Wekesa v Karumbu (Civil Appeal E682 of 2022)
[2024] KEHC 8283 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8283 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E682 OF 2022

JN NJAGI, J

JUNE 28, 2024

BETWEEN

JANET NASIMIYU WEKESA ..... APPELLANT

AND

ESTHER NJERI KARUMBU ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. C.W .Ndumia (Adjudicator) in Milimani Small Claims No. E1217 of 2022 delivered on 27/7/ 2022)

JUDGMENT

1. The appellant filed SCC COMM No. E1217 of 2022 for the recovery of a loan she had granted to the respondent after she defaulted payment. The adjudicator found the interest charged on the loan to be unconscionable and unreasonable. The court further found that the contract dated 20th May 2018 which emanated from a split of a debt between the respondent herein and her business partner was unconscionable and could not be enforced. Upon considering the split loan between the two partners, the Adjudicator entered judgment for the appellant against the respondent in the sum of Ksh.352,500/ =. The appellant was dissatisfied with the decision of Hon. Adjudicator and lodged the instant appeal.
2. The grounds of appeal are that:
    1. That the adjudicator erred in law by holding that the terms of the contract, specifically the interest thereto was unconscionable and commercially unreasonable yet the same was a condition of the loan agreement dated 30th May 2017.
    2. That the adjudicator erred in law and in fact by finding that the respondent had a loan due and owing to the appellant but went ahead to conclude the amount owing which was not in in the applicable contract.

3. That the adjudicator could only further err in law by equally denying the claimant the claim for interest from when the contractual sum fell due without offering any reason thereto.

4. That the adjudicator erred in law by basing her findings on matters which had neither been pleaded nor proven by evidence.

5. That the adjudicator erred in law in failing to consider the evidence on record and the submissions of the appellant which failure occasioned a miscarriage of justice.

6. That the trial adjudicator erred and misdirected herself when she failed to apply the well-established principles of contract in arriving at her decision.

3. The appellant asked this court to allow the appeal and set aside the judgment of the Adjudicator.

Background

4. The respondent and her business partner took a loan from the appellant of Ksh.500,000/= at an interest of 15% per month at reducing balance. They were by that time indebted to the appellant to the tune of Ksh.350,000/=. The two loans were consolidated to a total of Ksh. 850,000/=. They executed an agreement dated 2nd August 2016 in which it was agreed that the consolidated loan was to attract an interest of 15% per month at reducing balance. The total reducible amount came to Ksh1,185,000/=.

5. On the 30th May 2017, the respondent and her business partner requested the appellant to separate the loan amount into two for each partner to pay half of the amount owing. The amount owing was at that time calculated to Ksh.1,391,183/= for each partner. The appellant entered into a separate agreement with the respondent to pay the amount stated. It was a term of the individual contract that failure to settle the amount owed would attract a monthly penalty of 10%.

6. It was the appellant`s case that the appellant and her business partner only managed to pay Ksh.145,000/=. The appellant instituted a suit against the respondent at the Small Claims Court for a claim of Ksh.1,000,000/= and waived any claim in excess of Ksh.1 million.

7. The respondent admits that she and her partner took the loan of Ksh.500,000/= from the appellant and that they already owed her Ksh.350,000/=. That when the loans were consolidated it brought the amount owing to Ksh.1,185,000/=. That she and her partner paid a total of Ksh.145,000/=. That when the sums accrued to Ksh.2,782,366/=, they decided to split the loan on 30/8//2017. However, that it was agreed to reduce the principal sum to Ksh.850,000/= and the appellant waives the accrued interest. That each partner was required to pay Ksh.425,000/=. That since they had paid Ksh.145,000/=to the appellant, the amount was divided into Ksh.72,500 paid by each party. The outstanding balance to each partner was Ksh.280,000/= with no interest.

8. The appeal was canvassed by way of written submissions by the respective counsels for the parties.

Appellant's submissions

9. The appellant submitted that all the three essential requirements of a contract were met as there was an offer of the loan by the appellant, acceptance by the respondent through appending of signatures and consideration which was as a result of meetings held prior to the making of the agreement by the parties. Counsel referred the court to the Court of Appeal case of William Muthee Muthami vs. Bank of Baroda (2014) eKLR to buttress that where all the essentials of a contract are met then interest must be awarded.

10. Counsel for the appellant submitted that at no point at the hearing did the respondent claim that the contract was invalid or she was not aware of the terms therein. Therefore, that the trial court was in error to deny the appellant interest when the respondent had voluntarily entered into the contract.

11. It was submitted that no vitiating factors were pleaded by the respondent to invalidate any part of the contract. Reliance was placed in the case of National Bank of Kenya Ltd vs. Pipeplastic Samkolit (k) Ltd & another (2001) eKLR where it was held that parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved, which was not done in this case.

12. It was submitted that the adjudicator overstepped her mandate by crafting a new issue which had not been raised by the parties thereby coming up with a decision which was in error and unjust, to say the least, by holding that the accrued interest was unreasonably high and therefore that the terms of the contract and more so the interest was unconscionable and commercially unreasonable to the respondent. That there was no basis for the Adjudicator arriving at that conclusion. More so that the issue was not pleaded and was only raised by the respondent in her submissions. That the Adjudicator was in error to decide the case on matters that were not pleaded. Counsel placed reliance in Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others (2014) eKLR where the court emphasized that cases must be decided on matters that are properly before the court. In the case of Red Gems Investment Group Limited vs. Irene Chepkoech Chumo (2019) eKLR the court held that

> The totality of the proceedings does not support the conclusion that the issue of unfairness of the interest rate was raised in the statement of defence and testimony of both witnesses. There is no evidence that the appellant acquiesced to the issue being dealt with by the court in a manner that this court can come to the conclusion that parties left the matter for the court's resolution. I therefore find and hold that the issue whether the interest was unconscionable and unfair was not pleaded and was not left to the court by the parties for determination.

13. According to the appellant, the trial court ought to have made its decision based on substantive evidence as provided by the respondent. It was therefore improper for the learned adjudicator to suggest the interest to be unreasonably high in the absence of evidence.

14. The appellant also filed further submissions dated 9th November 2023 and contended that the issue raised by the respondent on jurisdiction of the Small Claims Court was a new issue which did not form part of the memorandum of appeal. Counsel relied in the cases of East Africa Portland Cement, CFC Stanbic Ltd & another vs. Peter Ividah Muliro (2019) eKLR to urge that submissions are not evidence and a new issue cannot be framed in submissions.

15. The appellant submitted that in the agreement of 30th May 2017, the appellant and her partner admitted owing the appellant Ksh.2,72,366/= which amount included interest. That in that agreement she affirmed her amount as Ksh.1,391,183/= after the outstanding amount was equally divided between them. Therefore, that the trial court was in error to deny the appellant interest on the basis that the same was unconscionable and unreasonable and yet the adjudicator did not refer to any substantive evidence to support the finding. In this regard the appellant cited the case of Jane Elizabeth Gitiri Waroga v John Dryden Kimotho (2019) eKLR where the trial court rejected the appellant`s claim on the basis that the interest claimed was excessive and punitive. The court held that the trial court had ignored that parties had an agreement that was valid and that bound them to honour their obligations.

16. The appellant submitted that in matters where the court can apply equity to relieve a party from a conscionable contract the same should be accompanied by substantive evidence. The appellant cited

the case of Euromec International Ltd v Shandong Talkai Power Engineering Company Ltd (2021) KEHC 93 (KLR) where the court held that:

> The applicant's invitation to this court to find that the Settlement Agreement is unconscionable is not supported by evidence. None of the considerations illuminated in the above jurisprudence has been alleged or proved. No evidence was submitted to demonstrate imbalance of bargaining power.

17. The appellant urged the court to allow the appeal and award full claim as pleaded.

Respondent's Submissions

18. The respondent submitted that the trial court did not have jurisdiction over the matter as it was filed on 8/3/2022 and judgment was delivered on 22/7/2022 after a period of 5 months tabulated into 93 days thus contrary to section 34 of the Small Claims Act which requires matters filed before that court to be finalized within 60 days of filing. That in the matter hearing was conducted on 28/6/2022 but judgment delivered on 22/7/2022 which was outside the 60 days statutory limitation. It was submitted that the Section 34 uses the word shall which makes it mandatory for compliance with the law. Therefore, that the court had ceased to exercise jurisdiction when judgment was delivered. Counsel relied in the case of *Kartar Singh Dhupar & Company Limited vs. ARM Cement PLC (In liquidation) (Civil Appeal No. 129 of 2022*) (2023) KEHC 2417 (KLR) where the court held that:

> "Considering the purpose of and purport of the Small Claims Court, it sounds unfair and unjust that the Appellant who violated the timelines now wishes to benefit from the violation by citing Sec. 34 of the Act in this appeal. Unfortunately, jurisdiction is everything and therefore, there is no room for sympathy and emotions in looking at a matter that is thrown out of the jurisdiction of the court by effluxion of time."

In concluding, that issue, the court held that,

> "Guided by these authorities, this court is satisfied that the judgement delivered by Hon. C.A. Okumu (Ms)/ Adjudicator on 23rd August 2022 was done outside the statutory timelines set under Section 34 of the *Small Claims Court Act* and hence made without jurisdiction. It is therefore a nullity, bereft of any force or effect in law."

19. The appellant submitted that the appellant lodged two separate claims arising from the same agreement and parties contrary to the provisions of section 14 of the Small Claims Act that provides that:

> Prohibition on division of claims
>
> No claim shall be divided or pursued in parts for the sole purpose of bringing the sum claimed in each of such proceedings within the jurisdiction of the Court.

20. It was submitted that the appellant separated the claim of Ksh.2,000.000/= that he was purportedly owed by each of the partners and brought two claims of 2 million each so as to fit within the jurisdiction of SCC. It was submitted that the matter was beyond the jurisdiction of SCC as the appellant should have claimed a maximum of Ksh.1 million against both respondents and waived the remaining sums owed by both respondents.

21. It was submitted that the appeal arises from a nullity and ought to be dismissed. The cases of Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd (1989) 1KLR and Samuel Kamau Macharia & another

v Kenya Commercial Bank & 2 others were referred to in respect to limitation of jurisdiction of a court. Therefore, that the judgment was a nullity for lack of jurisdiction.

22. The respondent submitted that the agreement of 30/5/2017 was unconscionable because it was based on exorbitant interest which was more than double the principal sum. It was submitted that the dispute arose when the issue of interest on the principal amount was rejected by the respondent. That the issue of interest was pleaded and rejected by the respondent in its witness statement. Therefore, that the learned adjudicator was free of error when she made a determination that the contract was unconscionable for its exorbitant interest. That the Adjudicator was not in error to apply the principles of equity to intervene where additional conditions in a contract are harsh, oppressive and inequitable to the other party. The respondent relied the case of Kenya Commercial Finance Company Ltd v Ng'eny & another (2002) eKLR where it was stated that:

> "The court will not interfere where parties have contracted on an 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 on such conditions."

23. Counsel submitted that the principles of money lending by financial institutions under Section 44A of the *Banking Act* are applicable to all lenders including the present case. Counsel relied in the case of *Mugure & 2 others vs. High Education Loans Board (Petition E002 of 2021*) (2022) KEHC 11951 (KRL) where it was held that:

> "Accordingly, the court finds that the application of the in duplum rule to the loans borrowed by the petitioners is not discretionary by the respondent but is as a matter of right and law.
>
> In this regard, the court would not declare section 15(2) of the HELB Act unconstitutional, but it would read into that section in the duplum rule. That upon the amount due clocks double the principle, the interest and fines shall cease to apply."

24. They also cited Canva Trading Kenya Ltd Mombasa vs. Catherine Halako Moraa (2022) eKLR where it was held that parties were at liberty to agree on the interest rate chargeable for a determinable period of time and that once the loan is non-performing, it shall be subject to the limitation set out under the duplum rule.

25. The respondent submitted that interest claimed by the appellant was unconscionable as parties in the case had agreed that interest be waived and that the respondent was only to pay the principal sum. They cited the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd (2014) eKLR where the Court of Appeal held that:

> 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.

26. The respondent submitted that it is in the interest of justice and fairness that this appeal be dismissed as it is an attempt to vex the respondent.

27. In sum, the respondent submitted that the judgment in E1217 of 2022 was a nullity for lack of jurisdiction.

Appellant`s Response to Respondent`s submissions

28. On the issue of jurisdiction of the court to entertain the matter after the 60 days` period had lapsed, the appellant responded that this was a new issue that was being raised in submissions of counsel for respondent. He submitted that submissions are not evidence and that new issues cannot be framed in submissions. He relied on the case of East Africa Portland Cement, CFC Stanbic Limited & another v Peter Ividah Muliro (2019) eKLR where the court referred to the Court of Appeal case of Avenue Car Hire & another v Slipha Wanjiru Muthegu civil Appeal No.302 of 1997 where it was held that:

> ....no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules].

29. The appellant submitted that there are contrary views to those expressed in the case of Kartar Singh Dhupar (supra) that a judgment delivered after the lapse of 60 days is a nullity. Counsel cited the case of Biosystems Consultants v Nyali Links Arcade (2023) KEHC 21068 (KLR) where it was held that:

> The purpose of the *Small Claims Court Act* was to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result was that balancing the two may result at times to overshooting the 60 days. The 60 days did not have penal consequences for good reason. They were aspirational. That was part of having access to justice over amounts that needed not be in the normal system. Allowing the application would open floodgates that would eventually defeat the purpose of the Act.

The non- compliance went to the court's performance and was answerable internally. It could not affect parties who were in court and ready to be heard. Defendants used various gimmicks to have matters adjourned and thereafter turned around to say, 60 days were over.

30. The appellant submitted that the issue of splitting the loan was a new issue. She reiterated the position that the same could not be raised during submissions. Additionally that the rationale for the appellant in filing two separate suits was as a result of the agreement dated 30/5/2017 in which the respondent and her business partner agreed to be held liable for payment of their respective loans to the appellant separately.

Analysis and Determination

31. I have considered the appeal and submissions by counsels for the parties and the authorities relied on. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, the Court of Appeal stated that;

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

32. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the same was stated about the duty of the first appellate court;

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

33. The issues for determination are:

(1) Whether the trial court was right in denying the appellant interest on the basis that it was unconscionable.

(2) Whether there was spitting of the loan.

(3) Whether the court was seized of jurisdiction over the matter.

Whether the trial court was right in denying the appellant interest on the basis that interest was unconscionable

34. There is no dispute that the respondent and her business partner were advanced a loan of Ksh.500,000/= by the appellant on 2nd August 2016 which after consolidation with an earlier loan came to Ks.850,000/=. It is agreed that after consolidation the amount owing came to Ksh1,185,000/=. It is also not in dispute that on 30/8/2017, the respondent and her business partner decided to split the loan for each to pay individually pay what was owing. The loan and the accruing interest had as at that date jumped to Ksh.2,782,366/=. It is at that point where the parties differ on what was agreed. According to the respondent it was agreed vide the agreement of 30/8/2017 that each parter was to pay Ksh.1,391,183/=. The respondent however says that the agreement was that the whole loan was to be reduced Ksh.850,000/= upon which the partners were to split that sum for each partner to pay half of the Ksh.850,000/=. That they agreed that interest be waived on the principal amount. The question then is as to who is telling the truth on that issue.

35. I have looked at the agreement of 30/8/2017 that was signed by all the parties. The agreement indicates that after splitting of the loan, the respondent was at that point individually indebted to the appellant to the sum of Ksh1,391,183/= which sum was not to accrue further interest until September 2017. The respondent has not produced any agreement to show that they agreed that both were to pay Ksh.850,000/= and not individually at Ksh.1,391,183/= as indicated in the agreement of 2/8/2017. She has not produced any agreement to show that interest was waived. She seemed to say in her written statement dated 4/5/2022 that she agreed orally with the appellant to waive the interest. The law is that an oral agreement cannot contradict a written agreement. I therefore find that the amount owed by the respondent after the split of the loan was Ksh1,391,183/=.

36. The trial court declined to award interest to the appellant because she was of the view that the interest that was being charged was unconscionable. The respondent admitted that the applicable interest for the loan was 15% per month.

37. It is trite that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the pleadings, or which is at variance with the averments of the pleadings goes to no issue and must be disregarded – see IEBC and Others -vs- Stephen Mutinda Mule & 3 Others (2014)

e KLR. The Supreme Court of Kenya in a ruling in Raila Amolo Odinga & Another –vs- IEBC & 2 Others (2017) e KLR re-emphasized that

> " ... No party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them..."

38. Nowhere in her response to the statement of claim did the respondent raise an issue that the interest agreed upon by the parties was unconscionable. The Adjudicator was therefore in error to entertain the issue when the same was not part of the respondent`s defence and only cropped up in the submissions of the respondent`s counsel. It is the law that submissions are not evidence and cannot take the place of pleadings -see Conrand Masinde Nyukuri & another v Robson Harris & another (2021) eKLR.

39. In addition, it is trite law that parties are bound by their contracts, unless coercion, fraud or undue influence are pleaded and proved - see the Court of Appeal decision in Pius Kimaiyo Langat –vs- Co-operative Bank of Kenya Ltd (2014) e KLR. The respondent has not adduced any evidence for the court to interfere with the terms of the said agreement. The respondent was bound by the interest agreed upon as there was no challenge in the pleadings that it was unconscionable. The trial court erred in failing to award the appellant interest.

Whether there was splitting of the loan

40. The respondent admits that she and her partner agreed with the appellant that the loan be split so that each partner could pay her share of the loan individually. The respondent then entered into a separate agreement with the appellant on the amount of money owing and the new terms of payment. The issue of splitting the loan so as to fit within the jurisdiction of SCC therefore does not arise. The splitting was done way back in 2017 before the appellant decided to file the case. The argument holds no water.

Jurisdiction

41. The judgment in the matter was delivered after the period of sixty days within which it was supposed to have been heard and determined had lapsed which was contrary to the provisions of section 34 of Small Claims Act. The respondent argued that the judgment was a nullity and relied on the case of Kartar Singh Dhupar & Company Ltd (supra) where it held that a judgment delivered outside the statutory period is a nullity. The appellant on the other hand relied on the case of Biosystems Consultants v Nyali Links Arcade (supra) where it was held that non-compliance with section 34 only goes to the performance of the court and is not fatal to a case. I take the view postulated in the latter case that non-compliance with the section is not fatal to a case. The court has to look into what the intention of the legislature was when it passed the section. I do not think that the legislature intended to mean that the court ceased to exercise jurisdiction over a matter filed in that court which was not finalized within 60 days. If that were the case, it would defeat the purpose of the whole Act. I thereby dismiss the argument that the judgment of the Adjudicator in this matter was a nullity.

42. The end result is that the appellant had proved that the respondent owed her Ksh.1,391,183/= which sum was backed by a signed agreement. The respondent in cross-examination admitted to owing that amount. There was no document tendered by the respondent to prove her contention that she and her partner were to split the consolidated sum of Ksh.850,000/= for each to pay half of that amount. The finding of the Adjudicator to that end was not based on any documentary evidence yet parties had signed an agreement to bide them in their transaction. It is trite that a court of law cannot rewrite a contract between the parties as they are bound by the terms of the contract – see Samuel Munyao Nzioka v Housing Finance Company of Kenya Ltd (2019) eKLR. When the appellant filed

the suit before the SCC, she waived her claim in excess of Ksh.1,000,000/= that she was owed by the respondent. I see nothing wrong with that.

43. The up shot is that the appellant had proved the claim of Ksh.1,000,000/= against the respondent. The appeal is thus merited. The judgment of the Adjudicator is hereby set aside and replaced with a judgment for the appellant in the sum of Ksh.1,000,000/= only.

44. The Appellant to have the costs of this appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH JUNE 2024.

J. N. NJAGI

JUDGE

In the presence of;

Mr. Mbugua for Appellant

Mr. Kyobika for Respondent

Court Assistant - Mokeira

30 days R/A.