



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 318 OF 2015

MOLYN CREDIT LIMITED.....APPELLANT

VERSUS

ADAM KATANA SHAHENZA.....RESPONDENT

(Being an appeal from the Judgment delivered on 18th June, 2015 by Hon. Mrs. M. Chesang (RM) Milimani Commercial Courts in CMCC No.6856 of 2013)

JUDGMENT

1. Vide a plaint dated 25th October, 2013 the Respondent who was the Plaintiff in the Lower Court prayed for judgment against the Appellant (Defendant) as follows:

“a) A declaration that the plaintiff has repaid Ksh.98,964/=,Ksh.55,428/= more than the full loan of Ksh.43,536/=

b) A declaration that it is unlawful for the defendant to unilaterally change the terms of the loan agreement and to demand be paid Ksh.392,916/= as at 31st October, 2013 which is ten (10) times more than the total loan amount of Ksh.43,536/=.

c) Costs and interest of this case.”

2. The Respondent pleaded that he had obtained a Ksh. 30,000/= Loan from the Appellant on 10th October, 2009. That the loan was repayable within 12 months at Ksh. 3,628/= per month through a check off system with the Respondent's employer. That due to financial constraints, the check off began in February 2011. The Respondent blamed the Appellant for unlawfully revising the terms of the loan 12 months to 44 months with payment of 3,550/= per month in January, 2011, making the total loan payable at 31st October, 2013 at Ksh.392,916/=.

3. The claim was denied by the Appellant. The Appellant filed a defence and counter claim. The Respondent was blamed for having defaulted in the payment of the monthly instalments for 15 months. It was contended that the accumulated debt of Ksh.434,309/= was due to accrued interest which was provided for in the terms of the loan agreement. The Appellant counter claimed for the said sum of Ksh.434,309/= with 6/25% interest until payment in full.

4. The Respondent filed a reply to the defence and a defence to the counter claim. The Respondent joined issues with the defence and reiterated the contents of the defence. The counter claim was denied.

5. During the hearing of the case, the Respondent testified. He adopted his witness statement as his evidence. The Respondent testified that he obtained the loan of Ksh.30,000/= from the Appellant on 19th October, 2009. He stated that the loan was repayable in 12 months at monthly instalments of Ksh.3,628/= making the total repayment Ksh.43,536/=. He described himself as a civil servant and stated that due to the Government policy that attachment of salary should not go beyond 1/3, he was not able to commence the repayments immediately as his basic salary was Ksh.8,000/=. That therefore the repayment started in February, 2011. The Respondent expressed his dismay at the balance of the loan at Ksh.219,635/= indicated by the Appellant as at October 2012. According to the Respondent, despite the repayments the loan kept on increasing instead of reducing. That is what triggered the filing of the suit. The Respondent produced documents to back up his case. The same included the loan application and agreement form, payslips and loan statements.

6. Lydia Nyambura Anyango (DW1) a Director of the Appellant Company testified on the Appellant's side. She adopted her witness statement as her evidence. She described the Defendant as engaged in the business of offering loans to its customers who then repay with interest. Her evidence was that the Respondent was granted a loan facility in the sum of Ksh.30,000/=. That the payment was by monthly

instalments of Ksh.3,628/= for a period of 12 months at the interest rate of 6.25% per month and in case of default a penalty of 2,000 on 5% of the outstanding amount which ever amount was higher.

7. It was further stated that the Respondent defaulted in the repayment of the loan and only started the repayments fifteen months after the loan was disbursed. That the arrears inclusive of interest stood at Ksh.434,309/= as at 2nd December, 2013.

8. At the conclusion of the case, the trial magistrate entered judgment in favour of the Respondent against the Appellant as prayed in the plaint. The counter claim was dismissed. That is what triggered the appeal herein.

