



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 71 of 2011

DANSON MURIUKI KIHARA.....APPELLANT

VERSUS

AMOS KUTHUA GATUNGO.....RESPONDENT

(Being an Appeal against the Judgment and subsequent Degree of S.N. NDEGWA Senior Resident Magistrate delivered on 11th May, 2011 in Kerugoya SPMCC No. 146 of 2009)

J U D G M E N T

The Appellant was the Plaintiff in the Court below while the Respondent was the Defendant. He had filed a claim for Sh.40,000/= plus interest at 50% per month as per their agreement. The Respondent disputed the amount of Sh.40,000/= saying it was Sh.20,000/=. This matter proceeded to full hearing and the learned trial Magistrate found for the Appellant. She enter judgment for Shs.40,000/= plus costs and interest at Court rates.

The Appellant was dissatisfied with this judgment and filed the present appeal raising the following grounds:-

- 1. The Learned Magistrate erred in law and fact by finding that the Appellant proved his case on a balance of probabilities yet proceeded to reduce the interest payable by the Respondent from 50% per month to interest at Courts rates yet no evidence was adduced to make such findings.***
- 1. The Learned Magistrate erred in law and fact by holding that the Respondent should pay to the Appellant Sh.40,000/= with interest at Court rates which finding was contrary to the friendly loan agreement between the parties and without giving cogent reasons for such departure.***
- 2. The Learned Magistrate erred in law and fact by reducing the interest payable on the amount loaned to the Respondent which act contravenes the principles of contract as parties are legally bond by the terms of own contract and without giving reasonable grounds for the same.***

The parties agreed to dispose of the appeal by written submissions which they did file.

Mr. Kahigah for the Appellant in his submissions gave brief facts of the case. He submits that the parties were bound by the terms of their contract. And the trial Magistrate did not show any terms of the agreement that would vitiate it. And the agreement was that 50% per month be paid. He cited the case of ***NATIONAL BANK OF KENYA LIMITED VS PIPEPLASTIC SANKOLIT (K) LIMITED & PROF. SAMSON K. ONGERI, COURT OF APPEAL NAIROBI CIVIL APPEAL NO. 95/1999*** where it was held that

“a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract”.

He therefore prayed that the judgment of the lower Court be set aside and substituted with an order granting judgment to the Appellant against the Respondent for payment of Sh.40,000/= with interest at 50% per month with effect from 16/4/2009 until payment in full.

The Respondent has opposed the appeal. He supported the finding of the learned trial Magistrate that the Appellant was not a financial institution authorized to charge interest.

As a first appeal Court, I am enjoined to re-evaluate and reconsider the evidence that was adduced before the lower court and come to my own independent conclusion.

The Appellant testified and explained that he lent the Respondent Sh.40,000/=. An interest of 50% per month would be charged in the event that he defaulted in repayment. He produced their agreement (PEXB1). Respondent's title deed (PEXB3) photo (EXB.5). His money had not been refunded. He said there was a witness who witnessed the receipt of the money. This witness was not however called.

The Respondent's evidence is that he was only given Sh.20,000/= for payment of fees for his 2 children. The agreed interest rate was 50%. He disputed receiving Sh.40,000/=. And when his daughter read for him the agreement he disputed the figure of Sh.40,000/=. He came to pay Sh.15,000/= but the Plaintiff was demanding Sh.40,000/=.

DW2 an advocate explained how the agreement was drawn. DW2 did not witness the drawing and signing of this agreement. The same was done by Wakini Kiarie advocate. The agreement PEXB1 bears both a signature and RTP (Right Thumb Print) of the Respondent. In any event the Respondent in cross examination admitted that the signature and right thumb print are his.

After analyzing this evidence the learned trial Magistrate came to the conclusion that indeed the Respondent did receive Sh.40,000/=. It is only the interest payable that she interfered with. From the evidence tendered it is not disputed that the Respondent had a problem with school fees for his children and he approached the Appellant to lend him money for that purposes. The evidence of the Appellant, DW2 and the agreement (PEXB1) confirm that Respondent was lent Sh.40,000/= and not Sh.20,000/=. He did not avail any witness to support his claim of receipt of Sh.20,000/=.

I therefore find that the claim of Sh.40,000/= was well founded. The Appeal raises 3 grounds which all rotate around the issue of the interest payable. I will therefore consolidate them into one ground. The agreement (PEXB1) provided for payment of interest at 50% per month. The Respondent in his evidence admitted that that was interest they had agreed on.

In her judgment the learned trial Magistrate stated that the Appellant was not entitled to charge 50% interest since he was not a financial institution. She therefore ordered that the interest payable was to be at Court rates. This is now the appellant's bone of contention.

In the case of the ***NATIONAL BANK OF KENYA LTD VS PIPEPLASTIC SAMKOLIT (K) LIMITED (Supra)*** the Court of Appeal held that

“A Court of law cannot re-write 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”

This case was decided on 8th June 2001. And later on 28th June 2002 in the case of ***AJAY INDRAVADAN SHAH VS GUILDERS INTERNATIONAL BANK LTD CIVIL APPEAL NO. 135/2001 [2002] 1 EA 269***. The Court of Appeal held that the provisions of Section 26(1) of the Civil Procedure Act are applicable only where the parties to a dispute have no, by their agreement, fixed the rate of interest payable. If the parties by their agreement have fixed the rate of interest, then the Court has no discretion in the matter and must enforce the agreed rate UNLESS it is shown in the usual way that

either that agreed rate is illegal or unconscionable or fraudulent.

From these two judgments, it is clear that the Court can interfere even where parties have agreed on a rate of interest as long as it is shown that the rate is illegal, unconscionable or fraudulent. From the evidence before the learned trial Magistrate there is no evidence of illegality or fraud.

The circumstances of this case are a bit disturbing and as the learned trial Magistrate correctly pointed out the Appellant is not a financial/lending institution. The Respondent was borrowing this money for purposes of paying fees for his children. The Appellant stated in his evidence that he saw the letters showing the fees balances from the school.

An interest of 50% PER MONTH was agreed on. This calculates to an interest of 600% PER ANNUM. Even the financial institutions which are authorized to charge interest do not charge those kind of rates. The agreement was drafted after the Respondent had already been given the cash and taken it to school.

This bargain between the Appellant and Respondent is found by this Court to be unconscionable in the sense that no man in his senses and not under delusion would agree to such an interest rate. Even no honest or fair man would make such an offer to a friend. This rate is so unreasonable and oppressive to the Respondent, even though they had agreed to it. The Appellant took advantage of the Respondent's desperate situation to fleece him.

The learned trial Magistrate may not have expanded on her reasoning for the variation of the interest rate, but from my appreciation of the facts, I do find that she did so on the ground of unconscionability. I therefore find no reason to make me interfere with the lower Court Judgment which I confirm.

The Appeal is dismissed with costs.

DELIVERED, SIGNED AND DATED THIS 6TH DAY OF NOVEMBER 2012.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Respondent

Njue CC