REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
HCCSCC APPEAL NO. E1121 OF 2023

-between-

ROSEMARY KITUVA.....APPELLANT

-versus-

RITA NDUNGE NDUNDA.....RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. G. Simatwo (RM/Adjudicator) in Nairobi [Milimani] Small Claims Court Commercial Case No. E635 of 2023 delivered on 4th August 2023)

JUDGMENT

Background:

1. Through a Loan Repayment Agreement executed on 2nd December 2019, *Rosemary Kituva,* the Appellant herein, advanced *Rita Ndunge Ndunda*, the Respondent herein, a principal sum of Kshs. 1,000,000/- which was to be repaid within 30 days. The agreement stipulated that the loan would attract an interest rate of 10% per month, alongside a further 10% penalty in the event the Respondent defaulted on repayment.

2. The Respondent made partial payments totalling Kshs. 700,000/- through bank transfers on 6th August 2021, and 7th October 2021. Seeking to recover the balance and accrued interest, the Appellant filed a Statement of Claim in the Small Claims Court on 31st January 2023.

3. The trial Court entered a consent judgment for the admitted principal balance of Kshs. 300,000/- on 14th June 2023. On 4th August 2023, the trial Court delivered its final judgment, wherein it dismissed the Appellant's claim for Kshs. 8,400,000/-

in accumulated interest as calculated in the Appellant's submissions before the trial Court. The Court observed that the Covid-19 pandemic frustrated the contract and that enforcing the agreed interest would be grossly unfair and unreasonable. Dissatisfied with the decision, the Appellant preferred the instant appeal which was disposed of by way of written submissions.

The Appeal:

4. The Appellant filed a Memorandum of Appeal dated 13th October 2023, seeking to set aside the lower Court's judgment on the following grounds: -

    1. *The Learned Trial Magistrate erred in law in failing to give effect to the contract of the parties.*

    2. *The Learned Trial Magistrate erred in law in holding that in duplum rule apply to friendly loans.*

    3. *The Learned Trial Magistrate erred in law in holding that the interest agreed between the parties was reprehensible and unconscionable.*

    4. *The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Respondent benefited with the Appellant's money for 42 months and it was unfair to keep the Appellant's money without interest for the 42 months.*

The Submissions:

5. The Appellant urged her case further through written submissions dated 12th June 2025. She asserted that the loan agreement was freely and voluntarily negotiated by the parties and executed before an Advocate, who must have explained the terms. She argued that it is a hallowed legal maxim that Courts cannot rewrite contracts for parties unless vitiating factors like coercion, fraud, or undue influence are pleaded and proved, none of which the Respondent pleaded. To anchor the foregoing, she cited the Court of Appeal decisions in *National*

Bank of Kenya Ltd. -vs- Pipe Plastic Samkulift (K) Ltd (2002) 2 E.A. 503 (2011) eKLR and *Pius Kimaiyo Langat -vs- Cooperative Bank of Kenya Ltd* (2017) eKLR.

6. The Appellant further submitted that the trial Court committed a fundamental error of law by applying the *in duplum* rule to a personal, friendly loan between individuals. She called to her aid the decision in *Mwambeja Ranching Co. Ltd. & Another -vs- Kenya National Capital Corporation* (2019) eKLR, to assert the position that the rule exclusively applies to banks and gazetted financial institutions.

7. In reference to Section 26 of the Civil Procedure Act and the cases in *National bank of Kenya Ltd. -vs- Peter Nyakundi & Another* (2006) eKLR, the Appellant argued that once parties fix an interest rate by agreement, the Court lacks discretion and must enforce it unless the rate is illegal or fraudulent. The Appellant urged the Court to allow the appeal as prayed.

