



REPUBLIC OF KENYA



KENYA LAW
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**National Bank of Kenya Limited v Muhehe (Civil Appeal E061 of 2023)
[2025] KEHC 1088 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E061 OF 2023
SC CHIRCHIR, J
JANUARY 30, 2025**

BETWEEN

NATIONAL BANK OF KENYA LIMITED APPELLANT

AND

JOHN MBOGE MUHEHE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. L Kassan (CM)
delivered on 29th March 2023 in Kakamega CMCC NO E41 of 2020)*

JUDGMENT

1. The respondent filed suit against the appellant in the lower court seeking for the following orders:
 - a). A declaration that the loan sum advanced to the plaintiff by the defendant institution is fully paid.
 - 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 rates from the plaintiff
 - c). General damages for punitive listing of the plaintiff at the Metropol credit Reference Bureau.
 - d). costs and interests of the suit.
2. The Appellant filed a defence and a counter claim seeking for judgment against the respondent herein for:
 - a). Ksh.694,473.18
 - b). interest on a above at 13% per annum from 14/01/2020 until payment in full
 - c). costs of this counterclaim.



3. The trial court heard the parties and found in favour of the respondent/ plaintiff. The court gave the orders as sought and awarded punitive damages of ksh. 500,000.
4. The appellant was aggrieved and filed the present Appeal. He has presented the following grounds:
 1. 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
 2. 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.
 3. 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.
 4. 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.
 5. 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.
 6. 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.
 7. 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.
 8. 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.

Appellant's submissions

6. It is the Appellant submission that the trial court erred by punishing the Appellant for varying the interest rate despite its finding that the Appellant had the liberty to vary the rates. In so finding, it is argued, the trial court varied the contract between the parties yet there was no evidence of fraud coercion or undue influence. To buttress its submission in this regard the Appellant has relied on the decision of Pius Kimaiyo vs Co-operative Bank Ltd (2017) e KLR .



7. The Appellant further argues that even if the trial court found the variation of the interest rates to be unconscionable, he only needed to decline enforcing the contract, but not to go ahead and punish the Appellant by way of punitive damages as this would amount to double loss to the Bank.
8. It is submitted that in any event, the letter of offer signed by the parties gave the Appellant the liberty to unilaterally vary the rate of interest , a fact that was admitted to by the respondent during his cross-examination in court ; that despite this express provision, the Appellant still went ahead and issued public Notices on the variation of interest
9. The Appellant further contends that there was no prove of negligence, breach of statutory duty , malice and or recklessness by the Appellant in initiating the listing of the respondent by the credit Bureau. Further, that there was no proof of loss for injury suffered as a result of the said listing.
10. It is the Appellant's further submission that at the time of forwarding the name of the respondent to the credit reference Bureau, the respondent was in arrears of ksh.387,083 and under the then Credit reference Bureau Regulations of 2013(now repealed), the Appellant was obligated to communicate either a positive or negative rating to a credit reference Bureau . To the Appellant, in the absence of malice , negligence or recklessness, it should not be punished for carrying out a statutory obligation The decisions in the case of Co-operative Bank Ltd vs peter Ochieng(2018) e KLR, Barclays Bank of Kenya vs Dennis Owour(2022) e KLR and Reuben Kioko Vs KCB & others (2020)e KLR have been relied on in this regard.
11. It is further submitted that aggravated damages are meant to punish a defendant who acts out of improper motive or interalia failure to apologise; that in this case none of such acts has been demonstrated and therefore the award of ksh. 500,000 had no basis.
12. It is the Appellant's further submissions that the award of ksh. 500,000 was excessive in any event. This is contrasted with the award of ksh. 200,000 in the case of Namalwa Christine Masinde vs National Bank of Kenya(2016)e KLR .
13. It is the Appellant's final submissions that the trial court failed to make a determination on the counterclaim and consequently the judgment was irregular, invalid defective and unlawful. It urges the court to invoke the provisions of section 78 of the *civil procedure Act*, and determine the counter-claim.

Respondent's Submissions.

