Select Management Services Limited v Maobe (Civil Appeal E207 of 2022)
[2025] KEHC 14916 (KLR) (Civ) (24 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14916 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E207 OF 2022

H NAMISI, J

OCTOBER 24, 2025

BETWEEN

SELECT MANAGEMENT SERVICES LIMITED ..... APPELLANT

AND

EVANS RAMBEACH MAOBE ..... RESPONDENT

(Being an Appeal against the Judgement of Hon. B.J. Ofisi, SRM delivered on 21 October 2022 in Milimani Small Claims SCCCOM No. E2597 of 2022)

JUDGMENT

1. This appeal arises from a suit in the Small Claims Court filed by the Appellant, seeking the following reliefs:

    i. Judgement in the sum of Kshs 927,408/=;

    ii. Compensation (to be determined by the Court)

    iii. Costs of the claim

    iv. Any other relief the Court deems fit to grant.

2. The dispute emanated from a staff loan facility advanced by the Appellant to the Respondent during the currency of his employment with the Appellant. The Appellant's claim for the outstanding loan balance was dismissed by the trial court.

3. In brief, on or about 30 August 2019, the Appellant and the Respondent entered into a Staff Loan Agreement. Pursuant to the Agreement, the Appellant advanced to the Respondent a total sum of Kshs 897,651.55, At the material time, the Respondent was a senior employee of the Appellant, holding the position of National Sales Manager. The terms of the facility were captured in the Loan

Schedule, which was executed by the Respondent and incorporated into the Agreement. The Schedule expressly provided for an interest rate of 40.5% per annum, with the total amount due over the 60-month term being Kshs 2,105,040/=, payable in monthly instalments of Kshs 35,084/=. Clause 7 thereof further stipulated that any amount in arrears would attract interest at the rate specified in the Agreement.

4. It was not disputed that the Respondent made some repayments towards the loan, primarily through salary deductions, until his employment was terminated in 2021. Thereafter, the loan fell into default. On 24 April 2022, the Appellant instituted the suit in the Small Claims Court, for recovery of the outstanding balance, which it averred was inclusive of accrued interest.

5. The Respondent filed a Statement of Defence and Counterclaim dated 25 July 2022. He denied liability and raised several defences, the most pertinent of which for purposes of this appeal are:

   i. That the interest rate of 40.5% was abnormal, illegal and unconscionable;

   ii. That the total interest charged (Kshs 1,207,388.45) exceeded the principal amount of Kshs 897,651.55, which he contended was contrary to the law, thus invoking the in duplum rule.

   iii. A sum of Kshs 526,260/- had been paid on what the Respondent considered to be a lawful interest rate, and thus the Respondent was entitled to a refund.

6. In its judgement, the trial court held as follows:

   > " The Claimant admits that the interest charged was 40.5%, which I find is unconscionable. In light of the foregoing, the claim and counterclaim fail. Each party shall beat their own costs."

7. The trial court relied on the cases of Mamta Peeush Mahajan (suing on behalf of the estate of late Peeush Premlal Mahajan) -vs- Yashwant Kumari Mahajan (Sued personally and as Executrix of the estate and Beneficiary of the estate of late Krishan Lal Mahajan) [2017] eKLR and Margaret Njeri Muiruri -vs- Bank of Baroda Kenya Ltd [2014] eKLR. In the latter case, the Court of Appeal indicated that it would interfere and refuse to enforce an unconscionable contract which results from contract terms that are unduly harsh, commercially unreasonable and grossly unfair given the existing circumstances.

