Jelangant & another v Mwananchi Credit Limited & another (Civil Case 374 of 2018) [2023] KEHC 19922 (KLR) (Commercial and Tax) (10 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 374 OF 2018

A MABEYA, J

JULY 10, 2023

BETWEEN

EUNICE JELANGANT ..... 1ST PLAINTIFF

GEORGE M. KHANIRI ..... 2ND PLAINTIFF

AND

MWANANCHI CREDIT LIMITED ..... 1ST DEFENDANT

MISTAN AUCTIONEERS ..... 2ND DEFENDANT

JUDGMENT

1. By a plaint dated July 18, 2017 and amended on December 5, 2022, the plaintiff sought various prayers against the defendants. These included; a permanent injunction to restrain them from selling or dealing with the suit property known as Nairobi Block/82/7303; a declaration that the interest levied of 10% per month contravened the in duplum rule and was illegal, unconscionable and oppressive; a declaration that the principal amount was paid and the charge dated November 11, 2016 over the property was null and void, a declaration that the penalty and default charges clogged the plaintiffs equity of redemption, an order applying interest at 12% p.a on the principal sum of Kshs 7 million, a declaration that the public auction scheduled for 25/07/2017 was illegal together with costs of the suit.

2. The defendants filed a joint statement of defence and counterclaim dated August 17, 2017. They denied the plaintiff's claim and prayed for judgment against the plaintiffs for declarations that there was a legal charge dated November 11, 2016 over the suit property, that the 2nd plaintiff owed the 1st defendant Kshs 15,005,121/67 as at June 12, 2017 and for payment of the said sum failure of which the suit property be sold by public auction.

3. The dispute between the parties related to the loan agreement between the 2nd plaintiff and the 1st defendant dated November 9, 2016 for Kshs 7 million. The same was repayable in 2 monthly instalments of Kshs 700,000/= on December 9, 2016 and Kshs 7,700,000/= on January 9, 2017, respectively.

4. The parties dispute was on clause 4 and 5 of the agreement which provided that, in case of default, the 2nd plaintiff would pay interest at 10% per month and incur penalty charges for continued default. The plaintiffs' case was that though the agreement provided that the 1st defendant was to charge the property, it failed to do so and had no enforceable rights over the plaintiff.

5. The plaintiff defaulted and on January 12, 2017, the 1st defendant demanded payment of Kshs 9,317,000/-. On July 10, 2017, the 1st defendant instructed the 2nd defendant to advertise the property for sale. The plaintiffs obtained injunctive orders on July 21, 2017 stopping the sale on condition that they paid the admitted principal sum of Kshs 7million within 60 days.

6. The plaintiffs paid the principal sum, albeit late and the question for trial was the interest payable. On October 12, 2022, the court directed the parties to file submissions on interest. The plaintiffs' submissions were dated December 5, 2022 whereas those of the defendants were dated February 14, 2023.

7. The plaintiff submitted that the 10% monthly interest rate offended the in duplum rule which was applicable to the 1st defendant. That the interest rate was unconscionable and exorbitant as it translated to 120% per annum and was thus commercially unreasonable and immoral. That the harsh conditions on the repayment period and interest imposed a heavy burden on the 2nd plaintiff and the court could interfere where the bargain was unduly harsh and overwhelmingly in favor of one party.

8. That the agreement did not provide for the penalty charges and it was unclear how they were arrived at. That the 1st defendant's computation clogged the 2nd plaintiff's equity of redemption.

9. The defendant on the other hand submitted that it was not for courts to re-write contracts between parties. That the 2nd plaintiff voluntarily accepted the terms of the agreement.

10. On in duplum, the defendants submitted that the 1st defendant was a non-deposit taking micro finance company that issued loans against a collateral thus the in duplum rule was inapplicable to it and neither was the 1st defendant regulated by the *Microfinance Act* cap 493D. That the 1st defendant was also not listed in section 2 of the *Central Bank Act* in its schedule of banks and financial institutions thus the Act was inapplicable. That the agreement was thus regulated by general principles of contract law.

