

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANGA
CIVIL APPEAL NO. E051 OF 2024

VERONICA WAIRIMU MWANGI.....
APPELLANT

VERSUS

MARGARET GICHARU.....1ST
RESPONDENT

MARY NYAMBURA.....2ND
RESPONDENT

(Being an appeal from the judgements of the learned resident magistrate/ adjudicator Hon. Dorrence C. Soy Murang'a C.M.CC CLAIM NO. E029 OF 2024 dated 28.5.2024.)

JUDGEMENT

1.The instant appeal is lodged vide a memorandum of appeal dated 6th June 2024 on the grounds that:

- a. The learned resident magistrate erred in law and fact in finding the 2nd respondent was not privy to the contract and/ or friendly loan agreement when she is the one who introduced the first respondent to the appellant and therefore the respondents were joined in a hip***
- b. The learned resident magistrate erred in law and in fact in obliterating the hallowed maxim of law that says that court should not rewrite contracts between parties by finding that the interest charged by the appellant was unconscionable, unfair and oppressive***
- c. The learned resident magistrate erred in law and fact in finding that the appellant was not entitled the 25% per month interest charged on the loan***
- d. The learned resident magistrate erred in law in failing to find the sum of KShs. 93,000.00 received by the appellant represented the***

interest charged on the loan and that the principal sum of KShs. 70,000.00 and interest remained unpaid at the time of filing the suit in the lower court

- e. The learned resident magistrate erred in law in failing to make a positive finding that the second respondent admitted in her evidence that the loan advanced to her attracted interest and the money paid by her to the appellant only represented the interest due and not the principal sum**
- f. The learned resident magistrate erred in law in finding that the interest payable of 25% per month from the date of default was not friendly and unconceivable while as the parties had agreed on the issue at the time the agreement was executed**
- g. The learned resident magistrate erred in law in failing to find that the first respondent had defaulted on paying the loan and the finding made by the lower court that the first respondent had fully paid the loan was erroneous in law and fact**
- h. The learned magistrate erred in law and fact in condemning the appellant to pay the cost of the suit**
- i. The learned resident magistrate erred in law and fact in making a finding that the appellant did not prove her case on a balance of probabilities**

2. Therefore, the appellant prayed that the appeal be allowed and that the respondents be condemned to pay a sum of Kshs.112,500.00 plus interest to the as well as the costs of this appeal and of the suit in the lower court be borne by the respondents.

3. The basis of the appeal was that the Appellant claimed that on 30th December 2022, she advanced the Respondents a friendly loan of Ksh. 70,000.00 vide an agreement. It was a term of the agreement that the loan was to be repaid within one year from the date of a loan. However, the Respondents defaulted in paying the loan thus attracting an interest of Kshs. 14,000.00 per month for three months. Despite demand, the Respondents refused to refund the loan. Therefore, the Appellant instituted the suit claiming refund of Ksh. 112,000.00 comprising the loan amount plus interest.
4. The 1st Respondents admitted being loaned Ksh. 70,000.00 by the Appellant but counterclaimed on the basis that they had repaid the loan totalling to Ksh. 98,530.00. They also denied signing the loan application form as alleged by the Appellant, thus contesting its authenticity. The 1st Respondent denied the ID affixed to the loan agreement; it was not hers.
5. The 2nd Respondent on the other hand denied the statement of claim stating that she only introduced the Appellant and the 1st Respondent. She denied signing any loan agreement. She denied owing the Appellant.
6. During the trial, the Appellant testified that the agreement was silent on the fact that interest would apply to the loan. She admitted receiving Ks. 93,000.00 via Mpesa from the Respondents.
7. The 1st Respondent testified that she had never met the Appellant. She denied agreeing to pay the Appellant Ksh. 112,000.00. She clarified that they had agreed on a lump sum interest of Ksh. 25,000.00 while the principal sum was Ksh. 70,000.00.

8. At the end of the trial, the court dismissed the claim with costs to the Respondents on the basis that the appellant had failed to prove its case on a balance of probabilities.
9. Aggrieved and dissatisfied with the finding of the trial court, the Appellant lodged the instant appeal.
10. By order of the court the appeal was canvassed through written submissions.
11. The appellant submitted that the trial court erred in law in finding that there was no proof of disbursement of the loan amount and the respondents indebtedness. In any case, the loan agreement was exhibited as evidence of agreement between the parties that the loan was actually disbursed.
12. The Respondent submitted that the loaned amount was Ksh. 70,000.00 and a total of Ksh. 93,000.00 had been refunded to the Appellant. There was therefore no legal basis for claiming Ksh. 112,000.00 as the agreement was silent on the interest. Therefore, parties are bound by their contracts and it is not the business of the court to rewrite contracts between parties.
13. The Respondent therefore prayed that the appeal be dismissed.
14. The duty of the Court on first appeal is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (**See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown

demonstrably to have acted on wrong principles in reaching the findings.

15. The only issue that I have distilled for determination is whether the Appellant proved on a balance of probability that the Respondents had breached the agreement.

16. A contract binds the parties thereto and each party ought to comply with the terms thereof. In the case of **Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR**, the court stated as follows:

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

17. In the instant case, the Appellant's contention is that she was entitled to 25% interest on the loan advanced to the Respondents pursuant to a contract dated 30th December 2022. However, the validity of the said agreement was hotly contested by the Respondents. The 1st Respondent contended that the ID affixed to the contract was not hers, while the 2nd Respondent maintained that he had not signed any agreement with the Appellant. She had simply acted as an intermediary to link up the 1st Respondent with the Appellant.

18. The Appellant has not availed any evidence to discount the allegations on the validity of the contract. In the circumstance, I find that there was no valid written contract between the parties.

19. Although the existence of the written contract has been disputed, the 1st Respondent has admitted receiving a loan of Ksh. 70,000.00 from the Appellant with a lumpsum

interest of Ksh. 25,000.00. The 1st Respondent contended that she duly discharged the contract by refunding the Appellant Ksh. 93,000.00 comprising both the principal sum and the interest due. The Appellant admitted receiving the said Ksh. 93,000.00 from the 1st Respondent, through Mpesa.

20. Flowing from the above, the main contention is whether the 1st Respondent fully discharged her contractual obligations when she refunded Ksh. 93,000.00 to the Appellant.

21. It is trite that whoever desires a party to believe the existence of a certain fact in issue has the burden of proving that fact, pursuant to **Section 107 and 108 of the Evidence Act**. Therefore, the Appellant had the burden of proving that there was a valid contract between the parties and that pursuant to that contract she was entitled to charge interest at the rate of 25% per month.

22. The Appellant confirmed that requirement for paying interest at 25% had not been written in any agreement. I find that the Appellant has not demonstrated any basis for claiming such an interest from the Respondents. On the other hand, the 1st Respondent has not only admitted receiving a loan of Ksh. 70,000.00, she has also maintained that the loan was to attract a lump sum interest of Ksh. 25,000.00.

23. As earlier observed, it is not the business of courts to rewrite contracts between parties. If the parties desired that the issue of 25% per month be included in the agreement, nothing would have prevented them from doing so. A court cannot imply into an agreement that which it has not expressly or explicitly stated.

24. I am therefore satisfied that the trial court was correct in finding that the Appellant had failed to prove its case to the required standard.

25. The upshot of the matter is that the instant appeal is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 6TH DAY OF NOVEMBER, 2025.

**HON. T. W. Ouya
JUDGE**

ORIGINAL