**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENY AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CIVIL APPEAL NO. 156 OF 2018**

**AHMED MOHAMMED NOOR..........................................................APPELLANT**

**VERSUS**

**ABDI AZIZ OSMAN.......................................................................RESPONDENT**

***(Being an appeal from the judgment and decree by Hon. E. Muriuki Nyagah, Principal Magistrate in Migori Chief Magistrate's Civil Suit No. 299 of 2017 delivered on 16/10/2018)***

**JUDGMENT**

**Background:**

1. The appeal subject of this judgement arose from the dismissal of **Migori Chief Magistrate's Civil Suit No. 299 of 2017** (hereinafter referred to as '**the suit'**).

2. The suit was initiated by the Appellant herein, **Ahmed Mohammed Noor** against the Respondent herein, **Abdi Aziz Osman.** It was premised on an alleged failure to repay a financial advancement made by the Appellant to the Respondent to the tune of Kshs. 2,325,100/= sometimes towards the end of 2015.

3. The suit was defended. The Respondent denied receipt of the alleged sums and put the Appellant into strict proof thereof.

4. The suit was eventually heard. The parties testified and availed a witness each. The Appellant called one **Abdikadir Omar Dari (PW2)** whereas the Respondent called one **Robert Omondi Mandela (DW2).**

5. The suit was dismissed with costs on 16/10/2018.

**The Appeal:**

6. The Appellant was dissatisfied with the judgment. He preferred an appeal. On 12/11/2018 he filed a Memorandum of Appeal. He raised 9 grounds of appeal as under: -

**1. The learned Trial Magistrate erred in fact and law in finding and holding that the Appellant herein had neither laid before the Honourable Court sufficient evidence nor proved that same had advanced to and in favour of the Respondent the sum of Kshs. 2,325,100/= only, notwithstanding the explicit admission and/or confirmation of the advancement of the money in question in terms of clause (a) of Exhibit P1.**

**2. The learned Trial Magistrate erred in fact and law, in disregarding and/or ignoring the pertinent clauses of the Debt Settlement Agreement, which was executed by the Appellant and the Respondent, respectively, in the presence an attesting witness and thereby contravening the established principles of the law.**

**3. In finding and holding that the Appellant had not proved his case on a balance of probabilities, notwithstanding the existence of a written memorandum duly signed by both parties, the Learned Trial Magistrate contravened and/or violated the doctrine that prohibits reliance on extraneous evidence and/or issues, to explain a written Document and/or Deed.**

**4. The learned Trial Magistrate disregarded and/or ignored the totality of the evidence tendered and/or rendered before himself and thereby arrived at a slanted conclusion, contrary to and in contravention of the evidence on record.**

**5. The learned Trial Magistrate failed to appreciate, consider and/or address the salient and pertinent features of the Appellant's case and/or pleadings and thereby abandoned his judicial mandate and/or responsibility, albeit without any lawful cause and/or basis.**

**6. The learned Trial Magistrate having heard the case by and/or on behalf of the Appellant, same failed to render himself fully, on all the aspects of the case. Consequently, the Judgment and resultant decree of the learned Trial Magistrate, is not only inconclusive, but same is Omnibus and has therefore occasioned a miscarriage of justice.**

**7. The learned Trial Magistrate failed to cumulatively and / or exhaustively evaluate the entire Evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before her (Trial Magistrate) and thus arrived at an Erroneous conclusion, contrary to and in contradiction of the uncontroverted evidence.**

**8. The Judgment of the Learned trial Magistrate does not capture the issue(s) for determination, the determination thereof and the reasons fro such determination. Consequently, he Judgment of the learned trial magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.**

**9. The Judgment and/or Decision of the Honourable Trial Magistrate, is a *nullity ab initio* and a mockery of the Due Process of the law and hence ought to be set aside *Ex - Debito Justitiae*.**

7. Directions were taken. The appeal was disposed of by way of written submissions. Both parties duly complied.

8. The Appellant submitted that he proved the suit against the Respondent. He cited the provisions of **Sections 107** and **108** of the **Evidence Act, Cap. 80** of the Laws of Kenya (hereinafter referred to as '**the Act**') and the decision in **Mbuthia Macharia v. Annah Mutua Ndwiga & Another (2017) eKLR** in buttressing that he had indeed satisfied the required standard of proof.

