Kinyili v Co-operative Bank of Kenya Limited (Commercial Case E015 of 2021) [2025] KEHC 8439 (KLR) (Commercial and Tax) (12 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8439 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E015 OF 2021

AB MWAMUYE, J

JUNE 12, 2025

BETWEEN

JACINTA NGULE KINYILI ..... APPELLANT

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED ..... RESPONDENT

(Being appeal against the Judgment delivered by Hon.L.L Gicheha (Mrs.) CM on 29th January 2021 in Milimani CMCC No. 1360 of 2016)

JUDGMENT

Introduction And Background

1. This appeal arises from the judgment delivered by Hon. L.L Gicheha (Mrs.) CM in Milimani CMCC No.1360 of 2016 rendered on 29th January, 2021, wherein the learned Magistrate entered judgment in favour of the Respondent against the Appellant in the sum of Kshs. 1,298,653.25 plus costs and interest at court rates. Dissatisfied with the said judgment, the Appellant filed a Memorandum of Appeal dated 26th February, 2021 raising to five grounds of appeal, being:

    i. That, the Honourable Court erred in Law and in Fact and misdirected itself by finding that the Defendant owes the Plaintiff Kenya Shillings One Million Two Hundred and Ninety Eight Thousand Eight Hundred and Sixty Three and Twenty Five Cents (Kshs. 1, 298, 863.25/-) only as prayed in the plaint.

    ii. That, the Honourable Court erred in Law and in Fact and misdirected itself, by failing to interrogate the Defendant's and Plaintiff's evidence on record.

iii. That, the Honourable court erred in Law and Fact and misdirected itself in making the finding that the loan facility was not covered by the insurance policy as provided Section 11 of the Loan Agreement.

iv. That, as a consequence of the aforegoing error the Honourable Court upheld an unconscionable contract between the Plaintiff and the Defendant.

v. That, the learned magistrate erred in failing to give any consideration or weight to the arguments and submissions of the Appellant's counsel and to case law cited on the law relating to the equity of redemption.

2. The Appellant's argument is based on the assertion that the loan she received from the Respondent was secured by an insurance policy that covered retrenchment. She claims to have depended on the Respondent's representations and thus made payments for the insurance premium.

3. Conversely, the Respondent claims that the loan contract specified an insurance policy that only covered death and permanent disability, with loss of employment distinctly excluded. The Respondent insists that the Appellant is responsible for the unpaid balance and any accrued interest.

4. The Respondent initiated legal action against the Appellant to recover Kshs.1,298,653.25, which represents the outstanding balance on a loan issued to the Appellant, along with interest and legal costs. This loan, totaling Kshs. 1,500,000, was granted to the Appellant on 10th August 2008 and was to be repaid in 60 equal monthly installments of Kshs. 37,218.37 via a salary check-off system. Additionally, the Appellant paid a single insurance premium of Kshs. 30,483, claimed to be for coverage against events like retrenchment.

5. The Appellant made payments until 2010, when she was laid off by her employer. Following this, she informed the Respondent and argued that the insurance cover should have settled the outstanding loan balance. However, the Respondent contested the claim regarding insurance coverage for job loss and sought payment for the remaining balance.

6. The Appellant proposed repaying in smaller installments due to financial difficulties, but the Respondent rejected this proposal. Consequently, the Respondent pursued legal action, and the trial court, upon reviewing the evidence, ruled in their favor and granted judgment for the claimed amount. The Appellant argues that the trial court made an error by not fully understanding the implications of the insurance policy, misinterpreting the nature of the representations made by the Respondent's representatives, and overlooking her evidence. The Appellant is therefore appealing to this Court, seeking that the judgment be overturned and the claim against her be dismissed.

Appellant's Case

7. The Appellant claims that in 2008, she sought a loan from the Respondent and was promised that the loan would be insured against job loss, death, or disability. Based on this assurance, she paid a one-time insurance premium of Kshs. 30,483 and accepted the loan. She met her monthly payments until 2010, when she was laid off.

8. After her retrenchment, she notified the Respondent and was led to believe that the insurance policy would cover the remaining balance. On 21st October 2010, her loan account showed a zero balance. The Appellant was taken aback when the Respondent later demanded Kshs.1,284,453.25 and informed her that her credit information had been sent to the Credit Reference Bureau (CRB).

