



**Progressive Credit Limited v Ibido (Civil Appeal E514 of 2023)  
[2024] KEHC 7902 (KLR) (Civ) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 7902 (KLR)

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

**CIVIL**

**CIVIL APPEAL E514 OF 2023**

**DAS MAJANJA, J**

**JULY 2, 2024**

**BETWEEN**

**PROGRESSIVE CREDIT LIMITED ..... APPELLANT**

**AND**

**MOHAMED SARBO IBIDO ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. V. Mochache RM/Adjudicator dated 10.06.2022 at the Small Claims Court at Milimani, Nairobi in SCCC No. E2287 of 2022)*

**JUDGMENT**

**Introduction and Background**

1. On 01.04.2020, the Respondent requested for and was granted a loan facility of Kshs 330,000.00 by the Appellant. Under the agreement, the loan was repayable in 6 monthly installments of Kshs 71,500.00 from the 20<sup>th</sup> of every month starting from 20.05.2020 and ending on or about 20.10.2020. The loan was secured by a motor vehicle registration number KBW XXXQ (“the motor vehicle”). The agreement provided that in case of default, the loan was to be charged an additional default interest at a rate of 4% per month on the principal amount in addition to the 5% applied on the facility. Further, bounced cheques would be charged Kshs 5,000.00 plus 4% of the cheque amount subject to a minimum of Kshs 3,000.00 and a maximum of Kshs 30,000.00.
2. By a statement of claim dated 08.04.2022, the Appellant filed suit claiming that the Respondent issued it with six postdated cheques that did not clear and it incurred extra charges due to the bounced cheques. That the Respondent tampered with the motor vehicle chassis number, number plate and engine number and knowingly used it to obtain a loan facility from a different creditor who already repossessed and sold it. The Appellant further stated that the Respondent continued defaulting in repayment of his loan facility and as at 21.04.2021 the loan was in arrears of Kshs 913,696.00 and



continues to accrue interest for late payment. The Appellant prayed for judgment for Kshs 913,696.00, compensation as determined by court, interest on the outstanding loan balance at the contractual rate of 6.5% per month from 05.01.2021 till repayment in full, interest on the outstanding loan balance at the contractual rate of 9% per month from 21.04.2021 till repayment in full and general damages for breach of contract.

