



REPUBLIC OF KENYA



**Orengo v Progressive Credit Limited (Civil Appeal E034 of 2024)
[2026] KEHC 391 (KLR) (23 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E034 OF 2024
AK NDUNG’U, J
JANUARY 23, 2026**

BETWEEN

JOHN PAUL ORENGO APPELLANT

AND

PROGRESSIVE CREDIT LIMITED RESPONDENT

*(Appeal from the judgment and decree passed on 11/09/2024 in
Nanyuki CM Civil Case No. E134 of 2021- Kithinji AR (CM))*

JUDGMENT

1. The Appellant instituted a suit against the Respondent vide a plaint dated 02/12/2021 seeking for a mandatory injunction to compel the Respondent to discharge and release Appellant’s logbook for motor vehicle registration no. KBM 371G and a permanent injunction restraining the Respondent from repossessing and selling properties described in the proclamation notice dated 17/11/2021.
2. It was averred that on or about September 2019, the Appellant was advanced a loan facility of Kshs.100,000/- which was secured by the aforementioned motor vehicle. That on 18/06/2020, he fully settled the loan but the Respondent declined to discharge him and release his logbook. That on 27/11/2021, he was issued with a proclamation notice asserting that he owed the Respondent a sum of Kshs.283,000/- despite fully settling the loan.
3. The Respondent filed a defence and counterclaim dated 08/12/2021. The Respondent averred that the loan was to be repaid within 6 months from 20/10/2019 until 20/03/2020 but the payment by the Appellant was irregular and below the required amount which necessitated it to issue a demand notice dated 23/11/2019. That the proclamation notice was issued after the Appellant failed to heed to the demand.
4. In the counterclaim, the Respondent averred that the Appellant was in breach of the conditions of the offer letter and particularized particulars of breach on the part of the Appellant. The Respondent



- therefore prayed for the repayment of the outstanding loan amount in the sum of Kshs.233,000/- as at 07/01/2021, interest on the outstanding loan balance at the contractual rate of 11% per month from 07/12/2021 until payment in full, general damages for breach of contract and order directing the Appellant to surrender the motor vehicle.
5. The matter proceeded for hearing with parties calling one witness each.
 6. Vide a judgment delivered on 11/09/2024, the learned magistrate dismissed the Appellant's case with costs and allowed the Respondent's counterclaim as prayed.
 7. Being aggrieved by the said judgment, the Appellant lodged this appeal appealed to this court vide a memorandum of appeal dated 08/10/2024 raising the following grounds;
 - i. The learned magistrate erred by entering judgment in favour of the Respondent and awarding it outstanding balance, interest and penalties which were unconscionable, illegal and in breach of 'in duplum rule'.
 - ii. The learned magistrate erred when he awarded the Respondent reliefs sought in the counterclaim thus leaving the Appellant without a remedy.
 - iii. The learned magistrate erred by holding that the Appellant raised the issue of interfering with the contract during submissions contrary to the record.
 - iv. The learned magistrate erred when he failed to find that the Appellant had proved his case on balance of probability.
 - v. The learned magistrate failed to consider the evidence on record, submissions and judicial decisions relied on by the Appellant.
 8. The appeal was canvassed by way of written submissions. The Appellant's counsel argued that according to the Respondent, the Appellant is supposed to pay Kshs.387,300/- which is against the in duplum rule. That having borrowed Kshs.100,000/-, the loan together with any interest and penalties charged would only accrue up to Kshs.200,000/- as per the in duplum rule. On whether section 44 of the Banking Act is applicable to the Respondent, he relied on *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation (2019) eKLR*; *Mugure & 2 others v Higher Education Loan Board (2022)* and *Jelangat & another v Mwananchi Credit Limited & another (KLR)*. He submitted that from the above authorities, the in duplum rule is meant to protect borrowers from all lenders regardless whether they are banks or not.
 9. He submitted that the trial court ordered him to pay the outstanding loan together with interest which continues to accrue which means that he will have to pay a total of Kshs.451,075/-. That out of loan of Kshs.100,000/-, the Respondent would therefore earn interest in the sum of Kshs.351,075/- which is in breach of in duplum rule. That the trial court ordered him also to surrender his motor vehicle despite ordering him to pay the outstanding amount together with interest leaving him without a remedy. Further, the issue of interfering with the contract was raised in reply to defence and counterclaim. The contract was also illegal having rates which were against the in duplum rule and rendered it difficult for him to repay the loan since it meant that if he defaults, the penalties and interest payable was much higher than the loan. Further, the interest on the outstanding amount is also almost equal to the amount borrowed. Hence the contract was illegal and shall lead to unjust enrichment. He submitted that the Appellant proved that he paid Kshs.154,000/- being the amount due hence he proved his case.
 10. The Respondent's counsel also filed written submissions. On allegation that the Appellant settled the entire loan on 18/06/2020, he submitted that the payment was erratic and a demand letter was issued but the Appellant ignored the demand resulting into accrual of interest and penalties. Hence, there



was no full payment and default persisted throughout the loan term. The Respondent was also entitled to repossess the motor vehicle being the charged asset upon default but the Appellant deliberately frustrated the recovery of the vehicle by disabling vehicle's tracking device and denying access which was a fundamental breach of the agreement.

11. On the issue of in duplum rule, the Respondent's counsel submitted that the Respondent is not a financial institution within the meaning of the *Banking Act*, as it neither accepts deposits from members of public nor employ such funds for lending or investment as contemplated under the Act. That there is no evidence that the Respondent falls within the statutory framework of a licensed or gazetted institution under the Act as was held in *Progressive Credit Limited v Ibido* (Civil Appeal E514 of 2023) [2024] KEHC 7902 (KLR). The assertions that the *Banking Act* applies to all lending institutions is a misapprehension of the law and therefore, section 44 of the Act was not applicable to contractual relationship between them.
12. On unconscionability of the contract, he submitted that the Appellant failed to make payments between 20/10/2019 and 20/03/2020 and there was no variation of the contract to suspend the accrual of interests and penalties. That he only paid a one-off payment of Kshs.154,000/- which did not fully settle the outstanding debt. That he cannot create a crisis through his non-compliance and then seeks court's intervention to shield him from the contractual consequence of his breach. That no element has been demonstrated to render the contractual obligations or reliefs granted illegal, oppressive or unconscionable. That the Appellant acquiesced to the contractual consequence of default and has not shown factual basis to challenge the outstanding sum, accrued interest save for the reliance on the in duplum rule.
13. On the contention that the trial court failed to consider Appellant's submissions, he submitted that courts have held that there is no substance in a ground of appeal for not considering submissions unless the submissions would have affected the result. Further, failure to agree with his submissions does not mean that there were not considered.
14. I have considered the parties submissions together with the authorities relied thereon. This being a first appeal, the duties of an appellate court were well enunciated in the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 in the following terms:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
15. From parties' submissions, the main issue for determination is whether the in duplum rule is applicable to the Respondent.
16. It is not in dispute that the Respondent advanced a loan facility of Kshs.100,000/- to the Appellant on 18/09/2019 which was secured by Appellant's motor vehicle registration no. KBM 371G. According to the offer letter, the loan was repayable in 6 monthly instalments comprising of both the principal and the interest amounting to Kshs.22,670/- on 20th of every month starting on 20/10/2019. The Appellant's case is that he paid a total of Kshs.154,000/- which means that he had repaid the whole



loan advanced together with interests and penalties. The Respondent contention on the other hand is that the Appellant defaulted in servicing the facility as his payments were irregular and fell below the agreed monthly instalments and failed to remedy the arrears despite being issued with the notice. That the Appellant made a single lump sum payment of Kshs.154,000/- on 08/06/2020 which was outside the stipulated repayment period. That as at 07/12/2021, the outstanding loan balance, inclusive of the accrued interest and penalties stood at Kshs.233,000/-.

17. The Appellant submitted that the amount that he should have paid, together with the interest should not have exceeded Kshs.200,000/- according to the in duplum rule. The Respondent's contention on the other hand is that it is not a financial institution within the *Banking Act* and no evidence has been advanced to the contrary hence, the in duplum rule is inapplicable to the contractual relationship between them.
18. The in duplum rule basically limits the amount a bank or financial institution may recover from a non-performing loan. It stems from Section 44A of the *Banking Act* which provides that: -
 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”
19. The rationale for this rule was elucidated in the case of *Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation (2019) eKLR* 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”.
20. There has been a controversy on whether the in duplum rule applies to microfinance and the like with courts of equal status having different opinions. For example, the court in *Momentum Credit Limited v Kabuiya [2022] KEHC 13705 (KLR)* held that;

“For purposes of section 44, 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..... The adjudicator held that by describing itself as a financial institution, the appellant brought itself under the ambit of the regulation under the applicable statutes. I reject this finding as the issue whether



the appellant is regulated is not a matter of pleading or choice. It is therefore clear that the adjudicator failed to consider whether the appellant was subject to section 44 of the *Banking Act*. On my part and having considered the applicable law, I find and hold the said section 44 aforesaid does not apply to the relationship between the appellant and the respondent. The irresistible conclusion is that the rate of interest in the circumstances is governed by contractual provisions which are not disputed.”

21. Also, in *Salene Credit Limited v Karanja & another* [2025] KEHC 5183 (KLR) the court opined that;

“The Appellant has submitted that it is not a financial institution, and no other evidence to the contrary, has been provided to show that the Appellant falls within the scope of the *Banking Act*. In the absence of any such evidence, and given that the regulation of interest rates is governed by Section 44(a) of the *Banking Act* this court concludes that the interest rate applicable to the loan agreement between the Appellant and the Respondent is that governed by the contractual provisions, which I note has not been disputed.”

22. On the other hand, the court in *Samoei v National Housing Corporation (NHC) & another* [2024] KEHC 14300 (KLR) held thus;

“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.” ...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. 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. 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. 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....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.”



