Dhiman v Shah (Civil Appeal E380 of 2023) [2025] KECA 1264 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1264 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E380 OF 2023

PO KIAGE, WK KORIR & JM NGUGI, JJA

JULY 11, 2025

BETWEEN

KANWAL SARJIT SINGH DHIMAN ..... APPELLANT

AND

KENSHAVJI JIVRAJ SHAH ..... RESPONDENT

(Being an appeal from the judgment of the High Court at Nairobi (Makau, J) dated 19th September, 2019 in HC Comm Case No 205 of 1999)

Principles the court considers when determining whether a contract is unconscionable

The parties had entered into a loan agreement in which the appellant used the title to the suit property as security. The respondent was to advance Kshs. 13,000,000 but only released Kshs. 7,000,000. The appellant defaulted on repayment, leading to an ex parte judgment, sale of the property, and transfer to the respondent. The judgment was later set aside, and the matter retried. The appellant alleged that the agreement and sale were unconscionable. The court held that while parties were bound by their contracts, courts could intervene where terms were oppressive or unjust. The loan terms—charging 36% annual interest compounded quarterly—would have inflated a Kshs. 4,000,000 balance to over Kshs. 69 billion, which was deemed oppressive and unconscionable. The agreement was declared void for unconscionability, and the vesting order was set aside. The appellant was ordered to repay the Kshs. 4,000,000 balance with interest at court rates to avoid unjust enrichment. The appeal partly allowed.

Reported by John Wainaina

Law of Contract *– validity of a contract – doctrine of unconscionability - what principles did the court consider in determining whether a contract was unconscionable - whether courts could interfere with contracts where the parties had already agreed on the terms - whether the terms of a loan agreement that could result in punitive or extortionate financial consequences, particularly through excessive compounding over long durations, could be struck down or moderated - whether the High Court could declare a contract void for being unconscionable and order the release of the security to the creditor while at the same time ordering for the unpaid principle amount to be repaid.*

Banking Law *– interest – unconscionable interests – where the contract was between two parties where neither of them was a bank - whether an agreement between two non-bank parties could be found to charge unconscionable interest, contrary to section 3(1) of the Banking Act – Banking Act (Cap 488) section 3(1).*

Brief facts

The parties had entered into a loan agreement in which the appellant used the title of the suit property as security. The respondent was to advance Kshs. 13,000,000 in three instalments of Kshs. 2,500,000, Kshs. 2,500,000, and Kshs. 8,000,000. However, the respondent only advanced a total of Kshs. 7,000,000 in instalments of Kshs. 2,500,000, Kshs. 2,500,000, and Kshs. 2,000,000. By the time the suit was filed, the appellant had defaulted on payment of the first and second instalments and the accrued interest, which prevented him from accessing the third instalment. Despite that, the respondent advanced Kshs. 2,000,000 as part of the third instalment. During the pendency of the case before the trial court, the appellant repaid Kshs. 3,000,000 of the principal amount.

Following the default, the respondent obtained an interlocutory *ex parte* judgment against the appellant, sold the property by public auction, and subsequently secured a vesting order transferring ownership to its name. The appellant later moved to set aside the *ex parte* judgment, and the Court of Appeal quashed the decision and ordered a retrial. At the retrial, the appellant filed a counterclaim alleging that the transaction was unconscionable and that the sale and transfer of the property were irregular, but the trial court ruled in favour of the respondent.

In the appeal, the appellant pleaded that although the parties had entered into a loan agreement secured by the title to the suit property, the respondent only advanced Kshs. 7,000,000 instead of the agreed Kshs. 13,000,000. He claimed that he later repaid Kshs. 3,000,000 during the pendency of the case. The appellant argued that the respondent's subsequent sale and transfer of the property, based on an *ex parte* judgment later set aside, was irregular, unconscionable, and contrary to the terms of the agreement. He sought to have the sale and transfer nullified and the property restored to his name.

Issues

i. What principles did the court consider when determining whether a contract was unconscionable?
ii. Whether courts could interfere with contracts where the parties had already agreed on the terms.
iii. Whether the terms of a loan agreement that may result in punitive or extortionate financial consequences, particularly through excessive compounding over long durations, could be struck down or moderated.
iv. Whether the High Court could declare a contract void for being unconscionable and order the release of the security to the creditor while at the same time ordering for the unpaid principle amount to be repaid.
v. Whether an agreement between two non-bank parties could be found to charge unconscionable interest, contrary to section 3(1) of the Banking Act

Held

1. The facts of the case did not disclose a contract that had totally failed or one that had become frustrated. Instead, they disclosed a contract that had been totally breached. While the appellant implied that both parties breached the contract and, therefore, "materially compromised" it leading to its "total failure", in the Law of Contract, it was the party that first materially breaches the contract that becomes liable. When a party materially breached a contract, the other party was entitled to either withhold performance of their part until the breaching party cures the material breach (if it was capable of cure) or calls for the breach, if it was a total breach, and sue for damages. In the instant case, the uncontested facts were that after drawing the first two installments, the appellant was unable to pay the interests as required under the Agreement. The respondent attempted to accommodate him by advancing a further sum of Kshs. 2 Million. By his own admission, the appellant was still unable to repay as per the terms of the Agreement. Therefore, when the respondent declined to advance the remaining amount

of kshs. 6 million under the Agreement, he was not equally breaching the contract; he was rescinding the contract for a total breach by the appellant as he was entitled to do by the Law of Contract. It was the appellant who was in total breach of the contract entitling the respondent to rescind it and sue.

