



**BCF Kenya Limited v Kamau (Civil Appeal E039 of 2024)  
[2024] KEHC 16707 (KLR) (Commercial and Tax) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16707 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E039 OF 2024  
BM MUSYOKI, J  
NOVEMBER 22, 2024**

**BETWEEN**

**BCF KENYA LIMITED ..... APPELLANT**

**AND**

**ALEXANDER NJONDE KAMAU ..... RESPONDENT**

*(Being an appeal from judgment and consequential orders of Honourable Kiongo Kagenyo (RM)  
in Milimani Small Claims Courts commercial case number E3966 of 2023 dated 19-01-2024)*

**JUDGMENT**

1. The appellant filed suit in the lower court claiming a sum of Kshs 1,000,000.00 which was said to be balance due and owing from two loans advanced to the respondent. The first loan was for Kshs 1,200,000.00 advanced on 5-09-2017 while the 2<sup>nd</sup> one was for Kshs 850,000.00 advanced on 8-04-2019. The honorable adjudicator dismissed the suit after finding that the contract was unconscionable since the respondent had paid a total of Kshs 6,220,500.00 and more was being demanded from him.
2. The appellant has raised a total of 11 grounds of appeal. All the grounds revolve around two issues in my opinion. The first one is whether the respondent had paid a sum of Kshs 6,220,500.00 as held by the adjudicator while the 2<sup>nd</sup> issue is whether by holding that the terms of the agreement between the parties were unconscionable, the adjudicator's judgement amounted to re-writing the contract between the parties. Whether or not the respondent had paid a sum of Kshs 6,220,500.00 may on the face of it look like a matter of fact but when intertwined with the 2<sup>nd</sup> issue, it becomes laced with matters of law as it touches on compliance or lack of it with the terms of the contract. I had to make this clarification so that I may be understood to comply with Section 38(1) of the Small Claims Courts Act which limits appeal from the said courts to this court to matters of law only.



3. When the matter before the trial court came for hearing on 14-08-2023, the parties opted to proceed by way of filed documents which is allowed under Section 30 of the *Small Claims Court Act*. The respondent had not filed any documents save for response to the claim and his witness statement. On the other hand, the appellant had filed a total of 27 documents which included correspondences, text messages, emails, agreements, cheques, vouchers and the statements of account for the two loans.
4. This is a first appeal. It is trite that an appellate court of the first instance conducts the appeal in a manner of a rehearing where it should re-examine, re-analyse and re-consider the evidence produced in the trial court and come to its own independent conclusion but always reminding itself that it did not take evidence from the witnesses and had no opportunity to observe their demeanour and should give due allowance for that. In *Mursa & Another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (2022) KEHC 282 (KLR), it was held that;

‘A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.’

5. According to the witness statement filed by the appellant, the respondent was unable to pay his two loans and on 8-10-2019, the parties entered into a loan restructuring agreement where the respondent was to pay Kshs 1,795,000.00 within one week and Kshs 1,000,000.00 within twelve months. The appellant made reference to what he called a restructuring letter dated 8-10-2019. I have looked at that letter which has not been denied by the respondent. The letter which is signed by the respondent confirming acceptance of the terms therein states that the total amount outstanding as at then was Kshs 2,795,000.00 which was to be paid by two installments of Kshs 1,795,000.00 in that week and the balance of Kshs 1,000,000.00 in a period of twelve months. In addition, there would be an interest of 4% and a one-off loan processing fee of 4%. The interest was applicable for the second batch of installments and not on the first payment. I also note from the letter that, contrary to the submissions by the appellant, the restructuring agreement did not have provision for penalties.
6. The appellant also produced two promissory notes as part of its evidence. The first promissory note appearing on page 19 of the record of appeal which is dated 5-09-2017 shows that the respondent committed to pay Kshs 1,560,000.00 together with interest at 10% on unpaid sum. The 2<sup>nd</sup> promissory note is dated 8-04-2019 which is on page 39 of the record of appeal and states that the respondent was to pay a total of Kshs 977,500.00 plus 10% interest on unpaid sum. It is these promissory notes that gave rise to the dispute between the parties. It would appear that the parties then sat down and made the restructuring agreement which in my view took care of the previous transactions. That restructuring agreement must have accounted for the past transactions and it is what the court is bound to concentrate on unless any of any party pleaded and proved a vitiating factor to the later contract.
7. I have seen the two sets of account statement produced by the appellant on pages 23 to 32 and 43 to 44 of the record of appeal and I find it interesting that the statement does not reflect the position as per the restructuring agreement. For instance, on 8-10-2024 when the restructuring agreement was made, the statements indicates that the balance on the first loan was 2,491,091.00 while the 2<sup>nd</sup> loan had Kshs 1,020,000.00 although the date is partly obliterated. The total of these two loans is therefore Kshs 3,511,091.00. The statement goes further to charge both interest and penalties despite the penalties having not been provided for in the restructuring agreement. The appellant has not convinced me where this penalty was coming from since it was not in the promissory notes or the restructuring agreement.