9. The Appellant tried to negotiate a repayment plan with the Respondent but insisted that the loan had been cleared through the insurance policy. She argues that the demand is malicious and made in bad

faith. She maintains that the Respondent misrepresented the extent of the insurance coverage, failed to present the policy in court, and that her reliance on this representation was reasonable and led her to enter into the contract.

Respondent's Case

10. The Respondent claims that it lent the Appellant Kshs.1.5 million to be repaid over 60 monthly installments through a salary deduction system. The Appellant defaulted on repayment following retrenchment and did not settle the remaining balance. Although the Appellant did pay an insurance premium, the Respondent contends that the policy only provided coverage for death and permanent disability, not retrenchment.

11. In January 2013, the Respondent sent a demand notice, and the Appellant replied with a proposal to repay in installments of Kshs.3,000, which was later adjusted to Kshs.5,000. However, she subsequently failed to adhere to this repayment arrangement. The Respondent argues that the Appellant acknowledged her responsibility through her payment proposals, and that the notification of the personal loan disbursement explicitly stated that retrenchment was not included in the insurance coverage. The Respondent references clause 11 of the loan agreement, asserting that the policy was selected at its discretion and was not a contractual obligation for protection against job loss.

12. The appeal was canvassed through written submissions, and both parties complied by filing their respective submissions.

Appellant's Submissions

13. The Appellant, through her counsel argues that the trial Magistrate made a mistake by concluding that the loan was not protected against job loss. She asserts that she was misled into signing the loan agreement under the impression that the insurance premium she paid would cover job termination. Her main issue for determination is whether the Appellant is liable for the claimed amount and, if so, whether this debt was appropriately insured. The Appellant asserts that she does not owe Kshs.1,298,653.25, referencing the loan application's reference to insurance and the payment of her balance being settled in October 2010 through the policy.

14. She claims that a year later, the Respondent acted in bad faith by demanding repayment of the debt despite it being previously cleared, which demonstrates mala fides and unjust enrichment. The Appellant also argues that the Respondent failed to provide the policy terms to support its claim of coverage limitations to death or personal injury, and that statements made by an employee of the Respondent led her to believe that job loss was part of the coverage.

15. In urging this Court to reassess the evidence thoroughly, the Appellant cites binding appellate case law that mandates a fresh evaluation of facts. She contends that the Respondent neglected its duty of care by misrepresenting the scope of the insurance coverage, invoking a principle from Esso Petroleum Company Limited v Mardon [1976] QB 801 regarding reliance on specialized knowledge or skill. She asserts that enforcing the claimed amount and associated collection fees would mean endorsing an unconscionable contract.

16. As a result, the Appellant prays that this Court grants the appeal, overturns the lower court's judgment, and this appeal be allowed with costs.

Respondent's Submissions

17. The Respondent argues that a loan of Kshs.1,500,000 was extended to the Appellant on 10th August 2008, to be repaid in 60 equal monthly installments of Kshs.37,218.37, with a provision

for salary deductions via standing order. The Appellant also paid an insurance premium totaling Kshs.30,483.00. It is the Respondent's position that the insurance policy acquired only provided coverage for death and permanent disability, excluding loss of employment. Clause 11 of the loan agreement granted the bank the authority to secure insurance, and the Notification of Loan Disbursement letter specifically stated that job loss was not an insurable event.

18. The Respondent contends that the Appellant breached her loan repayment obligations after being retrenched in 2010 and acknowledged her liability in written communications dated 24th July 2013 and 10th September 2013. The proposed repayment plans of Kshs. 3,000 and later Kshs.5,000 are cited as clear admissions of debt. Counsel for the Respondent relied on the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR arguing that courts do not have the authority to amend contracts for the parties involved, asserting that liability should be addressed according to the terms mutually accepted.

19. It was further submitted that there was no evidence of fraud, misrepresentation, or undue influence presented. Furthermore, the Respondent invoked the parole evidence rule as outlined in Sections 97 and 98 of the *Evidence Act* (Cap. 80) to eliminate oral statements that aim to alter the clearly defined terms of a written agreement. Reliance was placed in the case of Urbanus Kyalo Wambua v Briggitta Ndila Musau [2019] eKLR.

20. It is averred that the Appellant's reliance on purported misrepresentations that were not documented is legally indefensible. The court is urged to affirm the validity of the loan contract and disregard any external evidence that contradicts its explicit terms. Regarding the assertion that the balance was reduced to zero, the Respondent clarifies that this was a standard accounting practice in accordance with the application of the in duplum rule under Section 44A of the *Banking Act*, not an indication that the debt had been paid off. Interest stopped accumulating once the unpaid interest equaled the principal amount.

