REPUBLIC OF KENYA

IN THE MICRO AND SMALL ENTERPRISES TRIBUNAL

MSET MOMBASA No. 10 OF 2021

CANVA TRADING KENYA LTD MOMBASA……..……CLAIMANT

VERSUS

DENNIS NYOKA MWANYANJE….…….…….……RESPONDENT

JUDGEMENT

INTRODUCTION

1. This claim dated 4th May 2021, was filed under Certificate of Urgency at the Tribunal's registry in Mombasa Law courts. The Claimant, Canva Trading Kenya Limited Mombasa was represented by the Managing Director Ms Eunice Okal who described the Claimant as "a small & micro finance giving soft loans to small business to buy motorbikes for riders on hire purchase. The claim was for recovery of Ksh 76,000/= being the accumulated amount of loan, accrued interest and penalties, incurred by the Respondent who borrowed Ksh20,000/= and failed to re-pay.

2. The respondent is referred to as a businessman hailing from Mombasa CBD.

3. The Cause was mentioned on 11th June 2021 when the Claimant confirmed that the Respondent was served with the claim and supporting documents on 15th May 2021. The affidavit of service was filed accordingly. The Respondent was however not present during the mention. The Cause was slated for hearing on 1st July 2021 physically at Mombasa Law courts.

4. The cause did not proceed on 1stJuly 2021 as neither the respondent nor her representative attended thecourt, thematter was however slated for mention on 13th July 2021 where compliance of orders was confirmed and hearing date was fixed on 3rd September 2021. The hearing of the Cause however did not take off due to the absence of the Respondent. When contacted, the Respondent cited network challenges. The Tribunal granted the final adjournment as the parties agreed that the cause be heard on 10th September 2021.

5. The Respondent did not file any Response nor appeared during the hearing. The matter had to proceed by way of formal proof as Tribunal was convinced that it was proper in the circumstances to allow the matter to proceed since the claimant had sufficiently demonstrated to the Tribunal that she had made every effort to duly serve the Respondent to make him aware of the existence of the Claim as well as the hearing notice and date.

THE CLAIMANT'S CASE

6. The Claimant avers that the Respondent applied for a soft loan of **Ksh20,000/**=from the Claimant, the **Canva Trading Kenya Ltd** which was approved and disbursed on 20th February 2020. The Respondent was to repay by 20th March 2020.

7. In addition, the Claimant avers that the loan was disbursed to the Respondent subject to a charge of 20% interest per month. Further, that as at the time of filing this claim the Respondent had not repaid the loan as per the payment schedule, thus attracting

interest and penalties to a tune of **Ksh 76,000/=.**

8. She finally submitted that the Claimant is entitled to costs of this Cause as it had incurred more expenses while trying to locate the Respondent to serve him with the claim.

ISSUES FOR DETERMINATION

9. Arising from the claim and the oral evidence at the formal proof hearing, the following issues presented themselves for the determination by this Tribunal;

a) Whether the Respondent was served with the claim.

b) Whether the Respondent obtained a loan of Ksh. 20,000/= from the Claimant.

c) Whether the **20%** interest charged by the Claimant on the borrowed amount of **Ksh20,000/=** was justified.

d) Whether the Claimant Canva Trading Kenya Limited-Mombasa was entitled to demand as it did the **Ksh76,000/=** being the principal sum, accrued interests and penalties charged on the borrowed principal sum of **Ksh20,000/=.**

e) Who bears the cost of this claim"

DETERMINATION AND FINAL ORDERS

The right to be heard

10. The first issue is whether the Respondent was granted the right to be heard. The Tribunal grappled with this issue as it is a Constitutional right for the Respondent to be accorded the right to be heard.

11. The Tribunal notes that the Claim was served upon the Respondent. Further, the hearing notice was also served upon the Claimant. The Respondent however did not file the Response nor attended the hearing of the suit. No explanation was given for failure to file the Response. Further, no explanation was given for failure to attend the hearing of this suit by the Respondent or his Representative despite fixing a hearing date by mutual agreement.

12. The Tribunal heard from Ms Eunice that she had made numerous calls upon the Respondent. She told this tribunal how she sought the assistance of the guarantor to urge the Respondent to file the Response and to attend the court on diverse dates when called upon all in vain.

13. The Tribunal underscores the right to be heard as was held by the Supreme Court of India in ***Sangram Singh v Election TribunalKoteh*****1955 AIR 425**thus:-

"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

14. Every party in a case has a right to be heard and subsequently, that right should not be denied unless there are very good reasons for doing so. The Tribunal having considered the facts and prevailing circumstances set the suit for formal proof hearing on 10th September 2021. The Tribunal was convinced that Respondent was served with the claim and was accorded reasonable time to file and serve the Response. It cannot therefore be said that the Respondent was denied the Constitutional right to be heard.

