



Kimutai & another (Suing as personal representative of Estate of Jeremiah Cheruiyot Kimutai) v Kenindia Assurance Company Ltd (Civil Case 56 of 2006) [2024] KEHC 1908 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 56 OF 2006
SM MOHOCHI, J
FEBRUARY 29, 2024**

BETWEEN

PHYLIS JEROTICH KIMUTAI 1ST PLAINTIFF

HENRY KIPKORIR KIMUTAI 2ND PLAINTIFF

**SUING AS PERSONAL REPRESENTATIVE OF ESTATE OF JEREMIAH
CHERUIYOT KIMUTAI**

AND

KENINDIA ASSURANCE COMPANY LTD DEFENDANT

JUDGMENT

1. The Plaintiff vide Plaint dated 3rd March 2006 and subsequently amended on 1st October, 2017 filed the instant suit against the Defendant. The Plaintiffs suing as administrators to the estate of Jeremiah Cheruiyot allege that the deceased applied for a loan Thirty-two (32) years ago, on 11th March 1991, which was approved by the Defendant upon agreed conditions in the offer letter dated 13th March 1991.
2. A charge was subsequently registered on 30th April 1991 over property known as Nakuru Municipality, Block/ 11/25 with the legal date of redemption set on 31st July, 1991. As per the requirements of the offer letter, the Plaintiff took out a life policy for him and his wife for Kshs. 2.5 million and paid for the initial quarterly instalments.
3. The monies were disbursed to the Plaintiff and thereafter he defaulted on payments. The default notwithstanding the Plaintiff had allegedly paid Kshs. 1,392,485/-.
4. In 2006, as a result of the default, the Defendant sought to auction the charged property and the administrators to the estate filed the instant suit as sought the following orders:



- a. Permanent injunction restraining the selling, alienating for sale and/or in any way dealing with the suit property.
 - b. A declaration that the charge dated 2nd April, 1991 is illegal and a nullity and the recovery of the alleged interest or any party thereof from the estate is barred by limitation of actions act and the Registered Land Act, Cap 300 Law of Kenya.
 - c. A declaration that the interest as charged by the defendant and/or the basis of charging and calculating the interest by the Defendant was illegal thus null and void ab initio.
 - d. A declaration that the sums and/or amounts demanded by the Defendant as being the outstanding fees due to the loan granted to the deceased are illegal for being in violation of the common law principle of the duplum rule
 - e. An order cancelling the registration of the charge dated 2nd April, 1991 and rectification of the register according and damages.
 - f. Any other or further orders that the Honourable Court may deem fit and just to grant.
5. The Defendant on the other hand in opposing the suit filed its Defence to the Amended Plaint dated 17th November, 2017 and sought to have the suit dismissed with costs. It was the Defendant's contention that the deceased took the loan in 1991 and since then up to his demise on 12th March 2002, the deceased had only paid Kshs. 400,000.
 6. That the administrator was appointed in 2002 and only filed the instant suit in 2006, four (4) years later. That this suit was dismissed twice due to the administrator's tardiness.
 7. The Defendant contended that the suit seeks relief 15 years after the contract was executed 9 years after the 6-year period for limitation of contractual suit and that the Plaintiff seeks to use his own time lapse to limit recovery of the loan.

Plaintiff's Case

8. The Plaintiff called two witnesses to adduce evidence. PW1 was Henry Kipkorir Kimutai, a farmer, a businessman and also the Personal Representative to the estate of his late father, Jeremiah Cheruiyot and produced a Grant issued on 12th March, 2002 as P. Exhibit 1. He stated that he was in Court to stop the sale of Nakuru Municipality/Block 11/125. Which was charged by his late father. He stated that his father died in 2002 and when they went through his documents they found out that he taken a loan of Kshs. 2.5 million from the Defendant and produced a charge registered on 30th April, 1991 as P. Exhibit 2.
9. He stated that together with his mother went to the Kenindia to negotiate the loan on or around 2003 or 2004 and added that the deceased had paid Kshs 1.2 million leaving a balance of Kshs. 1.3 million. They met Mr. Praful Dhanji who told them to put in an offer in writing. That the property consisted of 4 houses and they decided to sell 2 units to give money to the Defendant. That the sale agents said the houses would go for Kshs. 2 million and 2.5 million and they realized they could pay 4 million. That they met Praful Dhanji who said he could arrange for a meeting with the Managing Director and they went for the meeting with his mother where they were asked for 16million. He states that they could not make that offers since even if they sold the property, it would only fetch 8-9 million.
10. He further added that he asked for loan statements and found out that the outstanding balances was Kshs. 26,512,624.10. He added that prior then they had not seen any statement as their view was that the balance was Kshs. 1.3 million.



11. He stated that they approached Interest Rates Advisory Centre (IRAC) to know how the amount came to over 26 million and from their report they were advised to approach Advocate Ambrose Weda. They moved Court when they were served with an auction notice and managed to get conditional injunction to deposit Kshs. 4 million in an interest earning account which they did. He stated that he was not aware of any auctioneering process. He adds that at paragraph 6 of the charge the loan ought to have been repaid by 31st July, 1991.
12. His prayer is that the intended sale of Nakuru Municipality/Block 11/125 be stopped, discharge of Nakuru Municipality/Block 11/125 and that they be allowed to pay what is legally and just fully fair. The amount IRAC calculated was Kshs. 5.3 million.
13. On cross-examination, he admitted to making inventory of assets of the deceased and the subject property was included when applying for letter of administration. He also admitted that the loan was premised on the subsistence of the insurance policy but denied having the loan agreement or being a party to the loan or charge. He stated that prior to his father's death he knew of the existence of loan but not specific ones. the loan was to run up to 31st July, 1991.
14. He stated further that he did not have any document to support that there was payment of the Kshs. 1.2 million or whether interest was paid or that the loan was cleared. That balance was Kshs. 1.3 million and it had been 18 years and balance was still outstanding. He admitted to there being correspondence between him and the Defendant. He admitted that in the charge document there was a provision of interest and that the principle that was unpaid ordinarily continued to accrue interest and that there was no provision for pardoning interest in the event of death. He confirmed that that the Defendant had tried to sell the property more than a year after the demise of his father but it was stopped by the conditional injunction.
15. He further added that he was not aware that the Defendant had previously wanted to sell the property and added that the loan was not recoverable after 31st July 1991 and referred to paragraph 8 (1) (a) and (b). He was not aware that his father filed HCC 496 of 1996. He stated that the loan is limited by statute. He was not aware of any 2 cases filed by his late father.
16. He stated that he was also aware that that the 20% interest rate existed at the time the loan was given out. He added that after they got the statements they received advice from IRAC he does not know how the interest rate was varied as a layman. He also did not have any document to show how the 1.2 million was paid. He admitted that it was possible that his father was served with a default notice, that the father communicated with the Defendant and that he got default documents and did not communicate with them.
17. In re-exam he admitted they filed a Notice to produce on 14th November, 2016.
18. PW2 was Mr, Wilfred Abincha Onono a Certified Public Accountant since 1978 he referred to the IRAC report dated 18th February 2019 in the bundle of documents filed on 4th April 2019. He testified that the report is an interest recalculation report on loan of 2.5 million granted to Jeremiah Cheruiyot Chemtai on 2nd May 1991 to be repaid over a period of 72 months at an initial interest of 19%.
19. He testified that there was a maximum interest rates on financial institution and produced Gazette Notices No.s 1617 of 1990, 1458 of 1990 and 4939 of 1990 with capped it at 19% per annum. He stated that the Defendants had charged more than what was allowed statutorily.
20. He stated that he re-calculated using the common law principle of In Duplum Rule to get the amount that would have been due. He added the In Duplum Rule is used to limit the amount of loan payable that it is not more than double the principal amount taken. He stated that as at 31st October, 2018,



