**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY**

**HCCA NO.33 OF 2018**

**CORNELLA NABWANANABANGALA.....APPELLANT**

**-VERSUS-**

**MOLYNE REDIT LIMITED.....RESPONDENT**

**JUDGMENT**

1. Before the trial court the Respondent in this appeal, as the plaintiff then, sued the Appellant and sought the recovery of the sum of **Kshs 992,317/-,** said to be the outstanding debt as at 30th November 2011 together with interest at agreed rate of **6% per** month as well as penalty of **Kshs 2,000/-** till payment in full. The debt was pleaded to have been contracted pursuant to a loan agreement said to have been executed between the parties on 13th June 2009. Together with the Plaint dated 9th March 2012 and filed in court on the same day, the Plaintiff filed a witness statement and a list and copies of documents which included the said credit agreement and statement of accounts showing the debit and credit entries between the parties and printed in the letter heads of the Respondent.

2. When served, the Appellant filed a statement of defence and a counterclaim by which she *pleaded* the doctrine of ***extorpi causa* non *oritur action*** and sought a declaration that the Respondent was not a licensed financial institution to engage in a business as such financial institution, a declaration that the sums due to the Respondent had been repaid in full and the release of the log book and/or documents of title to motor vehicle registration **No. KBA 911B.** In summary the Appellants position in the defense and counterclaim was that the Defendant having not been a licensed financial institution was by law forbidden from conducting such business and by such business entered by it was contra statute and thus cannot be enforced by the court and all the benefits acquired by the Respondent were due for restitution to restore the parties at their respective positions as at the date of impugned contract. The matter was heard by oral when each side called one witness to prove its case.

3. The evidence by the Plaintiff was given by **PW1 Lydia Anyangu** who swore to be the Director of the Respondent and that the Company's business was the provision of credit services and lending of money. He produced the loan agreement for **Kshs 640,000/-** to the appellant by which the Appellant covenanted to pay back the sum by equal installments within 36 months at **Kshs 43,743/-** per month. She also produced a statement of accounts and a demand letter seeking payment of the sum of **Kshs 774,058/-** as at 7th July 2011. The witness said that when there occurred a default on payment, efforts were made to repossess the motor vehicle given as security, but the vehicle was discovered to have been involved in an accident and got damages. She sought a judgment as prayed in the plaint.

4. On cross-examination the witness confirmed that their business involved lending of money. She then relied on the statement of accounts produced the highlight being that the sum drawn down was shown as **Ksh 648,575/-** with interest for the month of July being **Kshs 38,400/-** and that total loan repayment would be about **Kshs 1,500,000/-.** She then added that some cheques were returned unpaid. She reiterated that their practice was similar to that by the banks. In re-examination, the witness said the sum demanded included penalties and contractual interests and that the agreement bound both parties to it.

5. For the Appellant, she gave evidence in person by adopting her witness statement as evidence in chief. she admitted having signed the agreement and borrowed **Kshs 640,000/-** but only received **Kshs 608,000/-** He said that he did pay to the Respondent the sum of **Kshs 897,730/-** as evidenced by document at **page 34** of his bundle of documents. He said that he stopped payment with the belief that he had paid in full what was due. He reiterated that the Plaintiff not being licensed to conduct financial services did not have the right to carry out the business of lending money and to charge interest as they did and asked the court to discharge him and order release of the log book given as security.

6. When cross-examined, the witness said that he did not pay all the 36 installments but had paid **Kshs 897,730**/- and that some cheques were dishonoured but later honoured. He said that it was a term of contract that in case of default he was to pay extra by way of a penalty of **Kshs 2,000/-** per month of default**.** In re-examination she said that she did not pay all the **36** installments because he felt he had paid more than she was obligated to.

7. Parties then filed written submissions upon which the court prepared and delivered a Judgment dated 2nd March 2016, now challenged in this appeal.