14. The respondent submits that the financial accommodation from the Appellant was secured on the basis of a memorandum of understanding(MOU), between Masinde Muliro university (The university) , the respondent's employer , and the Appellant. The MOU was executed on the 2nd of march 2021. That as per the terms of the letter of offer, the respondent was supposed to settle the entire loan plus interest in 60 monthly instalments of ksh. 18,389. It is further stated that the interest rate at the time of advancement of the loan was capped at 15% and was only to be varied upon 30 days Notice being issued to the university. That further the varied interest rate was to apply to Loan Applications made after the date of variation.
15. The respondent further submits that the liberty given to the Appellant to vary the interest rate was unconscionable. The respondent has relied on, and extensively cited the decision of Margaret Njeri Muiruri vs Bank of Baroda Ltd(2014)e KLR.
16. It is stated that the variation of the interest rate from 15% to 27% without so much a notice or consultation was unconscionable; and that the alleged media publication that announced the variation of interest could not have been known to the Respondent .



17. The Respondent further submits that , according to the MOU between the respondent's employer and the Appellant, interest was to be calculated at 15% and in case of variation of interest rates , the new rates would only apply to new Loan Approvals. Consequently, the new rates were not to apply to the respondent's loan.
18. It further follows, the respondent argues , that the sum of ksh. 440, 571.11 stated in the counter-claim was not owed to the Appellant, as he had cleared his loan.
19. On whether the claim for damages was proved , the respondent submits that he suffered ridicule, was unable to access financial accommodation in other lending institutions and could not meet the needs of his children. He further suffered mental anguish and psychological torture, he states. He is therefore entitled to damages.

Evidence in brief

Plaintiff's case

20. Pw1 was the plaintiff . He told the court that he was a pensioner. He relied on his written statement as his evidence- in- chief. In the statement , he states that he borrowed a loan of ksh. 800,000 from the defendant.; that the loan was secured based on an MOU executed by the university and the Appellant on 2/3/2009; that in terms of the letter of offer he was to pay the entire sum within 60 months in instalments of ksh. 19,032.95 monthly ; that under clause 6 of the MOU the interest was capped at 15%, and that he has completed his repayment of the loan.
21. He further states that, he was notified about the listing by the metropolitan corporation Ltd credit reference Company on 28th of February 2014 and upon making inquiries with the defendant, he was told that he owed the Bank ksh. 681,251. He stated that the defendant acted contrary to the MOU and the letter of offer by arbitrarily increasing the interest rate to 27%.
22. He states that having fully serviced the loan as agreed, the listing at the reference bureau was malicious and was aimed at occasioning him financial suffering and ridicule.
23. On cross- examination, he told the court that he was given a letter of offer by the Bank and his employer gave him a copy of the MOU. He admitted that the MOU and the letter of offer gave the Bank the right to vary interest.; that the Bank also had the right to refer defaulters for listing by a credit reference Bureau. He admitted that he received the Notices for listing. And that when he received the Notice he went and lodged a complaint with the credit Bureau; that he tried arbitrating the matter with the bank but they did not come to an agreement.
24. On the loss suffered he testified that he was unable to defend his PHD thesis. The defence of the thesis required him to pay ksh. 150,000 and he was denied to borrow the said amount because of the negative listing by the refrence Bureau.
25. On re- examination , he stated that the Notices came in 2016 after he had cleared the loan.

Defence case

26. The defence witness was a credit clerk at the Appellant Bank. Her testimony in CMCC no. E42 of 2020 and which is a subject of Appeal before this court, as HCCANO. 062 was adopted, subject to the necessary variations on the dates and figures. The witness concurred with the Plaintiff on the amount he borrowed and the then monthly instalments payable. She further stated that it was a term of the agreement that the bank reserved the right to vary interest without Notice; that any default was to be



reported to a credit reference Bureau. That on 21/11/2011, through an advertisement in a newspaper the bank changed the interest rate to 27% per annum, and the Notice went to all the customers by way of a newspaper advertisement ; That despite the review of rates the respondent continued to pay the loan based on the previous rate.

27. She further stated that based on the MOU, its addendum dated 21/12/2010 and the letter of offer signed by the plaintiff, there was no obligation to seek the consent of or give notice to the plaintiff before variation of interest rates. she told the court that the plaintiff had so far paid a total of ksh. 1,141,974.60 leaving a balance of ksh. 694,473.18 as at 14/01/2020. She finally stated that the defendant was seeking the said balance at the agreement rate of 13% from 14/01/2020 until payment in full, as per the counterclaim.

