



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 285 OF 2003**

**MOHAMED MUIN AHMAD MALIK.....PLAINTIFF**

**- VERSUS -**

**JOSEPH MUIRURI GITHONGO.....DEFENDANT**

**JUDGEMENT**

1. The only issue for determination by me relates to the interest, if any, which is payable by the Defendant to the plaintiff.
2. The plaintiff, in his submissions, says that there cannot be any dispute that the principal sum which he lent to the defendant was Kshs. 22,500,000/-.
3. The plaintiff went on to say that there was consensus that the defendant was to pay Kshs. 7,500,000/- as interest on the loan, for the initial period of 30 days. Therefore, according to the plaintiff, the total sum which the defendant admitted owing was Kshs. 30,000,000/-.
4. But the plaintiff also pointed out that the defendant had admitted, in writing, that he had borrowed Kshs. 30,000,000/-. The plaintiff submitted that the defendant should not be allowed to renege or to rescind his acknowledgement regarding the loan amounting to Kshs. 30,000,000/-.
5. Considering the defendant's said acknowledgment, the plaintiff submitted that the sums which the defendant was due to have paid back to the plaintiff was Kshs. 37,500,000/-. That sum was made up of the principal sum of Kshs. 30,000,000/-, plus the interest amounting of Kshs. 7,500,000/-.
6. The law pertaining to the enforcement of contracts is clear. The obligation of the court is to enforce the terms agreed upon by the parties.
7. In **NATIONAL BANK OF KENYA LTD Vs PIPELASTIC SAMKOLIT (K) LTD [2002] 2 E.A 503**, at page 507, the Court of Appeal said;

***“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved?.***

8. Based on that position in law, the next question that arises is whether the contract between the parties herein was one in which the loan was for Kshs. 22,500,000/- or was for Kshs. 30,000,000.
9. The other question that arises is with regard to the applicable rate of interest. Was the interest payable at the rate of 48% per annum? If that was the applicable rate of interest, what is the period during which it would apply?
10. The figure of 48% per annum was cited by the plaintiff.
11. But, by the defendant's calculations, the sum of 7,500,000/- constituted 400% interest per annum, when it is borne in mind that the said amount was payable over a period of 2 months.
12. The defendant deems such a rate of interest as being so extravagant and unconscionable that the

court should interfere with the same.

13. In the case of **MARGARET NJERI MUIRURI Vs. BANK OF BARODA (KENYA) LIMITED, CIVIL APPEAL No. 282 of 2004**, the Court of Appeal reiterated that courts do not rewrite contracts for parties. However, the Court went on to add as follows;

***“Nevertheless, courts have never been shy to interfere with or to refuse to enforce contracts which are unconscionable, unfair or oppressive due to 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?.*”**

14. It is obviously a matter of fact, as determined from case to case, whether or not the terms of any contract were unconscionable.

15. In **ANJELINE AKINYI ATIENO Vs MALABA MALAKISI FARMERS CO-OP UNION LTD, CIVIL APPEAL No. 96 of 1997**, the Court of Appeal noted as follows;

***“This is at the rate of about 284% per annum. This rate of interest is obviously manifestly harsh, unconscionable, oppressive and so exorbitant that no reasonable court could conscientiously countenance it. Indeed, we think that it is farcical and ridiculous beyond all reason?.*”**

16. If the 284% rate of interest was so oppressive that the Court of Appeal refused to enforce it, a rate of 400% per annum would most certainly be unconscionable.

17. Reverting to the contract, the court notes that the plaintiff suggests that the principal sum was both Kshs. 22,500,000/- and Kshs. 30,000,000/-. Obviously, as the defendant only received one loan from the plaintiff, it cannot have been 2 different amounts.

18. The correct position, as already alluded to by Warsame J. (as then was), is that the amount which was loaned to the defendant was Kshs. 22,500,000/-.

19. Secondly, the defendant had already paid Kshs. 5,500,000/- by the time the suit was filed against him. It is on that basis that Warsame J. ordered the defendant to pay to the plaintiff, the outstanding balance amounting to Kshs. 17,000,000/-.

20. On 18<sup>th</sup> March 2011 the Court of Appeal pointed out as follows;

***“We note that the parties agree that Kshs. 17,000,000/- which was the balance of the original loan had been paid pursuant to the orders of Warsame J. It is therefore mainly the interest that is still being claimed by the respondent?.*”**

21. As the court had ordered that the said sum be paid within 7 days from 15<sup>th</sup> May 2008, I presume that that is what happened.

22. In the circumstances, it would not be right to enter judgment for the plaintiff in the sum of Kshs. 32,000,000/- plus interest at Court rates from 19<sup>th</sup> May 2003, as has been asked for by the plaintiff.

23. Kshs. 5,500,000/- was paid prior to the institution of these proceedings. Therefore, that sum must be deducted from the principal sum of Kshs. 22,500,000/-.

24. Secondly, the parties had agreed on the sum of Kshs. 7,500,000/- as interest payable on the principal sum, if the said sum was not paid within the agreed time-span.

25. In effect, out of the sum of Kshs. 30,000,000/- there was already the in-built element of interest, amounting to Kshs. 7,500,000/-. The parties did not have an understanding that the loan would be compounded. Therefore, the amount relating to interest could not attract interest.

26. Thirdly, the claim by the plaintiff for interest on the principal amount was for it to attract court rates of 14% per annum, from the date when the suit was filed. I find that that claim for interest is not only reasonable, but was well in keeping with the claim as pleaded.

27. The pleading that I am referring to is in relation to the rate of interest.

28. Of course, I am aware that the plaintiff wants the interest to be paid from 1<sup>st</sup> December 1996.

29. The plaintiff has not satisfied the court that interest should be payable from that date.
30. On my part, I find that when a party lays claim to interest on a principal amount, if such interest is not expressly provided for in the contract, the court would ordinarily award interest either from the date of filing suit or from the date of judgement.
31. In this case, if interest was calculated from the date of judgement, it would be unfair to the plaintiff.
32. The justice of the case demands that the interest be payable from the date when the plaintiff filed this case in court.
33. The interest would be payable on the principal sum, from 19<sup>th</sup> May 2003 until 5<sup>th</sup> May 2008 when the principal amount was paid in full.
34. For the purposes of calculating the interest, the principal sum shall be Kshs. 17,000,000/-, as that was the outstanding balance.
35. Once that calculation was done, the contractual interest sum of Kshs. 7,500,000/- would be loaded onto it.
36. Accordingly, my calculations for the interest which is payable by the defendant is as follows;

1. *Principal Amount* *Kshs. 17,000,000/-*

2. *Interest at 14% p.a from 19/05/2003 to 05/05/2008* *Kshs. 11,259,231/-*

3. *ADD, Agreed interest of* *Kshs. 7,500,000/-*

***TOTAL*** ***Kshs. 18,759,231/-***

37. I do now enter judgement in favour of the plaintiff for the sum of Kshs. 18,759,231/- , in respect to the interest payable by the defendant.
38. For the avoidance of any doubt, the said sum has been arrived at on the presumption that the defendant had not paid the sum of Kshs. 7.5 Million, which was the agreed interest amount.
39. The plaintiff is also awarded the costs of the suit.

**DATED, SIGNED and DELIVERED at NAIROBI this 7<sup>th</sup> day of March 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Judgement read in open court in the presence of:**

Orina for A.B. Shah for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.