REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCC NO. E391 OF 2019

SMP CAPITAL LIMITED ……
…… **PLAINTIFF**

-VERSUS-

WIL DEVELOPERS & CONSTRUCTION LIMITED ……
1ST DEFENDANT
JOHNSON MWANZIA WAMBUA ……
2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff**, SMP Capital Limited**, moved this Court by way of a Plaint dated 17th September 2019, seeking a declaration that the Defendants are indebted to it in the sum of **Kshs. 31,469,018**, payment of the said amount, interest, and costs. The claim arises from two loan agreements entered into in January 2014.

2. The Plaintiff's case is that it advanced two facilities to the 1st Defendant: **Loan L00117** (Kshs. 1,000,000/-) and **Loan L00118 (**Kshs.1,000,000/-). The two loans were secured by a motor vehicle (KHMA 027C) and a personal guarantee from the 2nd Defendant. The Plaintiff alleges the Defendants defaulted, leading to the current claim, which includes a 5% monthly penalty interest.

3. The Defendants filed a Defence dated 29th January 2020 in which they admitted having received the loan facilities but disputed the quantum claimed, alleging coercion and unconscionable interest.

4. The matter proceeded by viva voce evidence on 20th June 2025. The Plaintiff's witness, **Mr. Joseph Kamau,** adopted his filed statement dated 10th May 2023 and produced documents in the list of documents dated 17th September 2019.

5. The Defence case also proceeded on the same day, with the defence witness, Mr. Johnson Mwanzia Wambua, relying on his witness statement dated 11th April 2021. The witness also produced documents in the list dated 11th April 2022 and a further list of documents dated 29th October 2022.

The Plaintiff's Case

6. The Plaintiff's case is that by two written loan agreements executed on 21st January 2014, it advanced two separate loan facilities to the 1st Defendant, being **Loan Reference No. L00117** and **Loan Reference No. L00118,** on mutually agreed terms. The total principal sum advanced was Kenya Shillings Two Million (KES.2,000,000), repayable together with agreed interest and charges within the stipulated contractual periods.

7. That under **Loan Reference No. L00117** executed on 21st January 2014, the Plaintiff advanced a principal sum of Kenya Shillings One Million (KES1,000,000), repayable over ten (10) months by monthly instalments, each of Kshs.129,000/=. The loan was to be fully liquidated by 20th November 2014.

8. That under **Loan Reference No. L00118** executed on the same date (21st January 2014), a further principal sum of Kenya Shillings One Million

(KES1,000,000/=) was advanced to the Defendant, repayable as a bullet payment – a lump sum of Kshs. 1,221,300/-, within three (3) months, that is, by 20th April 2014.

9. The witness contended that the default clause in both loans provided that any delay or default in repayment of the installments would attract penalty interest of 5% on the amount due as at the time of delay.

10. It was further the Plaintiff's case that the loans were secured by, inter alia, the logbook of **motor vehicle registration number KHMA 027C**, and were further supported by **a deed of guarantee** and **indemnity executed by the 2nd Defendant**, who was a director of the 1st Defendant.

11. The Plaintiff contended that the Defendants defaulted in meeting their repayment obligations as stipulated in the loan agreements. As a result of the default, the Plaintiff's contractual right to levy penalty interest at the agreed rate of 5% per month accrued, and its right to repossess the secured motor vehicle crystallized.

12. The witness averred that when it attempted to repossess the security motor vehicle, the defendants subsequently filed **Milimani CMCC No. 2807 of 2014** seeking injunctive relief against the plaintiff, but the suit was dismissed with costs to the plaintiff.

13. According to the Plaintiff, the Defendants remain indebted to the Plaintiff, and as at the time of filing suit, the outstanding sums stood at Kshs. 9,851,243/= under Loan Reference No. L00117 and Kshs. 21,617,775/= under Loan Reference No. L00118, totaling Kshs. 31,469,018/=, totaling to **Kenya Shillings Thirty-One Million Four Hundred Sixty-Nine Thousand and Eighteen (KES 31,469,018),** being the outstanding principal, accrued interest, and contractual charges.

14. The Plaintiff maintains that the loan agreements were lawfully and voluntarily entered into, that no fraud, coercion, duress, or illegality was pleaded or proved, and that the Defendants are bound by the express terms of the contracts they executed. It is the Plaintiff's position that the agreed **penalty interest of 5% per month** is legally enforceable and that the Court ought not to rewrite the parties' bargain.

15. The Plaintiff further asserted that the statutory in duplum rule under section 44A of the Banking Act does not apply to it, as it is not a bank or a deposit-taking financial institution within the meaning of that statute, but a non-deposit-taking lender whose relationship with the Defendants is governed by contract.

