



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CIVIL APPEAL CASE NO. 8 OF 2018**

**NANCY MUTHONI NYARUAI.....APPELLANT**

**-VS-**

**GRACE WANJIKU MUGURE.....RESPONDENT**

***(An Appeal from the Judgement of Honorable O. Momanyi, SRM,***

***in Nyahururu Chief Magistrate's Court No. 238 of 2014)***

**RULING**

**INTRODUCTION**

1. This is an appeal by Nancy Muthoni Nyaruai, the Appellant herein and the Plaintiff in the original action from the judgement of Honorable O. Momanyi, Senior Resident Magistrate, Nyahururu delivered on 25<sup>th</sup> January 2018 in Nyahururu Chief Magistrate's Court No. 238 of 2014 whereby the trial court ordered as follows:-

***i. The plaintiff is awarded the principal sum of Kshs.76,000/-.***

***ii. Each party bear its own costs.***

2. The Appellant being aggrieved by the judgement appealed against part of it on the following grounds inter alia:-

***i. That the learned trial magistrate erred in law and fact in failing to award interest and penalties on the principal debt as per the express terms of the agreement dated 23<sup>rd</sup> July 2014.***

***ii. That the learned trial magistrate erred in law and in fact in failing to award costs of the suit to the Appellant who was successful in her claim.***

***iii. That the learned trial magistrate erred in law an fact in failing to find that the Respondent did not adduce evidence to contradict the Appellant's claim.***

3. Reasons whereof, the Appellant prayed for the following reliefs:-

***i. Interest on the main claim of Kshs.76,000/- at Kshs.7600/- per week from 10/9/2014 and a further Kshs.1520/- per day from 11/9/2014 be awarded until payment in full.***

***ii. The costs of the suit in the lower court to be awarded.***

***iii. Costs of the appeal.***

4. Briefly stated, the Appellant and Grace Wanjiku Mugure, the Respondent herein entered into a friendly loan agreement whereby the Appellant intended to loan the Respondent kshs 76,000/-. The agreement was drawn by an advocate and was executed by the parties and attested/ witnessed by an advocate. The same was produced in court as Exh. 1 and is contained in page 10 of the Record of Appeal. The said friendly loan agreement provided that:-

i. The amount advanced shall attract interest of 10% per week.

ii. In default the said interest to attract a penalty of 20% every day until payment in full.

5. The Respondent paid the interest chargeable for 6 weeks and thereafter refused or failed to pay further monies in terms with the friendly loan agreement aforesaid therefore the Appellant filed suit. By the time the Appellant filed the suit the Respondent had paid a total of Kshs.45,600/- as interest to the Appellant. The trial court entered judgement for the Appellant for Kshs.76,000/- and parties were ordered to bear their own costs. The Appellant being aggrieved by that decision filed this appeal based the grounds aforementioned.

#### **APPELLANT'S SUBMISSIONS**

6. The Appellant submitted that by failing to award the interest while delivering its judgement what the court sought was to rewrite the terms of the contract between parties. It was averred that vide the agreement dated 23<sup>rd</sup> July 2014 the terms of interest were very clear that the amount of Kshs.76,000/- shall attract interest of 10% per week, in default of the said interest to attract a penalty of 20% every day until payment in full and the agreement was duly signed by the Respondent. Reliance was placed on the case of **Margret Njeri Muiruri vs Bank of Baroda Kenya Limited (2014) eKLR.**

7. The Appellant asserted that the Respondent never alleged coercion, fraud or undue influence and in essence she entered the said agreement out of free will, with a clear mind and voluntarily and that equity only seeks to rescue a party from a bad bargain where the aforementioned special circumstances have been proved. It was averred that there was no ambiguity in the terms of the contract thus it must be construed according to the clear words used by the parties as was held in the quoted case of **Jiwaji vs Jiwaji (1968) EA S47.**

8. Further, the Appellant submitted that there was no sufficient or proper reason that was advanced to explain why the court arrived at the decision that each party should bear its own costs. That there being no proper or justified cause to deny the Appellant the costs of the lower court file by the trial court, the Appellant prayed that this court awards the said costs to her in the interest of justice as guided by the principles of **Section 27(1) of the Civil Procedure Act.**

#### **RESPONDENT'S SUBMISSIONS**

9. The Respondent's counsel submitted that despite it being a friendly loan agreement the Respondent was slapped with (i) 480% p.a. interest rate which was to continue until full payment (ii) a further 3,830,400/- penalty every year till the same was fully defrayed.

