



**Evangelical Lutheran Church in Kenya Registered Trustees v First Capital
Kenya Limited (Civil Suit 416 of 2018) [2022] KEHC 12046 (KLR)
(Commercial and Tax) (19 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12046 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 416 OF 2018
A MABEYA, J
AUGUST 19, 2022**

BETWEEN

**THE EVANGELICAL LUTHERAN CHURCH IN KENYA REGISTERED
TRUSTEES PLAINTIFF**

AND

FIRST CAPITAL KENYA LIMITED DEFENDANT

JUDGMENT

1. The plaintiff is a church registered with the Registrar of Societies and carries out its activities through its registered trustees.
2. The defendant is a limited liability company duly incorporated in Kenya carrying out the business of microfinance in Kenya.
3. In or about April, 2016, the defendant advanced a loan facility of Ksh 5,000,000 to the plaintiff. The terms were set out in a loan agreement dated April 6, 2016 (“the agreement”) and a charge dated July 25, 2017. The property known as flat No A1 erected on LR No 330/576 (“the suit property”) was given as security for the advances.
4. By a plaint dated December 18, 2018, the plaintiff alleged that the said facility was a friendly loan which attracted nil interest. That the defendant had wrongly charged interest on that loan and was demanding Kshs 37,064,667/- as the outstanding amount and had threatened to sell the suit property in recovery thereof although the plaintiff had offered to pay the said sum of Kshs 5,000,000/-.



5. The plaintiff therefore prayed for a permanent injunction against the defendant to restrain it from disposing off the suit property. It also prayed for a declaration that there was no interest payable on the said sum of Kshs 5,000,000/-.
6. The defendant filed a defence dated March 15, 2021 denying the plaintiff's claim in total. It pleaded that the parties had agreed that the loan was to attract interest at 18% per month for 3 months. That the plaintiff had defaulted in repayments and the interest due on the loan was Kshs 24,960,289/52. The total amount paid on the loan was admitted to be Kshs 5,008,000/.
7. Accordingly, the defendant counterclaimed for a declaration that the loan of Kshs.5,000,000/- was not a friendly loan and attracted interest of 18% per month for a period of 3 months. It also counterclaimed for outstanding interest of Kshs 24,960,289/52.
8. At the trial, the parties agreed that the case be determined on the material on record. That since the documents on record were not contested, the suit be determined by way of agreed facts and written submissions.
9. The court has considered the record, the witness statements, the documents and the submissions of learned counsel. The undisputed facts are that an advance of Kshs 5,000,000/- was made to the plaintiff by the defendant in April, 2016. A loan agreement was executed and subsequently a charge created over the suit property. That a total sum of Kshs 5,008,000/- was paid over time.
10. The point of departure by the parties, which constitute the issues for determination, is; whether interest was payable on the loan advanced, if so, what was the agreed rate of interest rate; are the parties entitled to the reliefs sought, what order as to costs?
11. On the first issue, the defendant produced a loan agreement dated April 6, 2016 and charge dated July 25, 2017. Both documents were executed by the parties. The agreement provided, inter alia, as follows: -
 - “ 1. The borrower is desirous of borrowing from the lender the sum of Kenya shillings five million (Kshs 5,000,000/-) only (“loan”) against the security of title deed LR 2 apartment
 - ...
 3. The borrower will repay the Loan amount in full plus interest on or before July 13, 2016 (“the due date”).
 - a) There shall be an interest charged and payable monthly on the Loan amount advanced at a flat rate of 18% per month of the principal loan amount “interest”.
 - b) The maximum loan repayment period is 3 calendar month(s) and the monthly loan instalments shall be Kenya shillings two million five hundred & sixty six thousand (Kshs 2,566,667/-) only. All instalments shall be paid by the 13th day of each subsequent month effective from the date the Loan is disbursed. ...”.
12. On its part, clause 2.2 of the charge provided that the monies secured were repayable together with interest as provided for clause 3. Clause 3.1 of the charge did not give the rate of interest as the spaces remained blank in both copies of the charge produced by each party. However, clause 3.2 provided for penalty interest 15% per annum on arrears.



