

5 **THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**

**[COMMERCIAL COURT]**

**CIVIL SUIT No. 651 OF 2013**

**ROSE NANFUUMA MUYIISA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

10 **VERSUS**

**RUTH KIJJAMBU ::::::::::::::::::::::::::::::::::::::: DEFEDANT**

**BEFORE: HON. MR. JUSTICE B. KAINAMURA**

**JUDGEMENT**

The plaintiff brought this action against the defendant seeking for the recovery of her Motor  
15 Vehicle Isuzu Forward, Model 1991, Registration No. UAM 412F or for its present market  
value from the defendant, special damages for the wrongful detention of her vehicle and loss  
of earnings of the vehicle, general damages for detinue or conversion, interest and costs of  
the suit.

The brief facts of the case are that the defendant without any color of right detained the  
20 plaintiff's vehicle in un specified place where she allegedly kept it in some unsafe place and  
has remained adamant to the plaintiff's repeated pleas and requests to have the vehicle  
released.

It was the plaintiffs case that the defendant ought to have known that the vehicle had  
previously been pledged as collateral with Ugafode Microfinance Limited and that it's  
25 continual detention was prejudicial to the loan repayment schedule.

In her defence, the defendant averred that she sold the suit vehicle and used the proceeds of  
UGX 8,000,000/= to partially offset the plaintiffs loan leaving a balance of UGX 31,139,229  
which she is currently servicing.

The defendant counter claimed against the plaintiff seeking a payment of the sum of UGX  
30 31,139,229/= that remained due and owing to Centenary Bank, general and punitive damages.

The brief facts in the counter claim are that, the counter claimant gave powers of attorney to  
the plaintiff to pledge her land comprised in Kyadondo Block 232, plot 1047 at Namugongo,

Wakiso district at Centenary Rural Development Bank (CERUDEB) to obtain credit for the plaintiffs business.

That the plaintiff was advanced UGX 25,000,000/= by CERUDEB of which the plaintiff failed and neglected to service. The bank moved to sell defendants property valued UGX  
5 150,000,000/= to recover the loan which made the defendant to file a suit against the plaintiff and Centenary Bank. A consent decree was obtained wherein the plaintiff was to pay balance of the decretal sum to Centenary Bank.

That earlier before the consent decree was obtained, both parties in the suit entered into a Memorandum of Understanding where the plaintiff was to pay UGX 9,500,000 as arrears by  
10 19<sup>th</sup> October 2012 and in default, the defendant was to attach and sale without recourse to court, the plaintiff's motor vehicle Reg. No UAM 412F to use the proceeds of the sale to pay part of the outstanding plaintiffs loan owed to M/S Centenary Bank.

That the counter defendant/plaintiff filed a Bankruptcy Petition which stayed the execution. The counter defendant/plaintiff was given a period of six months within which to pay the  
15 decretal balance of UGX 22,639,229 /=.

That the counter claimant/defendant has since serviced the plaintiff/counter defendant's loan and continues to do so without the assistance of the counter defendant.

In reply to the counter claim, the counter defendant contended that the decree holder in Civil Suit No. 489 of 2012 is Centenary Bank against both the counter defendant and the counter  
20 plaintiff and as such the counter plaintiff has no decree to enforce.

The counter defendant further averred that the said authorised sell of the motor vehicle and any purported sale was illegal and contrary to law. And further that the counter claimant already compromised herself in the Civil Suit No. 489 of 2012 and she cannot now be seen to claim these sums from the counter defendant.

25 The agreed issues for determination were.

1. Whether the plaintiff was coerced into signing the impugned memorandum of understanding.
2. Whether the sale of the suit vehicle was proper
3. Whether the defendant owes the plaintiff any money
- 30 4. Whether the plaintiff is indebted to the defendant

5. If so, which of the parties is entitled to set off
6. Whether the parties are entitled to the reliefs sought.

**Issue One;                    Whether the plaintiff was coerced into signing the impugned memorandum of understanding**

5 The plaintiff testified that the memorandum of understanding between herself and the defendant was without free consent as she was in police custody at that time.

