



**National Bank of Kenya Limited v Kitiyo (Civil Appeal E062 of 2023)
[2025] KEHC 1408 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E062 OF 2023
SC CHIRCHIR, J
JANUARY 30, 2025**

BETWEEN

NATIONAL BANK OF KENYA LIMITED APPELLANT

AND

GIDEON ROTICH KITIYO RESPONDENT

*(Being an appeal from the judgment of Hon. L Kassan (CM)
delivered on 29th March 2023 in Kakamega CMCC NO E42 of 2020)*

JUDGMENT

1. The Respondent herein filed suit against the Appellant in the lower court seeking judgment as follows:
 - a. A declaration that the loan sum advanced to the plaintiff by the defendant institution is fully settled.
 - b. A permanent injunction restraining the defendant from listing the plaintiff at the metropol credit reference Bureau and demanding any amounts based on the varied interest rate from the plaintiff.
 - c. General damages for punitive listing of the plaintiff at the metropol Reference Bureau.
 - d. Costs of the suit and interest
2. The Appellant filed a defence and a counterclaim seeking for Kshs. 440,571 as against the respondent plus interest at 13% per annum from 14/01/2020 until payment in full, and the costs of the suit.
3. In a Judgment delivered on 29th march 2023, the trial court returned a verdict in favour of the respondent , and awarded damages for ksh. 500,000 for wrongful listing.



Memorandum of Appeal

4. The Appellant was aggrieved by the outcome and proffered this Appeal. It has set out the following grounds;
 - a. That the learned Trial Magistrate erred in law by failing to appreciate that a counterclaim is separate suit that requires a court to make a determination on the same and as such his failure to make a determination on the appellant's counterclaim renders the judgment and decree of the court irregularly invalid, defective and unlawful
 - b. That the learned trial magistrate erred in law and in fact by entering judgment in favour of the plaintiff when there was no evidence adduced by the plaintiff before the court proving his case as pleaded on a balance of probabilities.
 - c. That the learned trial magistrate erred in-law and in fact by awarding the plaintiff Kshs. 500,000/= as general damages for listing at the credit Reference Bureau when there was no evidence before the court establishing negligence, breach of statutory duty, malice and or recklessness by the dependant on a balance of probabilities.
 - d. That the learned trial magistrate erred in law and fact by failing to consider the Defendant's evidence that the plaintiff at the time of being listed at the Credit Reference Bureau was in default of the repayment to the Bank under the loan agreement as a result he awarded Kshs. 500,000/= in general damages which was an error in law and fact in the circumstances.
 - e. That the learned trial magistrate erred in law and in fact by awarding the plaintiff Kshs. 500,000/= in general damages when no evidence before court establishing actual loss or injury suffered by the plaintiff as a result of the impugned listing with the credit Reference Bureau.
 - f. That the learned trial magistrate erred in law and in fact by awarding the plaintiff Kshs. 500,000/= in general damages which amount id inordinately high, excessive and punitive in the circumstances.
 - g. That the learned trial magistrate erred in law and in fact by awarding the plaintiff sum of Kshs. 500,000/= in general damages despite there being no evidence before the court of malice and or improper motive by the appellant in reporting the plaintiff to the credit Reference Bureau in compliance with its statutory obligations under the law.
 - h. That the learned Trial Magistrate erred in law by amending and rewriting the terms of the contract between the parties by holding that the variation of interest by the defendant was excessive despite finding that the Defendant had the discretion to vary the interest chargeable and thereafter proceedings to enforce the court amended terms and conditions of the agreement by giving judgment in favour of the plaintiff and awarding the plaintiff Kshs. 500,000/= in general damages.
5. The appeal was canvassed by way of written submissions.

