



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL CASE NO. 28 OF 2013

DANSON MURIUKI KIHARA.....PLAINTIFF

VERSUS

JOHNSON KABUNGO.....DEFENDANT

JUDGMENT

1. The Plaintiff **Danson Muriuki Kihara** filed this suit against the defendant **Johnson Kabungo** claiming a refund of Ksh.100,000/- with interest at such rates as court shall determine with effect from 9th November, 2004 until payment in full and costs.

2. The Defendant filed a defence and counter claim. He denies that the Plaintiff advanced him Ksh.100,000/- and states that what was advanced was Ksh.50,000/- which was paid in full with interest. He denies that he refused to pay and avers without prejudice that the interest rate of Ksh.100% is excessive, oppressive, unconscionable and therefore unenforceable in law.

3. In the counter claim the defendant contends that the loan was secured with his title deed for L.R. No. **Mutira/Kiaga/1308** which is still in possession of the Plaintiff. Despite having repaid the loan and interest, the defendant has refused to return the aforesaid title deed which he now claims together with general damages for retaining it.

4. The Plaintiff filed a reply to the defence and counter claim and denied that the amount was refunded. He contends that the interest rates applicable is in the discretion of the Court.

5. The hearing proceeded ex-parte as the defendant though served did not attend court. The Plaintiff claims that he advanced to the defendant a friendly loan of Ksh.100,000/- which was to be repaid on 9th December, 2004 failure to which it will attract an interest of ksh.100% per month. The defendant also surrendered his title deed for L.R. Mutira/Kiaga/1308 as security. The parties executed an agreement before the advocate. The defendant refused to pay and he now seeks refund of Ksh.100,000/- with interest.

6. I have considered the pleadings and the evidence which was adduced in court by the Plaintiff. The defendant never attended court for the hearing and so the hearing proceeded ex-parte. It is not in dispute that the parties entered into a friendly loan agreement. The same was produced in Court by the Plaintiff as exhibit P1. The dispute is on the amount advanced and whether the loan was repaid.

7. The agreement, exhibit P1 shows that the loan advanced was Ksh.100,000/-. The defendant who was disputing the amount did not attach any documents to prove that the loan was Ksh.50,000/- and more so that the same was repaid. The defendant did not prove on a balance of probabilities that the loan advanced was Ksh.50,000/- and that he repaid. He who alleges must prove as he bears the burden of proof. This is provided under **Section 107** of the **Evidence Act** which provides:

“Whoever desires any court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts exist. When a person is required to prove the existence of any fact it is said that the burden of proof lies on that person.”

8. The Defendant with production of the agreement exhibit P1 has proved on a balance of probabilities that the loan advanced was Ksh.100,000/- and the defendant failed to repay. I am of the view that the Plaintiff has proved that he is entitled to the refund of Ksh.100,000/- which he advanced to the defendant.

9. The second issue for determination is on the interest payable. The agreement exhibit P1 shows that the interest payable was 100% if the defendant defaulted in repayment. The Court of Appeal has dealt with the issue of interest and unconscionable contract. In **Margaret Njeri Muiruri -V- Bank of Baroda (Kenya) Limited (2014) eKLR** it was stated:-

“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 the/a procedural abuse during formation of the 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.”

Further in the case of **John G. Kamunyu & Another -V- Safari ‘M’ Park Motors (2013) eKLR** where the plaintiff’s argument was that the loan agreement entered into was unconscionable due to the usurious compounded monthly interest rates of 30%. The Court entered judgment in favour of the defendant for the loan advanced to the plaintiff together with interests at court rates. The Court stated:-

“This section (Section 44A Banking Act) provides a statutory application of the in duplum rule to the banking sector, which rule basically provides that interest stops running when the unpaid interest equals the outstanding capital amount. I find that this rule is also applicable in the present case as it seeks to prevent lending contracts which provide usurious rates of interest. The rate of interest in the present case was therefore unconscionable to the extent that it provided for payment of interest that considerably exceeded the amount outstanding as the principal sum.”

10. The loan advanced to the Plaintiff was Ksh.100,000/-. Upon default it would attract 100% per month. The rule is applicable in the present case. An interest rate of 100% is no doubt unconscionable as it amounts to doubling the amount advanced on monthly basis as long as the amount remains unpaid. It is indeed excessive, oppressive and unenforceable in law. The Court will hesitate to enforce such contracts even though voluntarily entered. In the case of **Danson Muriuki Kihara -V- Amos Kuthua Gatungo (2012) eKLR**.

“The plaintiff/appellant filed a claim for Kshs.40,000/= plus interest at 50% per month. The matter proceeded to full hearing and the learned trial magistrate entered judgment for Shs.40,000/= plus costs and interest at court rates. The appellant appealed against the judgment on ground that the interest payable was reduced from 50% per month to interest at Court rates. The court held that the interest rate of 50% was unconscionable and stated:

In the case of the NATIONAL BANK OF KENYA LTD VS PIPEPLASTIC SAMKOLIT (k) LIMITED (Supra) the Court of Appeal held that:-

“A Court of law cannot re-rewrite 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.”

This case was decided on 8th June 2001. And later on 28th June 2002 in the case of **AJAY INDRAVADAN SHAH VS GUILDERS INTERNATIONAL BANK LTD CIVIL APPEAL NO. 135/2001 [2002] 1 EA 269**. The Court of Appeal held that the provisions of Section 26 (1) of the Civil Procedure Act are applicable only where the parties to a dispute have no, by their agreement, fixed the rate of interest payable. If the parties by their agreement have fixed the rate of interest, then the Court has no discretion in the matter and must enforce the agreed rate UNLESS it is shown in the usual way that either that agreed rate is illegal or unconscionable or fraudulent.

From these two judgments, 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.

11. The upshot is that the Plaintiff has proved the claim on the principal sum of Ksh.100,000/= for which I enter judgment as prayed. Interest will be 14% from the date of filing the suit to the date of judgment under **Section 26 (2) Civil Procedure Act** which provides:

“Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6% per

annum.”

Interest on the decretal sum shall be at 6% from the date of decree till payment in full.

Dated and delivered at Kerugoya this 8th day of December, 2017.

L. W. GITARI

JUDGE

Read out in open Court.

L. W. GITARI

JUDGE

8.12.2017