21. In conclusion, the Respondent prays that the appeal be dismissed with costs and that the judgment of the trial court be upheld since the Appellant's case constitutes an unacceptable attempt to evade a legitimate obligation that was freely accepted.

Analysis And Issues For Determination

22. Having analyzed the grounds of Appeal, reviewed the written submissions filed by the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Judgment of the trial, I find that the issues of determination are:

    i. Whether the Appellant is liable to the Respondent for the outstanding amount of Kshs. 1,298,653.25 arising from the loan facility advanced in 2008.

    ii. Whether the said loan was covered by an insurance policy that extended to loss of employment or retrenchment, and if so, whether the Respondent was estopped from demanding repayment.

    iii. Whether the trial court erred in law and in fact in evaluating the evidence, including the interpretation of the loan agreement, the scope of the insurance policy, and whether the contract and subsequent conduct of the Respondent rendered the arrangement unconscionable.

23. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

24. This was aptly stated in the case of Selle & another v Associated Motor Boat Co Ltd & others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

Whether the Appellant is liable to the Respondent for the outstanding amount of Kshs. 1,298,653.25 arising from the loan facility advanced in 2008.

25. This issue forms the crux of the dispute and is essential for the appeal. It is undisputed that the Appellant received Kshs.1.5 million from the Respondent as part of a loan agreement executed on 10th August 2008. The loan was to be repaid in 60 equal monthly payments of Kshs.37,218.37. The Appellant fulfilled her obligations until 2010, when she was laid off, leading to a default.

26. The Appellant asserts that the remaining debt was negated by an insurance policy that was supposed to cover retrenchment. However, she did not present the policy or provide direct proof of the exact coverage terms. On the other hand, the Respondent submitted the Notification of Loan Disbursement and the Loan Agreement, both of which verify that the insurance covered only death and permanent disability. The Appellant's letters dated 24th July 2013 and 10th September 2013, in which she suggested repayment plans, imply that she acknowledged the debt. Courts have repeatedly held that repayment proposals signify an acceptance of liability. Acknowledgment of debt through payment proposals or partial payments serves as adequate evidence of liability.

27. In Bosire v Madison Insurance Company Limited (Civil Appeal E064 of 2023) [2024] KEHC 5593 (KLR), the Court held:

> " My understanding of the Policy agreement HQS/173463/2019 is that the same ought to be interpreted a s per the benefits the Appellant had chosen to pay premiums for. The Policy agreement in its entirety has provisions for all the benefits including the ones like temporary total disability, Medical expenses, funeral which the Appellant did not subscribe to and thus while relying on the same one has to be careful not to use clauses that have no relationship with the benefits that the Appellant did not subscribe to. I therefore do not find any viable reason to fault the learned trial Magistrate for holding that the Appellants compensation could not extent to injuries that resulted temporary disability. The claim of the appellant being confined for three months at the doctors' instruction after the accident could have been a valid claim worth being considered by this court had the Appellant subscribed to the benefits of TTD and Medical expenses listed in the policy. As I have stated hereinabove the schedule under clause (b) outlined all the benefits wherein it's only the two benefits death and PTD which are filled up with the amount of premiums paid against them. It will be absurd if this court would go ahead to order compensation for benefits the Appellant did not subscribe. Equally as I have observed hereinabove the Appellant confirmed at re-examination by his own counsel that he was properly notified by the defendant that he or his estate was only going to be compensated in case of death or in case of injuries that resulted into a permanent disability which was not the case herein given that he only suffered injuries which according to the doctors who examined him did not result to him sustaining permanent disability. I agree with the finding of the trial Magistrate that, policy identified the nature of disabilities the policy covers alongside the percentage payable whereby the injuries sustained by the Appellant are not included at all."

35. The contract between the parties herein is in black and white and is binding on them. This court has no jurisdiction to re-write it to suit the new intentions of any party."

This underscores strict adherence to written terms and refusal to imply broader cover. By analogy, an unproven claim that insurer settled upon retrenchment cannot extinguish liability.

28. The Appellant's own correspondence proposing repayment plans such as monthly installments of Kshs.3,000 or kshs.5,000 indicates acceptance of outstanding debt rather than sole reliance on insurer discharge. Such negotiations cannot be treated purely as protective; they confirm awareness of liability absent insurer settlement.

29. The trial court was justified in relying on the documentary evidence produced by the Respondent. Courts must confine themselves to the pleadings and evaluate the evidence in support thereof. The Respondent's documents were coherent, uncontroverted, and corroborated by admissions in the Appellant's correspondence.

30. This Court reiterates the principle that he who alleges must prove, as codified under Section 107 of the *Evidence Act*. The Appellant failed to demonstrate by credible evidence that the loan obligation was extinguished or that any payments had been made following the alleged discharge. Unsubstantiated assertions of discharge via insurance cannot override clear payment history. The burden lies on a party alleging coverage to produce policy or insurer confirmation. Here, the Appellant produced no insurer confirmation of settlement on retrenchment.

31. In Kariuki v Barclays Bank of Kenya Limited (Now ABSA Bank Kenya PLC) [2024] KEHC 15573 (KLR) it was held that:

> "It is therefore incumbent upon the Plaintiff to demonstrate any error, irregularity or illegality on any entry of a statement of account issued by the Bank. This, the Plaintiff has not done meaning that it is presumed that the statements of account issued to him and annexed by the Bank are a true account and reflection of his financial standing with the Bank. As the statement of account has already been annexed and now furnished, I find that this prayer is also now spent and was unnecessary, considering that the Plaintiff could have gotten the same from the Bank as a matter of right, were he to apply for the same from the Bank rather than the court."

32. Moreover, in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR, the Court defined a prima facie case as one based on material evidence. Here, the Respondent's case met that threshold. The Appellant's response was largely speculative and unsupported by material documents.

33. No reliable evidence of fraud or errors that would negate the debt has surfaced. The Appellant claimed that bank staff made oral statements regarding insurance coverage but did not provide any supporting documentation such as a letter from the insurer. According to the *Evidence Act* Cap 80, unverified oral claims that contradict written records hold minimal significance. The trial court rightly dismissed these claims due to the absence of evidence, as mere statements without supporting documents do not fulfill the obligation to prove the insurer's settlement.

34. Considerations pertaining to in duplum apply solely to interest and not to the principal. Section 44A of the *Banking Act* limits interest accumulation once the unpaid interest equals the principal amount. While the Appellant may contest the overcharged interest at a later date, this does not eliminate

the liability for the principal amount of Kshs. 1,298,653.25. The calculations from the trial can be reassessed for compliance with in duplum, but the principal amount remains owed in the absence of any discharge from the insurer. Therefore, the primary liability issue is resolved against the Appellant.

35. As such, based on this new assessment, the Appellant is still accountable for the outstanding principal amount of Kshs. 1,298,653.25. No confirmation from the insurer regarding discharge has been provided. The trial court's determination of liability is upheld. The Appellant's dispute regarding liability is unsuccessful.

Whether the said loan was covered by an insurance policy that extended to loss of employment or retrenchment, and if so, whether the Respondent was estopped from demanding repayment.

36. The Appellant's primary defence was premised on the assertion that the insurance policy, for which she paid a one-off premium of Kshs.30,483, covered retrenchment. She argues that the Respondent's representative informed her of this during the application process. However, no evidence whether written or oral was presented at trial to substantiate the claim that retrenchment was an insured risk.

37. The Notification of Loan Disbursement and Loan Agreement both categorically state that the insurance policy was limited to "death and permanent disability." The trial court correctly held that this constituted the entirety of the agreement, consistent with the parole evidence rule under Sections 97 and 98 of the *Evidence Act*. Extrinsic evidence is inadmissible to contradict written contracts unless ambiguity is proved.

38. Regarding the doctrine of estoppel, estoppel arises where a party makes a representation on which another relies to their detriment. The doctrine of estoppel is as provided in the *Evidence Act* at Section 120, it states:

> "When one person by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing."

39. Estoppel is also defined at Paragraph 1471 Halsbury's Laws of England vol. 16 4th Edition to be.....:

> "Where a party lies by his words or conduct waived or made to the other party a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position the party who gave the promise or assurance either by words or conduct cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him. He must accept their legal obligations subject to the qualification which he has himself so introduced either by words or conduct even though it is not supported by any legal agreement."

40. The Supreme Court of Kenya in it's exposition in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others 2014 eKLR while quoting the case of Serah Njeri Mwobi v John Kimani Njoroge *CA 314 of 2009* stated as follows:

> "The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."

41. The Supreme Court of Kenya further expressed itself thus:

> " Estoppel by record relates to a judgment delivered by a court determining the rights and issues between parties. Withdrawal of an application by a party does not constitute estoppels by record since no court of competent jurisdiction has determined the rights or the issue between the rights or the issue between the parties. It is our considered view that in the instant case, no estoppel arose by the withdrawal of the application for security for costs by the applicant in the lower court. This is in view of the fact that no representation was made expressly or impliedly that the applicant would not pursue enhancement of security for costs."

42. Estoppel cannot override explicit statutory or contractual provisions. The Appellant is unable to use estoppel to contest the clear terms of a written loan agreement. Even if, for the sake of argument, such a representation was made, the Appellant's failure to ask for or acquire a copy of the insurance policy undermines her claim of reliance. A party that neglects to seek clarification of the terms of a binding document cannot later assert that they misunderstood its content. Furthermore, the Appellant did not include the insurer as a third party or present any evidence of a settled claim under the policy. Her argument lacks evidentiary value and amounts to mere speculation. The trial court correctly disregarded it.

43. The in duplum rule outlined in Section 44A of the *Banking Act* does not support the Appellant's case either. This rule restricts interest accumulation on non-performing loans to the principal amount but does not eliminate liability or resolve debt. A write-down in the ledger does not absolve a borrower of their obligation to repay a debt unless it is accompanied by a clear release. Given the above, this Court concludes that the insurance did not provide coverage for retrenchment, and no valid estoppel exists against the Respondent. Therefore, the claim regarding this issue is unsuccessful.

Whether the trial court erred in law and in fact in evaluating the evidence, including the interpretation of the loan agreement, the scope of the insurance policy, and whether the contract and subsequent conduct of the Respondent rendered the arrangement unconscionable.

44. The Appellant contends that the trial court failed to consider that the contract was unconscionable and the bank's conduct inequitable. She relies on the alleged misrepresentation and on the fact that she was retrenched and unable to pay. However, the Court must evaluate such arguments against the backdrop of binding legal principles.

45. On contractual interpretation, the trial court construed Clause 11 and the Notification strictly, recognizing their unambiguous exclusion of retrenchment cover. This is supported by recent High Court decisions emphasizing literal interpretation of insurance clauses unless ambiguity exists. There was no misdirection in interpreting those clauses; the court correctly gave effect to their clear language. No contrary credible evidence warranted departure.

46. In the locus classicus case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd, [2002] 2 EA 503 the Court held as follows:

> " 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 regard to the terms of the charge..."

47. Similarly, in the Court of Appeal case of Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited, [2017] eKLR it was held:

> "So that where the intention of parties has in fact been reduced to writing, under the so-called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.... The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements of terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing."

48. A contract can only be deemed unconscionable if it is so excessively unfair that it shocks the court's conscience. The Appellant voluntarily signed the agreement, received the funds, and accepted the terms, which included repayment responsibilities and insurance coverage. Her assertion of unconscionability lacked supporting evidence of deceit, coercion, or an extremely unbalanced deal. A party claiming that a contractual provision is unconscionable must present compelling evidence to show an imbalance in bargaining power or exploitation. However, this type of evidence was not provided. The trial magistrate assessed the contractual documents and testimonial evidence according to the pleadings. The conclusion that the Appellant did not successfully prove her case was logical and backed by evidence. The magistrate is not to be criticized for choosing not to infer provisions that were not included in the agreement or in the Notification of Disbursement.

49. Appellate intervention is warranted only when there is a clear misunderstanding of facts or a misapplication of the law. In this case, no such error has been shown. Based on the preceding analysis and determinations regarding each of the three issues, this Court concludes that the appeal lacks merit. The Appellant has not been able to prove that the trial court made any legal or factual errors in its interpretation of the loan agreement, the extent of the insurance policy, or its understanding of the parties' responsibilities under those agreements. The evidence presented in the record convincingly indicates that the Appellant obtained the loan, fell into default on repayments after her retrenchment, and later proposed a repayment plan. The claim that the insurance policy covered job loss is not supported by the written documentation and lacks credible evidence.

50. The trial court properly applied the relevant principles of contractual interpretation and upheld the sanctity of the agreement freely entered into by the parties. The allegations of unconscionability and misrepresentation were not substantiated to the standard required in law.

51. Consequently, I find no justifiable reason to interfere with the decision of the trial court. The Appellant's Appeal is devoid of merit and is dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JUNE 2025.

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BAHATI MWAMUYE.

JUDGE