3. In his response, the Respondent admitted that he applied for a loan of Kshs 330,000.00 but that only Kshs 158,000.00 was disbursed to him and that the Appellant retained the balance without any plausible explanation. The Respondent contended that he issued the cheques on the understanding that the Kshs 330,000.00 was to be released to him and not Kshs 158,000.00 and that the Appellant's claim of Kshs 913,396.00 was exaggerated, untenable and unreasonable. He claimed that the Appellant unscrupulously duped him that it was to advance the loan as agreed only for it to change unilaterally the amount so as to unjustly enrich itself by demanding a refund of the amount claimed. The Respondent further disputed the loan interest rate as illegal oppressive and manifestly excessive and also disputed the interest as levied by the Appellant as against Kshs 330,000.00 while in actual fact the amount was Kshs 158,000.00 as received by the Respondent. The Respondent thus urged the court to dismiss the suit against it with costs.
4. At the hearing Julius Maina Kimani, a branch manager at one of the Appellant's branches testified on behalf of the Appellant while the Respondent testified on his own behalf. The Adjudicator rendered the judgment on 10.06.2022. The Adjudicator found that a relationship existed between the parties and that Kshs 330,000.00 was approved as the loan but the sum disbursed was Kshs 158,000.00 and it was also an admitted fact that the sum of Kshs 50,000.00 was withheld by the Appellant and never disbursed. While it was noted that the Appellant's explanation that the amount outstanding after deducting the Kshs 50,000.00 withheld was Kshs 863,696.00, the Adjudicator was of the view that the outstanding amount included interest, penalties, and even charges charged on account of the said Kshs 50,000.00. That at all material times, the Appellant had the benefit of investing the said funds and could not therefore seek to unjustly enrich itself as it purported to do. That the right approach would have been to maintain an account based on correct figures advanced.
5. The Adjudicator considered that Kshs 92,000.00 is said to have been utilized for insurance cover and that it in as much as the Respondent did not dispute that it was utilized to his benefit, he challenged that the deduction was not part of the parties' agreement and as such, awarded the Respondent this sum. In sum, the Subordinate Court was of the view that the Respondent's account was not properly maintained and that the statement of account was not a true reflection of the true state of affairs.
6. The Adjudicator stated that she had looked at the statement of account and that it was clear that the Respondent made some payments towards the facility and that the amount claimed consisted of the principal, interest, charges and bounced cheques and penalties. That according to the demand letter dated 04.06.2020, the Appellant was seeking a sum of Kshs 79,500.00 in principal and in a subsequent one dated 06.01.2021, the Appellant sought for Kshs 794,896.00 and that apparently, the debt had grown tenfold in less than 6 months. The Adjudicator held that the proper debt was that as at 06.01.2020 which was Kshs 79,500.00 and thus awarded the Appellant the same. On interest payable, the learned Adjudicator applied the common law in-duplum principle and found that the maximum interest recoverable was Kshs 79,500.00. She also awarded charges incurred for bounced cheques which the Appellant testified was Kshs 8,000.00 for each bounced cheque as the same was expressly agreed in the agreement. That in the statement she found that the amount was charged 4 times giving a total of Kshs 32,000.00. On the Auctioneer fees, the Adjudicator held that she had not seen any evidence that the same was charged and that the Appellant annexed copies of its instructions to the auctioneers without annexing a fee note or receipt to show that the cost was duly incurred. That Clause 10 of



the agreement provided that this cost would be paid on indemnity basis and if any, the Adjudicator held that the Auctioneer was at liberty to pursue his cost from the debtor in accordance with the Auctioneer's Act. On penalties, the Adjudicator stated that she was hesitant to make any awards as it appeared that the Appellant defaulted on the agreement by failing to disburse the full amount pursuant to the agreement. In conclusion, the Subordinate Court entered judgment against the Respondent in the sum of Kshs 191,000.00 plus interest at court rates from the date of judgement until payment in full.

7. The Appellant appeals against the decision based on its memorandum of appeal dated 08.07.2022. The appeal has been canvassed by way of written submissions although only those of the Respondent are on record. In any case, since the submissions restate the parties' positions I have already highlighted above, I will only make relevant references rather than summarize the same in my analysis and determination below.

### **Analysis and Determination**

8. In determining this appeal, I am aware that the court's jurisdiction is limited by section 38(1) of the Small Claims Court Act (Chapter 10A of the Laws of Kenya) which provides that 'A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.' A court limited to matters of law is not permitted to substitute the Subordinate Court's decision with its own conclusions based on its own analysis and appreciation of the facts unless the findings are so perverse that no reasonable tribunal would have arrived at them (John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR). Thus, the duty of this court is to determine whether the subordinate court's conclusions were supported by the evidence on record and the law.
9. The Appellant is aggrieved by the Adjudicator's findings that the Respondent was to pay interest on the default amount at court rates and not the agreed rate of interest as per the express terms of the parties' agreement dated 07.04.2020. That the Adjudicator failed to award interest and penalties on the principal debt as per the express terms of the agreement dated 07.04.2020 and that the in-duplum rule applied to the transaction between the parties notwithstanding that the Appellant is not a banking institution. It complains that the Adjudicator failed to find that the Respondent did not adduce evidence to contradict the Appellant's claim on default in payment and that the Respondent had made payments towards the loan facility without the Respondent pleading and proving the same. Further, that the Adjudicator erred in finding that the maximum interest recoverable is Kshs 79,500.00 and not applying the agreed rate of interest and that the Adjudicator erred by re-writing the agreement between the parties.
10. On the first ground, the Appellant states the Adjudicator erred by finding that the Respondent was to pay interest on the default amount at court rates and not the agreed rate of interest as per the express terms of the agreement dated 07.04.2020. Under the agreement in case of default, the loan was to be charged an additional default interest at a rate of 4% per month on the principal amount in addition to the 5% applied on the facility. Further, bounced cheques would be charged Kshs 5,000.00 plus 4% of the cheque amount subject to a minimum of Kshs 3,000.00 and a maximum of Kshs 30,000.00. The Adjudicator made a finding that the Respondent was indebted to the Appellant in the principal sum of Kshs 79,500.00 as per the demand letter of the Appellant dated 04.06.2020 and that he had made some repayments but that the statement of account was not reflective of the true position as it was admitted that not all of the entire loan amount was disbursed and yet the charges and interest applied was against the entire amount. I agree. Indeed, the entries of the said statement of account was not