23. In *Jelangat & another v Mwananchi Credit Limited & another* [2023] KEHC 19922 (KLR) the court held that;

“This court reiterates the foregoing here. In its opinion, the in duplum rule was a principle that was imported into our laws to address a social and public interest issue wherein lenders would target defaulters as profit making machines. The rule is an answer to the need to have a reprieve for borrowers by doing away with exploitation through ensuring that lenders, be they banks, unregulated institutions or private lenders, are motivated to recover debts owed at the earliest opportunity and are limited in what they can recover. In this regard, I hold that the rule is not only applicable to banks and financial institutions under the *Banking Act* but it extends to all lenders. A narrow interpretation of the application of the rule will defeat justice. It will be discriminatory in that, those who borrow from banks will enjoy greater protection leaving those borrowing from elsewhere exposed. Borrowing is borrowing and it would be inequitable for one group in society to be treated differently. The 1st defendant lends money to Kenyans against collaterals and recovers the same at an interest. Being a lender who earns an interest, the same is subject to the rule. This court is not the first to arrive at a similar finding.....The upshot is that the in duplum rule is applicable to the 1st defendant. Consequently, once the 10% per month interest was applied and the amount due surpassed the principal amount, it contravened the rule.”

24. It is trite that courts do not re-write contracts for parties but they may intervene where contractual terms are illegal, unconscionable, oppressive or contrary to public policy. In my view, this court must defer to freedom of contract but must be guided by principles of fairness and equity as well as public policy. While it is true that parliament has so far not enacted law that directly caps interest in where lenders not governed by the *Banking Act* are concerned, the public policy and public interest behind the enactment of Section 44 of the *banking Act* must transcend to non-banking institution that are not governed by the Act. The mischief that the Act sought to cure cannot be allowed to thrive merely by a party who lends money claiming that its not a deposit taking body.

25. True, every business entity is in business to make money. As held in *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* [2001] Eklr, A court of law cannot re-write a contract between parties and parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

26. Courts will intervene, however, where enforcement of the contract would result in injustice due to unequal bargaining power or unconscionable conduct. In *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd* [2014] eKLR, the court held that courts may decline to enforce terms that are oppressive or unconscionable, particularly in lender borrower relationships. The court of Appeal in *Kenya Commercial Bank v Osebe* [1982] KLR acknowledged the court's equitable jurisdiction to restrain unconscionable enforcement of contractual rights.

27. On my part I cannot find a better exemplification of an unconscionable contractual term than one in a contract where a party is required to pay more than double the principal sum borrowed. Parliament in its wisdom was alive to this when enacting Section 44 of the *Banking Act* and I see no reason why, applying known tenets of justice and equity, the public policy, public interest and equitable principles behind Section 44 of the *Banking Act* should not apply in this matter.

28. I have reviewed the evidence as obligated of this court, it being the first appellate court. There is no dispute that the Appellant was advanced monies by the Respondent. Evidence also shows that the Appellant did not repay the monies strictly within the terms of the contract. Following my earlier



analysis, it would be unconscionable to have the Appellant pay a total of Kshs. 387,000, a sum more than 3 times the principal amount, of which Ksh. 233,000 is in the form of accrued interest and penalties and which continues to accrue interest.

29. There is evidence that the Appellant has paid Ksh 154,000 to the Respondent. My evaluation of the evidence shows that the Appellant did not repay the loan instalments strictly within the agreed schedules. The monies were, as admitted by the Appellant, to be repaid within 6 months from 20.10.19 to 20.3.20. The exhibited statement of account shows that the Appellant made 3 payments of Kshs. 50,000, Kshs. 50,000 and Kshs. 54,000 on 18.6.2020. This was contrary to the monthly payment arrangements envisaged in the contract. The Appellant was thus liable to pay any interest and penalties accrued subject to the same, as per the analysis above, not exceeding double the principal sum, thus the principal sum, interest and penalties would not exceed Kshs 200,000. The taking of proper accounts, though not a prayer sought by either of the parties becomes necessary to ascertain any monies due as penalties and interest since it is clear the loan was not repaid on schedule.
30. In light of the above, I find merit in the appeal. I set aside the judgement an order dismissing the Plaintiff's suit and substitute thereof an order allowing the appeal to the extent particularised hereunder. For reasons stated here before, the Counter Claim is dismissed.
31. With the result that the appeal allowed and I make the following orders;
 1. A declaration that the proclamation of attachment/repossession of movable property by the Defendant's m/s Antotech Auctioneers dated 17 the November 11 is irregular, and null and void for being based on incorrect sums due.
 - b. That accounts be taken in strict adherence to the contract terms.
 - c. A mandatory injunction do issue compelling the Defendant to discharge and release Plaintiff's logbook of Motor Vehicle Registration No. KBM 371 G retained as a security a loan subject to payment by the Appellant of any sums due after the taking of accounts which sum shall, in any event, not exceed a total sum of Kshs. 200,000 being the total of the principal sum, penalties and interest.
 - c. In the circumstances of this appeal, each party is to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 23RD OF JANUARY 2026.

A.K. NDUNG'U

JUDGE

