Gakure v Mbithi (Civil Appeal E1099 of 2024)
[2025] KEHC 18167 (KLR) (Civ) (2 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18167 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1099 OF 2024

FR OLEL, J

DECEMBER 2, 2025

BETWEEN

RICHARD NICODEM RICHU GAKURE ..... APPELLANT

AND

DANIEL MUNYAO MBITHI ..... RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT DELIVERED IN MILLIMANI COMMERICAL COURT MCCC NO E147 OF 2022 BY HON L.B. KOECH (Mrs) DATED 23 rd AUGUST 2024)

JUDGMENT

A. Introduction

1. The Appellant sued the respondent claiming that he did advance to the said respondent a sum of Ksh 4,000,000/=, which was to attract interest at the rate of 11.1% per month and the said amount would be settled within Nine (9) months. The total amount to be repaid was calculated at Ksh 8,000,000/ = and the said loan was secured using land parcel Nairobi/Block 157/1841 measuring approximately 0.0182HA.

2. It was the Appellant's contention that the respondent failed to pay the amount due and thus sort judgment to be entered in his favour as follows

    a. The sum of Kshs 8,000,000/= plus interest at prevailing commercial rates from the date of filing the suit until date of payment in full.

    b. A mandatory injunction do issue compelling the respondent to execute the land transfer forms within 7 days from the date of the orders of this court, in favour of the plaintiff over property known as Nairobi/Block/157/1841 used as security for the default loan.

c. A mandatory injunction do issue compelling the executive officer of this Honorable court to execute land transfer forms with respect to the property known as Nairobi/Block/157/1841 in the event of default of prayer (c) above.

d. A mandatory injunction do issue compelling the chief lands registrar Nairobi to effect the land transfer with respect to the property known as Nairobi/Block 157/1841

3. The respondent though served did not file any response and the matter did proceed on formal proof and was subsequently dismissed on the basis that the Appellant did not sufficiently prove his case.

4. The Appellants, being dissatisfied with the said ruling, raised Six (6) grounds of appeal, namely: -

a. That the learned Magistrate erred in law and in fact by failing to find that the respondent had furnished the Appellant with security of land parcel No Nairobi/Block/157/1841, therefore an indication that the Appellant had complied with the terms of the loan agreement dated 17th September 2021 by advancing the loan of Kshs 4,000,000/=.

b. That the learned Magistrate erred in law and in fact by failing to find that the respondent did not controvert the fact that the sum of Kshs 4,000,000/= was advanced to him and therefore the same is deemed to have been admitted.

c. That the learned Magistrate erred in law by making an incorrect interpretation of the decision of the High court in Civil case No E834 of 2021 Harrogate Limited & Another V Mwananchi credit ltd

d. That the learned Magistrate erred in law and in fact by finding that the Appellant had failed to discharge his burden of proof to show that he advanced the loan sum of Kshs 4,000,000/= to the respondent.

e. That the learned magistrate erred by failing to find that the respondent acknowledged recipt of the full amount of the loan sum in the agreement dated 17th September 2021 which was duly executed by both parties.

f. That the learned Magistrate erred in law and in fact by failing to consider the evidence and submissions adduced by the Appellant and consequently failed to render a decision in favour of the Appellant.

5. The Appellant thus prayed that the appeal be allowed and the ruling/order of the trial court be set aside.

B. Analysis And Determination

6. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123) & Peters Vs Sunday Post Limited(1968) EA 123

7. While courts generally uphold the principle of freedom of contract, they retain inherent equitable powers to intervene when a contract is so unfair, oppressive, or one-sided that it "shocks the conscience" of the court. The goal is to prevent injustice and unjust enrichment.

8. The Doctrine of Unconscionability was recently discussed in great detail in the case of Euromec International Limited v Shandong Taikai Power Engineering Company Limited [2021] KEHC 93 eKLR, where the Court held as follows;

> "Unconscionability was meant to protect those who were vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made. Although other doctrines could provide relief from specific types of oppressive contractual terms, unconscionability allowed courts to fill in gaps between the existing islands of intervention so that the clause that was not quite a penalty clause or not quite an exemption clause..... would disappear.
>
> 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..... 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.
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> 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".

9. This position was restated by the Court in CIS v Directors, Crawford International School & 3 others [2020] eKLR, where it stated; That courts have authority to infuse fairness in unconscionable contracts was also affirmed by the Court of Appeal in Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR when it was stated that:-

> It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract." Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing facts"

10. A monthly interest rate of 11.1% per month translates to an annual interest rate of 133.2% under simple interest or approximately 254.4% (APY) if compounded. Such an agreement without doubt is

unconscionable, grossly unfair, and oppressive. Secondly the trial Magistrate too, could not be faulted for holding that the appellant had failed to prove actual advance of Ksh 4,000,000/= as he failed to provide evidence in support of the same.

C. Disposition

11. I do therefore find and hold that this Appeal lacks merit and is dismissed with no orders as to Costs.

12. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS .....2ND DAY OF DECEMBER, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this .....2nd ...day of DECEMBER,2025.

In the presence of: -

.....N/A.....Appellant

.....N/A..... Respondent

.....JARSO.....Court Assistant