9. He further submitted that he produced a Debt Acknowledgment Agreement duly executed by the parties and their witnesses as an exhibit. He posited that the Agreement was not adequately challenged. He referred this Court to **Section 3** of the **Law of Contract Act, Cap. 23** of the Laws of Kenya and the decisions in **Josephine Mwikali Kikenye v. Omar Abdalla Kombo & Another (2018) eKLR**, **Provincial Insurance Company East Africa Limited v. Mordekai Mwanga Nandwa Kisumu CACA No. 179 of 1995**, **National Industrial Credit Bank Limited v. Aquinas Francis Wasike & Another (2015) eKLR** and **Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others (2016) eKLR** in support of the submission.

10. The Appellant further posited that despite such clear evidence the trial court failed to address itself on the Agreement and casually dismissed the suit.

11. It was further submitted that the trial court did not evaluate the evidence on record and rendered a decision that not only infringed **Order 21** of the **Civil Procedure Rules** but remains a nullity in law.

12. The Appellant contended that the trial court was biased. He prayed that the appeal be allowed, the judgment be set-aside and judgment be entered as prayed for in the suit.

13. The Respondent supported the judgment. He submitted that the Appellant failed to prove the case. He referred to the Supreme

Court of Kenya in **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2Others (2014) eKLR** on the incidence of burden of proof. He submitted that the evidence tendered did not attain the bar to shift the evidential burden to the Respondent. That, the case just fell flat on its face.

14. The Respondent variously challenged the Agreement. It was submitted that the Agreement was signed under undue influence and fraud. He relied on **Abdul Jalil Yafai v. Farid Jalil Mohammed (2015) eKLR**.

15. The Respondent prayed that the appeal be dismissed with costs.

**Analysis and Determinations:**

16. As the first appellate Court, it is well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348).**

17. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the parties.

18. There is one main issue for determination in this appeal. It is whether the Debt Acknowledgement Agreement was procured by undue influence or fraud.

19. Before I deal with the main issue I will generally look at the burden and standard of proof in civil cases.

20. I recall substantively dealing with this issue in an election petition. It was in the High Court of Kenya at **Bungoma Election Petition No. 4 of 2017 Levi Simiyu Makali vs. Koyi John Waluke & 2 Others (2018) eKLR.** Although the issue arose in an election petition, the principles in law relating to the legal burden of proof and the evidential burden of proof remain constant. I will therefore reiterate what I stated therein: -

14. Likewise, ………

*22. That is ……*

***(i) The legal burden of proof: -***

*23. The legal basis for the legal burden of proof is provided in **Section 107** of the **Evidence Act**, Cap. 80 of the Laws of Kenya. The said section states as follows: -*

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

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

*24. The onus is therefore upon a Petitioner who seeks the annulment of an election 'on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds 'to the satisfaction of the court'. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged…..' (See **paragraph 131** of **'the 2017 majority judgment'**).*

*25. That is the legal burden of proof.*

***(ii) The evidential burden of proof: -***

*26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.*

21. The majority decision of the Supreme Court in **Presidential Election Petition No. 1 of 2017** between **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR** had the following to say on the evidential burden of proof in **paragraphs 132** and 1**33** thereof: -

***[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.***

***[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law…..***

22. The foregone analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.

23. On the standard of proof, the **Black's Law Dictionary**, (9th Edition, 2009) at page 1535 defines ***'the standard of proof'*** *as '[t]he degree or level of proof demanded in a specific case in order for a party to succeed.'*

24. The standard of proof in civil cases is proof on the balance of probability. In criminal cases the standard of proof is proof beyond any reasonable doubt. In election petitions the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, the standard of proof is proof beyond reasonable doubt.

