



**Canva Trading Kenya Ltd Mombasa v Masita (Tribunal Case 28 of 2021)
[2022] KEMSET 747 (KLR) (Civ) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEMSET 747 (KLR)

**REPUBLIC OF KENYA
IN THE MICRO AND SMALL ENTERPRISES TRIBUNAL
CIVIL
TRIBUNAL CASE 28 OF 2021
J.BETT, CHAIR, R.KATINA, VICE CHAIR, JWERE, A GIKUYA & A KIBET, MEMBERS
JULY 28, 2022**

BETWEEN
CANVA TRADING KENYA LTD MOMBASA CLAIMANT
AND
ROSE MOGENI MASITA RESPONDENT

JUDGMENT

1. This matter was commenced by way of a statement of claim dated October 29, 2021 and filed on the same date. The claimant was introduced as “a small & micro finance giving soft loans to small business and buy motorbikes to (sic) riders which on hire purchase. The managing director Ms Eunice Okalwho appeared for the claimant and represented it in all the sessions before the tribunal.

The respondent on the other hand Ms Rose Mogeni Masita is described as a business lady, owner of Eagle Nursery and Primary School Mikindani Mombasa Town. She was represented by the firm of Mutisya and Associates who filed a notice of appointment dated April 11, 2022. She however appeared in person at the final virtual hearing of this matter.

2. The matter on the face of the statement of claim is for recovery of Ksh 592,000 (erroneously depicted as 5920000) being a loan borrowed by the respondent at 20% interest which had accrued interest from an initial amount of ksh 80,000/=

The Claimant’s Case

3. The claimant gave her testimony and stated that the respondent visited their establishment on 21st January 2019 to apply for an emergency loan of Ksh 80,000/=.
4. The respondent submitted a copy of her national Identity card, Mpesa Statement and business license, sketch map of location of business to meet the requirements of loan approval.



5. The claimant avers that the loan was disbursed to the respondent subject to a charge of 20% interest per month. This loan was to be repaid within one month, that is on February 17, 2019 but at the time of filing this case 32 months have lapsed before full repayment was made.
6. She further averred that she had whatever amount the respondent says she repaid through the auctioneer or through a Mr Eliud has not been recorded in the repayment statements and therefore was not received by the claimant.
7. The claimant urged this Tribunal to help resolve this dispute.

Respondent's reply

8. In her response, the respondent admits she borrowed a loan of Ksh 80,000/= but refutes the charged interest and costs as claimed.
9. She further held that the claimant is not a duly licensed lending institution/bank hence cannot charge the alleged interest and puts the claimant to strict proof.
10. The respondent contends that the alleged interest is illegal, unreasonable, inequitable, unconscionable and prays that the tribunal makes a declaration and cancel it but otherwise the respondent puts the claimant to strict proof thereof.
11. She however acknowledges that although she did not begin repayment of the loan within One month as agreed, she intended to repay fully as she had done previously with Ksh 100,000/= she had borrowed from the claimant.
12. The respondent pleaded that she fell into difficult financial times with this second loan and became unable to keep up with the repayments as required by the loan agreement instead she resorted to paying in instalments albeit irregularly in the following manner;
 - i. ksh 41000/= sent to the claimants by Mpesa.
 - ii. Ksh 60,000/= paid to an Auctioneer
 - iii. Ksh 8,000/=
 - iv. Ksh 4,000/= Cash paid to Eliud Okumu on diverse dates
 - v. Ksh 4500/=
13. The respondent acknowledged that the amounts she paid to the Auctioneer and the amount paid to Eliud may have not reached the claimant, further stating that had all the payments been accounted for, she would have been left with a balance of only Ksh 13,000/= to clear the Loan.
14. The respondent while closing her case requested to be given an opportunity to make a payment proposal to clear the outstanding debt which she put at 55,000/= Kenya shillings.

Issues for Determination

15. Having carefully heard the parties, the following issues lend themselves for determination.
 - a. Whether the claimant Canva Trading Kenya Limited-Mombasa could charge interest from the respondent.



