



Hanson Trading Limited v Zamzam Construction Limited (Civil Appeal E022 of 2024) [2025] KEHC 8093 (KLR) (Civ) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8093 (KLR)

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

CIVIL

CIVIL APPEAL E022 OF 2024

AC MRIMA, J

JUNE 5, 2025

BETWEEN

HANSON TRADING LIMITED APPELLANT

AND

ZAMZAM CONSTRUCTION LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon. N. Ng'ang'a (Resident Magistrate/ Adjudicator) delivered on 8th December 2023 in Nairobi SCCC No. E6107 of 2023)

JUDGMENT

1. The only issue for determination in this appeal is whether the Learned Adjudicator erred, after allowing the Claim, in reviewing the interest rate of 5% monthly as agreed between the parties to interest as per Court rates and that the parties do bear their respective costs of the claim.
2. The Appellant instituted Nairobi [Milimani] Small Claims Court Case No. E6170 of 2023 [hereinafter referred to as 'the suit'] against the Respondent on the basis that the parties had entered into two contracts where the Appellant honoured its part and delivered Bitumen grade 60/70, but the Respondent delayed payment for 4 months thereby attracting interest at the agreed rate of 5% of the total contract value monthly thereby translating to Kshs. 1,296,592/80. However, the Appellant only sought to recover only Kshs. 1,000,000/= thereby abandoning the balance. For certainty, the total contract sum in the two supply agreements was Kshs. 5,534,962/20.
3. In its response, the Respondent admitted the said delay in payment which it attributed to factors beyond its control including delayed payment of the works it had undertaken by the Government.
4. The suit was heard by way of viva voce evidence where the Appellant called a witness, but the Respondent did not call any witness. Parties filed respective submissions and the trial Court rendered



its judgment on 8th December 2023 where after finding that the Respondent had delayed in making the contracts in accordance with the contracts, the Court found the agreed interest rate of 5% of the total contract value monthly to be unconscionable, unfair, oppressive and tantamount to the Appellant unjustly enriching itself and thereby reviewing and substituting that rate with interest at Court rate. The Court also declined to award costs to the winning party.

5. Aggrieved by the judgment, the Appellant filed the instant appeal through a Memorandum of appeal dated 8th January 2024 and preferred the following 7 grounds: -
 1. That the Learned Magistrate erred in fact and in law by failing to take into account considerations that should have been taken into account before entering judgment for the Appellant against the Respondent.
 2. That the Learned Magistrate erred in fact and in law by failing to apply the applicable laws of evidence on the facts before it.
 3. That the Learned Magistrate erred in fact and in law by finding that the interest rate of 5% per month in the two contracts to be unconscionable, unfair, oppressive and tantamount to the Appellant.
 4. That the Learned Magistrate erred in fact and in law by misapplying the principles of contract law to find that the 5% penalty interest was unconscionable and unfair despite noting that this was the intention of the parties at the time of entering into the contract.
 5. That the Learned Magistrate erred in fact and in law by failing to evaluate, consider and assign the appropriate weight to the averments raised by the Appellant in their submissions which were to the effect that the Appellant is entitled to the 5% penalty interest per month as agreed by the parties in the contracts dated 7th October 2022 and 31st October 2022.
 6. That the Learned Magistrate erred in fact and in law by finding that the interest rate agreed by the parties was akin to the Appellant unjustly enriching itself.
 7. That the Learned Magistrate erred in fact and in law by declining to allow the Statement of Claim as prayed but instead entered judgment in favour of the Appellant and against the Respondent and awarded the Appellant interest at court rate on the value of the goods supplied and delivered being Ksh. 5,534,962.20 from the date of filing suit to the judgment.
6. The Appellant then prayed that the appeal be allowed, the judgment of the trial Court be set aside and the Appellant be awarded costs of the appeal and the suit.
7. This Court gave directions on hearing of the appeal by way of written submissions. Both parties filed their respective submissions whose gist will be ingrained in the latter part of this judgment.
8. As this is an appeal from a decision of the Small Claims Court, the jurisdiction of the High Court as the first and final appellate Court is provided for in Section 38 of the *Small Claims Court Act* where this Court only determines matters of law. As the appeal herein is on the manner in which the trial Court varied the terms of a contract, then such an issue transcends the borders of matters of fact into the realm of matters of law. Therefore, this Court is properly seized of jurisdiction over this appeal.
9. The law guiding Courts relating to consensual contracts between parties is by now quite well settled and has been properly so reiterated by the parties in their submissions. Reference has been made to several decisions including National Bank of Kenya Ltd vs. Pipeplastic Sankolit [K] Ltd, which was rendered by the Court of Appeal to the effect that a Court of law cannot rewrite an agreement between



parties. This Court does not, therefore, need to regurgitate on the law. It is, however, for this Court to determine whether the impugned findings were proper.

