

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO.E144 OF 2022**

**SARAH LESAME.....1<sup>ST</sup>**  
**APPELLANT**

**NICHOLAS OKUKU.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**LIN-CAP INVESTMENT LIMITED .....**  
**RESPONDENT**

***(Being an Appeal against the entire Judgment of the Small  
Claim's Court at Nairobi before Hon. Keyne G. Odhiambo  
Resident Magistrate delivered on the 24<sup>th</sup> February 2022  
in SCCOM 954 of 2021)***

**ARISING FROM**

**LIN-CAP INVESTMENT LIMITED ..... CLAIMANT**

**VERSUS**

**SARAH LESAME.....1<sup>ST</sup>**  
**RESPONDENT**

**NICHOLAS OKUKU.....2<sup>ND</sup>**  
**RESPONDENT**

**JUDGEMENT**

**(A) Introduction**

1. The Appellants herein filed this appeal to challenge the Judgment and Decree of Hon. Keyne G. Odhiambo, Resident Magistrate/Adjudicator issued in small claims court at **Nairobi SCCOM Number 954 of 2021** delivered on 24<sup>th</sup> February 2022, where judgment was entered in favour of the respondent in the sum of **Kshs.400,417.00/=** plus costs and interest of the suit. Aggrieved by the said judgment, the Appellants filed their memorandum of appeal dated 15<sup>th</sup> March 2022, raising the following grounds of appeal: -

**(a) That the Trial Magistrate erred in law and fact by failing to hold that the exaggerated amount of Kshs. 400,471/= which the Respondent could not show how it was arrived at was against the In Duplum Rule.**

**(b) That the Trial Magistrate erred in law and fact by failing to hold that the contract between the 1<sup>st</sup> Appellant and the Respondent had been frustrated by force majeure as COVID-19 affected the financial status of the 1<sup>st</sup> Appellant which was beyond her control as she had diligently serviced her previous facility before pandemic hit.**

**(c) That the Trial Magistrate erred in law and fact by failing to appreciate the fact that the 1<sup>st</sup> Appellant made attempts to reach out to the Respondent in a bid to restructure the loan facility because of the effects of COVID-19 pandemic but the Respondent was adamant to consider her request hence acting in bad faith.**

**(d) That the Trial Magistrate erred in law and in fact by failing to take the evidence of the 1<sup>st</sup> Appellant where some goons purporting to be auctioneers from the Respondent visited her house on 2/06/2020, harassed her, forced her to sign a consent authorizing them to confiscate her items without a court order hence coming to court with unclean hands.**

**(e) That the Trial Magistrate erred in law and fact by failing to scrutinize the evidence on record with great circumspection this grossly being misdirected that the evidence on record was in favor of the Respondents.**

## **B. Pleadings**

2. The Respondent filed their statement of claim dated 1<sup>st</sup> September 2021 against the appellants seeking a sum of **Kshs.400,471/=** plus costs and interest of the suit. It was their contention that on or about 30<sup>th</sup> September 2019, at the 1<sup>st</sup> appellant's request, they did process and advanced her a loan of **Kshs.150,000/=**, which was to be repaid back within three (3) months with interest capped at 8% per month. The 2<sup>nd</sup> respondent did guarantee the said loan, which eventually remained unpaid and thus sought the sum claimed from both appellants plus costs and interest.
  
3. In response the 1<sup>st</sup> appellant stated that the suit was ill conceived, obtuse and exemplary of a downright shake-down attempt by the respondent to unjustly gain from her. She admitted that on or about 30<sup>th</sup> September 2019, she was bedeviled by a grievous illness and was in dire need of funds to address the same, thus sought a personal facility from the respondent to the tune of **Kshs.150,000/=**, which request was acceded to and **Kshs.120,000/=** was wired into her account the difference being processing charges. She further noted that the said loan was to be repaid within three months through monthly installments of **Kshs.49,600/=**, and she had since repaid **Kshs.102,700/=** and thus had a balance of **Kshs.17,300/=**.