16. In consequence, the Plaintiff contends that it has proved its claim on a balance of probabilities and is entitled to judgment against the Defendants jointly and severally for the sum claimed, together with interest and costs of the suit, as prayed in the Plaint.

The Defendants' Case

17. The defendants filed a statement of defence dated 29th January 2020 and admitted the existence of the loan agreements but contended that the monthly penalty interest of 5% stipulated in the agreements was illegal, oppressive, unconscionable, and extortionist, amounting to an unreasonable minimum annual rate of 60%, which was unknown in legitimate commercial lending practice.

18. They asserted that the court had jurisdiction to declare the said penalty interest unlawful and unenforceable.

19. The defendants acknowledged that the 2nd defendant executed a guarantee and indemnity, but stated that the 1st defendant had

additionally furnished motor vehicle registration number KHMA 027D Road Mack as security for the loans. They alleged that the plaintiff unlawfully and without consultation transferred the said vehicle, valued at approximately Kshs. 60 million, into its own name for a loan amount of Kshs. 2,511,300/=. They attributed initial repayment difficulties to a harsh economic environment, which led to the plaintiff instructing auctioneers on 2/5/2014 to recover alleged outstanding sums.

20. They averred that following the proclamation by the auctioneers, the 1st defendant paid a total of Kshs. 2,151,000/= and that thereafter the parties verbally agreed that the amount stated in the proclamation represented the full settlement of the two loans, with the consequence that the loans were fully discharged. The defendants denied owing the plaintiff any further sums and stated that it was inconceivable for a loan of Kshs. 2,000,000/= to escalate to Kshs. 31,469,018/=, particularly after substantial payment had been made.

21. They further contended that the plaintiff lacked authority to levy interest and penalties as it was not a registered financial institution, and that the purported interest charged offended the provisions of the Banking Act. While admitting receipt of demand and notice to sue, they maintained that the same were ineffective given that the loans had been fully settled.

22. The defendants also challenged the court's jurisdiction, alleging that the claim had been deliberately exaggerated, and prayed that the suit be dismissed with costs.

23. The sole defence witness, the 2nd defendant, who is also the managing director of the 1st defendant, admitted receipt of the loan facilities but stated that Loan Reference No. L00117 was fully paid and, in fact, overpaid by Kshs. 111,000/=, which amount ought to have been applied towards the Loan Reference No. L00118. In respect of Loan

Reference No. L00118, he stated that payments of Kshs. 100,000/= were made on 28/8/2014, Kshs.50,000/= in cash on 17/9/2014 during a meeting with the plaintiff's director, and Kshs.500,000/= on 28/10/2014, bringing the total paid to Kshs.761,000/= and leaving an outstanding balance of Kshs.460,300/=.

24. He contended that the plaintiff's demand for Kshs. 31,469,018/= on a principal sum of Kshs.2,000,000/= was unconscionable, extortionist, oppressive, and illegal, and the penalty interest of 5% per month was contrary to acceptable banking practice and amounted to 60% per annum, resulting in unjust enrichment. He further asserted that the amount claimed violated the in duplum rule and was therefore unlawful.

25. The witness stated that upon service of the plaint, he discovered that the plaintiff had unilaterally transferred ownership of motor vehicle registration number KHMA 027C into its own name on 27/12/2016, contrary to the agreement that the vehicle be jointly registered during the loan period, thereby depriving the defendants of its use and occasioning loss of business.

26. The defendants therefore prayed that the court declare the plaintiff's claim illegal and dismiss it with costs, and further order the cancellation of the unilateral transfer and reinstate joint ownership of the motor vehicle.

Reply to the statement of defence

27. Vide a reply to defence dated 12th February 2020, the plaintiff denied the allegations that the agreed penalty interest of 5% per month was illegal, oppressive, unconscionable, extortionist, unreasonable, or harsh, maintaining that the rate was a contractual term freely agreed upon by the parties.

28. The plaintiff asserted that courts had previously upheld even higher monthly interest rates and that the court had jurisdiction to enforce the contract, the parties having executed the agreements after receiving independent legal advice. It further contended that courts ought not to interfere with the parties' freedom of contract and should give effect to their intentions.

29. The plaintiff stated that it lawfully enforced its security rights upon default and that it was within its discretion as lender to determine which security to enforce, including the guarantee and indemnity executed by the 2nd defendant. It denied that the motor vehicle registration number KHMA 027D was valued at Kshs. 60,000,000/=, stating that it was valued at Kshs. 10,000,000/= at the time the agreement was executed, and maintained that it was entitled to attach the vehicle to recover the entire outstanding loan.

