



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA.**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1827 of 1994**

**HARRISON NYAUNDI KABURI.....PLAINTIFF**

**VERSUS**

**AMOS OGELA BASWETI.....DEFENDANT**

**JUDGMENT**

The Plaintiff has sued the Defendant for the repayment of a sum of shs 441,956 plus interest at 50% per month until payment in full. The said sum represents a sum of shs 50,000/= advanced to the Defendant on 4<sup>th</sup> June 1991 at an interest rate of 25%. The initial agreement between the parties was verbal and stipulated that the said interest would apply as from February 1992. It was later reduced into writing and an agreement dated 21<sup>st</sup> February 1993 executed bearing the following terms:

- (a) That the Defendant would pay the sum then outstanding at shs 70,000/= on 16<sup>th</sup> April 1993 or
- (b) That if the total sum of shs 70,000/= was not paid on 16<sup>th</sup> April 1993 then the same would attract interest of 25% per month w.e.f 16.4.93
- (c) That if the whole of Kshs 70,000/= would not be repaid by 16<sup>th</sup> June 1993 the same would attract an interest rate of 50% from that date.

The Plaintiff claims that the Defendant did not adhere to the agreed schedule of payment and has paid him nothing to date.

The Defendant in his defence filed on 24<sup>th</sup> August 1994 admitted the loan of 50,000/= but denied the terms of the agreement of 21<sup>st</sup> February 1993 which he claims to have been “*extracted from him by use of coercion; inducement and threat to terminate the Defendant’s employment with the Kenya Posts and Telecommunication Corporation if he did not sign it*”.

He claims to have repaid the loan of shs 50,000/= but did not in his defence state when and how the money was paid.

The Defendant failed to attend court to give evidence at the hearing despite having been served with a hearing notice through his advocates as proved by an affidavit of service filed herein on 22<sup>nd</sup> February 2006. The loan of shs 50,000/= has been admitted. Although the Defendant claims to have repaid the same, no evidence has been tendered of such payment. I find therefore that in the absence of such evidence the Defendant has not adequately dispelled the Plaintiff's claim that he is entitled to judgment against the Defendant for the said sum. The law requires that where a defence of tender before action is pleaded, the Defendant must pay into court the amount said to have been tendered. A tender would never be available as a defence unless and until the payment into court is made. The Defence is therefore refused for that reason as well.

The Agreement of 21<sup>st</sup> April 1993 was tendered in evidence as the Plaintiffs' Exhibit "P. 1". It is shown to have been executed in the presence of witnesses who endorsed their identity card numbers thereon. It refers to the Plaintiff as the "**complainant**" and the Defendant as the "**Respondent**". Its title is given as follows:

**"AGREEMENT**

REF: MR AMOS OGEKA BASWETI VERSUS MR. HARRISON NYAUNDI KABURI – ALL STAFF AT NAIROBI INLAND EXCHANGE."

One of the witnesses Mr. Jackson G. Mwangi has endorsed against his signature a Stamp suggestive of his position as the (Assistant Manager) A. M. / Inland Exchange.

The manner in which the agreement was drawn and signed would render some credence to the Defendant's claim that he did not voluntarily execute the agreement. I have no doubt in my mind that the same was intended to put pressure on the Defendant. The repayment proposals enumerated as (a) to (c) in the earlier part of this judgment are expressed to be the Plaintiff's demands. It reads as follows:

**"However, owing to the fact that Mr. Amos Ogeka Basweti failed to honour our No. 1 above (referring to the repayment of the 50,000/= by the 4<sup>th</sup> June 1991), I do hereby now make the following demands:-"**

The purported agreement then goes to calculate the debt at the rate of 20% and to impose the additional rates if 25% and 50%.

The Defendant is shown at page 2 of the Agreement to have accepted the agreement and its new terms in the following words.

**"I Amos Ogeka Baweti do hereby confirm that I entered into a verbal contract with Mr. Harrison Nyaundi Kaburi on terms specified above.**

**I also confirm I have today, the 16<sup>th</sup> April 1993 read and understood his new terms from 16<sup>th</sup> April 1993 and I do hereby agree to abide with his terms and conditions."**

The above wording does suggest clearly that the Plaintiff unilaterally purported to alter the terms and conditions of the verbal contract. The law cannot give effect to such alteration of terms. However the Defendant having admitted the loan of shs 50,000/= and having not proved that he did repay the same I find him liable to the Plaintiff in respect of the same. The problem I have is as regards the rate of interest imposed on this friendly loan of shs 50,000/=

Even if the sum may be said to have been substantial at the time, I find that compared to the interest rates prevailing then and the cost of living at the material time the rate claimed herein is definitely excessive. The Defendant cannot, as I have already found, be said to have accepted to pay it. The Plaintiff on the other hand has not established the basis upon which the same was imposed. I am of the view that the interest rate imposed and claimed herein grossly contravenes the principles of fair dealing.

In the circumstances, while I find that the Plaintiff has, on the balance of

probabilities proved his case and is entitled to judgment against the Defendant, I am not inclined to allow any interest at the rate claimed herein.

Accordingly I allow the suit and enter judgment for the Plaintiff for the sum of Kshs 50,000/= plus interest thereon at court rates from 4<sup>th</sup> June 1991 until payment in full. Additionally, the Plaintiff shall have the costs of the suit with interest at court rates.

Dated and Delivered at Nairobi this 8<sup>th</sup> day of June 2006.

**M.G. MUGO**

JUDGE

Delivered in the presence of

For Applicant

For Respondent