8. Being aggrieved by the judgment of the trial court, the Appellant lodged an appeal on the following grounds:

   i. The learned Magistrate erred in law by relying on the doctrine of unconscionability under section 44A of the *Banking Act*, Cap 488;

   ii. The learned Magistrate misinterpreted and misapplied the law in finding that the Appellant had invoked an unconscionable interest rate for the loan amounts issued to the Respondents;

   iii. The learned Magistrate erred in law by failing to appreciate that the in duplum rule under section 44, *Banking Act*, Cap 488 as relied on by the Respondent in his Response to the Claim is not applicable to the Appellant;

   iv. The learned Magistrate erred in law by failing to appreciate that the interest charged by the Appellant was contractual and not subject to *Banking Act* or regulations thereunder;

   v. The learned Magistrate erred in law in applying wrong legal principles by dismissing the Claimant's suit dated 24 April 2022;

   vi. The learned Magistrate erred in law by failing to consider all the evidence on record and reaching a perverse and unsound decision;

9. The Respondent did not participate in this appeal, despite being served on numerous occasions. The Appellant filed written submissions, which I have keenly read and considered.

Analysis & Determination

10. Section 38 of the *Small Claims Court Act* provides as follows:

    1. A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;

    2. An appeal from any decision or order referred to in sub section (1) shall be final.

11. In the case of Otieno, Ragot & Company Advocates -vs- National Bank Kenya Ltd [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law.

> " This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

12. Similarly in the case of Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:

> " This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR in which it was held that: "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

13. The duty of this Court in this instance is similar to that stated herein above, which is essentially limited to points of law.

14. Turning to the appeal herein, the Appellant's grounds are anchored on 3 main pillars

15. First, that the learned Magistrate fundamentally misdirected herself on the applicability of the *Banking Act*. The Appellant argues that the Appellant is not a financial institution as defined under Section 2 of the *Banking Act*. The Appellant, being a non-deposit taking lender, falls outside the regulatory ambit of the Act. Consequently, section 44 A of the Act, which codifies the in duplum rule, is wholly inapplicable to the loan agreement between the parties. The Appellant relies on the cases of Momentum Credit Ltd -vs- Teresia Kabiya Nduta eKLR and Desires Derive Ltd -vs- Britam Life Assurance Co. Ltd eKLR, in support of this proposition.

16. Second, the Appellant submits that the interest rate of 40.5% was a term of a contract that was voluntarily and freely entered into by parties. The Respondent, being fully aware of the terms, executed the Agreement and the Loan Schedule. The Appellant invokes the hallowed principle of sanctity of

contract, arguing that it is not the function of the Court to rewrite contracts for parties, however improvident they seem in hindsight. The Appellant cites the Court of Appeal cases of National Bank of Kenya Ltd -vs- Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR and Pius Kimaiyo Langat -vs- Co-operative Bank of Kenya Ltd [2017] eKLR.

17. Third, flowing from the first two points, the Appellant contends that the learned Magistrate's finding of unconscionability was an error of law. It is argued that this finding was improperly founded on the misapplied *Banking Act* and not on the established principles of the equitable doctrine of unconscionable bargains. The Appellant submits that succeed under equity, the Respondent needed to demonstrate that he was in a position of special disadvantage or vulnerability which was exploited by the Appellant. Citing LTI Kisii Safari Inns Ltd & 2 Others -vs- Deutsche Investigations -Und Enwishlungsgellschaft (Deg) & Others [2011] eKLR, the Appellant argues that no such evidence was adduced. On the contrary, the Respondent's position as a National Sales Manager suggests a level of commercial sophistication inconsistent with the vulnerability required to invoke the doctrine.

18. Having considered the Memorandum of Appeal, the record and submissions of the Appellant, I find that the appeal crystalises into 3 issues for determination:

    i. Whether the trial court erred in applying the provisions of the *Banking Act* and specifically the in duplum rule under section 44A of the Act;

    ii. Whether the trial court erred in law in finding the contractual interest rate of 40.5% to be unconscionable;

    iii. Whether, in consequence of the findings above, the trial court erred in law by dismissing the Appellant's claim.

19. I have keenly read the record, and particularly the judgement of the trial court. I fail to see where the trial court applied the provisions of the *Banking Act* or the in duplum rule. What is clear is that the trial court considered the conscionability of the contract. The Appellant's challenge on this basis, therefore, fails.

20. The trial court's sole reason for dismissing the claim was the finding of the interest rate being unconscionable. The question before me is whether the contract could be set aside under the general equitable doctrine of unconscionable bargains. This Court has the power to refuse to enforce a contract where the terms are oppressive, and one party has imposed the objectionable terms in a morally reprehensible manner, taking advantage of the other's special vulnerability or weakness.

