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My Credit Limited v Kamau (Civil Appeal E255 of 2021) [2023] KEHC 3598 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3598 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E255 OF 2021

LN MUGAMBI, J

APRIL 20, 2023

BETWEEN

MY CREDIT LIMITED .... APPELLANT

AND

JOHN WAMBURU KAMAU .... RESPONDENT

(Being an appeal from the Judgement and decree of the Honourable Wanjala Senior Resident Magistrate delivered on the 25th of November, 2021 at Thika Law Courts, Thika MCL&E No. 34 of 2021)

JUDGMENT

1. The Appellant initiated this appeal after being dissatisfied of the Honourable Wanjala Senior Resident Magistrate delivered on the 25th of November, 2021.

Summary Pleadings

2. The Respondent, the Plaintiff in the trial court, instituted the suit through a Plaint dated 12th April, 2021 and filed on even date, seeking the following prayers against the Appellant, (the Defendant in the trial court):

   a. That a permanent injunction restraining it whether by itself, its agents, employees or persons claiming under it from interfering with the Plaintiff's quiet ownership, use enjoyment and/or utilization of L.R No. Thika Municipality Block 19/1042;

   b. A cancellation of the entry in the register transferring L.R No. Thika Municipality Block 19/1042 to the Defendant herein, a transfer of L.R No.

Thika Municipality Block 19/1042 back to the Plaintiff at the Defendant's costs;

c. In default thereof, the Executive Officer of the Court do execute all necessary documents to effect transfer and the Land Registrar Thika Lands Registry be directed to dispense with the production of the original title;

d. General damages;

e. Costs of the suit and interests in (c) and (d) above;

f. Such other and further relief that the Court may deem fit and just to grant.

3. The Respondent averred that on the 11th of December, 2019, he applied for a loan of KShs. 2,500,000 from the Appellant. The said loan was premised on certain conditions some of which he raised issues with Appellant's credit officer attending to him at the time by the name Brian who promised that the matters would be addressed as the signing was only meant to ensure the loan processing was commenced. He alleged he had protested to fully transfer his land parcel- L.R No. Thika Municipality Block 19/1042 to the Appellant as security for the said loan and monthly interest at 6.5% and only signed the letter of offer based on the assurance to him that those aspects of the agreement would be looked into so that a legal charge would be created against the property offered as security for the loan and interest rate to 14% per annum. Upon approval of the loan facility, the Appellant only disbursed Kshs. 2,500,000 leaving a balance of Kshs. 1,000,000 of the loan amounts which it withheld despite several follow ups and reminders from the Respondent. In spite of that fact, the Respondent repaid KShs. 990,000 out of the KShs. 1,500,000 that the Appellant had advanced. That the Appellant had been demanding that the Respondent do repay KShs. 2,905,787 pursuant to a loan agreement dated 17th December, 2019 which the Respondent alleged he is a stranger to. The Respondent also denied that he agreed to transfer the property to the Defendant. He outlined the particulars of illegality on the Appellant's part as:

a. The Defendant illegally transferred the property to itself while having presented to the Plaintiff that it is only intended to charge the property to secure the amounts to be advanced;

b. The Plaintiff did not at any time consent either expressly or by implication that he intended to divest himself of all the ownership of the property of a much higher value in exchange for the loan amount;

c. The Defendant misrepresented to the Plaintiff that it would amend the relevant sections of the offer letter objected to and present different terms of particularly, interest;

d. The Defendant by charging interest engaged in actions legally reserved to Banks duly licensed in law;

e. That the Defendant in furtherance of the illegality intends to take possession of the property in purported enforcement of a non-consented contract.

4. The Respondent also outlined particulars of unconscionability, oppression, usury and undue enrichment on the Appellant's part as:

    a. The Defendant imposed interest at 6.5% per month making the same an annual interest rate of 78% a rate that is oppressive and unreasonable contrary to the prevailing base lending rate set by Central Bank of Kenya;

    b. The Defendant's actions constitutes usury. Any payments made by the Plaintiff to the Defendant will not actually terminate his indebtedness to it;

    c. The terms the Defendant seeks to enforce constitute usury and seek to unduly enrich the Defendant with the property while still claiming payment of outstanding loan amount without providing a mechanism for the Plaintiff to redeem the property.

5. The Appellant, (the Defendant in the trial court), filed its defence on the 19th of May, 2021. It averred that the Respondent transferred the property to secure KShs. 1,500,000 only and the same was not collateral for the additional KShs. 1,000,000 that he claims was not disbursed. The Appellant admits that although, the Respondent repaid KShs 990,000, there was still a huge balance of principal, interests, penalties and other charges. The Appellant averred further that the Respondent consciously entered into the agreement and voluntarily transferred the suit property to secure the loan as agreed and that the registration of the caveat on the said property was done in bad faith and with malicious intent. The Appellant urged the Court to dismiss the Respondent suit with costs.

6. The hearing at the trial court commenced on the 29th of July, 2021 with the Plaintiff calling one witness and closing his case. The defence similarly called one witness during the defence hearing on the 10th of August, 2021.

7. In its judgement, the trial court held in thus:

    a. The Plaintiff be and is hereby allowed to offset the outstanding amount within the next 90 days from the date hereof, failure to which the defendant shall be at liberty to dispose of Land Parcel No. Thika Municipality Block 19/1042 that was used a security;

    b. The applicable interest rate shall be the Central Bank of Kenya base lending rate as announced by the Monetary Policy Committee every two years. The rate has consistently been maintained at 7% in the year 2021 going back to 29th April, 2022 at 7.25% on the 23/03/2020 and at 8.25% on 27/01/2020. It was reviewed at 8.5% on 25/22/2019. The same to be applied on the principal amount from the date of disbursement till payment in full, subject only to the in duplum rule;

    c. The Defendant to give credit to the amount of K.Shs. 990,000 that had admittedly been repaid by the Plaintiff by the time that this suit was filed;

    d. The Defendant is entitled to recover from the Plaintiff the costs, charges and expenses as set out at paragraph 4 of the offer letter that it presented to court dated December 11, 2019 but calculated based on the loan amount of KShs. 1,500,000 that was eventually disbursed to the Plaintiff. The said charges are: licensing processing fees at 3% of principal amount-KShs. 45,000; risk insurance at 2.5% of the principal amount KShs. 37,500; RTGS charge-KShs.

1,000; Legal stamping fee-KShs. 52,000; CRB-KShs. 300; Company name and CR12 search fees- KShs. 1,500; and Membership fees-KShs. 1,000;

e. Should the Plaintiff default in repayment as stipulated at (a) above, the Defendant shall be at liberty to charge default interest at the rate of five percent per month on the principal amount as per clause 5 of the said offer letter subject to the in duplum rule;

f. The claim for general damages was neither articulated at trial nor proved by any other documentary evidence. It is declined;

g. Notwithstanding the finding that the registration of the property herein in the name of the Defendant was not procedurally procured, prayers (b) and (c) of the Plaint cannot be granted at this stage as it is likely to allow the Plaintiff steal a match against the Defendant;

h. Notwithstanding the judgement, parties are at liberty to renegotiate and reschedule the terms of loan herein as they wish;

    i. Since the Plaintiff's suit has partly succeeded he will recover half of the costs of the suit.

The Appeal

8. Being dissatisfied with the decision of the trial Court, the Appellant lodged the Memorandum of Appeal dated 20th December, 2021 on the 22nd of December, 2021 listing the grounds of appeal as:

a. The Learned Magistrate misdirected himself both in fact and in law by failing to consider pleadings and evidence presented before Court while opting for factors and issues not raised by either parties;

b. That the Learned Magistrate misdirected himself both in law and in fact by holding a preconceived position against the Appellant based on the strong language against the Appellant's business thus depriving it of the right to fair hearing;

c. That the Learned Magistrate erred in law and in fact by granting reliefs which were not sought at all notwithstanding the fact that all substantive reliefs sought by the Respondent were dismissed;

d. That the Honourable Court erred in law and in fact in finding, without any evidence, that the Applicant was regulated by the *Banking Act* of Kenya and duty to comply with the provisions of the Banking Amendment Act, 2016 in terms of the regulation of its interest rate by the Central Bank and that the in duplum rule applied to its loans and its business;

e. That the Honourable Court erred in law and in fact by ignoring the suit contracts (together with their terms and conditions), pleadings, evidence and submissions of the Appellant while opting to shift the burden of proof of the case upon the Applicant to justify the Respondent's claims;

f. That the Honourable Court misdirected itself both in law and facts by holding that it had capacity to rewrite the contract between the parties herein

notwithstanding that the Respondent partially discharged its obligations pursuant to the suit contract;

g. That the Learned Magistrate misdirected himself in both fact and law by introducing the new terms in the contract between the parties by ignoring the terms and conditions agreed thereon;

h. That the Learned Magistrate also misdirected himself both in fact and in law by rendering self-contradictory judgement requiring the Applicant to comply with aspects of the relationship between parties which he found to be irregular and/or illegal.

9. The Appellant urged this Court to find merit in his appeal, allow the same with costs and make an order setting aside the judgement and decree of the lower court made on the 25th of November, 2021 and the same be substituted with an order dismissing the suit in the Court below.

10. The Record of Appeal was filed on the 22nd of December, 2021 and the Court admitted the appeal for hearing on the 18th of May, 2022. The Appellant filed a supplementary Record of Appeal filed on the 31st of May, 2022. The Court directed that the appeal be canvassed by way of written submissions.

Appellant's Submissions

11. The Appellant filed its submissions on the 21st of September, 2022. The Appellant restated the facts of the case during trial and submitted on the grounds of appeal. For grounds 1 to 4 of the appeal, the Appellant submitted that the trial court ignored the issues and pleadings presented by the parties and opted for extraneous issues. The Appellant relied on the case of *Daniel Otieno Migore vs. South Nyanza Sugar Co. Ltd* where the Court held that:

> " Parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings."

12. The Appellant faulted the trial court for deeming the agreement unconscionable due to the corona virus pandemic yet the agreement was made on the 11th of December, 2019 before the coronavirus was declared a pandemic.

13. On the validity of the contract, the Appellant submitted that this was not pleaded in the plaint and the Court erred in raising the issue of validity of contract suo moto and proceeded to make a finding without involving the parties. That the Court could not find as it did that there was no contract between the parties since such finding would affect the accrued rights and liabilities of both parties considering the fact that the Respondent himself recognized the existence of the contract and that he only challenged specific clauses.

14. While submitting on the reliefs sought by the Respondent in the plaint, the Appellant stated that the Respondent sought an injunction, cancellation of title in the name of the Appellant and a re-transfer of the same to the Respondent. That the trial court dismissed all the reliefs and engaged in a fresh pleading by issuing orders which were neither pleaded or submitted on by the parties. That the dispositions and/or orders made by the Court did not flow from the pleadings. That the Court departed from the

pleadings violatingorder 2 rule 4 of the *Civil Procedure Rules,* 2010. The Appellant relied on the case of *Philmark Systems Co. Ltd vs. Andermore Enterprises* (2018) eKLR where the Court held that:

> “Issues for determination in a suit generally flow from the pleadings unless the pleadings are amended in accordance with the Civil Procedure Rules. In order to determine the issues between the parties herein, one needs to look mainly at the Plaint.”

15. While submitting on ground 5 of the appeal, the Appellant submitted that it was not regulated by the Central Bank of Kenya and that the in duplum rule did not apply to it. That vide the letter of offer dated 11/12/2019 the parties agreed on the terms of the loan that was advanced to the Respondent, specifically the interest rate on the principal sum which was expressed as 6.5% per month. That the Respondent confirmed during trial that he did not that he did not object to the interest rate. That the Court could not alter the said interest rate as it was what had been agreed upon by parties. The Appellant submitted that the *Banking Act* or Banking Amendment Act, 2016 did not apply to it as the same amounted to re-writing the agreement between the parties. That the Respondent had partly repaid the loan and accrued interest and the court erred by purporting to review the interest rate ex post facto.

16. That the Appellant is a micro-credit institution and non-deposit taking credit facility as envisaged under the *Microfinance Act*, 2006. That section 3 of the Act mandated the Minister to make rules and regulations for the operations of non-deposit taking micro-finance businesses and the said rules are yet to be made and even if made, they shall not apply retrospectively to the Respondent. That the Court similarly failed to put the Respondent to strict proof on whether the Appellant was under the Central Bank of Kenya's regulation or not.

17. On whether the in duplum applied to the Appellant, the Appellant submitted that the Court failed to give reasons for its findings that the rule applied to the Appellant save for the fact that: Like any other financial institution the Defendant could not claim to be unregulated (page 105 of the Record of Appeal line 10-12). That the Court ignored the act that the rules to regulate the services of the institutions similar to the Appellant had not been made as envisaged under *Microfinance Act*. That under section 54 of the Banking specifically section 54(1) (d) thereof the institutions envisaged under the *Microfinance Act*, 2006 are excluded or exempted from the provisions of the *Banking Act*. The Appellant relied on the case of *Boniface Oduor vs. Attorney General & another; Kenya Banker's Association & 2 others (interested parties)*(2019) eKLR to the extent that:

> “...the object of enacting section 33B of the *Banking Act* was because of the run-away high interest rate curb the Banks...there were no complaints regarding the other financial institutions that do not fall under the purview of the *Banking Act*.”

18. That in case in *Pride Inn Hotels & Investments Limited vs. Tropicana Hotels Limited* (2018) eKLR, the Court was of the view:

> “The said rule is only applicable in cases of loans or financial facilities offered by financial institutions as defined under the *Banking Act*.”

19. The Appellant also relied on the case of *Kings Group School Limited & Another vs. Kenya Women Microfinance Bank Limited* where the Court held that:

> “The simple answer that micro finance institutions are governed by the *Microfinance Act* No. 19 of 2006. They operate in a slightly different legal regime than conventional banks.

The interest rates by microfinance institutions despite the regulation by Central Bank of Commercial Banks have remained higher beyond the current policy on interest capping."

20. On ground 6 of the memorandum of appeal, the Appellant submitted that no evidence was tendered by the Respondent on taking advantage of the Respondent by the Applicant, and that both parties were clear in their minds that they entered the loan agreement consciously and without coercion. That the trial Court to relieve the Respondent form proving that the interest rate was excessive and/or unconscionable failing to take judicial notice of clear admissions made by both parties noting that the evidence presented including correspondences from the Respondent and letter of offer had clear terms and conditions. They relied on the decision of *Alice Wanjiru Ruhiu vs. Messiac Assembly of Yahweh* (2021) eKLR where the Court held that it is upon the Plaintiff to prove its allegations without shifting the burden to the Defendant.

21. That further in the case of *Muriungi Kanoru Jeremiah vs. Stephen Ungu M'mwarabua* (2015) eKLR the Court held as follows with regard to the burden of proof:

> " ....As I have already stated, in law, the burden of proving the claim was the Appellant's including the allegation that the Respondent did not pay the sum as agreed i.e. into the account provided...the trial magistrate was absolutely correct in so holding and did not shift any legal burden to the Appellant...The Appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove...In the circumstances of this case, the respondent bore no bore no burden proof whatsoever in relation to the debt claimed....The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied..."

22. On grounds 7 to 9 on the memorandum of appeal, the Appellant submitted that there were agreed terms of contract between parties and more particularly the clause on interest and security. That the clauses on the interest and security were clearly indicated in the letter of offer signed by the parties and that the Trial Court noted that the issue of security uncontested. That both parties agreed on the express terms of interest rate and security for the loan amount and the position was confirmed during hearing and as such the Trial Court had no powers to rewrite the contract between the parties despite the Respondent inviting it to do so.

23. That the trial Court erred in assuming powers which it lacked by rewriting the agreement between parties the particularly by ignoring clear admission by the parties that the agreement had partly been performed and that both parties were conscious of its terms when they executed it. They relied in the case of Civil Appeal No. 330 of 2003, *Hussanmudin Gulamhussein Pothiwala (administrator, trustee amd executor of the Estate of Gulamhussein Ebrahim Pothiwala) vs. Kidogo Basi Housing Cooperative Society Limited and 31 Others* where the Court held that:

> " A court of law cannot rewrite a contract between parties...it is clear beyond peradventure that save for those special circumstances where equity may 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."

24. That further in the case of *Five Forty Aviation Limited vs. Erwan Lanoe* (2019) eKLR, the Court held that;

> " The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path...The Court in Pius Kimaiyo Langat vs. Co-

operative Bank of Kenya Ltd (2017) eKLR after reviewing case law on the subject reiterated as follows:

"We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."

25. The Appellant submitted further that the trial court's judgement was self-contradictory as most dispositions either departed from the findings or were not grounded at all. That the record of appeal (pages 90-91) confirmed that the key terms of the agreement were uncontested and that page 96 (lines 1-6) of the Record shows the court's attempts to try and impeach the contract between parties. That despite the trial Court holding that the transfer of the security was irregular, it authorised the Appellant to dispose of the security to recover the outstanding amount.

26. The Appellant concluded by submitting that the judgement as a whole was inconsistent in an attempt to avoid taking into account issues raised by the Appellant both in its defence and evidence. It implored this Court to set aside the judgement and/or vacate the orders issued and the same be substituted with an order dismissing the suit filed in the lower Court. It also prayed for costs of the appeal and those in the trial court.

27. The Appellant filed his supplementary submissions dated 16th January, 2023 via the electronic mail. It reiterated its position that the lower Court merely amended the contract between parties without quashing the same and that the same was to act as a warning to the Appellant and other lenders from taking advantage of members of the public. That the Respondent's submissions are in support of the appeal to the extent that the lower court failed to be guided by the rules of pleadings and the adversarial nature of litigation which frowns upon the Court descending into the arena, pleading and taking sides instead of being a neutral arbiter.

28. While relying on the case of Momentum Credit Limited vs. Teresia Kabuiya Nduta HCCOMMA/E035/2022 the Appellant reiterated that its operations are not subject to regulation under the *Banking Act* as it is neither gazetted as a financial institution nor does it take deposits from the public. Therefore, the relationship between the Appellant and the Respondent was contractual terms which bound both of them. That the Appellant is not subject to the *Banking Act* and the in duplum rule does not apply to it as held in the case cited above.

The Respondent's Submissions

29. The Respondent filed their submissions on the 7th of December, 2022. They submitted on the following issues for determination:

a. Public Interest: Grounds 1-4

b. Regulation: Ground 5;

c. Burden of proof: Ground 6;

d. When can a court to rewrite a contract

30. On the first issue, the Respondent submitted that the trial court extensively deliberated on the issue of validity of the contract as evidenced on pages 92-93 of the Record of Appeal. That the Court noted that both the Plaintiff and the Defendant adduced as evidence, two different offer letters; bearing different dates of execution, having different terms and different modes of execution. That the Court considered the documents and its findings that the contract was illegal were based on pleadings and evidence

presented before it. That the said judgement was not only proper but was also meant to protect the public from future lenders who pry on the innocence and desperation of the borrowers at the time of borrowing. That in a case where one party has such a high bargaining power as opposed to another, the court ought to look at a case holistically and its net effect to not only the contracting parties but also to other members of the public who are financially weak and vulnerable. He relied on the case of *LT Kisii Safari Inns Ltd & 2 others vs. Duetsche Investitions-Und Enwicklugsgellschaft ('Deg') & Others* (2011) eKLR where the Court of Appeal stated that:

> "This is an equitable doctrine. There are at least three prerequisites to the application of a doctrine, firstly, that the bargain must be oppressive that the very terms of the bargain reveals conduct which shocks the conscience of the court. Secondly, that the victim must have been suffering from certain types of bargaining weakness and thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that behaviour of the stronger party is morally reprehensible."

31. That it is evident that the bargain of the Appellant was stronger and the facts of the illegality also make the contract morally reprehensible. That the Court made a consideration of this and the impact of its judgement would have on not only the parties but also the public consumers of the products of the Appellant. That the judgement of the trial court was allowing the appellant to amend the loan facility to make it regular without interfering with the intention of the parties which was to lend money on interest for the appellant and the acquisition of a loan facility for the Respondent.

32. On the issue of regulation, ground 5 of the memorandum of appeal, the Respondent submitted that the *Banking Act* was used to illustrate that indeed the Defendant was regulated by the Central Bank of Kenya and that consequently; the provisions of the *Banking Act* were applicable in the circumstances of this case. That pre-ambula paragraph of the *Banking Act* provides that one of the objects of the *Banking Act* is to "Amend and consolidate the law regulating the business of banking in Kenya and for connected purposes." That section 2(c) of the *Banking Act* defines banking business to mean "the employing of money held on deposit or on current account, or any part of the money, by lending…" That by dint of engaging in lending business based on deposits taken from its clients, the Appellant carries on banking business. That therefore the Central Bank of Kenya regulates the Appellant Company. That the Appellant Company was a financial institution as defined by section 2 of the *Banking Act*: a company, other than a bank, which carries on and proposes to carry on financial business and includes any other company which the Minister may, by notice in the gazette, decree to be a financial institution for purposes of this Act.

33. That the Appellant through its witness testified further that the Company was issued with a Letter of No Objection in 2012 by the Central Bank of Kenya. That even though the Appellant was not a bank, it is still a financial institution as provided for in law and regulated by the Central Bank of Kenya otherwise the letter of no objection would not have been issued. That although the issue of the interest rates was not raised, the Respondent had raised the same with the representatives of the Appellant who had confirmed that the rates would be looked into but that never happened. That the Appellant's allegation that they are unregulated is false and the trial court aptly gave the rationale for its finding that the Appellant is a financial institution regulated by the Central Bank of Kenya.

34. On the third issue, the Respondent submitted that he discharged his legal burden of proof to the required threshold in a civil case: on a balance of convenience. That the trial court rightly held therefore that the formal validity of the loan contract was in doubt and gave the reasons. That the two parties were at different impressions as to what the various terms of the loan contract represented. That Brian who worked for the Appellant had informed the Respondent that the interest rates would be revised from

6.5% a month or 78% per year to 14% per annum. That the said evidence remains uncontroverted. That the Appellant transferred the Respondent's property without evidence of the requisite consent of the land control board deeming the transaction as illegal. The Respondent contends that he demonstrated on a balance of convenience that he established illegality on transfer of the suit property due to lack of following procedure.

35. On the final issue, the Respondent submitted that the Court did not rewrite the contract but rather invalidate some of the clauses. That in special circumstances, Courts can interfere with a contract. He sought to rely on the case of *Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Ltd* (2014) eKLR which case was relied on by the trial court. That in the said case the Court emphasized that exemption and stated thus:

> "Nevertheless, Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedural abuse during formation of the meaningful choice of either party."

36. He urged this Court to uphold the trial's finding by holding that courts can rewrite contracts in exceptions highlighted above and that the trial court applied the above legal principle and its exception correctly in the present case and procedural abuse. That the said abuse was manifest in the undisputed fact that the transfer of the suit property was done before the loan amount was disbursed. That the Appellant's loan officer, Brian, misrepresented facts to the Respondent in particular that the interest rate would be changed, which was false. That the trial Court observed that based on its analysis, serious doubt was cast on the validity of the contract and further, if two contrasting contracts could be enforced as a whole.

37. The Respondent concluded by submitting that this Court has powers and discretion to grant reliefs and that will set precedent in situations that call for it due to predatory lending practices that have left many individual and families at crossroads; in battles akin to David and Goliath battle. That upholding the trial court's decision is akin to protection of public interest: protection of the lowly from the mighty who act oppressively and unconscionably.

Determination

38. From the pleadings and submissions, the following issues arise for determination:

    a. Whether the Appellant is a financial institution under the *Banking Act*, CAP 488, Laws of Kenya;

    b. Whether the Appellant is governed by the Central Bank of Kenya;

    c. Whether the contract between the parties is valid;

    d. Whether the trial court rewrote the contract between the parties:

    e. Whether the appeal is merited; and

    f. Who pays for the costs of the appeal?

39. The main point of contention in this appeal is whether the Appellant is a financial institution as described under the Banking Cap 488 Laws of Kenya, hence the first issue. The Appellant has

submitted that it is not a financial institution as defined under the *Banking Act*, Cap 488 Laws of Kenya. Section 2 (1) of the *Banking Act* defines a financial institution as:

> " financial institution" means a company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of this Act;

40. The *Banking Act* in the same section also defines financial business as:

> " financial business" means—
>
> a. the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; and
>
> b. the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money;

41. The Appellant has distanced itself from the aforementioned definition and contends that it neither takes deposits from the public and neither has it been gazetted by the Minister as a financial institution. Justice Majanja in the case of Momentum Credit Limited (supra) stated thus:

> " ...In order to qualify as a financial institution, The Appellant must be gazetted as such by the Minister or be one that carries on or proposes to carry on financial business ad defined under the *Banking Act*. In order to qualify as a financial institution, it must accept money or deposit from members of the public and employ that money or part of it for lending or investment as contemplated under the Act..."

42. During cross-examination of Daniel Kariuki Wangai, the Defendant's Chief Operating Officer who testified as DW1, he stated that:

> " I am aware of the terminology predatory lending behaviours. The Defendant is a financial institution. It is not regulated by CBK. We are unregulated. The lending business in this country is not regulated...."

43. When the trial court sought clarification from DW1, he stated thus:

> " The defendant is a limited liability Co. registered under the Co. Act. I have looked at its memorandum and articles of association. One of the articles provides that we are a lending co. We are not a bank and not covered by the provisions of the *Banking Act*. We lend money, offer insurance, do guarantees for bid bond, performance bonds and advance payment. We were given a letter of no objection by CBK. It was issued in 2012."

44. From the aforementioned it is apparent that the Appellant is not a financial institution as described under the provisions of the *Banking Act*.

45. This leads us to the second issue. Despite the above finding, is the Appellant regulated by the Central Bank of Kenya? The Respondent has hammered on the fact that the letter of no objection was issued by the Central Bank of Kenya in favour of the Appellant in 2012 and stated that this essentially means that they are regulated by the Central Bank of Kenya. The other objects of the Central Bank of Kenya

are enumerated under section 4A of the *Central Bank of Kenya Act*, Cap 491 Laws of Kenya which provides that:

> " Without prejudice to the generality of section 4 the Bank shall: -
>
> a. formulate and implement foreign exchange policy;
>
> b. hold and manage its foreign exchange reserves;
>
> c. license and supervise authorised dealers;
>
> d. formulate and implement such policies as best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems;
>
> e. act as banker and adviser to, and as fiscal agent of the Government; and
>
> f. issue currency notes and coins."

46. The Appellant through DW1's testimony describes itself non-deposit taking microfinance institution. Such institutions are governed by the *Microfinance Act* No. 19 of 2006. The said Act at section 2 defines non-deposit taking microfinance business as:

> " non-deposit-taking microfinance business" means microfinance business, other than deposit-taking microfinance business;"

47. Section 3 of the Act provides that:

> (1) Subject to subsection (3), this Act shall apply to:
>
> a. every deposit-taking microfinance business;
>
> b. specified non-deposit-taking microfinance business, in the manner prescribed under subsection (2)(b);
>
> (2) For the purposes of subsection (1) (b), the Minister may make regulations:
>
> a. specifying the non-deposit-taking microfinance business to which that subsection applies; and
>
> b. prescribing measures for the conduct of the specified business

48. The Appellant contends that despite the proviso for formulation of guidelines by the Minister in the Act, the same have never been formulated and thus they remain unregulated. However, the *Microfinance Act* has provided that it applies to the institutions like the Appellant and such the Appellant is bound by the provisions of the Act. Section 3(2) (a) only required the Minister to list the business under which the section will apply to them. The letter of no objection issued by the Central Bank however does not intimate that the said institutions are governed by the Central Bank. That letter is a requirement for the registration of non-deposit taking microfinance institution.

49. So which body oversees and regulates non-deposit taking institutions? The Central Bank of Kenya (Amendment) Act No. 15 of 2021 introduced the regulation of digital lenders by the Central Bank of Kenya. Although the Appellant is not a digital lender, the High Court in the case of *Association of Micro-Finance Institutions Kenya (AMFIK) vs. The Central Bank of Kenya & 3 others* (Constitutional Petition E008 of 2022) [2022] KEHC 13053 (KLR), held that the Central Bank of Kenya (Digital

Credit Providers) Regulations, 2022 were not unconstitutional and reiterated the CBK's position that the DCP Regulations apply to all unregulated digital credit providers including non-deposit-taking microfinance institutions.

50. Currently non-deposit taking micro-finance institutions are regulated by the Central Bank of Kenya and the *Central Bank of Kenya (Digital Credit Providers) Regulations,* 2022 applied to them. However, the *Central Bank of Kenya (Amendment) Act* No. 15 of 2021 commenced on the 23rd of December, 2021 and the respective regulations in 2022. The present case had already been heard and determined by the trial court prior to the enactment of the said Act and Regulations. The principle of retrospectivity of the law therefore kicks in as the said Regulations cannot be applied to the loan agreement between the Appellant and the Respondent herein. As a matter of fact, at the time of entering into the agreement and subsequent filing of the present case, the Appellant was not regulated by the Central Bank of Kenya as no regulations had been passed to regulate non-deposit taking institutions. It thus means that at the time, the interest rates of the micro-credit institutions or corporations operating credit facilities were then not restricted by the law and their operations were based on principle that those involved had the bargaining power to negotiate for themselves and extract a fair rate. The issue of charging usury rates, or those above the legal rates thus did not apply at the time and the trial court was thus in error to take that route. That latitude however is no longer there as Banks, companies, micro-finance institutions or persons offering financial services are now subject to any restrictions/regulations that Central Bank may impose in the that business environment.

51. The terms of the contract between the parties was thus what should have been referred to in govern their dealings. This leads to the third issue: was the contract between the parties valid? In posing this question, I will be addressing two issues, which contract? The original contract that was negotiated and signed by both parties for a loan facility of 2.5 million or a subsequent arrangement in which Kshs. 1.5 million which was disbursed without prior negotiations about the amount but which was however spent by the Respondent anyway?

52. In regard to the loan facility of Kshs. 2.5 million, the Respondent applied for a loan facility from the Appellant. From the letters of offers produced by the parties (page 14 and 51 of the Record of Appeal) the terms of grant of the facility was outlined and the parties signed. A look at the letter of offer filed by the Respondent however indicates that the interest page was missing (page 2 of the Letter of Offer). The dates of the letters of offer are also different: with the one produced by the Appellant executed on the 17th of December, 2019 and that produced by the Respondent executed on the 11th of December, 2019.

53. Save for these differences, the parties agree that the loan facility was for KShs. 2,500,000 which was to be repaid in twelve equal monthly instalments of KShs. 370,833 per month. The parties executed the loan agreement dated 17th December, 2019.The Court in the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) held that:

> " ...When a person signed a document, that signature should denote an intention to be bound by the terms and conditions embodied in the signed document..."

54. The said contract between the parties was intended to be binding to them and as such the same is valid. The contract entered into was for a loan sum of Kshs. 2,500,000/- and this is the offer that the Respondent negotiated for and signed for crystallizing into an acceptance of the terms.

55. However, the Appellant confirmed both in his pleadings, and through the testimony of its representative during the trial before the trial court, it was only a loan of KShs. 1,500,000 that was

disbursed to the Respondent. Clearly, those were not the terms of the original contract that the Respondent had accepted by executing the letter of offer. Did this invalidate the initial contract? The author of *Hudson's Building and Engineering Contracts*, 10th Edition, at page 22 postulates: -

> " A simple contract can be validly varied by the subsequent agreement of the parties, so long as there is consideration to support the variation agreement. If at the time when the variation agreement is made, obligations remain partly unperformed under the original contract by both parties, there will usually be consideration for the new agreement. If, however, one party to the contract has wholly performed his obligations, and therefore agrees without advantage to himself or detriment to the other party to forgo some part of the performance of the outstanding obligations of the other party, there will be no consideration to support his agreement to do so. The variation agreement will therefore be unenforceable if not under seal and the original contract requiring full performance will remain...."

56. The contract amount was a main term of the contract which should not have been varied by unilateral act of one party without the involvement of the other party. The letters of offer produced indicate the facility was for KShs. 2,500,000 and so the monthly calculations and the interest rates were based on that amount. For instance, did the variation also affect the monthly payments or rate of interest? In the case of *Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna* Nairobi HCCC No. 1601 of 1999, the Court explained:

> " ... Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract. "

57. In another case of *Gimalu Estates Ltd & 4 others -vs- International Finance Corporation & another* [2006] eKLR, Justice Emukule referred to various English decisions and observed that;

> "Parties to a contract effect a variation of the contract by modifying or altering its terms by mutual agreement"
>
> ...a mere unilateral notification by one party to the other in the absence of any agreement cannot constitute a variation of contract. (see Cowey vs. Liberation Operations Ltd, [1966} 2 Lloyds' Rep. 45).
>
> ...So the form of variation is important to determine whether there has been a mere variation of terms or a rescission. The effect of a subsequent agreement – whether it constitutes a variation or a rescission depends upon the extent to which it alters the terms of the original contract. In the case of MORRIS -VS- BARON & CO. [1918] A.C. 1, 19, Lord Haldane said that, for a rescission, there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which leave it still subsisting."

58. It is thus the finding of this court the unilateral action taken by the Appellant to vary a fundamental term of the contract invalidated the initial loan agreement for KShs. 2,500,000/- considering that no letters of variation were prepared and no new contracts executed. The Appellant purported to vary the terms of the loan agreement unilaterally without involving the Respondent. The terms for the issuance of the loan of KShs. 1,500,000 was in effect a new offer by the Appellant which was not subjected to any prior negotiations with the offeree (Respondent) as was the original negotiations where the terms

were worked out and agreed. It cannot be assumed that the terms of the first agreement applied mutatis mutandis to the second loan agreement in so far as the interest rate, duration of payment or terms of repayments are concerned as this was an entirely different facility. In effect, there was no contract in respect of Kshs. 1,500,000 spelling out any specific terms that were agreed between them. In the absence of any mutual document indicating that loan of Kshs. 1,500,000 was to be governed by the terms of the previously executed contract, the court cannot import the terms in this particular agreement as this was a separate arrangement for which consensus ad idem was also necessary for the agreement to be binding and enforceable.

59. It may be argued that the Respondent was impliedly bound by the said terms because he commenced the repayment of the loan without dealing with the variation. The Respondent however maintained his repayment was based on the original contract and he hoped the balance of Kshs. 1000,0000- which he had negotiated would be disbursed. He was unaware that the appellant had varied that until very late. From the evidence it is thus clear that he never accepted this unilateral variation as he even said he followed up with the Appellant to fulfil its part of bargain by disbursing the balance without success.

60. In respect of the amount of Kshs. 1,500,000/- the minds of both parties were thus in cross-purposes, it cannot be said that there was a valid contract in respect of this amount since there was no consensus ad idem on what terms that applied to the amount. The appellant ought to have given the Respondent an opportunity to negotiate the terms afresh including deciding on whether to provide same securities, whether to maintain same monthly payments or interest rates, or whether the loan served the purpose and such other issues instead of leaving him in darkness only to realise the position of the Appellant later after he had spent the money disbursed that the original contract had been departed from and was no going to get the entire loan facility he had signed for.

61. Without consensus ad idem, my finding is that the parties were not bound by the terms of the purported loan agreement for KShs. 1,500,000 as this this court is incapable of imputing a contract between parties where non-existed for lack of meeting of the minds. The Appellant contends that the trial court rewrote the terms OF the contract between the parties but there was no contract to re-write that one could speak of in the context of this case.

62. In light of the foregoing, the orders of the trial court are varied and substituted as follows:

    a. There being no valid contract between the parties in respect of the purported agreement of Kshs. 1,500,000/- loan, this court finds that there was no enforceable contract between the parties.

    b. Any money had and received by the Respondent from the Appellant under the purported loan facility shall be refunded to the Appellant within 45 days from the date hereof failing which the Appellant shall be at liberty to execute for the amount. There was no consensus ad idem on the terms of the disbursement of the said amount, hence the applicable rate of interest will be the court rate from the date of disbursement.

    c. The security offered by the Respondent-Thika Municipality/Block 19/1042 was premised on the original contract for a loan of Kshs. 2,500,000/- which the Appellant unilaterally abandoned to the detriment of the Respondent hence any transfer effected in respect of this property by the Appellant is null and void as there was no other valid agreement violated by the Respondent to necessitate the loss of his property. The property shall thus revert to the Respondent.

    d. As the Appellant has partly succeeded in certain aspects it challenged in this appeal, each party shall bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH APRIL, 2023.

L.N MUGAMBI

JUDGE

In presence of:

Appellant-

Respondent-

Advocate for Appellant- no appearance

Advocate for Respondent- Mr. Gacharia

Court Assistant- Alice

Court

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

L.N MUGAMBI

JUDGE

Mr. Gachau – we request we get certified copy of judgment.

Court – certified copy of judgment to be availed on payment of applicable court fees.

L.N MUGAMBI

JUDGE