15. In allowing this suit to proceed to formal proof hearing, the Tribunal was also guided by the Constitutional principles of the right to be heard and the reasoning of the appellate court in ***James Kanyiita Nderitu & Another [2016] eKLR***, where the Court of Appeal stated thus:

"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment.

16. This point is further emphasised by *Ojwang, J (as he then was) in* ***Mungai –vs- Gachuhi and Another [2005] eKLR*** **cited** with approval in the case of **Signature Tours & Travel Limited -V- National Bank of Kenya Limited** [2017] eKLR **when he stated as follows:**

"**a court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity."**

17. The Tribunal is guided by the Constitutional principles of the right of a party to be heard while noting that this right should not create injustice and prejudice to others. Having found that there was proper service and that there was no justification for the failure to file the Response and attend the hearing of the suit, the Tribunal was convinced that it was proper and justifiable in the circumstances to allow the matter to proceed to formal proof on 10th Septemebr 2021.

Loan advanced

18. As to whether the Respondent obtained a Ksh. 20,000/= loan from the Claimant, the Claimant relied on a loan agreement dated 20th February 2020. The agreement was signed by the Respondent on 20th February 2020. Other terms of the contract including the 20% interest rate payable per month were set out. The form was marked in red ink "*approved 20,000/= and disbursed 20,000/=*." No evidence was presented to the contrary. We therefore find that the Claimant granted the Respondent a loan facility of Ksh. 20,000/=.

Interest charged

19. The Tribunal while considering the claim herein and the Respondent's reply was concerned that the principal sum of Ksh.20,000/= advanced on 20th February 2020 had attracted interest and penalties to the tune of Ksh. 76,000/= in 14 months. In **Pius Kimaiyo Lagat v Co-operative Bank of Kenya Limited** [2017] eKLR, the Court of Appeal was confronted with a related challenge and ruled thus:

"There is a perennial vexing nightmare for borrowers who take a relatively small loan from a lending institution, but few years down the line, the institution drops a bombshell of a demand for the immediate payment of a colossalsum, literally bankrupting the borrower, if not confining him/her to a hospital bed due to depression. The main bones of contention are invariably; uncertainty of lending terms and documentation, fluctuating rates of interest, penalty interest, default charges, interests on arrears, additional interest,commissions,bank charges,Bank statements or lack of them,among others which may or not have been part of the written contract"

20. We have perused through the statement of claim, the attached application form which contains the loan agreement. The relevant part is paragraph 6 titled "LOAN AGREEMENT" with the following relevant clauses:

a) "(1) In pursuance of the said agreement and in consideration of the promises of the agreement and of the loan application form duly filled by the borrower and whose details have been duly approved by the lender and annexed as a schedule hereto, the lender HEREBY ADVANCES the borrower the sum of Ksh. 20,000/= (hereinafter referred to as the loan amount receipt whereof hereby acknowledged.

b) (2) The loan amount is subject to interest being charged at a flat rate of 20% per month.

c) (3) The borrower shall pay the loan amount together with the above charged cumulative sum of interest (both hereinafter

referred to as the advanced sum payable) 24,000/= in equal monthly/fortnight/weekly instalments of Ksh 24,000/=.

d) (8) I hereby authorise Canva Trading Ltd to deduct the fee from the loan request and disburse the balance."

21. The agreement was signed by Respondent on 20th February 2020. It is believed the Respondent therefore received Ksh. 20,000/=.

22. Our reading of the agreement is that the Respondent was bound to pay **20%** interest on the loan per month. Clause 6 (3) provides for a loan period of one month. However, on the face of the Loan agreement and Loan application, we are unable to find the time limit of the defaulting party's' interest rate accrual. We also take note that the interest on the principal sum has increased exponentially and stood at Ksh. 76,000/= against the principal sum of Ksh. 20,000/= in 14 months.

23. The Tribunal notes that whereas it ***is not for the court to rewrite a contract for the parties***, where a contract between parties is exploitative, courts have not been shy to interfere as held by the Court of Appeal in the case of **National Bank of Kenya Ltd Vs.Pipe plastic Sankolit (K)Ltd Civil Appeal No.95 of 1999.** The court held as follows:

"a court of law cannot rewrite a contract with regard to interest as 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 procedural abuse..."

24. We hold the view that whereas the parties are bound by their agreements and terms thereto, such terms should apply in accordance with the law and where it is determined to be unfair, unconscionable and oppressive, we should not hesitate to re-state the law so as to protect the interest of the parties and by extension advance the public interest.

25. We therefore find that the interest chargeable without clarity on time limit upon the determination that the loan is non-performing is unmerited. In the case of **Danson Muriuki Kihara-v-Amos Kuthua Gatungo (2012) eKLR,** the court addressed a related issue thus:-

"the plaintiff/appellant filed a claim for Ksh.40,000/=plus interest at 50% per month. The matter proceeded to full hearing and the learned trial magistrate entered judgement for Ksh 40,000/= plus cost and interests at court rates. Theappellant appealed against the Judgement on ground that the interest payable was reduced from 50% per month to court rates. The court held that the interest rate of 50% was unconscionableand upheld the decision of allowing interest at Court rates."

26. Thus, clearly showing that the Court can interfere even where parties have agreed on a rate of interest as long as it is shown that the rate is illegal, unconscionable or oppressive. We therefore find that the 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 limitations set out under the *in duplum rule.*

Amount due and interest payable

27. As regards the third issue, the Tribunal was concerned by the finding that theRespondent's debt rose exponentially from the principal sum of **Ksh20,000/=** to the current **Ksh76,000/=**before this claim was filed.

28. It was apparent that the Claimant demanded more than 2 times the principal amount borrowed by the Respondent.

29. Therefore, in order to make a just determination of this issue, the Tribunal had to rely on the principles of lending by financial institutions drawn from Section 44A of the Banking Act which provides statutory application of the ***Induplum rule.*** For clarity, we cite the Court of Appeal in **Kenya Hotels Ltd Vs. Oriental Commercial Bank Ltd (Formerly Known as Delphis Bank Limited) (2019)** eKLR,which stated that the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced...''

30. It was observed by the Court of Appeal that the principle of *Induplum* has been applied by the courts with reasonable degree of consistency citing the following cases;

1) Lee G. MuthogaV.Habib Zurich Finance (K) Limited (2016)

2) **Mwambeja Ranching Company limited & another V.Kenya National Capital Corporation (2019)eKLR**, just to cite a few where the In duplum rule has been invoked.

31. Similarly, in the most recent case, the Court of Appeal in **Housing Finance Company of Kenya Limited v ScholarsticaNyaguthii Muturi & Another [2020] e KLR reiterated the application of the rule thus:**

"As we have shown section 44A of the Banking Act came into force on the 1st May, 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2):"The maximum amount referred in subsection (1) is the sum of the following –

a) **The principal owing when the loan becomes non -performing;**

b) **Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non- performing; and**

c) Expenses incurred in the recovery of any amounts owed by the debtor.

By that provision if a loan becomes non -performing and the debtor resumes payment on the loan and then the loan becomes non performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non performing."

32. The rationale for this rule is therefore to safeguard the interests of the parties against any form of injustice, oppression or exploitation as they perform their contractual obligations. Despite their right to freely contract, they must at all material times put themselves into an inquiry on the existence and the potential application of the rule.

33. An analysis of the foregoing rule and its safeguards, leads the Tribunal to make a determination of this claim guided by the provisions of S.44A of the Banking Act which sets the maximum amount of money a banking institution that grants a loan to the borrower. The Claimants by their own description consider themselves small and micro finance institution, we are of the considered view that the Claimant herein should also abide by the *Induplum* rule as required of any financial institution.

34. This Tribunal is therefore persuaded that the Claimant is not entitled to the ksh.76,000/= since this amount is more than double the principal amount it disbursed to the Respondent. The Tribunal is equally persuaded that the 20% interest rate chargeable is only applicable for a determinable period subject to the *in duplum* rule set out above.

Costs

35. On the issue of costs, the Tribunal notes that the Claimant has encountered considerable cost in sustaining this claim. We find that it is fair and just to award costs to the Claimant.

Orders

36. Flowing from the findings, we find that in the interest of justice, the Respondent should pay the Claimant:-

a) Principal sum of Ksh. 20,000/=

b) Interest on (a) above of Ksh. 20,000/=

c) Costs of the suit of Ksh 10,000/=

It is so ordered.

Dated delivered and signed on this 6th October 2021

Dr J. BETT ……..... [CHAIRMAN]

R. KATINA….....[VICE-CHAIR]

J. WERE…….....[MEMBER]

A. GIKUYA…….....[MEMBER}

A. KIBET.....[MEMBER]

Judgement delivered virtually in the presence of:

1. Ms Eunice for Claimant

2. Mr. Isaac Kapalikinei –Tribunal Administrator

3. Ms Joy Kendi –Tribunal Administrator

4. Ms Zulekha Abdullahi –Tribunal Assistant