Counsel for the plaintiff submitted that at common law and in equity an agreement devoid of free will and consent is voidable at the instance of the plaintiff. Counsel averred that for duress to succeed in impeaching an agreement, it must be shown that the duress, if not the  
10 sole reason for the execution of the impugned agreement, was the predominant reason. That there must be a direct connection between the two; a cause and an effect. In this case Counsel argued it is clear that on the day that the agreement was executed, is the same day that the plaintiff was granted bail bond by the police.

In reply Counsel for the defendant averred that it was the defendant's (DW1's) evidence that  
15 the agreement executed on 16/10/2012 between the plaintiff and the defendant was executed after the plaintiff had been granted police bond and not before the police bond was granted. Counsel also averred that it was PW3's (John Muyisa) evidence that the memorandum dated 11/ 12/2013 was made at the police canteen. That there was no police officer.

Counsel for the defendant relied on the case of *Nakalima Vs Ann Nandawula Kabali, Misc.*  
20 **Appl No. 235 of 2013** where court held that;

*“From the definition, it can be deduced that the "duress" has to be unlawful. What is unlawful needs further clarification and may depend on the facts of the case. Some general remarks can however be made. The first conclusion is that lawful force cannot be actionable as "duress". It is therefore necessary for the applicant relying on  
25 the ground of duress to prove that unlawful pressure was applied on him or her so as to lose his or her free will. Threat of the process of court cannot be unlawful pressure and is always exacted by litigants or potential litigants to threaten anybody they claim is in breach of the law to comply with their demands or else face the due process of law. Consequently it is necessary to establish by evidence that the force or threat of  
30 force or pressure which was applied was unlawful pressure and that as a consequence thereof, the applicant lost her free will”.*

Counsel for the defendant further averred that DW1 testified that the plaintiff was sued in H.C.C.C NO. 489 OF 2012. Subsequently the Notice to Show Cause issued and the warrant of execution against the plaintiff were by court of competent jurisdiction. Counsel submitted that the criminal charges cannot amount to unlawful pressure.

- 5 Duress is defined to include a threat of harm made to compel a person to do something against their will or judgment; **Blacks Law Dictionary 8th Edition Page 542.**

In the case of ***Pao On Vs Lau [1979] 3 ALL ER 65 at 78***; Lord Scarman held as follows;

10 “Duress, whatever form it takes, is a coercion of the will so as to vitiate consent... There must be present some factor ‘which could in law be regarded as a coercion of this will so as to vitiate consent.’ In determining whether there was a 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  
15 advised; whether after entering he took steps to avoid it. All these matters are, as was recognized in ***Maskell Vs Home [1915] 3KB 106***, relevant in determining whether he acted voluntarily or not.” ***Burton Vs Armstrong [1976] AC 104 at 121***”.

This suggests that the test to determine coercion is that a person must show that; he protested to the duress, that he did not have any other alternative course open to him such as an  
20 adequate legal remedy and he was independently advised and whether the person took steps after entering it to avoid it.

From the facts before me, PW2, the plaintiff in her testimony, stated that the defendant lodged criminal charges at Buganda Road Court against her alleging that she had defrauded her of her property. That as a result, PW1 (Alex Mulenzi) was arrested and detained at  
25 Central Police Station Kampala for four days in October 2012. That the following day on 16<sup>th</sup> October, 2012 while she was still detained at Central Police Station as a suspect, the defendant drafted a memorandum of understanding where she required her to release the motor vehicle registration number UAM 412 F to her custody. Having no choice in the matter and since she had been jailed for four straight days, she signed the memorandum of  
30 understanding and was released on police bond.

PW2 further stated that;

In the month of February 2013, the defendant once again along with her client Baguma Fred had her arrested and detained yet again at CPS-Kampala for the offence of obtaining money by false pretences and theft. That while she was at CPS, the defendant suggested that she signs a document stating that she had given her the motor vehicle registration number UAM 412F so that she could use it to recover the sum due and owing to Centenary Bank. She further stated that believing that she had no other way out of jail, she signed the memorandum of understanding and immediately gained her freedom on the 11<sup>th</sup> February 2013.

10 It is clear that the plaintiff was arrested on several occasions and later released. The plaintiff states that her signing the memorandum was a condition of her release. It goes without saying however that duress in civil law must be unlawful and threat of process of court has been held not to constitute duress.

While the plaintiff states that she had no other option but to sign the memorandum, she does not show that she took any steps to avoid the contract after entering it.

