Case Number:	Civil Appeal E024 of 2020
Date Delivered:	30 Jul 2021
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Judgment
Judge:	David Shikomera Majanja
Citation:	Amesnet Enterprises Limited & 2 others v Susan Wanjiru Wangendo [2021] eKLR
Advocates:	Mr instructed by Mbugua Ng'ang'a and Company Advocates for the Appellants. Mr instructed by Wanja and Kibe Advocates for the Respondent.
Case Summary:	-
Court Division:	Commercial Tax & Admiralty
History Magistrates:	Hon. L. Gicheha - CM
County:	Nairobi
Docket Number:	-
History Docket Number:	Civil Case 1682 of 2017
Case Outcome:	Appeal dismissed.
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. E024 OF 2020

BETWEEN

AMESNET ENTERPRISES LIMITED.....1ST APPELLANT

JAMES MWANGI MBUGUA.....2ND APPELLANT

JANET WAITHIRA MACHARIA.....3RD APPELLANT

AND

SUSAN WANJIRU WANGENDO.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon. L. Gicheha, CM dated 26th July 2019 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 1682 of 2017*)

JUDGMENT

1. This is an appeal against the judgment of the Subordinate Court dated 26th July 2019 where the said court entered judgment for the Respondent against the Appellants for KES. 6,875,000.00 together with interest and costs of the suit.

2. The facts and background leading to Respondent filing suit against the Appellants are largely common cause and are as follows. The 1st Appellant and the Respondent entered into an agreement dated 30th August 2011 ("the Sale Agreement") in which the 1st Appellant sold to the Respondent two plots of land, title nos. 54068 and 54069 situated in Kilifi for a total consideration of KES. 4,500,000.00. Despite the Respondent paying the full consideration for the properties, the 1st Appellant failed to honour its part of the bargain under the Sale Agreement which prompted the Respondent to demand a refund of the monies paid to the 1st Appellant.

3. The Appellants and the Respondent then entered into an agreement dated 5th August 2016 ("the Refund Agreement") for the refund of the monies now owed by the 1st Appellant to the Respondent which together with an agreed interest came to KES. 7,875,000.00. The Appellants only refunded KES. 1,000,000.00 which prompted the Respondent to institute the suit for recovery of the balance due under the Refund Agreement. In her Plaint, the Respondent claimed for the sum of KES. 6,875,000.00 being the outstanding amount, interest at court rates from 5th August 2016, Legal Fees of Kshs. 50,000.00, costs and interest.

4. In their Statement of Defence, the Appellants averred that the Refund Agreement was intended to supplement the Sale Agreement and in this respect the purchase price remained KES. 4,500,000.00 and nothing more. They stated that the Refund Agreement was, *"unconscionable, unreasonable and oppressive as the same is inconsistent with the provisions of the sale agreement dated 30th August 2021 in terms of the purchase price."* They added that the terms of the Sale Agreement were applicable as the same had not been repudiated and that the 2nd and 3rd Appellant were not liable under the Agreements as the 1st Appellant which entered into the Sale Agreement was a distinct and separate entity.

5. The trial magistrate heard testimony from both sides; the Respondent (PW 1) and the 2nd Appellant (DW 1). At the conclusion of

the trial, the learned trial magistrate found that the Respondent had proved her case on a balance of probability against the Appellants and entered judgment as prayed for in the Plaint save for the prayer for legal fees.

6. It is this decision by the Subordinate Court that has precipitated this appeal, whose determination I now turn. The Appellants' appeal is grounded in their Memorandum of Appeal dated 15th July 2020. They pray that the judgment of the trial court be set aside. The appeal was disposed by way of written submissions with the parties advancing their respective positions.

7. I have considered the submissions, authorities cited and the record and although the Memorandum of Appeal raised several issues, the main issue for resolution can be condensed into a single issue; whether the Respondent proved her case on the balance of probabilities.

8. Both parties agree that as a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand (see ***Elizabeth Njambi Kimemia v Florence Ngina Banga*** **NRB CA Civil Appeal No. 124 of 2012 [2018] eKLR** and ***Selle v Associates Motor Boat & Co.*** **[1968] EA 123**).

9. It is not in dispute that the parties executed both the Sale Agreement and the Refund Agreement and that the execution of the latter was precipitated by non-compliance or a breach of the earlier Sale Agreement by the 1st Appellant. Under the Refund Agreement, the 1st Appellant and Respondent agreed that in consideration of the Respondent suspending intended legal proceedings for default, the 1st Appellant would pay KES. 7,875,000.00 in full and final settlement of the principle amount and agreed interest. The 2nd and 3rd Appellant executed the Refund Agreement as guarantors.

10. The Appellants, in their Statement of Defence, challenged the validity of the Refund Agreement by stating that it was entered into by duress, coercion, intimidation. They alleged that they did not execute the same out of their free will. However, in his testimony before the trial court, the 2nd Appellant admitted that he signed the Refund Agreement but did not challenge it. He further admitted that the parties agreed to pay KES. 7,875,000.00 and that they made part payment of KES. 1,000,000.00 after executing the Refund Agreement. The 2nd Appellant further acknowledged being indebted to the Respondent and that through their advocates, the Appellants sought indulgence from the Respondent to repay the outstanding debt. The 2nd Appellant also admitted that together with the 3rd Appellant, they personally guaranteed to pay the outstanding amount to the Respondent and that by the time of giving evidence, the sum of KES. 6,875,000.00 was still outstanding.

