



**Swift Capital Limited v Chandi (Appeal E179 of 2022) [2023] KEHC 22502 (KLR)
(Commercial and Tax) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
APPEAL E179 OF 2022
FG MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

SWIFT CAPITAL LIMITED APPELLANT

AND

ELISON MUTUNGATI SHEIKH CHANDI RESPONDENT

JUDGMENT

Brief Facts

1. This is an appeal arising from the judgment of the Small Claims Court delivered on November 11, 2022 by Honourable Keyne G. Odhiambo. The dispute between the parties emanated from a loan of Kshs. 432,000/= advanced to the respondent by the appellant on November 27, 2021 at an interest rate of 5% per month. Upon default of the loan, the appellant filed a statement of claim before the adjudicator seeking judgment against the respondent for Kshs. 729,502.27. Judgment was delivered in favour of the appellant but for a reduced amount of Kshs. 209,900/=.
2. Aggrieved by the said judgment, the appellant lodged this appeal on November 22, 2022 citing the following grounds of appeal:
 - i. That the learned magistrate erred in law by disregarding the laws governing the Small Claims Court in relation to the claimant's case.
 - ii. That the learned magistrate misdirected himself by disregarding the laws protecting and governing the sanctity of a contract by not awarding interests and penalties on the loan that was taken up by the respondent.
 - iii. That the learned magistrate erred in law by stating that the interest under the contract between the claimant and respondent was unconscionable



- iv. That the learned magistrate erred in law by not applying ALL the laws and rules governing the doctrine of equity in so far as the facts of this case are concerned
 - v. That the learned Magistrate erred in law by disregarding the law on stare decisis in relation to the claimant's case.
 - vi. That the learned magistrate erred in law by disregarding the laws of evidence in relation to the claimant's case.
3. In its submissions the appellant stated that the adjudicator erred in disregarding the High Court's pronouncement on matters regarding interest rates and penalties. Further it was the appellant's submissions that the adjudicator in giving an award that was less than what was requested, went against the laws of equity. Counsel submitted that the adjudicator rewrote the terms of the contract by failing to award interest.
 4. The respondent filed grounds of opposition dated February 27, 2023 and submissions dated July 10, 2023. Counsel submitted that there was no error on the part of the adjudicator in holding that the interest charged was unconscionable. The respondent stated that the penalty interest that would accrue weekly at the rate of 5% per week in the event of default was unconscionable and unreasonable. It was the respondent's submissions that the interest rate would translate to 60% per annum.

Analysis

5. I have carefully considered the totality of the pleadings, evidence and the written submissions of rival parties. Going by the decision in *Selle v Associates Motor Boat & Co*, [1968] EA 123 this court has a duty to examine matters both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand.
6. The main issue for determination is whether the appeal is meritorious. From the proceedings before the adjudicator the dispute between the parties was premised on a breach of contract between a borrower and lender.
7. It is common ground that the parties entered into a loan agreement dated November 29, 2021. The terms of the agreement were such that the appellant would lend Kshs. 432,000/= to the respondent. The facility would be secured by depositing the logbook of motor vehicle registration number KDE 390Q. The loan was repayable over a period of 12 months at a monthly rate of Kshs. 60,100/=. Arrears would attract penalties at the rate of 5% per week.
8. It is not in dispute that the respondent defaulted in making the requisite payments as per the agreement and for this reason the appellant demanded Kshs. 729,502.27. In his ruling the learned adjudicator compared the interest charged with that of the bank and held that 60% per annum was unfair and unconscionable.
9. The law on interest and unconscionable contracts is largely crystalized to the effect that the court will not re-write a contract for the parties with regard to interest as the parties are bound by the terms of their contract. The exception to this rule is that it falls on the court to refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the meaningful choice for the other party. This would apply where the contract terms are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.
10. The Court of Appeal has remained consistent in this view and numerous decisions can be cited including *National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Ltd*, Civil Appeal No. 95 of 1999;



Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited, (2014) Eklr; Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited, [2017] eKLR and Kenya Commercial Finance Company Ltd v Ngeny & another, [2002] 1KLR amongst many others.

11. This jurisdiction of the courts to interfere with unreasonable contracts is validated in the Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298. It states as follows with regard to 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.”

12. Drawing guidance from these judicial pronouncements and writings, this court acknowledges that in the case before court, out of the loan for Kshs. 432,000/= the respondent paid Kshs. 268,180/= which was more than 50% of the facility. The balance had accumulated interest amounting to Kshs. 729,502.27, which is almost double the repayable amount. In my view the interest rate of 5% per week upon which the amount outstanding was calculated was excessive considering the interest rates ordinarily charged in the commercial environment. Such rates would amount to unjustly enriching the appellant.

Determination

13. In the premises, I find no error on the adjudicators decision to warrant interference by this court. The appeal dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

Delivered in presence of:

Ms. Akoko for the appellant

N/A for the respondent

Court Assistant: Ms. Carolyne Kyalo

