



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 209 OF 2008

LEPOSO OLE KOILA.....1ST PLAINTIFF

BENSON SAOLI.....2ND PLAINTIFF

-VERSUS-

ISAAC KIREU.....DEFENDANT

JUDGMENT

1. The plaintiffs' claim against the defendant is for payment of Kshs.492,500/= plus interest at 25% per month being monies owing and due to the plaintiffs from the defendant that he had been advanced on the 8th March 2006 pursuant to an agreement executed by both parties on the same day. Demand for the payment did not elicit any payment.

2. By a defence dated 21st October 2008 and filed on the 27th October 2008, the defendant denied the claim in its totality.

3. The 1st plaintiff testified as **PW1**. His evidence was that the defendant was his business partner in buying and selling cows and that the plaintiffs advanced the defendant a sum of Kshs.492,500/= pursuant to an agreement dated the 8th March 2006 in support of the said advance but he failed to repay the said sum hence the case. The said sum was stated to have been for purchase of cows.

4. **PW2** was **Benson Saoli** whose evidence was that he sold some cows to the defendant for Kshs.492,500/= but he failed to pay the purchase price after which he entered into a agreement that he would pay but never paid. It was his further evidence that the parties were not new to each other as were business partners trading together and at all times the defendant would be advanced money to buy cows and would always repay but this time he failed to repay.

5. On the part of the defendant his evidence was that on the 8th March 2006 he entered into an agreement with the plaintiffs, but as an agent of some undisclosed 3rd parties who failed to pay the sum claimed in the plaint. He further testified that he was forced to execute the agreement at the police station where he had been summoned for failure to pay. In effect the defendant did not deny having been advanced the said sum, nor did he state that he paid back the money.

Parties filed written submissions.

6. From the pleadings and evidence adduced the issues that arise for determination and put forth by counsel are

1. Whether the defendant owes the plaintiff the principal sum of Kshs.492,500/=.

2. Whether interest is payable on the principle at 25% per month as claimed from April 2006 to September 2008 in the sum of Kshs.3,693,750/= or in any other sum or at all.

3. Whether the defendant was an agent of the undisclosed principals.

4. Whether the contract by way of the agreement dated 8th March 2006 is valid and enforceable.

7. I have considered the agreement dated the 8th March 2006 being the basis of the plaintiffs claim. It is an agreement for sale of cows by the plaintiffs to the defendant for a sum of Kshs.492,500/= that was to be paid on a specified period on or before 31st March 2006.

It is specific that if there was default in payment on the due date interest at 25% per month would accrue until payment in full. All the three parties signed the agreement.

8. I have not heard the defendant describe himself as an agent of either a disclosed or undisclosed party save in the submissions. Indeed the defendant denied having entered into the said agreement in his statement of defence and never mentioned any agency by or to 3rd parties.

9. There is no doubt that the defendant was advanced the money. The agreement in my view was executed without any coercion on the part of the defendant. His only defence is that he was acting on behalf of some undisclosed parties. If that was so, the defendant at the time of execution of the agreement he would have disclosed that fact.

10. I do not agree with the defendant's submissions that the defendant was an agent of some undisclosed parties.

Stating their names in submissions when no pleading or evidence supports such is not only unacceptable but also against the law.

11. Parties are bound by their pleadings. Any evidence adduced that does not support the pleadings is inadmissible **Civil Appeal No. 219 of 2013 IEBC & Another -vs- Stephen Mutinda Mule (2014) e KLR.**

12. The issue of agency was not pleaded in the defence. So when the defendant testified that he was an agent of some undisclosed parties it could only have been an afterthought and escapist evidence

In the above case the Judges of Appeal held that

“Any evidence not supported by the pleadings or are at variance with averments in the pleadings goes to issue and must be disregarded.”

That too goes for submission by the defendant's counsel on the matter of agency - on whether the defendant was an agent. Having stated the legal principles on parties pleadings I find no reason to even interrogate that issue, as no pleading supports the assertion.

13. In the **IEBC -vs- Stephen Mutinda Mule** case (Supra) the judges of Appeal held further held

“The above issues were new and had not been pleaded in the petition. The respondents therefore could not and had not responded to the same either in their pleadings or in evidence that they had tendered in response to the pleaded matters.”

14. The court cannot abandon its role as an independent and impartial adjudicator and descend to the arena of conflict.

I therefore find that the issue of agency to be misplaced an afterthought and must be disregarded. As there is no plausible defence or evidence to rebut the plaintiffs claim that the defendant was indeed advanced the money, and properly supported by the agreement entered into by the parties on the 8th March 2006, it is evident that the plaintiff claim is well founded.