25. I will now turn to the main issue in this appeal. There is no doubt that the parties herein together their witnesses executed the Debt Acknowledgment Agreement on 11/12/2016. I will hereinafter refer to the Debt Acknowledgment Agreement as '**the Agreement'**. The Agreement was produced at the trial as the Appellant's exhibit 1.

26. That being so, the issue in contention are the circumstances under which the Agreement was executed. I am alive to the caution by the Court of Appeal in ***National Industrial Credit Bank Limited*** *case (supra) that '...a written contract is read, understood and applied by what it expressly says. Implication is out of question and that is the position here….'*

27. The Agreement is a contract between the parties. It remains valid and binding unless it is set aside. Lord Denning LJ in **Lole vs. Butcher (1949) A ER 1107** while considering the factors that may render a contract invalid stated as follows: -

***…. Once a contract has been made, that is to say, once parties, whatever their innermost state of mind have to all outward appearances agreed with sufficiently certain in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some conditions or implied in it or for fraud or on some equitable ground….***

28. The Court of Appeal of Eastern Africa in **Ismail Surnderji Hirani v. Noorali Kassam (19520 19 EACA 131** while dealing with the contractual nature of a consent order had the following to say on the binding nature of contracts: -

***…. cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable a court to set aside agreement…***

29. In **Mombasa Employment and Labour Relations Court Cause No. 78 of 2013** the Court stated as follows: -

***…...The threshold of setting aside a contract is the existence of any or all or the vitiating factors including mistake, misrepresentation, coercion and/or undue influence….***

30. From the above decisions a contract may be set aside on any or a combination of the vitiating factors. The vitiating factors seems to be unlimited since it all boils down to any reason or equitable ground which would render a Court to set aside a contract. There are however common vitiating factors like those illuminated in the said decisions.

31. In this case the Respondent pleaded in paragraph 7 of the Statement of Defence as follows: -

**Without any prejudice to the foregoing, the defendant avers that the said agreement between himself and the plaintiff is void for reason that his signature was obtained by undue influence on the part of the plaintiff who caused the defendant to be arrested by the police on clear instructions of the plaintiff to the effect that the defendant be released only upon signing the agreement undertaking to pay the suit amount to the plaintiff.**

32. In paragraph 8 of the Statement of Defence the Respondent further stated that his signature was procured fraudulently.

33. The Respondent therefore raises two vitiating factors against the Agreement. They are undue influence and fraud. The two vitiating factors factual.

34. In such a case the onus of proof first rested upon the Appellant. It was incumbent upon him to prove the existence of the Agreement. Once the Appellant discharged that evidential burden then the evidential burden would shift to the Respondent. The Respondent would then be required to prove the vitiating factors.

35. Did the Appellant discharge the evidential burden of proof herein" The Appellant testified on his relationship with the Respondent. He expounded on how he advanced the sum of money in issue. He further testified how the Respondent failed to make good his promises to pay until the parties voluntarily entered into the Agreement. The Agreement was produced as an exhibit. The evidence of the Appellant was corroborated by PW2.

36. I have carefully considered the Appellant's case. Based on the oral and documentary evidence on record I find that on a balance of probability that there is *prima facie* evidence that the Appellant advanced the money to the Respondent. The Appellant therefore discharged the evidential burden.

37. To the Respondent. The Respondent contended that he did not execute the agreement voluntarily. He testified and called a witness, DW2. He raised two grounds in support of his position. As said they are undue influence and fraud.