reflective of the correct debt position of the Appellant and could not be relied upon by the trial court owing to the Appellant's admission that it did not disburse the entire loan amount as agreed.

11. I cannot also fault the Adjudicator for relying on the Appellant's demand letter dated 04.06.2020 that indicated that the Respondent was in arrears of Kshs 79,500.00 as opposed to that of 06.01.2021 that indicated that the outstanding arrears was Kshs 796,896.00. I find that the former was indicative of the applicable interest rate and additional penalty interest as opposed to the latter which does not explain the ten-fold ballooning of the arrears based on an erroneous drawdown.
12. Having found that the Respondent was indebted to the Appellant in the principal sum of Kshs 79,500.00, the next issue is whether the Adjudicator erred in applying interest on this sum at court rates as opposed to the contractual rate. The Adjudicator relied on the in-duplum rule to arrive at this decision. In *Momentum Credit Limited v Kabuiya* KEHC 13705 (KLR) I stated that the in-duplum rule which is anchored under section 44 of the *Banking Act* (Chapter 488 of the Laws of Kenya) is only applicable to entities that qualify as "financial institutions" under the *Banking Act*. In order to qualify as a financial institution, the entity 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 *Banking Act*. There was no evidence that the Appellant was such an institution and 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 *Banking Act*. It is for these reasons that I held the said section 44 did not apply to the relationship between parties such as those in the present appeal. The Adjudicator erred in law in applying the in-duplum rule when the rate of interest was governed by the contractual interest rate of 5% per month.
13. The Adjudicator further erred in finding that the maximum interest recoverable is Kshs 79,500.00 and not applying the agreed rate of interest and by awarding interest from the date of judgement as opposed to the contractual rate of 4% as per Clause 5 of the agreement. From the totality of the record, the Adjudicator in effect re-wrote the parties' agreement and bargain contrary to the holding by the Court of Appeal in *National Bank of Kenya Limited v Hamida Bana & 103 others* [2017] eKLR thus:

24. A concomitant of the doctrine of freedom to contract is the binding force of the contracts. See Chitty on Contracts (supra) Para 1-036. As such, the learned Judge by holding otherwise re-wrote the terms of the VER contrary to the intention of the parties. It did not matter that the respondents got less favourable terms than those that were provided for under the HR manual or CBA. What matters is that the parties voluntarily agreed on the terms of the VER which ought to have been enforced. We agree and adopt the reasoning of Lord Hoffman in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 to the effect that:-

"The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute, or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means ... It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would be reasonably available to the audience to whom the instrument is addressed."



**Disposition**

14. I allow the appeal to the extent that the rate of interest on the principal sum of Kshs 79,500.00 at court rates in the judgment before the Subordinate Court is set aside and substituted with a rate of interest at 9% per month from 20.05.2020 until payment in full and that all penalties in the agreement dated 07.04.2020 including penalty interest at the rate of 5% are applicable to this transaction. The Appellant shall have costs of the appeal assessed at Kshs 20,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JULY 2024.**

**D. S. MAJANJA**

**JUDGE**