Analysis and determination

28. This is a first Appeal and the mandate of this court is well settled. It is to review the evidence as tendered at the trial court, evaluate it and arrive at its own findings but must make allowance to the fact that it neither heard or observed the demeanour of witnesses.(ref: *Selle v Associated Motor Boat Company Ltd & Others* [1968]1EA 123)
29. I have considered the memorandum of Appeal the lower court proceedings and the parties submissions and has identified the following issues for determination:
- a. What were the terms of the Agreement between the parties and what was the place of the MOU signed between the Appellant and the University?
 - b. Was either party in breach of the Agreement.
 - c. Did any of the parties suffer loss?

What were the terms of the agreement and the place of the MOU?

30. It is not in dispute that the Appellant and the university entered into an MOU containing certain provisions. It is not also in dispute that the respondent was then an employee of the university.

31. Some of the key provisions of the MOU were as follows:

Preamble 1: 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 2; The University was to facilitate the recovery of loan through the check- off system.

Clause 6(a)(i)- interest rate was to be at 15% and more specifically as shown at a referred schedule which was stated to have been attached to the MOU.

Clause 6(a) (iv) provided: " prior to variation of any interest or additional interest the Bank will give THE University 30 days Notice of its intention to vary the interest as such"

Clause 21, provides for services of Notices via a fax, ordinary mail or personal delivery to the physical addresses.

32. On the other hand when the parties herein sign the letter of offer, there is a departure on the issuance of notice prior to variation of interest . The Paragraph on interest provides as follows: " To be at the rate of 15% per annum on monthly rests for the time being, calculated on daily balances. The Bank



however reserves the right to change the rate of interest without notice depending on the cost of funds in the money market.....” (Emphasis added)

33. It is this difference on the provisions of the MOU vis-à-vis the letter of offer that is at the core of this dispute.
34. The letter of offer makes no reference at all to the MOU and as was rightly held by the trial court, the respondent was not a party to the MOU. The trial court went ahead to hold that the contract was unenforceable for being unconscionable on grounds that the variation in the rate of interest was huge and the Respondent was not notified.
35. I agree with the trial court that the variation without Notice was unconscionable , but otherwise the actual variation of rate could not have been said to have been so huge so as to be considered unconscionable.
36. The imperative question however is, what was the use of this MOU? What was its place in the relationship between the respondent, his employer, the university and the lender? Why was it signed in the first place.
37. In paragraph 5 of the plaint , the plaintiff pleaded as follows” “ The plaintiff avers that at the time of securing the said financial accommodation he was an employee of Masinde Muliro University of science and technology hence the financial accommodation was secured based on the memorandum of understanding executed on the 2nd of march 2009 between National Bank of Kenya Ltd (the defendant) herein and Masinde Muliro university”
38. In response the defendant , under paragraph 3 of its defence, stated: “ The defendant admits paragraphs 3,4 and 5 of the plaint”. The admission of paragraph 5 of the plaint means the defendant was in agreement that the financial accommodation was based interalia on the MOU.
39. Further the Appellant’s witness told the court that the loan terms were governed by both the letter of offer and the MOU. (paragraph 2 of page 186 of the record of Appeal).
40. Thus both in their pleading and evidence the Appellant admitted that the MOU and the letter of offer was the basis upon which the loan was advanced to the Respondent.
41. However on re- examination she stated that the role of the university was Administrative. However , if it was true that the role of the university was purely Administrative , I further pose the question ;why was it necessary for the MOU to capture the interest rate and the fact that a 30- days Notice would be issued before any change on the interest rate is effected? Why, yet the university was not the borrower and therefore will not be the defaulter. It is not also lost to this court that the rate of interest in the letter of offer is the same rate stated in the MOU.
42. In view of what I have stated in paragraphs 33 to 41 hereof, it is obvious that the loan was advanced against the background of the MOU. The MOU was what constituted “negotiations” prior to contract. It is evident that the respondent was induced into entering a contract on the basis of pre-negotiated terms but some of which terms were later changed to the disadvantage of the respondent. What clearly emerges was a case of undue influence.
43. Whereas the respondent did not specifically plead the doctrine of undue influence, it was implied by the averments of paragraph 5 of the plaint(supra).
44. The doctrine of undue influence was defined in *Irvani Vs Irvani* [2000] 1 Llyods 412 cited with approval in the case of *LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft (‘Deg’) & others* [2011] eKLR, 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.....”

