



**Salene Credit Limited v Karanja & another (Civil Appeal E097 of 2024)  
[2025] KEHC 5183 (KLR) (Civ) (11 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5183 (KLR)

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

**CIVIL**

**CIVIL APPEAL E097 OF 2024**

**RC RUTTO, J**

**APRIL 11, 2025**

**BETWEEN**

**SALENE CREDIT LIMITED ..... APPELLANT**

**AND**

**CAROLINE MUTHONI KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**STARA MICROFINANCE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Small Claims Court of Kenya  
at Nairobi delivered by the Hon. Resident Magistrate B.A. Akinyi,  
on the 19th March 2024 in Nairobi SCC COMM NO E8690 of 2023)*

**JUDGMENT**

1. This appeal arises from a judgment and decree entered in Nairobi SCC COMM No. E8690 of 2023. In the said suit, the Appellant (Claimant) sued the Respondent for breach of contract relating to money received as a loan from the claimant.
2. The genesis of this dispute, as stated in the statement of claim, is that pursuant to a loan agreement signed on 5<sup>th</sup> June 2021, the 1<sup>st</sup> Respondent was granted a credit facility of Kshs.300,000/= by the Appellant. The terms of the contract were that; the facility would attract a flat interest rate of 10% per month and such other rate as may be determined by the claimant from time to time; the facility was to be repaid directly by the 1<sup>st</sup> respondent cumulatively comprising of both principal and interest of Kshs.130,000/- for three months; a penalty interest rate of 10% per month on the principal due. Additionally, the loan was secured by both household and business assets.



3. It was the Appellant's case that despite the 1<sup>st</sup> Respondent's attempts to make payments through cheques issued in the 2<sup>nd</sup> Respondent's name, the cheques were dishonoured and the matter reported to the police. As a result, the outstanding loan balance stood at Kshs.587,000/-.
4. The Respondents did not respond to the claim.
5. The trial Adjudicator entered judgment against the Respondents on 19<sup>th</sup> March 2024 as follows:-
  - a. Principal sum of Kshs.300, 000/-
  - b. Interest on (a) above of Kshs.130,000/= being the accumulated interest of Kshs.300, 000/- on (a) above with a deduction of Kshs.105, 000/= repaid by the Respondent.
  - c. Costs of the suit of Kshs.5, 000/=
6. The Appellant aggrieved with the entire judgment, lodged this appeal on 10<sup>th</sup> April 2024 setting out the following grounds of appeal: that the Adjudicator erred in law and fact by failing to enter judgment in favour of the Appellant against the Respondents as prayed in the memorandum of claim when on the contrary, the trial court misapprehended and failed to properly evaluate written submissions by the appellant and evidence on record; failing to take cognisance of the fact that the appellant is a mere non-deposit taking money lending institution and not a financial institution; in applying the in duplum rule in its judgment whereas the same is not applicable to the appellant non-deposit taking money lending institution; failing to sufficiently appreciate that the respondent's evidence was purely based on falsehoods, gaps and hypothesis with no basis at all; by making conclusions that are not supported by evidence on record.
7. The Appellant prayed that the appeal be allowed with costs and, that the judgment delivered on 19<sup>th</sup> March 2024 be set aside and substituted with a judgment for the sum of Kshs.587, 000/= in favour of the Appellant with costs of the appeal.
8. The appeal was canvassed by way of written submissions. At the time of writing this judgment, only the Appellant had filed its submissions dated 9<sup>th</sup> October 2024.

### **Appellant's submissions**

9. The two issues identified by the Appellant for determination are; first, whether the adjudicator erred in failing to enter judgment for the appellant for Kshs.587,000/- as prayed in the claim. Second, whether the adjudicator erred in failing to take cognisance of the fact that the appellant is a mere non-deposit taking money lending institution and not a financial institution thus the in duplum rule is not applicable to it.
10. On the first issue, it was submitted that there is a binding contract between the parties and every effort to recover the loan amount in accordance with the loan agreement was futile. That the evidence was not controverted since the respondents failed to enter appearance and or file a response. As such, the Appellant maintained that it is entitled to the sum of Kshs.587,000/- as prayed for in the claim. Reference was made to the cases of Abdul Jalil Tafai v. Farid Jalil Mohammed [2015] eKLR and Housing Finance Company Limited v. Mary Wambui Muturi [2018] eKLR, in support of the argument that a court of law cannot rewrite a contract between two parties.
11. On the second issue, the Appellant submitted that pursuant to the loan agreement, it is neither a micro-lending institution, nor a financial institution that accepts savings or deposits from the public. The Appellant argued that since the existence of the loan agreement is uncontroverted, the court cannot deviate from the parties' intention as expressed in the contract. The Appellant relied on the cases of