- b. Whether the claimant was justified to demand from the respondent the Ksh 592,000/= being the principal sum, accrued interests charged on the borrowed principal sum of Ksh 80,000/=.
- c. Whether the amount paid by the respondent to the Auctioneer and Eliud should be considered valid repayments towards the loan borrowed in this case.
- d. Costs.

Determination

16. Whether the claimant was duly licenced lending institution so as to charge interest as it did. The Tribunal looked at the registration documents filed by the claimant and observed that it is a Small & Micro finance Enterprise that gives soft loans to small businesses. Further the loan agreement presented before us shows the respondent appended her signatures as a sign of commitment to be bound to repay the loan together with 20% interest in one month as per the terms of contract. The respondent is therefore estopped by her own acts of commitment and cannot challenge the validity of the process she consented to.

The Tribunal on similar matters and on this one as well, stands by a 'long standing principal of law that parties to a contract are bound by the terms and conditions there of and that it is not the business of the courts to rewrite such contracts, unless coercion, fraud and undue influence are pleaded and proved as was held by the Court of Appeal In *National Bank of Kenya Ltd v Pipe Plastic Samkolit Ltd* (2002)2 EA 503-reported in (2011)eKLR.

The Tribunal therefore finds that it cannot determine the interest that should have been charged by the claimant in this case.

17. The second issue is whether the claimant was entitled to demand the of Ksh 592,000/= being the principal sum, accrued interests charged on the borrowed principal sum of Ksh 80,000/=. The tribunal in unanimity holds the view that an accumulation of interest that doubled the principal amount borrowed violates the principles of lending by financial institutions. This is drawn from section 44A of the *Banking Act* which provides statutory application of the In duplum rule. which stated that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of Amount due and interest payable. This was opined in *Kenya Hotels Ltd v Oriental commercial bank Ltd (Formally known as Delphis Bank Limited)* (2019) e Klr and applied by the courts with reasonable degree of consistency.

It was held in *Mwambeja Ranching Company Limited & another v. Kenya National Capital Corporation* [2019]..The In duplum rule is concerned with public interest and its key interest is to protect borrower from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In summary the In duplum rule is meant to protect both sides.

18. Going by this principle therefore respondent having borrowed Ksh 80,000/= she repaid the uncontroverted amount of Ksh 41,000/= the balance is then Ksh 39,000/=.

However since interest of kept accruing, the In Duplum rule would therefore stop the amount from exceeding the unpaid balance of the principal debt which is outstanding at Ksh 39,000/= multiplied by 2.

19. Thirdly, as to whether the amount paid by the respondent to the auctioneer and Eliud should be considered valid repayments towards the loan borrowed in this case. Although she says the individuals



were introduced to her by the claimant, there is an apparent failure on the part of the respondent to ensure that the payments were well directed to the right account, through the agreed mode, received and accounted for in favour of the claimant, by her own admission the respondent agrees that she trusted the wrong people whom she paid in cash without being issued with official Canva Trading Kenya Ltd. receipts.

The tribunal can only empathize with the respondent and encourage her to seek separate legal redress in an appropriate court such as small claims court to recover the amount from the said individuals.

Orders

1. The tribunal finds that in the interest of justice, the respondent shall pay follows;

I. Borrowed Ksh 80,000/=

II. Less [paid] 41,000/=

III. Outstanding balance 39,000/= multiplied by 2=

Total amount due Ksh 78,000/= which shall be paid by the respondent in 3 instalments over the next 3 months beginning from the date of this judgement.

2. Costs.

The tribunal hereby awards Ksh 10,000/= to the claimant to be borne by the respondent.

Those then are the orders of the tribunal.

DATED DELIVERED AND SIGNED ON THIS 28TH DAY OF JULY, 2022.

J. BETT..... [CHAIRMAN]

R. KATINA... [VICE-CHAIR]

J. WERE [MEMBER]

A. GIKUYA..... [MEMBER]

A. KIBET..... [MEMBER]

Judgement delivered virtually in the presence of:

SUBPARA 1.

Ms Eunice for claimant

SUBPARA 2.

Rose Mogeni Masita.

SUBPARA 3.

Denis Kibet -Tribunal Assistant

