellant's servant. The appellant's complaint is that he was

allegedly coerced to enter into the agreement in order to save his worker who was charged with the offence of arson contrary to section 332(a) of the *Penal Code*. The appellant's other contention is that the agreement was conditional to the respondent withdrawing the criminal proceedings initiated against his worker. He also complains that the agreement was drawn in the respondent's home and, therefore, it was not drawn of his own free will.

29. We have perused and appreciated the terms of the agreement. It was clearly drawn between the appellant and the respondent. Suffice it to note that, it was drawn in the 'Kiswahili' language, which none of the parties claimed not to have understood. The purpose of the agreement was spelt out as payment of Kshs. 1,200,000 as compensation for the damage caused by the fire.

30. We note that one of the witnesses to the agreement, one 'Christopher Mwaringa', would have been better placed to testify on what transpired during the signing of the agreement, but was not called as a witness, particularly by the appellant. In that case, we cannot help but conclude that the allegations by the appellant that he signed the agreement under duress was not substantiated.

31. We agree with the findings of the learned Judge that the claims of coercion and duress were not particularly pleaded and proved in evidence as is required under Order 2 Rule 10(1) (a) of the Civil Procedure Rules, 2010 which provides that:

    1. Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-

        a. particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies;

32. Instead of complying with the law, the appellant shifted blame to the respondent by imputing negligence on his part.

33. The appellant also sought to introduce parole evidence to the terms of the contract. He claimed that the contract was subject to some conditions, namely that the respondent was to drop the criminal charges for the due performance of the contractual terms.

34. The reason why parties intending to enter a contractual relationship reduce contracts in writing is to affirm the termsto be the exclusive memorial of the parties, and to lend certainty. Parties enter into a contract so that none reneges on it, especially in the event of change of mind or other circumstances, such as the death of one of the parties. A contract or agreement is a testament of a commitment to do something out of one's volition. Once parties enter into a contract, there is no room left for them to introduce extrinsic evidence to add or modify the contract which, for all intent and purposes, is inadmissible. Any change that may be introduced to the contract must, just as in the making of the contract, be done by mutual agreement of the parties to the contract. It is presumed that a party has candidly thought through the terms on which it intends to enter into the agreement, so much so that a later introduction of conditions that were not contained in the agreement/contract become unacceptable and unenforceable, unless such variation is mutually agreed in writing.

35. In the instant case, it is clear that the written agreement specified the reasons for payment of the money, which is damages for the destruction of the suit premises arising from the fire incidence. What this implied is that, in the event that the appellant did not pay the money, it became a debt which he was liable to pay.

36. It is trite law that a court cannot rewrite an agreement or contract made between parties. In National Bank of Kenya Limited vs. Pipe Plastic Samkolit (K) Ltd [2002] eKLR, this Court stated:

> " A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved." See also Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited [2017] eKLR.

37. In Kenya Breweries Limited & Another vs. Bia Tosha Distributors Limited & 5 others (2020) eKLR, the Court of Appeal, while overturning the decision of the High Court in the matter, had this to say:

> (46) We differ with the learned Judge's conclusion that the issues of constitutional rights raised by the 1st respondent were not suitable for arbitration as the said issues arose from the distributorship agreement. There is no way the infringement of the alleged constitutional rights can be divorced from the written agreements they are embedded in, and which is allegedly breached. The parties were brought together by the trade agreements, the claim for unfair trade practices and payment of goodwill are emanating from the agreements. Moreover, there is a plethora of cases, some cited by the learned Judge, that reiterate the principle that parties are bound by the terms of their contracts; that a court of law cannot purport to rewrite a contract between the parties, and that where there is no ambiguity in an agreement, it is to be construed according to the words used by the parties. (See Section 97 of the *Evidence Act*). The learned Judge also failed to give due consideration to the provisions of Article 159 (2) (c) of *the Constitution* that mandates courts to promote alternative dispute resolution such as mediation and arbitration by disregarding the terms contained in the distributorship agreement. It is clear to us the learned Judge did not heed to the dictates thereto to promote alternative dispute resolution in this matter but rather downgraded it."

38. We hasten to add, though, that the above decision was appealed to the Supreme Court in Bia Tosha Distributors Limited vs. Kenya Breweries Limited & 6 others (Petition 15 of 2020) [2023] KESC 14 14 (KLR) (17 February 2023) (Judgment). Notably, is that the appeal to the Supreme Court succeeded, but for a different reason than what is in issue before us, being that the Court of Appeal had shelved making a determination on an issue of contempt of court for which the Supreme Court assumed jurisdiction.

39. As is evidenced in the demand letter dated 2nd December 2016, a payment of Kshs. 100,000 was made by the appellant towards part settlement of the compensation sum. If the appellant knew that he was not indebted to the respondent, he would not have made the partial payment. It is too late in the day for him to now claim that he was under duress when he signed the contract when in fact he paid part of the debt, the payment of which he did not deny.

40. The evidence established is that the agreement dated 6th November 2016 between the parties was valid. As observed earlier, he failed to prove the particulars of coercion or duress under which he allegedly signed the agreement. He must rest assured that his hands are totally bound by what he committed himself to do.

41. For the foregoing reasons, it follows that the appeal is unmeritorious and is hereby dismissed. We hereby uphold the Judgment of the High Court (P.J. Otieno, J.) dated and delivered on 26th November 2019. Consequently, the appeal is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR