REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E024 OF 2025

EVANS OMOKE ONYAMBU ..... 1ST APPELLANT

MOTEONKOBA YOUTH GROUP ..... 2ND APPELLANT

VERSUS

ELIMERITA NYABONYI NYAKINA..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. Mugendi Nyaga (PM) dated 23.1.2025 arising from Etago PMCC No. E168 of 2023.

2. The Memorandum of Appeal dated 17.2.2025 set out grounds that the learned magistrate erred in law and fact in:
    a) Failing to appreciate that the suit was filed pursuant to section 3(1) of the Law of Contract Act and not the Banking Act.
    b) Not applying the doctrine of estoppel.
    c) Holding that a friendly loan given by members to a member was a commercial loan.
    d) Departing from pleadings and evidence.

e) Failing to appreciate that the Respondent was a member of a registered youth group who contributed towards savings giving loans at 10% interest.

Pleadings

3. The Appellants sought the following reliefs in the plaint dated 13.12.2023 in the court below:
   (i) Payment of principal sum of Ksh. 240,000/= with interest at the rate of 10% per month making a total of Ksh. 528,000/=, in alternative the court do order that the security be sold by way of public auction.
   (ii) Defendant to pay costs.
4. In the plaint, the Appellant averred that on 18.4.2018, the Respondent borrowed Ksh. 240,000/= advanced on condition that it would be repaid at 10% monthly interest.
5. It was the pleaded case of the Appellants that the Respondent failed to repay both the loaned amount and the accrued interest hence the suit.
6. The Respondent entered appearance and also filed defence dated 19.2.2024 denying the averments in the plaint and also pleaded that she was a registered member of the Appellant but did not borrow Ksh. 240,000/= as alleged.
7. The learned magistrate considered the case and rendered judgment on 23.1.2025 dismissing the Appellants' suit with

costs on the basis that the lending contract was illegal and the resultant loan was as such not recoverable. Aggrieved, the Appellants filed this appeal.

Evidence

8. PW1 was the 1st Appellant. It was his stated case that the Respondent was a member of the 2nd Appellant. She borrowed Ksh. 240,000/= to repay at 10% per month and total repayment could be Ksh. 528,000/=. On cross examination, it was his case that the 2nd Appellant was registered 10 years ago. He was the chairman. There were passbooks and a loan passbook was issued when a loan was disbursed. The Respondent, according to him, became a member in November 2017. She stopped paying deposits after getting the loan. She had paid Ksh. 2,000/=. The security was redeemable 3 months after default.
9. DW1 was the Respondent. She testified that she was a member of the group. She never took a loan with the Appellants. The only loan she took was Ksh. 10,000/= which she repaid in full. She testified further that she never signed any documents on 18.4.2018.

Analysis

10. The issue is whether the learned magistrate erred in finding that the loan was based on a contract that was illegal so that the loan amount was in law irrecoverable.
11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind

that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

12. In the case of **Mbogo and Another vs. Shah [1968] EA 93** the Court stated:

> *"...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*

13. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the Judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

14. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

15. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

16. I now proceed to establish whether the Respondent was entitled to the reliefs awarded. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by *Lord Goddard CJ* in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177), that:

> *[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.*

in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

17. On this subject, Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

> **Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

18. Therefore, it follows that the Appellants herein had the duty to prove their claim against the Respondent. Courts have belabored the burden and standard of proof in civil cases which I find necessary to lay down as below. In **Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

> "As a general proposition under Section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires

the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

19. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. In **Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail fi no evidence at all were given as either side."**

20. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in **William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

> **"In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of**

51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

21. The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. Lord Nicholls of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."

22. The standard must carry a reasonable degree of probability, but not so high as is required in a criminal case. In the case of **Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of Appeal held that:

> "Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the

> evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties… are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

23. The Appellants pleaded that they loaned the Respondent Ksh. 240,000/= at monthly interest of 10%. It was common position of the parties that the Respondent was a member of the 2nd Appellant and the 1st Appellant was the chairman and treasurer of the 2nd Appellant.

24. The lower court dismissed the Appellants' suit on the basis that the loan agreement was illegal as the Appellants being a nonbanking institution could not purport to grant the loan to the Respondent. The court relied on **Section 3(1)(a)** of the Banking Act Cap 488 which provided that no person in Kenya shall transact any banking business or financial business or the business of a mortgage finance company unless it is an institution which holds a valid license and also cited **Samwel Bosire V Gladys Monyangi Omosa (2010)e KLR** where the court held as follows:

> "Members of a self-help group cannot lawfully pool together their resources for the core purpose of lending the same to members of the

public at exorbitant rates of interest, even way beyond the rates charged by banks and other licensed financial institutions. Loans made by moneylenders in contravention of statutory provisions are irrecoverable.

25. The lower court misapprehended Section 3(1) of the Banking Act. This piece of legislation governed banks and financial institutions and expressly prohibited any person, whether natural or juridical from transacting in Kenya in any banking or financial or mortgage finance company business unless the person is an institution or a duly approved agency conducting banking business on behalf of an institution which hold a valid licence. I reproduce the entire Section 3 of the Banking Act As follows:

> No person shall in Kenya—
> (a) transact any banking business or financial business or the business of a mortgage finance company unless it is an institution or a duly approved agency conducting banking business on behalf of an institution which holds a valid licence;
> (b) unless it is a bank and has obtained the consent of the Central Bank, use the word "bank" or any of its derivatives or any other word indicating the transaction of banking business, or the equivalent of the foregoing in any other language, in the name, description or title under which it transacts business in Kenya or make any representation whatsoever that it transacts banking business;
> (c) unless it is a financial institution or mortgage finance company and has obtained the consent of the Central Bank, use the word

"finance" or any of its derivatives or any other word indicating the transaction of financial business or the business of a mortgage finance company, or the equivalent of the foregoing in any other language, in the name, description or title under which it transacts business in Kenya or make any representation whatsoever that it transacts financial business:

Provided that—(i)the provisions of paragraphs (b) and (c) of this subsection shall not apply to investment banks licensed under section 11(3) of the Capital Markets Act (Cap. 485A) and microfinance banks licensed under section 6(1) of the Microfinance Act (Cap. 493C); and

(ii) a person granted consent by the Central Bank under paragraph (b) or (c) and who does not obtain a licence within twelve months of such grant shall forthwith cease the use of those words.

(2)Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

(3) Where an institution conducts business through an agent, the institution shall be liable for the acts or omissions of the agent in so far as such acts or omissions relate to that business.

26. The transaction between the Appellants and the Respondent was a transaction between members of a self-help group. It is discernible from the documents produced in the lower court that the 2nd Appellant was registered on 26.3.2009 under the Ministry of Social Protection as a self-help group. Its key objective under its bylaws was to

promote thrift among its members by affording them an opportunity for accumulating their savings and to create thereby a source of funds from which loans can be made to them for productive purpose at fair and reasonable rates of interest thereby enabling them to use and control their money for mutual benefit. Repayment default would lead to forfeiture of shares of a member or guarantor or both which could lie attachable.

27. Clearly therefore, this was a self-empowering group whose benefits were limited to its members. It did not pool the resources of its members together for the purpose of lending the same to the members of the public. Even if it did so, as narrated in the bylaws that loans were for members and nonmembers, the issue before the court was between the group and its member.

28. It was not a case of the Respondent that the 2nd Appellant carried out its business as a financial institution and there was no such evidence that the 2nd Appellant had offered loans or banking services to the members of the public. To find so was tantamount to limiting the bedrock objective of the 2nd Appellant which was clearly to empower its members through product loans under the bylaws through which shares of the borrower or guarantor's security or both could be attached on default. If the 2nd Appellant acted ultra vires to its bylaws or if the bylaws were contrary to statute, that was not the issue before the court for determination for such a finding could as well

declare the bylaws null and void and aim at including disbanding the 2nd Appellant.

29. In essence, the 2nd Appellant's source of funds was the members' contribution and the members could be empowered through obtaining loans from their own pooled money. I do not think this kind of scenario breached Section 3 of the Banking Act and amounted to financial business or taking money or deposit from members of the public. Under Section 2 of the Banking Act, "financial business" meant:

> *(a)the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; and*
> *(b)the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money.*

30. As earlier indicated herein, what I gather too is that the bylaws opened up loans to both members and non-members, which was an illegality but it was not the case before the lower court that a nonmember or member of the public had been advanced with a loan. The court had to restrict itself to the facts of the case as pleaded by the parties. In the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR**, Justice A C Mrima stated as doth: -

> "11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the

pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

31. On the merits, I understand the Respondent's case to be that she did not sign any loan application form. This was an imputation of forgery and the Respondent had the burden to prove that the signature on the Loan Request Form dated 18.4.2018 was not her signature. The need to prove and the

burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in ***Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another*** **[2016] eKLR** where the court stated that –

> 'It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges….

32. However, in my reevaluation, the lower court established and returned a verdict that indeed the Respondent had borrowed the loan. Per the Request Form dated 18.4.2018, the loan was to be repaid within a specified 120 days and the interest was 10% per month.

33. Notwithstanding, as observed above on the burden of proof, the Respondent denied receiving the loan. The Appellants adduced a loan request form for Ksh. 240,000/= signed by the Respondent. It was upon the Appellants to prove that the amount was disbursed to the Respondent. No bank or M-pesa statement or receipt was adduced in

evidence. The existence of a loan contract was not evidence that the loaned amount was disbursed. The Supreme Court of the United Kingdom later stated as follows in the case of **RTS Flexible Systems Ltd *v* Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14,[45]**:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

34. The protection of commercial transactions and property is based on the principle of *Nemo dat quod non habet*. Though used in relation of transfer of ownership, the term means that there needs to be evidence that the Respondent had money and capacity to transfer the money, did indeed transfer on the said date to the Appellant, since no one can give what they do not have. In **Katana Kalume & another vs Municipal Council of Mombasa & another (2019)**

eKLR the court cited with approval the holding in **Bishopsgate Motor Finance Corporation Ltd vs Transport Brakes Ltd (1949) 1 KB 322, at pp. 336-337** where it was held as follows:

> *"In the development of our law, two principles have striven for masterly. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.*"

35. Therefore, I find that the Appellants advanced Ksh. 240,000/= to the Respondent. It is money had and received. The illegal interest levies cannot bar recovery of the money. The court cannot allow a party to unjustly enrich himself. The principle of unjust enrichment was addressed by J.N. Mulwa in the case of **Stephen Karanja Kibuku v Safaricom Limited [2018] KEHC 1367 (KLR)** as follows:

> The principle of unjust enrichment requires that a party has received a benefit unjustly, and such party is required to make restitution to the other party. It presupposes that:

a) A party has been enriched by the receipt of a benefit,

b) That he has been so enriched at the expense of the giver and

c) That it would be unjust to allow him to retain the benefit.

36. In the case of **Chase International Investment Corporation and Another v Laxman Keshra and 3 others** [1978] KECA 7 (KLR), the court of appeal **[**Madan, Wambuzi & Law JJ A] addressed the principle of unjust enrichment as hereunder:

> The benefit of Laxman's work went to Chase as equitable owner of the property under the charge secured by the debenture. As counsel put it, every brick that Laxmanbhai laid became a Chase brick. And as the judge put it:
>
> Chase took his money and his services and materials in the lodges when it scooped the proceeds of the sale of the lodges by the receiver which Chase asked [Devco] to effect under the trust deed for its debenture by appointing receivers and managers for [the company].
>
> In Fibrosa Spolka, Lord Wright ([1943] AC at page 61):
>
> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different

from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

It seems to me that upon a fine analysis the first category, ie the contract of guarantee which I have discussed above, blends into the theory of restitution which gives it the foundation to justify it. Goff and Jones in their treatise, Law of Restitution, state (page 11):

Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment. There are many circumstances in which a defendant may find himself in possession of a benefit which, in justice, he should restore to the plaintiff.

Obvious examples are where the plaintiff has himself conferred the benefit on the defendant through mistake or compulsion. To allow the defendant to retain such a benefit would result in his being unjustly enriched at the plaintiff's expense, and this, subject to certain defined limits, the law will not allow ... The principle of unjust enrichment presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain the benefit.

All the three foregoing conditions are satisfied in this case: the appellants have been enriched by the receipt of benefit at the expense of Laxmanbhai, and, so obviously, it would be unjust to allow the appellants to retain the benefit of it to the full

extent of Laxmanbhai's claim. Goff and Jones also state (at page 12):

> The principle of unjust enrichment is placed in the forefront of the American Restatement of Restitution. Paragraph 1 provides that 'a person who has been unjustly enriched at the expense of another is required to make restitution to the other'.

37. The Respondent was a member of the youth group raising a sum of Ksh. 200 per member. This means a member simply paid only Ksh. 2,400/= per year. This is therefore an amount collected from 100 members in one year. This is the money the Respondent wishes to keep. It is unconscionable and untenable.

38. The payment of money is not disputed. It is the legality of the agreement. The agreement is not necessarily illegal. It has a clause which is unconscionable. It does not invalidate the entire agreement. Courts must be slow to re-write contracts. In the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another** [2001] KECA 362 (KLR) [Tunoi, Shah & Keiwua JJ A] held as follows: -

> 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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

39. Fraud though alleged was not merited because it was not strictly proved. The need to prove and the burden of proof of such allegations of forgery, fraud, falsehood or dishonesty was elaborated by the court in ***Christopher Ndaru Kagina vs. Esther Mbandi Kagina & Another*** **[2016] eKLR** where the court stated that –

> ***'It is trite law that*** **he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges. In Belmont Finance Corporation**

Ltd. v. Williams Furniture Ltd [27] Buckley L.J. said:

"An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity."

In Armitage v Nurse [28] Millett L.J. having cited this passage continued:

"In order to allege fraud it is not sufficient to sprinkle a pleading with words like "willfully" and "recklessly" (but not "fraudulently" or "dishonestly"). This may still leave it in doubt whether the words are being used in a technical sense or merely to give colour by way of pejorative emphasis to the complaint."

In Paragon Finance plc v D B Thakerar & Co the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with

innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: (see also the cases of Mpungu & Sons Transporters Ltd –v- Attorney General & another. In Jennifer Nyambura Kamau v Humphrey Nandi, the Court of Appeal, Nyeri, emphasized that fraud must be proved as a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities.'

40. On the interest rate, the lower court noted that the interest rate was exorbitant and unconscionable. The loan interest rate was stated as 10% per month. This would translate to 120% per annum and was indeed exorbitant and unjustified. Mr. Justice Mativo (as he then was) in the case of **Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling)** vividly propounded himself as follows:

Unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and an improvident transaction. In cases where inequality of bargaining power had been demonstrated, the relevant disadvantages impaired a party's ability to freely enter or negotiate a contract, compromised a party's ability to understand or appreciate the meaning and significance of the contractual terms, or both.

A bargain was improvident if it unduly advantaged the stronger party or unduly disadvantaged the more vulnerable. Improvidence was measured at the time the contract was formed. Unconscionability did not assist parties trying to escape from a contract when their circumstances were such that the agreement then worked a hardship upon them. For a person who was in desperate circumstances, for example, almost any agreement would be an improvement over the status quo. In those circumstances, the emphasis in assessing improvidence ought to have been whether the stronger party had been unduly enriched. That could occur when the price of goods or services departed significantly from the usual market price.

Unconscionability, in sum, involved both inequality and improvidence. The nature of the flaw in the contracting process was part of the context in which improvidence was assessed. And proof of a manifestly unfair bargain could support an inference that one party was unable to adequately protect their interests. It was a matter of common sense that parties did not often enter a substantively improvident bargain when they had equal bargaining power.

An undertaking that was extracted by an unlawful or unconscionable threat of some considerable harm, was voidable. Economic duress (or business compulsion) could broadly be described as an imposition, oppression, or taking undue advantage of the business or financial stress or extreme necessity or weakness of another. Economic duress was constituted by illegitimate commercial pressure exerted on a party to a contract, which induced him to enter into the contract, and which amounted to the coercion of the will which vitiated his consent.

The party relying on duress had to prove a threat of considerable evil to the person concerned; that the fear was reasonable; that the threat was of an imminent or inevitable evil

and induced fear; that the threat or intimidation was unlawful or contra bonos mores; and that the contract was concluded as a result of the duress. On the other hand, a party wishing to rely on undue influence had to prove that the other party had influence over him or her; the influence weakened his or her resistance; the other party used his influence unscrupulously towards the innocent party; the transaction which was concluded was prejudicial; and exercising a normal and free will, the innocent party would not have entered into the jural act or transaction. The court should have regard to the person complaining of the duress and the circumstances in which he found himself at the time and then decide, in the light of all the relevant factors, whether it was reasonable for the person concerned to have suffered fear and to have succumbed.

According to the principle of, perceptive restraint a court had to exercise perceptive restraint when approaching the task of invalidating, or refusing to enforce, contractual terms. A court would use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases. Contracts, freely and voluntarily entered into, should be honoured.

41. The Appellants were not entitled to claim such exorbitant interest within a span of 120 days. This court cannot close its eyes on an illegality. It would appear that the loan was disbursed as a bait to unlawfully fish the Respondent's property for the purpose of sale and which this court frowns at.

42. The appeal is therefore merited and allowed.

43. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
>
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

44. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case

of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR**) had this to say:

> **It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

45. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR,** as follows:

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

46. The appellants are successful. Consequently, they shall have costs. A sum of Ksh. 65,000/= will suffice.

Determination

47. In the upshot, I make the following orders:

(a) The appeal is allowed.

(b) The judgment of the lower court is set aside and substituted with an order allowing the claim partly.

(c) Judgment is entered for the plaintiff for a sum of Ksh. 240,000/= being money had and received.

(d) Interest at court rates from 13.12.2023 until payment in full.

(e) The Appellants will have costs of the suit in the lower court.

(f) The Appellants shall have the costs of the appeal of Kshs. 65,000/=.

(g) The rest of the claim is untenable and is dismissed.

(h) 30 days stay of execution.

(i) Right of appeal 14 days.

(j) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **13th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Appellants

Ms. Chepkorir for the Respondent

Court Assistant – Michael