The Respondent's case:

8. The Respondent challenged the appeal through written submissions dated 31st January 2025 and an even dated Notice of Preliminary Objection. The objection was couched as follows;

    1. *The Appeal does not lie, is incompetent, superfluous, fatally defective, misconceived, lack merits and tantamount to gross abuse of the court process and this preliminary objection ought to be heard and allowed in limine.*

    2. *This Appeal offends the provisions of Section 38 (1) of the Small Claims Courts, which provides that a person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law (emphasis). This provision ousts this Court's jurisdiction on matters of facts hereof.*

    3. *The right of appeal on ONLY POINTS of law must be done within 30 days and cannot be extended. The Appeal did not file an application for stay/review before the trial Court but proceeded to execute and got paid the entire decree by the Respondent.*

4. *The appeal has gravely abused Court process through forum shopping. A party cannot be allowed to cross over to different forums in search of a favourable order because that is tantamount to gross abuse of the Court process.*

5. *The Appellant has not appealed against the judgment herein, has not filed and served the Record of Appeal within 7 days as stipulated by the rules or paid the decretal amount. The Appellant has offended the law of equity to wit; He who seeks equity must do equity and he who comes to equity must come with clean hands.*

6. *Justice must have an end! Delay defeats justice. The appeal offends the objects of the Small Claims Court, which was to serve justice to small claims.*

7. *The Appellant has not impugned the matter and process of hearing at the trial Court. The Appellant in the appeal has NOT raised any cogent, valid or reasonable legal point hereof.*

8. *The Appellant cannot legally challenge the evidence and facts tendered before the trial Court because that would offend the law.*

9. *The Appellant's Company directors gravely breached their duty of reasonable care, skill and diligence of section 145 of the Companies Act, No. 17 of 2015 (Revised 2021) by and ought to be liable jointly and severally.*

10. *Jurisdiction of the Court is everything and the Court must down its tools of there is no jurisdiction.*

The Submissions:

9. In her submissions dated 31st January 2025, the Respondent, drawing support from the case of *Owners of Motor Vessel "Lillian S" -vs- Caltex Oil (Kenya) Ltd* (1989) eKLR argued that the High Court lacks jurisdiction to entertain this appeal because it raises matters of fact, offending Section 38(1) of the Small Claims Court Act. To distinguish between points of law and fact, the Respondent quoted the case of *Ann Wanjiku Kanyori -vs- Elijah Muriira Eringo (*2024) eKLR, and submitted that questions of law require the application of legal

principles, unlike questions of fact which rely on evaluating evidence.

10. Finally, the Respondent submitted that the Appellant acted inequitably by executing the decree against the Respondent while pursuing this appeal.

Analysis:

11. From the record before Court and on appreciation of the disputants' respective cases, the issues that emerge for determination are as follows: -

    i. *The propriety of the Preliminary Objection.*

    ii. *Depending on (i) above, the merits of the Preliminary Objection, if any.*

    iii. *Depending on (ii) above, the propriety of the trial Court's decision.*

12. This Court will now look at the above issues in *seriatim*.

[a] The propriety of the Preliminary Objection:

13. A valid preliminary objection strictly raises pure questions of law capable of disposing of the matter at once. It must not raise factual issues requiring the calling of evidence. In the longstanding case of *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd* (1969) E.A 696 *pg.* 700, the Court observed as follows: -

> *... a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."*

> *...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.*

14. In *Civil Suit No. 85 of 1992, Oraro -vs- Mbaja* [2005] 1 KLR 141**,** *Ojwang J*, [as he then was], cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of Preliminary Objection;

> *…. I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.*

15. Having interrogated the entirety of the grounds forming the substratum of the objection, it is evident that they offend the strictures that define a valid preliminary objection. Save from the contest under Section 38 of the Small Claims Court Act, the objection raises matters of fact that can only be ascertained upon adducing evidence. This Court will, therefore, only examine the merits of the objection with regard to section 38(1) of the Small Claims Court Act.

[b] <u>The merits of the jurisdictional contest:</u>

16. Section 38(1) of the Small Claims Court Act provides as follows:

> ***38. Appeals***
>
> *(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.*

(2) An appeal from any decision or order referred to in subsection (1) shall be final.

17. The Respondent's objection hinges on the assertion that the Appellant's grounds of appeal are purely factual. As such, distinguishing between matters of law and fact is vital. Whereas there has been no universally accepted definition of the term *'matters of law'*, there has been some working definitions thereto. The term '***point of law'*** may also be referred to as ***'matter of law'***. The ***Black's Law Dictionary*** defines '*a matter of fact'* and *'a matter of law'* as follows: -

> ***Matter of fact:*** A matter involving a judicial inquiry into the truth of alleged facts and **Matter of law**: A matter involving a judicial inquiry into the applicable law.

