REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E100 OF 2023

MWANANCHI CREDIT LIMITED …..... 1ST APPELLANT

NYALUOYO AUCTIONEERS ……...… 2ND APPELLANT

- VERSUS -

JOHNSTONE SIMIYU WEKESA ……..….. RESPONDENT

(Being an appeal from the ruling and order of **Hon. K. Cheruiyot SPM** delivered on **8/6/2023** in **Kisumu MCCC No. E016 of 2023**

J U D G M E N T

1. On **19/4/2021**, the respondent walked to the offices of the 1st appellant and executed several documents. He obtained a facility of **Kshs.200,000/-** on the security of his motor vehicle registration **No. KBZ 215W** Toyota Mark Xzio ('the said motor vehicle').

2. According to the Loan Agreement dated **21/4/2021,** the amount borrowed was **Kshs.200,000**/- at a monthly interest of 6% (making it 72% per annum). The amount was payable within 24 months by way of monthly instalments. Very critical was the clause on interest. It was clause 1.4 which read: -

> ***"1.4. In consideration of the Lender agreeing to advance to the Borrower the Principal Loan Amount per Clause 1.1, the Borrower expressly covenants to pay the Lender, interest on the Principal***

Loan Amount at the rate of 6% per month ('standard interest') compounded/flat rate/reducing balance monthly from the date of disbursement for the duration of the term."

3. The Loan Agreement also had other stipulations such as the mode of repayment, default charges fees, events of default, repossession of the security amongst many others.

4. The amount of the facility was disbursed and the repayment commenced. There was default and on **30/11/2022**, the 1st defendant caused the said motor vehicle to be repossessed.

5. On **20/1/2023**, the respondent went to Court seeking a permanent injunction to restrain the appellants from selling/disposing or moving the said motor vehicle. He also sought its release and a declaration that the sum of **Kshs.459,000/-** already paid to the defendant was in full and final settlement of the loan and interest.

6. Simultaneous with the Plaint, the respondent took out a Motion on Notice of even date seeking an injunction to restrain the disposal of the said motor vehicle. He also sought the release of the said vehicle to him on a running attachment pending the determination of the suit. In both the Plaint and

Motion, the respondent claimed that the loan document were not released to him.

7. The appellants opposed the application vide the replying affidavit of **Sylvia Njoroge** sworn on **12/4/2025**. In that affidavit, it was deposed that the loan documents had been released to the respondent at the time of execution. That the respondent had applied for a loan of **Kshs.200,000/-** repayable in 24 monthly instalments of **Kshs.27,904/-.** That the said motor vehicle had been offered as a collateral. That the respondent was in default.

8. That as at **20/3/2023**, the total amount outstanding was **Kshs.424,219.02** which continued to accrue interest. That as at that date, he had paid a total sum of **Kshs.648,411.14.** The appellants produced various documents that included the Loan Agreement dated **19/4/2021**. Letter of Offer dated **19/4/2021**, Personal Guarantee dated **22/4/2021**, the Security Agreement under the ***Moveable Property Security Rights Act, 2017*** dated **21/4/2021**, a Letter of Offer dated **19/4/2021**, Account Statement from **26/4/2021** to **20/3/2023**, demand notice dated **12/9/2022**, a repossession order dated **18/10/2022** and a Notification of Sale dated **31/10/2022**.

9. The appellants denied the respondent's allegations and prayed that the application be dismissed.

10. After hearing the parties, the trial court (**Hon. Cheruiyot, SPM**) allowed the application on **8/6/2023**. He held that the claim by the 1st appellant of **Kshs.426,824.61** as being outstanding was against the *in Duplum Rule*. He restrained the 1st defendant or its servants and agents from disposing off the said vehicle and directed that the appellants release the same to the respondent in a running attachment pending the trial of the suit.

11. That is the order that has been appealed against vide the Memorandum of Appeal dated **5/7/2023**. The same set out 14 broad grounds of appeal that can be summarized as follows: -

    a) ***That the trial court erred in the exercise of its discretion by failing to apply the principles applicable in applications for injunction.***

    b) ***That the trial court erred in ordering the release of the said vehicle to the respondent as the respondent was attempting to re-write the contract between the parties.***

    c) ***That the trial court erred in holding that the amounts sought by the 1st appellant was against the in duplum rule yet that 1st applicant is not subject to that rule.***

d) That the trial court erred in failing to accord the appellants a fair hearing and failed to consider the evidence, submissions and authorities presented.

12. Being a first appellate Court, the jurisdiction is well known. It was set out in the case of **Selles & Another vs Associated Motor Boat Company Ltd & Others (1968) EA 123**. This Court must re-evaluate the facts afresh and come to its own independent findings and conclusions. This, the Court has already done in the proceeding paragraphs.

13. The first ground was that the trial court erred in failing to apply the principles applicable in applications for interlocutory injunctions.

14. In order to consider this ground, one has to look at the ruling. In its ruling, the Court had this to say: -

> ***"7) There is this (sic) a prima facie case on the balance due and the penalties charged. The material presented in the supporting affidavit and replying affidavit reveal a legal right which has apparently been infringed on account of the amount said to be due and owing by the 1st defendant as against the amount borrowed.***

8) That being the case, it is not necessary to consider the other principle for grant of injunction set out in the case of Giella vs Cassman Brown."

15. From the foregoing, it is clear that the trial court was aware that it was dealing with an interlocutory injunction. It was aware of the existence of the case of **Giella vs Cassman Brown** and the principles enunciated therein. That is why it referred to the prima facie case and the lack of necessity to consider the other principles in that case. To this Court's mind, the Court must have directed its mind properly even if it did not set out the 3 principles in **Giella vs Cassman Brown case**; to wit, the existence of a prima facie case with a probability of success, that the applicant will suffer irreparable damage if the injunction is not granted, that if in doubt, the application be determined on a balance of convenience.

16. On prima facie case, the Court considered that the validity of the charges and penalties charged on the respondent's account was in question. That out of a loan of **Kshs.200,000/-**, there was an a mount of **Kshs.426,824.61** that was being demanded by the 1st appellant. And for the view that there was a breach of the *in duplum rule*. I will consider that in the 2nd and 3rd ground of appeal. Let me first deal with prima facie case.

17. The cardinal principle of law, and as has been firmly held by the Court of Appeal, parties are bound by their contracts. It is not in the business of the courts to vary or re-write the contracts of the parties. (see **NBK vs Pipeplastic Samkolit (K) Ltd (2002) EA 503**). Contracts that are entered into with eyes wide open, however prejudicial they may be to one of the parties, they are to be enforced. Unless there is fraud, and if the terms are unconscionable and prick the conscience of equity, they are to be strictly enforced.

18. In the present case, there is a contract in writing signed by both parties. Some of the clauses in the contract are crucial. The first one is the one for interest. I set it out in paragraph 2 of this judgment. The question at the trial will be, was 6% interest per month c**ompounded**, **flat rate** or was it on a **reducing balance**? Since it is not clear from the Loan Agreement exhibited and the document belongs to the 1st appellant, the same will be construed strictly against it. Therefore, the most favourable term, '**on a reducing balance'** will be the one applicable.

19. That being the case, what interest was applied in the loan as from the statement of account, was it compound, flat rate or reducing balance in view of the conclusion I have just arrived above? That an arguable issue.

20. The second issue which raises eye brows and therefore arguable are the averments in the replying affidavit of **Sylvia Njoroge** sworn on **12/4/2023** in response to the application. She stated as follows: -

> ***"4. That on 21st day of April, 2021 upon the applicants requests and instance the 1st respondent advanced to the applicant a log book loan facility for the sum of Kshs.200,000/- for the purpose of business development ('hereinafter the facility').***
>
> ***5. That the facility was to be repaid directly from the applicant in 24 monthly instalments of Kshs.27,904/- comprising of both principal and interest starting after 30 days from the date of disbursement. The facility was to be secured by a collateral over Toyota Marx Xzio, registration number KBZ 215W in the name of the applicant ('hereinafter the subject motor vehicle').***
>
> ***…***
>
> ***12. That in accordance with the agreement the applicant was to pay the principal loan amount of Kshs.200,000/- plus interest of Kshs.182,453/- totalling to the sum of***

Kshs.382,453/- if he serviced the facility in accordance with the terms of the agreement."

21. Several issues arise from the foregoing averments. First, if the facility was for **Kshs.200,000/-** for 24 months at 6% per month and the total interest for the period as stated in paragraph 12 of the replying affidavit, then the interest was applicable on a reducing balance. This is so because the deponent states that the interest was expected to be **Kshs.182,453/-** for the period. If it was to be simple interest or flat rate, then the interest for the period would have been **Kshs.200,000/- x 6% x 24 = Kshs.288,000/-.**

22. The second issue is, if paragraphs 10 and 12 of the said replying affidavit were the case, where did the parties agree to the repayment of the facility at 24 monthly instalments of **Kshs.27,904/-** as sworn in paragraph 11 of the replying affidavit?

23. A simple calculation of **Kshs.27,904/-** by 24 months amounts to **Kshs.699,696/-** and not **Kshs.382,453/-** as stated in paragraph 12 of the replying affidavit. Going through the 1st appellant's documents, one will find the figure of **Kshs.27,904/-** in the Letter of Offer dated **21/4/2021**. In that Letter of Offer, the amount of the facility was disclosed as **Kshs.300,000/-** at

interest of 6% per month on a reducing balance. This is at **pages 74 and 75** of the Record of Appeal.

24. That therefore leads to the third issue, if the Letter of Offer for which the repayment amount was **Kshs.27,904/-** the facility to be advanced was **Kshs.300,000/-**, why was the respondent advanced **Kshs.200,000/-** only? What was to be the monthly repayment amount for the Kshs.200,000/- advanced?

25. Further, if the total repayment for a facility of **Kshs.300,000/-** at a monthly instalment of **Kshs.27,904/-** would have been **Kshs.699,696/-,** what should have been the total repayment for a facility of **Kshs.200,000/-**, that was the amount actually advanced? What should have been the monthly instalment? The respondent having repaid a total of **Kshs.636,123.96** as at **20/3/2023** (as admitted in **paragraph 15** of the replying affidavit), would there be any arrears or any amount due for which the security would be liable for repossession?

26. In my view, the foregoing issues were very serious that required an explanation in the footing of the case of **Mrao Ltd vs First American Bank of Kenya (2003) eKLR** on what is a prima facie case.

27. In view of the foregoing, I find that having found that there were such very serious issues for consideration at the trial, it was not necessary to consider the issue of irreparable loss and damage and balance of convenience.

28. In any event, if the respondent had already repaid more than 3 times the principal, he was contesting that he had repaid the facility in full and the repossessed vehicle is sold, the loss will be irreparable in the sense that he will have to commence compensation proceedings. As to balance of convenience, it lay in leaving the status quo to obtain, the respondent continue being in possession of his vehicle and the 1st appellant who had already received more than 3 times what it had loaned out in less than 24 months await to prove if it was still owed any amount to warrant it pursue the collateral. Ground No. 1 fails.

29. Ground Nos. 2 and 3 are to the effect that the trial court erred in ordering restoration of the motor vehicle to the respondent and that the 1st applicant was not subject to the *in duplum rule*.

30. The complaint was that since the contract between the parties allowed repossession in the event of default, then the Court should not have interfered. I have already found that there was some indiscretion on the part of the 1st appellant in its handling of the loan. That from its own documents,

an amount which seemed to exceed 3 times of the loan had already been paid by the respondent.

31. Further, if at the trial the Court finds that the loan had been repaid in full while the vehicle was still in the hands of the 2nd appellant, the storage charges would be too excessive and might even exceed the value of the vehicle. However, by having it released to the respondent on a running attachment, the security of the 1st appellant would still be intact by the time of the trial.

32. As regards the *in duplum rule*, this legal principle traces its origins to Roman Law where it was developed to curb usurious lending practices. The term means '*double the amount*', that interest should not exceed the principal debt. As a consumer protection principle, the rule protects borrowers from predatory lending practices and ensures that debts remain manageable even in cases of default. It prevents the debt from growing exponentially which may otherwise trap borrowers in a cycle they may never escape.

33. In Kenya, it was codified in 2007 vide ***section 44A of the Banking Act*** which provides to the effect that a bank or financial institution cannot recover interest exceeding the principal amount of a non-performing loan. A

non-performing loan is that which remains in default for the period specified.

34. This Court is aware that ***section 44A of the Banking Act*** applies only to financial institutions recognized under the Banking Act. The Court of Appeal had this to say of the rule in the case of **Mwambeja Ranching Co. Ltd vs Kenya National Capital Corporation (2019) eKLR**.

> ***"The in duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant protect both sides."***

35. There is no agreement in the High Court as to whether the *in duplum rule* extends to other lenders who operate outside the Banking Act. In **Momentum Credic Ltd vs Kabuiya (2022) KEHC 13705 (KLR)** and **Mogo Auto Ltd vs Otianga (2024) KEHC 13055 KLR**, the Courts were of

the view that the **in duplum rule** as codified in ***section 44A of the Banking Act,*** was applicable to banks only and did not extend to other lenders.

36. However, in **Francis Maria Wambugu vs Jitegemee Credit Ltd (2020) KEHC 2586 (KLR)** and **Mugure & 2 Others vs Higher Education Loans Boards (2022) KEHC 11951 (KLR**) the Courts held that the *in duplum rule* extends to other lender who are not banks.

37. On my part, I hold the view that restricting the *in duplum rule* to ***section 44A of the Banking Act*** would be acting too restrictively. The rule existed as an independent principle, way before being codified in Kenya in the ***Banking Act in 2007***. As an independent principle, it was meant to give certainty in matters lending and a consumer protection mechanism. The intention of the legislature in codifying the rule did not intend to exclude other money lenders from the application of the principle.

38. The rule, as a principle, was developed under the Roman Law with a focus on dealing with exertion of usurious interests in the lending business. That being the case, this Court's view is that, that principle being legal and having been declared to be in public interest by the Court of Appeal in the **Mwambeja Ranching Company Ltd's** case (supra), this Court hold that the principle is applicable in all lending business whether under the Banking

Act or otherwise. It is a prudent and good tool that ensures predictability, equity and consumer protection. It is the hope of this Court that the Court of Appeal will get an opportunity to pronounce itself on this aspect in order to give its directions. For now, I hold the opinion that the *in duplum rule* goes beyond the codification in ***section 44A of the Bank Act***.

39. I should here point out that this Court is not applying ***section 44A of the Banking Act*** to the contract between the parties, but it is expressing the view that the principle enunciated in that statutory provision is applicable in the lending business in this country for certainty and predictability. Accordingly, those grounds 2 and 3 also fail.

40. In view of the foregoing, the appeal is found to be without merit and is dismissed with costs.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **24th** day of **April**, **2026**.

A. MABEYA, FCI Arb

JUDGE