



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CIVIL APPEAL NO. 29 OF 2017**

**JANE ELIZABETH GITIRI WAROGA.....APPELLANT**

**VERSUS**

**JOHN DRYDEN KIMOTHO.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. This is an appeal against the judgment of Embu Principal Magistrate in CMCC No. 223 of 2016. The appellant sued the respondent for breach of an agreement dated 5/09/2015 for liquidated damages and interest as per the said agreement. The appellant's case before the trial court was that the respondent borrowed Kshs. 700,000/= from her which amount was to accrue an interest of Kshs. 50,000/= to be paid on or before the 5<sup>th</sup> of every month from the 5/10/2015.

2. The appellant also told the trial court that the principal amount was to be paid on or before the 28/02/2016 and in default the same would attract interest of 10% per month. In ruling in favour of the respondent, the trial court held that having settled the principal amount as well as interest of Kshs. 100,000/=, it was extremely excessive and punitive in nature for the appellant to proceed with her claim for interest as per the agreement, the trial court thus dismissed the appellant's claim.

3. Being dissatisfied with the trial court's decision, the appellant filed her memorandum of appeal dated 2017 based on four grounds that can be summarised as follows;

*a) That the learned magistrate erred in law and fact by arriving at a decision that was against the weight of evidence and that contravened the principle that parties are bound by the terms of their own contract*

4. The parties filed submissions to dispose of the application

**B. Appellant's Submissions**

5. It is submitted that the parties herein were bound by the express terms contained in the loan agreement and as such they had an obligation to comply with the conditions therein.

6. It was further submitted that the trial court erred as it attempted to re-write a contract between the parties therein and as such proceeded to pass a verdict that the interest charged was excessive. Reliance was placed on the case of **Fina Bank Limited v Spares & Industries Ltd** where it was held 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."

7. The appellant also relied on the case of **National Bank of Kenya Ltd v Pipelastik Samkolit (K) Ltd & Another (2001) eKLR** where it was held that a party should never be allowed to take advantage of his wrongs/omissions at the expense of the other party.

**C. Respondent's Submissions**

8. The respondent submits that the loan agreement was frustrated by ill fortune in business and death of one Victor Muthee Kimotho, an occurrence that was not within the control of either party and as such it was unconscionable for the appellant to attempt to reap benefits from it.

9. It was further submitted that the appellant's claim screamed of injustice and illegality as it was contrary to the provisions of section 44a of the Banking Act and the CBK rules of interest which provided for the statutory application of the *in duplum rule*.

10. The respondent further submitted that the appellant had no legal basis to charge interest without a license authorizing her to engage in money lending to other members of the public as was provided in section 3 (1) (a) of the Banking Act and as such the appellant was guilty of a criminal offence pursuant to section 3 (2) of the Banking Act.

11. It was submitted that no valid appeal was before the court as the memorandum of appeal filed by the appellant did not disclose a cause of action and as such this court lacked the power to grant what was being sought. Reliance was placed on the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR** where the Court of Appeal held inter alia “*that parties are bound by their pleadings and that a party’s failure to support any of the averments in its pleadings is a non issue and must be disregarded.*”

#### **D. Analysis & Determination**

12. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Ano. v Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**.

13. I have considered the appeal and the submissions by learned counsel. An application to strike out pleadings as disclosing no reasonable cause of action, as asserted by the respondent in his submissions, involves the exercise of judicial discretion on the part of the court. In **Crescent Construction Co.Ltd vs Delphis Bank Ltd [2007] eKLR** this Court stated that:

***“...one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”***

14. It is my considered view that a court should strive to hear and finally determine matters at the expense of striking out the same. Article 159(2) (d) of the Constitution provides that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice in any case there is no prejudice that will befall the respondent if the instant appeal proceeds whereas conversely if it is struck out the appellant will be driven away from the seat of justice unheard.

15. Turning to the substantive issues raised in the appeal herein, it is my considered view that the issue for determination is *whether the magistrate erred by finding in favour of the respondent even in light of his obligations in contract for loan agreement.*

16. It is the applicant’s case that she entered into a loan agreement with the respondent for loan of Kshs. 700,000/= which despite being eventually settled, the respondent breached some parts to which he was liable to compensate the appellant. The respondent on his part states that the agreement was frustrated by ill fortune in business and death of one Victor Muthee Kimotho, and as such it was unconscionable for the appellant to attempt to reap benefits from it. Further the respondent stated that the appellant’s claim was illegal as it was contrary to the provisions of Section 44a of the Banking Act and the CBK rules of interest which provided for the statutory application of the *in duplum rule* and that the appellant had no legal basis to charge interest as was provided in section 3 (1) (a) of the Banking Act.

17. It is evident that that the respondent and his son borrowed Kshs. 700,000 from the appellant vide a loan agreement dated 5/09/2015, which amount was to accrue an interest of Kshs. 50,000/= to be paid on or before the 5<sup>th</sup> of every month from the 5/10/2015. Further the principal amount was to be paid on or before the 28/02/2016 and in default the same would attract interest of 10% per month.

18. In **Jiwaji v Jiwaji [1968] E.A. 547**, the Court held that “**where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties.**” I respectfully agree with that summation of the law.

19. In view of the foregoing, I find that there was a binding contract between the appellant and the respondent. Consequently, the parties of the loan agreement were bound by the terms therein.

20. It is evident that parties are bound by the contract that they have entered. See the case of **Total Kenya Ltd v Joseph Ojiem, Nairobi HCCC No.1243 of 1999**, where the Court held that: -

***“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”***

21. In the case of **National Bank of Kenya Ltd ...Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, 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”.***

22. Having found that the parties herein are bound by the loan agreement that they entered, then the respondent is stopped from introducing other conditions that were not expressly or impliedly provided for in the said loan agreement such as the provisions of the Banking Act.

23. On unconscionability, courts have never shied away from interfering with unconscionable contracts. In **Kenya Commercial Finance**

Company Ltd v Ngeny & Another [2002] 1KLR it stated:

***“The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions.”***

24. Halsbury’s Laws of England Volume 22 (2012) 5<sup>th</sup> Edition at Paragraph 298 states of unconscionability:

***“Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. ....The jurisdiction of the courts to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident.”***

25. The trial magistrate completely ignored the fact that the parties had an agreement that was valid and that bound them. He rejected the appellants claim on grounds that the interest claimed was excessive and punitive in nature. I do not agree with this reasoning since the parties must be bound and honour their contractual obligations. It is not for the court to write a new agreement for the parties or sympathize with one of the parties after he subjected himself to the terms of the contract.

26. It is my considered view that the parties herein contracted on arms length basis and as such in my considered view the trial court erred in dismissing the appellants claim, parties must be held accountable to their obligations.

27. Consequently, I find the appeal merited and allow it on the following terms: -

***a) That the judgment of the trial court is hereby set aside.***

***b) That judgment is hereby entered in favour of the appellant for payment of interest as per the terms of the agreement made between the parties on 5/09/2015.***

***c) That the respondent do pay the costs of this appeal.***

28. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Abubakar for Respondent**

**Ms. Muriuki for Ndana for Appellant**