The Appellant's submissions

6. The Appellant faults the trial court for punishing it for varying the interest rates despite the fact that the respondent had agreed to the loan terms. It submits that courts should not interfere with contractual arrangements of the parties, save in instances of fraud, coercion and or undue influence . In this regard they have relied on the court of appeal case of Pius Kimaiyo Langat vs. cooperative Bank of Kenya (2017) EKLK



7. It is further submitted that the findings of the trial court were not supported by evidence.
8. On the punitive damages awarded to the respondent, the appellant submits that it was never demonstrated how the listing of the respondent in the credit reference bureau caused the respondent loss and or injury to warrant the award .
9. It is further submitted that the Applicant was within its statutory obligation to forward the respondent's name to the credit reference bureau as the respondent was indebted to the Appellant in the sum of ksh. 440,571.11/=. It insists that its actions were lawful and therefore should not be penalized for carrying out their statutory obligation.
10. That in any event, the respondent acknowledged taking loan from the appellant, and that the variation of interest was in compliance with the loan agreement and that the respondent was duly notified of the variation through a newspaper advertisement.
11. The Appellant finally submits that it proved its counterclaim on a balance of probabilities and they should get orders as sought.

Respondent's submissions.

12. The respondent submits that based on the memorandum of understanding (MOU) between his employer, Masinde Muliro University(The university) and the Appellant as well as the letter of offer, the respondent fully serviced the loan. It is further submitted that contrary to the MOU, the Appellant unilaterally increased the interest rate to 27% ,without notice to him. That the Appellant was thus in breach.
13. The respondent further submits that the unilateral increase of the interest rate from 15 % to 27% was unconscionable. He has cited extensively the finding of the court in the case of Margaret Njeri vs Bank of Baroda kenya Ltd (2014) e KLR to buttress his submissions in this regard.
14. It is submitted that the publication of the variation of interest rate in the media did not suffice , as it presupposes that the respondent was having access to media; that the manner in which the variation was done was unconscionable, unfair and burdensome.
15. On damages, it is submitted that as a result of the listing, the respondent suffered ridicule, was unable to access financial Accommodation from other institutions; that he has not been able to sufficiently finance the needs of his children which has led him to suffer mental anguish and psychological torture .
16. Both parties have cited a number of Authorities which I have considered.

Summary of the evidence

17. PW1 was the plaintiff (respondent herein). He testified that he worked as a senior technologist in the University. He stated that he took a loan of ksh. 700,000 from the defendant; that they had an MOU between the university and the defendant to give them a reasonable loan. The loan was advanced at an initial interest rate of 15% and he was to repay Kshs. 18,389/= a month for 52 months, through a check off system. He stated that he had cleared his repayments , when two years later, the Bank Manager told him that the interest rate had increased to 27%; that no notice was issued prior to variation of interest. In his written statement which he had adopted as part of his evidence- in- chief, he stated that the listing at the reference Bureau had occasioned him massive loses both financially, economically and socially.
18. On cross -examination he admitted that as per the provisions of the letter of offer , the Bank had the right to vary interest rate , and that he was aware about it. ; that he was also aware that the Bank had



the right to refer defaulters to a credit reference Bureau . He further told the court that he was served with both the pre-listing and listing notices. . He stated that no one else received the listing letter except him. He complained that the Defendant referred him to an Auctioneer who called him at night; that he developed high blood pressure, he was unable to get funds after the listing and that he was unable to complete building a house.

19. DW1 was one Mercy Mudimba, a credit clerk at the defendant bank. She adopted her written statement as part of her evidence. She produced the defence documents, which were marked as defence exhibits Nos.1 to 10. She confirmed that the plaintiff was given a loan of Kshs. 700,000/= and the loan terms were governed by both the letter of offer and the MOU . That the initial interest rate was 15%; that the Bank did not require consent to vary the interest rate ; that the work of the university was administrative; that the notices on variation were sent to the plaintiff's employer and placed in the newspaper; that the plaintiff willingly signed the letter of offer.
20. She further stated that the plaintiff had paid a total of ksh. 956,268 as at January 2020; that he still owed the Bank ksh. 440,571 and that the plaintiff had not made any effort to clear the said amount , and that that was the basis of the Bank's counter-claim.She told the court that the listing of the plaintiff at the bureau was in accordance with the law.
21. On cross- examination, she confirmed that the bank and the university had entered into an MOU; that the MOU was binding on the Bank and the university. She admitted that clause 6 of the MOU talked of 30 days notice prior to the variation of interest; that the repayment was through the check- off system; that no demand Notice was issued to the plaintiff to pay , and no court process was commenced for purposes of recovery of the debt.

