



REPUBLIC OF KENYA



KENYA LAW
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**Aamrin v Progressive Credit Limited (Civil Suit E423 of 2025)
[2025] KEMC 167 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEMC 167 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT E423 OF 2025
PA NDEGE, SPM
JULY 29, 2025**

BETWEEN

FATHIMA AAMRIN PLAINTIFF

AND

PROGRESSIVE CREDIT LIMITED DEFENDANT

RULING

1. By Notice of Motion dated 12th May, 2025, the Applicant herein seeks the following substantive orders:
 - i. That pending the hearing and determination of the main suit, this Honorable Court be pleased to issue a temporary injunction restraining the Respondent from advertising, auctioning, disposing, or otherwise interfering with the suit property, Kiambogo/Kiambogo Block 2/799 (Mwariki).
 - ii. That the Honorable Court be pleased to issue an order compelling the Respondent to provide a full and accurate loan statement showing the true status of the Applicant's loan account from inception to date, including all disbursements, repayments, interest charged, and penalties, if any.
 - iii. That this Honorable Court to declare that the interest charged and demanded by the Respondent is illegal, unconscionable, and in violation of the in duplum rule as provided for under Kenyan law, and any amount exceedingly twice the principal sum should not be recoverable.
 - iv. The costs of this Application be provided for.
2. The notice of motion is brought under Order 40, rules 1, 2 and 4 of the Civil Procedure Rules, 2010, and section 3A of the *Civil Procedure Act*. The application was based on the following grounds and is supported by the affidavit of Fathima Aamrin sworn on 12th May 2025: -



- i. The Applicant entered into a legally binding loan agreement with the Respondent vide an Offer Letter dated 20th January 2023, for a sum of Kshs. 3,194,362, which was secured by a legal charge over the Applicant's property known as Kiambogo/Kiambogo Block 2/799 (Mwariki).
 - ii. The Applicant diligently serviced the loan by making regular and partial payments until she suffered financial hardship and was unable to continue consistent repayment during part of 2024.
 - iii. Despite the temporary interruption, the Applicant resumed payments and is now willing and able to continue with her obligations under a revised repayment plan.
 - iv. The Respondent has arbitrarily and without just cause demanded an alleged outstanding loan balance of Kshs. 8,666,390, an amount which is more than double the principal sum advanced to the Applicant, despite evidence of substantial payments.
 - v. The purported computation of interest and penalties by the Respondent grossly violates the in duplum rule, which bars a creditor from recovering interest that exceeds the amount of the principal once a loan goes into default, as provided for under section 44A of the [Banking Act](#) and the principles laid out by the courts in Kenya.
 - vi. The Respondent has since issued threats to auction the Applicant's charged property through auctioneers, without issuing the mandatory statutory notices as required under Sections 90 and 96 of the Lands Act, thereby rendering the process illegal, irregular, and procedurally flawed.
 - vii. The planned auction is scheduled to be carried out imminently, and unless restrained by their Honorable Court, the same shall render the intended suit and this application nugatory, cause irreparable harm to the Applicant, and deprive her of her only residential and economic asset.
 - viii. The balance of convenience tilts in favour of the applicant who is not evading repayments, but rather challenges the illegality of the interest demanded by the Respondent and seeks a fair opportunity to resolve the dispute.
 - ix. This Application has been made in good faith and without unreasonable delay, and it is in the interest of justice that the orders sought be granted.
3. It is thus the plaintiff's case that she took a loan from the Respondent, a limited liability company, for the principal amount of Kshs. 3,194,362, via an Offer Letter dated 20/01/2023, which was exhibited herein as FAA-1. That she charged the suit land herein as security for the loan. That she has made several payments towards the said loan and that she is not in total default, save for a brief period when she was in financial distress in the latter half of 2024, caused by economic hardship and ill-health, which temporarily affected her ability to meet the loan obligations consistently. That she has however since resumed making payments on the loan from early 2025, and has continuously engaged the Respondent in good faith to reach an amicable settlement on the outstanding amount. She mainly complains that the balance demanded for by the Respondent is almost triple the original principal sum and which she categorically state is false, exaggerated and legally unsustainable. That the same is in violation of the in duplum rule, a legal principle embedded in Section 44A of the [Banking Act](#) which provides that once a loan becomes non-performing, the interest recoverable on the outstanding loan shall not exceed the principal sum due at the time of default. That unless this court intervenes and grant the prayers sought, she shall suffer irreparable loss and prejudice that cannot be compensated by way of damages, as the property is not only of substantial value, but also serves as her only family home and source of livelihood.



4. In response to the application herein, the defendant/ respondent filed a Replying affidavit contesting the Plaintiff's claim and asserting its right to dispose of the security herein so as to realize the loan arrears herein as per the offer-cum-loan facility agreement between it and the plaintiff herein, which it exhibited as PCL 02. That as per Clauses 3 and 4 of the Offer letter-cum-loan agreement, the terms of the loan were that it was to attract interest at a flat rate of 4.5% per month payable in 12 equal monthly instalments comprising of both the principal and interest of Kshs. 409,950 each. That the repayments were expected on 01st of every month starting from 01/03/2023 and ending on or about 01/02/2024 in the event of non-default. That further, as per clause 5 of the offer letter-cum-loan agreement, in case of default, a default interest of 2% of the principal amount per month is charged. That Clause 14 of the same letter of offer-cum-loan agreement illustrates events that constitute default in loan repayments and cause any amount outstanding under the proposed facility to become immediately due and repayable immediately in full without any set off or commitment whatsoever. That the events inter alia includes: -
- a. Upon any of the cheques issued by the borrower being dishonored and the subsequent failure of the borrower to remedy the same within 24 hours from the date of dishonor by paying the bounced cheque charges along with the cheque amount in full,
 - b. The failure of the borrower to observe or perform any other obligations under this letter and/ or the security documents;
 - c. Any of the borrower's indebtedness is not paid on its due date.
5. That Clause 12(b) of the loan agreement further provides that bounced cheques are charged a further Kshs. 8,000/- plus 4% of the Cheque amount to a maximum of Kshs. 30,000/-. That the plaintiff/ applicant accepted the said letter of offer voluntarily by signing it and returning it to the defendant/ respondent as per Clause 19 of the said letter of offer-cum-loan facility agreement. That the plaintiff/ applicant however defaulted in payments by non-payment and issuing bounced cheques against the contractual terms and their outstanding loan balance as at 01/06/2025 stands at Kshs. 9,250,016.40 and continues to accrue. It exhibited the Loan Statement as PCL 05 showing the defaulting patterns in terms of non-payment of the amount due and issuing bounced cheques thus creating penalties and interest accrued thereto. That from the loan statement provided, the plaintiff/ applicant has only paid a total of Kshs. 960,000, as per paragraph 17 of the Replying Affidavit. That in all of the 11 remaining repayments attempts, the plaintiff/ applicant issued bounced cheques, as listed in paragraph 18 of the Replying Affidavit. That in addition to the accruing contractual interest of 4.5% per month, the bounced cheques continued creating loan defaults thus continued to attract default penalties of 2% of the principal very month, being Kshs. 95,830.90 every month. That the same rightful interest in the suit property as the bounced cheques further attracted bounced cheque charges as per the provisions of Clause 12(b) as aforesaid, being Kshs. 8,000 plus 4% of the Cheque amount to a maximum of Kshs. 30,000 which in this case yields the bounced cheque charges indicated in the loan statement over each of the bounced cheques listed in paragraph 17 of the Replying Affidavit and as further highlighted in paragraph 20 of the same affidavit. That due to these defaults and their consequences as aforesaid and as tabulated in the loan statement, the outstanding loan balance as on 01/06/2025 stands at Kshs. 9,250,016.40 and continues to accrue as per the provisions of the loan agreement. That due to this glaring breach of contract, the defendant/ respondent issued a demand letter dated 08/03/2023 and thereafter statutory notices in commencement of its power of sale, where a 3-month statutory notice dated 20/12/2024 was issued to the plaintiff/ applicant pursuant to section 90(1) of the Land Act, 2012, having been posted on 21/12/2024. The demand letter, the 3 months statutory notice and the corresponding postage stamp were respectively exhibited herein as PCL 06, PCL 07 and PCL 08. That further, a 40 days' notice to sell dated 11/04/2025 was issued by the defendant/ respondent to the



plaintiff/applicant pursuant to section 96(2) of the Land Act 2012. The same and its postage stamp were respectively exhibited herein as PCL 09 and PCL 010. That this application is therefore unmerited due to the glaring evidence of breach of contract through defaulting and issuing of bounced cheques, and with the presence of security availed and charged by the defendant/respondent as per the laid down legal procedures, having the charge duly executed by the plaintiff/applicant and having proper notices given to the plaintiff/applicant. That this court should therefore be pleased to allow the auction process to go on since it is not the duty of the court to rewrite contracts between parties.

Applicant's Submissions

6. Learned counsel for the Plaintiff/ Applicant submitted on the principles to be considered in an application for temporary injunctions such as the one herein as enunciated in the case *Giella -vs- Cassman Brown & Company Limited* [2017] EA 358 are whether there a prima facie case, whether the applicant stand to suffer irreparable harm and which side the balance of convenience lie?
7. As to whether there is a prima facies case, learned counsel relied on the provisions of Section 44A (1) of the Banking Act, the in duplum rule, which provides that an institution shall not in the course of providing a loan to a borrower recover, whether by way of interest or otherwise, an amount exceeding the principal amount lent. He therefore submitted that the defendant's claim of Kshs. 9,250,000 is illegal, oppressive and contrary to public policy, and that no auction should be permitted on the basis of an unlawful debt.
8. On the test of irreparable harm, learned counsel referred the court to the decision in the case of *Mrao Ltd vrs First American Bank of Kenya Ltd & 2 Others* [2003] e KLR where the court held that irreparable injury means that the injury must be one that cannot be adequately compensated in damages. learned counsel therefore submitted that the intended auction herein will render the entire suit nugatory, stripping the plaintiff of the very subject matter of the dispute. Learned counsel further submitted that the balance of convenience lies in preserving the property until the dispute is heard and determined on its merits.

Respondents' Submissions

9. The defendants/respondents, through their counsel Musamali & Associates Advocates, filed their submissions dated 09th day of June 2025. Learned counsel submitted that the plaintiff/ applicant's application are baseless and meant to waste the court's precious time. That the plaintiff/applicant has failed to point out the discrepancies alleged in the loan statement. That they have sought equity with dirty hands because of their defaulting in loan repayments and thus are not bona fide litigant but busy bodies intended to waste the court's time. That the defendant/ respondent's replying affidavit is robust and well documented, demonstrating a clear breach of contract by the plaintiff/applicant by way of nonpayment and issuance of bouncing cheques. That despite being fully aware of the loan terms, including the interest rate and penalties for default, the plaintiff/applicant failed to comply with the repayment schedule, resulting into a breach of contract which led to financial losses to the defendant/ respondent. That thus both the application and the substantive suit have zero chances of success. That it is therefore just and equitable for this Honorable Court to dismiss the plaintiff/ applicant's application with costs to the defendant/ respondent.

Determination

10. After considering the application, replying affidavit and submissions, I do concur with the plaintiff/ applicant herein that the following issues arise for determination:



- i. Whether the plaintiff/ applicant has met the criteria for the grant of an order of temporary injunction pending hearing and determination?
- ii. who shall bear cost of application?

Whether the plaintiff/ applicant has met the criteria for the grant of temporary injunction pending hearing and determination?

11. The guiding principles for grant of orders of temporary injunction are set out in the case of *Giella vrs Cassman Brown*, supra, and reiterated by the Court of Appeal in the case of *Nguruman Limited vrs John Bonde Nielsen & 2 Others C/ A No 77 of 2012* where it was held as follows: -

In an interlocutory injunctions application, the applicant has to satisfy the triple requirements to establish his case only at

- (a) prima facie level
- (b) demonstrate irreparable injury if a temporary injunction is not granted and
- (c) allay any doubts as to b, by showing that the balance of conveniences is in his favor. These are the three pillars on which rest the foundation of any order of injunction, if it is established that all the above three condition and states are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially

12. The plaintiff has to first demonstrate that he has a prima facie case. The court in *Mrao LTD vrs First American Bank of Kenya LTD (2003) eKLR* stated as follows on what constitutes a prima facie case: -

...in the civil case, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by opposite party as to call for an explanation or rebuttal from the latter

13. On this issue of whether a prima facie case has been established or not, I have gone through the evidence presented herein, and I do agree with the learned counsel for the defendants' submissions, that the evidence so far tendered by the respondent in the application herein is uncontroverted. The loan statement has not been challenged in any way and it proves that the plaintiff substantially breached the terms of the contract, she voluntarily entered into with the defendant, as to the repayments of the loan amount advanced to an extent of issuing bouncing cheques. Thus the penalties and interest as per the loan agreement appear valid after all.

14. On the applicability of the in duplum rule, I again agree with the learned counsel for the defendant/ respondent that the rule might not be applicable herein, give that the defendant has not been described to be a banking institution with powers to accept and receive deposits, before lending the same. The decision of Justice D. S. Majanja in *Momentum Credit Limited vrs Kabuiya [2022] KEHC (KLR)* on the issue is binding on me. In the case, the learned judge stated as follows: -

13. For purposes of section 44 of the *Banking Act*, it must be established that the appellant is a bank or financial institution. It is not in dispute that the appellant is neither a bank nor mortgage finance company. In order to qualify as a financial institution, the appellant must either be gazetted as such by the Minister or be one that carries on or proposes to carry on financial business as defined under the *Banking Act*. In order to qualify as a financial institution, it must accept money on deposit from members of the public and employ that money or part of it for lending or investment as contemplated under the Act. The appellant's witness clearly stated on



cross-examination that the appellant was not a deposit taking institution while the respondent did not provide evidence to the contrary or show that it is gazetted under the law in order for it to fall under the ambit of the Act. ...

...While it is true that a micro-finance institution is regulated by the Central Bank of Kenya such regulation is subject to the law. In this respect, the regulation of interest rates is governed by section 44 of the [Banking Act](#) which I have shown is very specific as to its application which does not include the Appellant. Further section 33B of the [Banking Act](#) was repealed by the Finance [Act No 23 of 2019](#).

15. As to whether the defendant herein may be a bank or a microfinance institution, the learned judge went ahead to reason as follows while referring to a case involving a similar institution as the defendant herein: -

15. The respondent has referred to Francis Mbaria Wambugu v Jijenge Credit Limited and another KBU No 145 of 2019 [2020] eKLR where the court seemed to suggest that a microfinance institution operating under [Microfinance Act](#) is not exempt from section 44 of the [Banking Act](#). The court stated as follows,

“The 1st respondent though a registered as a microfinance institution [see annexure JCL 1] under the [Microfinance Act](#) to operate as a financial institution is on the face of it not exempt from the provisions of section 44A of the [Banking Act](#)”.

I use the word suggest advisedly because the matter before court was an application for an interlocutory injunction and the court was not making a conclusive determination on the matter hence the use of the phrase, “on the face of it”. Further, the court did not consider the wording of both statutes to make the determination.

16. I thus do agree with the learned counsel for the defendant/respondent that there is no evidence at this stage that the defendant herein is not a non-deposit taking lending institution, thus not regulated by neither the Central Bank of Kenya nor the [Banking Act](#) Cap 488 of the Laws of Kenya, hence the in-duplum rule in section 44A of the [Banking Act](#) appears not to apply to it. I have arrived at this conclusion upon considering the applicable law and found and hold that the said section 44A aforesaid appears not to apply to the relationship between the applicant and the respondent. The irresistible conclusion at this prima facie stage is that the rate of interest in the circumstances is governed by contractual provisions which are not disputed and not the in duplum rule.

17. Moreover, the Court of Appeal in Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2020] KEHC 7181 (KLR) observed as follows:

It is not for the court to rewrite a contract for the parties. As this court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd Civil Appeal No 95 of 1999:

“a court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract. Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.’



18. I am bound by the statement of law explained by the Court of Appeal. The substantive unconscionability relied on by the applicant appears to be based on breach of the section 44A of the *Banking Act* which I have found appears not to be applicable to this case. Since the applicant did not deny the loan agreement and its terms and the fact that she had defaulted, I see no need to interfere with the respondent's rights to enforce the terms of the contract herein at whatever stage and as per the contract.
19. As this court cannot re-write the contract for the loan facility herein that was entered into between the parties and the plaintiff/applicant in this case having expressly confirmed that she has defaulted by way of non-payment and by way of issuing bounced cheques, I do find that she has approached equity with unclean hands and therefore appears to have no chance of success herein, and a zero probability of suffering any irreparable loss if the orders sought are not granted. The consequences of breach of the contract herein were well known to her when she provided security of her land parcel being the suit land herein as security.
20. I thus do hereby dismiss the application herein for not having met the threshold for the grant of the orders of temporary injunction; or any of the other orders sought for herein.

Who shall bear cost?

21. The general rule is that costs follow the event in accordance with provision of section 27 of the *civil procedure Act*. A successful party should ordinarily be awarded cost of an action unless the court, for good reasons, directs otherwise. Therefore, the defendant/ respondent is awarded the costs of this application.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 29TH DAY OF JULY, 2025

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Present for Plaintiff/ Applicant: Mwaura

Present for Defendants/ Respondents: Musamali

Plaintiff/ Applicant: n/a

Defendant/ Respondent: n/a

