IN DUPLUM RULE

Protecting Borrowers from Exploitation

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Introduction

Have you borrowed a loan before and wondered whether the interest charged on the amount was legal? This article will offer some guidance on the *In duplum* rule and its implications on the payment of loans in the Kenyan jurisdiction.

Legal Framework governing the *In duplum* rule

The introduction of the *In duplum* rule in Kenya is enshrined in the **Banking (Amendment) Act No. 9 of 2006**. The amendment incorporated Section 44A which states as follows:

(1) *An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).*

(2) *The maximum amount referred to in subsection (1) is the sum of: a) the principal owing when the loan becomes non-performing; b) interest, as per the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and c) expenses incurred in recovering any amounts owed by the debtor*

Essentially, **Section 44A** of the Banking Act stipulates that the interest charged on a non-performing loan should cease to accumulate when such unpaid interest equals the outstanding principal amount.

Rationale behind the *In duplum* rule

At the core of the *In duplum* rule lies the need to safeguard public interest/public policy. The Court of Appeal in **Mwambeja Ranching Company Limited and Another v Kenya National Capital Corporation [2019] eKLR** that the *In duplum* rule is concerned with public interest and aims to protect borrowers from exploitation by lenders who may allow interest to accumulate to astronomical figures, thereby hampering a borrower's ability to repay. Further, in the case of **James Muniu Mucheru v National Bank of Kenya Limited [2019] eKLR**, the National Bank of Kenya had computed an exorbitant loan amount contrary to the rule. The Court held that the bank ought to adjust the amount accordingly.

Understanding the *In duplum* rule within the Kenyan context

Sometimes, the application of the *In duplum* rule tends to be unclear. First, the question arises whether the rule strictly applies to banks and financial institutions as opposed to all lending arrangements. A reading of Section 2 with Section 44A of the Banking Act reveals that the rule governs banks, financial institutions and mortgage finance companies. In **Desires Derive Ltd v Britam Life Assurance Co (K) Ltd (2016) eKLR**, the Court held that the *In duplum* rule was applicable in cases involving financial institutions only.

Conversely, in **Anne Mugure & 2 others v Higher Education Loans Board [2021] eKLR**, the Court determined that HELB acted in breach of the *In duplum* rule by imposing excessive interest charges on the principal amounts. The High Court held in favour of the Petitioners as follows:

> *In this regard, I hold that being of public interest, the In duplum rule will be applicable for those lending monies as it does to banks…*

The Court held that HELB, despite not being a formal financial institution, was bound by the *In duplum* rule and that in continually charging interest penalties over and above the principal amount, HELB violated the *In duplum* principle.

We therefore find that there is need to reconcile Section 2 and 44A of the Banking Act with the **Anne Mugure judgment** in order to widen the scope of the application of the rule. In the Court of Appeal case of **Lee G. Muthoga v Habib Zurich Finance (K) Limited & another (2016) eKLR**, it was held that the *in duplum* rule in Kenya was specifically designed to apply to formal loans granted by financial institutions.

Distinction between the Kenyan and South African jurisdictions

Notably, the *In* duplum rule in Kenya applies strictly to non-performing loans. This means that for a performing loan (a loan whereby repayments are being made on time), a creditor is at liberty to claim unpaid interest even if such amount is greater than the outstanding principal.

Further, in South Africa, the *in duplum* rule further applies to judgment debts from the date of issuance. The South African Constitutional Court in **Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd [2015]** held that the *in duplum* rule extends to matters concerning payment of [any] judgment debts. This is significantly different from Kenya, whereby the law is silent on whether interest on a loan continues to accrue when a creditor files a lawsuit in court.

Limitations of the *in duplum* rule in Kenya

First, the *In duplum* rule has limited the application of the rule to strictly govern financial institutions. This is detrimental to persons and entities who have borrowed loans from entities which fall outside the scope of financial institutions; as such entities continue to charge exorbitant interest on loans. For instance, the Act fails to protect persons who have borrowed from microfinance institutions, pawnbrokers and persons who have executed hire purchase agreements. In **Momentum Credit Limited v Teresia Kabuiya [2022]**, the High Court held that Section 44A of the Banking Act does not apply to microfinance institutions.

Second, the *In duplum* rule in Kenya does not eliminate the mischief that Section 44A was intended to cure, which is to reduce exorbitant interest rates. Section 44A (3) states:

> *If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing*

The above section ignores the fact that the principal keeps changing in value as a debtor pays up their loan. Resultantly, a debtor may end up paying up the loan amount at an interest higher than the principal amount initially borrowed. This hinders debtors who enter into debt restructuring arrangements from enjoying protection under the *In duplum* rule. For instance, under such an arrangement, a debtor may negotiate with the creditor to pay back a loan in instalments over a long period of time, however, the interest rates may be charged at a higher rate.

Conclusion and MK Advisory

The Kenyan legal framework has been progressive in protecting borrowers from exploitation by lenders as is evident from Section 44A of the Kenyan Banking Act and the courts' jurisprudence. Nonetheless, there is need for the Act to be amended to address the limitations discussed above.

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