Analysis and determination

22. This is the first appellate court and its mandate is to review the evidence , evaluate it and arrived at own findings. (Ref: selle & Ano vs Associated Motor Boat Co Ltd (1968) EA 123).
23. There are certain undisputed facts in this Appeal. These are: there was a MOU signed between the Appellant and the respondent's employer; there was a letter of offer signed between the parties to this suit; the respondent borrowed ksh. 700,000 and the initial interest rate was 15%;
24. In my view therefore the issues that remain for determination by this court are:
 - a). what was the role of the MOU in the contract between the parties herein
 - b). Was there wrongful listing of the respondent at the Metropol credit Reference Bureau
 - c). Did the respondent suffer loss or damage as a result of the listing.
 - d). Is the Appellant entitled to judgment on the counterclaim?

The role of the MOU

25. The Appellant and the university signed an MOU on 01/03/2009. The salient provisions of the MOU were : The Appellant undertook to advance unsecured loans to the university employees subject to recommendation by the university and the employee's eligibility under the Bank's personal loans scheme.(preamble 1); the recovery of the loan was to be through the check -off system (preamble 2); the initial interest rate was 15 % (clause 6(a) (i)); 30 days notice was to be issued to the university before variation of interest rates (clause 6(a)(iv) ; the liberty of the Appellant to disclose any information touching on the Respondent to the Bank(clause 12) and service of the Notices were to be done through a fax, ordinary mail or physical delivery(clause 21).



26. When the parties herein were contracting, the agreed interest rate was an initial one of 15%; the Appellant could vary interest without any obligation to issue Notice.
27. It is this deviation on the issue of the Notice that forms the genesis of this dispute. Granted, the Respondent sued the Appellant in the lower court for wrongful listing at the credit reference Bureau, but the listing came about because there was no meeting of the minds on what interest the respondent ought to have been paying.
28. It is trite law that , subject to a few exceptions , parties are bound by the provisions of their contracts and it is not the business of the courts to rewrite them or help parties to wriggle out of their contractual obligations. In the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited (2014) eKLR cited by the respondent, the court stated interalia :

“It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Ltd. Civil Appeal No 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.....”
29. The Appellant’s case is that as per the letter of offer, which was the contractual document between the parties herein , the Appellant was at liberty to vary interest rate without any notice to the borrower. On the other hand the respondent insists that a 30 -days’ notice was required, as per the provisions of the MOU.
30. The respondent was not privy to the MOU and as pointed out by the trial court , he can not therefore seek to rely on the terms of the MOU.
31. What then was the place of the MOU? Each party has approached the court waving the MOU and the letter of offer. The Appellant’s witness (DW1) told the court that the loan was advanced on the basis of both the MOU and the letter of offer. The plaintiff also told the court: “we had an MOU between Masinde Muliro and the defendant to give us a reasonable deal . we used the MOU to get the loan” .
32. It is clearly evident therefore that the genesis of the contract between the parties was the MOU signed between the university and the Appellant. It was akin to pre- contracting negotiations. The pleadings and the testimonies of both parties testify to the above fact.
33. Further I have looked at the preamble No. 1 to the MOU. It provides as follows: “ Masinde Muliro university of science and Technology has requested and the Bank has agreed to advance secured and unsecured loans to all eligible members of staff of Masinde Muliro university of science and Technology as specified hereinafter subject to the recommendation by Masinde Muliro university of science and Technology and also to the eligibility under the Bank’s personal loans scheme “
34. It follows that the loan agreement was entered into on the basis of pre-negotiated terms outside the contract. The law does recognize that pre- negotiated terms need not be in the contract.
35. However , when the contract was signed , there was a glaring variation on the question of Notice. The Appellant now had the liberty to vary interest rates without Notice.. The Appellant’s witness told the court that the role of the university was Administrative. It may have been so, but what was the logic of spelling out the interest rate , the Notice period and the right of the Bank to avail statutory reports yet these had nothing to do with the university? The university was not the borrower.
36. My conclusion is that the MOU was the carrot. It was an inducement dangled to the employees of the university , including the respondent herein but when it came to the actual contracting the carrot had



been stripped of certain vital ingredients. In legal terminology what the Appellant engaged in, is what the law of contract calls undue influence