2. The agreement was not in violation of public policy and did not violate section 3(1) of the Banking Act. The Banking Act applied to banking institutions which were in the regulated business of lending money for interest. There was no evidence presented before the trial court that the respondent was engaged in any such business. Instead, that was a "friendly" loan by two individuals who were known to each other. There was no law that proscribed individuals from lending each other money for interest. The prohibition only kicked in where there was evidence that the individual so lending, in fact, engaged in habitual business and was otherwise acting as a banking institution by stealth or in the shadows. Without any such evidence, there was no basis for invalidating the agreement between the two parties on public policy grounds.
3. Courts did no rewrite contracts for individuals who belatedly realized they entered into "bad bargains." However, courts in Kenya did not enforce unconscionable contracts either.
4. The doctrine of unconscionability in contract law as a safeguard against contracts that were so unfair or one-sided that enforcing them would offend the sense of justice. At its core, the doctrine allowed a court to refuse to uphold a contract, or specific terms of it, if they were imposed in a way that took undue advantage of one party's vulnerability, ignorance, or lack of bargaining power.
5. This doctrine looks at two broad aspects: how the contract was made, and the nature of its terms. How the contract was made was called procedural unconscionability, it examined whether the weaker party had a meaningful choice in the matter, that was, whether the terms hidden in fine print or whether there was deception, pressure, or a clear imbalance in knowledge or power or unequal bargaining power during the negotiations. The second aspect, the nature of the contract's terms, substantive unconscionability, focused on the terms themselves: whether they were harsh, oppressive, manifestly unjust, or unreasonably favoring one side. Courts typically required at least some measure of both elements before declaring a contract unconscionable. The goal was never to rewrite bad bargains by parties, but to ensure that contracts were not used as instruments of injustice.
6. The doctrine of unconscionability, though not always expressly named, was recognized and applied through general principles of equity, fairness, and public policy under the law of contract. A court could interfere with a contract even where parties had agreed on the terms if the resulting agreement was highly oppressive or unfair as to offend an objective sense of justice.
7. The terms of the contract that the parties entered were unconscionable. The facts show that the appellant was loaned kshs. 7 million and repaid kshs. 3 million leaving a balance of kshs. 4 million unpaid. If the court used the figure to calculate the amount payable as at the date of the instant judgment under the terms of the parties' agreement, the amount would be slightly over Kshs. 69 billion.
8. An annual interest rate of 36% compounded quarterly over a period of nearly three decades, the terms included in the parties' agreement. It was not in question that the astronomical figure exceeding Kshs. 69 billion on a principal sum of Kshs. 4 million was a disproportionate escalation; it was not merely commercially unreasonable; it was, in the eyes of equity and good conscience, oppressive and unconscionable. Where the terms of a loan agreement result in punitive or extortionate financial consequences, particularly through excessive compounding over long durations they may be struck down or moderated. That was because equity abhored oppression and refused to enforce contractual provisions that shock the conscience of the court. The sheer disparity between the original loan and the amount which would now be due evidences a contract whose enforcement, without judicial intervention, would undermine principles of fairness, good faith, and proportionality. We, therefore, find the contract between the parties void for unconscionability.
9. The vesting order was set aside with the result that the suit property will revert to the appellant as a result of the operation of this court's judgment of 31 July 2015.

10. The appellant received Kshs. 7 million as a loan from the respondent. Out of this amount, undisputed evidence showed that he repaid Kshs. 3 million. He had not repaid Kshs. 4 million. To allow the appellant to retain that amount and still get his house back would amount to unjust enrichment, a situation abhorred by equity as much as unconscionability in contractual terms. To disgorge the unjust enrichment, the appellant was to repay the amount owing, Kshs. 4 million, at court rates of 12% to be calculated since the date of the High Court judgment namely 19 September, 2019.
11. The setting aside of the ex- parte judgment dated 16 September 1999 meant that the status quo between the appellant and the respondent before the sale of the suit property (by virtue of the ex-parte judgment) remained, until the matter was heard afresh and determined. Hence, the orders granted in the said ex-parte judgment and all other consequential orders that arose therefrom, including the vesting order, were null and void. The agreement between the parties was void for unconscionability. The appellant was liable to refund the unpaid amount of Ksh. 4,000,000 received from the respondent on a theory of unjust enrichment.

Appeal partly allowed.

Orders

i. *All the orders granted by the High Court in its judgment dated 19 September 2019 were set aside.*
ii. *The orders granted in the ex-parte judgement dated 16 September 1999 and all other consequential orders that arose therefrom were null and void by virtue of it being set aside by this Court's judgment dated 31 July 2015, in Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah, Civil Appeal No. 33 of 2007.*
iii. *Order of revocation of the respondent's title to the parcel of land known as LR No. 209/8192/8 and rectification of the land register in favour of the appellant.*
iv. *The appellant shall pay to the respondent Kshs. 4,000,000 with interest at court rates calculated from 19 September, 2019.*
v. *Following (iii) above, the appellant was liable to pay the amount owed to the respondent and interest thereof as shall be calculated, failure to which the suit property shall be subjected to sale by public auction as it was secured for purposes of enabling the respondent to recover the loan amounts advanced to the appellant.*
vi. *No order as to costs.*

Citations

Cases

Kenya

1. *Ajay Indravadan Shah v Guilders International Bank Ltd* Civil Appeal 135 of 2001; [2002] KECA 307 (KLR) - (Explained)
2. *Benard Kiprono Bett v Benard Kiprono Koech* Environment & Land Case 11 of 2020; [2021] KEELC 702 (KLR) - (Mentioned)
3. *CIS v Directors, Crawford International School & 3 others* Petition 162 of 2020; [2020] KEHC 3394 (KLR) - (Mentioned)
4. *Geoffery Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR) - (Mentioned)
5. *Jamii Bora Bank Limited v Wapak Developers* Civil Suit 22 of 2018; [2018] KEHC 9599 (KLR) - (Mentioned)
6. *Kenya Commercial Finance Company Ltd v Kipng'eno Arap Ngeny & another* Civil Appeal 100 of 2001; [2002] KECA 306 (KLR) - (Explained)
7. *LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') & others* Civil Appeal 72 of 2008; [2011] KECA 1 (KLR) - (Mentioned)

8. *Margaret Njeri Muiruri (Being the Administrator of the Estate of the Late Joseph Muiruri Gachoka (Deceased) v Bank of Baroda (Kenya) Limited* Civil Appeal 282 of 2004; [2014] KECA 319 (KLR) - (Explained)
9. *Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja* Civil Appeal 2 of 1985; [1986] KECA 21 (KLR) - (Mentioned)
10. *Mursal Guleid & 2 others v Daniel Kioko Masau* Miscellaneous Application 53 of 2016; [2016] KEHC 6122 (KLR) - (Mentioned)
11. *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another* Civil Appeal 54 of 2014; [2015] KECA 469 (KLR) - (Mentioned)
12. *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* Civil Appeal 95 of 1999; [2001] KECA 362 (KLR) - (Explained)
13. *Patrick Kimathi Muchena v Michael Mwasa Kilonzo* Miscellaneous Civil Application 483 of 2015; [2017] KEHC 9849 (KLR) - (Mentioned)
14. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR) - (Mentioned)
15. *Trans Mara Sugar Co Ltd & Ben Kangwaya Ayiemba; Ben Kangwaya Ayiemba & Trans Mara Sugar Co Ltd* Civil Appeal 132 of 2019; [2020] KEHC 3762 (KLR) - (Mentioned)

United Kingdom

Strydom v Vendside Ltd [2009] EWHC 2130 (QB) - (Explained)

Australia

Commercial Bank of Australia Ltd v Amadio [1983] 51 CLR 447 - (Explained)

Regional Court

Selle v Associated Motor Boat Co Ltd [1968] EA 123 - (Mentioned)

Statutes

1. Appellate Jurisdiction Act (cap 9) section 3 — (Interpreted)
2. Banking Act (cap 488) section 3(1) — (Interpreted)
3. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 21 rules 75, 78, 81, 83; order 22 rules 70, 74, 77 — (Interpreted)
4. Court of Appeal Rules, 2010 (Repealed) (cap 9 Sub Leg) rule 33 — (Interpreted)
5. Land Registration Act (cap 300) sections 26, 106, 107 — (Interpreted)
6. Law of Contract Act (cap 23) In general— (Cited)
7. Limitation of Actions Act (cap 22) In general— (Cited)
8. Registration of Titles Act(repealed) (cap 281) section 24 — (Interpreted)
9. Stamp Duty Act (cap 480) section 19(2)(3) — (Interpreted)

Advocates

Mr Nduati for the appellant.
Mr Mwenesi & Ms Wanjiru for the respondent.

