Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021) [2022] KEHC 11951 (KLR) (Commercial and Tax) (19 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11951 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

PETITION E002 OF 2021

A MABEYA, J

AUGUST 19, 2022

IN THE MATTER OF: ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLE 2(1) AND (4), 10(1) (C), 2 (B) 21 (1) AND (3), 22(1), 2(B) AND (C), 48, 55 (A) (A) AND (A), 56 (B) AND (C), 165 (3) (B) AND (D) (II), 258 (1), (2) (B) AND (C), 259 (1) (A) (B) (C) AND (D) & 260 OF THE CONSTITUTION OF KENYA;AND IN THE MATTER OF: SECTIONS 6(A) AND (M) & 15(2) OF THE HIGHER EDUCATION LOANS BOARD ACT, CAP 231AANDIN THE MATTER OF: SECTION 44A OF THE BANKING ACT.AND IN THE MATTER OF: THE APPLICATION FOR THE CEASATION OF INTEREST RATES ON NON-PERFORMING LOANS UNDER THE IN DUPLUM RULE BY THE HIGHER EDUCATION LOANS BOARD;

BETWEEN

ANNE J MUGURE .... 1ST PETITIONER

DAVIS NGUTHU .... 2ND PETITIONER

WANGUI WACHIRA .... 3RD PETITIONER

AND

HIGHER EDUCATION LOANS BOARD .... RESPONDENT

Court declares the in duplum rule applicable to HELB in relation to payment of loans advanced by the institution.

Reported by Kakai Toili

Banking Law *– in duplum rule - nature and rationale of the in duplum rule - whether the in duplum rule was applicable to bodies lending monies other than banks – whether the in duplum rule was applicable to money loaned out by the Higher Education Loans Board - Banking Act, cap 488, section 44A.*

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to equality and freedom from discrimination - whether the continued imposition of interest and penalties on*

non-performing loan accounts by the Higher Education Loans Board even when the interest and penalties exceeded the principal amount amounted to discrimination where those borrowing from banks were protected by the in duplum rule in section 44A of the Banking Act - Banking Act, cap 488, section 44A.

Brief facts

The petitioners were beneficiaries of the Higher Education Loans Board's (the respondent) loan to finance their undergraduate studies. The petitioners' case was that they borrowed loans from the respondent to facilitate their undergraduate studies and that the respondent had been charging exorbitant interest and penalties which often grew beyond double the principal amounts owed thereby making repayment difficult.

The petitioners prayed for among other orders, declarations that; by imposing interest amounts and penalties that exceeded the principal amount, the respondent was in contravention of articles 43 (1)(e) and (f) of the Constitution of Kenya, 2010 (Constitution) and section 44(A)(1) and (2) of the Banking Act; that section 15(2) of the Higher Education Loans Board Act (HELB Act) was unconstitutional to the extent that it led to interest rates and charges becoming equal to or more than the principal amounts.

Issues

i. Whether the *in duplum* rule was applicable to bodies lending monies other than banks.
ii. Whether the continued imposition of interest and penalties on non-performing loan accounts by the Higher Education Loans Board even when the interest and penalties exceeded the principal amount amounted to discrimination .
iii. What was the nature and rationale of the *in duplum* rule in Kenya?

Relevant provisions of the Law

Higher Education Loans Board Act cap 213

Section 15 - Obligations of the loanees

(2) Any loanee who fails or neglects to satisfy the requirements of subsection (1) within the stipulated time shall, in addition to any other action that the Board may take against him, be guilty of an offence and liable to a fine of not less than five thousand shillings in respect of each loan deduction that remains unpaid in accordance with provisions of subsection (1), and such fine shall be payable to the Board.

Held

1. *In duplum* was a Latin phrase derived from the word "*in duplo*" which loosely translated to "in double". Simply stated, the rule was to the effect that interest ceased to accumulate upon any amount of loan owing once the accrued interest equaled the amount of loan advanced.
2. In *Desires Derive Ltd v Britam Life Assurance Co (K) Ltd* (2016) eKLR, it was held that the *in duplum* rule was only applicable in the circumstances of banks only. Since its introduction on May 1, 2007, courts had pronounced on it variously.
3. The *in duplum* rule was concerned with public interest. The rule was introduced in Kenyan laws to tame the appetite of lenders who had made recovery of interest on advances a cash cow. It was intended to protect borrowers from exorbitant interest accumulation on loans and limit the amount recoverable by a lender on a defaulted facility to no more than double the principal owing when the loan had become non-performing plus recovery expenses.
4. Being of public interest, the *in duplum* rule was applicable for those lending monies as it did to banks. The loanees of the respondent's facilities were helpless students. They acquired the subject loans to finance their education. The fund could have been established to help the less fortunate to access education through the fund. In most cases, after studies, the majority of the loanees found themselves jobless. The loan matured before they secured employment and interest and penalties kicked in. It would be unfair to have the loan continue attracting interest plus penalties *ad infinitum*. With the shrunken economy, scarce employment opportunities, it was definitely a nightmare for those loanees. The monthly fines would eventually make the amount irrecoverable. That was unacceptable.

5. The continued imposition of interest and penalties on non-performing loan accounts even when the interest and penalties had exceeded the principal amount violated the *in duplum* rule. As borrowers, the petitioners were being discriminated upon as compared to those borrowing from banks who were protected by section 44A of the Banking Act. Although their rate of interest was low, their personal circumstances of being students from humble and financially challenged backgrounds, necessitated protection.
6. Their socio-economic rights under articles 43(1)(e) and (f) and consumer rights under article 46(1)(c) of the Constitution had been violated. That had the counter-effect of making it difficult for the petitioners and others in the same situation to conveniently repay the loan. The petitioner's case did not challenge the State in the action it had taken, but rather sought the aid of the court to give effect to those measures.
7. Having recognized the gap that existed, that was, the lack of legislation that would protect borrowers from exorbitant and never-ending interest rates, the state introduced the *in duplum* rule vide section 44A of the Banking Act. Through that legislation, the State sought to ensure fairness and justice in matters borrowing even where the lender had a higher bargaining power. There was nothing to bar the extension of such relief and accommodation to the specific borrowers under the HELB Act.
8. The application of the *in duplum* rule to the loans borrowed by the petitioners was not a discretionary matter to be considered by the respondent but was a matter of right and law. The court would not declare section 15(2) of the HELB Act unconstitutional, but it would read into that section the *in duplum* rule. That upon the amount due clocking double the principal sum, the interest and fines would cease to apply.
9. Since the taking of the loans was not denied nor the failure to make substantial payment, and considering that the respondent indicated that it was taking steps to apply the *in duplum* rule, it was time the petitioners took steps to perform their part of the contracts.

Petition allowed with each party to bear own costs.

Orders

i. *A declaration was issued against the respondent that by imposing interest amounts and penalties or fines that exceeded the principal amount, the respondent was in contravention of article 43(1)(e) and (f) and article 27 of the Constitution.*
ii. *A declaration was issued that section 15(2) of the HELB Act was unconstitutional to the extent that it led to interest rates and fines becoming more than the principal amount advanced.*
iii. *A declaration was issued that the respondent was not entitled to recover from the petitioners or its loanees an amount exceeding double the amount advanced in contravention of the in duplum rule.*

Citations

Cases

Kenya

1. *Desires Derive Limited v Britam Life Assurance Co. (K) Ltd* Civil Case 211 of 2016; [2016] KEHC 3890 (KLR) - (Explained)
2. *Muthoga, Lee G v Habib Zurich Finance (K) Limited & another* Civil Appeal 50 of 2010; [2016] KECA 592 (KLR) - (Applied)
3. *Mwai, John Kabui & 3 others v Kenya National Examination Council & 2 others* Petition 15 of 2011; [2011] KEHC 1696 (KLR) - (Explained)
4. *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* Civil Appeal 30 of 2018; [2019] KECA 436 (KLR) - (Applied)

Statutes

Kenya

1. Banking Act (cap 488) section 44A(1)(2) - (Interpreted)

2. Constitution of Kenya articles 21, 22, 23, 27, 43(1)(c)(e)(f); 46(1)(c); 55; 56; 165; 258; 259 - (Interpreted)
3. Higher Education Loans Board Act (cap 213) sections 3, 21(b); 15(2) - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The petition before court is dated March 23, 2021. The petitioners are Kenyan citizens and beneficiaries of the respondent's loan to finance their undergraduate studies. The respondent is a statutory body established under section 3 of the *Higher Education Loans Board Act* ("the *HELB Act*") whose function include granting of loans to students, setting the criteria for loan repayment including rate of interest and formulate sound policies for regulating and management of the Fund.

2. The petition was supported by the petitioners' respective affidavits sworn on March 23, 2021. Their case was that on diverse dates, they borrowed loans from the respondent to facilitate their undergraduate studies. That the respondent had been charging exorbitant interest and penalties which often grew beyond double the principal amounts owed thereby making repayment difficult.

3. That on November 19, 2020, through its twitter handle, the respondent threatened to publish the names and photos in leading newspapers of defaulters since 1975 and issued a 30 day repayment notice.

4. The 1st petitioner who was a youth living with disability had borrowed Kshs 82,980 in July 2004 at an interest rate of 2%. As of July, 2016, the debt had accumulated to Kshs 540,464/10. The 2nd petitioner borrowed Kshs 146,090 in July, 2016, as of March 2021 the amount stood at Kshs 335,207/28. The 3rd petitioner borrowed Kshs 135,000 in July, 2016 and as at February 2021 the amount due was Kshs 336,573/83.

5. It was therefore contended that, the debts had doubled the principal amounts. That the interest rates and penalties were exorbitant and contravened the beneficiaries' socioeconomic rights as enshrined in the *Constitution* and made it difficult for them to repay the loans. That the beneficiaries with non-performing loans were denied clearances which were necessary for job applications thereby being denied employment opportunities in both private and public sectors. That the non-performing loans were due to the hefty interest and penalties whereas most beneficiaries were youths who are considered a vulnerable group under article 55 of the *Constitution*.

6. The petition was grounded on several constitutional provisions including articles 21, 22, 23, on enforcement of rights and fundamental freedoms in the Bill of Rights and needs of vulnerable groups including persons living with disabilities and the youth; article 43 on state obligation to ensure enjoyment of socio-economic rights; article 46(1) on consumer protection, artice 48 on access to justice; articles 55 and 56 on access to education and employment for all including minorities and marginalized groups; article 165, 258, and 259 on powers of this court, the right to institute court proceedings for contravention of constitutional principles and role of the court in construction of the *Constitution*.

7. The petitioners contended that the respondent had violated the *Constitution* and the law. That the charging of interest, fees and penalties had increased the debt to more than double the principal in contravention of section 44A(1) and (2) of the *Banking Act*, section 43(1)(e) and (f) of the Consumer Rights under article 46(1) of the Constittution. That by imposing a fine of not less than Kshs 5,000 in

respect of each loan deduction that remains unpaid, section 15(2) of the HELB Act contravened the *in duplum* rule as it increased charges and interest.

8. The petitioners therefore prayed for declarations that; by imposing interest amounts and penalties that exceed the principal amount, the respondent was in contravention pf article 43(1)(e) and (f) of the *Constitution* and section 44(A)(1) and (2) of the *Banking Act*; that section 15(2) of the *HELB Act* is unconstitutional to the extent that it leads to interest rates and charged becoming equal to or more than the principal amounts; an order to restrain the respondent from charging interest rates on non-performing loans under the *in duplum* rule to conform with section 44A(1) and (2) of the *Banking Act* and the costs of the petition.

9. The respondent opposed the petition vide the replying affidavit of Rachel Kipkech sworn on 10/5/2021. She admitted the fact of the advances to the petitioners as alleged in the petition. That the terms and conditions for grant of loans was provided for in the *HELB Act* under section 15(1) and (2) which provided for loan repayment within one year of completion of studies and a fine of not less than Kshs 5,000 on each unpaid loan deduction.

10. That since maturity of the 1st petitioner's loan in July 1995, she only paid Kshs 11,500.00 and had not made any contact with the respondent to explain any hardship in repayment. That her loan thus continued to incur interest and penalties to a sum of Kshs 251,732.10. That had the 1st petitioner informed the respondent that she was a youth living with disability, the respondent would have taken that fact into consideration under section 21(b) of the *HELB Act* on the board's discretion to waive the loan.

11. As regards the 2nd petitioner, he had only made three payments in March, April and May 2018. No effort had been made to repay or inform the respondent of any hardship in repayment and therefore the loan had continued to incur interest and penalties to Kshs 332,674.15. As for the 3rd petitioner, her loan matured in July 2014 and she had made no effort to repay the loan or explain any hardship in repayment. Her loan had therefore ballooned to Kshs 338,473.83.

12. That since receiving the petitioners' demand to review the loans to be in line with the law, the respondent had reviewed its credit policy and capped interest and penalty charges to the principal amount. This was despite section 15(2) of the Act which mandated the respondent to impose a fine each month that a loanee failed to remit repayments.

13. That the review of policies took sometime but corrective action had been taken. That had the petitioner's accorded the respondent the time sought, the adjustments sought would have been done without recourse to court. That the statements produced by the respondent had been adjusted appropriately and interest and penalties caped at the principal loan amount.

14. On the contention that section 15(2) of the *HELB Act* violated the law, it was averred that the respondent had already undertaken measures to cap the accruing interest on the petitioner's accounts and to loanees accounts at HELB to the outstanding principal loan.

15. That nevertheless, the provisions of section 44A of the *Banking Act* was not applicable to section 15(2) of the *HELB Act* as the repayment of HELB loans was not only contractual provision but also a statutory. That the fine of Kshs 5,000 was only a statutory fine which was subject to waiver and that the respondent's decision to cap the penalty charges did not arise out of section 44A aforesaid but from its own discretion.

16. The alleged violations of the petitioners' socioeconomic rights under article 43 (1)(e) and (f) of the *Constitution* were denied and it was contended that the establishment and operations of the respondent

was designed to secure the socioeconomic rights of all Kenyans. That the effort made on loan recovery was to ensure sustainability of the fund to continue empowering people's dreams.

17. That the respondent, as a policy, does not deny job seekers clearance certificates upon request. That until the demand issued on 4th March, 2021, the petitioner's had not presented their case to the respondent for consideration. That the petitioner's did not fall under the category of marginalized groups as defined in the *Constitution* and the respondent had not violated article 56 of the *Constitution*. That the petition was premature as the respondent had not been granted an opportunity to address the petitioner's concerns. The respondent therefore prayed that the petition be dismissed with costs.

18. I have considered the pleadings, evidence and both written and oral submissions made in court. There are two inter-related issues for determination being which I propose to determine together; these are; whether the respondent is in contravention of article 43(1)(e) and (f) of the *Constitution* and section 44A of the *Banking Act* and whether section 15(2) of the *HELB Act* is unconstitutional for violating the *in duplum* rule.

19. "*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.

20. The respondent contended that the *in duplum* rule was not applicable to it as it was under *Banking Act*. The court is aware of the decision in *Desires Derive Ltd v Britam Life Assurance Co (K) Ltd* (2016) eKLR, wherein it was held that the rule was only applicable in the circumstances of banks only.

21. Since its introduction on 1/5/2007, courts have pronounced on it variously. See *Lee G Muthoga v Habib Zurich Finance (K) Limited & another* [2016] eKLR and *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* [2019] eKLR.

22. The rationale for this rule was elucidated in the latter case of *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation* (*supra*) wherein 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".

23. From the foregoing, the Court of Appeal was alive to the fact that the rule was concerned with public interest. In my view, the 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 was expressing its displeasure with lenders who left amounts of advances to go over the roof due to interest before pouncing on the hapless borrowers.

24. It was intended to protect borrowers from exorbitant interest accumulation on loans and limit the amount recoverable by a lender on a defaulted facility to no more than double the principal owing when the loan has become non-performing plus recovery expenses.

25. 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

26. Turning to the present case, the loanees of the respondent's facilities are helpless students. They acquire the subject loans to finance their education. The fund may have been established to help the less fortunate to access education through the fund. In most cases, after studies, the majority of these

loanees find themselves jobless. The loan matures before they secure employment and interest and penalties kick in.

27. It would be unfair to have the loan continue attracting interest plus penalties ad infinitum. With the shrunken economy, scarce employment opportunities, it is definitely a nightmare for these loanees. The monthly fines would eventually make the amount irrecoverable. That is unacceptable.

28. Turning to section 15(2) of the HELB Act, it was the petitioners' case that the section was unconstitutional and contravened the in duplum rule to the extent that it provided for a penalty of Kshs 5000 each unpaid loan deduction. That the penalty increased the interest charged. Conversely, the respondent contended that the penalty was statutory and did not therefore contravene the *Constitution*. That alive to the unemployment situation facing the youth in this country, the respondent was in the process of working on an internal policy that would ensure the capping of all loans at double the principal amount. That this was only at the discretion of the respondent and not because it was bound by the in duplum rule.

