



**Wanjiku & another v Wangari (Civil Appeal E102 of 2024)
[2025] KEHC 5057 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E102 OF 2024
FN MUCHEMI, J
APRIL 25, 2025**

BETWEEN

CATHERINE WANJIKU 1ST APPELLANT

WILSON NGURE 2ND APPELLANT

AND

GRACE WANGARI RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. J. K. Tawai (RM/Adjudicator)
delivered on 15th April 2024 in Ruiru Small Claims Court SCCC No. E165 of 2024)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Ruiru Resident Magistrate/Adjudicator in SCCC No. E165 of 2024 entered in favour of the respondent as against the appellants for the sum of Kshs. 550,000/- in a claim that arose from a loan agreement between the parties. Interest at court rates from the date of filing the claim until payment in full was awarded.
2. Dissatisfied with the court's decision, the appellants lodged this appeal citing 2 grounds of appeal considered as follows:-
 - a. The learned trial magistrate erred in law and in fact in that after making a finding that the respondent advanced to the appellant a loan of Kshs. 50,000/- on 13th august 2022 failed to make a finding that the interest demanded was excessive, unconscionable, unjust and warranted interference by the court.
 - b. The learned trial magistrate erred in law and in fact in awarding the respondent further interest in the judgment sum after awarding her interest for the advanced amount of Kshs. 50,000/- to be refunded as Kshs. 550,000/- which amounted to unjust enrichment.



3. Parties disposed of the appeal by way of written submissions.

The Appellants' Submissions

4. The appellants submit that it was the respondent's case that they breached the money lending agreement dated 15th August 2022. The said agreement was entered into between the respondent and the 1st appellant who gave his title deed as collateral. The respondent then advanced the sum of Kshs. 50,000/- to the 2nd appellant for one month with a direct interest of Kshs. 25,000/- and a further interest of Kshs. 1,000/- daily if the sum was unpaid.
5. The appellants argue that the learned magistrate after making a finding that the respondent advanced to them a debt of Kshs. 50,000/- on 13th August 2022, failed to make a finding that the interest demanded was excessive, unconscionable, unjust and warranted interference by the court. It is further argued that the interest charged infringed the legal principle of the in duplum rule and the appellants submit that they have been condemned to pay the respondent over ten times the principal amount. To support their contentions, the appellants rely on the case *John G. Kamunyu & Another vs Safari 'M' Park Motors (2013) eKLR*.
6. The appellants submit that the 2nd appellant did not deny that she was advanced money by the respondent on 13th August 2022 and that she contacted the respondent severally to repay Kshs. 50,000/- only for the respondent to frustrate her by demanding a high interest. The 2nd appellant further submits that he did not sign any agreement at the time of being lent the money and was unaware that they had been charged interest. It is further argued that the respondent's demands were being made under duress since she held the title deed for land parcel number INOI/KIAGA/2487 belonging to the 1st appellant. The appellants further argue that the respondent testified that she did not issue any formal demand notice to them and thus she could not prove what amount she was claiming at a particular moment.
7. The appellants submit that the trial magistrate failed to hold that the award sought violated the presumption against delivering an absurd, irregular, irrational or illogical result. The terms of the agreement were silent as to when the lending period would end or stop attracting interest thereby accumulating an interest of Kshs. 1,000/- daily which motivated the respondent's irregular claim. The appellants submit that the trial court failed to make a finding that it would be unfair to have the loan continue attracting interest and penalties ad infinitum. The interest sought by the respondent was unreasonable, excessive and unconscionable for inflating the principle sum of Kshs. 50,000/- to Kshs. 500,000/-. To support their contentions, the appellants rely on the case of *National Bank of Kenya Muiruri vs bank of Baroda (Kenya) Limited [2014] eKLR*.
8. The appellants submit that the agreement between the respondent and the 1st appellant who produced the title deed purports to be a loan guarantee as its clear the 1st appellant was a surety. Thus, the appellants argue that the loan guarantee ought not to suffice in the absence of a valid loan contract between the respondent and the 2nd appellant who received the money as per the Mpesa statement.
9. The appellants argue that the respondent testified that she was not a licensed lending institution and indeed ought not to benefit from lending interests like such institutions. The appellants further argue that the agreement remained vague and/or ambiguous in terms of the 1st appellant's obligations as a surety and the 2nd appellant who received the money was also never mentioned anywhere on the subject agreement rendering the nature of the contract engaged and the mode of repayment totally vague and ambiguous.
10. The appellants argue that since the respondent did not serve them with a demand letter and notice of intention to sue before lodging the matter, she ought not to be awarded costs and interest. The



appellants rely on the case of Premier Bag & Cordage Limited vs National Irrigation Board ML HC No. 1123 of 2001 [2014] eKLR and submit that the trial court in awarding the respondent further interest meant that the respondent was not only compensated but also reaped a financial windfall.

11. The appellants further rely on the case of Danson Muriuki Kihara vs Johnson Kabungo (supra) and submit that they have shown that the award violated the public policy of Kenya by being inconsistent with *the Constitution* or other laws of Kenya; inimical to the national interest of Kenya and contrary to justice or morality and thus ought to be set aside.

