REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

[MILIMANI LAW COURTS]

THE CIVIL APPELLATE DIVISION

CIVIL APPEAL NO. E769 OF 2024

MWANANCHI CREDIT LIMITED……

APPELLANT

VERSUS

VIDESIOUS MURAGE KAGIRI……

RESPONDENT

(Being an appeal from the Judgment and Decree by Hon. Judith Omollo (SRM/Adjudicator) in Nairobi SCCOMM Case No. E7826 of 2023 delivered on 8th June 2023)

JUDGMENT

1. The Appellant was the Respondent in Nairobi SCC E7836 of 2022 where the Claimant was VIDESIOUS MURAGE KAGIRI.
2. VIDESIOUS MURAGE KAGIRI was seeking a permanent injunction to restrain the Appellant, their agents and/or employees from illegally repossessing, seizing, proclaiming and/or attaching their motor vehicle Registration No. KCG 730W Toyota Vitz.
3. The Respondent was also seeking an order of restitution for the Appellant to release the log book for the said motor vehicle free of any charge or encumbrance.

ORIGINAL

4. The Appellant filed a counter-claim dated 31/01/2023 seeking a declaration that the Respondent was in breach of the letter of offer and loan agreement by making late payments.
5. Further, the Appellant sought a declaration that the said log book would be released upon payment of the outstanding loan amount, applicable charges and penalties and other related fees.
6. The Appellant also sought General damages for breach of contract by the Appellant.
7. The Respondent's evidence was that he took a loan of Ksh. 205,000/= from the Appellant to be repaid within 18 months on or before the 12th of every month.
8. The Respondent said he repaid a total of Ksh. 355,000/= which was over and above the Ksh. 205,125/= borrowed. He said some of the payments were made late but he regularized the same and paid penalties. He is now seeking release of the log book to him.
9. The Respondent produced a statement printed on 28/3/2022 showing that he had an outstanding balance of Ksh. 14,518.66.
10. The Appellant produced a statement printed on 12/01/2023 which showed that the outstanding balance on 26/3/2022 was Ksh. 14,518.97.
11. The trial Court found that the Respondent had paid a total of Ksh. 355,797.940 which was over and above the sum borrowed due to penalties and interest.

ORIGINAL

12. The trial Court held that imposing additional interest would be unconscionable unfair and oppressive.

13. The trial Court made an order of restitution against the Appellant to release the log book of the motor vehicle Registration No. KCG 730W to the Respondent free from any charge, penalties or any encumbrances within 14 days of the date of the judgment.

14. The trial Court ordered each party to bear its own costs of the suit.

15. The Appellant has appealed to this Court against the said judgment on the following grounds:-

    (i) That the Honourable Magistrate misdirected herself while reviewing the evidence on record leading to a finding that the Respondent had proved its case on a balance of probabilities.

    (ii) That the Honourable Magistrate erred in law by failing to make any determination on the counter-claim filed by the Appellant.

    (iii) That the Honourable Magistrate erred in law in finding that the interest charged by the Appellant was unconscionable and oppressive despite parties having wilfully contracted on its applicability.

    (iv) That the Honourable Magistrate erred in her evaluation of the evidence and material placed before her by:-

ORIGINAL

(a) Failing to consider the question of breach by the Respondent and the attendant consequences.

(b) Failure to consider what acts by the Respondent amounted to breach thereby being liable to pay damages.

(c) The consequential effects of any breach of contract despite parties having spelt out the applicable terms.

(v) The Honourable Magistrate erred in finding that the amount due for Respondent was Ksh. 57,797/- yet the amount was higher whereas proceeded to disregard issuing order of payment of what was outstanding.

(vi) The Honourable Magistrate erred in law in failing to consider that the penalty and charges applicable were part of the contractual terms whereas payment of the loan was due on or before a specified date.

(vii) The Honourable Magistrate erred in the manner she evaluated the evidence adduced, and the documents availed by the parties thereby arriving at a wrong decision.

(viii) The Honourable Magistrate erred in failing to make a determination on the failure by the Respondent to file a defence to the counter-claim thereby making it uncontroverted.