9. The grounds of appeal are as follows:

“1. That the Honourable Magistrate erred in law and in fact by Ruling for the Respondent and failing to consider the Appellant’s grounds of defence and counterclaim dated 20th December, 2013

2. That Honourable Magistrate erred in law and in fact in failing to appreciate that the Contract between the Appellant and Respondent was valid and enforceable for it met all the legal requirements

3. That Honourable Magistrate erred in law and in fact in not finding that the contract being valid and enforceable, the parties herein are bound by the terms of the Contract Agreement.

4. That the learned Magistrate erred in law and in fact in finding that the interest imposed on the Respondent was highly unconscionable.

5. That the learned Magistrate erred in law and in fact in failing to appreciate the fact that the agreed rate of interest was not obviously manifestly harsh, unconscionable, oppressive and/or so exorbitant

6. That Honourable learned Magistrate erred in law and in fact in holding that the appellant unilaterally changed the terms of the Contract Agreement herein.

7. That Honourable learned Magistrate erred in law in purporting to rewrite a contract between the parties herein.

8. That Honourable learned Magistrate erred in law failing to give reasons for her holding.”

10. The appeal was canvassed by way of written submissions which I have considered alongside the authorities cited.

11. It is not in dispute that the parties entered into a loan agreement. The terms of the loan agreement as stipulated in the loan agreement are not in dispute. The loan was for the sum of Ksh.30,000/= payable by equal monthly instalments of Ksh.3,628/= over a period of 12 months. The payments were to be made through deductions from the Respondent’s salary through the Respondent’s employer. It is also not in dispute that the repayments started late and were irregular.

12. Both parties are in agreement on the repayments made. The Statement of Account produced as an exhibit reflects a total outstanding amount of Ksh.434,300/= as at 2nd December, 2013. The monthly instalments are reflected on various dates as Ksh.3,552/=, Ksh.3,530/= and 3,550/=.

13. The Credit Application and Agreement Form produced as an exhibit reflects that the monthly deductions were to be Ksh.3,628/=. The Respondent explained that his financial constraints and his employers policy were the reasons behind the late payments. Whereas the agreement provided for penalties and interest in respect of defaults, there is no evidence to reflect how the monthly repayments were made in the instalments of Ksh.3,552/=, Ksh. 3,530/= and Ksh. 3,550/= instead of Ksh.3,628/=. This is a pertinent issue because it put the Respondent in a defaulting state throughout yet the difference between the Ksh.3,628/= and the payments made left a balance of less the Ksh.200/= per month.

14. The Respondents complaint is that the repayment terms were changed unilaterally by the Appellant through the Respondent’s employer. The Appellant has not given any evidence on how the said changes occurred. Parties are bound by the terms of their agreement. It was therefore not proper for the Appellant to unilaterally change the instalments payable.

15. Turning to the issue of the total repayment demanded by the Appellant of Ksh.434,309/=:, the Respondent’s contention is that the same is unconscionable taking into account that the total repayment as per the agreement was Ksh.43,536/=:.

16. The Appellant is described in the Credit Application and Agreement Form as a “Credit and Financial Advisory Services Company”. The Appellant is therefore not a Banking Institution under the Banking Act. The Appellant is in my view a money lender. Consequently, the parties are governed by the terms of the agreement that they entered into. (See for example **John G. Kamuyu & another v Safari ‘M’ Park Motors [2013] eKLR**)

17. In the case at hand, it is not disputed that the Respondent paid a total of Ksh.98,964/= inclusive of interest and penalties. This payment is over two times the total loan amount of Ksh.43,536/=:The Ksh.434,309/= demanded by the Appellant is about ten times the loan amount. I am in agreement with the finding by the trial magistrate that the said demand was excessive, oppressive and unconscionable. The Respondent should be relieved of the burden of making any further repayments. (See for example **Anjeline Akinyi Otieno v Malaba Malakisi Farmers Co-op Union Ltd [1988] eKLR.**)

18. With the foregoing, I find no merits in the appeal and dismiss the same with costs.

Date, signed and delivered at Nairobi this 17th day of May, 2018

B. THURANIRA JADEN

JUDGE