Lucy Wanjiru Mbugua v. Speed Capital Limited [2016] eKLR and Momentum Credit Limited v. Kabuiya (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) (Commercial and Tax) (7 October 2022) to submit that the trial court erred in holding that the Appellant was bound by the in duplum rule, as the Appellant is not in the business of lending money.

12. It was further submitted that since the Appellant's claim is undefended judgment ought to be entered as prayed. To buttress this, reference was made to the case of *Mwakinyango v. Mwalimo* (Civil Appeal E004 of 2024) [2024] KEHC 9538 (KLR) (17 July 2024).
13. In conclusion, counsel urged the court to allow the appeal with costs as prayed.

### **Analysis and Determination**

14. This court has considered the grounds of appeal, the proceedings of the lower court, and the submissions filed by the Appellant. To begin with, the duty of this court as the appellate court exercising jurisdiction under the Small Claims Court squarely falls under Section 38 of the *Small Claims Court Act*. This section limits the jurisdiction of the High Court on appeals from the Small Claims Court to matters of law only.
15. What constitutes, points of law, has been settled in the case of *Mwita v Woodventure (K) Limited & another* (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), wherein the Court of Appeal, while referring to a second Appeal, which is essentially on points of law and thus similar to the duty of the court under section 38 of the Small Claims Court, stated as follows: -

“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that: ‘In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.’”

16. Upon reviewing the Memorandum of Appeal and the grounds set out therein, I observe that the Appellant raises both issues of law and fact. All the grounds of appeal are premised on the assertion that the learned adjudicator erred in both the law and fact. I particularly take issue with Ground 4 of the Memorandum of Appeal which points out that the adjudicator erred in law and in fact in failing to sufficiently appreciate that the respondent's evidence was purely based on falsehoods, gaps and hypothesis with no basis at all and yet the Respondent did not enter appearance or defend the claim in the trial court.
17. The submissions too have been crafted to support both the issues of fact and law. Thus, based on the above authority, and on the definition, of what constitutes issues of law, this court will limit itself from delving into factual issues and address the only issue of law arising which is;

Whether the Appellant is a non-deposit taking money institution warranting the applicability of the in duplum rule as required by law?



18. It is undisputed that the Appellant sent Kshs.300,000/= to the Respondent. It is also not in dispute that the Respondent repaid a total sum of Kshs.105,000/= towards the loan. The issue in contention is whether the accrued interest was in breach of Section 44 of the Banking Act, that is whether the in duplum rule is applicable in the circumstance.

19. The trial court while considering the foregoing stated;

“ 13. As to whether the in duplum rule governs the Claimant, the courts have had divergent views on the same. See the cases of Momentum Credit Limited v Kabuiya (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) (Commercial and Tax) (7 October 2022) (Judgment)

14. I associate myself with the decision of Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021)[2022] KEHC 11951 (KLR) (Commercial and Tax) (19 August 2022) (Judgment) and find that the Claimant is bound by the in duplum rule being that it’s in the business of lending monies.

15. Applying the above cases to this claim and while this court cannot purport to rewrite a contract for the parties, who are at liberty to agree on the interest rate chargeable for a determinable period of time, I regret that I cannot under any circumstances, be called upon to enforce an agreement that on the face of it is characteristically unconscionable and oppressive for reason that once a loan is non- performing, it shall be subject to the limitations set out under the in duplum rule.

16. Therefore, I find that the Claimant is not entitled to Kshs.587, 000/= and since this amount is more than double the principal amount it disbursed to the Respondent.”