10. There is no doubt that the parties entered into the contracts which provided for interest on delayed payments at the rate of 5% of the total contract value monthly. The trial Court found as much and the Respondent did not appeal on the issue. In its Response to the Claim dated 1st September 2023, the Respondent had averred that both parties were Muslim believers who did not ascribe to the issue of interest, but only the refund of the principal sum. Therefore, the issue before the Court for determination was whether the contracts were governed by the Islamic law on the aspect of the interest. Although the Court did not outrightly render itself on the issue, there is no doubt that it nevertheless dismissed the Respondent's contention in finding that indeed the Appellant was entitled to interest, but instead at Court rates. In reaching the impugned finding, the trial Court relied on the decision in *Margaret Njeri Muiruri vs. Bank of Baroda [K] Limited [2014] eKLR* which found the interest rate of 45% per annum to be unconscionable.
11. Whereas the principle of stare decisis is applicable in the Kenyan legal system, and must be respected for consistency and certainty, Courts must ensure that the factual set up of the case at hand and the decision of a superior Court referred to are at all four corners before applying the legal principles established in the binding decision. Such a consideration gives a Court an opportunity to distinguish a binding decision, if need be, depending on peculiar circumstances of a case and thereby rendering substantive justice.
12. In this matter, the trial Court only relied on the finding of the Court of Appeal that the interest rate of 45% per annum was unconscionable and nothing more. It appears, with tremendous respect, that the Learned Adjudicator did not appraise of herself of the facts in the said case. A quick search on the new Kenyalaw website would have accorded the Court the background of that case. To say the least, the circumstances that led the Court of Appeal to make the findings in *Margaret Njeri Muiruri vs. Bank of Baroda [K] Limited* case [supra] were not at par with those in this case. The issues therein were as follows: -
 - a. Whether the provisions of Section 44 of the *Banking Act* were followed.
 - b. Whether the interest rate charges were reasonable and in good faith.
 - c. Whether the Bank supplied statements of accounts to the appellant.
 - d. Whether the contract between the parties was conscionable.
 - e. Whether the variation of interest discharged the appellant from liability.
 - f. What is the appropriate order for costs?
13. Further, the above matter had a completely different factual set up involving a Bank and a customer [who had since died] and having undertaken many financial dealings over a long period of time where loans were advanced and repayments made beyond the principal sums among many other issues. After an extensive legal sojourn on the 'principle of unconscionability', the Court of Appeal had the following to say: -

56. We have found in the above discussion that there was no evidence that the interest rate charged by the respondent was in accordance with Section 44 of the *Banking Act*. We have found that it was manifestly excessive, and, in the words of the trial judge, morally wrong. We have further expressed the view that the clause relied on to charge the interest that led to this exorbitant indebtedness was not only unconscionable and without notice to the appellant,



but was bad for failure to accord with the relevant provisions of the law. In addition, we have found that the bank owed a statutory and fiduciary duty of care to the appellant and the deceased's estate.

14. Based on the above findings, the Court ordered inter alia as follows:
 - a. An order in terms of prayer (c) of the plaint dated 19th October 2000.

To give effect thereto, we order that: -

 - i. The Bank shall, within 60 days from the date of delivery of this Judgment, furnish to the appellant and to the High Court, detailed statements of account in relation to both the loan and current accounts from the inception of both accounts showing all debits and credits and interest rates charged at different times so as to arrive at the balance claimed by the Bank to be outstanding on each account.
 - ii. In default of compliance by the Bank, the appellant and the estate of the deceased shall stand discharged from all claims by the Bank.
 - b. Upon compliance with this order, the matter shall be remitted back to the High Court for determination of the following, and any other, issues that may arise and for disposal by any Judge excluding Kasango J:
 - i. Whether the interest charged by the Bank on the loan and current accounts of the borrower from time to time was in accordance with the terms of the agreement between the parties and the law.
 - ii. Whether the appellant is indebted to the Bank, and if so, to what extent.
 - iii. The liability of the appellant and the estate of the deceased if any and the extent thereof.
15. As the matter was remitted to the High Court for further consideration, one of the issues clearly delineated by the Court of Appeal was 'whether the interest charged by the Bank on the loan and current accounts of the borrower from time to time was in accordance with the terms of the agreement between the parties and the law.'
16. Therefore, the Court of Appeal in the above decision did not establish a legal binding principle to the effect that any interest charged on commercial transactions at the rate of 45% was unconscionable and illegal. The Court only acted to protect borrowers from being charged interests which may not be in conformity with the terms of the agreements and the law. It was that distinction which the Learned Arbitrator, respectfully so, failed to appreciate.
17. This Court having appraised itself of the parameters of the principle of unconscionability as discussed in Margaret Njeri Muiruri vs. Bank of Baroda [K] Limited case [supra] does not find the agreed interest between the parties in this case as unconscionable. The contracts were purely commercial and the interest rate heartily agreed upon.
18. It is on the basis of the foregoing that this Court finds the appeal holding, and, hereby makes the following final orders: -
 - a. The appeal is merited and hereby succeeds.
 - b. The part of the judgment of the trial Court in SCCC No. E6107 of 2023 dated 8th December 2023 finding that the agreed monthly interest rate of 5% of the total contract value to be unconscionable, unfair, oppressive and tantamount to the Appellant unjustly enriching itself



and thereby reviewing and substituting that rate with interest at Court rate is hereby set aside and substituted with an order that interest be charged as agreed. Consequently, the claim in SCCC No. E6107 of 2023 is allowed as prayed.

c. The Respondent shall bear the costs of the suit and the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF JUNE, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Miss Gicheru, Learned Counsel for the Appellant.

Miss Philsira, Learned Counsel for the Respondent.

Amina/Abdirazak – Court Assistants.