JUDGMENT

1. The basic facts giving rise to this torturous matter are uncontested and can be gleaned from the pleadings. On December 17, 1996, the respondent and the applicant entered into an agreement (the "Agreement") whereby the respondent agreed to lend a total sum of Shs 13,000,000 to the applicant in three installments as follows:

    a. Shs 2,500,000 on or before the execution of the Agreement.

b. Shs 2,500,000 on January 31, 1997.

c. Shs 8,000,000 on April 2, 1997.

2. Pursuant to this Agreement, the respondent lent the appellant a sum of kshs 7,000,000 as follows:

Kshs 2,500,000 paid on December 17, 1996

Kshs 2,500,000 paid on 31st January,

1997 kshs 2,000,000 paid on August 5, 1997

Kshs 7,000,000.00 Total

3. The terms and conditions of the written agreement provided that the loan was repayable with interest at the rate of 36% per annum on the sums advanced payable in arrears at the end of each quarter. The agreement also provided, among other terms, that the first two installments were to be secured by two promissory notes each for Shs 2,500,000 payable on March 31, 1997 and also by a Memorandum of Charge by Deposit of Documents of Title in favour of the lender over the parcel of land known as LR No 209/8192/8 (suit property) which was owned by the appellant. The terms also provided that the appellant had the option to take the third installment of Shs 8,000,000 and a further option to repay the sums already advanced before taking the third installment; and further that if the appellant exercised the option to take the third installment, then the applicant was required to execute a first legal charge on the suit property.

4. It is not in dispute that that the respondent only lent to the appellant the sum of kshs 7,000,000. It is also not contested that upto February 25, 1999, the applicant had not repaid any part of the loan amount of kshs 7,000,000 or the interest accrued. Consequently, the respondent did not lend the remaining amounts and the relationship broke down.

5. The respondent herein filed a plaint dated February 25, 1999, in High Court Commercial and Tax Division, Civil Case No 205 of 1999 seeking the following prayers:

a. Kshs 13,813,132/25 together with interest at 36% per annum from February 1, 1999until payment or realization in full;

b. An order for sale of the aforesaid property by public auction and in the event of there being a deficit on sale a personal decree against the defendant for the balance of the amount unrealized;

c. Costs of the suit and interest thereon at court rates from the date of filing the suit until payment or realization in full;

d. Interest on the decretal amount at the rate of 36% per annum from the date of judgment until payment or realization in full; and,

e. Such other or further relief as to this Honorable Court may deem just.

6. In the plaint, the respondent averred that pursuant to the agreement, he lent a total of kshs 7,000,000 to the appellant; that the respondent caused the Memorandum of the Charge by Deposit of Document of Title executed by the appellant pursuant to the Agreement to be registered against the title on October 15, 1998; that the appellant failed to repay the loan and that the amount outstanding then was kshs 13,813,132/25 inclusive of interest for which he sought judgment.

7. On May 26, 1999the respondent filed an application for an interlocutory judgment on the ground that the applicant had neither entered appearance nor filed his defence. On September 16, 1999the

High Court, upon formal proof, entered an interlocutory judgment in favour of the respondent for kshs 17,020,365/40 plus interest at 36% per annum from August 31, 1999until payment in full plus costs of the suit.

8. Armed with the judgment, the respondent proceeded to attach the suit property in execution of the decree. He then advertised suit property for sale by public auction and obtained leave of the court to bid at the auction. He was the successful bidder at the public auction at the price of Kshs 17,000,000. He proceeded to apply for a vesting order, which was given to him on June 13, 2006. The respondent, then, used the vesting order to register himself as the owner of the suit property on September 27, 2006. Thereafter, the respondent applied for and obtained an eviction order against the appellant on August 11, 2006.

9. On November 16, 2006, the appellant filed an application in the High Court for an order that the ex parte judgment of June 16, 1999be reviewed and set aside and that he be given leave to defend the suit. The application was dismissed by the High Court (Kasango, J) on December 18, 2006.

10. Dissatisfied, the appellant appealed to this court in Civil Appeal No 33 of 2007. In a judgment dated July 31, 2015, this court allowed the appellant's appeal and remitted the case to the High Court for retrial. In its disposition, this court ruled:

> We think that it is only fair, in the circumstances of this matter, that the appellant is given a chance to ventilate his case. We are of the considered view that the learned judge failed to exercise her discretion judiciously and the law allows us to interfere with the exercise of such discretion so as not to cause injustice. See *Mbogo & Another v Shah* [1968] EA 93.
>
> Accordingly, we allow the appeal. We set aside the exparte judgment entered on September 16, 1999. The draft defence is deemed as duly filed upon payment of the requisite fees within 7 days from today's date. The costs of this appeal shall be borne by the appellant."

11. With the matter remitted back to the High Court, the appellant filed a defence and counterclaim dated August 6, 2015, seeking the following prayers:

    a. There be a declaration that the purported agreement between the plaintiff and the defendant was null and void and unenforceable in law.

    b. The Honourable Court be pleased to order revocation of plaintiff's title and rectification of the register in favour of the defendant.

    c. Costs of this suit and counterclaim with interest at courts rates.

12. In his statement of defence and counterclaim, the appellant denied the claims by the respondent and stated that: the respondent had since transferred the suit property to himself irregularly and without his knowledge or consent; and at the time of signing the agreement, he was in dire need of financial assistance and the respondent, who was introduced to him by a close friend, offered to advance him the monies; but took advantage of his desperate need for the money and unlawfully loaded unconscionable interests thereon, and pressured him to sign the agreement under duress. The appellant pleaded that, as such, for all intents and purposes, the Agreement was tainted with coercion and irregularity; and was a contract of adhesion which was unenforceable in law.

13. The appellant also averred that the monies advanced by the respondent were "not in accordance with the Agreement" and were "material violations" which went "to the root of the agreement", rendering it substantially compromised and incapable of being enforced in its original form; and that the agreement was illegal as it was not witnessed and provided charging interest by an individual and/or money

lender who was not authorized in law to do so. He also contended that purported interest rates were unconscionable and highly oppressive not recoverable in law.

