Simple Pay Capital Limited v Kioko & another (Commercial Suit E162 of 2023) [2025] KEHC 10206 (KLR) (Commercial and Tax) (15 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10206 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL SUIT E162 OF 2023

BM MUSYOKI, J

JULY 15, 2025

BETWEEN

SIMPLE PAY CAPITAL LIMITED ..... PLAINTIFF

AND

BONIFACE WAMBUA KIOKO ..... 1ST DEFENDANT

JOSEPH WAMBUA MONYOH ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants claiming Kshs 35,243,953.14 plus interest at 10 per cent per month from April 2023 until payment in full and the costs of the suit. The money was claimed to be due from the defendant in respect of a loan of Kshs 15,000,000.00 advanced to a company known as Blitz Logistics Limited (hereinafter referred to as 'the borrower') vide agreement dated 1-07-2022. It was pleaded that on the same date, the defendants executed deeds of guarantee and indemnity on the same date in favour of the plaintiff in respect of the said loan.

2. In their defence, the defendants stated that it is was only the borrower who cloud confirm receipt and purpose of the loan but admitted executing the guarantees and indemnity but stated that the interest was to be charged at 10 per cent on one off basis and therefore the computation by the plaintiff was wrong. They also stated that the loan agreement was inconsistent with the letter of offer and that they were not aware that the borrower defaulted in payment and according to them, the plaintiff should pursue the borrower for any outstanding amount. They also stated in their defence that the loan agreement provided for arbitration and as such the matter should have been referred to arbitration before filing of the suit.

3. The plaintiff called one witness who told the court through his witness statement dated 11-04-2023 that, he was the operations manager of the plaintiff which is a financial institution duly authorised

to provide credit facilities to qualified persons within Kenya. He added that pursuant to a letter of offer dated 1-07-2022 the plaintiff advanced the borrower Kshs 15,000,000.00 upon request by the borrower and the defendants. The term of the loan was three months and default thereof would attract interest on the amount due and owing at the prevailing market rates until the date of payment. The borrower was also to pay costs and disbursements incurred by the lender in connection with the preparation and enforcement of the agreement.

4. He added that the defendants executed personal deeds of guarantee and indemnity in favour of the plaintiff and unconditionally agreed to discharge the loan together with interest and related costs. He testified further that the borrower defaulted payments as a result of which the amount outstanding as at 30th March 2023 stood at Kshs 35,243,953.14 which continues to attract interest at the prevailing market rates. The witness produced the following documents;

    a. Letter of offer dated 1-07-2022.

    b. Loan agreement dated 1-07-2022.

    c. Deeds of guarantee and indemnity dated 1-07-2022 between the plaintiff and the defendants.

    d. A statement of the loan account.

    e. Demand letters dated 6-02-2023.

5. I cross-examination, the witness testified that the defendant was a digital credit provider duly registered with the Central Bank of Kenya and that he was not aware of any regulations on how much they could recover from a borrower. He said that he was not aware of the status of the borrower and that they had taken action on the borrower by conducting one Diana Mwangi, the agent who introduced it to the plaintiff but the borrower did not turn up for discussions.

6. The witness added that at the time he recorded his witness statement, the loan was outstanding at Kshs 28,550,232.86. He also admitted that the rate of interest the plaintiff was charging translated to 120 per cent per annum and according to him, it made economic sense. He also admitted that they did not commence arbitration proceedings as their lawyer advised them to file suit.

7. The defendants did not testify or call any witness despite having filed witness statements dated 6-09-2023. Their advocates closed their case after they failed to show up despite having been given opportunity to testify twice. Having read through the submissions and the evidence of the parties, I discern that there is no dispute that the plaintiff advanced Kshs 15,000,000.00 to the borrower and that the defendants guaranteed the loan. There is no dispute too that the borrower defaulted on the loan as there has been no denial of the averment. In my opinion, the issues in this matter are;

    a. Whether the plaintiff could sue the guarantors without first attempting to recover from the borrower.

    b. Whether the dispute should have been taken to arbitration.

    c. What was the rate of interest applicable and how much is due to the plaintiff?

8. The plaintiff's witness testified that it demanded payment from the borrower who failed to respond or go to its office for a discussion. The defendants maintain that there was no proof of service of any demand of payment upon the borrower. The defendants have submitted that the plaintiff's right to pursue the guarantors was not mature unless it showed that it had tried to pursue the borrower.

9. The plaintiff on the other hand argues that it had the right to sue the guarantors without first trying to recover from the borrower. The effect and position of guarantees has been discussed in many cases.

Judicial pronouncements hold it that a guarantee is a separate contract from that between the lender and the borrower. In *Kolaba Enterprises Ltd v Shamshudin Hussein Varvani & another* (2015) KEHC 8185 (KLR), the court held that;

'Guarantee is a separate contract from and distinct from that of the borrower. Liability of guarantor is therefore based on the guarantee to pay the debts of the principal debtor should he not pay or be unable to pay. However, liability of guarantor is limited to the liability set out in the guarantee.'

10. The defendants in the guarantees which they have not denied executing undertook to pay the debt whether the same was demanded from the borrower or not. Clause 24 of the deeds of guarantee and indemnity provided that failure by the guarantee to exercise or delay in exercising a right to remedy provided by the guarantee or by law does not constitute a waiver of the right or remedy or waiver of other rights or remedies.

11. My interpretation of the above clause in the context of this suit is that failure by the plaintiff to follow up payments from the borrower does not divest it of its right to follow up payments from the defendants as guarantors. What matters is that the amount remains unpaid which the defendants have not denied. When they executed the guarantees, the defendants committed to ensuring that the borrower paid the loan. In that regard, the answer to the first issue is in the affirmative.

12. The second issue is whether the dispute should have gone to arbitration. As observed above, the contracts between the plaintiff and the defendants were separate from the contract between the plaintiff and the borrower. The terms of contracts between the parties herein were embodied in the deeds dated 1st July 2022 which I have gone through. The said deeds do not have an arbitration clause and the plaintiff was therefore not bound to resort to arbitration. In any event I do not see any dispute capable of being referred to arbitration in this matter.

13. The last issue is the rate of interest applicable and how much is the plaintiff entitled to. The defendants have claimed that the document produced by the plaintiff as its exhibit 5 does not amount to a proper statement of account as it is seemingly a computer generated document which does not have signature or authority of the plaintiff. I do agree that the document does not pass for a proper statement of account. However, since the disbursement of the loan is not disputed and there is no suggestion that the borrower paid anything towards liquidation of the loan, anyone can do calculation on what was due based on the terms of the agreement between the parties.

14. The plaintiff claims that the defaults were to be charged ten per cent per month on the unpaid principal sum and that is the basis of its calculations contained in the said exhibit 5. The plaintiff produced a letter of offer which has two clauses on interest which I quote in verbatim as follows;

> Clause 6 Interest rate
>
> Interest chargeable on the amount overdrawn shall be calculated at a rate of ten (10) per cent per month.
>
> Clause 7 Late payment and default interest
>
> Default of principle repayment rate of ten (10) per cent interest, shall be payable at the rate above the Lender's prevailing prime lending rate per month or such other rates as may be determined by the Lender in its sole discretion on any part of the letter of offer for the facility which is not paid on its due date or on demand (as the case may be) due to any reason whatsoever, including without limitation any administrative period required in connection with the facility.

15. However, when we come to the agreement, this court has not managed to see any clause on interest. The plaintiff's submissions make reference to clause twelve of the agreement. However, a look at the agreement produced as exhibit 2, does not show. I note from the pagination of the exhibit that page 6 is missing and most likely that is the clause which had the clause twelve. This court is therefore unable to ascertain the terms of the said clause noting that the same is disputed by the defendants who argue that the clause applicable a one off ten per cent interest.

16. Where a letter of offer is followed by an agreement, the court or the parties cannot resort to the terms in the letter of offer unless there is a clear indication or demonstration that the terms in the letter of offer were meant to be incorporated in the agreement. In the case before me, the parties are at variance on what the agreement provided in terms of interest. Honourable Lady Justice Mogeni restated this position of the law in *Iluluwe Development Limited v Omondi* (2023) KEELC 18974 (KLR), by holding that;

> 'The prevailing jurisprudence on the tenor of a letter of offer is that there is no binding contract in the absence of the anticipated formal contract by way of agreement for sale. The prevailing law is that parties to the letter of offer remained in negotiations pending settlement of terms and execution of the formal contract by way of an agreement for sale.'

17. Being unable to see the clause the plaintiff has made reference to and the plaintiff having had the duty to prove the rate of interest applicable, I have no alternative but to hold that the terms of interest applicable was the one off ten per cent which has been acknowledged and admitted by the defendants.

18. The defendants have made submissions attacking the terms of interest claimed by the plaintiff as unconscionable but I will not go into that noting that the agreement produced does not show the contentious clause. In that regard, it is my finding that the amount payable to the plaintiff was the principal sum advanced plus ten per cent. However, the defendant is entitled to some interest to compensate it for the withholding of its money which I grant at court rates from the date of filing the suit.

19. The upshot of the above is that this suit succeeds in the following terms.

    a. Judgment is entered for the plaintiff against the defendants jointly and severally for Kshs 16,500,000.00 plus interest at court rates from the date of filing this suit until payment in full.

    b. The plaintiff shall have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Jane Okoth for the plaintiff and in absence of the defendant.