



**Samoei v National Housing Corporation (NHC) & another (Civil Suit E008 of 2020) [2024] KEHC 14300 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14300 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E008 OF 2020  
RN NYAKUNDI, J  
NOVEMBER 15, 2024**

**BETWEEN**

**WILLIAM CHERUIYOT SAMOEI ..... PLAINTIFF**

**AND**

**NATIONAL HOUSING CORPORATION (NHC) ..... 1<sup>ST</sup> DEFENDANT**

**TIMON KIPKOECH TOO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff's claim is based on a plaint dated 14<sup>th</sup> December, 2020. He avers that all material time to the suit, he is the duly registered owner of the land parcel registration No. Nandi/kimanda/1707 measuring approximately 0.92 Ha (2.27 acres).
2. The gist of the Plaintiff's claim is that at around 16<sup>th</sup> October, 2018 guaranteed the 2<sup>nd</sup> Defendant, Timon Kipkoech Too a loan of Kshs. 500,000 in respect of the land parcel registration No. Nandi/kimanda/1707 measuring approximately 0.92 Ha (2.27 acres) which land was used as a security and consequently charged by the 1<sup>st</sup> defendant. The Plaintiff avers that the 2<sup>nd</sup> Defendant has since defaulted servicing the said loan which has now accrued interests and as at 14<sup>th</sup> July, 2020 the 'outstanding loan arrears' is allegedly Kshs. 2,241,440. That the 1<sup>st</sup> defendant's unconscionable, unlawful, and illegal interest charged on the suit property has denied him right of redemption so as to recover the suit land. The Plaintiff further stated that the 1<sup>st</sup> defendant has now issued the statutory notice demanding for the 'outstanding loan arrears' which arrears are unconscionable and illegal.
3. The Plaintiff therefore claims against the 1<sup>st</sup> defendant, a declaration that he is entitled to redeem the suit land being land parcel No. Nandi/kimanda/1707 measuring approximately 0.92 Ha (2.27 acres). The Plaintiff stated that having guaranteed the 2<sup>nd</sup> the loan in question is willing to pay 'outstanding loan arrears' that are lawful and legal. He also seeks a declaration order against the 1<sup>st</sup> defendant to the



- effect that the 1<sup>st</sup> defendant is not entitled to the loan interest that is beyond the principle amount owing.
4. The Plaintiff seeks a declaration order against the 1<sup>st</sup> defendant to the effect that the interest charged herein on a defaulted loan is unconscionable, illegal and unlawful. He also seeks an order directing him to pay the principle amount together with the lawful interest accrued within the reasonable time on behalf of the 2<sup>nd</sup> Defendant so as to redeem the suit property.
  5. In sum, the Plaintiff prays for judgment against the defendants severally for;
    - a. A declaration order against the 1<sup>st</sup> defendant to the effect that the 1<sup>st</sup> defendant is not entitled to the loan interest that is beyond the principle amount owing.
    - b. A declaration order against the 1<sup>st</sup> defendant to the effect that the interest charged herein on a defaulted loan is unconscionable, illegal and unlawful.
    - c. A declaration that the Plaintiff is entitled to redeem the suit land being land parcel No. Nandi/kimanda/1707 measuring approximately 0.92 Ha (2.27 acres) on behalf of the 2<sup>nd</sup> defendant whom he guaranteed the defaulted loan paying and/or clearing the lawful and legal outstanding loan arrears within reasonable time.
    - d. A declaration to the effect that on paying/or clearing the said principle amount together with the lawful and legal interest accrued, the Plaintiff is entitled to a refund of the same from the 2<sup>nd</sup> defendant.
    - e. The Honorable court be pleased to issue a mandatory injunction compelling the 2<sup>nd</sup> defendant to refund the Plaintiff the amount of monies paid to the 1<sup>st</sup> defendant in settlement of the lawful and legal outstanding loan arrears herein.
    - f. The Honorable court be pleased to restrain the 1<sup>st</sup> defendant, its agents, servants, and/ or any other person acting on its behalf by way of a permanent injunction from demanding unconscionable, illegal and unlawful interest in respect of defaulted loan herein and consequently from advertising for sale, selling by public auction, and/or in any other manner alienating or disposing of land [parcel from No. Nandi/kimanda/1707 measuring approximately 0.92 Ha (2.27) based on unconscionable and illegal interest accrued thereof.
    - g. Costs of and incidental to the suit
  6. The 1<sup>st</sup> defendant filed its statement of defense dated 11<sup>th</sup> January, 2021 denying the claim and faulted the Plaintiff and the 2<sup>nd</sup> defendant for breach of contract. The 1<sup>st</sup> defendant averred that the Plaintiff has perpetually defaulted in the loan repayment and that the interest charged is conscionable, lawful and legal and instead invites the Plaintiff to strict proof thereof to the contrary.
  7. In further response, the 1<sup>st</sup> defendant stated that it is a public institution which provides housing facilities to the citizens of Kenya as such the Plaintiff is required to pay up for the loan facility availed to the 2<sup>nd</sup> defendant before he can redeem his property which was used as security for the said loan facility. That the prayers sought by the Plaintiff are unattainable as it is intended to oust the 1<sup>st</sup> defendant from what is legally theirs.
  8. The parties filed written submission in agitation of their arguments. The 1<sup>st</sup> defendant filed submission dated 10<sup>th</sup> February 2023 whereas the Plaintiff filed submissions dated 16<sup>th</sup> May, 2023.