10. It was the Respondent's submission that though the agreement was reduced in writing, the same was extremely sharp, oppressive, harsh, unfair and utterly unconscionable against the Respondent and the court of equity would never countenance the enforcement of such harsh and punitive terms whether written or not.

11. With regard to interest payable before or after action, the Respondent relied on **Section 26 (1) Civil Procedure Act** which stated that the trial court has the discretion to award interest before and after the institution of the case and that the only guiding factor the court has to consider is reasonableness.

12. The Respondent averred that the law with regard to oppressive, sharp and unconscionable bargains even in reduced in writing is now settled. Reliance was placed on the cases of **National Bank of Kenya Ltd Vs Pipeplastic Sankolit (K) Ltd Civil Appeal No. 95 of 1999** and **John Kamunyū & Another Vs Safari 'M' Park Motors (2013) eKLR.** Therefore, the Respondent asserted that the interest and penalty charged were astronomical, extremely punitive, commercially unreasonable, unconscionable, excessive, grossly oppressive and enforceable in law and thus the trial court rightly declined to award the same to the Appellant.

13. On the issue of costs, the Respondent submitted that the trial court exercised its discretion and ordered each party to bear its own costs and that the exercise of discretion cannot be challenged unless the discretion was exercised against existing provisions of the law or was whimsical, capricious or fanciful. It was their submission that the trial court exercised its discretion judiciously, fairly and reasonable as envisaged under **Section 27 Civil Procedure Act** and that exercise of discretion is unimpeachable.

14. In conclusion, the Respondent averred that the memorandum of appeal dated 31/1/2018 was not supported by facts or law, it lacks merit and should be dismissed with costs.

#### **ANALYSIS AND DETERMINATION**

15. Beforehand I associate myself with both parties' assertions that this being the first Appellant court, it is the duty of this court to review the evidence afresh, reassess and reconsider it and make its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify before the trial court and give allowance for this

16. This position is well settled in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123;****Peters V Sunday Post Limited [1958] EA 424 ;****Nairobi HCCC Appeal No. 213 of 2006, Oluoch Erick Gogo vs Universal Corporation Limited (2015) eKLR and; Sumaria & Another Vs Allied Industrial Limited (2007)2 KLR).**

17. I have considered the pleadings herein, the evidence given by and on behalf of the parties herein as well as the submissions filed herein, the issues of determination are

a. ***Whether the trial court erred in failing to award the Appellant interest as prayed for and;***

**b. Whether the whether the trial court erred in failing to award costs of the suit to the Appellant.**

18. From the foregoing and as held by the trial court there indeed was a contractual relationship between the Appellant and Respondent. However, the terms of interest envisioned in the said contract are in my view to the unfair detriment of the other party to the contract. I agree with the learned trial magistrate's reasoned conclusion that the interest and penalty clauses in the agreement entered into by the Appellant and Respondent make it a special one which equity should be availed to aid the disadvantaged party from a bad bargain.

19. This position is enumerated further in the case of Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of The Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003 where the court held that:

***“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”***

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.

21. Moreover, I am inclined to associate myself with the position taken by L.W. Gitari J in Danson Muriuki Kihara Vs Johnson Kabungo (2017) eKLR that:-

***..... “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. Even the financial institutions which are authorized to charge interest do not charge those kind of rates. The agreement was drafted after the Respondent had already been given the cash and taken it to school. 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.***

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:-

***“In my view, it would be unconscionable if the agreement which I have found to be a bad bargain is enforced to the letter.”***

23. On the issue of costs I remain guided by Section 27 (1) of the Civil Procedure Act which is very clear in stating that:-

***Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***

***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***

24. The issue of costs remains strictly a matter of court's discretion thus I find no reason to interfere with the trial court's finding on costs. Thus court makes the following orders;

**(i) In That the appeal lacks merit and is therefore dismissed with no orders as to costs.**

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 23RD DAY OF SEPTEMBER, 2021.**

.....

**CHARLES KARIUKI**

**JUDGE**