8. In the Judgment, having reviewed the evidence by the parties, a pertinent portion of the judgment says that the plaintiff had completely failed to prove its claim as there was a dearth of evidence on how the sum claimed was calculated and that both parties had not established their respective cases against each other but all the same found the applicant liable to pay back the sum advanced. It is that judgment the appellant challenges on the broad basis that it is incoherent, fails to address the issued placed before the court and runs against the evidence adduced

9**. <u>Issues, analysis and determination</u>**

Even though the ground of appeal were set out to be 12 in the memorandum of appeal, all could in brevity be summarized into 2 grounds as the appellants counsel opted to do. The counsel opted to frame and argue the appeal on these two broad grounds;-

**i) Whether the court can lend its aid to a claim grounded upon a contract entered contra statute"**

**ii) Whether the trial court directed its mind to the evidence laid before it on the counter-claim"**

10. My reading of the pleadings and proceedings at trial reveal to me that the first and outright defense advanced by the appellant at the trial was the fact that the Respondent was conducting financial and or banking services without a license in that regard and therefore contrary to law. That law was however not specifically pleaded but paragraph 2 of the statement of defense and prayer **b** of the counter-claim left no doubt that the Respondent was being accused of engaging in the business that require licensing by The Central Bank without a license in that regard. I find that even if not pleaded, this was a matter of law and public policy the court had no otherwise but to determine because a court of law is presumed and expected to know the entire corpus of the law.

11. Having been so pleaded the appellant ensured that evidence was extracted from the Respondent during cross examination which admitted that it engaged in the business of lending and charging interests and other bank like charges but without a license. Some of the answers given by PW1 in cross-examination at pages 311 and 312 clearly show that the respondent was conducting banking business. In those pages, the record shows the respondent to have said:-

*"**We deal with credit and financial advisory services. The word credit means lending money. I was not the one who processed the loan…***

***Our practice is similar to that of the bank…"***

12. That being the respondent's admitted position, and on the pleading by the appellant, it was the duty of the court at trial to address its mind to the question whether the contract upon which the suit was brought was one capable of enforcement by the court through the suit before it. The court thus needed to and was obligated have considered the provisions of the banking act at section 3 which provides:-

3. ***Restrictions on carrying on banking business, etc.***

***(1) No person shall in Kenya—***

***(a) transact any banking business or financial business or the business of a mortgage finance company unless it is an institution or a duly approved agency conducting banking business on behalf of an institution which holds a valid licence;***

***(b) …..***

***(c) …..***

***(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.***

***(3) Where an institution conducts business through an agent, the institution shall be liable for the acts or omissions of the agent in so far as such acts or omissions relate to that business.***

13. The statute defines the terms, '***banking and financial business'*** in like terms and includes the lending and investment of money at the risk of the lender and criminalises such business if conducted without approval and license by The Central Bank. While the respondent must be taken to have joined issues with the appellant's pleadings on the legality of its business by the reply to defense and defense to counter-claim filed on the 28. 06.2012, there was never an attempt by it to disprove such allegation by evidence. Whether or not the respondent was licensed was a fact that could only be in the knowledge of the respondent and therefore by dint of **Section 112**, **Evidence Act**. It that follows that the respondent failed in its onus of proof and that fact had to be resolved against it.

14. I do find that the respondent, having not been licensed to

conduct banking or financial business, acted contrary to a positive law and an agreement made in furtherance of such contravention cannot be the basis of a court finding for the person in contravention. A court of law cannot countenance violation of the law but is obligated never to lend its aid to every contract made in contravention of the law. It matters not that the parties plead or never plead the fact of illegality. It is enough that it comes to the attention of the court that the contract founding the suit was an infringement of a positive law.

15. The Court of Appeal in underscoring the prohibition on the court against enforcing such contracts did hold and say in ***Standard Chartered Bank ltd vs intercom services Ltd [2004] eKLR*** and explained the application of the principle ***ex turpi causa non aritur actio*** in Kenya in the following words:-

*"****… if illegality is on the face of the contract upon which a claim is based, then the Court will deal with that question of illegality irrespective of whether it is raised in the statement of defence or not but if illegality is to be discovered from some evidence that the defendant has knowledge of, then illegality should be pleaded so that the plaintiff is pre-warned on the issue and it is only then that the Court can act on it".***

16. In this matter I do find the contract produced by both sides as the basis of their dealings and the evidence led show clearly that the respondent was engaged in the business that statute mandate to be regulated but without the nod of the regulator. To enforce that agreement by affording to the respondent a benefit under it would be to turn the law onto its head and sanction an illegality and encourage violation of the statute. That cannot be the attribute of a court of law. On that basis alone I do find that the trial court erred in failing to find that the agreement the respondent was relying upon was tainted with illegality and being contra statute would not have been the basis of a court's judgment in the Respondents favour.

17. There is a second reason this court must interfere with the decision of the trial court. That reason is the fact that the judgment on its own face is contradictory, incoherent and self-defeating. The summation by the court to be found at pages 229 and 330 of the record reads:-

***"however , the plaintiff completely to prove its claim…***

***and then..***

***It is my opinion that the parties have failed to conclusively establish their claims against each other and as such I deem it fit to find and hold that the defendant is liable to pay the plaintiff Kshs. 608,000 as was borrowed with interest at court rates from the date of the agreement till payment in full since interest chargeable already having been deemed unconscionable and the plaintiff should release the log book and other documents belonging to the defendant with respect to the motor vehicle that was allegedly used to secure the disputed loan after repayment of the loan with interests as aforestated".* (Emphasis added)**

18. It is difficult to understand why the appellant was to be held responsible on account of failure by both sides to prove their respective cases. It can only be said that the finding against the appellant did not sit in congruence with the evidence and the court's analysis leading to the finding. It is to that extent a decision that cannot be upheld but must be set aside. I do set it aside and in its place substitute a judgment dismissing the suit against the appellant with costs.

19. In contesting the respondents claim, the appellant filed a defense and counter-claim which sought a declaration of plaintiff as being disentitled to get a benefit from business conducted contrary to the law, a declaration that sums advanced to the appellant had been repaid and an order for the return of the documents of title to Motor Vehicle KBA 911B. For those prayers, prayer b must as of course abide my determination above determining the respondent's claim. Having found that the respondent based its claim upon an agreement that was contrary to the law, it follows that the declaration ought to be made that the respondent cannot be entitled to any benefit derivable and flowing from such an agreement.

20. In its judgment the trial court did find at page 329 of the record that the respondent had admitted that the appellant had made payments towards the repayment of the loan but some of the cheques were returned as dishonoured. That judgment however did not at all consider the evidence by the appellant on the sums paid which evidence was supported with documents which I find to have not been challenged on the contents. One of such documents is the tabulation of the payments made including the details of dishonoured cheques and those dishonoured and later re-presented and honoured. That document, to be found at page 70 of the record of appeal, says that there had been payment in the sum of Kshs 879,730. That was the kind of evidence the trial court ought not to have ignored. I do find that the payment of Kshs 879,730 was sufficiently proved and to the requisite standards and that sum when compared with the sum advanced on a faulted contract, was to this court sufficient restitution of the respondent to its position prior to the impugned contract and that, to order that the respondent gets the principal sum over and above such payment would depict a clear unfair and unjust enrichment and unconscionable bargain. I do find that the appellant is entitled to a declaration that it had refunded in full the sums advanced to him by the respondent and therefore the respondent had no justification to continue holding on to the documents of title to the motor vehicle.

21. The sum total and summary of this decision is that while the respondent's suit is ordered dismissed with costs, the appellants counter-claim is allowed as prayed. Accordingly the trial court's decision allowing the respondents suit and ordering the release of the log book on conditions is set aside and substituted with a judgment dismissing the suit with costs and allowing the counter-claim as prayed with costs.

22. I award the costs of this appeal to the Appellant

**Dated this 13th day of September 2019**

**P. J. O OTIENO**

**JUDGE**

In the presence of;

Mr. Kabere for the Appellant

Mr. Walubengo for the Respondent

Sylvia - Court Assistant