14. Further, the appellant averred that at the time of filing the suit, the parties were in talking terms and negotiating an out of court settlement; and that he had, in good faith, paid Kshs 3,000,000 leaving a balance of Kshs 4,000,000 which he was ready and willing to pay at the time, but the respondent declined to accept as he was hellbent on trasferring the suit property to himself.

15. The respondent's reply to the appellant's defence and counterclaim was that the suit property was regularly transferred pursuant to court orders, permission having been granted for him to bid at the auction, and vesting of the suit property in the respondent's name – decisions which, the respondent insisted, the appellant did not appeal against.

16. The respondent contended that the appellant freely and voluntarily signed the agreement in the presence of Mr Guatama, a senior lawyer, without any sort of coercion as the existing interest rates at the material time were high and the appellant willingly agreed to pay 36% interest rate, being a business man of many years standing.

17. The respondent also contended that the appellant's claim as set in his counterclaim dated August 6, 2015, was barred by virtue of the *Limitation of Actions Act*, as it was made more than six years since the cause of action arose.

18. During trial, the respondent testified as PW1 and relied on his witness statement dated March 14, 2016, (Exhibit P1(a)); further statement dated April 12, 2017, (Exhibit P1(b)); sequence of events filed on April 12, 2017, (Exhibit P1(c)); and list of documents (Exhibit P1(d)).

19. He told the court that the appellant asked for Kshs 30,000,000 but he only gave him a total of Kshs 7,000,000. Thereafter, pursuant to an ex-parte judgment, the suit property was auctioned and he was given a vesting order, through which the suit property was transferred to his name and he has been paying land rates and rent, which at the time had been unpaid to the tune of Kshs 976,426.90.

20. When he was asked about the interest rate charged, the respondent told the court that he was not a money lender but he was not aware of any law which required an individual to lend money without interest. He explained that he based the interest rate of 36% on the then charges by banks to customers, which was 42% pa whilst the treasury bond was up to 54% pa.

21. He informed the court that according to the Agreement, the appellant was to be given Kshs 13,000,000 in variations of Kshs 2,500,000 (on or before execution of the Agreement); Kshs 2,500,000.00 (on January 31, 1997) and Kshs 8,000,000 (on 02/04/1997). However, he did not comply with the variations of payment as he gave the appellant Kshs 2,000,000 in August, 1997 and not Kshs 8,000,000.00. He also stated that clause 6 of the Agreement had a condition based on withdrawal of the third instalment of Kshs 8,000,000 that was to be advanced to the appellant; and the suit ought to have been filed three years from April 2, 1997, but he instituted it because of non- payment of the entire interest by 1999. Additionally, he stated that the agreement was not registered and neither did they sign a deed of variation.

22. The respondent called one witness, Edward Mwangi Njehia (PW2). The witness relied on his witness statement dated August 16, 2018(Exhibit P2) and Memorandum of Agreement (EMW-2). He told the court that he was the one who prepared the agreement upon dictation by Mr Guatama, as he was his stenographer; and the same was done in the presence of the parties herein.

23. When it was his turn to testify, the appellant reiterated his statement of defence and counterclaim and relied on his witness statement (Exhibit D1), bundle of documents (Exhibit D2) and agreement

(Exhibit D3). He contended that he wanted Kshs 13,000,000 but the respondent only advanced him three instalments totaling to Kshs 7,000,000; which was a breach of the agreement.

24. He also contended that: Clause 4 provided for his (appellant's) election; he did not give nor execute the Memorandum of Charge as per clause 5; and even though he gave the title of the suit property to his friend and advocate, Mr Guatama, he did not register the Certificate of Title and neither did he know who registered it.

25. The appellant further contended that the loan was to be paid within three years upon him electing to draw the final instalment of Kshs 8,000,000. However, the respondent only advanced Kshs 2,000,000 in April 1997, and not the agreed Kshs 8,000,000. He also stated that there was a conditional payment in the Agreement which he conceded that he failed to fulfil because he was unable to which breach triggered the respondent to act as he did.

26. In addition, the appellant also confirmed the testimony of PW2 that Mr Gautama dictated the Agreement to PW2, who wrote it in the presence of both parties. He also said that he was not forced to sign the Agreement and confirmed the respondent's testimony that his land rent and rates had accumulated to the tune of Kshs 976,426.90. However, he was willing to pay the said rate and rent; together with the remaining loan balance of Kshs 4,000,000.00.

27. In his decision, the learned trial judge outlined seven issues for consideration as follows:

    a. Whether the suit was prematurely instituted.

    b. Whether the defendant complied with the court's order as regards filing of the Defence.

    c. Whether the defendant's defence and counterclaim were time barred.

    d. Whether the memorandum of agreement was inadmissible for lack of stamp duty under the *Stamp Duty Act*.

    e. Whether the Memorandum of Agreement was illegal, null and void.

    f. Whether in the absence of defence and counterclaim whether a claim for rectification of Land Register can ensue.

    g. Whether the suit claim was competent as drawn and filed.

28. On the first issue, the learned trial judge found that the suit was not premature because the appellant had not controverted the respondent's claim that he had defaulted in paying interests as required under the agreement.

29. On the second issue, the learned trial judge resisted the respondent's invitation to strike out the appellant's defence and counterclaim on the claim that he had filed a new one and not the one deemed as duly filed by this court. The learned Judge found the objection merely technical; and the objection to have been forfeited since the respondent had not raised it in his reply to the defence and defence to the counterclaim.

30. On the third issue, the learned trial judge found the counterclaim to be time-barred since it was based on contract and should have been

    brought within six years of the cause of action. The learned Judge rejected the appellant's arguments that his counterclaim was a proprietary claim grounded in ownership rights and wrongful transfer of property as opposed to a contractual claim.

31. Turning to the fourth issue, the learned trial judge made reference to the provision in section 19(2) and (3) of the *Stamp Duty Act* and various authorities and found that failure to have the agreement stamped and pay stamp duty was not fatal. In the alternative, he found that the court can collect the assessed stamp duty through the Deputy Registrar and forward it to the collector of stamp duty if the appellant does not comply with the respondent's request for his PIN number. Hence, it was his view that the Agreement between the respondent and the appellant was valid and enforceable.

32. As regards the fifth issue, the learned trial judge found that the appellant had agreed and willingly signed for the interest rate of 36%; and that, therefore, it was not open to him to turn around and claim that it was unconscionable; null and void. The learned Judge found no cause at all to invalidate the agreement, finding it valid and enforceable in law.

