REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM CASE NO. 113 OF 2022

BETWEEN

LILIAN WANGARI NDEGWA…………………………………… ………….PLAINTIFF

AND

ENCARTA & RAPID (E&R) GROUP LIMITED………………………………DEFENDANT

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JUDGMENT

Introduction and Background

1. By a Plaint dated 1st April 2022, the Plaintiff states that on 20th September 2018 she loaned the Defendant Kshs.3,500,000.00/= and that the loan was to be repaid within 30 days with an interest rate of 15% per month. She claims that the Defendant failed to repay the principal sum within the agreed period and she now seeks repayment of the Kshs.3,500,000.00/= principal loan, payment of Kshs.21,000,000.00/= in accrued interest as of 30th January 2022, continued interest at 15% per month until the full amount is paid and costs of the suit.

2. The suit is opposed by way of the Defendant's Statement of Defence dated 13th June 2022 wherein it maintains that the suit is bad in law and premised on a misapprehension of the nature of engagement between the parties. It is the Defendant's considered view that from a plain reading of the contract, the said amount advanced was not a loan but rather an investment and therefore the Plaintiff was entitled to a Return on Investment pegged on profits realized, if any. The Defendant further maintains that the said interest of Kshs.21,000,000.00/= is quite unconscionable and further that the interest claimed is not premised on the Agreement. As such, the Defendant urges that the court dismisses the suit with costs.

3. The matter was heard where the Plaintiff testified on her own behalf (PW 1) adopting her witness statement dated 1st April 2022 and she produced the Bundle of Documents dated 1st April 2022 (PExhibit 1-6) and the Further Bundle of Documents dated 26th October 2022 (PExhibit 7-8). On its part, the Defendant called its director, David Nyangi(DW 1) who adopted his witness statement dated 15th September 2022 and produced the Bundle of Documents of the same date (DExhibit 1-6). Thereafter, the parties were directed to file written submissions which I have considered together with the

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evidence on record and I will make relevant references to the same in my analysis and determination below.

Analysis and Determination

4. In making this determination, the court is guided by the fact that the standard of proof in civil cases is on a balance of probabilities and that the burden of proof is on the party alleging the existence of a fact which they want the Court to believe. This is anchored in **section 107 (1) and (2)** of the ***Evidence Act(Chapter 80 of the Laws of Kenya)*** which 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"* and that **"***When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person".* In ***Miller V. Minister of Pensions*** **1947 ALL E.R 372,** Lord Denning aptly summarised the application of the standard in the following terms:

> *"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities*

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means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

5. The Court of Appeal in **James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)** simply put it that *'Courts will make a finding based on which party's version of the story is more believable.'*
6. With the above in hindsight, I will now proceed to determine this matter. From the parties' submissions, the following issues arise for the court's determination:
   1) *Whether the parties entered into a money lending agreement dated 20th September 2018 or whether the nature of the contractual relationship was that of an investment agreement*
   2) *Whether the Plaintiff is entitled to the reliefs sought*

Whether the parties entered into a loan or investment agreement

7. The parties agree that they entered into an agreement, but they differ on its nature. The Plaintiff states that it was a money lending

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agreement whereas the Defendant contends that the agreement, while titled "Lender's Agreement," repeatedly uses terms like "investor," "invested funds," and "silent investor" making it an investment agreement and that the purpose of the funding was specifically to supply sanitary towels under a government tender. The Defendant argues this indicates a partnership where the Plaintiff was meant to share in both profits and losses and that under Clause 2(e), repayment was conditional upon the Defendant receiving funds from the government for the supply. That since the tender was frustrated and eventually cancelled due to manufacturing and logistical challenges, the Defendant argues the condition for payment was never met. The Defendant notes that the Plaintiff drafted the Agreement and therefore, any ambiguity regarding whether the funds were a loan or an investment should be interpreted against the Plaintiff. It submits that the "interest" was actually a "Return on Investment" pegged to the success of the business venture.

8. The resolution of this issue turns to the interpretation of the agreement and the intention of the parties. Going through the Agreement and despite the Defendant's arguments, the overwhelming evidence supports the characterization of the

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same as a loan/money lending agreement, not a joint venture or pure investment agreement. The document is titled "*Lender's Agreement*". The parties are defined as "*Lender*", that is the Plaintiff and "*Borrower*", that is the Defendant. These are the primary and consistent terms used throughout the substantive clauses which DW 1 stated in his testimony he was familiar with.

9. Clause 2 of the Agreement then begins: "*Repayment of Funds: In consideration of the Lender providing the funds...*" which frames the transaction as an advance for which repayment is the core consideration. The subsequent clause on breach found at Clause 10 reinforces this by stipulating the Kshs. 3,500,000.00 to be paid out upon breach and the same is not tied to the venture's profits or losses as advanced by the Defendant. The Agreement further provides for "*Interest payment*" of *"…15% pm of the invested amount* and that "*Any additional days after 30 days, the interest amount will accrue daily on pro rata basis*". A fixed, time-based interest rate is a classic characteristic of a loan, not an equity investment where returns are variable and based on performance. As stated, the Agreement contains no clauses detailing profit-sharing ratios, loss-bearing obligations, management rights, or decision-making authority for the Plaintiff. I would imagine that a

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silent partner or investor in a venture would typically have these elements, even if their role is passive. The Agreement is solely focused on the advance and repayment of money.

10. In my view, I find that the sporadic use of the terms "investor" and "invested funds" in the Agreement is language incidental and contextually external to the intention of the parties which is that of a lender advancing money to a borrower. Further, even if I am to assume that Clause 2(e) indeed makes repayment conditional upon the Defendant receiving government funds, this introduces a condition precedent. However, this does not transform the loan into an investment. It simply creates a conditional loan as the obligation to repay is still absolute, but its enforceability is triggered by a specific event. The fundamental lender-borrower relationship remains and that the loan was intended to finance a specific tender of sanitary towels is the purpose of the loan, not its legal nature. Loans are frequently taken for specific projects without altering their character as debt.

11. The Defendant's argument that any ambiguity should be interpreted against the Plaintiff who drafted it is also weak here. From a reading of the Agreement, it is clear to me that the same is not ambiguous in its core structure. It clearly creates a debtor-

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creditor relationship and any ambiguity arising from the casual use of "investment" language would be secondary and ancillary and would not override the clear, operative definitions and obligations set out therein.

12. In the end and in summary, I am satisfied that it was the intention of the parties, as evidenced by their written agreement, to create a loan relationship. This therefore means that the agreement is, in substance and form, a Loan Agreement. The Plaintiff advanced a principal sum of Kshs.3,500,000.00/= to the Defendant, who was obligated to repay it with fixed interest. The Defendant's position that this was an investment agreement where repayment was contingent solely on the success of a tender and the Plaintiff shared in the risk of loss is not supported by the Agreement’s architecture. At its highest, the Defendant might argue for a conditional loan, where the due date for repayment was contingent on the government paying the Defendant. However, even if that condition was not met, the underlying obligation to repay the principal and interest, as a form of damages for breach of the repayment term would remain, as evidenced by the specific breach clause at Clause 10. Therefore, I find that the parties’ agreement can definitively be called a Loan Agreement and not an investment agreement.

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Reliefs sought by the Plaintiff

13. Having established the nature of the parties' Agreement, the next issue to determine is whether the Plaintiff is entitled to the reliefs sought in her plaint. As stated, the Plaintiff seeks the Kshs.3,500,000.00/= principal loan amount, Kshs.21,000,000.00/= in accrued interest as of 30th January 2022, continued interest at 15% per month until the full amount is paid and costs of the suit. On the principal sum, whereas the Defendant stated that it had repaid Kshs.1,025,000.00/=, DW 1 admitted that the Defendant had no proof of payment of this sum. It therefore remains that the entire principal sum of Kshs.3,500,000.00/= remains unpaid and I find that the Plaintiff is entitled to this sum.

14. On the interest, I have found that the Agreement provided for "*Interest payment*" of *"…15% pm of the invested amount* and that "*Any additional days after 30 days, the interest amount will accrue daily on pro rata basis*". In his evidence, DW 1 conceded that the Defendant had not paid any interest to the Plaintiff but that it was willing to pay the same but only to the extent of 30 days as at 25th October 2018 and nothing further. It submits that the claim for Kshs.21,000,000.00/= in interest is "manifestly usurious, excessive, and oppressive" and it points out that 15% per month equals 180%

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per annum, which it deems illegal and unenforceable. On her part, the Plaintiff submits that while the interest rate is high, it was intended for a short-term, 30-day repayment period. That the total amount became large only because the Defendant defaulted for several years and she argues that courts will not usually interfere with high interest rates if the parties consented and the default caused the escalation.

15. The Plaintiff further asserts that the Defendant enjoyed the funds and is now attempting to use the high interest rate as an excuse to bolt from a lawful debt, which would constitute unjust enrichment.

16. Whereas it is correct that the Defendant willingly bound himself to the interest rate terms set out in the Agreement and whereas it is also true that this court has always held that a party who has willingly entered into a lawful contract cannot be allowed to bolt out of it unless there was fraud, the Court of Appeal, in **Dhiman v Shah [2025] KECA 1264 (KLR)** has recently drawn sharp focus on contracts that have interests and interest rates that "shock the conscience of the court" in spite of the fact that the said contracts are lawful. In that case, the appellate court found that "*an annual interest rate of 36% compounded quarterly over a period of nearly three decades…… was not merely commercially*

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unreasonable; it was, in the eyes of equity and good conscience, oppressive and unconscionable. That where the terms of a loan agreement result in punitive or extortionate financial consequences, particularly through excessive compounding over long durations they may be struck down or moderated……..The sheer disparity between the original loan and the amount which would now be due evidences a contract whose enforcement, without judicial intervention, would undermine principles of fairness, good faith, and proportionality…"

17. The above reasoning by the Court of Appeal applies directly to the present case and situation. The Plaintiff's claim results in a total demand of Kshs.24,500,000.00/=, which is 7 times the principal amount. In ***Dhiman(supra),*** the court found a claim of Kshs. 69 billion on a Kshs. 4 million principal oppressive and unconscionable. While the scale here is smaller, the principle of proportionality is the same. A 700% increase due to interest is astronomically high. The court in ***Dhiman(supra)*** specifically noted the excessive compounding over long durations and in this case, the massive sum is a direct result of applying a 180% per annum interest rate over a 40-month default period. The Plaintiff's argument that the rate was for a short-term is irrelevant as the Agreement allowed for

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this exact outcome by not capping interest in the event of a long default. The Agreement's structure permitted a punitive, snowballing liability and in my view, a 15% monthly translating to a 180% annual interest rate is, on its face, extortionate in any commercial context and I feel legally and morally compelled to intervene against such usury.

18. The Plaintiff argued that the court should not interfere because the parties consented. However, ***Dhiman(supra)*** explicitly overrides this. The appellate court found a contract void for unconscionability despite the parties' agreement. Consent alone does not validate a term that is substantively oppressive. The function of equity is to prevent exactly this: one party exploiting another through grossly unfair terms. On her submission that it is the default that caused the escalation, this argument is circular. Every usurious claim is large because of default. The legal issue is whether the contractual mechanism that produces such an outrageous sum upon default is enforceable. ***Dhiman(supra)*** says it is not.

19. The Plaintiff's further claim that denying the full interest would unjustly enrich the Defendant is weak. Unjust enrichment aims to prevent a party from retaining a benefit without payment. The

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Defendant would not be enriched by avoiding a penalty that is deemed illegal. However, I am inclined to support her argument that the sums retained by the Defendant could have been put to good commercial use had the Defendant paid the money earlier. I will therefore award interest at the court rate of 12% per annum from the October 2018 until payment in full which I feel is reasonable interest for the period of default, thereby ensuring the Plaintiff is compensated for the use of her money and the delay, without enforcing the usurious term. I believe this prevents unjust enrichment on both sides.

20. Finally, as the Plaintiff has been largely successful in the prosecution of her suit, I will also award her costs of the same.

Conclusion and Disposition

21. In the upshot, I find and hold that the Plaintiff's suit is allowed and judgment is entered for the Plaintiff against the Defendant as follows:

    1) **Kshs.3,500,000.00/= together with interest at the court rate of 12% per annum from October 2018 until payment in full.**

    2) **Costs of the suit.**

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DATED SIGNED and DELIVERED virtually this 12TH DAY OF FEBRUARY 2026

...
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Chanimbaga holding brief for Mr. Willis Otieno for the Plaintiff.
2. Mr. Mutugi for the Defendant.
3. Amos - Court Assistant

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