- the loan stood at Kshs. 301,943,023. That the interest was calculated at the end of each month there were legal fees charged of Kshs. 588,103.80.
21. That at the point of applying the In Duplum Rule he relied on Section 44A of the *Banking Act* which applied to loans to institutions registered as banking institutions. He further added that it was to determine amounts that were payable and would be for recalculation from the point the loan was declared non-performing. He stated that the loan was non-performing from 9th March 1992 in line with the CBK guidelines.
 22. He further added that any debtor is not to pay more than double the amount owing to any loan, interests and principal amount. That when the loan was at Kshs. 2,492,919.09 when it was deemed non-performing from the 2.5million taken. That according to him (and report) the principal owing, the interest not exceeding principal interests' fees and levies to the account amounted to a total of Kshs 5,361,506.52. The report was produced as P. Exhibit 4
 23. In cross-examination, he stated that they applied the In Duplum Rule under Section 44A of the *Banking Act*, effective May, 2007. He admitted the In Duplum Rule was not applicable in Kenya at that time. He had seen financial institution use the rule to negotiate non-performing loans but there was no legal compulsion to apply that principle. That the In Duplum Rule should be used by financial institution giving loans. He admitted that he was aware that the loan was given under the *Insurance Act* and not the *Banking Act* and that there was no amendment to the *insurance Act*.
 24. He added that from his report at page 19 the first amount paid was Kshs. 400,000, the other amounts did not reduce the principal sum and at point 3 the total amount paid was Kshs 1,392,485/50. He admitted the interest was negotiated from 20% to 19% and that there was a contract for the loan
 25. On re-exam he stated that the In Duplum Rule was a common law principle since it has been used to negotiate non-performing loans
 26. PW1 Henry Kipkorir Kimutai, was recalled on 20th June, 2022. He reiterated what he had testified on 4th November, 2019. He referred to the list of documents filed on 26th February, 2019 and dated 26th February, 2019. He produced charge document registered on 30th April 1991 as P. Exhibit 2, Gazette Notice 1458/1990 and 4939 of 1991 as P. Exhibit 3 (a) and (b) Notification of Sale dated 17th July, 2014 as P. Exhibit 4 and Letters of Administration dated 12th March 2002 as P. Exhibit 5.
 27. On cross examination clause 13 of the Charge it stated "provided always that the company shall have full power to vary the interest rate". He stated he could not recall PW2 confirming that the loan had become non-performing in March 1992 and was not aware which statute governed borrowing. He stated that he had not seen the life insurance policy and had not seen in the Defence to the Amended Plaintiff filed on 17th November, 2017 whether the policy was a security for the loan. That the interest would be 20% per Annum. He stated that the Defendant should be a specified formal institution. He added that he was aware that the charge is a legal document and binds parties and the property was insured. He added that that they are not tenants in the property and it was true that the property has been vacant for 31 years.
 28. In re-examination he referred to the letter of offer dated 13th March, 1991 and stated that the policy document was dated 26th April, 1991. It was dated after the letter of offer.

Defendant's Case

29. DW2 was Pauline Kalibo, Manager Finance Department at the Defendant company. She relied on the Affidavit of Praful Dhanji dated 3rd March, 2006, the Defence to the Amended Plaintiff dated 17th