4. Despite making effort to settle the said sum, during Covid 19 pandemic, the respondent had attached her household goods and thereafter has been harassing her *ad nauseam*, demanding that she pays an amount of **Kshs.400,000/=**, which demand was oppressive, unfair, and unconscionable yet the contract had been frustrated by “force majeure”. It was also to be noted that the respondent could not justify the sum claimed in light of the amendments effected in the **section 44A Banking Act, Cap 488 laws of Kenya**, which introduced the “**In-duplum rule**”, that capped the sum payable at not more than double of what one had borrowed.
5. As a consequence, to the forgoing, the 1<sup>st</sup> appellant maintained that the demand of **Kshs.400,000/=** by the respondent was unlawful, had no cogent foundation and reiterated that the suit is unfounded, unmeritorious and ought to be dismissed with costs.

### **C. The trial courts Judgment**

6. The matter proceeded under **Section 30 of the small claims court Act**, with the parties filing their respective submissions. The trial court in his considered judgment highlighted the fact that the manner in which the 1<sup>st</sup> appellant made repayments for the facility advanced was not as per the loan agreements and therefore the 10% penalty interest

kicked in, from January 2020 to July 2021, being the primary reason for the loan ballooning.

7. Additionally, it was the trial court's finding that the respondent had not been listed as a banking or financial institution as per the schedule in the Central Bank Act for **section 44A of the banking Act** to apply and as such concluded that the interest per se did not offend the "*In duplum rule*" since it's pegged on terms of the agreement expressly agreed upon between the parties herein.
8. The Court concluded by stating that the guarantor (2<sup>nd</sup> Appellant) also had a duty to pay any outstanding amount under the facility and therefore entered judgement in favor of the respondent for the amount of **Kshs.400,471/=** plus costs and interest from the date of filing the suit.

#### **D. Analysis and Determination**

9. I have considered the entire record of appeal and pleadings filed, the grounds of appeal raised, the submissions filed by both parties, and the cited authorities. This being an appeal from the Small Claims Court, it is important to point out that **Section 38 of the Small Claims Court Act** provides that appeals from the said court shall be only on issues of law.

10. An appeal limited to matters of law does not permit the appellate court to substitute the tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. In **John Munuve Mati Vr The returning officer, Mwingi North Constituency & 2 others (2018) eKLR**, what amounts to “*matters of law*” was described as;

***(38) The interpretation or construction of the constitution, statute, or regulations made thereunder or their application to the sets of facts established by the trial court. As far as facts are concerned, our engagement with them is limited to background and context, and to satisfy ourselves, when the issue is raised, whether the conclusions of the trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into consideration of the credibility of witnesses or which witnesses are more believable than others; by law, that is the province of the trial court.***

11. I have carefully perused the record of appeal including the lower court pleadings and the judgment. I have also carefully considered the grounds of appeal, and the parties’

respective rival submissions. The main issues for determination in this appeal are:

- i. Whether the doctrine of frustration arising from the COVID-19 pandemic discharged the Appellant from her contractual obligations.***
- ii. Whether the interest levied offended the in duplum rule;***
- iii. Who should bear the costs of the appeal?***

**(i) Whether the contract was frustrated by COVID-19 Pandemic**

12. The Appellant contends that the loan agreement was frustrated by the onset of the COVID-19 pandemic, which adversely affected her financial ability to repay the loan. She relies on the doctrine of frustration as set out in **Taylor v Caldwell (1863) 3 B & S 826**, which established that a contract may be discharged where a supervening event renders performance impossible.

13. The ***Black's Law Dictionary*** defines frustration of contract in three ways:

**Commercial frustration** – an excuse for a party's non-performance because of some unforeseeable and

uncontrolled circumstance, also termed as economic frustration;

**Self-induced frustration** – a breach of contract caused by one party’s action that prevents the performance;

**Temporary frustration** – an occurrence that prevents performance and legally suspends the duty to perform for the duration of the event

14. The frustration of contracts is a common law mechanism by which a contract may be discharged or terminated. Frustration in contract law occurs when performance of a contract is frustrated or rendered impossible due to a supervening event not caused by the fault of any party. Frustration has a high threshold of proof such that mere difficulty or hardship will not suffice, it must be proved that the contract was impossible to perform and not merely hard. What the appellant needed to prove was that:

***1. Show the occurrence of a supervening event i.e., an event beyond the control of the parties: e.g., war, act of God such as an earthquake, an act of terror, exercise of governmental power etc. This means that self-induced frustration cannot be relied on.***

***2. That the event was unforeseen.***

**3. That the contract has become impossible perform and not merely difficult.**

**4. That there is therefore a radical change in the purpose and circumstances of the contract.**

**( See; Kenya Airways Limited v Satwant Singh Flora 2013 Eklr & Davis Contractors Ltd v Fareham Urban District Council [1956] UKHL 3)**

15. The doctrine of frustration has also been defined in the case of **J Lauritzen AS v Wijs muller BV ( The Super Servant Two) [1990] 1 Lloyd's Rep 1,8,** where the Court stated as follows;

***"The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises ... The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances ... (2) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very***

**narrow limits and ought not to be extended ... (3) Frustration brings the contract to an end forthwith, without more and automatically. (4) The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it ... A frustrating event must be some outside event or extraneous change of situation ... (5) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it ...**

16. It is not in dispute that the loan agreement was entered into in September 2019, between the parties herein prior to the onset of the COVID-19 pandemic in Kenya, which was officially declared in March 2020. While the pandemic undoubtedly disrupted economic activities, courts have taken judicial notice that COVID-19 did not automatically discharge contractual obligations, particularly financial obligations. Rather, it may at best justify renegotiation or restructuring but not extinguishment of debt.

17. Further, the Central Bank of Kenya issued guidelines in March 2020 allowing for restructuring of loans for borrowers affected by the pandemic. However, such relief was not automatic and required engagement between the borrower and lender. The Appellant alleges that she attempted to engage the

Respondent, but there is no evidence that any restructuring agreement was reached. See **Republic v Kenya Bankers Association & Another ex parte Okiya Omtatah Okioti**, where it was held that contractual obligations were not extinguished but could only be varied through lawful restructuring. Consequently, the pandemic did not suspend the operation of interest nor trigger the In duplum rule automatically.

18. The agreement herein was entered into prior to the Covid pandemic and the appellant ought to have finished paying off her loan way before the pandemic hit. In the circumstances, I find that there was no frustration of the contract signed.

**(ii) Whether the interest charged on the loan offended the “In duplum rule.”**

19. The Appellant further argued that the sum demanded of ***Kshs.400,471/=*** offended the in duplum rule as provided for under ***Section 44A of the Banking Act***. The rule provides that interest ceases to accrue once it equals the principal amount on a non-performing loan. The applicability of the in duplum rule depends on whether the lender falls within the ambit of institutions regulated under the Banking Act. However, as correctly noted by the trial court, the respondent is not demonstrated to be a financial institution listed in the schedule to the Central Bank Act as defined

under Section 2 of the said Act. In similar circumstances, the High Court in **Momentum Credit Limited v Kabuiya Civil Appeal E035 of 2022 [2022] KEHC 13705 (KLR) (Commercial and Tax) & Desires Derive limited Vs Britam life Assurance Co Ltd (2016) eKLR** held that the in duplum rule does not apply to private lending arrangements governed purely by contract.

20. The Appellant did not pay the agreed amount at any given month and the interest kept growing using the rate that had been agreed upon in the contract and thus cannot reap benefit from where she did not sow. She is also before the court with dirty hands in equity for failing even to offset the primary principal sum. Consequently, the terms agreed upon must prevail as the court cannot re-write the contract signed between the parties herein. I therefore find no basis to interfere with the trial court's finding on the inapplicability of the in duplum rule.

### **Disposition**

21. Having arrived at the above finding, I do find and hold that this Appeal lacks merit and the same is dismissed with costs to the respondent.

22. The same are assessed at ***Kshs.100,000/=*** all inclusive.

23. Stay of execution 30 days.

24. It is so ordered.

**Dated, signed, and delivered** in open court at **KIAMBU** this **28<sup>th</sup>** day of **APRIL, 2026**.

**FRANCIS RAYOLA OLEL  
JUDGE**

Delivered on the virtual platform, Team this day of **28<sup>th</sup>**  
**APRIL, 2026**.

**In the presence of: -**

.....Appellant

..... Respondent

..... Court Assistant

ORIGINAL