33. Lastly, the learned trial judge found that the appellant had testified that he voluntarily and willingly surrendered the title documents with the signed Memorandum of Charge to charge the property to the respondent, should it be necessary under the agreement. As such, he granted the respondent irrevocable authorization to utilize the Memorandum of Charge and the Title if he did not exercise his option to pay under clause 4 of the Agreement. The learned trial judge also found that the appellant admitted that he breached clause 4 of the Agreement to pay up Ksh 5,000,000.00 with interest to enable him access the next tranche of Kshs 8,000,000.00 on April 2, 1997.

34. The learned Judge found that the sale and vesting order in issue in the case were valid as the appellant had failed to appeal against the sale of the property. It was the learned Judge's opinion that the property vested in the plaintiff on the 27th February, 2004 in execution of a valid order of the court that has never been set aside or appealed against.

35. Ultimately, the learned Judge found that the respondent's case was meritorious and made the following orders in his favour:

    a. That under sections 19(3) and 20 of the *Stamp Duty Act*, there is a statutory right availed for unstamped documents to be stamped out of time for payment of requisite Stamp Duty and penalties and their being unstamped do not make an agreement unenforceable nor fatally defective or inadmissible. As the Stamp Duty over Memorandum of Agreement of December 17, 1996 has already been assessed by the collector of Stamp Duty, I direct the plaintiff to pay the assessed Stamp Duty to the collector of Stamp Duty within 14 days from the date of the judgment herein and cause the same to be filed in Court Registry within 4 days from the date of stamping.

    b. A declaration be and is hereby issued that Parcel No LR No 209/8192/8 Lavington, Nairobi is property of the plaintiff.

    c. The defendant's counterclaim is dismissed with costs.

    d. The Defendant is hereby directed and ordered to grant vacant possession of Land Parcel No LR 209/8192/8, Lavington, Nairobi to the Plaintiff within the next sixty (60) days from the date of judgment in default eviction do issue.

    e. The plaintiff is awarded costs of the suit.

36. Aggrieved by the decision of the High Court, the appellant filed a notice of appealdated September 19, 2019, and a Memorandum of Appeal dated May 30, 2023, in which he raised the following nine 9 grounds of appeal:

1. The trial judge of the superior court grossly erred in law and principle in finding that the vesting order and other consequential were still in force despite the Court of Appeal having set aside the ex-parte judgment of September 16, 1999, and ordered the suit to be heard afresh.

2. The superior court was in gross error in law and in principle in holding that the memorandum of agreement dated December 17, 1996was enforceable in law despite the parties having materially deviated from its terms and conditions as to render it compromised both in letter and in spirit.

3. The trial judge grossly misdirected himself in law and fact in holding that the suit was not prematurely filed despite there being an express stipulation in the said memorandum of agreement providing for the period within which the full loan was repayable and which period had not lapsed.

4. The trial judge erred in law and in fact in holding that the said agreement in which an individual had loaned money on unconscionable interest of 36% per annum was legal and enforceable despite there being an express statute prohibiting unauthorized persons or institutions from charging interests on such advances.

5. The superior court erred in principle in holding that the defendant's counterclaim was time barred by failing to distinguish that the same was for recovery of land/property which was unlawfully still vested in the plaintiff's name despite the ex-parte judgment having been set aside.

6. The trial judge misdirected himself in law in failing to distinguish that the suit as drawn and filled was expressly a monetary claim and not for the property herein.

7. The superior court in total misdirection held that LR No. 209/8192/8 Lavington is the plaintiff's property even though the earlier judgment that had given rise to the said property into the respondent's name had been set aside, which was an error in principle and in fact.

8. The trial judge ignored the defendant's submissions and exhibited open bias by replicating the plaintiff's submissions word for word in his judgment and as such the said judgment is devoid of impartiality and has given rise to an injustice.

9. The trial judge deliberately ignored the respondent's admissions during trial and only focused on the appellant's testimony in order to tilt the case in favour of the respondent.

37. Consequently, the appellant prayed that the judgment and all consequential orders made on September 19, 2019be set aside; the suit property given as security for the loan herein be restituted back to the appellant; the Honourable court be pleased to make any other orders as it deems fit and just in the circumstances of this case; and costs of this appeal.

38. During the virtual hearing of the appeal, learned counsel, Mr Nduati, appeared for the appellant and learned counsel, Mr Mwenesi and Ms Wanjiru, appeared for the respondent. They all relied on their written submissions and briefly highlighted them.

39. This is a first appeal in which we are required to review issues of both facts and law afresh and come to our own independent conclusions. We are, however, obligated to bear in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle v Associated Motor Boat Co Limited* (1968) EA 123). In addition, this court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on

a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane v Olenja* (1968) KLR 661).

40. We have carefully considered the appeal, the rival submissions of the parties in support of the opposing positions. We will now address them. The nine grounds of appeal can be grouped into four main questions which the parties addressed:

    a. Whether the vesting order and other consequential orders remained in force after this court set aside the ex parte judgment of September 16, 1999;

    b. Whether the agreement between the parties was enforceable;

    c. Whether the respondent filed his suit prematurely; and

    d. Whether the appellant's counterclaim was time-barred.

41. The appellant also argued alleged bias on the part of the learned Judge as a separate ground of appeal but we have found it unnecessary to address it as such given our obligation as a first appellate court to do a de novo review of the evidence anyway. If there was any such bias in the analysis, our de novo re-evaluation of the evidence would catch it and cure it as we are required to come to our own conclusions without deferring to the trial court's own conclusions.

42. We will now look at each of these four questions *in seriatim*.

43. On the first question, the appellant contended that the learned trial judge misdirected himself when he held that the judgment by this court dated July 31, 2015, which set aside the ex-parte judgment dated September 16, 1999, and ordered for a fresh hearing, did not set aside the vesting orders and all the consequential orders therein. The appellant argues that the sale was a nullity following the setting aside of the ex-parte judgment. This would be because, with the setting aside of the monetary part of the judgment, then the sale of the suit property would be without consideration hence rendering it unenforceable.

44. The respondent opposed the above appellant's submission and relied on *Patrick Kimathi Muchena v Micheal Mwasa Kilonzo* [2017] eKLR and *Benard Kiprono Bett v Benard Kiprono Koech* [2021] eKLR for the argument that where an auction is court-sanctioned and the buyer has fulfilled the terms of the auction, the sale can only be challenged vide a specific court process; and there was none in this case. The respondent argues that the appellant did not make an application under order XXI rules 78, 81 and 83 of the *Civil Procedure Rules* in force at the time, which respectively correspond to order 22 rules 74, 77 and 70 of the 2010 Rules, to set aside the sale of the suit property; and neither did he make an application under order XX1 rule 79 (rule 75 of the 2010 Rules) on the ground of fraud or irregularity which he has now brought up on appeal. He contended that in light of failure by the appellant to follow the specific procedure to set aside the sale of the suit property, the certificate of sale and the vesting order issued by the High Court were and are still in force; and the judgment of this court dated July 31, 2015, did not set aside the certificate of sale and vesting order. For this proposition, he relied on *Speaker of National Assembly v Karume* (1992) eKLR; *Geoffery Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR; and *Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another* [2015] eKLR

45. He further contended that the appellant did not present to the High Court any order drawn in accordance with rule 33 of the then prevailing *Court of Appeal Rules*, 2010, and flowing from the said judgment of this court, which showed that the judgment specifically related to setting aside of all and any "consequential orders" of the High Court; despite having the opportunity to invoke this court's

jurisdiction under section 3 of the *Appellate Jurisdiction Act* in Civil Appeal 33 of 2007, and persuade it to proceed under order 22 of the *Civil Procedure Rules*, 2010.

