



**Momentum Credit Limited v Ambwere (Commercial Appeal E137 of 2022)
[2023] KEHC 17812 (KLR) (Commercial and Tax) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17812 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E137 OF 2022**

FG MUGAMBI, J

MAY 19, 2023

BETWEEN

MOMENTUM CREDIT LIMITED APPELLANT

AND

COLLINS AMBWERE RESPONDENT

JUDGMENT

Brief Facts

1. This is an appeal arising out of the judgment of the small claims court dismissing the appellants claim for Kshs. 209,508/=. The dispute arose from a facility advanced to the respondent on 27th November 2020 for a sum of Kshs. 116,800/= which was secured by a motor vehicle registration Number KBF 401B. The amount was repayable within a period of 18 months in monthly instalments of Kshs. 11,161/= from 4th January 2021 to 3rd June 2022.
2. The respondent fell into arrears amounting to Kshs. 389,508/= and the appellant realized the security where the vehicle was sold at Kshs. 180,000/= leaving a balance of Kshs. 209,508/=. The appellant filed a suit against the respondent to realize the balance and a judgment was delivered on 15th September 2022 dismissing the appellants claim.
3. Aggrieved by the said judgement, the appellant filed the present appeal vide a Memorandum of Appeal dated 29th September 2022 citing the following grounds;
 - i. The Learned Magistrate erred in law and fact by finding that the interest rate on the loan amount was not specified and therefore unenforceable.



- ii. The Learned Magistrate erred in law and fact by misdirecting himself on the application of the daily interest rate of 0.33% on the outstanding installment amount.
 - iii. The Learned Magistrate erred in law and fact by misdirecting himself on the interpretation of the Respondent's statement of account by stating that the outstanding loan amount as of the 4th January 2021 had tripled to Kshs. 365,125/=
 - iv. The Learned Magistrate erred in law and fact by failing to take into account the fact that the respondent never made a single installment repayment to the facility as contractually obliged nor enter appearance in the trial court.
 - v. The Learned Magistrate erred in law and fact by taking into account the issue of interest being unconscionable despite neither of the parties to suit raising this issue in their pleadings.
 - vi. The Learned Magistrate erred in law and fact by failing to take into account that the interest applied on the Respondent's facility on the 4th January 2021, 3rd of March 2021 and 5th of April 2021 amounted to 4.68%, 4.36% and 3.48% respectively.
 - vii. The learned Magistrate erred in law and fact by dismissing the appellant's claim on account of unreasonable and unconscionable interest.
4. The orders sought in the appeal are as follows;
- i. The appeal be allowed and this honorable court set aside the judgement of the small claims court in its entirety.
 - ii. Costs of this appeal be awarded to the appellant
5. The appellant's case was that it was a non-deposit taking microfinance institution which relied on shareholder capital to grant facilities to its customers. On this basis the appellant's view was that it was not regulated by section 44A of the *Banking Act*. Counsel submitted that the appellant was regulated by contract law since there were no regulations governing the business of money lending for Micro Finance Institutions.
6. With respect to the interest charged, it was the appellant's submissions that the loan application form clearly stated that daily interest would be charged at the rate of 0.33% on outstanding instalments. The appellant faulted the Adjudicator for failing to take into consideration that Kshs. 365,125/= was inclusive of repossession charges, tracking fees, valuation fees and bounced cheques. It was contended that the issue of unconscionable interest had not been raised at the trial and therefore not pleaded. Further, it was the appellant's contention that the respondent had the burden to prove unconscionable interest rate.
7. The respondent on his part filed a replying affidavit dated 10th January 2023 and written submissions dated 2nd February 2023. The respondent's case was that he took out a loan with the appellant for Kshs. 116,800/= and the loan was to be repaid over a period of 18 months. According to the respondent the loan agreement signed by the parties on 30th October 2020 did not contain a provision of interest. It was the respondent's submissions that the interest on the principal sum had increased exponentially as it stood at Kshs. 365,125/= against the principal sum of Kshs. 100,000/=



8. The respondent's view was that the parties were at liberty to agree on the interest rate chargeable for a period of time and when the loan became non performing the interest would be subject to the in duplum principle.

Analysis

9. Before I proceed to determine the appeal, I am conscious of the limitation placed on the jurisdiction of this court by section 38(1) of the Small Claims Court which states 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.

10. I have considered the pleadings, submissions filed by Counsel and authorities cited in support of their cases. The first issue that falls for determination is whether the loan agreement is enforceable. The appellant faults the finding of the Learned Adjudicator for finding that the loan agreement was null and void and therefore unenforceable.

11. The Court of Appeal dealt with the issue of unconscionable contracts between a borrower and a lender and particularly on the issue of interest in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR where it was stated as follows:-

“It is not for the Court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd*. Civil Appeal No. 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.”

12. Further, in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR:- the Court again emphasized as follows:-

This Court has never shied away from interfering with unconscionable contracts. In *Kenya Commercial Finance Company Ltd v Ngeny & Another* [2002] 1KLR it stated:

“The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions.”

13. The Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298 states of unconscionability:

“Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. ... The jurisdiction of the courts to set aside



is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident."

14. I would finally add that it is an implied term of the contract between a borrower and a lender that the rates of interest would not be set dishonestly, capriciously or arbitrarily. *Paragon Finance PLC v Nash & Another* as this forms the basis for expectation by both parties.
15. From a perusal of the documents, what appears to be in issue is whether the trial court erred in dismissing the appellants case based on the interest charged on the facility granted to the respondent.
16. I have perused the documents that form part of the Record of Appeal in this matter. The offer letter which appears on pg 17 of the record (there is a missing page) was signed on 30th October 2020. The loan agreement does not appear to have been completely filled out and importantly does not bear the borrower's signature. The loan agreement form states at section 7 that there will be a daily interest on outstanding instalments charged at the rate of 0.33%. This amount is restated in the statutory declaration signed by the parties on 30th October 2020. Paragraph 6 of the statutory declaration states as follows:

That I shall pay to MCL, in addition to the applicable instalment interest, on any instalment(s) or part instalments which remain unpaid, a roll over interest fee of 0.33% per day of the outstanding instalment from the 4th day after the due date.
17. This is the closest that the loan agreement comes to disclosing the cost of the loan. Beyond the 0.33%, no other references are made to the interest rate payable by the borrower.
18. The appellant states at paragraph 2(a) of its submissions filed in court that interest rates would be charged at a rate of 4% per month on the reducing balance. The appellant states that this amount was indicated in the documents filed in the lower court but does not point the court to any specific section of the loan document.
19. I take note that this amount was introduced at trial by a witness of the appellant who also stated that the interest chargeable on the loan was 4% per month. To further compound the uncertainty, the appellant confirms at page 20 of its submissions that interest rates were charged at the rate of 4.68%, 4.36% and 3.48%, over the months of January, March and April 2021. The variation on interest rate has not been explained.
20. The first question that the court must answer is whether from this information, there was a meeting of the minds in this contract. The appellant has asked this court not to rewrite the contract between them. The appellant has further averred that the contract was not entered into under duress. That said, it has been said time and again that courts cannot be used to assist individuals who wish to take advantage of the credit system. It is trite that when a contract is entered into between parties, they should both be aware of what they are entering into and particularly the weaker party in the contract.
21. The decisions that I have referred to say it all. This court cannot shut its eyes to an allegation of irregularity so as to aid a party to rely on that irregularity. The varying of interest with no explanation was irregular and the appellant should not be allowed to benefit from the same. In addition to this, there is a daily penalty interest of 0.33% on the outstanding amount. This on quick calculation amounts to penalty charges of 9.9% per month and 119% per year, as observed by the Learned Adjudicator. This may have been a relatively small loan of Kshs. 100,000/= which had in just 7 months ballooned to a colossal sum and tripled the loan amount, because of the interest rate and penalties charged.



22. Having found that the contract was unconscionable and that there was no meeting of the borrower and the lender's mind, I must deal with the effect of that. I am aware that the respondent did not make any repayment towards the loan. I am also aware that the appellant has sold the security and recovered part of the amount due. The appellant has come to this court as he wishes to benefit further and claim the rest of the amounts due.
23. The Court of Appeal in *Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR Dealt with the issue of void contracts. The Court cited a passage by Nyarangi, JA from the case of *Archbalds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, at page 388 as follows:-

“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”

Determination and orders

24. In conclusion, I do not find any fault with the finding of the Learned Adjudicator and the discussion on whether or not the in duplum rule applies will therefore not be relevant as the contract is void ab initio.
25. The upshot is that I find no merit in the appeal and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 19TH DAY OF MAY 2023

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