21. The legal threshold for proving an unconscionable bargain is high. It is not enough to say a contract to be merely disadvantageous or a bad bargain. As held in LTI Kisii Safari Inns case (supra), the doctrine requires proof of, firstly, an oppressive bargain that shocks the conscience of the Court, and, secondly, a bargaining weakness or vulnerability in the victim which was knowingly exploited by the stronger party.

22. While courts have recognised that they may interfere and refuse to enforce contracts that are unduly harsh and commercially unreasonable, especially if the result of procedural abuse or unequal bargaining power, the burden lies heavily on the party alleging unconscionability to demonstrate that they were not fully aware of the nature of the transaction or were in no position to negotiate.

23. In a recent case, Dhiman v Shah [2025] KECA 1264 (KLR), the Court of Appeal opined thus:

> " Kenyan courts have consistently used the doctrine of unconscionability in contract law as a safeguard against contracts that are so unfair or one-sided that enforcing them would offend

the sense of justice. At its core, the doctrine allows a court to refuse to uphold a contract, or specific terms of it, if they were imposed in a way that took undue advantage of one party's vulnerability, ignorance, or lack of bargaining power.

This doctrine looks at two broad aspects: how the contract was made, and the nature of its terms. The first — called procedural unconscionability—examines whether the weaker party had a meaningful choice in the matter, that is, whether the terms hidden in fine print or whether there was deception, pressure, or a clear imbalance in knowledge or power or unequal bargaining power during the negotiations.

The second aspect - substantive unconscionability — focuses on the terms themselves: whether they are harsh, oppressive, manifestly unjust, or unreasonably favoring one side.

Courts typically require at least some measure of both elements before declaring a contract unconscionable. The goal is never to rewrite bad bargains by parties, but to ensure that contracts are not used as instruments of injustice.

In Kenya, the doctrine of unconscionability — though not always expressly named — is recognized and applied through general principles of equity, fairness, and public policy under the law of contract. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR this Court emphasized that while courts do not interfere with parties' freedom to contract, they will not enforce a contract that is "illegal, immoral, or unconscionable.

.....

In short, as the above authorities demonstrate, a court can interfere with a contract even where parties have agreed on the terms if the resulting agreement is highly oppressive or unfair as to offend an objective sense of justice. "

24. In the present context, the Respondent claimed coercion, but the trial record showed the Respondent's witness confirmed that they were not coerced to take the staff loan. The Respondent, being a National Sales Manager, was not an ignorant, illiterate or desperate individual being taken advantage of. He held a senior position, which presupposes a significant degree of commercial literacy and understanding. He voluntarily entered into a Staff Loan Agreement and proceeded to service the loan at the rate of 40.5% through salary deductions for a considerable period, without protest. There is no evidence of procedural abuse, lack of meaningful choice, duress or exploitation. The Respondent simply made a commercial bargain, which upon his default, he now wishes to resile from. This does not meet the test of an unconscionable bargain in equity.

25. Given the numerous strong legal precedents that affirm the sanctity of contracts, the trial court's reliance on the general doctrine of unconscionability to strike down the contract, absent of clear evidence of illegality or proof of duress/undue influence represents an error in law.

26. For the foregoing reasons, this Court finds that the appeal is meritorious, and makes the following orders:

    i. The Appeal dated 20 December 2022 is hereby allowed;

    ii. The judgement and decree of the Small Claims Court at Nairobi in SCCOMM E2597 of 2022 delivered on 21 October 2022 is hereby set aside;

    iii. In substitution thereof, judgement is hereby entered for the Appellant against the Respondent for the sum of Kshs 927,408/=.

iv. The Appellant is awarded costs of the proceedings in the trial Court.

v. The Appellant is awarded costs of this appeal assessed at Kshs 40,000/=.

DATED AND DELIVERED AT NAIROBI THIS 24 DAY OF OCTOBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Appellant: Mr. Arunga

For Respondent: N/A

Court Assistant: Lucy Mwangi