



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 6 OF 2013

PICCADILLY HOLDINGS LIMITEDPLAINTIFF

VERSUS

ANWAR HUSSEIN.....1ST DEFENDANT

ALBRIGHT HOLDINGS LIMITED2ND DEFENDANT

S. GICHUKI WAIGWA t/a

S. GICHUKI WAIGWA & ASSOCIATES3RD DEFENDANT

RULING

1. It seems to this Court that the only issue that remains for determination is whether the interest rate of 4% per month sought by the Plaintiff against the Defendants is unconscionable, unreasonable, illegal and usurious.
2. Anwar Hussein (the 1st Defendant or Anwar) is a director of Albright Holding Limited (Albright or the 2nd Defendant). In need of money to pay land rent and rates for certain property it owned in Kileleshwa, Nairobi, Albright through its director, Anwar, sought a friendly loan from Piccadilly Holdings. Anwar says that the loan sought was for Kshs.20,000,000/= but only Kshs.16,602,830/= was advanced. This would be on 9th February 2012.
3. A week or so earlier on 2nd February 2012, the firm of S. Gichuki Waigwa & Associates (the 3rd Defendant), acting on behalf of Albright, gave the following undertaking to Piccadilly:-

“2nd February 2012

Piccadilly Holdings Limited

NAIROBI.

Dear Sir,

RE: SALE OF LR No. 209/11609/2, LR No. 209/11609/3, LR No. 209/11609/4, LR No. 209/11609/5, LR No. 209/11609/6, LR No. 209/11609/7, LR No. 209/11609/9, LR No. 209/11609/10, LR No. 209/11609/11, LR No. 209/11609/12, LR No. 209/11609/13, LR No. 209/11609/14, LR No. 209/11609/15, LR No. 209/11609/16, and LR No. 209/11609/17.

ALBRIGHT HOLDINGS LIMITED TO EPSILON HOLDINGS LIMITED

We act for M/s Albright Holdings Limited who became the beneficial owners of the above properties pursuant to a High Court Order issued on 16th May 2011.

Indeed we, on behalf of M/s Albright Holdings Limited are in the process of making good the transfer of the above properties from

the existent registered owner having obtained the Rates Clearance Certificates, Rent Clearance Certificates and the Consent of Transfer.

The Stamp duty required to finalise the Transfers is in the sum of Kshs.20,000,000 after valuation of the properties by the Chief Valuer, Department of Lands.

Upon registration of the properties in favour of M/s Albright Holdings Limited, the said properties shall immediately be transferred to M/s Epsilon Holdings Limited for the sum of Kshs.730,000,000/=.

A Sale Agreement has already been executed to that end (see copy).

Consequently, we as advocates for M/s Albright Holdings Limited (the seller) confirm that the full purchase price shall be channeled through our office.

To that end, we give you our professional undertaking to remit to you the sum of Kshs.20,000,000/= (plus interest of 4% per month from the date of disbursements) to be advanced by yourselves to Mr. Anwar Hussein, a Director of M/s Albright Holdings Limited for purposes of meeting Stamp Duty expenses hereinabove mentioned, within one hundred and twenty (120) days from the date of disbursements.

Yours faithfully,

S. GICHUKI WAIGWA & ASSOCIATES ADVOCATES.”

4. Although given before the money was advanced, the said advocate reiterates the contents of that undertaking through subsequent letters of 27th June 2012 and 21st August 2012.

5. The sum advanced was not paid and in a Complaint dated 10th December 2012 and filed on 16th January 2013, Piccadilly sued the three Defendants for the sum of Kshs.20,000,000/= together with interest at a rate of 4% per month from 8th June 2012 until payment in full.

6. In defence, the Defendants averred that the amount advanced was Kshs.16,602,830/= and not Kshs.20,000,000/=. Further, that the rate of interest at 4% per month sought by the Plaintiff is unilateral, exorbitant and usurious.

7. On 29th May 2018, at the urging of the Plaintiff, Havelock J entered partial Judgment in favour of the Plaintiff for the sum of Kshs. 16,602,830/= and noted:-

“Further the question of the rate of interest payable on the lending needs to be determined.”

8. Parties have now made their respective submissions on that singular issue and two questions are to be answered-

i. Was interest rate at 4% per month contracted?

ii. If so, is the same usurious and illegal?

9. As noted earlier, the first undertaking to repay the loan at 4% per month was given before the advance was made on the basis of that the friendly loan was Kshs.20,000,000/=. Seven days later, the Plaintiff advanced Kshs. 16,602,830/= and not Kshs.20,000,000/=. It can therefore be argued that consideration for which the promise to repay at 4% per annum had not been fulfilled.

10. However, while only Kshs. 16,602,830/= had been advanced, the 1st and 2nd Defendants, though the 3rd Defendant, reiterated the undertaking in two subsequent letters (of 27th June 2021 and 21st August 2021). That is, they promised to repay at the rate of 4% per month. I think that, notwithstanding, contrary arguments by the Defendants that there was no offer, acceptance and consideration, there was an unequivocal agreement on the rate of interest to be paid on the borrowed sum. In this respect a contract on the interest had been reached and Chitty on Contracts (24th Edition), cited by the Plaintiff, is relevant. At page 21 (paragraph 41) the authors state:-

“In order to decide whether the parties have reached an agreement it is usual to inquire whether there has been a definite offer by one party and an acceptance of that offer by the other. In answering this question, the courts apply an objective test; if the parties have to all outward appearances agreed in the same terms upon the same subject matter neither can generally deny that he intended to agree.”

11. The bigger hurdle for Piccadilly is whether the contracted rate of interest is usurious, illegal and therefore unenforceable.

12. While the general and often restated rule is that a Court will not rewrite a contract freely entered by parties, Courts have taken the position that, even in the absence of duress or undue influence, they have jurisdiction to interfere with harsh and unconscionable interest rates on a borrowing .See, for example, the observation of the Court of Appeal in Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR :-

“44. This Court has never shied away from interfering with unconscionable contracts. In Kenya Commercial Finance Company Ltd

vs 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.”

45. 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.”

46. Finally on unconscionability, this Court in the Margaret Njeri Muiruri case (supra) stated:

“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 contract, or due to contract terms that are unreasonably favourable to one party and would preclude 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 (See Black”s Law Dictionary, 9th Edition, Gardner, Ed.)”

13. In invoking this power to intervene, the Court of Appeal in Margaret Njeri Muiruri v Bank of Baroda (k) Limited [2014] eKLR held that an interest rate of 45% per annum was unconscionable. On my part, I do not doubt that the interest rate contracted by the parties here which works at 48% per annum is usurious. The Court will not uphold it.

14. As to what would be a fair rate in the circumstances of this case, it has to be, I think, higher than Court rates as it was in a commercial transaction. The Court upholds that the rate of 20% per annum which Anwar accedes was the agreed rate.

15. Interest on the sum of Kshs. 16,602,830/= shall be at 20% per annum from 9th February 2012 until payment in full. The Plaintiff shall also have costs of the suit.

Dated, Signed and Delivered in Court at Nairobi this 8th Day of March 2021.

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Nixon: Court assistant

Gachomba for Plaintiff

Githui for Defendant