15. It has not been shown how the agreement of 8th March 2006 was marred with coercion. Being summoned to a police station when a complaint has been lodged cannot be termed as coercion. If the defendant had not been advanced the money he would have stated so and objected or refused to sign the agreement. No evidence of coercion was demonstrated.

16. In the case **William Kazungu Karisa -vs- Cosmos Angore Changera Civil Suit No. 85 of 2001**, the court held that the parties must perform their respective obligations under the contract. Having executed the agreement as drawn and being aware that a court cannot rewrite a contract for parties it was his obligation to repay the money advanced – **Margaret Njeri Muiruri -vs- Bank of Baroda (2014) e KLR.** There is no doubt that the defendant breached the contract that. It was voluntarily executed and therefore binding on the parties.

17. The plaintiffs did not plead compensation by way of general damages. I am not persuaded to award such relief. – See **IEBC** case and in **Global Vehicles Kenya Ltd -vs- Lenana Road Motors (2015) e KLR** while quoting from the holding **David Sirona Ole Tukai -vs- Francis Arap Muge & Others – C.A No. & 6 of 2014**, the Court of Appeal expressed itself thus:

“ it is well established in our jurisdiction that the court will not grant a remedy which has not been applied for, and that it will not determine issues which the parties have not pleaded---The duty of the court is to adjudicate upon specific matters in dispute which the parties have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation--- a decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

18. The above holding summarises and reiterates the legal principle that parties are bound by their pleadings, and a court has no business determining an issue that is not pleaded.

19. A claim for interest at 25% per month on the principle sum was pleaded. The agreement – Clause 4 talks of such interest if there is default in repayment.

Are the plaintiffs entitled to the interest?

20. The advance given to the Defendant by the plaintiffs can be termed as a friendly loan. It is only a banking or financial institutions that are authorised under the Banking Act to charge interest on loans to their customers. Charging interest on friendly loans/advances has been held to be unconscionable oppressive and unenforceable in law – especially where it is shown that the rate of interest though agreed in the

agreement is illegal, unconscionable or fraudulent.

21. An interest rate of 25% per month is by all means oppressive unreasonable and fraudulent.

In the case **Ajay Indravadan Shah -vs- Guilders International Bank Ltd – Civil Appeal No.135/2001 (2002) IEA 269 and cited in Civil Case No. 28 of 2013 Davidson Muriuki Kihara -vs- Johnson Kabungo (2017) e KLR** the the court held that

“a court can interfere even when parties have agreed on a rate of interest if it is shown to be illegal unconscionable or fraudulent - even when shown that there is no illegality in the same, but that which is clearly made to freeze the borrower should there be default, and proceeded to deny interest charged at exorbitant and unreasonable rates.”

22. In the case **John G. Kamuyu & Another -vs- Safari “M” Park Motors (2013) e KLR**, in similar circumstances where the defendant was advanced a friendly loan with interest on default of repayment, the court found the interest charged to be unconscionable and denied the plaintiff the same.

23. In **National Bank of Kenya Ltd -vs- Wilson Ndolo Ayah (2009) e KLR** in similar situation, the court rendered that as the plaintiff did not have a licence to engage in money lending at interest rates to members of the public no interest was payable despite such being stated in the lending agreement. Accordingly I decline to award such interest to the plaintiff as undeserving and a fraud.

24. The upshot is that the defendant owes the plaintiffs the principle sum of Kshs.492,500/= advanced to him. The defendant has failed to sufficiently challenge the plaintiffs evidence that he received the said sum and defaulted in repayment. I find the said sum to be due and owing to the plaintiffs.

25. I however find that the interest charged on the principal sum at 25% per month to be unconscionable and unreasonable. It can not be payable under the contract which I find to be valid and enforceable save the matter of the interest.

26. From the above decisions it is evident that an individual who is not licensed under the Banking Act to lend money and charge interest to members of the public should not benefit unfairly by charging exorbitant interest rates or any interest.

The plaintiffs calculation of interest at 25% per month from drawdown to the date of filing suit is calculated at Kshs.3,693,750/=.

27. Looking at the principal sum of Kshs.492,500/=, there is no doubt that the amount of interest of Kshs.3,693,750/= and further interest is unreasonable, unconscionable, fraudulent and an illegality.

28. Accordingly judgment is entered for the plaintiffs against the defendant in the sum of Kshs.492,500/=.

I shall allow interest on the said sum at court rates from the date of filing the suit until payment in full.

29. Costs of the suit are awarded to the plaintiffs.

Dated, signed and delivered this 6th day of December 2018.

J.N.MULWA

JUDGE