



**Canva Trading Kenya Ltd Mombasa v Mwaro (MSET Mombasa
27 of 2021) [2022] KEMSET 755 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEMSET 755 (KLR)

**REPUBLIC OF KENYA
IN THE MICRO AND SMALL ENTERPRISES TRIBUNAL
MSET MOMBASA 27 OF 2021
J.BETT, CHAIR, R.KATINA, VICE CHAIR, J.WERE, A GIKUYA & A KIBET, MEMBERS
JULY 7, 2022**

BETWEEN
CANVA TRADING KENYA LTD MOMBASA CLAIMANT
AND
BEATRICE KADZO MWARO RESPONDENT

JUDGMENT

Judgement

1. The respondent Beatrice Kadzo Mwaro approached Canva Trading Kenya Ltd Mombasa, a micro finance lender, about January 2019 seeking a loan facility in the sum of Kshs 50,000/- payable within one month at an interest rate of 20% per month. The loan was approved and disbursed on January 17, 2019 and the respondent was to begin payment of the loan amount from February 17, 2019 after a one-month grace period and it was to be repaid as Kshs 60,000/-.
2. It appears that Beatrice Kadzo Mwaro only paid Kshs 15,300/- and was unable to meet her obligation to Canva Trading Kenya Ltd Mombasa, to repay the balance of the debt leaving a balance of Kshs 44,700/- which has accumulated interest and the outstanding amount stands at Kshs 330,780/- for the 32 months as at time of filing this claim.
3. The matter came up for mention virtually on several dates; The claimant was self-represented by Eunice Okal the Managing Director of Canva Trading Kenya Limited and the respondent appointed messrs Mutisya & Associate Advocates to represent her.
4. Parties appeared before the court on 30th of May and counsel of record on behalf of respondent indicated there were some documents to be served on the respondent. The tribunal directed that the requisite documents should be served within a week and the matter was set for hearing on June 16, 2022.



5. On June 16, 2022, the matter came up for hearing with both parties present. Eunice Okal the Managing Director for the claimant represented Canva Trading Kenya Ltd. She requested the tribunal to help her recover the amounts owed to her, which totaled to a principal sum of Kshs 44,700/- that had accumulated interest of Kshs 330,780/-

Claimant's evidence:

6. The claimant had one witness- Eunice Okal who testified that the respondent obtained a loan through the claimant by filing in the loan agreement on January 17, 2022 for Kshs 50,000/- and the loan was disbursed the same day. The loan agreement has been submitted to the tribunal as evidence of the loan obtained. This loan was to be repaid at 20% within one month at a total of Kshs 60,000/-
7. This was not the first time that the respondent had obtained a loan from the claimant. The guarantor of the loan was one Khadija Ali of ID –No 2** and respondent gave collateral against one refrigerator model LG Serial Number xxxx, one 45 inch LG television set serial number 0xxxx, a 21 inch Samsung Television Serial Number Sxxxxx and an LG refrigerator Serial Number 3****.
8. During cross examination, it was confirmed that the loan had been guaranteed by the respondent's sister Josephine Karemba not Khadija Ali. The respondent claimed that since she fell unwell, she had been sending her repayments to the claimant's employee's M-Pesa account for a one Mr Eliud and Francis Kauga. The claimant confirmed that those amounts did not reach the company and she had in no way authorized the respondent to send money to any of her employees. Further, she confirmed that Francis Kauga had never been her employee at any one time. The respondent also claimed that she had send Kshs 18,000/- to the auctioneer who had been assigned to her and who informed her that she should be sending her repayments to him and not to the claimant.

Respondent's evidence:

9. The respondent testified under oath and did not refute the amount of the principal loan borrowed on January 17, 2019 but took issue with the interest charged and the fact that she had significantly repaid the loan by Kshs 75,050/- as per the below breakdown:
 - a. January 13, 2019 Kshs 38,000/- to the claimant via M-Pesa
 - b. January 15, 2019 Kshs 10,000/- to the claimant via M-Pesa
 - c. February 24, 2019 Kshs 10,000/- to the claimant via M-Pesa
 - d. March 25, 2019 Kshs 1,000/- to the claimants employee Mr Eliud via M-Pesa
 - e. April 10, 2019 Kshs 30,080/- to the claimants employee Mr Eliud via M-Pesa though Francis Kaugah
 - f. July 10, 2019 Kshs 9,000/- to the claimant's employee Mr Eliud by M-Pesa
 - g. September 29, 2020 Kshs 4,000/- to the claimant by M-Pesa
10. The respondent swore under oath that she had been unwell and underwent surgery and was therefore not able to physically go to the claimant's office to settle her loan. The one time she attempted this, one Mr Eliud the claimant's employee advised her that he would either come for the money himself or she could send the money via M-Pesa to his number and have the loan settled in that manner. She would then send the money to Eliud and Francis Kaugah- a fact that has been evidenced by the shared M-Pesa statements belonging to the respondent.



11. During cross examination, the claimant asked the respondent why she did not communicate with her first as she had her number instead of sending money via the same M-Pesa channel to her employee one Eliud Okumu (who no longer works for the claimant). The respondent responded that she did as she had been advised by the claimant's employee who was her loan officer- a claim that is denied by the claimant. The claimant indicated that Mr Eliud was engaged in boda-bodas and was not the respondent's loan officer at any one point. The Tribunal enquired on what led to the claimant terminating Mr Eliud's employment and it was advised that this was due to threats by boda-boda riders to Mr Eliud who in turn left employment as he could not handle these threats.
12. Further, the tribunal was notified that Mr Francis Kaugah had never been under the employment of the claimant and could not in any way have been issuing any orders on behalf of the claimant.
13. On the issue of the loan repayment of Kshs 38,000/- and Kshs 10,000/- that were both repaid on 13th and January 15, 2019, the tribunal noted during cross examination that such amounts were paid in relation to the first loan and not the second one which was obtained on the January 17, 2019.
14. The tribunal and parties dispensed with the requirement for further submissions and the matter was set for judgement on July 7, 2022.

Issues for determination:

What is the principal amount due if any?

15. The respondent claims that she has been repaying the loan from January 13, 2019. However, it is clear the loan could not be repaid before she applied for it- the loan was sought on January 17, 2019 and as heard during cross examination of the respondent, any amounts indicated prior to obtaining the second loan are in relation to the first loan. It is therefore clear that the first payment of the second loan began on February 24, 2019.
 1. The respondent has confirmed that she was unwell and therefore was unable to pay the money directly to the claimant and instead paid a total sum of Kshs 40,080/- to the claimant's employee Mr Eliud and one Francis Kaugah via M-Pesa, money which did not go towards reducing the loan obligation as she had intended.
 2. As much as the court sympathizes with the respondent on this; the respondent changed the terms of their agreement in relation to repayment mode without notifying the claimant even though she could have easily reached the claimant to notify or request if the change in repayment mode was agreeable. Further, the tribunal notes that the same mode of payment – M-Pesa was used to pay the claimant's alleged employee which could have also been used to pay the claimant- via M-Pesa paybill.
 3. The tribunal is therefore of the opinion that the outstanding principal amount is Kshs 44,700/-

What is the interest payable by the respondent

16. The tribunal notes that we do not rewrite contracts or agreements for the parties. The loan application document dated January 17, 2019 indicates that the loan was to be repaid at an interest rate of 20% per month. On the determination of the issue of interest payable, the tribunal has applied the common law doctrine of the *in duplum* rule.



17. In *Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited)* [2019] e KLR it was opined that:

“In duplum” is a Latin phrase derived from the word “in duplo” which loosely translates to “in double”. Simply stated, 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.

18. This principle has been applied by the courts with reasonable degree of consistency. See *Lee G Muthoga v Habib Zurich Finance (K) Limited & another* [2016] eKLR, *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* [2019] eKLR.

19. In *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* [2019] eKLR, the court ruled that “The In duplum rule is concerned with public interest and its key aim was to protect borrowers 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 essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides”.

20. The rule was recently reiterated by the Court of Appeal in *Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & Another* [2020] e KLR in the following terms:

“As we have shown section 44A of the *Banking Act* came into force on the May 1, 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.”

21. 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. In addition, by section 44A (6) it is provided that:

“This section shall apply with respect to loans made before this section comes into operation, including loans that have become nonperforming before this section comes into operation.”

22. The in duplum rule provides that with respect to non- performing loans, the contractual interest should not exceed the principal owing when the loan becomes non- performing. Any expenses incurred in the recovery of the amounts owed by the debtor may be recovered.

23. The respondent had not made any payment towards the debt owed and in line with the in duplum rule, interest payable should not exceed Kshs 44,700/-. We understand that the claimant is not a registered



financial institution under the Banking Act, however since it applies itself as a lender, the tribunal has followed the common law in duplum rule in the determination of the interest payable in light of public interest and to protect the borrower from unconscionable business practices.

24. The tribunal finds that the maximum amount of interest payable by the respondent shall not exceed Kshs 44,700/-

Who bears the cost of this claim?

25. On the issue of costs, the tribunal notes that the claimant has encountered considerable cost in sustaining this claim. We find that it is fair and just to award costs to the claimant.
26. The tribunal notes that the respondent sought to be allowed to pay any remaining balance by reasonable monthly installments due to economic and financial constraints and poor business considering she had been sickly and unable to work effectively. We hereby request the parties to sit and agree on a reasonable repayment plan.

Orders

27. Flowing from the findings, we find that in the interest of justice, the respondent should pay the claimant:-
- a. Outstanding loan amount of Kshs 44,700/-
 - b. Interest on the principal sum of Ksh 44,700/-
 - c. Costs of the suit of Ksh 10,000/=
28. Those then are the orders of the tribunal.

DATED DELIVERED AND SIGNED ON THIS 7TH JULY 2022

Dr. J. BETT..... [CHAIRMAN]

R. KATINA[VICE-CHAIR]

Hon J. WERE[MEMBER]

A. GIKUYA[MEMBER}

A. KIBET.....[MEMBER]

Judgment delivered virtually in the presence of:

- 1. Ms. Eunice for Claimant
- 2. Beatrice Kadzo Mwaro
- 3. Dennis Kibet - Tribunal Assistant