8. After the restructuring agreement, the appellant wrote letters to the respondent asking for payment of amounts which were not in accordance to the agreement. There is a letter dated 29-10-2019 which was demanding payment of the principal sum of Kshs 1,006,006.00 plus interest of 100,290.60 and penalties of Kshs 1,980,585.88 which totaled to Ksh 3,086,882.48. The same goes for another demand letter dated 21-11-2019 where the appellant was asking for Kshs 2,000,000.00. This to me, means that the appellant's books of accounts as related to the respondent's debt were either not in order or were deliberately being manipulated.
9. Having said the above, it is important to note that the respondent did not deny that the debt existed. Of more importance is the fact that the respondent has also not denied that he signed the restructuring agreement. I have noted hereinabove that the restructuring agreement settled the parties' previous transaction and engagements subject only to application of the law. The honourable adjudicator was of the view that the contract was unconscionable against the respondent in terms of interest and penalties. This was informed by his position that the respondent had already paid a sum of Kshs 6,220,500.00. I have gone through the statement filed by the appellant and I am unable to see where the adjudicator got this figure from. It seems that he was misled by the analysis done in submissions filed by the respondent to that effect which was obviously wrong.
10. The respondent has not in this appeal and in the lower court showed that he signed the restructuring agreement through misrepresentation, fraud, or anything flowing from illegality or any other vitiating factor. It is my finding that the plea for unconscionability does not arise as the respondent executed agreements in respect of the loans three times. He did it freely and without any coercion. In defining unconscionable contract, the Court of Appeal in *Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited* (2014) eKLR held that;

‘An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.’
11. Although I have found that the agreement was not unconscionable, there is however a legal issue which I think should be addressed which is informed by disputed interest and penalties. One would wonder whether the appellant could continue charging interest and penalties indefinitely or there should be a capping on the same. It has not been established in this matter what kind of institution the appellant is or whether it had been licensed to trade as a lending institution. By all means, looking at the kind of transactions between the parties, the appellant was operating as a lending institution to an extent that it could take securities for loans in form of charging motor vehicles. If indeed the appellant was operating without a licences under the *Banking Act*, Public Benefit Organizations Act, Micro-Finance Institutions Act or as a Cooperative Society, then its operations were illegal and would not be entitled to recover or benefit from illegal activities. However, this point was not taken in the appeal or the lower court and this court will not belabour it. I will assume that the operation was legal.
12. Section 44A (1) and (2) of the *Banking Act* provides that;
  1. An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).
  2. The maximum amount referred to in subsection (1) is the sum of the following;
    - a. the principal owing when the loan becomes non-performing;
    - b. interest, in accordance with the contract between the debtor and the institution not exceeding the principal owing when the loan becomes non-performing; and



- c. expenses incurred in the recovery of any amounts owed by the debtor.
13. I understand the above Section to mean that the lender cannot recover more than double of what it advances a borrower exclusive of costs of recovery. As much as the appellant may not be a bank, I hold the opinion that, it would be unconscionable and an illegality to allow it to recover more than what a licensed bank would recover in the same circumstances. It will be against the spirit of the said Section of the law and it would defeat the mischief the said Section was meant to remove from the money lending industry. The said law was introduced on a background of situations where the money lending institutions had developed a practice of loading runaway interests and penalties on loans which made repayments of the loans painful and punishing experiences. This made redemption of securities a herculean task, a history which should not be forgotten. The courts of law should not be seen assisting lenders to destabilise and distort the market by letting them harass borrowers with indefinite unconscionable interest rates and charges.
14. In this matter, it would be safe for this court to assume that, the time the loans became non-performing was when the parties entered into the restructuring agreement because demands for payment started flowing barely a month after the agreement. At that time, going by the restructuring agreement, the outstanding loan inclusive of interest and penalties was Kshs 2,795,000.00. At the time, the parties did not give a breakdown of what amounted to the principal loan, interest and penalties. However, by a letter dated 29-10-2019, the appellant wrote to the respondent cancelling the restructuring agreement and demanding payment of Kshs 1,006,1006.00 as principal amount, Kshs 100,290.60 as interest and penalties of Kshs 1,980,585.88. First, the appellant's purported cancelling of the restructuring agreement could not stand as the same, as I have held before, was a contract and could only be cancelled mutually or enforced as it was.
15. Going by what I have stated on spirit and intention of Section 44A (1) and (2) of the *Banking Act*, the appellant could only recover interest to a maximum of Kshs 1,006,006.00. The penalties shown in the said letter do not have legal or contractual basis as they would violate the said Section of the law and were not provided for in the restructuring agreement. According to the statement at page 27 of the record of appeal, the interest that was outstanding as at the date of the restructuring was Kshs 1,476.620.31. This was already in breach of the said Section of the *Banking Act* as the initial loan was Kshs 1,200,000.00 and as such interest could not be allowed beyond the principal loan. The same statement goes on to show that a transfer of Kshs 844,244.71 was made on 18-12-2019 and a further transfer of Kshs 892,335.31 was made on 24-12-2019. In its submissions, the appellant acknowledges payment of the first transfer but says nothing about the second one. These two transfers which total to Kshs 1,736,580.02 should have been enough to settle the principal sum of Kshs 1,006,006.00. However, the statement shows that the respondent continued paying more money. With such jumbled statement and inconsistencies, the said statement in my view is not capable of proving the respondent's debt to the appellant.
16. The appellant has acknowledged in its submissions that the first loan was paid in full. Noting that the appellant had imposed illegal penalties which were not provided for in the agreement, I see no ground for finding fault in the adjudicator's finding that the respondent had overpaid the loans although the same was not to the tune of Kshs 6,220,500.00. There was no basis for the penalties and in addition, the respondent paid interest beyond the statutory capping. In view of this, it is my finding that the agreement in itself was not unconscionable but the appellant sought to enforce the terms of the contract beyond the legal limits and by levying penalties which were not provided for in the contract. Be that as it may, the end result of the appeal would be the same as the judgement of the trial court.



17. The appellant claims that the respondent issued postdated cheques as acknowledgement of the debt which were not banked following the appellant's advice. The cheques which have been produced at pages 51 to 53 of the record of appeal are drawn by Triple N Car Clinic Limited but relationship of the drawer with the respondent has not been explained.
18. As I complete this judgment, I must express dissatisfaction at how both parties just threw documents at the court without sufficient analysis and sat back for the court to make sense out of them. The submissions by the parties did not help matters as the figures therein were tilted by each to favour their sides. It is important for parties to acknowledge that they own their cases and dispensation of justice entails them to help the court appreciate and understand the case before it because, it is only then that the court would write an informed judgment or decision. Perhaps this was not a proper case to proceed under Section 30 of the *Small Claims Court Act*. I say so because in his judgment, the adjudicator also expressed concerns of lack of clarity especially on payments made by the respondent. All in all, the burden was on the appellant to prove its case on a balance of probabilities which I find it failed to do.
19. The upshot of the above analysis is that I find no merit in this appeal and I hereby dismiss it with costs to the respondent.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered online in presence of:

Mr. Kibuthu for the appellant; and

Miss Kiiru holding brief for Mr. Thuita.

