Maingi v Mwongera & another (Civil Appeal E146 of 2023)
[2024] KEHC 16724 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16724 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E146 OF 2023

CJ KENDAGOR, J

DECEMBER 20, 2024

BETWEEN

ALBERT MWANGI MAINA MAINGI ..... APPELLANT

AND

HARUN MWONGERA ..... 1ST RESPONDENT

JOHN M'MARETE ..... 2ND RESPONDENT

(Being an appeal against Judgment of the C.M. Court Merru (Hon. J.M. Njoroge, Chief Magistrate) in Meru CMCC No. E005 of 2020 delivered on 21st August, 2023)

JUDGMENT

Introduction

1. The 1st Respondent advanced to the 2nd Respondent a soft loan of 420,000/= on 31st July, 2017. The terms of the loan were contained in a written Agreement dated the same date and executed by the two. The Appellant was a guarantor to the said loan and surrendered his title deed for L.R.No.Kiirua/Naari/Maitei/601 to the 1st Respondent as a security for the loan. He was also a witness to the loan Agreement and he appended his signature on the same. The 2nd Respondent failed to repay the loan as per the Agreement and the 1st Respondent sued him and the Appellant for breach of contract. He sought refund of the Kshs.420,000/= and damages for breach of the contract. He also sought, in the alternative, an order for attachment of the loan security for the recovery of the loan and damaged for contractual breach.

2. The Appellant filed a Statement of Defense and Counterclaim wherein he admitted the existence of the loan Agreement but denied that he was in breach. He stated that the 1st Respondent did not have any cause of action against him because he was not a party to the loan agreement. He also brought a counter claim against the 1st and 2nd Respondents wherein he prayed for the release of the title deed for

the parcel LR.No.Kiirua/Naari/Maitei/601 (the loan security) and a permanent injunction restraining the 1st Respondent from selling, leasing or charging the loan security.

3. The Court delivered the judgment on 21st August, 2023 in favor of the 1st Respondent against the Appellant and the 2nd Respondent jointly and severally. The terms of the judgment were as follows; the Appellant and the 2nd Respondent were to pay the loan amount of Kshs.420,000/= and Kshs.840,000/= as damages for breach of contract. It also held that in default of the above orders, the loan security would be sold by way of Public Auction to recover the above sums. It also ordered the Executive Officer of the Court to sign the transfer documents after a period of 90 days.

4. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 12th September 2023. He listed the following Grounds of Appeal;

    1. That the Honourable Learned Trial Magistrate erred in law and fact in ordering the Appellant to pay damages for breach of an agreement that the Appellant was/is not a party to.

    2. That the Honourable Learned Trial Magistrate erred in law and fact in literally rewriting the agreement dated 31st July, 2017 between the 1st and 2nd Respondents.

    3. That the Honourable Learned Trial Magistrate erred in law and fact in ignoring the evidence on record and ordering the Appellant to repay a loan of Kshs.420,000/= which from the evidence on record, had been obtained not by the Appellant but by the 2nd Respondent.

    4. That the Honourable Learned Trial Magistrate erred in law and fact in ignoring the Appellant's submissions and proceeding to irregularly grant both the main and alternative prayers in the 1st Respondent's plaint.

    5. That the Honourable Learned Trial Magistrate erred in law and fact in assisting and aiding the 2nd Respondent evade his obligations under a lawful contract between the 1st Respondent and himself.

    6. That the Honourable Learned Trial Magistrate erred in law and fact in rubbishing and ignoring the evidence on record and instead, basing his judgment on remote, irrelevant, and unsubstantiated considerations with the sole motive of favoring the 2nd Respondent against the Appellant and which has occasioned the Appellant grave injustice and prejudice.

    7. That the Honourable Learned Trial Magistrate erred in law and fact in purporting to enforce a non-existence and imaginary agreement between the Appellant and the Respondents instead of strictly confining his judgment to the loan agreement dated 31st July, 2017, between the Respondents.