18. *Lord Denning, J* in ***Bracegirdle vs. Oxley*** (2) [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say: -

> *…. The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them*.

19. Drawing from the above, the Court of Appeal in ***Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others*** [2014] eKLR sated as under: -

> *…. That reasoning has been adopted in this jurisdiction. In* ***A.G. Vs. DAVID MURAKARU*** *[1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law.* ***This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law****. See also* ***PATEL vs. UGANDA*** *[1966] EA 311 and* ***SHAH Vs. AGUTO*** *[1970] EA 263.*

20. Earlier, the Court of Appeal in ***M'riungu and Others -vs- R*** *[*1982-88] 1 KAR 360 observed thus: -

> *…. We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only,* ***an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that;_on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.***

21. Later, the Court of Appeal in ***Charles Kipkoech Leting -vs- Express (K) Ltd & another*** [2018] eKLR discussed what entails matters of laws as the Court considered its role as a second appellate Court. It observed thus;

> *…. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina -vs- Mugiria [1983] KLR 78, Kenya Breweries Ltd v Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & another v Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal,* ***the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters, they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse…..***

22. And, in ***Peter Gichuki King'ara vs. IEBC & 2 others***, Nyeri Civil Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law. [See also ***Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others***, (2014) eKLR]. Further, in the case of *J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another* [2017] eKLR, the Court discussed points of law in the following fashion: -

> *…. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations.*

23. From the foregoing, therefore, an appeal on matters of law calls upon the appellate Court to steer clear of findings of fact derived from primary evidence and to also restrain itself from treating findings of fact as holdings of law or mixed findings of fact and law unless the findings are so perverse as to defeat the object of justice.

24. In discharging its appellate role in matters from the Small Claims Court, the High Court should remain alive to the rationale behind the establishment of the Small Claims Court as a special and unique Court which is different from the mainstream civil Courts. It must always be remembered that the focal point of the Small Claims Courts is expeditious disposal of cases and that is why the Court is not bound by the strict rules of evidence [***Section 32*** of the Small Claims Court Act] and further the Court has power to control of its own procedure in determining any claim before it subject to regard to the principles of natural justice [***Section 17*** of the Act]. The High Court is, hence, duty-bound to assist the Small Claims

Court realize it's said objective and it ought to consider appeals from the said Court through those special lenses.

25. Having said so and upon careful perusal of the Memorandum of Appeal, the Appellant in essence, challenged the trial Court's application of the *in duplum rule* to a friendly loan and questions the legal authority of a Court to rewrite a contract without proof of vitiating factors. In the assessment of this Court, the Appellant's concerns are matters of law. They test the application of statutory principles and established judicial precedent, and not the trial Court's evaluation of the factual evidence.

26. Consequently, the objection lacks merit as this Court is properly seized of jurisdiction to determine the appeal.

[c] The propriety of the trial Court's decision:

27. In its rendition, the trial Court rightly established that there was a valid, binding contract between the parties. On whether the contract was frustrated by the Covid-19 pandemic, the Court had the following to say in the judgment: -

> *21. The courts have only held in some instances that Covid-19 pandemic can be regarded as a force majeure as it made it difficult for parties to fulfil their obligations in a contract. The Respondent, however, has not shown how the Covid 19 situation made it difficult for her to negotiate and consult with the claimant towards altering or varying, as the case may be necessary, the terms of the contract.* [emphasis added].

28. In finally settling the above matter, the trial Court then found as follows:

> *29. I therefore find that the global pandemic and the effects of Covid 19 frustrated the contract the parties could and demand of such an interest will result in grossly unfair and unreasonable outcome.*

29. The Court then dismissed the claim for Kshs. 8,400,000/= as accumulated interest and also found that the common law

doctrine of the *in duplum* rule did not apply in the matter since the Appellant was not a bank or a financial institution under the Banking Act. Going forward, therefore, this Court will address two sub-issues being whether the trial Court rightly found that the contract was frustrated and whether the interest applicable ought to be as agreed by the parties or under the *in duplum* rule.