37. The court in the case of *Irvani Vs Irvani* [2000] 1 L.Lyods 412 cited with approval in the case of *LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others* [2011] eKLR, defined the doctrine of undue influence as follows: "Undue influence is concerned with the prior relationship between the contracting parties, and with whether that was the motivation or reason for which the bargain was entered into....."
38. Also in *Royal Bank of Scotland Vs Etridge (No. 2) A.C. 773* as cited with approval in *Margeline Wambui Maina v Leonard Maina Mbuti; Stephen Kabuthi Kimiti (Interested Party)* [2020] eKLR the essence of the doctrine was stated as follows:

"The law will investigate the manner in which the intention to enter into the transaction was secured; how the intention was procured; in the often repealed words of Lord Eldon L.C, from as long ago as 1807 (*Hugvein Vs Basely* (1807) 14 Ves Jun 273 at 300, (1803 – 13) All E.R. Rep 1 at 13). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will".
39. In the present case, the respondent was made to believe that based on the MOU, he will get a 30- days' Notice before any change of interest is effected, when as it turned out the provisions of the contract stated the opposite. The circumstances under which the contract was signed was misleading. In the case of *Margaret Njeri Muiruri (supra)* the court went on to state: ".....Nevertheless, Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party....."
40. It is my finding therefore that the contractual agreement between the parties herein was procured through undue influence and this court declines to enforce it.

Whether the listing at the credit reference Bureau was wrongful

41. In view of what I have stated in paragraph 40 hereof It follows, that the respondent herein was not a defaulter and there was no basis for referring his name for the negative listing by the credit Reference Bureau. The listing was wrongful.

Whether the Respondent is entitled to damages

42. Banks owe a duty of care to its customers and this duty is based either in contract or tort or both (Ref: *Family Bank Limited v Njiru & another* (Commercial Appeal E150 of 2022) [2023] KEHC 22029 (KLR) and *Alice Njeri Maina v Kenya Commercial Bank Ltd* (Civil Case 72 of 2015) [2018] KEHC 5418 (KLR)
43. A reading of paragraph 16 of the plaintiff shows that the plaintiff has based his claim on tort. In his testimony he stated that he was unable to access any other financial facilities, he has suffered from high blood pressure, he has not been able to provide for his children adequately, he was unable to finish building a house and these has given him mental torture and anguish. I have perused the judgment of the trial court and it is apparent that the court awarded ksh. 500,000 without laying a basis for it.
44. Damage or loss cannot be assumed. The plaintiff was under the duty to demonstrate that he suffered loss or damage as a result of the tortfeasor's actions or inaction. There was no evidence that he had



attempted to borrow another loan but was declined because of his credit standing, there was no evidence that the house had stalled for instance. Am not satisfied that the respondent sufficiently discharged his duty in this regard, and therefore there was no basis for awarding damages.

The counterclaim

45. The Appellant has sought to recover ksh. 440,571.11 being unpaid loan. I have already found that the contract was procured through undue influence and therefore this court finds that for that reason, the contract is unenforceable. The counterclaim has no legs upon which it stands. It is hereby dismissed.
46. In conclusion, the Appeal partially succeeds and I proceed to make orders as follows:
- a). The judgment of the trial court limited to the award of ksh. 500,000 only is hereby set aside. The other findings of the trial court remain undisturbed.
 - b). The Appellant's counter-claim is dismissed.
 - c). The costs in the lower court is awarded to the respondent
 - d). Each party to meet their own costs in this Appeal

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2025.

S. CHIRCHIR

JUDGE.