46. Ultimately, the respondent urged that the sale of the suit property, certificate of sale and vesting orders were never set aside, vacated or appealed against. Therefore, the High Court did not err when it found and declared the respondent as the owner of the suit property; as ownership thereof was pursuant to the execution of a valid court order which had not been set aside.

47. When the High Court considered this aspect of the case, the learned Judge rendered himself thus:

> "74. In the instant suit, it is clear that the defendant exhibited the draft Memorandum of Appeal against the Ruling of February 13, 2004which ordered sale of the suit property. The defendant tries to suggest that the court failed to hear him on the application for stay of the sale. However, the fact is that there was no appeal against the sale. The application for stay of the order for sale was dismissed. The court of Appeal noted that the Defendant was the author of his own miseries. Defendant was even ordered at one time to pay deposit towards mesne profits which he did not.
>
> In view of the foregoing there is no doubt that the property vested in the plaintiff on the February 27, 2004in execution of a valid order of the court that has never been set aside or appealed against.
>
> 75. Under section 24 of the *Registration of Titles Act* (cap 281) of the Laws of Kenya in force in November 2006, under the *Land Registration Act*, 2012 No 3 of 2012, and section 106 and 107 thereof, where another person had become registered owner of one's property, the law direct that one would sue for damages and not for the property. The *Land Registration Act*, however allows challenge to title and rectification of register under section 26 and
>
> 80. The defendant who is in possession has acknowledged that the plaintiff is the registered proprietor. There is now no valid challenge to the plaintiff's ownership. In view of the foregoing I find the defendant has not established the condition- precedent for an order of rectification."

48. It is noteworthy that the judgment of this court dated July 31, 2015, whose pertinent part we have reproduced above set aside the entirety of the ex-parte judgment of the High Court dated September 16, 1999. It bears to reproduce the pertinent part here. The judgment, in part, stated as follows:

> "We think that it is only fair, in the circumstances of this matter, that the appellant is given a chance to ventilate his case. We are of the considered view that the learned judge failed to exercise her discretion judiciously and the law allows us to interfere with the exercise of such discretion so as not to cause injustice. See *Mbogo & Another v Shah* [1968] EA 93.
>
> Accordingly, we allow the appeal. We set aside the exparte judgment entered on September 16, 1999. The draft defence is deemed as duly filed upon payment of the requisite fees within 7 days from today's date. The costs of this appeal shall be borne by the appellant."

49. It seems clear to us beyond peradventure that this court set aside the entire High Court judgment dated September 16, 1999. The consequence is that all consequential orders that flowed from that ex parte judgment were also, ipso facto, set aside. The result was that the parties were returned to status quo ante: as they were before the judgment was entered. Without the ex parte judgment, the respondent

would have no basis for applying to sell suit property by public auction; and, therefore, would have no basis to bid at such public auction; or obtain a vesting order pursuant to such successful bidding. All these subsequent actions were based on the validity of the ex parte judgment which was set aside by this court. The result is that the sale at public auction as well as the vesting order – both of which were based on the ex parte judgment and derived their validity from it were, by operation of law, set aside by this court's judgment dated July 31, 2015.

50. We readily concede that this court's judgment would have been much clearer if it had included the phrase "and all consequential orders". However, the purport of the judgment as is is psychedelically clear: this court intended the parties to return to the High Court for a rehearing of their case. It would have been pointless to so require the parties to rehear their case if, in fact, the subject matter of the suit, the suit property, irreversibly remained in the hands of the respondent as adjudged by the impugned ex parte order which was set aside.

51. Combining the next two major grounds of appeal, the appellant argues that the Agreement was unenforceable on four grounds: first, that it was materially compromised as both parties failed to adhere to its terms; second, that it was against public policy because it violated the *Banking Act*; third, that it contained unconscionable terms, namely, very high interest rates; and fourth, that the Agreement was not "ripe" for enforcement and that the suit was filed prematurely.

52. The appellant contended that both parties did not adhere to the terms and conditions of the Agreement as the amount advanced was Kshs 7,000,000, which was not paid in accordance with the express terms and conditions of the Agreement; and that he repaid Kshs 3,000,000 and left a balance of Kshs 4,000,000. This, therefore, meant that the whole contract was materially compromised and became unenforceable since the Agreement contemplated that the appellant would borrow ksh. 13,000,000.

53. Additionally, the appellant argued that the respondent charged unconscionable interests without requisite authorization as per section 3(1)(a) of the *Banking Act*, which provided that no person in Kenya shall transact any banking business or financial business unless it is an institution, or duly approved agency which holds a valid license; the Money Lenders Act having been repealed in 1984, making it illegal for an individual to lend money on interest without a license to do so. Hence, the appellant argued, besides the Agreement being comprised, it was also caught up by the maxim "ex turpi causa non oritur actio" (no action can be based on a disreputable cause). Thus, the Agreement was an illegal contract in its nature and import and should not be enforced.

54. For the above propositions, the relied on Misc. Application No. 53 of 2016 – *Mursal Guleid & 2 others v Daniel Kioko Masau*; *LTI Kisii Safaris Inn Ltd & 2 others v Deutsche Investitions – Und Enwicklungsgellschaft & others* (2011) eKLR; *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* (2014) KLR; and Petition 162 of 2020 – *CIS v Directors, Crawford International School & 3 others* (2020) eKLR

55. The appellant also argued that the respondent filed this suit prematurely, contrary to the express stipulation in the Agreement which provided for the period within which the full loan was repayable; and clause 6 of the Agreement which provided that if he chose to draw the final instalment of Kshs 8,000,000 on 2nd April, 1997, he shall, as security for the repayment of the loan execute a first legal charge on the suit property, and such charge shall provide for the repayment of the amount lent together with interest calculated at 36% per year within a period from 2nd April, 1997. However, no such charge was ever executed despite opting to draw the said final instalment.