13. From the foregoing, it is clear that from the beginning, the parties contemplated that the sum advanced of Kshs 5,000,000/- was to be repaid within 3 months. They agreed that the interest thereon was to be 18% per month. That the three instalments were to be Kshs 2,566,667/- each. Accordingly, the maximum amount repayable was Kshs 7,700,001/-. The sum of Kshs 2,700,001/- must have been intended to be the consideration, interest.
14. The plaintiff failed to repay the money and it became necessary to execute the charge. Both the charge and the loan agreement were categorical that interest was payable. While the agreement provided for 18% per month, the charge provided none.
15. Accordingly, I hold that, from the evidence on record, the advanced sum of Kshs 5,000,000/- attracted interest at the rate of 18% per month. The first and second issues are answered in the affirmative.
16. As regards the 3rd issue on the reliefs, the plaintiff's reliefs were predicated on the premise that the advanced sum attracted no interest. The second prayer is not available as the court has already found that there was interest of 18% per month that was applicable.
17. The plaintiff pleaded that although it had delayed in repaying the loan as agreed between the parties, it had nonetheless managed to pay off the entire loan. It submitted that it had paid a total of Kshs 5,108,000/=, which payment had been acknowledged by the defendant and that it had overpaid the loan by Kshs 108,000/=.
18. That the defendant had demanded four different figures from the plaintiff and it was therefore a fictitious claim. That the rates of interest that was being demanded by the defendant were excessive and oppressive. That it was not justifiable for the principal sum of Kshs 5,000,000/= to have accrued interest to the high sum of Kshs 37, 064,667/= or Kshs 27,164,667/= or Kshs 24,228,000/- in the short period of 2 years between April 2016 when the loan was advanced and March 8, 2018 when the defendant started demanding for payments from the plaintiff.
19. The plaintiff therefore submitted that the defendant had was in violation of the provisions of the Banking Act including the *in duplum* rule.
20. On the other hand, the defendant submitted that it is not a bank therefore it does not operate under the provisions of the Banking Act. Further, that the plaintiff had not pleaded the *in duplum* rule and was therefore barred from relying on it at the submission stage.
21. From the record, the defendant seem to have demanded different sums at different times. On July 18, 2018, it issued the plaintiff with a statutory demand to sell the suit property in exercise of its statutory power of sale. It indicated the outstanding sum to be Kshs 27,164,667/- as at March 18, 2018.
22. The second demand of November 6, 2018, demanded Kshs 37,060,667. The auctioneers' notice of July 8, 2019, the amount demanded was Kshs 24,228,000/- as of June 25, 2019. Finally, the counterclaim is for Kshs 24,960,289.52.
23. From the forgoing, it is clear that the defendant was not clear as to the amount due from the plaintiff. With the varying figures, the only irresistible inference is that either the defendant's claim is fictitious or the defendant is unsure of its claim or it is simply out to fleece the plaintiff.
24. It clear that the plaintiff did not plead the doctrine of *in duplum* rule. However, can the court ignore that principle of law? I don't think so. Further, the defendant contended that since it was not a bank operating under the Banking Act, it was not bound by that rule.



25. The court is alive to the fact that the *in duplum* rule is provided for in section 44A of the [Banking Act](#) cap 388. The court is also alive to the decision of Tuiyot J (as he then was) in [Desires Derive Limited v Britam Life Assurance Co \(K\) Ltd](#) [2016] eKLR. In that case he stated: -

“As correctly submitted by counsel for the defendant, the in-Duplum rule which was given statutory clothing in Kenya by section 44A of The Banking (Amendment) Act No 9 of 2006) Act is applicable to Institutions as defined in the Act. Under the Act, Bank means: -

A company which carries on, or proposes to carry on, banking business in Kenya but does not include the Central Bank.

While a financial Institution means;-

“a company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial Institution for the purposes of this Act.

A schedule to the [Central Bank of Kenya Act](#) has a list of banks and financial institution under section 2 of the Act. The defendant is not one of the banks and institutions in that schedule. The submission by the defendant’s counsel that the provisions of section 44a of the [Banking Act](#) does not bind the defendant is therefore not without force. In my view, in so far as the plaintiff is questioning the interest charged by the defendant on the basis of in-duplum rule only, the argument by the plaintiffs will be met by this credible submission.”

26. However, while considering the provision in [Kenya Hotels Ltd v Oriental Commercial Bank Ltd \(Formerly known as The Delpbis Bank Limited\)](#) [2019] eKLR, the Court of Appeal held: -

“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”.

27. While I agree that in the latter case, the Court of Appeal was dealing with a matter where a bank was involved, and therefore the applicability of the [Banking Act](#), the court was alive to the fact that the rule was concerned with public interest.

28. In my view, that rule was introduced in our laws to tame the appetite of lenders who had made recovery of interest on advances a cash cow. Simply put, the Legislature frowned on lenders who left amounts of advances to go over the roof due to interest before pouncing on the hapless borrowers.

29. 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. What with such monstrous rates of interest such as the present one of 18% per month plus 15% pa on arrears! To my mind, it is rather better to apply the rule than to declare such rates of interest unconscionable and irrecoverable.

30. Accordingly, I hold that the *in duplum* rule is applicable in this matter. Since the amount lent was Kshs 5,000,000/-, the maximum recoverable would be Kshs 10,000,000/-. An amount of Kshs 5,108,000/- has already been paid. The amount recoverable is Kshs 4,892,000/-.



31. The defendant was not entitled to exercise its purported statutory power of sale. By demanding such astronomical sums, its intention was clearly to clog the plaintiff's equity of redemption. That went do. It was wrong.
32. Accordingly, both the plaintiff and the defendant were partially successful. The plaintiff was able to show that the amount demanded amounted to a clog on its equity of redemption while the defendant proved that the plaintiff had failed to pay arrears. However, the arrears alleged have been found to be monstrous.
33. In view of the foregoing, judgment is entered as follows: -
- a) An injunction hereby issues restraining the defendant, its employees, agents and/or servants from in any way howsoever selling by public auction or private treaty or in any way whatsoever dealing with the property known as flat number A1 erected on LR No 330/576 in pursuance of its alleged statutory power of sale under the charge.
 - b) The plaintiff do pay to the defendant a sum of Kshs 4,892,000/-.
 - c) Since the amount in b) above constitutes interest, there shall be no further interest thereon.
 - d) Each party to bear own costs.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

A MABEYA, FCIarb

JUDGE