38. I will first deal with the issue of undue influence. The **Black's Law Dictionary**, 10th Edition, Thomson Reuters Publishers at page 1760 defines the term '*undue influence*' as follows: -

**The improper use of power or trust in a way that deprives a person of free will and substitutes another's objective; the exercise of enough control over another person that a questioned act by this person would not have otherwise been performed, the person's free agency having been overmastered.**

39. Dealing with the subject, **Mwongo, J.** in **Benson Owenga Anjere v. Kivati Nduoto & Another (2013) eKLR** referred to the English case of **Pao On v. Liau Yiu Long (1980) AC 614** thus: -

***In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract***

***he did or did not have an alternative course open to him such as an adequate legal remedy; whether he as independently advised; and whether after entering the contract he took steps to avoid it. All these matters are …. Relevant in determining whether he acted voluntarily or not…***

40. The Court of Appeal in **Ngengi Muigai & Another v Peter Nyoike Muigai & 4 Others (2018) eKLR** quoted from **Mwathi v. Mwathi (1996) eKLR** that: -

***…Undue influence is proved if it can be shown that the testator was induced or coerced into making the dispositions that he did not really intend to make…***

41. Earlier the Court of Appeal in **Nabro Properties Limited v. Sky Structures Limited (1986) eKLR** held as follows in respect to a threat to prosecute which had been raised as a way of procuring the execution of a document by undue influence: -

***A threat to prosecute is not itself illegal; and the doctrine contended for does apply, where a just and bona fide debt actually exists, where there is good consideration for giving security, and where the transaction between the parties involves a civil liability as well as, possibly, a criminal act……… a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt, which he justly owes to his creditor….***

42. When the Respondent testified he partly stated as follows: -

**…. Later I was called to the police station because I had a debt owed to the plaintiff. I met the plaintiff and PW2….**

**I told the police we were running a project together and we were awaiting to be paid by the County Government and once they paid we would be able to resolve our issues…**

*(emphasis added).*

43. Based on that statement the Respondent stated in *examination-in-chief* that he was locked up for the night. He was released on the next day on a police cash bond of Kshs. 70,000/=. He was issued with a receipt.

44. The Respondent further stated that after he was released from police custody he later met the Appellant at Grabo Hotel in Migori. According to the Respondent the Appellant was in the company of PW2 and 2 police officers. He was in the company of DW2.

45. The Respondent then went on to say: -

**…I was then asked to execute an agreement. But I never received my copy which they promised they would provide me……**

*(emphasis added).*

46. On *cross-examination* the Respondent stated that: -

…. **There were 2 police officers at the time I executed the agreement…**

47. On *re-examination*, the Respondent's position was that: -

**…There were no police officers at the time I signed the agreement.**

48. DW2 testified that he went Grabo Hotel where he met the Appellant, PW2, The Respondent and 2 police officers. That, the parties herein discussed the terms of the agreement. Later they all left to prepare a formal agreement at a cyber café save the 2 police

officers who remained at the hotel. DW2 went on to say that they went back to the hotel with the typed agreement. The 2 police officers were still at the hotel. DW2 stated further that the Respondent did not want to sign the agreement, but the police told the Respondent that if he did not sign they would arrest him.

49. In DW2's own words: -

**…. Perhaps the words made him sign…... If I did not sign nothing would have happened to me…...**

50. In re-examination DW2 stated that: -

**…. I was requested by the defendant [Respondent] to sign the agreement…….**

51. From the foregone evidence several issues come to the fore. **First,** the Respondent said that he was called to the police station because of a debt he owed to the Appellant. When he was asked about the repayment by the police the Respondent explained that the delay to make good the debt was as a result of delay of payment he was experiencing at the County Government where he had rendered services. The Respondent indicated that once the payment was done he would sort out the issue he had with the Appellant.

52. **Second**, the Respondent was not forthright on the issue of the presence of police officers when he executed the agreement. He first stated that there were police officers when he signed the agreement. He then changed and said that there were no police officers when he signed the agreement.

53. A witness testifying on a factual issue must be straight forward. The evidence must be consistent and reliable. The manner in which a witness testifies determines the credibility of such a witness. It also determines if the Court will believe the evidence of the witness. In this case the Respondent failed the consistency test.

54. **Third**, even if the police officers were present during the signing of the agreement, would that be tantamount to undue influence" The Respondent did not state why the police officers were at the hotel. Further, he did not say what that the police officers did. It was DW2 who said *'…Perhaps the words made him to sign……'* Which words" By who" DW2 was purely speculative.

55. **Fourth**, what did the Respondent do after signing the Agreement" The Agreement was executed on 11/12/2016. A demand letter was served upon the Respondent in May 2017. The suit was filed in June 2017. The Respondent simply did not do anything to challenge his signing of the Agreement. No report to the police oversight body was made. The Respondent did not even instruct his Counsel to repudiate the Agreement.

56. From the re-evaluation of the evidence I am not convinced that the Appellant or the police, if any, improperly used their powers or trust such that the Respondent was under any forceful persuasion or pressure that overpowered his free will when he signed the Agreement. I find that he consciously and voluntarily signed the Agreement.

57. I now deal with the second vitiating factor; fraud. The **Black's Law Dictionary**, 10th Edition, Thomson Reuters Publishers at page 775 defines the term '*fraud*' in the context of contract to mean: -

**Unconscionable dealing esp. in contract law, the unfair use of the power arising out of parties' relative positions and resulting in an unconscionable bargain…**

58. The word '*unconscionable*' is defined by the **Black's Law Dictionary**, 10th Edition, Thomson Reuters Publishers at page 1757 in relation to a transaction as '*showing no regard for conscience; affronting the sense of justice, decency, or unreasonableness.'*

59. There is no doubt that fraud is a serious accusation. It must be pleaded and proved. **Bullen, Leake & Jacobs on Pleadings** 13th Edition provides as follows: -

**Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though**

**it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. 'General allegations, however strong may be by words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice''.**

60. **Order 2 Rule 10(1)(a)** of the **Civil Procedure Rules** requires a pleading to give particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies on.

61. The Court of Appeal in **Kinyanjui Kamau vs. George Kamau (2015) eKLR** held as follows: -

**….. It is trite law that any allegations of fraud must be pleaded and strictly proved……. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts….**

62. In **Kuria Kiarie & 2 Others v Sammy Magera (2018) eKLR** the Court of Appeal in dismissing an allegation of fraud held that: -

**27. We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegation that a sale agreement and a consent for transfer cannot be obtained on the same day is well below the standard of proof…... We need not belabor this issue as we are satisfied that it was neither properly pleaded nor strictly proved. That ground of appeal fails too.**

63. Properly guided, the Respondent herein is in a similar position as the Appellant in **Kuria Kiarie & 2 Others v Sammy Magera** (supra). In this case the Respondent only stated in passing in paragraph 8 of the Statement of Defence that his signature was obtained fraudulently. That was all. There were no particulars of fraud. No evidence of fraud was even availed. As held by the Court of Appeal aforesaid the claim of fraud was '*therefore stillborn and no evidence could be tendered'*.

64. I hereby find and hold that the Respondent failed to demonstrate any fraudulent conduct on the part of the Appellant that led him to execute the Agreement.

65. The Agreement was therefore not impugned. With such evidence on record there was no need for the Appellant to adduce further evidence on the circumstances in which or how he advanced the money to the Respondent.

66. I must say, however, with respect, that the trial court did not properly evaluate the evidence. The court did not address itself to the issue of the Agreement at all. The issue of the Agreement was hotly contested and there was no way it could not have been subject of the judgement. The court erred in law.

67. I now find and hold that upon re-evaluation of the evidence the suit was proved. Consequently, the following orders do hereby issue: -

**a) The appeal hereby succeeds and the judgment of the learned magistrate dismissing the suit is hereby set aside accordingly;**

**b) Judgment be and is hereby entered for the Plaintiff [now Appellant] as prayed for in Migori Chief Magistrate's Civil Suit No. 299 of 2017 against the Defendant [now Respondent];**

**c) The Appellant shall have costs of the suit as well as costs of the appeal.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 28th day of November, 2019.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open court and in the presence of: -**

**Mr. Oguttu Mboya** Counsel instructed by the firm of Messrs. Oguttu-Mboya & Co. Advocates for the Appellant.

**Mr. Nanda** Counsel instructed by the firm of Messrs. Gordon Ogola, Kipkoech & Co. Advocates for the Respondent.

**Evelyne Nyauke – Court Assistant**

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