11. That 10% interest was thus chargeable having been a term that was voluntarily agreed to by the plaintiff. That the payable amount per month was Kshs 70,000/- multiplied by 16 months thus Kshs 11,200,000/= and penalties which arrived to the amount claimed by the 1st defendant.

12. That if this court found that the rule was applicable, then the amount payable to the 1st defendant for interest was Kshs 7 million.

13. This court has considered the submissions, pleadings and evidence before it. The issues for determination are whether the 1st defendant is bound by the in duplum rule such that the 10% monthly interest rate is illegal, and whether the 10% interest rate is unconscionable.

14. "*In duplum*" is a latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced, it ceases to accrue.

15. The defendants contended that the in duplum rule was not applicable to it as it was not regulated under the *Banking Act*. The court is aware of the decision in *Desires Derive Ltd v Britam Life Assurance Co (K) Ltd* (2016) eKLR, wherein it was held that the rule was only applicable in the circumstances of banks only.

16. There has been different interpretations on the application of this rule as seen in various cases including *Lee G Muthoga v Habib Zurich Finance (K) Limited & another* [2016] eKLR and *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* [2019] eKLR.

17. In *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* (supra), the Court of Appeal held: -

> "The *In duplum* rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides".

18. In *Mugure & 2 others v Higher Education Loans Board* (Petition E002 of 2021) [2022] KEHC 11951 (KLR) (Civ) (19 August 2022) (Judgment), the court held that: -

> "In my view, the rule was introduced in our Laws to tame the appetite of Lenders who had made recovery of interest on advances a cash cow. Simply put, the Legislature was expressing its displeasure with lenders who left amounts of advances to go over the roof due to interest before pouncing on the hapless borrowers.
>
> It was intended to protect borrowers from exorbitant interest accumulation on loans and limit the amount recoverable by a lender on a defaulted facility to no more than double the principal owing when the loan has become non-performing plus recovery expenses.
>
> In this regard, I hold that being of public interest, the in duplum rule will be applicable for those lending monies as it does to banks"

19. This court reiterates the foregoing here. In its opinion, the in duplum rule was a principle that was imported into our laws to address a social and public interest issue wherein lenders would target defaulters as profit making machines. The rule is an answer to the need to have a reprieve for borrowers by doing away with exploitation through ensuring that lenders, be they banks, unregulated institutions or private lenders, are motivated to recover debts owed at the earliest opportunity and are limited in what they can recover.

20. In this regard, I hold that the rule is not only applicable to banks and financial institutions under the *Banking Act* but it extends to all lenders. A narrow interpretation of the application of the rule will defeat justice. It will be discriminatory in that, those who borrow from banks will enjoy greater protection leaving those borrowing from elsewhere exposed. Borrowing is borrowing and it would be inequitable for one group in society to be treated differently.

21. The 1st defendant lends money to Kenyans against collaterals and recovers the same at an interest. Being a lender who earns an interest, the same is subject to the rule.

22. This court is not the first to arrive at a similar finding. In *Francis Mbaria Wambugu v Jijenge Credit Limited* [2020] eKLR, the court found that a microfinance institution was bound by the in duplum rule and stated: -

> " The 1st respondent though a registered as a microfinance institution [see annexure JCL 1] under the *Microfinance Act* to operate as a financial institution is on the face of it not exempt from the provisions of section 44A of the *Banking Act*. The applicant was loaned a sum of Kshs 3,700,000/= in May 2018 and by July 2018 the loan was rendered non -performing due to his default in repayment. His default prompted the issuance of notices on July 4, 2018, July 12, 2018 and other demand notices all the way to November 2018. By the date of the scheduled auction, just over 7 months since default, the Applicant's total debt stood at a staggering Kshs 100,000,000/= and as at May 2019 had risen to Kshs 103,347,960/= despite rent collections amounting to Kshs 1.5M odd and payment of Kshs 400,000/= odd by the applicant. His complaint that he may never be able to repay the debt and therefore redeem his charged property does not, in view of the foregoing, appear an exaggeration."

23. The upshot is that the in duplum rule is applicable to the 1st defendant. Consequently, once the 10% per month interest was applied and the amount due surpassed the principal amount, it contravened the rule.

24. The second issue also related to the 10% per month interest rate. The plaintiffs submitted that the rate was unconscionable and exorbitant and that it clogged their equity of redemption.

25. The principal loan amount was Kshs 7 million which has been repaid. The defendant demanded Kshs 15,005,121,67 as at June 12, 2017 over and above the principal sum. The court is being asked to find that the application of that rate of interest as unconscionable. It was also submitted that the agreement did not provide for penalties and the 1st defendant could not explain how the same were calculated.

26. In *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* (2014) eKLR, the Court of Appeal stated: -

> " It is not for the court to rewrite a contract for the parties. As this court held in *National Bank of Kenya Ltd v 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."

27. Further, in the case of *John G. Kamunyu & another v Safari 'M' Park Motors* (2013) eKLR where the plaintiff's argument was that the loan agreement entered into was unconscionable due to the usurious compounded monthly interest rates of 30%, the court entered judgment in favour of the defendant for the loan advanced to the plaintiff together with interests at court rate. The court stated: -

> " This section (section 44A *Banking Act*) provides a statutory application of the in duplum rule to the banking sector, which rule basically provides that interest stops running when the unpaid interest equals the outstanding capital amount. I find that this rule is also applicable

in the present case as it seeks to prevent lending contracts which provide usurious rates of interest. The rate of interest in the present case was therefore unconscionable to the extent that it provided for payment of interest that considerably exceeded the amount outstanding as the principal sum."

28. In the present case, the loan advanced was Kshs 7 million which has already been repaid. The 1st defendant demands a staggering Kshs 15,005,121,67 as interest and penalties as at June 12, 2017. The defendant claims interest until judgment. That would be a remarkable amount.

29. An interest rate of 120% per annum in my view would be unconscionable and oppressive if the loan repayment was for a longer period. In *John G. Kamunyu & another v Safari 'M' Park Motors* (2013) eKLR, the court stated that: -

> " The loan advanced to the plaintiff was Kshs 100,000/-. Upon default it would attract 100% per month. The rule is applicable in the present case. An interest rate of 100% is no doubt unconscionable as it amounts to doubling the amount advanced on monthly basis as long as the amount remains unpaid. It is indeed excessive, oppressive and unenforceable in law. The court will hesitate to enforce such contracts even though voluntarily entered."

30. It is thus apparent that a court of law will not interfere with contracts entered into by two consenting parties and the interest agreed upon unless the terms are on the face of it illegal, unconscionable, oppressive and fraudulent. It will also interfere where the terms amount to unjust enrichment at the expense of a desperate borrower.

31. In the present case however, it is very clear that the plaintiffs entered into the contract well knowing what they were doing. The high interest rate charged was due to the short repayment period of 2 months. That contract in my view was not unconscionable until the default made the amount due exceed the principal sum.

32. Further, I find that the parties agreed that default charges would be levied on the outstanding amount. However, since the contract was silent on how it would be computed, the same could not be charged by the defendant. The clause for the charging of default charges therefore became in-operative and unenforceable uncertainty. The high rate of interest charged together with the default charges that were levied thereby clogged the plaintiffs' equity of redemption.

33. The upshot is that the plaintiffs have been able to prove that the terms of the contract were unconscionable. However, a court of law cannot allow a party who has willingly entered into a lawful contract to bolt therefrom unless there was fraud.

34. In this case, I make a finding that in view of the application of the in duplum rule, the defendant is entitled to recover from the plaintiffs a maximum of Kshs 7 million only.

35. Accordingly, judgment is hereby entered for the defendant against the plaintiffs for Kshs 7 million only. There will be no more interest. For reasons that the plaintiffs were partially successful, each party shall bear own costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE