Serem v National Bank of Kenya (Petition E005 of 2022)
[2024] KEHC 11304 (KLR) (23 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

PETITION E005 OF 2022

RL KORIR, J

SEPTEMBER 23, 2024

IN THE MATTER OF THE ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLE 2(1), 4, 10 (1) (C), 2(B), 21 (1) AND (3), 22 (1), 48, 165, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 44A OF THE BANKING ACT

AND

IN THE MATTER OF THE APPLICATION FOR CEASATION OF INTEREST RATES ON NON-PERFOMING LOANS UNDER THE IN DUPLUM RULE BY THE NATIONAL BANK OF KENYA LTD

BETWEEN

RICHARD KIPLANGAT SEREM ..... PETITIONER

AND

NATIONAL BANK OF KENYA ..... RESPONDENT

RULING

Background

1. This matter has been in court since the year 1996 where litigation began in the High Court at Nakuru before finding its way to this court. There have been several Applications which have made this matter drag endlessly in court for over 28 years.

2. The Respondent advanced the Petitioner a loan for Kshs 400,000/= sometime in the year 1992. The Petitioner stated that he had been unable to pay the loan in full due to the interest rates charged by the Respondent which made the loan untenable. That the interest charged on the loan were more than the principal amount. He invoked the provisions of section 44A of the *Banking Act*.

3. Before this court determined the present Petition dated 15th December 2022, the Respondent filed a Notice of Preliminary Objection dated 18th April 2023. I shall set out the Petition and the Preliminary Objection in the succeeding paragraphs.

The Petition

4. The Petitioner contended that the Respondent had violated the Article 43 (1) (e), 46 (1) of the *Constitution* of Kenya and section 44A (1) and (2) of the *Banking Act* by charging interest, fees and penalties which increased his debt to more than double the principal sum.

5. The Petitioner filed a Petition dated 15th December 2022 where he sought the following prayers:-

    i. A declaration that by imposing interest amounts and penalties that exceed the principal amount, the Respondent was in contravention of Article 43 (1) (e), 46 (1) of the *Constitution* of Kenya and section 44A (1) and (2) of the *Banking Act*.

    ii. 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*.

The Petitioner's case

6. Through his supporting affidavit dated and sworn on 15th December 2022, the Petitioner stated that he borrowed Kshs 400,000/= from the Respondent on 16th January 1992. That due to the exorbitant interest rates charged by the Respondent, the loan became difficult to clear and by 31st October 1995, the loan had ballooned to Kshs 1,453,025/=.

7. It was the Petitioner's/Applicant's case that the Respondent filed a suit (Nakuru High Court Civil Suit Number 53 of 1996) for the recovery of the loan. That his defence was struck out and Judgement was entered against him on 30th July 2003.

8. The Applicant stated the Respondent informed him by a letter dated 29th June 2010 that the debt had risen to Kshs 6,095,832. That he was thereafter served with a Notice to Show Cause dated 11th January 2022.

9. It was the Applicant's case that the interest charged by the Respondent exceeded the principal amount and that was in contravention to the *Banking Act* and the *Constitution* of Kenya.

The Response

10. Through a Replying Affidavit sworn on 19th April 2023 by Catherine Kamau, the Respondent stated that they sued the Petitioner in Nakuru High Court Civil Suit No. 53 of 1996 for the recovery of Kshs 1,453,025/=. That the Petitioner's defence was struck out and a Judgement was entered in their favour for Kshs 1,453,025/=. The Respondent further stated that the Petitioner defaulted on his payment and Warrants of arrest in execution were issued on 30th June 2004.

11. It was the Respondent's case that the Petitioner's Application to have the summary Judgement set aside was dismissed on 18th February 2005. That on 25th June 2010, the Petitioner was apprehended and committed to civil jail for three months. It was the Respondent's further case that on 1st July 2010, a Consent was recorded on how the Petitioner would settle his debt and this led to his release from jail.

12. The Respondent stated that the Petitioner failed to honour the terms of the Consent and has continued to default on his loan facility to date. That the Petitioner only paid Kshs 100,000/= as the first instalment as per the Consent and he has not made any further payments to date.

13. It was the Respondent's case that as a result of the Petitioner's indebtedness, they sought to recover the outstanding loan amount by selling Kericho/Koiyot/142 which was charged to the loan and this move was objected to by the Petitioner's family members through a Notice of Motion Application dated 11th November 2011 at the High Court in Nakuru. That the Application was dismissed on 19th January 2017 by Mulwa J.

14. The Respondent stated that on 16th December 2021, they made an application for the execution of the Decree by way of a Notice to Show Cause. That on 15th February 2022, Warrants of Arrest were issued against the Petitioner. The Respondent further stated that on 10th March 2022, the Petitioner filed an Application to review the arrest orders and to have the title deed to Kericho/Koiyot/142 released to him and to have the Decree be declared statutorily barred. That the Application was dismissed on 28th July 2022 by Chemitei J.

15. It was the Respondent's contention that the Petitioner filed for a Review of the above Ruling and during the pendency of its determination, the Petitioner filed the present Petition in Bomet High Court. That the prayers in this Petition were similar to those in Civil Suit Number 53 of 1996 in the High Court at Nakuru. It was the Respondent's further contention that the present Petition was res judicata as the same had been heard and a Judgement rendered.

16. The Respondent stated that the Petitioner intends to deny it the fruits of its Judgement and he should not be allowed to benefit from a loan that he does not intend to repay. That it would suffer irreparable damage if the prayers in the Petition are granted.

The Respondent's Preliminary Objection

17. The Respondent also filed a Preliminary Objection dated 18th April 2023 based on the following grounds:-

    i. That the Petition is grossly incompetent, bad in law and an abuse of the court process.

    ii. That the issues raised in the Petition are res judicata as the Petition herein entails the same issues, same facts and same parties as those in Civil Suit No. 53/1996 National Bank of Kenya v Richard Kiplangat Serem at Nakuru High Court that awaits execution of the full decretal amount and interest accrued which Judgement over the same has been delivered.

    iii. That the Petitioner filed an Application in Civil Suit No. 53/1996 National Bank of Kenya v Richard Kiplangat Serem at Nakuru High Court to have the decree declared statute barred among other orders which application was dismissed and the court declared that the attachment was not sanctioned by the court which statement had the Petitioner file an Application for Review of the orders given on 28th July 2022 to allow the Respondent go for attachment on 27th April 2023.

    iv. That the Application dated 29th September 2022 awaits Ruling expected to be delivered on 27th April 2023.

    v. That the Petition by the Petitioner is an attempt to circumvent the effect of the Ruling expected to be delivered on 27th April 2023.

18. As a matter of precedence, I shall determine the Respondent's Preliminary Objection first.

19. What constitutes a Preliminary Objection was set out in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where it was held that:-

> " A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

20. The Respondent stated that the matter was res judicata as the facts that were contained in the present Petition were the same facts presented and determined in Civil Suit Number 53/1996 National Bank of Kenya Ltd v Richard Kiplangat Serem at Nakuru High Court.

21. Section 7 of the Civil Procedure Rules provides that:-

> No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

22. The Court of Appeal in *The Independent Electoral And Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR held that:-

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common sensical (sic!) protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

23. I have gone through the Petition and I have noted that the Petitioner's main argument was that he had been unable to satisfy his loan obligations due to the punitive interest rates levied by the Respondent. He stated that the interest charged by the Respondent was more than double the principal amount which was in contravention to the in duplum rule provided for in section 44A of the *Banking Act*.

24. It is an undisputed fact that the Respondent sued the Petitioner in Civil Suit Number 53 of 1996 in the High Court in Nakuru. It is also undisputed that Judgement was entered in favour of the Respondent to the tune of Kshs 1,453,025/=.

25. Both parties failed to attach the full Plaint to enable this court appreciate the facts raised and the prayers requested. However, they both attached the resulting Decree and the claim against the Petitioner was among others:-

    i. The sum of Kshs 1,453,025/=

ii. Bank charges and interest on principal sum at ban rates of 30% per annum and/or current bank rate of interest calculated on daily balances at monthly rests from 31st October 1995 until payment in full.

26. The court (Nakuru High Court) ordered:-

> " That Judgement be and is hereby entered against the defendant for the sum of Kshs 1,453, 025/= plus simple interests at the current bank rates as prayed in the Plaint"

27. There is no evidence to indicate that this Judgement had been appealed. This means that the said Judgment is in force to date. The Judgement was clear on the issue of the rate of the bank charges and interest as it awarded the rate of 30% per annum.

28. The Petitioner has invoked section 44A of the *Banking Act* which provides:-

(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 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.

(3) 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.

(4) This section shall not apply to limit any interest under a court order accruing after the order is made.

(5) In this section—

(a) "debtor" includes a person who becomes indebted to an institution because of a guarantee made with respect to the repayment of an amount owed by another person;

(b) "loan" includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person; and

(c) a loan becomes non-performing in such manner as may, from time to time, be stipulated in guidelines prescribed by the Central Bank.

(6) This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that where loans become non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following—

(a) the principal and interest owing on the day this section comes into operation; and

(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

(c) expenses incurred in the recovery of any amounts owed by the debtor.

29. The above section of the law operates retrospectively as it applies to loans that became non-performing before it came into force as the present one did. The Court of Appeal in the case of *Kenya Hotels Limited v Oriental Commercial Bank Ltd (Formerly known As Delphis Bank Limited)* (2019) eKLR held 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. Since the introduction of this principle on 1st May 2007 it 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, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.
>
> "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".

30. It is clear to me from the prayers sought that the Petitioner by invoking section 44A of the *Banking Act*, was challenging the application of the interest charges levied by the Respondent. As shown earlier, the High Court in Nakuru determined the rate of the interest (30% per annum) that the Respondent would levy until the loan was repaid in full. If the Petitioner felt that the interest charges levied by the Respondent were exorbitant, it was open to him to seek review before the same court or appeal to the Court of Appeal. He had the right to have his rights finally determined in the higher court. The duplum rule which he seeks to invoke now came into force in May 2007 meaning his reprieve might have come sooner had he taken the proper legal course.

31. Respectfully, after considering the pleadings before me, it is my view that the Petitioner has been indolent and has allowed his loan to skyrocket while at the same time trying through several Applications to frustrate the process of recovery. The petition was one such attempt.

32. As I pen off, this matter was civil in nature. Even though the High Court has original and unlimited jurisdiction, the habit of clothing civil suits as Constitutional Petitions must be discouraged. I concur Mutungi J. in *Grace Jepkemoi Kiplagat v Zakayo Cheruiyot* (2021) eKLR, where he held that:-

> " .....there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well Constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially Civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court."

33. In the final analysis, having found that the issue of the interest rate had been determined by the High Court in Nakuru, I find the issues raised in the Petition as res judicata. From the material the parties placed before me, the decision has not been set aside or appealed.

34. I must also add that the conduct of filing the Petition in this court while there were related on-going proceedings in the High Court in Nakuru amounts to forum shopping and an abuse of the process of court. It is a practice that must be discouraged.

35. In the end, the Preliminary Objection dated 18th March 2023 has merit. Accordingly, the Petition dated 15th December 2022 is dismissed. The Petition having collapsed at the preliminary stage, each party shall bear their costs.

RULING DELIVERED, DATED AND SIGNED THIS 23RD DAY OF SEPTEMBER, 2024.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the absence of Mr. Kiburi for the Applicant and Mr. J.K. Rono for the Respondent. Siele (Court Assistant).