The Respondent's Submissions.

12. The respondent submits that the appellants are arguing that the award of Kshs. 550,000/- is excessive, unconscionable, unjust and warrants interference by the current court. The respondent relies on the cases of National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Limited [2001] eKLR and Ajay Indravadan Shah vs guilders International Bank Ltd Civil Appeal No. 135 of 2001 [2002] 1 EA 269 and submits that a court of law cannot rewrite a contract between parties.
13. The respondent argues that although the appellants are disputing the existence of an agreement between them, the 1st respondent confirmed at the hearing in the trial court that she signed the agreement. Further, the 2nd appellant also admitted during the hearing that he directed the 1st appellant to provide the title deed of their property LR. No. Inoi/Kiaga/2487 to secure the loan, reinforcing the existence of the agreement between the parties. The respondent argues that the factual confirmation of the agreement by the appellants cannot now be disputed and any attempt to do so is inconsistent with the record.
14. The respondent submits that the contract stipulated that a fixed interest of Kshs. 25,000/- is payable in addition to the principal amount. Consequently, the total sum due Kshs. 75,000/- was to be paid by 15th September 2022. Furthermore the contract stipulated that in the event of default, an additional interest of Kshs. 1,000/- per day would accrue. The respondent argues that those terms were agreed upon by both parties and the appellants cannot seek to later or challenge them, having willingly entered into the agreement.
15. The respondent further submits that the appellants did not plead coercion, fraud or undue influence in their responses and failed to produce any evidence of the same. The appellants simply denied the contents of the Statement of Claim. Thus in the absence of such evidence, there is no justification for the appellants to seek to set aside the agreement or the terms they voluntarily consented.
16. The respondent submits that the terms of the agreement were mutually agreed upon and were neither illegal, unconscionable nor fraudulent. The interest rates and penalties for default were negotiated and freely accepted by both parties and thus there is no legal basis for the court to interfere with the agreement reached. Furthermore, the appellant's securing of an agreement with her backed by a title deed, underscores the seriousness with which they approached the agreement.
17. The respondent refers to the case of Macharia vs Nyawira & Another [2024] KEHC 16752 (KLR) and submits that the claim by the appellants that they entered into the agreement under duress was not included in the appellants' pleadings and thus cannot be raised as a ground of appeal. Parties are bound by their pleadings and thus the appellants cannot introduce new claims that were not properly raised in the trial court.
18. The respondent argues that initially the 1st appellant challenged the authenticity of the signature on the agreement, stating that it did not match her own. However, she later admitted to signing the agreement and there that concession undermines the duress claims showing that the appellants willingly and



knowingly entered into an agreement. The respondent submits that their honesty and credibility is currently in doubt.

19. The respondent refers to Section 26 and 27 of the *Civil Procedure Act* and the case of Systems Reliability Limited & Another vs Yaya Towers Limited [2018] KEELC 1219 (KLR) and submits that the award of interest on the principal sum falls squarely within the discretion of the court. It is argued that a court is empowered to determine the rate of interest it deems reasonable and to apply it from the date of filing the suit until payment in full is made. In the instant case, the trial court appropriately exercised its discretion setting the interest rate at 14% which is reasonable given the liquidated nature of the claim and the fact that she has been deprived of the sum owed. The respondent argues that the appellants have failed to present any valid grounds to interfere with the court's exercise of discretion.

Issue for determination

20. The main issue for determination is whether the appeal has merit.

The Law

21. The Court of Appeal while referring to a second appeal, which is essentially on points of law and thus similar to the duty of this court under Section 38 of the *Small Claims Court Act*, set out the duty of the second appellate court in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR as follows:-

I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters that they should have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

22. In distinguishing between matters of law and fact the Court of Appeal stated in Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR as follows:-

I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of retrial and facts must be revisited and analysed a fresh. See *Selle and Another vs Associated Motor Boat Company Limited and Others* (1968) EA 123. 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.

Whether the appeal has merit.

23. The appellants submit that the trial court erred in making a finding that the respondent advanced to them Kshs. 50,000/- on 13th August 2022. Further, the trial court erred in failing to find that the interest charged by the respondent was excessive, unconscionable and unjust.
24. It was the respondent's case that on 13th August 2022, she entered into a loan agreement with the appellants for Kshs. 50,000/-. The loan agreement stipulated that the amount was to be repaid in one month's time with fixed interest of Kshs. 25,000/-. The agreement further provided that in the event of



default, the appellants were to pay a penalty of Kshs. 1,000/- daily. To act as security for the loan, the appellants gave security in form of a title deed in respect of their land parcel number Inoi/Kiaga/2487. The appellants defaulted on the loan and the respondent's efforts to have them repay the loan proved futile.