30. On the first sub-issue as to whether the trial Court rightly found that the contract was frustrated, the trial Court, correctly so, analysed the evidence and found that the Respondent had not proved the manner in which she was affected by the Covid-19 pandemic as to render her unable to stand by the terms of the contract. Having said so, and with utmost respect, and without more, there was no basis for the trial Court to then find that the contract was frustrated on account of the effects Covid-19. That finding can only be erroneous and is hereby set aside thereby resulting to the position that the contract was not frustrated by the effects of Covid-19 or at all.

31. Next is the aspect of applicability of the interest rates. The rival arguments are whether the interest rate be as agreed by the parties in the contract or be calculated under the common law doctrine of the *in duplum* rule. The interest chargeable under the contract yields to Kshs. 8,400,000/= as fronted by the Appellant. The Appellant's justification is that the parties agreed as much in the contract and further that the Appellant borrowed the Kshs. 1,000,000/= she advanced to the Respondent from a *Chama* at an interest rate such that if no interest is ordered in these proceedings, then the Appellant will suffer extreme economic disadvantage and loss.

32. This Court will first address the aspect as to whether the common law doctrine of the *in duplum* rule [which is in essence captured in Section 44A of the Banking Act] applies to loans between private individuals.

33. For clarity, Section 44A of the Banking Act, limits the interest recoverable interest between banks [as lenders] and borrowers as follows: -

44A. Limit on interest recovered on defaulted loans

(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2)

(2) The maximum amount referred to in subsection (1) is the sum of the following-

(a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes nonperforming; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

34. The common law doctrine of the *in duplum* rule traces its origin from the Roman-Dutch law, which holds that interest on a non-performing loan cannot exceed the principal sum outstanding when the loan becomes non-performing. This rule is hinged on the following ***five*** key considerations. The ***first one*** is to stop interest from accruing on a non-performing loan once the total interest equals the outstanding principal thereby protecting borrowers from exploitative, runaway interest accumulation that makes debt repayment impossible, while ensuring fairness in the credit market and promoting responsible lending practices. ***Secondly***, the rule seeks to prevent exploitation of the borrowers by preventing lenders from charging exorbitant interest that grows to "*astronomical figures,*" which can ruin debtors financially.

35. ***Thirdly,*** the rule ensures fair repayment by protecting debtors from having to pay interest that exceeds the amount actually borrowed, particularly when a loan becomes non-performing. ***Fourthly,*** the rule also aims at encouraging diligence on the part of the lenders by motivating banks to manage debt recovery efficiently and promptly, rather than allowing interest to accumulate indefinitely. ***Lastly***, the rule is anchored in public policy considerations by protecting consumer rights and

preventing predatory lending that makes it impossible for borrowers to redeem their security or property.

36. The above was reiterated by the Court of Appeal in ***Mwambeja Ranching Company Ltd & another v Kenya National Capital Corporation*** (Civil Appeal 30 of 2018) [2019] KECA 436 (KLR) (6 August 2019) (Judgment) as follows: -

> *41. 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 to protect both sides. Ironically, in this case the creditor was the one facing exploitation through numerous legal proceedings and unnecessary delays by being kept out of reach from its money. The calculation of interest at 21% per annum on the loaned sum of Kshs.30 Million and the interest on the guarantee over the years has been painstakingly outlined in the record before us. This has been enumerated for both appellants yet as rightly observed by the trial Judge, no evidence has been tendered to rebut the sums due were double the amount that was owed in principal and interest from the date the section came into operation. We therefore find that in the circumstance of this case it is not applicable.*

37. In her submissions, the Appellant strongly posited that the issue as to whether the common law doctrine of the *in duplum* rule applies to loans advanced between private individuals was settled in the negative in the ***Mwambeja Ranching Company Ltd & another v Kenya National Capital Corporation*** case [supra]. This Court has carefully perused the cited case and finds that the issue of the applicability of the *in duplum* rule to loans advanced between private individuals was not among those dealt with by the Court of Appeal. In fact, there was unanimity that the transaction was within the provisions of the Banking Act. The Court of Appeal also dealt with the applicability of Section 44A of the Banking Act in ***Langat -vs- Co-operative Bank of Kenya Ltd*** (Civil

Appeal 48 of 2015) [2017] KECA 152 (KLR), but again the issue of the applicability of the *in duplum* rule to loans advanced between private individuals was not among those settled.