Counsel for the plaintiff submitted that the plaintiff handed over the agreement of sale of car between her and the former owner to the defendant to effect the sale.

The plaintiff stated that she first signed the first memorandum of understating in October 2012. She did not do anything, and later in February 2013, she signed another memorandum with the same effect as the former. She filled the suit against the defendant in November 2013, after the sale was effected. This shows that she did nothing to get out of the contract and the suit was but only an afterthought.

The plaintiff had independent advice of her Advocate and should have sought legal remedy as soon she left police custody. Having taken no steps to avoid what she had entered into, leads to the conclusion that the plaintiff regarded the transaction closed and had no intention to repudiate the agreements.

Further, for it to amount to duress, the threat has to be illegitimate and the threat is always "illegitimate" if it is to do an unlawful act. Therefore threatening to do a lawful act does not amount to duress. In *Pao On Vs Lau Yiu Long (supra)* Fu Chip Investment Co Ltd, a newly formed public company, majority owned by Lau Yiu Long and his younger brother Benjamin (the defendants), wished to buy a building called "Wing On", owned by Tsuen Wan Shing On

Estate Co. Ltd. ("Shing On"), whose majority shareholder was Pao On and family (the claimants). Instead of simply selling the building for cash, Lau and Pao did a swap deal for the shares in their companies. Pao made clear that unless he got this "guarantee agreement", he would not complete the main contract. It was signed on 4 May 1973. But as it turned out  
5 the shares did slump in value. Pao tried to enforce the guarantee agreement. Lau argued that the guarantee agreement was not lawful because it was a contract procured by duress.

The Privy Council held that Lau's signing the guarantee agreement after the threat of non-completion of the main agreement was only a result of "commercial pressure", not economic duress.

10 Further in the case of *Nakalima Vs Ann Nandawula Kabali*, (supra) court held that duress was to be unlawful;

Therefore that fact that the plaintiff was arrested twice and promised police bond if she signs the memorandum of understanding cannot be said to be unlawful pressure and the plaintiff cannot be said to be coerced into signing the memorandum with the promise of being set free.

15 This appears to me as economic pressure but does not constitute duress. The plaintiff have therefore failed to prove duress and are in consequence bound by the memorandums they signed.

In the result issue one is answered in the negative.

**Issue Two;                    *Whether the sale of the said vehicle was proper in the circumstances.***

20 It was the plaintiff's case that the sale of the vehicle was not legal. Counsel for the plaintiff submitted that the valuation at the open market valued the vehicle at UGX 15,830,000/= and the forced sale value at UGX 9,500,000/= that this means that the forced sale value is the absolute least value that the vehicle could fetch. Further that the money that was obtained to pay off a loan was not deposited on the account until approximately 7 months later.

25 It was the defendant's case that the sale was lawful. According to Counsel for the defendant, the plaintiff authorized the sale of the motor vehicle per the agreements dated 16/10/2012 and another agreement dated 11/02/2013.

In the agreement dated 11<sup>th</sup> February 2013, the plaintiff agreed that the sale of the vehicle Reg No. UAM 412 F be sold by the defendant to realize the money to pay for the loan at Centenary Bank.

5 It should be noted that the memorandum of understanding does not indicate how much money the vehicle should be sold at. All that was agreed was that it should be sold and the money used to repay a loan. This therefore meant that it did not matter how much the car fetched, the proceeds were to go into payment of the loan. Conventional wisdom however dictates that the sum car was to be sold for should be reasonable.

10 DW3, (Dr. Ochwo Ochieng Ojomoko) a professional valuer gave an opinion that the forced sale value of the car would be UGX 9,500,000/= and the open market value would be UGX 15,830,000/=. In cross examination, he stated that the vehicle had so many issues. That the battery was not working. This meant that it had depreciated in value. Further that the fact that the vehicle was sold at a forced sale value could not invalidate the sale.

15 Under the circumstances therefore and since the plaintiff agreed to the sell of the vehicle, I find that the sale was lawful. Accordingly issue two is answered in the affirmative.

***Issue Three; Whether the plaintiff is indebted to the defendant.***

20 Counsel for the defendant submitted that the defendant testified that because the plaintiff had refused to share the loan from Centenary Bank, and the bank had advertised the sale of her property illegally, she instituted a suit H.C.CS. 489 of 2012 against Centenary Bank and the plaintiff. The plaintiff failed/refused to file a defence. That by consent judgement with Centenary Bank the defendant undertook to pay the loan and default judgement was entered against the plaintiff.

That on that basis the defendant paid a loan and interest to Centenary Bank to a tune of UGX 31,139,229/=.

25 The defendant caused the issuance of NTC and subsequently warrant of arrest in execution was issued to the plaintiff.

Counsel further submitted that the defendant's evidence is corroborated by plaintiff's Petition for Bankruptcy No.9 of 2013 and the affidavits verifying the petition, and in the affidavit verifying the statement of affairs the plaintiff listed the defendant as one of the creditors.

Counsel for the plaintiff in reply submitted that no evidence has been adduced in as far as the defendant's counter claim is concerned to prove where the amount owing emanates from. This claim is for compensatory damages which are in every sense special damages. That special damages must be specifically pleaded, particularized and proved. That no receipts or  
5 payment vouchers have been adduced or any bank statements that would support the claim.

From the facts before me, the defendant sued the plaintiff and Centenary Bank in Civil Suit No. 489 of 2013 and indeed obtained a decree against the plaintiff.

The defendant tried to execute the decree against the defendant by putting her in a civil prison.

10 Later the plaintiff petitioned for bankruptcy in Bankruptcy Petition No. 09 of 2013. On 14<sup>th</sup> October 2013, court granted the petition in a ruling where court ruled among others that the petitioner be released from prison and that the execution and or proceedings against the property or person as a result of HCCS No.489/2012 of the petitioner be stayed pending the final disposal of the petition for bankruptcy.

15 The defendant under this suit made a counter claim against the plaintiff over the same amount as was in dispute under HCCS No. 489 of 2012.

Section 7 of the CPA provides as follows:

20 *“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been finally decided by that court.”*

That provision outlines the following parameters that must be satisfied for the doctrine of *res judicata* to be applicable to a matter:

- 25
1. The existence of a former suit that has been finally decided by a competent court.
  2. The parties in the former suit should have been the same as those in the latter suit, or parties from whom the parties in the latter suit, or any of them, claim or derive interest.
  3. The parties in the latter suit should be litigating under the same title as those in the former suit.



4. The matter in dispute in the former suit should also be directly and substantially in dispute in the latter suit where *res judicata* has been raised as a bar.

In *Kamunye and Others Vs The Pioneer General Assurance Society Ltd, [1971] E.A. 263*, the tests to be used in determining whether a suit is *res judicata* were stated by LAW,

5 Ag V-P:

10 *“The test whether or not a suit is barred by res judicata seems to me to be- is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If so, the plea of res judicata applies not only on points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.....The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply...”*

15 In the present case there does exist a former suit (Civil Suit No. 489 of 2012) in which the issue of the sum of UGX 31,1139,229/= was conclusively decided by a competent court between the same parties as before me in the present case.

Under the circumstances therefore and as far as this issue is concerned, I find that the matter is *res judicata* and this court does not have jurisdiction to handle it.

20 **Issue Four:                      *Whether the defendant is indebted to the plaintiff***

Counsel for the defendants submitted that the vehicle was a commercial vehicle which was used in the haulage business which would earn about UGX 300,000/- a day and prayed that the plaintiff be compensated for the loss of earnings.

25 On the other hand, Counsel for the plaintiff contended that the defendant has not produced any evidence to show that she is owed any money.

In the memorandum of understanding, the plaintiff clearly agreed to sell off the vehicle for the payment of an outstanding loan. The same person cannot again claim that the vehicle was

a commercial vehicle that fetched her money. Indeed it was as evidenced by PW1, she allowed its sale and cannot again claim to be owed any money. Under the circumstances, I don't find any merit in this issue.

***Issue Five: Whether the parties are entitled to the reliefs sought.***

- 5 Having found that the plaintiff has failed to prove duress and she is bound by the agreement and that the car was lawfully sold as was agreed upon by the parties, the plaintiff's suit fails and is accordingly dismissed.

Having further found that the defendants counter claim is *res judicata*, her claim is also dismissed.

- 10 Each party is to meet its own costs.

I so order

**B. Kainamura**

**Judge**

- 15 **31.05.2018**