56. On his part, in response to these arguments about the enforceability of the Agreement, the respondent submitted that it was the appellant who failed to adhere to clause 4 of the Agreement, which provided

that before the appellant could be given the third (final) installment, he had to repay the first and second amounts that had already been lent to him with interest. As such, it was the appellant who caused the failure of the Agreement and that he should not be allowed to benefit from such breach. For this proposition, the respondent cited *Trans Mara Sugar Co. Ltd v Ben Kangwaya Ayiemba* [2020] eKLR, in which the court observed that a party should not be allowed to benefit from its own self-made illegality except if it pleads and proves any of the factors that may perfectly vitiate a contract.

57. With regard to the allegation that the respondent charged unconscionable interests contrary to section 3(1) of the *Banking Act*, the respondent argued that the trial court dealt with the issue and found that the appellant adduced no evidence pointing out that he was involved in lending money to thousands of businesses and used the form of contract that he used with the appellant in such lending; and that the appellant has not shown that there was evidence before the trial court which was not taken into account which showed that the respondent was lending money to businesses and contravened section 3(1) of the *Banking Act*, or that the respondent was operating a bank at all; and, there was no evidence that the appellant took precautionary measures to report the respondent to the relevant authorities in the banking industry.

58. Lastly, the respondent urged that the learned trial judge noted that the appellant testified that he was not forced or coerced to sign the agreement. Rather, he willingly entered into the agreement and knew about the interest he would be charged; but failed to opt out of it when he had the opportunity to. As such, the appellant was bound by the terms of the agreement in relation to the interest payable. He relied on *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* (supra) and *Jamii Bora Bank Ltd v Wapak Developers* [2018] eKLR, in which interest rates charged by the lender was challenged but ultimately allowed.

59. We will first answer the question whether the agreement was so woefully "compromised" that it was rendered unenforceable. In legal terms, what the appellant argues is that the contract had totally failed as to warrant rescission.

60. The undisputed facts on record show that: the parties herein entered into a consensual loan agreement and the appellant deposited the title of the suit property as security for the loan in case of default in payment of the loan advanced; the respondent advanced Kshs 7,000,000 in installments of Kshs 2,500,000, Kshs 2,500,000 and Kshs 2,000,000.00/=, instead of Kshs 13,000,000 in instalments of Kshs 2,500,000, Kshs 2,500,000, and Kshs 8,000,000; and as at the time the suit was filed, the appellant had failed to pay the first and second instalments and interest thereof to enable him to access the third instalment but the respondent advanced part of the third instalment in the amount of Kshs 2,000,000 anyway. The record also shows that during the pendency of the suit at the trial court, the appellant repaid Kshs 3,000,000 of the principal amount owed.

61. These facts do not disclose a contract that had totally failed or one that had become frustrated. Instead, they disclose a contract that had been totally breached. While the appellant implies that both parties breached the contract and, therefore, "materially compromised" it leading to its "total failure", in the *Law of Contract*, it is the party that first materially breaches the contract that becomes liable. When a party materially breaches a contract, the other party is entitled to either withhold performance of their part until the breaching party cures the material breach (if it is capable of cure) or calls for the breach, if it is a total breach, and sue for damages. In the present case, the uncontested facts are that after drawing the first two installments, the appellant was unable to pay the interests as required under the agreement. The respondent attempted to accommodate him by advancing a further sum of Kshs 2 Million. By his own admission, the appellant was still unable to repay as per the terms of the Agreement. Therefore, when the respondent declined to advance the remaining amount of Kshs 6 million under the agreement, he was not equally breaching the contract; he was rescinding the contract

for a total breach by the appellant as he was entitled to do by the *Law of Contrac*t. We, therefore, come to the conclusion that it was the appellant who was in total breach of the contract entitling the respondent to rescind it and sue.

62. But was the Agreement in violation of public policy for violating section 3(1) of the *Banking Act*? We do not think so. The *Banking Act* applies to banking institutions which are in the regulated business of lending money for interest. There was no evidence presented before the trial court that the respondent was engaged in any such business. Instead, this was a "friendly" loan by two individuals who were known to each other. There is no law that proscribes individuals from lending each other money for interest. The prohibition only kicks in where there is evidence that the individual so lending, in fact, engages in habitual business and is otherwise acting as a banking institution by stealth or in the shadows. Without any such evidence, there is no basis for invalidating the agreement between the two parties on public policy grounds.

63. The final consideration in this regard is whether the agreement is unenforceable for being unconscionable. The appellant's argument in this regard is that the interest rates of 36% are extortionate; and that he only agreed to them because he was under (economic) duress. The trial court was unimpressed by this argument holding that courts are not in the business of rewriting contracts for individuals who "make bad deals." In pertinent part, the learned Judge reasoned as follows:

> " 58. ..... On issue of the interest the defendant readily admitted the interest rate. In *Ajay Indrvada Shah v Guilders International Bank Ltd* [2002] 1 EA 269, a case with issues arising at about the same time as the issues in this case, the parties were negotiating an interest rate of 32% - 36% and the High Court fixed the rate of interest, and the Court of Appeal upheld, a rate of 35%. So the going rate was 36% when the parties entered into the agreement in this case. This was the plaintiff's evidence when asked where the rate of interest came from. It was in usage, in the trade; it was the going rate. I find that the court cannot interfere with it even if the defendant had come to court in time and given its evidence as the court is obliged to enforce the agreed rate of interest. The court may take judicial notice of the trade usage pursuant to section 60 of the *Evidence Act*. The court is not supposed to rewrite contract for the parties.
>
> 59. Where a money lending bargain appears on the face of it or on the evidence adduced to be unconscionable the lender may have to show that the contract ought not to be altered but that, on the facts of the case, where the borrower was a merchant of mature age and there was no evidence of fraud, trickery, pressure or undue advantage taken on the part of the lender or mental incapacity on the part of the borrower, the latter was not entitled to relief merely on the ground that the bargain was a hard bargain.
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> The principle in the above continue to rule the day the law of contracted precedent clearly points out that the parties will be held to their intentions. The defendant was not blind or otherwise incapacited or that he lacked alternative when he entered into contract on December 17, 1996in presence of his counsel; an experienced senior counsel.
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> 60 .....

61. Further to the above in *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & another* [2001] KLR 112 – under holding 1 and at page 118 it was held:-

> " A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. ... it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.'"

64. The learned Judge is correct that courts do no rewrite contracts for individuals who belatedly realize they entered into "bad bargains." However, it is true that courts in Kenya do not enforce unconscionable contracts either.

65. Kenyan courts have consistently used the doctrine of unconscionability in contract law as a safeguard against contracts that are so unfair or one-sided that enforcing them would offend the sense of justice. At its core, the doctrine allows a court to refuse to uphold a contract, or specific terms of it, if they were imposed in a way that took undue advantage of one party's vulnerability, ignorance, or lack of bargaining power.