38. The issue at hand has elicited divided opinion in the High Court where there are two diametrically opposite schools of thought. On one hand, the opinion is that the common law doctrine of the *in duplum* rule applies strictly within the four corners of the Banking Act and no more. [See ***Momentum Credit Limited v Kabuiya*** (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) (Commercial and Tax) (7 October 2022) (Judgment) among others]. On the other hand, it is opined that the common law doctrine of the *in duplum* rule be infused into limiting interest on loans advanced even outside the Banking Act [See ***Mugure & 2 others -vs- Higher Education Loans Board*** (Petition E002 of 2021) [2022] KEHC 11951 (KLR) (Commercial and Tax) (19 August 2022) (Judgment) among others].

39. In Kenya, while Courts highly respect the constitutionality and sanctity of contracts, they have never shied away from finding some contracts unenforceable on the basis of unconscionability, which in appropriate circumstances, include the invocation of the *in duplum* rule. In ***Langat -vs- Co-operative Bank of Kenya Ltd*** (Civil Appeal 48 of 2015) [2017] KECA 152 (KLR), the Court of Appeal, in reference to its earlier decisions, wholesomely discussed unconscionable contracts as under: -

> *44. This Court has never shied away from interfering with unconscionable contracts. In Kenya Commercial Finance Company Ltd -vs- Ng'eny & Another [2002] 1KLR it stated:*
>
> > *… The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions.*

45. *Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298 states of unconscionability:*

> *Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage a greements; or against contractual penalties, forfeiture of mortgages, extortion the loans or expectant heirs. ... The jurisdiction of the courts to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident.*

46. *Finally on unconscionability, this Court in the* ***Margaret Njeri Muiruri*** *case (supra) stated:*

> ***… 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 circumstances of the case (See Black's Law Dictionary, 9th Edition, Gardner, Ed.).***

40. Speaking to the unconscionability of contracts and in relation to the *in duplum rule*, a South African Court in ***Paulsen and Another -vs- Slip Knot Investments 777 (Pty) Limited*** [2015] ZACC 5, emphasized that the rule against unconscionable contracts is a common law mechanism designed to protect debtors from exploitation. It is an equitable doctrine and its application should focus on the nature of the transaction (the lending of money at interest), not merely the identity or regulatory status of the lender. The Court observed thus;

> *[68] To allow for uncapped, and possibly exorbitant, interest to run pendente lite grants a powerful tool to creditors to bully and possibly annihilate debtors using the litigation process to their best advantage. And this is made possible by the sheer imbalance in financial muscle. By allowing uncapped interest to run as a result of a debtor exercising her right of access to courts by*

suspending the in duplum rule pendente lite we risk rendering the debtors' right of access to courts tenuous, if not illusory.

[69] In sum, suspension of the in duplum rule pendente lite serves as a significant impediment to debtors seeking assistance from courts, inhibiting rather than promoting the right of access to courts. Conversely, the continued application of the rule does not serve as an equivalent impediment to creditors. This policy consideration against the suspension of the rule, founded as it is on the Constitution itself, is weighty indeed and ought to have been considered in Oneanate.

41. Returning to the matter at hand, the trial Court correctly observed that the Claimant is not a bank or a financial institution and that their transaction was not governed by the Banking Act. Be that as it may, drawing from the rationale behind the common law doctrine of the *in duplum* rule as discussed above, it goes without say that the rule aims at spotting an injustice and stopping it on its course. To this Court, an injustice is an injustice regardless of its form and manifestation. It is all about fairness and social justice. Therefore, the very reasons behind the adoption of the *in duplum rule* in Section 44A of the Banking Act must apply *mutatis mutandis* to any form of contractual engagement that yields to the very injustices which the rule seeks to stop. To that end, it is this Court's finding and holding that, applying the common law doctrine of the *in duplum* rule to loans advanced between private individuals or institutions not falling within the Banking Act should not be seen as a misdirection in law, but rather, an intentional infusion and application of the constitutional imperatives of fairness, social justice, human dignity, equity, non-discrimination, integrity and good governance as espoused in ***Article 10*** of the ***Constitution***.

42. Further justification relates to upholding of the socio-economic rights under ***Article 43*** and the consumer rights under ***Article 46(1)*** of the ***Constitution.*** Since the uncontrolled interest rates have the counter-effect of making it difficult for borrowers [as consumers] to ever repay the loans thereby redeeming their securities, such amounts to

permanently confining a borrower to a lifelong loan repayment status thereby denying such borrower the right to a dignified life. No doubt such state of affairs mines against the grain towards the realization of the socio-economic and consumer rights.

43. This Court is alive to the fact that the people of Kenya through Parliament in introducing Section 44A of the Banking Act to cap the interest chargeable on loans, were responding to a serious and genuine social need. By then, that problem was mainly manifested in loans advanced by banks. Over time, the pandemic, so to say, has spread out to other entities and even individuals. Many a times, people suffer under the ruthless patronage of money lenders or even shylocks over loans received with unending interest demands. Since that was the very injustice that resulted to Section 44A of the Banking Act, there is every justification for the adoption and application of the common law doctrine of the *in duplum* rule to all loans advanced by financial institutions and private individuals not covered under the Banking Act.

44. This Court now finds and hold that any loan repayment demand by financial institutions and/or private individuals not covered under the Banking Act that infringes the common law doctrine of the *in duplum* rule renders the contract unconscionable, hence, unenforceable.

45. In this matter, the Appellant is seeking to recover over Kshs. 8,400,000/= as accrued interest from the Respondent out of a loan of Kshs. 1,000,000/= advanced in December 2019. In total, the Appellant will receive Kshs. 9,400,000/=. Apart from alleging that she had also borrowed the sum of Kshs. 1,000,000/= from a *Chama*, the Appellant did not adduce any evidence to that end. Whereas the Respondent cannot be allowed to walk scot-free without paying any interest on the sums advanced, the interest terms in the instant contract are truly and unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case. The contract is, hence, substantively unconscionable and

invites this Court to intervene. The remedy thereto is for this Court to apply the common law doctrine of the *in duplum* rule.

46. Having addressed the two sub-issues, this Court, respectfully so, finds that the impugned judgment ought to be interfered with to the extent that the interest applicable under the contract shall be on the basis of the common law doctrine of the *in duplum* rule as more specifically provided for in Section 44A of the Banking Act, with the necessary modifications. Therefore, the Appellant shall be entitled to interest on the outstanding principal sum as at the time of the loan repayment default [which was 30 days from execution of the contract], and which interest, in any event, should not exceed the then outstanding principal amount.

47. From the record, since the outstanding principal sum as at the time of the loan repayment default was Kshs. 1,000,000/=, and going by the demand for Kshs. 8,400,000/=, then the interest payable in this matter is hereby capped at Kshs. 1,000,000/=. The sums shall, however, attract further interest as ordered in the judgment of the trial Court from the filing of the suit. For clarity, the pecuniary jurisdiction of the Small Claims Court shall not be a bar to the imposition and recovery of the interest in this case.

Disposition:

48. As I come to the end of this judgment, I wish to apologize to the parties for the late delivery of this decision which was to be in February 2026. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a Commissioner given that the Commission has been running interviews since December 2025 to date. Once again, galore apologies.

49. In light of the foregoing, the appeal is partially successful and the following final orders hereby issue: -

[a] The Respondent's Notice of Preliminary Objection dated 31st January 2025, is hereby dismissed.

[b] The Judgment of the Small Claims Court delivered on 4th August 2023, is hereby set-aside and is substituted with a judgment for the Appellant against the Respondent as follows: -

[i] Kshs. 300,000/= being the admitted balance of the principal loan.

[ii] Kshs. 1,000,000/= being interest on the loan default before filing of the suit.

[iii] Costs of the suit to the Appellant.

[iv] Interest on the judgment sum which includes the interest in [b][ii] above at Court rates from the date of filing of the suit.

[c] Parties shall bear their respective costs of the appeal.

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **15th** day of **May, 2026.**

A.C. MRIMA
JUDGE

Judgment virtually delivered in the presence of:

Mr. Kiwanka, Learned Counsel for the Respondent.

No appearance for the Appellant.

Amina – Court Assistant.