30. The plaintiff further averred that the defendants obtained an injunction preventing attachment of the vehicle and that **only Kshs.1,600,000/=,** and not **Kshs.2,151,000/=** was paid to the auctioneers pursuant to the proclamation. It stated that after the injunction was lifted, the 2nd defendant obstructed access to the vehicle, thereby necessitating its transfer into the plaintiff's name to protect its interests.

31. The Plaintiff denied that it lacked authority to levy interest, stating that the Banking Act was inapplicable as it was not a banking institution. The plaintiff maintained that the defendants had not fully repaid the outstanding loan amounts and that the demand, notice to sue, and the suit were therefore proper, and prayed that the defence be dismissed.

Analysis and Determination

32. Upon conclusion of the hearing, directions were given as to the filing of submissions. The Plaintiff filed its submissions dated 4th July 2025, whilst the Defendant filed their submissions dated 4th August 2025.

33. Having carefully examined the pleadings, the evidence, and the applicable law, the Court is of the view that the following issues arise for determination:

i. Whether this Court has the requisite jurisdiction
ii. Whether the loans were fully repaid and whether the contractual interest rate of 5% per month is enforceable.

Whether this Court has jurisdiction

34. In their defence, the Defendants put the issue of jurisdiction in question, contending that the matter ought not to have been filed in the High Court. They argue implicitly that the true value of the dispute, if assessed correctly given the Plaintiff's repossession of the collateral, would fall below the High Court's pecuniary threshold.

35. The Plaintiff, on its part, argued that the suit is properly before this Court and relies on Article 165(3) of the Constitution, which grants the High Court unlimited original jurisdiction in criminal and civil matters, save for the exceptions set out under Article 165(5), none of which relate to pecuniary jurisdiction or commercial disputes.

36. It is settled law that jurisdiction is foundational and must be addressed at the outset. A court must determine jurisdiction based on the pleadings, not on whether the pleaded claim later succeeds or fails. The Plaintiff's plaint expressly seeks **Kshs.31,469,018/=**, a figure well above the statutory jurisdiction of the Magistrates' Courts.

37. Article 165(3) gives this Court unlimited jurisdiction in civil matters, whereas Article 165(5) excludes only those matters assigned exclusively to other courts or tribunals—none of which include commercial lending disputes of this nature.

38. This matter does not fall under the exclusive jurisdiction of the ELC, ELRC, or any specialized tribunal. It is a commercial debt claim, squarely within the jurisdiction of the High Court.

39. The Defendants' argument that the claim is inflated or extinguished goes to the merits, not jurisdiction. Whether the Plaintiff ultimately proves its entitlement to the amount pleaded is distinct from whether this Court has jurisdiction to try the matter.

40. Accordingly, the Court finds that it has the requisite jurisdiction to hear and determine the matter.

Whether the loans were fully repaid and whether the contractual interest rate of 5% per month is enforceable

41. It is common ground that the Plaintiff advanced to the 1st Defendant two loan facilities of **Kshs.1,000,000/=** each, and that the Defendants made cash repayments totalling **Kshs.1,901,000/=**. It is also not disputed that the Defendants fell into default, thereby triggering the default and penalty clauses under the loan agreements.

42. The Defendants contend that the loans were effectively settled upon attachment of the security motor vehicle and further argue that the contractual penalty interest of **5% per month** is oppressive and unconscionable. The Plaintiff, on the other hand, maintains that the security was never realised, that the Defendants retained possession of

the motor vehicle, and that the agreed contractual terms must be enforced.

43. As to whether the penalty interest of 5% per month was oppressive and unconscionable, the Court begins by restating its holding in Matu & another v Waweru [2025] KEHC 16565 (KLR) where the Court stated that "[W]hile it is correct, as argued by the Plaintiffs that the law recognizes the principle of **freedom of contract**, as articulated in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, it is equally correct that courts have similarly recognized that freedom of contract is not absolute and may be limited where the terms are unfair, unconscionable, or contrary to public policy..."

44. The doctrine of unconscionability in contract law has consistently been upheld by the Kenyan Courts to protect parties against contracts that are so unfair and oppressive as to offend the sense of justice. In **Dhiman v Shah [2025] KECA 1264 (KLR),** the Court of Appeal stated that 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.

45. In the present case, it is not disputed that the total principal amount advanced by the Plaintiff to the Defendant was **Kshs.2,000,000/=,** to be repaid within a maximum of one year, and that the total amount that was to be repaid under the two facilities, inclusive of interest, was **Kshs.2,511,300/=.** It was further expressly agreed by the parties that any default or delay was to attract a penalty interest of **5% per month**.

46. The parties having contractually agreed to a penalty interest of **5% per month**, this Court, in line with the principle espoused in the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**, finds no basis to interfere with the same, particularly taking into account that the Court finds the rate not

unconscionable. See the case of Matu & another v Waweru (supra) where this court, in upholding a contractual monthly interest rate of 3%, stated that:

> "Bearing in mind the principles in **Dhiman v Shah (supra),** the Court is of the view that an interest rate of 36% per annum, though high, is not per se unlawful, particularly where voluntarily agreed upon."

