



**Molyn Credit Limited v Kimwele & another (Commercial Appeal E052 of 2021)  
[2023] KEHC 4052 (KLR) (Commercial and Tax) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 4052 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E052 OF 2021**

**DAS MAJANJA, J**

**MAY 4, 2023**

**BETWEEN**

**MOLYN CREDIT LIMITED ..... APPELLANT**

**AND**

**LYDIA NDANU KIMWELE ..... 1<sup>ST</sup> RESPONDENT**

**CHRISTINE NJERU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. D. O. Mbeja, PM dated 4th June 2021 at the Nairobi Magistrates Court, Milimani in CMCC No. 7923 of 2017)*

**JUDGMENT**

1. This is an appeal against the judgment of the Subordinate Court dismissing the Appellant's suit against the Respondents and the Respondents' counterclaim against the Appellant.
2. In its plaint dated November 6, 2017, the Appellant filed suit against the Respondents seeking judgment for Kshs 1,081,133.00 being monies advanced to the 1<sup>st</sup> Respondent and guaranteed by the 2<sup>nd</sup> Respondent. It stated that on request of the 1<sup>st</sup> Respondent on April 16, 2012 and on the strength of a Credit Application and Agreement ("the Agreement") executed between them, it advanced the 1<sup>st</sup> Respondent Kshs 100,000.00. It averred that among the terms agreed were the sum would be repaid over a period of 24 months in monthly installments of Kshs 7,968.00 and that the loan would be charged interest at 6% per month on a reducing balance basis and a penalty charge of 2% would be charged in default of the terms agreed. It was also agreed that the 2<sup>nd</sup> Respondent would guarantee the loan by executing a Guarantee Commitment Form undertaking to repay the amount of the loan plus interest that would remain unpaid by the 1<sup>st</sup> Respondent.



3. The Appellant pleaded that the 1<sup>st</sup> Respondent only paid 12 installments and defaulted in making further payments hence it was entitled to claim the outstanding amount together with interest thereon in accordance with the Agreement.
4. The Respondent filed the Statement of Defence dated December 15, 2017. The 1<sup>st</sup> Respondent admitted that she was advanced Kshs 100,000.00 as alleged but denied the interest claimed by the Appellant. She further pleaded that the Appellant did not, “make full disclosure of the interest rate chargeable on the loan facility in that at the time of signed the Credit Application and Agreement Form, Paragraphs 1, 2 and 3 of Section 10 on Terms and Conditions on the interest were blank.” She stated that she has fully paid Kshs 191,232.00 as per the loan agreement. The 2<sup>nd</sup> Respondent admitted that she was the 1<sup>st</sup> Respondent’s guarantor but denied any liability.
5. The Respondents also stated that they learnt from the Appellant that their employer was authorized to deduct monthly installments from their salaries and remit the same to the Appellant. They deny receiving any notice of default and claim that they were never issued with proper statements of account. They urged the court to dismiss the Appellant’s claim.
6. In the counterclaim, the 1<sup>st</sup> Respondent contended that she overpaid the loan facility by Kshs 11,900.00 for which she sought a refund. She claimed that the Appellant wrongfully referred her to the Credit Reference Bureau (CRB) where she was listed as a defaulter which affected her financial status hence she prays that the court direct that her name be removed or delisted from the CRB.
7. At the hearing, the Appellant called its director, Moses Anyango (DW 1) as its witness while the Respondents testified on their own behalf. After considering the evidence and submissions, the court rendered its judgment. The court held that from the evidence on record, the 1<sup>st</sup> Respondent had cleared the debt and that the interest charged was exaggerated and that it was never disclosed when the Agreement was executed by the 1<sup>st</sup> Respondent. The court also held that there was no evidence that the 1<sup>st</sup> Respondent was not given a copy of the credit application form dated April 16, 2012. In the circumstances the court held that the Appellant had not proved its case on a balance of probabilities. It likewise dismissed the counterclaim.
8. The Appellant’s case is based on the Memorandum of Appeal dated June 21, 2021. Both parties filed written submissions in support of their respective positions.
9. The thrust of the Appellant’s case is that the trial court erred in holding that it had failed to prove its case on the balance of probabilities. It complains that the trial court failed to consider the fact that the parties had entered into the Agreement in particular holding that the Appellant had failed to provide the 1<sup>st</sup> Respondent with a copy of the Agreement and that the trial court erred in holding that the 1<sup>st</sup> Respondent had fully paid the loan. It generally assails the trial court for ignoring the contractual obligations of the parties despite the clear provisions of the Agreement.
10. As this is a first appeal from the Subordinate Court, this court is guided by the established principle set out in several decisions that the first appellate court is entitled to review the record before the trial court and come to an independent conclusion as whether the findings of the trial court are correct but at all times making allowance for the fact that it never heard or saw the witnesses testify so as to assess their demeanour (see *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR and *Selle and Another v Associated Motor Boat Company Limited and Others* [1968] EA 123).
11. I have considered the material on record and this issue for resolution is whether the Appellant proved its case that the Respondents owed it Kshs 1,081,133.00 as a result of default on the loan. It is not



in dispute the parties entered into an Agreement. Although the trial magistrate held that a copy of the Agreement was not given to the 1<sup>st</sup> Respondent, this is not supported by the pleadings as the 1<sup>st</sup> Respondent, in her defence, admits the Agreement and its terms. Even if she did not receive a copy of the Agreement, this does not invalidate it as she does not deny that she executed it and took the benefit of the receiving the Kshs 100,000.00 as agreed.

12. The next question for resolution is what were the terms of the Agreement. The Appellant relied on and produced the Agreement which is titled, “Credit Application and Agreement Form No 3790.” The relevant part of the application at section 6 states as follows:

“I Lydia Ndanu Kimwele hereby apply for a loan of Kshs 100,000 subject to the terms and condition in this Credit Application and Agreement Form.

I irrevocably instruct you my employer KTDC to deduct equal monthly installments of Ksh 7,968 over a period of 24 months totaling Kshs 191,232 from my salary and pay these amounts to Molyn Credit Limited on/or before the last day of every month until such time as the full amount of Kshs 191,232 which I am indebted to Molyn Credit Limited has been settled.

Signature Lydia Ndanu Kimwele Date April 16, 2012

13. In order to support its case, the Appellant produced the Agreement, the Guarantee Commitment Form executed by the 2<sup>nd</sup> Respondent, copies of the Respondents’ identification cards and a 2-page statement of account running from April 18, 2012 to September 25, 2019 showing a balance of Kshs 1,081,133.00. When cross-examined, PW 1 stated that, “The defendant paid Kshs 203,131 to me in total. The amount exceeds the total amount by Kshs 11,899.00.” Thus and by the Appellant’s own admission, the 1<sup>st</sup> Respondent paid off the amount of Kshs 191, 232.00 as stated in the Agreement.
14. The issue in contention was whether the Appellant was entitled to claim interest, whether on the principal amount and default interest. The Appellant claimed interest at 6% per month on a reducing balance basis. In his testimony, PW 1 stated that it charges interest on the amount it lends and the amount is calculated in accordance with the Agreement. The Respondents denied that the Agreement set out the rate of interest.
15. A look at the Agreement, whose material contents I have set out above, does not provide for interest in the manner pleaded by the Appellant. Since the 1<sup>st</sup> Respondent disputed the issue of interest, the Appellant was duty bound to prove that it was contractually entitled to charge interest in accordance with the Agreement. The amount borrowed was, “subject to the terms and conditions in this Credit Application and Agreement Form.” The Agreement produced did not contain any other terms setting out the terms of interest pleaded by the Appellant. It was clear and unequivocal on the amount borrowed and to be repaid, the monthly installments to be paid and the period of payment. Further, the Agreement produced did not refer to or incorporate any other terms and conditions nor did the Appellant produce such terms and condition so incorporated as evidence.
16. From the totality of the evidence, oral and documentary, I find and hold that the Appellant did not prove that it was entitled to charge any interest as pleaded in the plaint. Having admitted that the 1<sup>st</sup> Respondent had paid the loan amount and had indeed overpaid the same, I hold that the trial magistrate was correct to conclude that that the Respondents were not indebted to the Appellant.
17. I therefore dismiss the appeal. The Respondents did not cross-appeal against dismissal of their counterclaim hence the decision of the trial court shall remain undisturbed. The Appellant shall pay the Respondents costs of the appeal assessed at Kshs 40,000.00 only.



**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MAY 2023.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Ms Mwikali instructed by Mugo Githinji and Company Advocates for the Appellant.

Mr Laichena instructed by Laichena Mugambi and Ayieko Advocates LLP for the Respondents.

