



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL CASE NO. 436 OF 2015**

**MOLYN CREDIT LTD.....APPELLANT**

**-VERSUS-**

**GEOFFREY KINAMBUKA LUKALO.....RESPONDENT**

**JUDGEMENT**

1. By a plaint dated 6/7/010, the Appellant prayed for;

**(a) Kshs. 251,950/= outstanding debt.**

**(b) Penalty Kshs. 2,000/= per month with payment in full.**

**(c) Cost and interest.**

2. The Respondent admitted debt of Kshs. 100,000/= but denied the alleged terms of the contract.

3. The matter was heard and Appellant called one witness but Respondent declined to testify.

4. In its judgement, the trial magistrate dismissed the suit for want of proof.

5. Thus, the Appellant lodged this appeal and set only 2 grounds of appeal;

**(a) That the Honourable Learned Magistrate erred in law and in fact in dismissing the suit.**

**(b) That the Learned Magistrate erred in law and in fact by failing to wholly analyze the evidence relied on by the Appellant and thereby misdirected herself in dismissing the claim by the Appellant.**

6. The court directed parties to file submissions to canvass appeal but none filed the same.

**Appellant's Case:**

7. The Appellant case was that by an express agreement made on or about the 3/4/08, the Appellant agreed to lend the Respondent the sum of Kshs. 100,000/= which amount was duly advanced to the Respondent and receipt thereof acknowledged.

8. It was an express term of the said agreement that the sum lent to the Respondent would attract a monthly interest rate of 6.5% on a reducing balance basis on any outstanding amount until repayment in full.

9. It was a further express term of the agreement that the Respondent would pay Kshs. 8,340/= per month for 24 months, towards the settlement of the loan with effect from 31/03/08 and any default by the Respondent in the payment would attract a monthly penalty of Kshs.2,000/=. The Respondent breached the agreement hence this suit.

**Defence Case:**

10. The Respondent on the other hand denied the allegations levelled against him by the Appellant. He however acknowledged being lent by the Appellant to the sum of Kshs.100,000/=. In a nutshell the Respondent denies that any contract was concluded between himself and the Appellant.

**Evidence:**

11. The Appellant called one witness; Ms. Lydia Anyangu who adopted her witness statement as filed in court and testified to the effect that the Appellant was a licensed financial service provider. The dispute agreement was then adduced as evidence. She added that the Respondent was to repay the loan on a monthly basis. He initially paid then he stopped making payments.

12. The Respondent was paying Kshs.310/= monthly the same was an amount lower than the amount set to be paid per the agreement. The Respondent was thus in default from the word go. Interest continued to accrue in the meantime. The Appellant is at present claiming Kshs.1,261,570/= and judgement as per the plaint.

13. During her cross-examination, it was revealed that the Respondent was a civil servant and the debt was being paid by the Ministry of Home Affairs via the Respondent's payslips. Deductions are still being made to date for Kshs.310 monthly.

14. Kshs.310/= has been paid now for about 64 months. The Respondent had paid Kshs.8,340/= for 8 months. So far Kshs.225,710/= has been paid and the Appellant now claims Kshs.1,254,320/=. The plaint makes a prayer for Kshs.251,950/=. The difference between the sum presently claimed by the Appellant and what has been paid is Kshs.26,240/=.

**ANALYSIS AND DETERMINATION**

15. In the case of *Susan Njoki (Suing as the Administrator of the estate of Francis Mwaniki Theuri) vs Joseph Kiiru & Another [2017] eKLR* the court stated that:

***“This being a first appeal this court is mandated in law to consider a fresh the evidence adduced before the lower court and be able to come up with its own decision. In discharging this duty this court has to bear in mind that it neither saw or heard the witnesses which the trial magistrate had the advantage of assessing the demeanor and draw relevant conclusions from them for the matter.”***

16. I have carefully considered the pleadings, evidence and able submissions of both counsel in this matter. The credit application and agreement form dated 3<sup>rd</sup> March, 2008 which was signed by both parties herein forms the basis of the issue in dispute. The agreement was duly signed and as such binds the parties thereto.

17. It was an express term of the said agreement that the sum lent to the Respondent would attract a monthly interest rate of 6.5% on a reducing balance basis on any outstanding amount until repayment in full.

18. It was a further express term of the agreement that the Respondent would pay Kshs. 8,340/= per month for 24 months, towards the settlement of the loan with effect from 31/03/08 and any default by the Respondent in the payment of any instalment would attract a monthly penalty of Kshs. 2,000/=.

19. The law is that parties are bound by the terms of their agreement unless coercion, fraud, or undue influence are pleaded and proved and courts of law should not rewrite contracts. In the present case the court is of the view that the contract was duly made by both parties herein and as such was enforceable. Vide a cursory look at the agreement, the Appellant appears entitled to the claim herein.

20. The respondent admitted being granted the amount of loan in the agreement but he did not tender evidence to prove payment of the same as agreed. Thus the court finds that the evidence on record and the bundles of evidence establish that the respondent is liable the debt as claimed in the suit. Thus the court makes the following orders;

***21. The trial court judgement is set aside and the court enters judgement as prayed in the plaint filed in the lower court plus costs of the lower court and of this appeal.***

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**