- November, 2017 filed on 17th November, 2017 and a further statement filed on 16th November, 2017. That the Witness Statement and the Defendants list of Documents dated 17th November, 2017 filed on 17th November, 2017. She testified that the charge was for 2.5 million and only Kshs 400,000 had been paid. She referred to further Witness Statements filed on 20th April, 2022 which had the rundown of the statement of the account.
30. She referred to Praful Dhanji's Affidavit at paragraph 9 of Paragraph which referred to correspondence between the late Cheruiyot, the Defendant and lawyer with respect to new payment and promises to pay the loan. At page 100, a letter from the desk of JK Cheruiyot, he lists the properties for sale but the Defendant did not receive the proceeds as promised. That there is an agreement for Sale LR. 531/47, Elburgon LR 487/98 Kampi ya Moto, with special conditions at paragraph 8 but the Defendant did not receive Kshs. 66 million in there.
 31. She stated that there was Statutory Notice of Sale sent on 25th May, 1992, the 1st Notice of Sale but the Defendant did not sell the property. The Borrower approached the company with the promise he would pay by a letter from the desk of JK Cheruiyot dated 28th December, 1994. Nothing came out of the promise. ICDC did not pay the money. By copies of cheques one to Samburu auctioneers for Kshs 50,000 and the other for Kshs. 5 million in favour of Kenindia Association Limited, the Defendant was to be paid but was later advised by Mr. Cheruiyot that the account was not funded they should not bank the cheque. That at page 139 there's a letter from M. Cheruiyot on sale of property to pay the loan. No money was paid to the Defendant. She also referred to agreement for sale for LR Municipality Block 11/125 between Consortium Holdings Limited and J. K. Cheruiyot. The property was not sold. Several Auctions were set for the property but no auction went through. That the loan stands unpaid and the Kshs. 400,000 paid went to interests and the principle remains 2.5 million She produced the running account as D. Exhibit 1. That as at 27th April, 2022, Kshs 1,065,156,407/23 was outstanding.
 32. She stated further that the insurance was additional security it was not the primary security. That the cover lapsed because the premiums were not paid. She referred to life cover that covered Mr. Jeremiah Cheruiyot and Mrs. Phylis Cheruiyot. One premium was paid under this policy. The loan was under Section 50(4) of the Insurance Act. The Plaintiff had filed 464 of 199 Nakuru High Court Nairobi HCC 496 of 1996 and the instant case 56 of 2006. That they sent notices to Mr. Cheruiyot by post hard copy to his office by messenger through the Defendant's advocate. She added that she was not aware that Kshs 1.2 million had been paid in Court and when Mr. Onono testified, she was not in Court. She relied on all her documents and the evidence annexed to her statement, affidavit of Praful Dhanji and all the attachments.
 33. On cross examination, she stated that she was well versed with the case, had been with the Defendant for 19 years and was an accountant by profession. She stated that the loan was issued under the auspices of the objects of the company and Insurance Act and that the Defendant was duly Registered under the Insurance Act.
 34. That all these documents have been approved by the Land Registry under Section 108 of the Registered Land Act. It is Registered under the Registered Land Act. That the charge document had been signed by 2 directors. Their names do not appear but she would know the 2nd signature because he was director when she was employed She did not know the 1st signature. She added that from the photocopies she could not tell whether the document had seal of the company. She did not have the original and admitted that there were no witnesses to the 2 signatures of the directors not even an advocate.
 35. She further stated that the legal date of redemption was the earliest date which the loan can be repaid which was 31st July, 1991 and the powers available to the company should the borrow fail to pay is to levy interest and power to sell the property. She stated was aware that it was a conditional breach if the



borrower failed to take out a policy or pay premiums but did not have the answer whether that breach allowed the Defendant to exercise its rights. That at the time of taking the loan the basal determination of interest which was the bank's lending rate at 19%. That would be adjusted and the Defendant had adjusted the same. The bank could adjust downwards or upwards. That she did not have information if the banks adjusted their interests but on this loan it was lowered. Clause on interest at page 3 from line 14 Registered Land Act Chapter 300 the interest 20% p.a. and that the company retained power to vary interest rate. paragraph 4 (b) 1st Level interest of second penalty on the unpaid principal, 3rd level of interest 20 % penalty on unpaid interest. "all over interest" was 4th level interest. She stated that interest is capitalized and that any outstanding interest will be treated as principal loan. This was another level of principal on top of the capital sum and that outstanding interest is added on to the principal sum and the interest is leveled on it. That it would be interest on principal and interest on outstanding interest. That the company has the discretion to add to the capital borrowed. She stated that according to the charge the directors can decide to issue notice to pay the interests. She showed one of the Notices a letter from JJ Patel, the Defendant's advocates which mentions 1st May, 1994 and attaches a breakdown of account.

36. She denied that the borrower could not have decentered his principal outstanding, interests outstanding, penalties outstanding and compounded interests on principal interests. She added that it was not a common practice to give a statement with broken down principal interest and penalties. She admitted that their demand does not indicate that.
37. From the letter dated 27th January, 1995, she stated that the reason for demand from the premiums in 1995 is that it has a condition from the issuance of the loan, that as long as the loan is running the policy should be in force and the premiums would be demanded for. The total outstanding on the loan was 5 million inclusive of the policy despite the subject of the letter being mortgage loan on LR Nakuru Municipal /block 11/125. The whole demand was for Kshs 5,861,557/35. She added that demand for the premiums do not form part of the loan amounts. The whole interest was disclosed. She referred to D. Exhibit 1 where it shows loan began at 2.5 million, statement of 2nd December, 1991, principal loan at 2.5 million, statement of 1994 and Kshs 502,950 added to principal sum statement of loan as per 26th April, 2022
38. She stated that from 1st January 2006 to 31st January, 2006 principal sum was Kshs. 3,088,103/80 and interest plus penalty Kshs. 41,684,182.71 interest for the year 799,293.94. she denied saying they had not established any relationship with the Plaintiff with regard to payment of the loan. That the Defendant could foreclose on the property any date after July 1991 it is the legal date of redemption.
39. Further Cross examination of DW2 on 23rd June, 2022
40. She continued, stated and confirmed that at page 24 of the Charge document, paragraph (b) to c (i), part of the remedies in the charge document was receivership, that they could take possession of the property and manage it. She admitted they attached a valuation report in the list of documents of 25th November, 2016 and at page 16 of the report, the valuer stated that the property can realize Kshs. 320,000 per month and that there was no reason why the company did not get into the property, manage it and earn Kshs. 320,000 per month.
41. She confirmed the contents of page 7 that:

"Provided however that if the borrower shall make default in payment in yearly payment on interest, thereon in the manner herein before provided the company shall be entitled to



charge to the borrower's additional interests of 2 1/2 % per annum over and above the said minimum rate of 20% per annum of any variation thereof."

42. From that she stated that, on default on monthly payment one is charged 2.5% as penalty and per year. That paragraph (c) had broken down the instalments into yearly payments. If at the end of the year he had not paid Kshs. 416,666 he would be in default and the penalty of 2.5% would be chargeable. The loan was structured that there were yearly payments on both principal and interest. She admitted that if one misses 2 month's payment, penalties would accrue, that on the 3rd month one is required to pay what was intended for the annual target and further admitted that if one fails to pay in a month, will never get Kshs 416,000 annual target and will be penalized yearly for not getting 416,000 annual targets. She failed to answer when asked if it was another type of interest.
43. She stated that the Plaintiff paid Kshs. 428,000. In the document filed on 25th November, 2016 "Summary of payment received" she stated it was not dated but last page signed by Ms. Kalibo, total loan outstanding as at 31st October, 2016. She admitted that the document was hers and admitted that she had said what was paid was Kshs 400,000 before but on the documents the payments were Kshs. 1,256,485.50. She agreed that they were unable to exercise power of sale because the Plaintiff got Court Orders. She stated they provided orders in evidence for the current suit but did not have specific orders stopping the sale.
44. She agreed that the Defendant gave out a loan under the Aegis of *Insurance Act* and its objects and it should be guided by the legal notices produced in Court. she denied from that part, the Defendant could be treated as a formal institution from its objects.
45. She stated that the loan was given under Section 50(4) of the *Insurance Act* (repealed act) and during that period the commissioner of insurance was the regulator of insurance and not Central Bank. Central Bank kept deposits. That according to the charge document the loan became a non-performing loan the end year when the full annual instalment had not been paid upon the 1st Demand Letter, March 1992.
46. In re-examination, she stated that the interests charged on the loan were (i) interest on principal loan and (ii) 2.5% penalty in addition to the 19% or 20% of outstanding interest on interests. That there was no separate column for penalties but it was possible to isolate them. She added that in her dealings with Mr. Cheruiyot, he never disputed the legality of the Charge. She also added that the Defendant gets its power to lend money from paragraph 41 and 48 of the Articles of Association. The Defendant acted as an insurance company and not a cooperative bank.
47. She further stated that the Defendant did not realize the security because Mr. Cheruiyot wrote to the Defendant and promised to settle the loan at the first instant when the Defendant in 1994 scheduled to sell the property via public auction. The Defendant gave him more time. She continued that there was remedy for receivership but it was optional not mandatory. That as at 1995 the policy was in a lapse state but could be revived the policy now cannot be revived as policy holder was no longer around. She added that the *Insurance Act* Section 30 (repealed act) requires the insurance company to hold 5 -10% with Central Bank. Central Bank does not regulate the interest rates by insurance.
48. After the trial parties were directed on 23rd June 2022 to file written submissions. The Plaintiffs filed their submissions on 22nd November, 2022 and the Defendant filed its written submissions on 15th May, 2023.



Plaintiffs' Submissions

49. The Plaintiffs submitted on 4 issues firstly that that the interests were unconscionable and illegal and there was no basis for charging the interests which were charged at a commercial rate yet the Defendant was not licensed to carry out financial business. It was the Plaintiffs' contention that the illegality arose from interest rates being above the permitted maximum rate, to unilaterally vary the interest upwards at its sole discretion, the charge document having yearly targets which attracted penalties yearly for not getting targets relied on. That despite the Defendant admitting that that the policy had lapsed they still demanded unpaid premiums and loan.
50. The Plaintiff also contend that there ought to have been a notice issued on variation of interests thus in contravention of section 71 of RLA (now repealed).
51. In emphasizing on the Court needing not to interfere with contractual terms but only interfere with contracts that are unconscionable relied on the following authorities;
 - i. National Bank of Kenya Ltd vs Pipelastic Sankolit (K) Ltd;
 - ii. Margarent Njeri Muiruri vs Bank of Baroda Kenya Ltd
 - iii. Housing finance Co of Kenya Ltd v Njuguna; and
 - iv. Pius Kimaiyo Langat vs Ngeny & Another (2002) 1 KLR.
52. Secondly, the Plaintiff submitted that the failure of the Respondent to use remedies available to it within time was an effort to defeat equity. It was the Plaintiff's contention that the Defendant had power to sell when the loan fell due, the right to charge interest and right of receivership by entering the property, managing it and collecting rent but failed to when the opportunities presented themselves. That that continued to charge and levy illegal and unconscionable interests that led to the loan getting to over 42 million from 2.5 million. They relied on Rajnkantkhetshi Shah v Habib Bank A.G. Zurich (216) eKLR.
53. Thirdly, the Plaintiffs submitted that the Defendant should not enjoy all rights to the charge despite the Charge document not being properly executed in accordance with section 109 of the RLA.
54. Lastly that the Defendant while issuing the loan was operating as a financial institution and derived its power under Section 50 (4) of the *Insurance act* and it Memorandum and Articles of Association therefore should be treated as a financial institution. The Plaintiffs relied on the case of BTB Insurance Brokers Ltd vs Commissioner for Domestic Taxes (2020) eKLR.
55. It was the Plaintiffs' contention that the Defendant was in breach of the principle of In Duplum Rule and relied on the case of Housing Finance Company Kenya Limited vs Scholastica Nyaguthii Muturi & Another (2020) eKLR. The Plaintiffs also relied on Commercial Bank of Zimbabwe vs MM Buildere &cSuppliers PVT Ltd, Ethekwini Municipality vs Verulam Medicentre (PTY) LTD authorities from the South African and Zimbabwean Courts respectively that interest should be cupped under the In Duplum Rule and Ann J Mugure & 2 Others vs Higher Education Loans Board.
56. According to the Plaintiffs, Section 44A of the *Banking Act* would apply to it and relied on Desires Derive Limited vs Britam Life Assurance Co. (K) Ltd (2016) eKLR.
57. The Plaintiffs urged the Court to be guided by the report of IRAC on the amounts due to the Defendant.



Defendant's Submissions

58. The Defendant naturally opposed the suit and through counsel submitted under 5 issues.
59. Firstly, that the In Duplum Rule is not a common law principle but a statutory provision under the [Banking Act](#) and does not apply to instruments executed under the [Insurance Act](#).
60. That the loan was granted on 13th March, 1991 and as such the In Duplum Rule came in too late and the rule applies to banks and relied on Kenya Hotels Ltd vs Oriental Commercial Bank Limited (Formerly Known as Delphis Bank Limited (2019) eKLR. It submitted that Insurance companies do not have legal capacity of lending money but under Section 50 of the [Insurance Act](#), insurance companies are permitted to invest by way of advancement of loans and to take security. To this end the defendant relied on Coast Brick & Tiles Ltd & Others versus Premchad Ltd (1960) EA 154; Maithya versus Housing Finance Co. of Kenya & another (2003) 1 EA 133 and Alghussein Establishments versus Eton College (1991) 1 ALL ER.
61. Secondly, the Defendant submitted that the Borrower signed an offer letter, executed all charge documents and did not at any time question the charge. That it was in evidence that he acknowledged the loan and makes promises to pay therefore with an admission of indebt-ness.
62. Thirdly, that the Defendant is not barred from the Limitations of Actions Act from recovery of the debt. That the Defendant attempted to recover unpaid loan by way of sale but was block by suits by the Plaintiffs. That it was the Plaintiff who interfered with the process. It is the Defendant's contention that the [Limitation of Actions Act](#) applied to suits and not to holding of security in land in disposing of such security and cannot be used to compel discharge of charge.
63. That under Section 23 of the Act, the limitation can be extended by the acknowledgement of such debt which the late Kimutai through letters acknowledged up to the time of his demise. It relied on Shire v Thabiti (2000) LLR 1455 (CAK) (reported in 2002) EA, HCCC 499 of 2004 Cooperative Bank of Kenya vs Pius Kimaiyo Langat.
64. That the debt is not statute barred since whenever interest is charged on a loan it becomes part of the debt and continue levy on interest creates a fresh cause of action as continuing charge and relied on D.T. Dobie & Co Ltd vs Muchina (1982) KLR1 and Trust Bank Limited (in liquidation) vs Amalo Industries Ltd & 2 Others (2012) eKLR.
65. That it is the Plaintiff's suit is time barred under Section 4 (1) (a) and 4 (3) of the Limitations of Actions Act. That a claim based on accounts stands on a contract and as the law provides for six years therefore the claim is time barred.
66. Fourth, the Defendant submitted that the terms of the loan were not unconscionable as the clause was agreed on by the parties. The Plaintiff accepted the conditions of interests and cannot claim the rate was unconscionable.
67. Finally, the defendant submitted that it is entitled to costs since the Plaintiff has failed to prove his case.

Analysis and Determination

68. Having considered the evidence on record and the well elaborated rival submissions by the parties' respective counsel, I find that the issues for determination are:



Whether the Plaintiff has made a case warranting grant of the reliefs and declarations sought?

69. It is trite that law that parties to a contract are bound by the terms of their contract and that a Court of Law cannot rewrite an agreement between parties as was held by the Court of Appeal in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* (2014) eKLR where it was stated: -

“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.”

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. 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.”