## Plaintiff's submissions

9. Learned Counsel Mr. Nabasenge identified one issue for determination: whether the In Duplum rule applies in the instant case. Learned Counsel submitted that the Plaintiff has pleaded the in duplum rule whereby the 1<sup>st</sup> defendant is claiming interests that accrued beyond double of the principal amount. On this he relied on the decision in *Kenya Hotels Ltd v Oreintal Commercial Bank Ltd (formerly known as The Delphis Bank Limited) (2019) eKLR C.A at Nairobi Civil Appeal No. 252 of 2009.*
10. Counsel maintained that the Plaintiff guaranteed a loan of Kshs. 500,000 and the 1<sup>st</sup> defendant/respondent is claiming loan arrears to the tune of Kshs. 2,241,440 which amount is far much quadruple of the principal amount loaned to the Plaintiff/Applicant. That the Plaintiff has since paid Kshs. 1,500,000/= to the 1<sup>st</sup> Defendant/Respondent in settlement of the loan herein. In addition to the principal loan amount of Kshs. 500,000, the Plaintiff has paid Kshs. 1,000,000/= to cater for the interest accrued. On this, the case of *Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021) (2022) KEHC 11951 (KLR) (CIV)* was cited.
11. In sum, it was submitted for the Plaintiff that as much as the 1<sup>st</sup> defendant is not a banking institution, it is a financial institution which advances loans and cannot be excluded from the financial regulations that govern loans and interests including the principle in the in duplum rule. Counsel urged the court to find that the interests accrued herein that is more than double of the principal amount, which violates the in duplum rule.

## 1st Defendant's submissions.

12. The 1<sup>st</sup> defendant through its legal counsel Mr. Omwenga submitted on three limbs. The first limb concerned the question as to whether the statutory power of sale had arisen at the time of filing the instant suit.
13. Learned counsel started by citing the provisions of section 96(1) of the *Land Act* and stated that it is not in dispute that the 2<sup>nd</sup> Defendant defaulted in repaying the loan owed to the 2<sup>nd</sup> Defendant as per the loan terms captured in the offer letter dated 11<sup>th</sup> December, 2008 and the charge registered on 9<sup>th</sup> January, 2009. Counsel pointed out that it is evidence from the plaint dated 14.12.2020 that at the time of filing this suit, the 2<sup>nd</sup> Defendant had defaulted to pay the loan which necessitated the 1<sup>st</sup> defendant to issue the Plaintiff and the 2<sup>nd</sup> defendant with the 90 days' statutory notice only as required under Section 90(1) of the *Land Act* demanding for the outstanding loan arrears.
14. It was submitted that the 1<sup>st</sup> defendant had not issued the 40 days' statutory notice and the 45 days' redemption notice which would thereafter give them the right to dispose of the parcel of land known as Nandi/kaminda/1707 which was used as the security loan. That the instant suit was filed before the said notices were issued and therefore the statutory power of sale had not arisen as at then. Statutory power of sale only arises where the charge has complied with the provisions of Section 90 of the *Land Act* by issuing the relevant statutory notices.
15. On the issue of the in duplum rule, learned counsel focused on the applicability of Section 44A of the *Banking Act* to the 1<sup>st</sup> defendant. Counsel argued that according to the definition laid out under Section 2 of the *Banking Act*, the key word is that the *Banking Act* is only applicable to banks and financial institutions which receive and/or accept money from the public. He submitted that the 1<sup>st</sup> defendant is a statutory body established by the National Housing Corporation Act, Chapter 117 of the Laws of Kenya. Its principal mandate is to implement the Government's housing policies and programs with a view to housing the nation. The 1<sup>st</sup> defendant does not accept and or receive any funds from the



public as the same is funded by the borrowings by housing and such moneys as voted or appropriated by parliament, repayments by local authorities, companies, societies or individual persons on account of loans advanced by housing as enumerated under Section 8 of the Housing Act. That this therefore confirms that the provisions of the Banking Act and specifically the induplum Rule does not apply to the 1<sup>st</sup> Defendant. On this he relied on the case of National Housing Corporation v Charles Lutta Kasamani & another (2022) eKLR.

16. It was further submitted for the 1<sup>st</sup> defendant that its dealings and/or business is governed by the Housing Act. Counsel cited the provisions of Section 8(2) and Section 20 of the Housing Act. That the 1<sup>st</sup> defendant herein charged the interest at the rate of 13% per annum which was in tandem with the above provisions. Furthermore, that the Plaintiff has not contested the said interest rates as the same is justified by the law. Learned counsel submitted that in duplum rule as provided for under Section 44A of the Banking Act does not apply to the contractual relationship between them and the 2<sup>nd</sup> defendant and therefore the accrued interest is justified.
17. On costs, learned counsel submitted that the Plaintiff should be condemned to pay the costs as costs follow the event. He urged the court to dismiss the suit as it is baseless. He prayed that the 1<sup>st</sup> defendant may be allowed to realize the loan arrears from the Plaintiff and the 2<sup>nd</sup> defendant by exercising its statutory power of sale upon compliance with the provisions of Section 90 of the Land Act.

### **Analysis and determination.**

18. At the heart of this dispute lies a fundamental question that speaks to the evolving nature of consumer protection in Kenya's financial sector. The court is called upon to determine whether the equitable principles that safeguard borrowers from oppressive interest accumulation, particularly the in duplum rule, should extend beyond the traditional confines of banking institutions to encompass statutory corporations engaged in lending activities. This question emerges against the backdrop of a loan that has seen its outstanding balance multiply from Kshs. 500,000 to Kshs. 2,241,440, despite payments of Kshs. 1,500,000 already made by the Plaintiff.
19. The determination of this issue requires this court to navigate through three interconnected streams of analysis: first, the proper interpretation and scope of the in duplum rule as developed in our jurisprudence; second, the nature and character of the National Housing Corporation as a lending institution; and third, the broader public policy considerations that underpin consumer protection in financial services.

### **The In Duplum Rule - Its Purpose and Application**

20. The in duplum rule, as elucidated by the Court of Appeal in Kenya Hotels Ltd v Oriental Commercial Bank Ltd [2019] eKLR, stands as a fundamental safeguard against the infinite accumulation of interest on debt. Its Latin phraseology - "in double" - encapsulates its core principle: that interest stops running when it equals the outstanding principal. The rule's incorporation into Section 44A of the Banking Act was not meant to restrict its application but rather to give statutory force to an equitable principle that predates modern banking regulation. The Court of Appeal's pronouncement on the rule's rationale is particularly instructive:

“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 making it impossible to redeem a charged property.”



21. This rationale raises a crucial question: Does the mischief that the rule seeks to remedy; the exploitation of borrowers through astronomical interest accumulation, become any less pressing merely because the lender is a statutory corporation rather than a bank?
22. The National Housing Corporation argues that this rule doesn't apply to them because they're not a bank. They point to their establishment under the [Housing Act](#) rather than the [Banking Act](#). But this argument in my view misses the heart of the matter.

### **Nature of the National Housing Corporation**

23. The 1st Defendant argues, citing *National Housing Corporation v Charles Lutta Kasamani & another* (2022) eKLR, that as a statutory corporation not regulated under the [Banking Act](#), it falls outside the ambit of the in duplum rule. While this position finds technical support in the strict interpretation of the [Banking Act](#)'s definition of "financial institution," it presents what this court considers to be an artificial distinction that elevates form over substance.
24. The fact that the National Housing Corporation derives its lending powers from the [Housing Act](#) rather than the [Banking Act](#) cannot serve as a shield against the application of fundamental principles of fairness in lending. This court must look beyond the mere nomenclature of institutions to examine the substance of their activities and their impact on the citizens they serve. When an institution steps into the arena of lending, whether under the [Banking Act](#) or any other statute, it simultaneously steps into a relationship of trust with the borrower, a relationship that our courts are duty-bound to protect from exploitation.
25. The 1<sup>st</sup> defendant's argument that its statutory mandate places it beyond the reach of equitable principles strikes at the very heart of consumer protection and access to justice. It would be a peculiar interpretation of our laws indeed if a statutory corporation, established to serve public interest through implementation of government housing policies, were permitted to impose more onerous terms on borrowers than those institutions directly regulated by the [Banking Act](#). Such an interpretation would create an anomalous situation where citizens seeking housing finance through a government institution would paradoxically enjoy fewer protections than those borrowing from commercial banks.
26. This court finds itself troubled by a stark contradiction. The National Housing Corporation exists to help Kenyans access housing, yet in this case, its actions threaten to achieve the opposite effect. I am presented with a disturbing arithmetic; a loan of Kshs. 500,000 has now ballooned to Kshs. 2,241,440, even though the Plaintiff has already paid Kshs. 1,500,000. Put simply, the Plaintiff has paid three times the original loan amount, yet finds himself deeper in debt than when he started. This multiplication of debt through interest does not align with the Corporation's mission to facilitate housing access.

#### Public Policy and Consumer Protection Considerations

27. The question before this court transcends mere statutory interpretation. It strikes at the heart of how we understand consumer protection in Kenya's financial sector. The court in *Mbeya v Consolidated Bank of Kenya & another* [2024] KEHC 5201 (KLR) has emphasized that where a dispute concerns interest charges, the courts must examine not just the legal framework but the broader implications for the borrower's right of redemption.
28. The argument that the 1st Defendant is exempt from the in duplum rule because it is not a deposit-taking institution mirrors the contentions rejected in *Mugure & 2 others v Higher Education Loans Board* [2022] KEHC 11951 (KLR). In that case, the court held that being of public interest, the in duplum rule applies to all those lending monies, as "the rule was introduced in our Laws to tame the appetite of Lenders who had made recovery of interest on advances a cash cow."



29. The parallel with the Mugure case is particularly instructive. Just as HELB's mandate to facilitate education could not justify unlimited interest accumulation, the NHC's housing mandate cannot justify interest charges that transform a housing assistance program into a mechanism for dispossession. In both instances, the public institution's core mandate would be frustrated by allowing unlimited interest accumulation.
30. When I scrutinize the arithmetic of this case through the lens of these principles, the inequity becomes stark. The 1st Defendant advanced Kshs. 500,000 to fulfill its statutory mandate of facilitating housing access. The Plaintiff, acting as guarantor, has already paid Kshs. 1,500,000, three times the principal amount. Yet, astonishingly, the 1st Defendant claims an additional Kshs. 2,241,440 remains due. This would bring the total cost of a Kshs. 500,000 loan to Kshs. 3,741,440; more than seven times the principal amount.
31. Section 44A of the *Banking Act*, while not directly applicable to the 1st Defendant, articulates a fundamental principle of fairness in lending: that the maximum amount recoverable from a defaulted loan should not exceed double the principal amount. This principle, as emphasized in *Kenya Hotels Ltd v Oriental Commercial Bank* (Supra), exists to protect not just the borrower's immediate financial interests but their fundamental right to redeem charged property.
32. The evidence before this court demonstrates that the interest charged has not only exceeded the principal but has grown to proportions that make redemption practically impossible. This outcome directly contradicts both the protective principles underlying the in duplum rule and the 1st Defendant's statutory mandate to facilitate housing access.
33. This court is guided by the evolving jurisprudence that emphasizes substance over form in matters of consumer protection. The reasoning in *Momentum Credit Limited v Kabuiya* [2022] KEHC 13705 (KLR), while distinguishing between deposit-taking and non-deposit-taking institutions, nonetheless affirms that the underlying principles of fairness in lending must prevail regardless of an institution's technical classification.
34. When the National Housing Corporation engages in lending activities, it cannot divorce itself from the fundamental principles of fairness that govern the lending relationship. To hold otherwise would create an absurd result where a public institution, established to facilitate housing access, would be permitted to impose terms more onerous than those allowed for commercial banks. The 1st Defendant's reliance on its statutory mandate under the *Housing Act* must be balanced against the broader principles of consumer protection and the right to redeem charged property. While Section 20 of the *Housing Act* permits the charging of interest, this power must be exercised in a manner consistent with both its facilitative mandate and fundamental principles of fairness in lending.
35. Having carefully weighed the evidence and legal principles, this court finds that the in duplum rule's underlying principle; protection against unlimited interest accumulation, ought to apply to the 1st Defendant's lending activities. To hold otherwise would not only frustrate the Corporation's statutory mandate but would undermine the fundamental principles of consumer protection in Kenya's financial sector.
36. The interest charged by the 1st Defendant, having already exceeded the principal amount, must be capped in accordance with the in duplum principle. The Plaintiff, having already paid three times the principal amount, has more than satisfied any reasonable interpretation of his obligations under the guarantee.
37. Having reached these conclusions, and in careful consideration of the pleadings, evidence, and submissions before this court, I hereby make the following orders:



- a. A Declaration Is Hereby Made that the principles underlying the in duplum rule apply to loans advanced by the National Housing Corporation, such that the total interest recoverable shall not exceed the principal amount of the loan.
- b. A Declaration Is Hereby Made that the Plaintiff, having paid Kshs. 1,500,000 against a principal loan of Kshs. 500,000, has satisfied his obligations as guarantor of the loan advanced to the 2nd Defendant, the said payment being sufficient to cover both the principal and legitimate interest.
- c. A Mandatory Order Is Hereby Issued directing the 1st Defendant to: Within 30 days of this judgment, prepare and provide to the Plaintiff a fresh statement of account reflecting interest capped at Kshs. 500,000 (being an amount equal to the principal sum); Credit all payments made by the Plaintiff totaling Kshs. 1,500,000 against the capped loan amount of Kshs. 1,000,000 (being the principal plus capped interest) and Issue a confirmation of full settlement of the loan within 14 days thereafter.
- d. A Permanent Injunction Is Hereby Issued restraining the 1st Defendant whether by itself, its servants, agents, or otherwise howsoever from: Demanding any further payments from the Plaintiff in respect of the subject loan; Advertising for sale, selling, alienating, or in any way dealing with the Plaintiff's land parcel No. Nandi/kimanda/1707 on account of the subject loan; Taking any adverse action against the Plaintiff based on the subject loan.
- e. The 1st Defendant Shall, within 60 days of this judgment, discharge the charge registered against the Plaintiff's land parcel No. Nandi/kimanda/1707 and return all original documents relating to the said property to the Plaintiff.
- f. Given the nature of this case, each party shall bear their own costs.
- g. Order accordingly.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024**

.....  
**R. NYAKUNDI**

**JUDGE**