66. This doctrine looks at two broad aspects: how the contract was made, and the nature of its terms. The first — called procedural unconscionability—examines whether the weaker party had a meaningful choice in the matter, that is, whether the terms hidden in fine print or whether there was deception, pressure, or a clear imbalance in knowledge or power or unequal bargaining power during the negotiations.

67. The second aspect - substantive unconscionability — focuses on the terms themselves: whether they are harsh, oppressive, manifestly unjust, or unreasonably favoring one side.

68. Courts typically require at least some measure of both elements before declaring a contract unconscionable. The goal is never to rewrite bad bargains by parties, but to ensure that contracts are not used as instruments of injustice.

69. In Kenya, the doctrine of unconscionability — though not always expressly named — is recognized and applied through general principles of equity, fairness, and public policy under the law of contract. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR this court emphasized that while courts do not interfere with parties' freedom to contract, they will not enforce a contract that is "illegal, immoral, or unconscionable."

70. Similarly, this court in *Ajay Indravadan Shah v Guilders International Bank Ltd*, Civil Appeal No. 135/2001 [2002] 1 EA 269, held that:

> " ....the provisions of section 26(1) of the *Civil Procedure Act* are applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If the parties by their agreement have fixed the rate of interest, then the court has no discretion in the matter and must enforce the agreed rate Unless it is shown in the usual way that either that agreed rate is illegal or unconscionable or fraudulent."

71. In the same vein, in *Kenya Commercial Finance Company Ltd vs Ngeny & Another* [2002] 1KLR, this court held thus:

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

72. This position was echoed in *Shah v Guilders International Bank Ltd* [2002] 1 EA 264 (CAK), where this court held that:

> "...where the rate of interest [has been agreed upon by parties,] the court was obliged to enforce the agreed rate unless it was illegal, unconscionable or fraudulent."

73. Also, in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* (*supra*), this Court held thus:

> "Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude 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 (See *Black's Law Dictionary*, 9th Edition, Gardner, Ed.)."

74. Comparative jurisdictions have equally developed the doctrine of unconscionability to prevent unfair dealing in contract law. For instance, in *Commercial Bank of Australia Ltd v Amadio* [1983] 51 CLR 447 the High Court of Australia stated that:

> "Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogues. [Such disability includes]
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> ...poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary". ... the common characteristic of such adverse circumstances "seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other". (Quoting *Blomley v Ryan* (1956) 99 CLR)"

75. In England, the High Court of Justice of England and Wales (the Queens Bench), held as follows in *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB):

> "(36) In summary, therefore, before the court will consider setting a contract aside as an unconscionable bargain, one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive. No single one of these factors is sufficient – all three elements must be proved, otherwise the enforceability of contracts is undermined.... Where all these requirements are met, the burden then passes to the other party to satisfy the court that the transaction was fair, just and reasonable."

76. In short, as the above authorities demonstrate, a court can interfere with a contract even where parties have agreed on the terms if the resulting agreement is highly oppressive or unfair as to offend an objective sense of justice. Looking at the contract the parties entered into, we have no doubt that the terms are unconscionable. The facts show that the appellant was loaned Kshs 7 million and repaid Kshs 3 million leaving a balance of Kshs 4 million unpaid. If we, for the sake of argument, used this figure to calculate the amount payable as at today under the terms of the parties' agreement, the amount would be slightly over Kshs 69 Billion!

77. This sum arises from the application of an annual interest rate of 36% compounded quarterly over a period of nearly three decades – the terms included in the parties' agreement. It is not in question that this astronomical figure exceeding Kshs 69 billion on a principal sum of Kshs 4 million is a disproportionate escalation; it is not merely commercially unreasonable; it is, in the eyes of equity and good conscience, oppressive and unconscionable. As demonstrated above, courts in Kenya have consistently held that where the terms of a loan agreement result in punitive or extortionate financial consequences — particularly through excessive compounding over long durations — they may be struck down or moderated. This is because equity abhors oppression and refuses to enforce contractual provisions that shock the conscience of the court. In the present case, the sheer disparity between the original loan and the amount which would now be due evidences a contract whose enforcement, without judicial intervention, would undermine principles of fairness, good faith, and proportionality. We, therefore, find the contract between the parties void for unconscionability.

78. The final ground urged by the appellant concerned the finding by the learned Judge that his counterclaim was time-barred. We think it was not, his claim having been a proprietary claim grounded in ownership rights rather than contractual obligations. However, given the resolution we have reached about the case, the issue is moot. The resolution we have reached, as intimated above, is that the vesting order is set aside with the result that the suit property will revert to the appellant as a result of the operation of this court's judgment of July 31, 2015.

79. Before we conclude, we are constrained to address one final matter. The record shows that the appellant received Kshs 7 million as a loan from the respondent. Out of this amount, undisputed evidence shows that he repaid Kshs 3 million. He, therefore, has not repaid Kshs 4 million. To allow the appellant to retain that amount and still get his house back would amount to unjust enrichment – a situation abhorred by equity as much as unconscionability in contractual terms. To disgorge this unjust enrichment, we order that the appellant repays the amount owing, that is, Ksh 4 million at court rates of 12% to be calculated since the date of the High Court judgment namely September 19, 2019.

80. For the avoidance of doubt, we hold that the setting aside of the ex- parte judgment dated September 16, 1999, meant that the status quo between the appellant and the respondent before the sale of the suit property (by virtue of the *ex-parte* judgment) remained, until the matter was heard afresh and determined. Hence, the orders granted in the said *ex-parte* judgment and all other consequential orders that arose therefrom – including the vesting order - were null and void. Additionally, we have found that the Agreement between the parties is void for unconscionability. However, we have also found the appellant liable to refund the unpaid amount of Ksh 4,000,000 received from the respondent on a theory of unjust enrichment.

81. The upshot is that the appeal partly succeeds. The final orders shall be as follows:

    a. All the orders granted by the High Court in its judgment dated September 19, 2019 are hereby set aside.

b. The orders granted in the *ex-parte* judgement dated September 16, 1999, and all other consequential orders that arose therefrom were null and void by virtue of it being set aside by this court's judgment dated July 31, 2015, in *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah*, Civil Appeal No 33 of 2007.

c. There shall be an order of revocation of the respondent's title to the parcel of land known as LR No 209/8192/8 and rectification of the land register in favour of the appellant.

d. The appellant shall pay to the respondent Kshs 4,000,000 with interest at court rates calculated from September 19, 2019.

e. Following (c) above, the appellant shall be liable to pay the amount owed to the respondent and interest thereof as shall be calculated, failure to which the suit property shall be subjected to sale by public auction as it was secured for purposes of enabling the respondent to recover the loan amounts advanced to the appellant.

f. Since each party has succeeded in part, there will be no order as to costs.

82. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR