REPUBLIC OF KENYA

IN THE MICRO AND SMALL ENTERPRISES TRIBUNAL

MSET MOMBASA No. 6 OF 2021

CANVA TRADING KENYA LTD MOMBASA.....CLAIMANT

VERSUS

CECILIA MUTAVE MUTISYA.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Claimant herein, Canva Trading Kenya Limited Mombasa represented by the Managing Director Ms Eunice Okal filed this claim dated 30th April 2021 under Certificate of Urgency at the Tribunal's registry in Mombasa Law courts. The Claimant was introduced as "a small & micro finance giving soft loans to small business to buy motorbikes for riders on hire purchase.

2. The respondent is referred to as a businesswoman from Changamwe Mombasa.

3. The claimant in her statement of claim was seeking the recovery of an "emergency soft loan" of Ksh 18,000/=, borrowed by the Respondent and said to have failed to re-pay, incurring an accrued amount in interest and penalties which had accumulated to Ksh 72,000/=

4. The hearing of this matter had to proceed in the absence of the Respondent or her advocate who became unavailable without any plausible reason, despite having agreed with the claimant during the Mention before this Tribunal on the date and time this matter was to be heard.

THE CLAIMANT'S CASE

5. The Claimant avers that the Respondent applied for an emergency soft loan of **Ksh 18,000/=** from the Claimant, the **Canva Trading Kenya Ltd** which was approved and disbursed on 25th January 2020. The Respondent was to repay by 25th February 2020.

6. 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 within one month as per the payment agreement thus attracting interest and penalties to an equivalent of **Ksh 72,000/=.**

7. **T**hat the Respondent has not heeded to the claimants demand for repayment.

8. The claimant did not pray for costs in her oral submissions.

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 has been served with the claim.

b) Whether the Respondent obtained a loan of Ksh. 18,000/= from the Claimant.

c) Whether the **20%** interest charged by the Claimant on the borrowed amount of **Ksh 18,000/=** was justified.

d) Whether the Claimant Canva Trading Kenya Limited-Mombasa was entitled to demand as it did the **Ksh 72,000/=** being the principal sum, accrued interests and penalties charged on the borrowed principal sum of **Ksh 18,000/=.**

e) Whether costs can be given when not specifically prayed

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 appointed an advocate who appeared during the mention of the matter but failed attend the hearing of the suit. No explanation was given for failure to appear. Further, the Respondent's phone could not go through on day fixed for hearing, leaving the tribunal with no choice but to allow the matter to proceed by way of formal proof as it did.

12. The Tribunal underscores the right to be heard as was held by the Supreme Court of India in ***Sangram Singh v Election Tribunal Koteh*** **1955 AIR 425** (which cannot be gainsaid and quoted here)

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."

13. 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 after the respondent and her advocate failed to appear for the hearing despite agreeing on the hearing date. It cannot therefore be said that the Respondent was denied the Constitutional right to be heard.

14. 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 as follows:

"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.

15. 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."**

16. 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 3rdSeptemebr 2021.

Loan advanced

17. As to whether the Respondent obtained a Ksh. 18,000/= loan from the Claimant, the Claimant relied on a loan agreement dated 24th January 2020. The agreement was signed by the Respondent on 24th January 2020. Other terms of the contract including the 20% interest rate payable per month were set out. The form was marked in red ink "*disbursed 18,000/=*." No evidence was presented to the contrary. We therefore find that the Claimant granted the Respondent a loan facility of Ksh. 18.000/=.

Interest charged

18. The Tribunal while considering the claim herein and the Respondent's reply was concerned that the principal sum of Ksh.18,000/= advanced on 24th January 2020 had attracted interest and penalties to the tune of Ksh. 72,000/= in 15 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 colossal sum, 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"

19. 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. 18,000/= (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) (8) I hereby authorise Canva Trading Ltd to deduct the fee from the loan request and disburse the balance."

20. The agreement was signed by Respondent on 24th January 2020. It is believed the Respondent therefore received Ksh. 18,000/=.

21. Our reading of the agreement is that the Respondent was bound to pay **20%** interest on the loan per 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. 72,000/= against the principal sum of Ksh. 18,000/= in 15 months.

22. 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.**

Pipeplastic Sankolit (K)LtdCivil 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..."

23. 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.

24. 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."

25. 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

26. As regards the third issue, the Tribunal was concerned by the finding that the Respondent's debt rose exponentially from the principal sum of **Ksh 18,000/=** to the current **Ksh 72,000/=** before this claim was filed.

27. It is apparent that the Claimant is demanding much more than double the principal amount borrowed by the Respondent.

28. 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 ***In duplum 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)** e KLR, 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...''

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

1) Lee G. Muthoga V.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.

30. Similarly, in the most recent case, the Court of Appeal in **Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii 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."

31. 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.

32. 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 *In duplum* rule as required of any financial institution.

33. This Tribunal is therefore persuaded that the Claimant is not entitled to the ksh.72,000/= 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

34. On the issue of costs, the Tribunal notes that the Claimant in her oral formal proof did not specifically plead for costs. We find that it is fair and just to award costs to the Claimant.

Orders

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

a) Principal sum of Ksh. 18,000/=

b) Interest on (a) above of Ksh. 18,000/=

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

Those then are the Orders of the Tribunal.

DATED DELIVERED AND SIGNED ON THIS 4TH DAY OF NOVEMBER 2021

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. CECILIA MUTAVE PRESENT

3. MS JOY KENDI -