



**Tufaa Capital Limited v Otieno (Commercial Case 182 of 2021)
[2021] SCC 5 (KLR) (26 August 2021) (Judgment)**

Tufaa Capital Limited v Jactone Owinyo Otieno [2021] eKLR

Neutral citation: [2021] SCC 5 (KLR)

**REPUBLIC OF KENYA
IN THE MILIMANI SMALL CLAIMS COURT
COMMERCIAL CASE 182 OF 2021
KO GWENO, RM
AUGUST 26, 2021**

BETWEEN

TUFAA CAPITAL LIMITED CLAIMANT

AND

JACTONE OWINYO OTIENO RESPONDENT

JUDGMENT

1. By a statement of claim dated 30th June 2021, the claimant seeks judgment to be entered against the respondent for a sum of Kshs 409,185.68. The claimant pleaded that on 8th July 2019, the respondent entered into a loan agreement with the claimant for Kshs 60,000. The loan was to be paid on or about the 24th August 2019 together with interest. The claimant stated that the respondent never serviced the loan, and he is currently in arrears of Kshs 409,185.68.
2. The respondent entered an appearance and filed a response to the claim dated 1st July 2021. He averred that he does not owe the claimant any money. He claimed that the claimant owed one Kevin Onyango Kshs 60,000; as a result, the claimant relinquished his debt. He further alleged that the amount charged was exorbitant.
3. The matter proceeded for hearing where the parties testified as follows;

Claimant's case.

4. PW1 Faith Mumali testified that the respondent took a loan of Kshs 60,000, and he was supposed to repay the loan after one month. She testified that the respondent reneged the agreement and the amount accrued to Kshs 409,185. She explained that the loan had a 10% interest per month and late penalty charges of 5% of the amount disbursed. She stated that the respondent did not repay his loan;



hence the loan had accrued to Kshs 409,185.68. She relied on her written statement and documents that were produced as exhibits.

Respondent's case.

5. Jacktone Owinyo Otieno relied on his written statements that were adopted as his evidence in chief. He admitted that he entered into an agreement with a person called Mulee for a loan of Kshs 60,000, and he was to refund the money by 8/8/2019. He told the court that his business was not doing good and he approached his friend called Kevin. He explained that Tufaa owed Kevin money for some work he had done for them, so Tufaa and Kevin entered into an agreement where his debt of Kshs 60,000 was waived. He claimed that Tufaa went quiet, and he thought the issue was settled.

Determination.

6. From the loan agreement produced, it is evident that the parties to the contract are Tufaa Capital limited and Jacktone Otieno. The amount being borrowed is Kshs 60,000. The agreement's effective date is 8/7/2019, and the loan was for a period of one month. The agreement was signed by the respondent and representative of the claimant called Mule.
7. The respondent does deny signing the agreement and receiving the loan from the claimant. The statement of account from Tufaa also shows that the respondent has not been servicing his loan, and the amount has accrued to Kshs 409,185.68.
8. The respondent's defense is that Kevin settled the amount. There is, however, no evidence to show that Kevin settled the loaned amount of Kshs 60,000. There is also no evidence that Tufaa owed Kevin Kshs 60,000 to set off the respondent debt.
9. The respondent also appears to complain that the interest rate charged in the agreement and the penalties therein are exorbitant and outrageous. In this regard, the court does state that the parties conscientiously executed the agreement. The agreement was therefore meant to be binding to all the parties. In *Jiwaji v Jiwaji* [1968] E.A. 547, the court held that "where there is no ambiguity in an agreement, it must be construed according to the clear words used by the parties.
10. The terms of the contract and the terms relating to interest and penalties are clearly set out, hence no ambiguity as to the terms. The respondent has also not adduced any evidence to show that the terms of the contract were ambiguous for them to be interpreted by the court.
11. There is also no evidence adduced by the respondent to show the existence of fraud, misrepresentation, duress, or undue influence. Therefore, the respondent is bound by the contract he willingly executed. In *Total Kenya Ltd v Joseph Ojiem*, Nairobi HCCC No.1243 of 1999, the court held that: -

“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”

12. Similarly in the case of *National Bank of Kenya Ltd ...v...Pipeplastic Samkolit (K) Ltd & Another*, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503, the Court held that: -

“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”.

13. Having found that the parties herein voluntarily entered into the said loan agreement, the parties must be bound and honour their contractual obligations. It is not for the court to write a new agreement for the parties or sympathize with one of the parties after he subjected himself to the terms of the contract.



14. Consequently, the court does enter judgment in favour of the claimant as against the respondent for Kshs 409,185.68. The claimant is also awarded cost of the suit and interest. Interest shall apply from the date of judgment.

KEYNE .G. ODHIAMBO

RESIDENT MAGISTRATE/ADJUDICATOR SMALL CLAIMS COURT

DATED, SIGNED, and DELIVERED at Nairobi this 26th day of August 2021.

In the presence of;

1. Ofafa – Court Assistant
2. Ms. Njeru holding brief holding brief for Ms. Gicheha for the Claimant
3. Mr. Awuor for the Respondent