70. This Court is equally not shy to interfere with unconscionable contracts where party who invokes the aid of the law and substantially asserts the affirmative of the issue has a legal burden of proving the same. Section 107(1) of the *Evidence Act* provides:

“107. Whoever desires any Court to give judgment as to any legal right or liability
(1) dependent on the existence of facts which he asserts must prove that those facts exist”

71. The “In Duplum Rule” Principle flows from the *Banking Act* Restrictions on increase in bank charges Section 44 which provides that; “No institution shall increase its rate of banking or other charges except with the prior approval of the Minister”

72. In this instance the Plaintiff was to prove that the charge dated 2nd April, 1991 was illegal and that, the “In Duplum Rule” is applicable to insurance companies subject to the *insurance Act*;

73. Jeremiah Cheruiyot-deceased exercised his agency in negotiating with and accepting a loan and it is not in dispute that the same was voluntary, without undue influence or coercion. The only point of departure is where the Personal Legal Representative to the estate of Jeremiah Cheruiyot-deceased argues that the Charge created over the loan was illegal and that the interests charged is illegal.

74. The illegality attributable to the charge evolves on terms of the interest charged on the loan thereby presenting the argument that the Court should interfere with the enforcement of the contract for being unconscionable. The Circumstances in which the loan was entered into by the parties is without contest and the purported dissatisfaction with the interest terms only emerges in 2006 after parties have been attempting a settlement including disposal of certain assets. The plaintiffs thus appear to have “shifted the goal posts” by stopping to service or fully repay the facility and opted to challenge the terms of the contract and not the contract itself.

75. The Plaintiffs appear and posture that, they are without fault and are in no hurry since the loan is admitted, efforts at settlement was made, promises to repay were done, no allegation that the deceased when contracting the loan agreement was unaware of the terms or was unduly influenced.

76. The loan and charge over the property known as Nakuru Municipality, Block/ 11/25 was given under Section 50(4) of the *Insurance Act* (repealed act) and the commissioner of insurance was the regulator



of insurance and not Central Bank, the loan was to run up to 31st July, 1991 which then means that the same has remained outstanding for the last thirty-two (32) years.

77. It was the Defendant's contention that the deceased took the loan in 1991 and since then up to his demise on 12th March 2002, the deceased had only paid Kshs. 400,000. In cross-examination M/S Kalibo admitted that they had received Kshs. 1,256,485.50. as per their own records.
78. In Cross Examination Henry Kipkorir Kimutai admitted that, in the "charge" document there was a provision of interest and that the principle that was unpaid ordinarily continued to accrue interest and that, there was no provision for pardoning interest in the event of death.
79. The substantive unconscionability relied on by the Plaintiff was based on breach of the Section 44 of the Banking Act which is not applicable to this case.
80. It is thus clear that there is no evidence has been presented on the illegality of the charge or that the interest as charged by the defendant and/or the basis of charging and calculating the interest by the Defendant was illegal.
81. I concur with the assertion by the defendants that, the suit seeking reliefs fifteen (15) years after the contract was executed, and 9 years after the 6-year period for limitation of contractual suit and that the Plaintiff seeks to use his own time lapse to limit recovery of the loan. In that context then the suit would be time barred.
82. I therefore find that the suit herein is without merit and that the same is accordingly dismissed.
83. The Kenya Shillings Four Million (Kshs 4,000,000/-) together with all interest accrued thereon and deposited in a joint interest-bearing account shall be forthwith, be released to Defendant - Kenindia Assurance Company Limited.
84. The Temporary injunction, restricting the Defendants from realizing their charge upon the property known as Nakuru Municipality, Block/ 11/25 is hereby vacated and the defendants are at liberty to realize the charge.
85. Since the Plaintiff did not deny the loan agreement and its terms and the fact that they had defaulted, the Defendant shall have judgment and is at liberty to realize the charge. In the absence of any special circumstances, the costs of the suit shall follow the event.

It is so Ordered

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 29TH DAY OF FEBRUARY, 2024.

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MOHOCHI S.M

(JUDGE)