45. In *Royal Bank of Scotland Vs Etridge (No. 2) A.C. 773* as cited with approval in *Margeline Wambui Maina v Leonard Maina Mbutii; 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”.

46. It is trite law that courts are not in the business of re-writing contracts but there are instances when their intervention become necessary. In the case of *. Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR*, it was held as follows: “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.” (Emphasis added)
47. To answer the question as to what the MOU with the university and the Appellant was all about, am of the view that it was to induce the employees to borrow loans from the Appellant. And the critical inducement in my observation was a constant interest rate , only revisable upon 30 days Notice. That was the inducement upon which the employees of the university, including the respondent herein did the borrowing. However when it came to the signing the letter of offer the terms upon which the bank could change the rate of interest was changed.
48. On the letter of offer , the Appellant had gone back on its word not to vary interest without due Notice. When the Appellant’s witness stated that the role of the Bank was simply administrative, yet it is abundantly clear that the provisions of the MOU was not merely in respect of the Administration of the loan, one cannot help but read mischief , almost deceit ,on the part of the Bank.
49. It is apparent that once the Appellant had secured the cooperation of the university in recovery loan , they were no longer interested on any other term of the MOU.
50. Thus it is my finding that the letter of offer was secured through undue influence , making the contract unenforceable.

Whether the Respondent suffered damage

51. On the particulars of loss, the Respondent pleaded that :
- a. The negative listing has rendered the plaintiff unable to access any financial accommodation from other lending institutions since 2015
 - b. The plaintiff has been unable to sufficiently finance the education needs of his children
 - c. The plaintiff has suffered mental anguish and Psychological torture as a result of the said action.
52. The Bank- customer relationship is fiduciary in nature. Banks owe a duty of care to their customers. It places the obligation on the part of the Bank to act in the best interest of the customer. A duty of care can arise both in tort and contract (see *Reuben Kioko Mutyaene vs Kenya commercial Bank (2020)e KLR* and *Kenya women finance trust & Ano vs Khisa (2023) KEHC 27056 KLR*).



53. Under paragraph 16 of the plaint the respondent pleaded” The plaintiff avers that he serviced his loan sum fully through the check off system and hence the unlawful demands and subsequent negative listing by metropol credit reference bureau was malicious and aimed at occasioning the plaintiff financial suffering and ridicule” He then went on to list the particulars of damage as stated in paragraph 51 hereof.
54. The plaintiff therefore based his claim on tort. The Appellant had the duty to be diligent in having the Respondent listed as a defaulter.
55. However despite setting out the particulars of loss, there was no evidence to prove the alleged loss. The claims for financial loss was not proved as there was no evidence that the respondent had tried to access loans from another financial institution and was denied. The Respondent also pleaded that he had suffered from hypertension but no evidence was led in this regard. He never mentioned about suffering from any ailment in his written or oral testimony. He also stated that he missed an opportunity to start his PhD thesis but save to attach an admission letter there is nothing to link the failure to start the programme to financial distress.
56. It is not enough for a party to file documents in court and leave them to the court to “figure out” what the documents are all about. Evidence touching on the documents ought to have been led. The next reference to the loss appeared in the submissions but it is trite law that submissions do not take the place of evidence.
57. It was not enough for the respondent to prove that the Appellant had been reckless or negligent or malicious in its action. There must be a nexus between the negligent or reckless acts of the tortfeasor and loss. The respondent therefore failed to prove that he suffered loss as a result of the wrong listing by the Credit reference bureau, and the award of ksh. 500,000 was made without basis.

The counterclaim

58. Through the counterclaim the Appellant sought for the recovery of ksh. 694,473.18 outstanding as at 14/01/2020 being the principal, interest and charges. I have already found that the respondent entered into the contract on the basis of undue influence and this court declines to give it effect.
59. Consequently, the counterclaim is equally dismissed.
60. In conclusion, the Appeal partially succeeds and I proceed to make orders as follows:
 - a). The judgment of the trial court is hereby varied only to the extent that the award on damages of ksh. 500,000 is hereby set aside. The rest of the orders remain undisturbed.
 - b). The respondent shall have the costs of the suit in the lower court.
 - c). Each party to meet their own costs in this Appeal.

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

S. CHIRCHIR

JUDGE.