    8. That the Honourable Learned Trial Magistrate erred in law and fact in insinuating, in the absence of any evidence, that the Appellant was the beneficiary of the loan amount of Kshs.420,000/=.

    9. That the Honourable Learned Trial Magistrate erred in law and fact in ignoring the fact that the Appellant was not a party to the loan agreement between the 1st and 2nd Respondents and in condemning the Appellant to pay both the loan amount, damages for breach of the said agreement and costs of both the main suit and the counterclaim.

    10. That the Honourable Learned Trial Magistrate erred in law and fact in politicizing court proceedings and in literally playing politics in writing a court judgment instead of basing his judgment on the evidence on record.

11. That the Honourable Learned Trial Magistrate erred in law and fact in ignoring and failing to notice that the Respondents had for some ulterior motive, teamed up so as to intentionally exonerate the 2nd [Respondent] from payment of his loan and to have the Appellant's land irregularly sold.

12. That the Honourable Learned Trial Magistrate erred in law and fact in importing into his judgment matters that did not arise in evidence during the trial.

13. That the Honourable Learned Trial Magistrate erred in law and fact in speculating and analyzing the evidence on record in a manner intended to favor the Respondents against the Appellant.

14. That the Honourable Learned Trial Magistrate erred in law and fact in rendering a judgment that was/is far below the standard set Under Order 21 Rules 4, 5, and 6 of the Civil Procedure Rules 2010.

15. That the Honourable Learned Trial Magistrate erred in law and fact in treating the 2nd Respondent's evidence and that of her witness as gospel truth and which offended Section 124 of the *Evidence Act* Cap.80 Laws of Kenya, thereby prejudicing the Appellant.

16. That the Honourable Learned Trial Magistrate erred in law and fact in dismissing the Appellant's counterclaim.

17. That the Honourable Learned Trial Magistrate erred in law and fact in delivering a judgment that was/is against the weight of evidence.

5. The Appellant asked this Court to set aside the Learned Trial Magistrate's Judgment and refer the matter to the Njuri Ncheke panel of Elders for mediation and for the parties to be subjected to the Ameru Traditional oath. He also asked this Court to order the 2nd Respondent to single handedly repay the loan of Kshs.420,000/=. In addition, he asked this Court to order the 2nd Respondent to pay agreed damages of Kshs.840,000/= for breach of the agreement between himself and the 1st Respondent. Lastly, he asked this Court to discharge his title deed for LR.No.Kiirua/Naari/Maitei/601 and have it released to him.

6. The appeal was canvassed by way of written submissions.

The Appellant's Written Submissions

7. The Appellant submitted that the lower Court should not have ordered him to pay damages for the contractual breach because he was not a party to the loan agreement, but only a guarantor. He argued that according to the doctrine of privity of contract, a person cannot be held liable for a contract he was never party to. He submitted that the contractual obligations under the loan agreement should be borne by the 2nd Respondent because the contract was solely between the 1st and 2nd Respondents.

8. In other words, the Appellant argued that he was a stranger to the loan agreement and thus there was no basis to impose contractual obligations on him. He relied on the case of Reclington (K) Ltd vs Thomas N. Nabende & Anor, South Nyanza Sugar Co. Ltd vs Leonard O. Orera (2020) eKLR, and Alghussein Establishment vs Eton College (199101) ALL ER 267.

9. The 1st Respondent's Written Submissions

10. The 1st Respondent submitted that the Appellant is bound by the loan Agreement because he willingly agreed to be a guarantor and he knew the consequences of default. He submitted that the Appellant

was a party to the contract and his role was to ensure that the 2nd Respondent performed his contractual obligations. He argued that the Appellant cannot claim to be a stranger to the loan agreement because he appended his signature to the loan and surrendered his title deed as a security for the loan. Lastly, it argued that the Appellant cannot negate his intentions to be bound by the loan agreement because he did not plead fraud, coercion, or undue influence at the time of executing the loan Agreement.

11. He relied on I &M Bank Limited v Shani Active Limited & 2 others [2022] eKLR, Mrao Ltd v First American Bank of Kenya Limited & 2 others [2003] eKLR, and National Bank of Kenya Limited vs Pipe Plastics Samkolit (K) Limited & Another (2002) EA 503.

Issues for Determination

12. Having considered the Memorandum of Appeal and Submissions from both parties, I am of the view that the following are the issues for determination;

    a. Whether the Appellant is obligated to pay the loan and damages for breach of the loan agreement.

    b. Whether Clause 10 of the Loan Agreement is Unenforceable for Unconscionability.

13. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate Court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:

> " ...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

Whether the Appellant is obligated to pay the loan and damages for breach of the loan agreement

14. The Court is being invited to determine whether the Appellant should be ordered to pay the loan and damages for breach of the loan agreement. While the 1st Respondent submitted that the Appellant should be ordered to discharge the unfulfilled contractual obligations, the Appellant, on the other hand, maintained that this should not happen because he was not a party to the loan agreement.

15. The Appellant does not dispute that he willingly signed the loan Agreement and that he was a guarantor. His main contention is that being a guarantor did not bind him to pay the loan or the damages for breach of the loan agreement. He argued that the payment of the loan was the 2nd Respondent's primary responsibility and that the court should pressurize the 2nd Respondent rather than him. Given that the Appellant agrees that he was a guarantor in the loan agreement, it is necessary to ascertain what his role was in loan agreement.

16. I have seen the Loan Agreement dated 31st July, 2017. It described the Appellant as the guarantor and stated that his property LR.No.Kiirua/Naari/Maitei/601 would be the security for the loan. However, it does not have express rights and duties of the guarantor. The Appellant seems to capitalize on this fact; the fact that the Agreement does not have express obligations for him as the guarantor. He argued that if the parties to the loan Agreement wished to impose any obligations on him, they would have

expressly stated as much. The 1st Respondent argued otherwise. He argued that, even without express terms in the agreement, the mere fact that the Appellant agreed to be a guarantor meant that he became a surety undertaking to ensure that the 2nd Respondent performed his contractual obligation.

17. The obligations of a guarantor in a loan agreement are well settled in common law. Courts have consistently held that a guarantor is liable upon default by the principal debtor. This principle is well-settled in law. In Halsbury's Laws of England 4th Edition Vol. 20 para 194 at page 124 thus,

> " On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default or previous recourse against the principal...."

18. Similarly, the Court in Ebony Development Company Ltd v Standard Chartered Bank Ltd [2008] eKLR, stated the following regarding the obligation of a guarantor:

> " The obligation of guarantor is clear. It (sic) becomes liable upon default by principal debtor..... It is not guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum"

19. The High Court in Clesoi Holdings Limited v Prime Bank Limited [2020] eKLR summarized the law on this area as follows;

> 62. The last issue relates to the Defendant's failure to pursue the principal borrowers before demanding payment from the Plaintiff as a guarantor and/or attempting to enforce the security and/or sale of the suit property. In this regard, I note that; generally, a guarantee is a written promise by one person to be responsible for the debt, default or miscarriage of another incurred by a third party. In other words, it is a written promise that, if the principal debtor does not pay, then the guarantor will.
>
> 63. However, the principal debtor retains primary liability for the obligations which have been guaranteed. The liability of the guarantor is thus a secondary obligation, which is contingent on the principal debtor failing to perform the obligation which has been guaranteed. The liability of a guarantor is therefore, dependent on the underlying obligation of the principal debtor to the guaranteed party.
>
> 64. This is known as the principle of co-extensiveness. The effect of this principle is that:
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> a. As a general rule, the liability of the guarantor can be no greater and no less than the liability of the principal debtor (although it is open to the parties to agree to limit the guarantors' liability);
>
> b. The liability of the guarantor will, as a general rule, be extinguished (or reduced, as applicable) if the principal obligation to the guaranteed party is void or unenforceable, illegal, has been discharged, ceases to exist or is reduced to a defence or right of set-off.

20. Based on the above authorities, I find that the Appellant is bound to repay the loan because the Principal Debtor, the 2nd Respondent, failed to discharge his contractual obligations.

Whether Clause 10 of the Loan Agreement is Unenforceable for Unconscionability

21. The Doctrine of Unconscionability was recently discussed in great detail in the case of Euromec International Limited v Shandong Taikai Power Engineering Company Limited [2021] KEHC 93 eKLR, where the Court held as follows;

> "Unconscionability was meant to protect those who were vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made. Although other doctrines could provide relief from specific types of oppressive contractual terms, unconscionability allowed courts to fill in gaps between the existing islands of intervention so that the clause that was not quite a penalty clause or not quite an exemption clause..... would disappear.
>
> Unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and an improvident transaction. In cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both.
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> A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed..... For a person who was in desperate circumstances, for example, almost any agreement would be an improvement over the status quo. In those circumstances, the emphasis in assessing improvidence ought to have been whether the stronger party had been unduly enriched. That could occur when the price of goods or services departed significantly from the usual market price.
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> Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable to adequately protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they had equal bargaining power".

22. Courts have inherent powers and authority to intervene in cases of unconscionable contracts. This position was restated by the Court in CIS v Directors, Crawford International School & 3 others [2020] eKLR, where it stated;

> 108. That courts have authority to infuse fairness in unconscionable contracts was also affirmed by the Court of Appeal in Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR when it was stated that:-
>
> > It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."
>
> Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would

preclude meaningful choice for the other party. 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..."

23. The Court in Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Supra) discussed the circumstances when a court can declare a clause to be unconscionable. It held as follows;

> " If a contract or term was unconscionable at the time the contract was made, a court could refuse to enforce the contract or could enforce the remainder of the contract without the unconscionable term. The determination that a contract or term was or was not unconscionable was made in the light of its setting, purpose and effect.....Enforcement of a contract was generally refused on grounds of unconscionability where the inequality of the bargain was so manifest as to shock the judgment of a person of common sense, and where the terms were so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. An unconscionable contract was one in which the provisions were so one-sided, in view of all the facts and circumstances, that the contracting party was denied any opportunity for meaningful choice".

24. I have looked at the Loan Agreement. The loan was for Kshs. 420, 000/= and it was to be repaid in two batches. The first payment of Kshs.60,000/= was to be paid on or before 2nd September, 2017 and the Balance of 360,000/= was to be repaid on or before 2nd October 2017. However, my attention has been drawn by clause 10 of the Loan Agreement, which seems to be the Penalty/Breach Clause. It stated as follows; 'Any party defaulting on any single clause of this agreement shall pay the innocent party total of Kshs.840,000/= (Eight Hundred Forty Thousand) only within 14 days of such default.'

25. Courts have previously grappled with the enforceability of unconscionable terms. In Nancy Muthoni Nyaruai v Grace Wanjiku Mugure [2021] eKLR, the Court refused to enforce exorbitant interests that had been agreed in a friendly loan agreement. In that case, the plaintiff took a friendly loan of Kshs.76,000/= and the Agreement was duly executed by the parties. The terms of the Agreement were that; "(i) The amount advanced shall attract interest of 10% per week and (ii) In default the said interest to attract a penalty of 20% every day until payment in full." The loanee fell into default and the issue went to court, where the High Court refused to enforce the terms for unconscionability and held:

> 20. Consequently, it is no function of this court to rewrite the contract between the parties. However, according to the terms of interest laid out in the contract I find this a special case where equity must be prepared to relieve the Respondent from the bad bargain that she entered into. I find that the interest envisaged in the contact to be unconscionable and a bad bargain on the Respondent's part, in what was termed as a 'friendly loan' between the Appellant and Respondent.
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> 22. Similarly, in the instant case the court can interfere where it finds that the interest charged is unconscionable even when there exists a written contract. The Appellant ought not to benefit unfairly from a bad bargain to the detriment of the Respondent due to the contract. Therefore, in my view the trial magistrate was right in finding that:-
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> > In my view, it would be unconscionable if the agreement which I have found to be a bad bargain is enforced to the letter."