ORIGINAL

(ix) The Honourable Magistrate erred in rendering a decision that was in favour of party that was non-deserving; in this case the Respondent.

16. The parties filed written submissions as follows:- the appellant submitted that the respondent did not prove his case to the required standard.
17. That the trial court found that the total amount demanded as per the statement of account was Kshs. 413,000 which was more than double the amount borrowed by the claimant.
18. It was however the appellant's argument that the amount charged arose out of the respondent's default in paying off the loan. The contract he willingly entered into explicitly detailed the consequences that would ensue should the respondent renege on servicing his loan.
19. The interest clause clearly stipulated that the rate of interest may be determined by the lender/appellant from time to time and may be amended without prior notice to the borrower.
20. Nevertheless, the appellant was always keen to keep the respondent abreast of any changes that may have arisen in the calculation of the interest.
21. The additional interest clause further stipulated that in case the borrower default, there would be additional interest rate of 5% per week from the date of such failure to the date of actual payment. It was the appellants position that the

ORIGINAL

interest calculated was reasonable and justified and were supported by the contract.

22. The appellant on the counterclaim submitted that the particulars were that the respondent was in default of the loan he had borrowed and as such the consequences of the loan default as spelt out in the latter if offer, loan agreement and attendant documents must now ensue and the claimant having failed to repay the loan instalments on time could not benefit out of her contract as she was in breach.
23. The appellant argued that the trial court erred when it found that the interest charged was unconscionable and being double the amount borrowed was erroneous.
24. The appellant noted that there was both the interest, the penalties and the penalties interest. The interest chargeable was 6 % per month on a reducing balance.
25. The repayment period was 18 months up to 11/11/2021. The loan statement indicates that as at that date the loan had not been repaid is full. The loan remained owed even as at 2022.
26. The appellant submitted further that Rules 13 and 15 of the Small Claims Court Rules provides that any person named as a party to the counterclaim may, unless some other order is made by the court, deliver a response within fifteen days after receiving the counterclaim and shall serve a copy to all the parties to the suit.
27. It thus follows from the foregoing that the respondent should have filed a response to the counterclaim within fifteen days

ORIGINAL

after receiving the counterclaim, and owing to his default in doing this, the trial court should have entered default judgment in favor of the appellant.

28. The failure to do this constitutes an error of law, and as such this appeal should be allowed in order to remedy this. The counterclaim remained unchallenged/uncontroverted.
29. The respondent alternatively submitted that the trial court reviewed the entire documentary trail, including contradictions in the appellants own records.
30. That the evidence clearly established that full repayment had occurred.
31. The respondent on the counterclaim submitted that in identifying the issues the small claims court identified the issues arising out of the counterclaim, thus appreciating the appellants grievances in so far as the appellant had raised them. No misdirection occurred.
32. The trial court also found that no specific figure was pleaded or proved. Sections 107-109 of the Evidence Act place the burden on the party alleging and the appellant could not articulate a coherent claim.
33. The respondent submitted that the factual findings were that the sum claimed form the respondent was more than 2 times the sum he had borrowed.
34. It was on this basis that the trial court found the interest to be unconscionable. The respondent argued further that the appellant alleged that there was an error in computing the amount due which is a factual issue and thus not appealable.

ORIGINAL

35. The trial court based its ruling on verified account balances. The figures relied upon were consistent and supported by evidence.
36. This appeal originated from the Small Claims Court (SCCC), and as such, it can only be entertained on a point of law.
37. **The issues for determination in this appeal are as follows:-**
    (i) Whether the learned trial magistrate erred in her evaluation of the evidence and in finding that the Respondent had proved his case on a balance of probabilities;
    (ii) Whether the trial court erred in failing to make a specific determination on the Appellant's counter-claim;
    (iii) Whether the interest and charges imposed by the Appellant were unconscionable, unfair, and oppressive.
38. On the first issue regarding the evaluation of evidence, the evidence before the trial court was largely documentary and revealed a critical inconsistency in the Appellant's own records.
39. The Respondent produced a statement from the Appellant dated 28th March 2022, showing an outstanding balance of Kshs. 14,518.66.
40. The Appellant, in its defence, produced a statement dated 12th January 2023, which curiously confirmed that the

ORIGINAL

outstanding balance as of 26th March 2022 was Kshs. 14,518.97.