20. I note that the issue of whether the interest applicable was unconscionable or not was raised by the trial court in protecting the interests of the parties and public interest as stated in the judgment when it analysed and determined the issue of applicable interest. Since the issue is a question of law stemming from the trial court’s determination and concerns the interpretation and application of the provisions of law on the in duplum rule, I will address the same as hereunder.

21. The in duplum rule basically limits the amount a bank or financial institution may recover from a non-performing loan. It stems from Section 44A of the Banking Act which provides that: -

“ 44A.Limit on interest recovered on defaulted loans.

1. An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

2. The maximum amount referred to in subsection (1) is the sum of the following —

a. the principal owing when the loan becomes non-performing;

b. interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and



- c. expenses incurred in the recovery of any amounts owed by the debtor”
22. From the foregoing, it is clear that the regulation of interest rates is governed by Section 44 of the *Banking Act*, which applies to banks and financial institutions.
23. It is crucial to determine whether the Appellant is a financial institution within the context of section 44 of the *Banking Act* or a non-deposit-taking money-lending institution. In this case, the appellant does not describe the nature of its business but states that pursuant to a loan agreement signed by parties on 5<sup>th</sup> June 2021 the 1<sup>st</sup> respondent was granted a credit facility.
24. As per Section 2 of the *Banking Act* for the Appellant to qualify as a financial institution under the *Banking Act*, the appellant must either be gazetted as such by the Minister or be one that carries on or proposes to carry on financial business. Section 2 of the *Banking Act* provides that;
- “‘financial institution’ means a company other than a bank which carries on or proposes to carry on financial business and includes any other company which the minister may by notice on the gazette, declare to be a financial institution for the purposes of this Act.”
25. The Appellant has submitted that it is not a financial institution, and no other evidence to the contrary, has been provided to show that the Appellant falls within the scope of the *Banking Act*.
26. In the absence of any such evidence, and given that the regulation of interest rates is governed by Section 44(a) of the *Banking Act*, this court concludes that the interest rate applicable to the loan agreement between the Appellant and the Respondent is that governed by the contractual provisions, which I note has not been disputed.
27. I am persuaded by the court’s determination in the case of *Momentum Credit Limited v Kabuiya* (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) (Commercial and Tax) (7 October 2022) (Judgment) cited by the Appellant in its submissions where the court in allowing the appeal before it held that in duplum rule is not applicable to non-deposit taking money lending institutions. The court had been faced with a similar question where the appellant contested the decision on grounds that it was not a financial institution that would be legally bound by the in duplum rule under section 44 of the *Banking Act* the court stated,
- “ 13. For purposes of section 44, it must be established that the appellant is a bank or financial institution. It is not in dispute that the appellant is neither a bank nor mortgage finance company. In order to qualify as a financial institution, the appellant must either be gazetted as such by the Minister or be one that carries on or proposes to carry on financial business as defined under the *Banking Act*. In order to qualify as a financial institution, it must accept money on deposit from members of the public and employ that money or part of it for lending or investment as contemplated under the Act. The appellant’s witness clearly stated on cross-examination that the appellant was not a deposit taking institution while the respondent did not provide evidence to the contrary or show that it is gazetted under the law in order for it to fall under the ambit of the Act.
28. The court proceeded to allow the appeal by stating that;



18. I agree with the statement of law explained by the Court of Appeal. The substantive unconscionability relied on by the respondent was based on breach of the section 44 of the Banking Act which I have found is not applicable to this case. I therefore allow the appeal and set aside the judgment of the trial court. Since the respondent did not deny the loan agreement and its terms and the fact that she had defaulted, the appellant shall have judgment. In the absence of any special circumstances, the costs of the suit and this appeal shall follow the event.
29. In view of the foregoing, I allow the appeal as follows:-
- a. The judgment of the subordinate court delivered on 19<sup>th</sup> March 2024 in Milimani SCCOMM No. E8690 of 2023 is hereby set aside and substituted with a judgment for the Appellant against the Respondents for Kshs.587,000/=.
  - b. The Respondent shall pay the costs of the subordinate court as already assessed by the trial court at Kshs.5,000/= and There will be no orders as to costs since the appeal was undefended.

Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 11<sup>TH</sup> DAY OF APRIL, 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....for Appellant

.....for Respondent

Sam Court Assistant