26. Similarly, the court in Danson Muriuki Kihara Vs Johnson Kabungo (2017) eKLR encountered an unconscionable term and held as follows;

> ..... "It is clear that the Court can interfere even where parties have agreed on a rate of interest as long as it is shown that the rate is illegal, unconscionable or fraudulent. From the evidence before the learned trial Magistrate there is no evidence of illegality or fraud..... An interest of 50% PER MONTH was agreed on. This calculates to an interest of 600% PER ANNUM. This bargain between the Appellant and Respondent is found by this Court to be unconscionable in the sense that no man in his senses and not under delusion would agree to such an interest rate. Even no honest or fair man would make such an offer to a friend. This rate is so unreasonable and oppressive to the Respondent, even though they had agreed to it. The Appellant took advantage of the Respondent's desperate situation to fleece him."

It is apparent from the authorities that a court of law will not interfere with contracts entered into by two consenting parties and the interest agreed upon unless the terms are on the face of it illegal, unconscionable, oppressive and fraudulent. It will also interfere where the terms amount to unjust enrichment at the expense of desperate borrowers. The defendant borrowed at 100%. In the case of National Bank cited (Supra) the Court found that the interest of 50% was unconscionable and that no man in his right senses would agree to such an interest rate. So in the present case where interest was at 100% I wonder how the Defendant could agree to such a rate and default from the first month. He may not have realized the full impact of such interest. He would be required to pay 1200% interest per annum which is no doubt extremely high for a person borrowing a paltry sum of 100,000/=. What use can he simply put to that money to enable him raise the interest. The Plaintiff must have taken advantage of the Defendant to unjustly enrich himself and/or acquire his land unjustly. This Court must refuse to enforce such interest rates in such contracts.

27. While as this court appreciates contracting parties' autonomy and freedom of contract, I am of the view that the above clause (Clause 10 of the Loan Agreement) does not pass the test of legality for Unconscionability. The Default clause imposes a Kshs.840,000/= penalty for any single breach of the loan agreement. The loan facility itself was Kshs.420,000/=. Clearly, a default clause that imposes a 200% penalty for any breach of a loan agreement is manifestly unconscionable. This is a Court of justice and will not allow such terms to ply.

28. In Macharia Mwangi Maina & 87 others –vs- David son Mwangi Kagiri[2014] eKLR in which the Court of Appeal held as follows:-

> " This court is a court of equity; equity shall suffer no wrong without remedy. No man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court is bound to deliver substantive rather than technical and procedural justice."

29. In my view, the clause was improvident and unconscionable because it unduly advantaged the stronger party (the 1st Respondent) and unduly disadvantaged the more vulnerable party (the 2nd Respondent). It is a matter of common sense that parties do not often enter a substantively improvident bargain when they have equal bargaining power. Due to this manifestly unfair bargain around the penalty clause, this Court infers that the 2nd Respondent was unable to adequately protect its interests. For these reasons, I find Clause 10 of the Loan Agreement unconscionable, and this court will not recognize or enforce it.

Disposition

30. The Appeal partially succeeds.

31. I enter judgment for the 1st Respondent against the Appellant and the 2nd Respondent jointly and severally as follows;

    a. The Appellant and the 2nd Respondent shall pay the loan amount of Kshs.420,000/= with interest at 14% to be calculated from October 3, 2017 to Date of this Judgment.

    b. In the default to (a) above, the Land Parcel No. Kiirua/Naari/Maitei/601 be sold by way of Public Auction to recover the above sums. The Executive Officer of the Court to sign the transfer documents after a period of 90 days.

    c. The 1st Respondent shall have the costs at the lower court.

    d. Each party shall bear their costs for this Appeal.

32. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 20TH DAY OF DECEMBER, 2024.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Albert Mwangi Maingi - Appellant

Advocate Mutuma for 1st Respondent

No attendance for 2nd Respondent