29. Having made a finding that the respondent is bound by the in duplum rule, is section 15(2) of the *HELB Act* unconstitutional? The section provides: -

> "Any loanee who fails or neglects to satisfy the requirements of subsection (1) within the stipulated time shall ... be guilty of an offence and liable to a fine of not less than five thousand shillings in respect of each loan deduction that remains unpaid in accordance with provisions of subsection (1), and such fine be payable to the Baord."

30. The court has seen the statement of accounts produced by the petitioners. It is clear that apart from interest being charged on the outstanding amount, the respondent was loading over the amount, a fine of Kshs 5000 monthly. This has the effect of increasing the amount due beyond the double the principal amount after a very short period.

31. The foregoing imprudence is demonstrated by the amounts allegedly due from the petitioners. The 1st petitioner borrowed Kshs 82,980 in July 2004 at an interest rate of 2%. As of July, 2016, the debt had accumulated to Kshs 540,464/10. The 2nd petitioner borrowed Kshs 146,090 in July 2016, as of March 2021 the amount stood at Kshs 335,207/28. The 3rd petitioner borrowed Kshs 135,000 in July 2016 and as at February 2021, the amount stood at Kshs 336,573/83. Of course, all those amounts had increased beyond double the amounts borrowed.

32. Undoubtedly, the continued imposition of interest and penalties on non-performing loan accounts even when the interest and penalties had exceeded the principal amount violates the *in duplum* rule. As borrowers, the petitioners were being discriminated upon from those borrowing from banks who are protected by section 44A of the *Banking Act*. Although their rate of interest is low, their personal circumstances of being students from humble and financially challenged background, necessitated protection.

33. Their socioeconomic rights under article 43(1)(e) and (f) and consumer rights under article 46(1)(c) of the *Constitution* have accordingly been violated. This has the counter-effect of making it difficult for them and others in the same situation to conveniently repay the loan.

34. In *John Kabui Mwai and others v Kenya National Examination Council and others* High Court Petition No 15 of 2011, the court observed: -

> "The inclusion of economic and social, cultural rights in *the Constitution* is aimed at advancing the socio - economic needs of the people of Kenya, including those who are poor,

in order to uplift their human dignity. The protection of these rights is an indication of the fact that the *Constitution*'s transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal equitable distribution of resources."

35. In this particular case, the petitioner's case does not challenge the state in the action it has taken, but rather seeks the aid of this court to give effect to those measures. Having recognized the gap that existed before, that is, the lack of legislation that would protect borrowers from exorbitant and never-ending interest rates, the state introduced the *in duplum* rule *vide* section 44A of the *Banking Act*.

36. Through the aforesaid legislation, the state sought to ensure fairness and justice in matters borrowing even where the lender has a higher bargaining power. There is nothing to bar the extension of such relief and accommodation to the specific borrowers under the *HELB Act.*

37. Accordingly, the court finds that the application of the *in duplum* rule to the loans borrowed by the petitioners is not discretionary by the respondent but as a matter of right and law.

38. In this regard, the court would not declare section 15(2) of the *HELB Act* unconstitutional, but it would read into that section the *in duplum* rule. That upon the amount due clocks double the principal sum, the interest and fines shall cease to apply.

39. Since the taking of the loans was not denied nor the failure to make substantial payment, and considering that the respondent indicated that it was taking steps to apply the *in duplum* rule, it is time the petitioners then now took steps to perform their part of the contracts.

40. The upshot is that, the petition is found to be merited and is allowed as follows: -

    a. A declaration hereby issues against the respondent that by imposing interest amounts and penalties or fines that exceed the principal amount, the respondent is in contravention of article 43(1)(e) and (f) and article 27 of the *Constitution of Kenya*.

    b. A declaration hereby issues that section 15(2) of the HELB Act is unconstitutional to the extent that it leads to interest rates and fines becoming more than the principal amount advanced.

    c. A declaration hereby issues that the respondent is not entitled to recover from the petitioners or its loanees am amount exceeding double the amount advanced in contravention of the in duplum rule.

    d. This having been a public interest matter, 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