11. Turning to the Appellants' defence, it must be recalled that under **Order 2 rule 10(1)** of the ***Civil Procedure Rules***, a party who relies on duress, coercion, undue influence and like defences must plead them with particularity. It provides as follows:

Subject to sub rule 2, every pleading shall contain necessary particulars of every claim, defence or other matter pleading including, without prejudice to the generality of the foregoing-

Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; [Emphasis mine]

12. In this case, the Appellants made bare statements of *unconscionable, unreasonable and oppressive* conduct without setting out the facts upon which the defences was founded. Even assuming that the parties proceeded on the basis that the defences were properly pleaded in line with the principle in ***Odd Jobs v Mubia*** **[1974] EA 476** where it was held that the court may base a decision on an upleaded issue where it appears that the parties proceeded on the basis that the matter was pleaded, it was still incumbent on the Appellants to prove their case. **Section 107 (2)** of the ***Evidence Act*** provides that *"When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*

13. The Court of Appeal in ***Mohamed Ahmed Abdun & another v Mini Bakeries (MSA) Limited*** **MSA CA Civil Appeal No. 88 of 2018 [2019] eKLR** went at length to explain the meaning of duress, as follows:

25. The editors of Chitty on Contracts, 13th edition, volume 1 note at paragraph 7-003, that a contract which has been entered as a result of duress may be avoided by the party who was threatened.

Duress is broadly defined in Black's Law Dictionary, 8th edition as:

"a threat of harm made to compel a person to do something against her will or judgment"

and strictly, as:

"the physical confinement of a person or the detention of a contracting party's property."

26. In Nabro Properties Limited vs. Sky Structures Ltd (above) this Court adopted an extract from Chesire & Fifoot's Law of Contract, 8th edition as a correct statement of legal duress sufficient to vitiate an agreement, that:

"Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e. threats calculated to produce fear or loss of life or real harm."

27. In Pao On vs. Lau Yiu Long [1980] A.C. 614 to which counsel on both sides referred, the Privy Council while accepting that economic duress might be recognized in principle in law insisted:

"… that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that payment made or the contract entered into was not a voluntary act."

28. In Lynch vs. D.P.P. of Northern Ireland [1975] A.C. 653 Lord Wilberforce expressed that while duress does not destroy the will, for example to enter into a contract, it prevents the law from accepting what has happened as a contract valid in law. In the same case, the court stated that duress does not literally deprive a person affected of all choice but leaves the person affected with a choice between evils. In effect, as noted by the editors of Chitty on Contracts the basis of duress is a combination of illegitimate pressure and absence of practical choice.

29. In the recent decision in John Mburu vs. Consolidated Bank of Kenya [2018] eKLR this Court echoed the words of the Privy Council in Pao On vs. Lau Yiu Long (above) that in determining whether duress is established,

"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law and be regarded as coercion of his will so as to vitiate his consent…In determining whether there was coercion of will such that there was no true consent it is material to enquire 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 was independently advised; and whether after entering the contract he took steps to avoid it."

14. Transposing the principles I have outlined above to this case, I do not find any evidence of duress, unconscionable, unreasonable and oppressive conduct on the Respondent's part. My review of the evidence on record shows that there is no evidence that the Appellants were subjected to any duress, that they protested the alleged duress, coercion or intimidation or that they took any legal recourse or remedy to arrest the threats or that they took any steps after signing the Refund Agreement to avoid it. Instead, they went ahead to make an initial payment of KES. 1,000,000.00 towards the refund and promised to make further repayments rather than either reporting the alleged threats to the relevant authorities or immediately challenging the Refund Agreement in court. This payment, if anything, fortified the Appellants' indebtedness.

15. In light of the clear and unequivocal admissions by the Appellants, I cannot fault the trial magistrate for concluding that the Respondent had proved her case that the Appellants were liable. I find and hold that the Appellants willingly entered into the Refund Agreement with the Respondent having recognized that they were truly indebted to the Respondent. The contention that they were threatened or coerced into signing the Refund Agreement is an afterthought intended to avoid legal consequences of the Refund Agreement.

16. Further, the Appellants complain that the Subordinate Court erred in awarding interest from 2nd November 2016 as opposed to awarding interest from the date of judgement without explaining the basis thereof. They submit that given the nature of the matter, an award of interest from the date of judgement would be fair. The Respondent support the court's decision to award interest as it does not overlap from the period of agreed interest stipulated in the Refund Agreement which covers the period from 2011 to 2016.

17. The trial court's decision to base the interest as from 2nd November 2016 appears to be informed by the date when the

Appellants made the payment of KES. 1,000,000.00 and defaulted in making further payment. Clause (d) of the Refund Agreement provides that in case of default, there shall be a further interest at court rates from the date of default until payment in full together with incident recovery costs.

18. In this case the application of interest was clearly stipulated in the Refund Agreement. It has been held in several decisions that award of interest prior to the date of filing suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest or in any other case as a matter of custom or mercantile usage (see ***Gulamhussein v French Somaliland Shipping Company Limited*** **[1959] EA 23**, ***Highway Furniture Mart Limited v The Permanent Secretary and Another*** **EALR [2006] 2 EA 94** and ***Ajay Indravadan Shah v Guilders International Bank*** **Ltd NRB CA Civil Appeal No. 135 of 2001 [2003] eKLR**). I affirm the trial magistrate's decision as it was simply a reflection of the parties' intention in the Refund Agreement. Further and as I have held, there is no plea in the defence that the interest was unreasonable or unconscionable to the extent that the court was called upon to intervene.

19. For the reasons I have set out above, I find that the decision of the Subordinate Court was well founded on the evidence and the law. This appeal lacks merit and is accordingly dismissed with costs to the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021.

D. S. MAJANJA

JUDGE

Mr instructed by Mbugua Ng'ang'a and Company Advocates for the Appellants.

Mr instructed by Wanja and Kibe Advocates for the Respondent.