41. This near-identical figure from the Appellant's own document significantly bolstered the Respondent's case that the debt had been substantially extinguished.
42. The trial magistrate was therefore on solid ground in finding that the Respondent had demonstrated, on a balance of probabilities, that he had repaid a total of Kshs. 355,797.94, a sum far in excess of the principal loan of Kshs. 205,000. There was no misdirection in this factual finding.
43. Concerning the second issue of the counter-claim, it is correct that the Respondent did not file a formal defence to it.
44. However, the failure to file a defence does not automatically result in judgment on a counter-claim.
45. The court retains a duty to consider whether the counter-claim, even if uncontroverted, discloses a reasonable cause of action and is supported by evidence.
46. The record shows that the trial court did indeed appreciate the issues raised in the counter-claim, as it specifically addressed the Appellant's argument that the Respondent was in breach of the agreement due to late payments.
47. The court proceeded to make a finding on the merits of that claim, holding that the imposition of further interest would be unconscionable.

ORIGINAL

48. This was a substantive determination on the issue. Furthermore, the burden of proof lay on the Appellant to prove its counter-claim.
49. The legal burden of proving a claim rests on the plaintiff, or in this case, the counter-claimant.
50. The Appellant failed to discharge this burden by presenting a coherent and justified final figure for the alleged outstanding debt.
51. Its own documents created doubt rather than certainty. In these circumstances, the trial court cannot be faulted for dismissing the counter-claim.
52. The third issue is the characterisation of the interest and charges. The Appellant argues that the parties were bound by the terms of their contract, which provided for penalties and interest on default.
53. While the principle of *pacta sunt servanda* (agreements must be kept) is fundamental in contract law, it is not absolute.
54. The case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] KLR** is a cornerstone of Kenyan contract law and it represents the foundational rule of contract law that courts must enforce the clear terms of an agreement that parties have willingly entered into.
55. This principle ensures certainty and predictability in commercial dealings.
56. However, the sanctity of contract is paramount but it is not absolute and must yield when the terms of the contract

ORIGINAL

themselves offend fundamental principles of justice and fairness.

57. The contract may have provided for penalties and interest, but when the enforcement of those terms results in a borrower paying over Ksh. 150,000 in interest and penalties on a loan of Ksh. 205,000 and is still being pursued for more, it crosses the line from a legitimate commercial sanction into an oppressive penalty.
58. In the present case, the Respondent had already paid a total of Kshs. 355,797.94 against a principal loan of Kshs. 205,000.
59. This means he paid interest and penalties amounting to approximately Kshs. 150,797.94. For an 18-month loan, this effective rate of return was manifestly excessive.
60. The trial court was entitled, in the exercise of its equitable jurisdiction, to find that to demand yet more payment—with the Appellant's own statement suggesting a final demand of over Kshs. 413,000—was unconscionable, unfair, and oppressive.
61. This was not an error of law but a correct application of equitable principles to prevent an unjust outcome.
62. In the final analysis, the appeal is without merit. The learned trial magistrate comprehensively evaluated the evidence, made a finding of fact that was supported by the Appellant's own documents, and correctly applied the principle against unconscionable terms.

ORIGINAL

63. The failure to file a defence to the counter-claim was not fatal, as the Appellant failed to prove its claim on a balance of probabilities.
64. Consequently, the appeal is hereby dismissed.
65. The judgment and decree of the trial court in Nairobi SCCOMM Case No. E7826 of 2023 delivered on 8th June 2023 are affirmed.
66. Each party to bear its own costs of this appeal.
67. It is so ordered.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **8th** day of **October, 2025.**

A. ONGERI

JUDGE

Judgment virtually delivered in the presence of:

……

……

ORIGINAL