47. The penalty interest rate of **5% per month** was a term knowingly and voluntarily agreed upon, and there is no legal basis for this Court to interfere with the same.

48. My finding on the enforceability of the penalty interest rate of **5% per month** notwithstanding, I must hasten to add that the total amount recoverable by the Plaintiff under the facility agreement is, however, in my view, be subject to the *in duplum* rule, which restricts the interest recoverable on a non-performing loan not more than to double the principal sum then outstanding.

49. Although the Plaintiff is not a bank within the meaning of the Banking Act, Courts have consistently held that the in duplum principle is no longer confined to section 44A of the Banking Act, but is a rule of equity and public policy applicable to lending transactions generally, particularly where default interest continues to accrue over an extended period. In Mbobu & another v Hypac Investments Limited & another [2025] KEHC 16564 (KLR), this Court, in upholding the applicability of the *in duplum* rule even in non-financial institutions, stated that:

> "Moreover, the Court is persuaded by the Plaintiffs' argument that the In duplum rule, though only codified in Section 44A of the Banking Act, embodies a principle of public policy that applies across lending transactions. The Rule is intended to protect borrowers from oppressive accumulation of interest, as is the case herein."

50. In the premises, the Court finds that whereas the contractual default penalty interest rate of 5% per month is lawful, and therefore not unconscionable, the maximum amount recoverable by the Plaintiff is, however, subject to the in duplum rule.

51. On the issue of repayment, the Court finds that although the Plaintiff caused the motor vehicle to be attached *in situ* and transferred into its name, the security was never realised. The motor vehicle remained in the possession of the Defendants, and no proceeds of sale were shown to have been received by the Plaintiff. The Court therefore rejects the contention that the attachment or transfer of title, without possession or sale, amounted to satisfaction of the debt.

52. The Defendants cannot, in law or equity, retain possession of the secured asset and at the same time assert that its value discharged the loan. The Court accordingly finds that the loans were not fully repaid, and that repayment must be assessed primarily by reference to cash payments actually made.

53. Having upheld the contractual penalty interest rate of 5% per month (subject to the in duplum rule)**,** and having found that the loans were not fully repaid and that the security was not realised, the Court now turns to the quantification of the amount recoverable by the Plaintiff in light of the *in duplum* rule.

54. In the present case, the Court notes from the Statements of Account presented by the Plaintiff (at pages 24–25), which were not materially disputed by the Defendant, that the total contractual (repayable) principal was to be Kshs. 2,511,300, and that the total repayments actually made by the Defendant were Kshs. 1,901,000, leaving an outstanding principal as at default: Kshs. 610,300.

55. The Claim by the Defendants that the 1st Defendant had paid a total of Kshs.2,151,000/= is not supported by evidence, neither is the claim by the defendant that the parties verbally agreed that the amount stated in the proclamation represented the full settlement of the two loans.

56. Applying the *in duplum* rule, the Court finds that the maximum recoverable interest is Kshs. 610,000/-. It therefore follows that the total amount recoverable by the Plaintiff (principal + interest) ought to be a sum of **Kshs.1,220,600/=.**

Final Orders

57. Accordingly, Judgment is hereby entered for the Plaintiff against the Defendants **jointly and severally** for:

(i) **Kshs.1,220,600/=**, being the maximum amount recoverable after application of the *in duplum* rule;
(ii) Interest on the said sum at court rates from the date of judgment until payment in full.

58. Upon receipt of the sums specified in paragraph 56(i) and (ii) above, the Plaintiff shall, within thirty (30) days thereof, reconvey title of the motor vehicle to the Defendants.

59. If the Defendants fail to make the payments specified under paragraph 56(i) and (ii) above, the Plaintiff shall be at liberty to proceed to realize the security, being motor vehicle **registration number KHMA 027C,** and credit the net proceeds to the loan account. In the event of: -

(i) Any shortfall is to be recovered from the Defendants.
(ii) Any excess from the realization of the security is to be paid to the Defendants.

60. The Plaintiff's claim for Kenya Shillings Thirty-One Million Four Hundred Sixty-Nine Thousand and Eighteen (KES 31,469,018) is hereby dismissed.

61. The Plaintiff having largely succeeded in its claim, the costs of this suit are hereby awarded to the Plaintiff in line with Section 27 of the Civil Procedure Act.

62. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

9th FEBRUARY 2026

ADO MOSES
JUDGE

In the presence of: -

C/A – *Moses*

Ms. Yala.....for the Plaintiff.

Kinyua.....for the Defendant.