25. The appellants testified that they did not enter into a loan agreement with the respondent. The 1st appellant stated that she was called by her husband, the 2nd appellant to bring their title deed to Nairobi. The 1st appellant further testified that the respondent loaned them money but it did not include any interest on the principal sum. She further stated that she did not receive the money but the respondent sent it to the 2nd appellant. The 1st appellant further testified that the title deed was security for the loan of Kshs. 50,000/- without interest. According to the 1st appellant, they agreed to pay the respondent the amount of Kshs. 50,000/- but she refused and brought them to court. The 1st appellant testified that the agreement produced in court was not the agreement she signed and that the signature on the agreement was not hers. On cross examination, the 1st appellant admitted that she signed the loan agreement.
26. It was the 2nd appellant's case that the respondent sent him money to pay for his car at the garage but she did not give him any loan document to sign. The 2nd appellant testified that he offered to pay the respondent back but she insisted on the interest which he could not pay. He further testified that he gave the respondent their title deed and she was to return it without interest.
27. From the evidence presented it is evident that a loan agreement was entered into by the respondent and appellants where the respondent was to loan the appellants Kshs. 50,000/-. The loan agreement which was produced in court stipulated that the loan was to be repaid in one month's time with a fixed interest of Kshs. 25,000/- and in the event of default the appellants were to pay Kshs. 1,000/- daily. The fact that there was a loan agreement between the parties was admitted by the 1st appellant in her testimony in the trial court. The 1st appellant even went ahead and testified that upon being called by her husband, she brought their title deed to Nairobi as security for the said loan. The 2nd appellant also admitted that there was a loan agreement between them. It is therefore my considered view that the respondent proved on a balance of probabilities that there was a loan agreement between the respondent and the appellants for Kshs. 50,000/-.
28. The appellants dispute the fact that the loan agreement had an interest clause. I have perused the loan agreement and noted that the terms of the agreement provided that the loan was to be repaid in one month's time with fixed interest of Kshs. 25,000/- and in the event of default, the appellants were to pay a penalty of Kshs. 1,000/- daily. The 1st appellant admitted on cross examination that she duly executed the said agreement meaning she acknowledged and accepted the terms of the loan agreement. The appellants further argued that the interest was excessive, unconscionable and unjust. It is trite law that a court cannot rewrite the terms of a contract between parties. In *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd* [2002] 2 EA 503 the court stated:-

A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regards to the terms of the charge. As was stated by Shah JA in the case of *Fina Bank Ltd vs Spares and Industries Ltd* [2000] 1 EA 52: "It's clear beyond peradventure that save 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."
29. The loan agreement dated 13th August 2012 stipulated that interest was fixed at Kshs. 25,000/- and additionally Kshs. 1,000/- daily in the event of default. The loan agreement was duly executed by the parties. The respondent produced the agreement in evidence. The appellants did not controvert that



evidence save for the denial on the amount of interest payable. The magistrate elide on the agreement and did not err in finding in favour of the respondent since she had discharged the burden of proof to the standards required. It is trite law that a court cannot rewrite the terms of the contract for the parties.

30. The appellants raised the issue that they were under duress when they were signing the loan agreement. The trial magistrate dealt with this issue and found that the appellants did not adduce evidence to support their claim. I have perused the record and find that no evidence in support of the allegation was adduced by the appellants. I have looked at the counter claim and noted that the issue of coercion was not pleaded. In the case of *Dare vs Pulham* (1982) 148 CLR 658 at 664, cited with approval in the case of *Treadsetters Tyres Ltd vs John Wekesa Wepukulu* (2010) eKLR the court held that:-

Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet, they define the issues for litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court....

31. The appellants further argued that the trial court was not justified to grant further interest on the judgment sum as the same amounts to unjust enrichment. On perusal of the record, the trial court awarded the sum of Kshs. 550,000/- plus interest at court rates from the date of filing the suit until the date of payment.

32. Section 26 of the *Civil Procedure Act* provides:-

Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

33. The authority and discretion of a court to award interest on costs is provided for in Section 27(1) & (2) of the *Civil Procedure Act* as follows:-

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

34. The foregoing decisions demonstrate that the court has wide discretion to award interests on the principal sum provided that such discretion is applied judiciously. Given this discretion, an appellate court is therefore enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some



erroneous principle or was plainly and obviously wrong. *New Tyres Enterprises Ltd vs Kenya Alliance Insurance Company Limited*.

35. The instant claim is based on a liquidated amount and the respondent in her claim pleaded for judgment sum of Kshs. 550,000/- and interest on the said amount from 12th February 2024.

36. The Court of Appeal in the case of *Prem Lata vs Peter Musa Mbiyu* (1965) EA 592 stated:-

In both these cases, the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.

37. Further in *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited* (1970) EA 469 the court held:-

The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment.

38. The interest agreed by the parties was part of their agreement and it was included in the amount claimed of Ksh.550,000/= upon entering judgment was given at court rates which was in order. It is evident that the interest was computed from the date of filing the suit and awarded from the date of filing the claim which is within the law. The appellants have failed to establish their two grounds of appeal, in my considered view.

39. Consequently, I find that the appeal lacks merit and it is hereby dismissed with costs to the respondent.

40. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE

