In Duplum Rule in Kenya: A Critical Analysis of the Unaddressed Aspects of Section 44A of the Banking Act

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Abstract

Amendment No. 9 of 2006 of the Kenya Banking Act introduced the in duplum rule into Kenyan legislation. The rule provides that with respect to non-performing loans, only the principal owing when the loan becomes non-performing; contractual interest not exceeding the principal owing when the loan becomes non-performing; and expenses incurred in the recovery of any amounts owed by the debtor may be recovered. This statutory rule has its roots in South African common law. Kenyan jurisprudence has demonstrated a divergence from interpretations of the rule as per other jurisdictions where the rule has a long standing history such as South Africa. This is indicative of a misnomer which upon further interrogation reveals that Section 44A of the Banking Act is merely a semblance of the in duplum rule and not the in duplum rule stricto senso. The aim of this paper is to scrutinise the rule while making reference to South Africa, without carrying out a full comparative analysis, in a bid to address the issue of whether our enactment of the in duplum rule will effectively serve the purpose for which it was enacted; the protection of debtors.

I. Introduction

The *in duplum* rule is a rule of law which provides that when interest on a debt equates to the capital of the debt, interest ceases to continue accruing.[1] It seeks to protect the debtor from exploitation by credit institutions. Having the objective of protecting borrowers from finding themselves entwined in a thread

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1 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule' 19 *South African Mercantile Law Journal* (2007), 337 – 345.

of debt that they cannot untangle; it has been generally described as being protective.[2] So great is this principle that it draws its roots from the Code of Hammurabi[3] in 1800 BC that forbade a collection of interest greater than that which was lawfully due.[4]

This rule made its way into the legal framework of the financial service sector via Section 44A of the Banking Act[5] which stipulates the maximum that an institution can recover from a debtor with respect to a non-performing loan.[6] Although this law seeks to provide protection to debtors from their creditors, it has some ambiguities that if not addressed, may hinder the objective of the law.

Kenya's legislation that introduces this consumer protectionist rule seems to borrow from both the common law *in duplum* rule and the statutory *in duplum* rule. There is a stark difference between the two and this divergence of concepts may lead to different applications of the rule and consequently, conflicting application of the law as shall be discussed later on in this article.

The key issue to be addressed is whether Section 44A of the Banking Act sufficiently protects the consumer of credit and whether it is detrimental to credit providers as well as credit consumers. This is premised on the hypothesis that Section 44A merely enacted a semblance of the *in duplum* rule and as such, will not be able to serve the intended purpose for which it was enacted.

A *prima facie* comparison of the *in duplum* rule applied in Kenya vis-à-vis that implemented in South Africa[7] reveals a variance in interpretation of the rule meant to ease the chokehold that financial institutions would have on debtors. Perhaps this is because the rule in Section 44A of the Banking Act is merely an illusion of the *in duplum* rule. The ramifications of this would be heavily felt by borrowers who would discover that the rule meant to shield them from overexploitation by lenders may actually leave them exposed.

Addressing the obscurity surrounding this rule will render clarity on a number of potential issues that may arise. This can only be done after interrogating the mischief that the rule was meant to address and evaluating whether or not it

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2 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule', 337-345

3 The Code of Hammurabi is considered to be one the earliest depictions of what is commonly known as statute today as depicted in Slanski K, 'The Law of Hammurabi and its audience' 24 *Yale Law Journal of Law and the Humanities* (2012), 1.

4 Homer S and Sylla R, *A history of interest rates*, John Wiley & Sons, New Jersey, 2005, 25.

5 Chapter 488, Laws of Kenya.

6 Amendment No. 9 of 2006.

7 South African jurisprudence is considered to be the bedrock of the *in duplum* rule. See generally, Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule', 337-345.

is capable of serving its purpose or whether it is a structure with a faulty foundation. This evaluation is approached through the lenses of consumer protection and safeguarding of creditors.

This article focuses on assessing the application of the rule to contracts that do not involve financial institutions as well as whether Section 44A (2) of the Banking Act provides an exhaustive list of elements that comprise the maximum amount that an institution can recover from a debtor with regards to a non-performing loan. Lastly, the article seeks to assess whether or not the rule stifles financial institutions under the pretext of consumer protection.

In order to adequately dissect and analyse Section 44A, a chronological approach has been adopted by the author. This begins with an introduction of the *in duplum* rule in Kenya and traces its legislative inception within the history of the Kenyan legal framework on governance of interest rates. This is then followed by a reference to South Africa, without a full comparative analysis, regarding the application of the *in duplum* rule. The outcome of the comparative study focuses on the restriction of the application of the *in duplum* rule regarding certain transactions and finally concludes with recommendations.

II. History of the Legal Framework on Governance of Interest Rates

i. Rationale for regulation of interest

> 'If a man begets a son…who lends at interest and exacts usury – this son certainly shall not live…he shall surely die; his death shall be his own fault.'[8]

Throughout history, the regulation of interest charged on loans has always been a bone of contention.[9] This has been so, to prevent usury – the practice of lending money to people at unfairly high rates of interest.[10] This regulation traces its roots back to the Code of Hammurabi dated 1750 BC which regulated the interest that could be charged on a loan.[11] The significance of this provision was to ensure that the borrower would not be extorted and hence, have his ag-

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8 Ezekiel 18: 13, *The African Bible*, Paulines Publications Africa, Nairobi, 1999.

9 Ackerman JM, 'Interest rates and the law: A history of usury' 61 *Arizona State Law Journal* (1981).

10 Oxford Advanced Learner's Dictionary, http://www.oxforddictionaries.com/definition/learner/usury on 30 October 2015.

11 Law 49, Code of Hammurabi.

ricultural produce suffer.[12] The Greeks shared similar sentiments regarding the regulation of interest. Both Plato and Aristotle believed usury was immoral and unjust. During the period of 800 – 600 BC the Greeks at first regulated interest, and then deregulated it. The consequences of deregulation were, *inter alia*, the creation of a colossal amount of unregulated debt as most Athenians had feeble pockets thus relied on loans from the wealthy that were accompanied by a hefty interest rate. The poor would then offer themselves as surety for the loan and upon default Athenians were sold into slavery.[13]

In the year 533 AD the Roman 'Code of Justinian' set a graduated maximum interest rate that did not go over 8.3% for loans to ordinary citizens.[14] Medieval Roman law treated those guilty of usury under stringent measures; they received a penalty of four times the amount taken whereas those guilty of robbery were fined twice the amount taken.[15]

Some drastic measures have been taken in the past such as doing away with interest charged on loans completely. As early as 325 AD the first general council of the Christian Church, the Council of Nicaea, passed a canon prohibiting usury by clerics and citing the Psalm 15.[16] Pope Leo the Great forbade clerics to take usury and declared laymen who take it to be guilty of 'shameful gain.'[17] It is important to understand that this stance had its root in the traditional Christian view that earning interest was a wrongful action equal to a sin. Christianity teaches that '…lend freely, hoping nothing nearby.'[18] The Islamic faith shares this doctrine as it prohibits lending money at an interest – *riba*.[19]

Such was a position that was adopted by Charlemagne in 800 AD as he outlawed interest throughout his Empire.[20] It can be seen that such an approach would have stemmed from the conception that interest charged on credit would easily be prone to abuse by credit providers. This perception must have been an

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12 Often the borrowers sought loans in relation to their agricultural produce as stated in Nagarajan KV, 'The Code of Hammurabi: An economic interpretation' 2 *International Journal of Business and Social Science*, 8 (2011), 111.

13 Ackerman JM, *'Interest rates and the law'*.

14 The History of Usury, 'Americans for fairness in lending' https://americansforfairnessinlending.wordpress.com/the-history-of-usury/ on 31 October 2015.

15 The History of Usury, 'Americans for fairness in lending'.

16 This particular psalm refers to conditions that must be met in order to gain admission into the kingdom of heaven and one of them is lending money without charging interest.

17 Homer S and Sylla R, *A history of interest rates*, 90.

18 Luke 6:35, *The African Bible*.

19 *Riba* is defined as lending money for interest without risk to the lender. Jones, *Islam and usury*, 1989

20 The History of Usury, Americans for fairness in lending, https://americansforfairnessinlending.wordpress.com/the-history-of-usury/ on 31 October 2015.

informed one as usurers were depicted in the lowest ledge in the seventh circle of hell – even lower than murders – by Dante in *The Inferno*[21] which he penned over a fifteen year period beginning in 1306.[22]

In the 18th century, the Church adopted a more tolerable approach towards interest-based lending.[23] Concurrently, the wave of capitalism promoted the lending of money at a 'cost' as it was argued that the lender shared in the risk of the borrower's venture and as such, was entitled to remuneration for the same.[24] The pursuit of self-interest and the right to own property are some of the objectives of the law if assessed through a capitalistic lens. This connotes an absence of a natural limit to the range of an individual's efforts in terms of profits – including interest.[25] This effectively means that persons ought to be permitted to recover any amount from their efforts so long as it is agreed upon by the parties.[26]

This is in contravention of the labour theory which postulates that one is entitled to the 'work of their hands'.[27] The absence of a limit on the amount of interest that can be recovered from an advancement of credit can easily lead to the extortion of weaker parties as seen in preceding paragraphs. Exorbitant interest may be charged or inequitable payment terms may be enforced by the credit provider to trap the credit consumer in a maze of unmanageable debt.[28] In this regard, an efficient law ought to protect the consumer's economic interests[29] yet at the same time, ought to be equitable to all parties.

ii. Attempts to regulate interest in Kenya: Donde Act

The Central Bank of Kenya (Amendment) Act[30]– commonly referred to as the Donde Act – was a private member's Bill introduced in Parliament in 2001 to control bank interest rates. The Bill sought to peg bank interest rates to Treasury bill rates[31] as well as establish a monetary policy committee. This was an attempt

21 Hollander R and Hollander J (trans), *The Inferno by Dante*, Random House, New York, 2000.
22 Hollander and Hollander (trans), *The Inferno by Dante*, 14.
23 Olechnowicz CA, 'History of usury: The transition of usury through Ancient Greece, the rise of Christianity and Islam, and the expansion of long-distance trade and capitalism' 5 *Gettysburg Economic Review*, 7 (2011), 104.
24 Olechnowicz CA, 'History of usury', 105.
25 See generally Hessen R, *Capitalism*, The concise encyclopaedia of economics, Liberty Fund, 2008.
26 Hessen R, *Capitalism*, The concise encyclopaedia of economics.
27 Simmons AJ, *The Lockean theory of rights*, Princeton University Press, Princeton, 1994, 223.
28 Olechnowicz CA, 'History of usury', 104
29 This right is enshrined in Article 46, *Constitution of Kenya* (2010).
30 Act No. 4 of 2001.
31 This refers to the interest rate on the treasury bills. A treasury bill is a paperless short-term borrowing

to place reins on an already out of control banking system that had suffered the effects of deregulated interest rates due to the Banking Act of 1993.[32] Such deregulation was ignorant of the oligopolistic nature of the Kenyan banking system and had led to collusion between certain banks whose increased interest rates often resulted in the borrowers paying interest equating to the principle sum advanced or even more.[33]

The Donde Bill polarized debate between banks and external donors in one corner and Parliament in the other corner.[34] The donors had it in their interests to maintain the deregulated interest rates thereby safeguarding the exorbitant profits that banks would make from lending at such extortionist interest rates. This would translate into handsome returns that they received on their investments – the donor funds that had been invested in the banks.[35] Many Kenyans supported the Bill in its quest to curb the usurious habit of banks and scale down the suffering of Kenyan consumers of credit.[36]

Although the Kenya Bankers Association (hereinafter KBA) acknowledged the unfriendly interest rates, it opposed the Bill due to its retrospective application. The Act came into force on 6 August 2001 but its commencement date was 1 January 2001. KBA challenged the constitutionality of this provision as Section 77 of the repealed Constitution protected persons from retrospective application of criminal sanctions as it contravened their right to a fair trial. The High Court held that the provision on the retrospective application of criminal sanctions was unconstitutional.[37] Those provisions touching on the non-criminal civil aspects of the Donde Act were left intact. One of such integral provisions was that the maximum interest rate chargeable on all loans and advances from 1 January 2001 was 'the 91-day Treasury bill rate published by the Central Bank of Kenya on the last Friday of each month, or the latest published 91-day Treasury bill rate, plus 4 per centum'.[38]

instrument issued by the Government through the Central Bank of Kenya (as a fiscal agent) to raise money on short term basis – for a period of up to 1 year. https://www.centralbank.go.ke/index.php/financial-markets/treasury-bill on 31 October 2015.

32 Murunga GR and Nasong'o SW, *Kenya: The struggle for democracy,* Zed Books, Dakar, 2007, 291 – 292.

33 See generally Murunga and Nasong'o, *Kenya*, 293.

34 Murunga and Nasong'o, *Kenya*, 293.

35 Murunga and Nasong'o, *Kenya*, 293.

36 Murunga and Nasong'o, *Kenya*, 293.

37 Interest Rates Advisory Centre (IRAC), *Section 39 of the Central Bank of Kenya Act: The legal dilemma in Kenya's banking landscape*, 5.

38 IRAC, *Section 39 of the Central Bank of Kenya Act: The legal dilemma in Kenya's banking landscape*, 5.

This position was buttressed by Ochieng J in *Mohammed Gulambussein Farzal Karnali & Another v CFC Bank Limited & Garam Investments,*[39] where he stated that the Act had come into force on 1 January 2001 thereby connoting the validity of the Act notwithstanding those elements that had been declared to be unconstitutional. Furthermore, the Act provided that 'the maximum interest chargeable shall not exceed the principal sum, and that the Section should only apply to loans and advances made or renewed after commencement of the Act.'[40] It is important to note that the limitation on interest so as to ensure that it does not exceed the principal sum is a precursor to the *in duplum* rule.

One of the arguments advanced by the antagonists of the Donde Bill was that the measures the Bill sought to implement to regulate interest rates would have adverse economic effects. The IMF made an 'offer' to send experts to the Office of the Attorney General and to Central Bank; an offer whose refusal would be reciprocated with the withholding of aid.[41] At the same time, efforts to have Government regulate oil prices led to an outcry against the same by the United States with the then Ambassador to Kenya, Johnnie Carson, advising Kenyan MPs that, '*Credit, like petrol, is a commodity*' that would dry up if wrong laws and policies such as those being proposed were implemented.[42] Many classified this as modern colonialism.[43] Unfortunately, this Act was repealed and can be classified as a piece of still born legislation. Its true intended effects were never felt.

iii. Introduction of the in duplum *rule*

The *in duplum*[44] rule generally provides that unpaid interest ought to stop running once it equals the unpaid capital amount.[45] This, in principle, ought to prevent the consumer of credit from paying interest that is greater than the capital sum advanced to him/her.[46] This was introduced into the Kenyan legal framework regulating the banking sector via Section 17 of the Banking (Amendment) Act that resulted in the inclusion of Section 44A in the Banking Act.[47]

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39 HCCC No. 3 of 2006.

40 HCCC No. 3 of 2006.

41 Rugene N, 'MF tough stand on aid' *Daily Nation*, January 18, 2001.

42 Wahome M, 'US envoy opposes oil sector bill' *Daily Nation*, January 27, 2001.

43 Macharia M, *Historical reflections on Kenya: Intellectual adventurism, politics and international relations*, University of Nairobi Press, Nairobi, 2015, 25.

44 *Duplum* in English refers to 'double.'

45 *Commercial Bank of Zimbabwe v MM Builders and Suppliers PVT Ltd* 1997(2) SA 285 ZHC

46 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule' *The Journal of Consumer & Commercial Law* (2007), 20-24.

47 Chapter 488, Laws of Kenya.

The Section states that an institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to a maximum amount comprising the principal owing when the loan becomes non-performing; interest in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing and expenses incurred in the recovery of any amounts owed by the debtor.[48]

This not only clearly establishes when interest on a non-performing loan ought to stop running, but it also outlines the elements that comprise the recoverable sum from the debtor. This has, to some extent, carried out the intention of the Donde Act of ensuring that borrowers are not extorted into paying back more than double the principal amount accorded to them by credit-rendering institutions.

The 1972 reiteration of the rule by the South African Transvaal Provincial Division has often been quoted as being one of the most succinct that stated,

> '…for the statement that interest may not exceed the amount of the capital itself, as soon as the interest reaches an amount equal to the capital the interest ceases to run, if the accrued interest or a part thereof is paid, it starts to run again, but again only until it is again as high as the capital.'[49]

Interestingly enough, the terminology '*in duplum*' has been regarded as being technically incorrect as the rule itself prohibits charging of more than twice the capital. In *Commercial Bank of Zimbabwe v MM Builders (Pty) Ltd,*[50] Gillespie J states that the proper reference to this rule ought to be '*ultra duplum'*. This is because although the rule prohibits more than double the capital, it *allows* less than double; and only prohibits beyond double the capital amount when the interest is in arrears.[51]

There have been, however, numerous questions raised on whether the *in duplum* rule is fit for its intended purpose. It has been posited that its application in the Kenyan context may yield different results from those which it was intended to yield – the simultaneous protection of the debtor and safeguard of the creditor's interests. The reason for this assumption is that it was derived from the South African jurisdiction but was not fully adapted to the Kenyan context.[52]

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48 Section 44A, *Banking Act* (Chapter 488, Laws of Kenya).

49 *Stroebel v Stroebel* 1973 2 SA 137 (T).

50 1997 2 SA 285 292.

51 Vessio ML 'The effects of the *in duplum* rule and clause 103 (5) of the National Credit Bill 2005 on interest' Unpublished LLM Thesis, University of Pretoria, 2006, 34.

52 See generally Khaseke GM, *Introduction of the in duplum rule in Kenya: A legal mechanism of equitable*

Certain distinctions[53] in its application in the Kenyan context vis-à-vis that of South Africa are visible and precipitate the question as to whether Section 44A of the Banking Act is indeed the codification of the *in duplum* rule *stricto senso* or whether it is a mere semblance of the same.

III. Comparative Study of Kenya and South Africa Regarding the Application of the in Duplum Rule

i. *Common law v statutory* in duplum *rule*

a. Common law *in duplum* rule

It is of utmost importance to note the existence of both the common law *in duplum* rule as well as the statutory *in duplum* rule. The former, as construed in South African law[54] and fortified through judicial precedence, provides that interest stops running when unpaid interest equals the outstanding capital amount. If the total amount of unpaid interest – both contractual and default interest, has accrued to an amount equal to the outstanding capital sum, the defaulting debtor must first start making payments on his loan again (and so decrease the interest amount), after which interest may once again accrue to an amount equal to the outstanding capital sum.[55]

The rule thus effectively prevents unpaid interest from accruing further once it reaches the unpaid capital sum. Even if interest is capitalised and interest is therefore charged on interest, the capitalised interest does not lose its character as interest and become part of the capital amount for purposes of applying the *in duplum* rule.[56]

Therefore, the common-law *in duplum* rule implies that the total amount of unpaid interest on a loan or credit transaction may accrue only to an amount equal to the outstanding capital sum and that all arrear interest ceases to run when that interest has reached the outstanding capital amount.[57] This rule was

distribution of resources or a poverty redistribution initiative?, 2008 http://kenyalaw.org/kl/index.php?id=1921 on 22 October 2015.

53 These differences shall be discussed in depth in the following chapters, particularly in Chapter 3.

54 It is important to consider the context of South African law as the *in duplum* rule has been part of their legal toolbox since 1830.

55 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule', 20.

56 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule', 20.

57 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule', 20.

fortified in the case of *Sanlam Life Insurance Ltd v South African Breweries Ltd*[58] where it was held that the *in duplum* rule only ought to apply to interest in arrears.

It is imperative to note that the rule does not mean that a creditor is prevented from collecting more than double the unpaid capital amount in interest. He or she is permitted to do so as long as he or she at no time allows the unpaid interest to reach the unpaid capital amount.[59] Nevertheless, if this escalation occurs, interest ought to immediately cease to accrue. Once payments on the account are again made and the interest element of the total amount owed is decreased, the interest can start running again until it equals the outstanding capital. It is thus clear that the rule only prevents the interest from running on a temporary basis and does not set a maximum amount of interest that may be charged.[60]

The common-law *in duplum* rule is not limited to interest on money-lending transactions. In fact, it applies with equal force to all types of contracts in which a capital sum is due by the debtor to the creditor and on which amount a specific rate of interest is payable. One such example is where a debtor owes money to a creditor under a contract of letting and hiring of work on which interest is payable.[61]

b. Statutory *in duplum* rule

The common-law *in duplum* rule has been codified into statute which is commonly referred to as the statutory *in duplum* rule.[62] One such example is that found in Section 103(5) of the National Credit Act of South Africa which states:

> 'Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in Section 101(1) (b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the defaults occurs.'[63]

The statutory *in duplum* rule has been argued by some to provide greater protection to the consumer of credit as it not only prohibits the incessant accrual of interest that surpasses the outstanding principal amount owed, but goes a step further to clearly outline the constituent amounts that accrue during the time that

58 2000 (2) SA 647 (W) at 652 G-I.
59 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule', 20.
60 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule', 20.
61 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule', 22.
62 KPMG, Correctly applying the *in duplum* rule, 2013.
63 Section 103 (5) National Credit Act (South Africa).

a consumer is in default under the credit agreement that may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the defaults occurs.[64]

Since Kenya's history does not point towards any application of the *in duplum* rule prior to the amendment made to the Banking Act, it will be taken that all references to the *in duplum* rule in a Kenyan context refer to the statutory *in duplum* rule. Certain practices synonymous with the banking industry such as the rule in *Devaynes v Noble*[65] (hereinafter the Clayton rule) and the capitalisation of interest have presented thorny questions with regards to the application of the *in duplum* rule.

c. Application of clayton rule to *in duplum* rule

The Clayton rule[66] is that payments towards running an account, such as a bank account, are applied to the earliest debt first. Thus, the most recently incurred charge is the last charge that will be paid off.[67] This is commonly referred to as 'first-in-first-out principle'. The pertinent issue regarding the Clayton rule is its concurrent application with the *in duplum* rule.

In S*tandard Bank of SA Ltd v Oneanate Investments (Pty) Ltd,*[68] Selikowitz J stated that when interest on the unpaid capital has reached an amount equal to it, then the effect of applying the *in duplum* rule would be to grant the debtor a double benefit that was not intended. This can be better grasped with the aid of an illustration.

The example of the cessation of 1,000 Kenya shillings[69] arrear interest having accrued from an unpaid capital amount of 1,000 Kenya shillings is apposite. If the debtor pays to the creditor 100 Kenya shillings, and the Clayton rule were

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64 See generally Section 103(5), National Credit Act (South Africa) and Section 44A(2), Banking Act (Chapter 488, Laws of Kenya).

65 *Devaynes v Noble* (1816) 1 Merivale 529.

66 *Devaynes v Noble* (1816) 1 Merivale 529.

67 Stewart WJ, *Collins dictionary of law*, 2001, http://law.academic.ru/9333/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/%5C/%5C/tg.delnapb.com/?id=276422&t=iframe on 23 November 2015.

68 1995 (4) SA 510 (C).

69 The original example furnished by Vessio ML refers to rand as the currency but the author has substituted this for Kenya shillings to bring the example closer to home without any material alteration of substance from the work cited.

to be applied, then 100 Kenya shillings would reduce the capital amount. At the same time the *in duplum* rule would take effect with the implicative consequence of the creditor only being able to recover 1,800 Kenya shillings in total, 900 Kenya shillings in capital and an equal 900 Kenya shillings in interest, which could not exceed the capital. In effect, this would mean that the debtor has benefited double that which he has paid, that is 200 Kenya shillings from payment of only 100 Kenya shillings. The next payment by the debtor would have much the same effect and the first-in-first-out rule would prevent interest from running after payment, as the *in duplum* rule intrinsically instructs.[70] It seems reasonable from the aforementioned example that any payments made ought to be appropriated to the interest first only before being appropriated to the capital.

ii. Capitalisation of interest

The capitalisation of interest is an aspect of loan repayment from which confusion has arisen in the past regarding the application of the *in duplum* rule.[71] This is because the capitalisation of interest has been argued to change the nature of interest thereby leading to many considering it as capital and not interest for the purposes of application of the *in duplum* rule.[72] This was seen in the case of S*tandard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*[73] where Standard Bank argued that interest, once capitalised, changes its nature and is then considered as capital. One of the main arguments of Standard Bank was that the *in duplum* rule ought not to apply to overdraft accounts as interest was almost immediately capitalised in such accounts. Selikowitz J in his judgement stated that

> '…words like 'capitalisation' are used to describe the method of accounting used in banking practice. However, neither the description nor the practice itself affects the nature of the debit. Interest remains interest and no methods of accounting can change that.'[74]

If interest were to be considered as capital then the capital amount of the debt would continuously increase and the bank would run no risk of a lesser capital amount being the subject matter of the rule.[75] Furthermore, if lenders

70 Vessio ML 'The effects of the *in duplum* rule and clause 103 (5) of the National Credit Bill 2005 on interest'.
71 In the case of S*tandard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) one of the issues was whether capitalisation of interest ought to apply in relation to the *in duplum* rule.
72 See generally the case of S*tandard Bank of SA Ltd v Oneanate Investments*.
73 1995 (4) SA 510 (C).
74 S*tandard Bank of SA Ltd v Oneanate Investments*, para 572.
75 See generally, S*tandard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*.

were entitled to benefit from the convenience of a book entry to convert what is interest into capital, this would afford an easy way to circumvent the *in duplum* rule. When interest is compounded it remains as interest.[76]

iii. What comprises the amounts that ought not to exceed the principal owing at the time of default?

Kenyan legislation stipulates that the

> '…principal owing when the loan becomes non-performing; interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and expenses incurred in the recovery of any amounts owed by the debtor…'[77]

are what ought to be considered in determining the maximum amount recoverable by an institution from a debtor with respect to a non-performing loan.

The wording of this particular Section begs for clarity as '...any expenses incurred in the recovery of any amounts owed by the debtor…' can be selectively and widely interpreted to encompass a wide array of 'expenses'.

On the contrary, South African legislation has a clearer position on the matter as it provides that,

> 'A credit agreement must not require payment by the consumer of any money or other consideration, except
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> (a) the principal debt, being the amount deferred in terms of the agreement…
>
> (b) an initiation fee, which –
>
> (i) may not exceed the prescribed amount relative to the principal debt; and
>
> (ii) must not be applied unless the application results in the establishment of a credit agreement with that consumer;
>
> (c) a service fee, which-
>
> (i) in the case of a credit facility, may be payable monthly, annually, on a per transaction basis or on a combination of periodic and transaction basis; or
>
> (ii) in any other case, may be payable monthly or annually; and
>
> (iii) must not exceed the prescribed amount relative to the principal debt;
>
> (d) interest, which-

[76] S*tandard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*, 34.
[77] Section 44A (2), *Banking Act* (Chapter 488, Laws of Kenya).

(i) must be expressed in percentage terms as an annual rate calculated in the prescribed manner; and

(ii) must not exceed the applicable maximum prescribed rate determined …;

(e) cost of any credit insurance provided …;

(f) default administration charges, which –

(i) may not exceed the prescribed maximum for the category of credit agreement concerned; and

(ii) may be imposed only if the consumer has defaulted on a payment obligation under the credit agreement, …; and

(g) collection costs, which may not exceed the prescribed maximum for the category of credit agreement concerned …'[78]

Moreover, South African legislation leaves little room for creative interpretation as it adequately provides definitions of and the limits to which the aforementioned elements enumerated in Section 101 of the National Credit Act apply. For example, the National Credit Regulations spell out the maximum limits that apply to the initiation fees that may be charged according to the different types of credit agreements,[79] and list the dates upon which an initiation fee may be levied.[80] Additionally, the regulations outline the maximum prescribed contractual interest rates that may be charged on the different types of credit agreements. Regulation 42 stipulates the maximum interest rate applicable to the principal debt set out and also applies to the maximum default interest that may be charged on a specific credit agreement.[81] Lastly, the legislation even defines costs of credit insurance to include the credit insurance premiums payable on the permitted costs of credit insurance that may be charged.[82]

This shows the stark difference in detail as regards the elements comprising the recoverable amounts under Kenyan legislation and its South African counterpart. The latter is much more detailed leaving little or no grey areas regarding its interpretation.

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78 Section 101 (1) *National Credit Act* (South Africa).

79 Regulation 41 and 42 of the National Credit Regulations, 2006 (South Africa).

80 Kelly-Louw M, 'Better consumer protection under statutory *in duplum* rule', 22.

81 It is important to note the Kenyan legal framework makes an attempt to do so by the introduction of the Kenya Bankers' Reference Rate (KBRR) which forms the base upon which financial institutions ought to employ in the calculation of their interest rates. However, this does not place a fixed ceiling on interest rates. As of October 2015, the interest rate on asset finance loans from KCB was 13.85% whereas that of EcoBank was 21.5%.

82 See generally Sections 101 and 106 *National Credit Act* (South Africa).

IV. Restriction of the Application of the in Duplum Rule

i. Application of the in duplum *rule to contracts involving financial institutions*

It is of paramount importance to note that Section 44A of the Banking Act clearly outlines the scope of the *in duplum* rule as only being applicable to loans involving institutions as seen from the wording of Section 44A (1):

> 'An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan…'[83]

The Act further defines an institution to mean a bank or financial institution or a mortgage finance company[84] and describes a loan to include any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person.[85] This has led to many positing that the introduction of the *in duplum* rule into the Kenyan legal framework was intended to govern the banking sector solely, thereby excluding its application from contracts between natural persons.[86]

Conversely, South African jurisprudence provides an alternate view to the same. To begin with, the common law *in duplum* rule has been interpreted to not only relate to money lending transactions involving financial institutions but rather to all contracts where a capital amount that is subject to interest at a fixed rate is owed.[87] In *Sanlam Life Insurance Ltd v South African Breweries Ltd,*[88] Blieden J said at 655D-I:

> '[T]he *In Duplum* rule is confined to arrear interest and to arrear interest alone. In my judgment the reason for this is plain: it is to protect debtors from having to pay more than double the capital owed by them at the date on which the debt is claimed…'[89]

In the case of *Ethekwini Municipality v Verulam Medicentre (PTY) Ltd*[90] it was stated that '[*in duplum* rule] does not relate only to money lending transactions but applies to all contracts where a capital amount that is subject to interest at a

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83 Section 44A (1), *Banking Act* (Chapter 488, Laws of Kenya).
84 Section 2, *Banking Act* (Chapter 488, Laws of Kenya).
85 Section 44A (5), *Banking Act* (Chapter 488, Laws of Kenya).
86 Khaseke GM*, Introduction of the in duplum rule in Kenya*, 4.
87 *LTA Construction Bpk v Administrateur van Transvaal* (112/90) (1991) ZASCA 147.
88 2000 (2) SA 647 (W).
89 (1) SA 473 (A) at 482I-483A.
90 (2005) ZASCA 98 (457/04).

fixed rate is owing.' This was the position that was held in *LTA Construction Bpk v Administrateur, Transvaal*[91] and was quoted in the *Ethekwini case*.

The South African position alludes to the fact that it would be utterly unfair and somewhat counterproductive to restrict the application of the rule to money lending transactions to which financial institutions are party to. This is because the objective of the rule is to protect debtors from exploitation. The object of protection of the law in this regard is the vulnerable consumer of credit that often finds himself or herself bound by unfavourable credit terms and subsequently at the mercy of credit providers.

It ought to be duly noted that the Supreme Court of South Africa in the *Ethekwini case* was applying the common law *in duplum* rule and not the statutory *in duplum* rule. This is because the National Credit Act had not yet been passed into law hence the application of the common law *in duplum* rule.

The Kenyan position may, if not addressed, lead to a scenario where the only governing rules are that of the binding nature of a valid contract as has been expressed time and time again in local jurisprudence. 'A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.'[92] The same was also expressed in the case of *Housing Finance Co. of Kenya Limited v Gilbert Kibe Njuguna*[93] where it was held, 'Parties only bind themselves by the terms contracted and executed and not anything else…Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose…'

Leaving such matters to the law of contract will in fact be counterproductive to the purpose of the enactment of the *in duplum* rule which is to protect debtors from overexploitation and thus stabilise the Kenyan economy by doing so.[94]

It is interesting to note that the *in duplum* rule cannot be waived by the debtor. This can be inferred from the public policy aspect upon which the enactment of the rule is based. Additionally, jurisprudence bears testimony to this as

[91] 1992 (1) SA 473 (A)at 482I- 483A.

[92] *Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of the estate of Gulamhussein Ebrahim Pothiwalla v Kidogo Basi Housing Corporative Society Limited & 31 others* Civil Appeal No. 330 of 2003.

[93] Nairobi HCCC No. 1601 of 1999.

[94] Kenya National Assembly Official Record (Hansard) 18 Nov 2004, 4432.

well and elaborates that the rule can neither be waived in advance nor during the lifetime of the credit agreement between the creditor and the debtor.[95]

ii. Application of the in duplum *rule to judgement debts*

The position taken by Kenyan legislation on the application of the *in duplum* rule to judgment debts may prove to be detrimental to the success in achieving the objective for which the rule was enacted into law. Under the Banking Act, Section 44A is clear on whether or not judgment debts fall under its scope of application: *'This Section shall not apply to limit any interest under a court order accruing after the order is made'*[96]

The logical deduction that can be made in this instance is that the interest on a judgment debt can accrue such as to surpass the original judgment debt. This appears to be an instance in which the codification of the rule seems to contradict its very essence embodied in the common law rendition of the rule.

The Civil Procedure Act provides as follows:

> (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
>
> (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.[97]

Interestingly, the position of foreign courts is that interest ought to begin running anew. Upon judgment being given, interest on the full amount of the judgment debt commences to run afresh but will once again cease to accrue when it reaches the amount of the judgment debt, being the capital and interest thereon for which cause of action was instituted. This may be seen to be due to the perceived novation of the initial debt owed. This was the position held in *Commercial Bank of Zimbabwe v MM Builders and Suppliers PVT Ltd*.[98]

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[95] S*tandard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C).

[96] Section 44A (4), *Banking Act* (Chapter 488, Laws of Kenya).

[97] Section 44A (4), *Banking Act* (Chapter 488, Laws of Kenya).

[98] 1997(2) SA 285 ZHC.

Another issue requiring utmost concern is whether or not interest continues to accrue such as to surpass the principal amount being sued for during the litigation process before the judgment is made. Section 44A (4) remains mute on this pertinent question as it only addresses itself to judgment debts – the judgment has already been issued by the court.

As aptly pointed out by Khaseke,[99] when faced with this question the Supreme Court of South Africa observed that it was paramount to reiterate the purpose for the establishment of the *in duplum* rule in order to adequately answer the question of interest *pendente lite*.

> 'It appears as previously pointed out that the rule is concerned with public interest and protects borrowers from exploitation by lenders who permit interest to accumulate. If that is so, I fail to see how a creditor who has instituted action can be said to exploit a debtor, who with the assistance of delays inherent in legal proceedings, keeps the creditor out of his money. No principle of public policy is involving in with the protection pendente lite against interest in excess of the double.'[100]

Following the reasoning of the court in this matter, the creditor cannot be deemed to exploit the debtor as the former has no control over the delays present in the litigation process. The consequent suspension of the *in duplum* rule pending the outcome of a litigation dispute is thus justified. It is important to underscore that the clock is said to begin running from the time of service of the initiating process of the suit.

This position was disputed in a dissenting opinion issued by Madlanga J in the case of *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd*[101] where he went on to find that the *in duplum* rule ought to be applicable during the litigation process. In doing so he went against the contrary decision of the South African Supreme Court of Appeal in the *Standard Bank case*.[102] The *ratio* of his judgement stated that failure to apply the rule demonstrated ignorance of the debtor's right of access to courts and other valid policy considerations and, in doing so, failed to conduct a proper balancing exercise. This rendered it inappropriate for a court to make a choice one way or the other.[103] However, this was a dissenting opinion and thus, did not form part of the main judgment to which 5 of the judges concurred.

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[99] Khaseke GM*, Introduction of the in duplum rule in Kenya*, 5.

[100] S*tandard Bank of SA Ltd v Oneanate Investments (Pty) Ltd*, 50.

[101] [2015] ZACC 5.

[102] *Standard Bank Ltd v Oneanate Investments (Pty) Ltd*.

[103] *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5.

It is reasonable, therefore, to assume that the same argument would be lifted as it is and applied in the Kenyan context *mutatis mutandi*. The power of the courts to make an interim award in anticipation of the judgment to be issued alludes to the likelihood of application of the principle regarding interest pending litigation emanating from the *Standard Bank case*.

The application of the rule in the *Standard Bank case* is contentious. Although it is true that the delays, if any, in the litigation process are not the fault of the creditor, failure to apply the *in duplum* rule in this regard is in fact a burden that the debtor is forced to bear. The debtor is no longer afforded the protection of the *in duplum* rule due to the mere lack of expediency on the part of the judicial system. This, undoubtedly, is the culmination of injustice as the debtor is simply being punished for something that is beyond his or her control.

iii. Application of in duplum *rule to tax debts*

Tax debts are those penalties that accrue due to failure to remit tax returns on time.[104] Numerous taxpayers are caught by this provision that is enshrined in the principal statutes on taxation.[105] The rational for such debts is to incentivise taxpayers to remit their taxes in a timely manner for fear of being slapped with penalties that incessantly increase as they are based on compound interest. It is in the interest of the government to have such penalties as it allows for efficient financial planning for the government based on consistent source of income; taxpayers' money.[106]

There have been debates as to whether the *in duplum* rule ought to apply to such debts. An argument that may be advanced in furtherance of the application of the rule to tax debts is that failure to apply the rule will lead to taxpayers having to pay penalties that may accrue to more than the principle amount owed. This is because the penalties in this case often are subject to compound interest.

The application of the rule to tax debts can be refuted by the fact that the *in duplum* rule is meant to protect debtors from the exploitation of the creditors. This presupposes the contractual relationship between the borrower and

[104] The author chooses to focus on income tax as that is the form of tax most poorly remitted and is individual-focused as opposed to other forms of tax such as corporation tax or VAT which target legal rather than natural persons; the general subject of consumer protectionist laws such as the *in duplum* rule.

[105] Section 72D and Section 94 *Income Tax Act* (Chapter 470, Laws of Kenya).

[106] Tax is the largest source of government finance as seen in Turnovsky SJ, *International macroeconomics dynamics*, MIT Press, Cambridge, 1997, 299.

the lender. Such a relationship is non-existent[107] between a taxpayer and the state, thereby excluding the application of the *in duplum* rule to tax debts.

However, a counterargument to this would be that generally, the practice of many jurisdictions is to object to increased or penalty interest on default.[108] An extrapolation of this practice and application in the realm of taxation ought to, reasonably, lead to its application *mutatis mutandis*. However, arguments made in opposition of this are that tax debts are owed to the government. Consequently, failure to remit taxes on time leads to a deficit in the financing of government expenditure.[109] The penalty interest charged on tax debts has a twofold function. The first is to act as a deterrent for those intending to remit their taxes late, if at all. The second function is to ensure that the government is adequately compensated for the delayed taxes received.[110] The penalty interest, in effect, serves to compensate the government for the opportunity lost – or rather delayed in the case of late remittance – which the government would have otherwise profited from. Simply put, the penalty interest ought to be proportional to the lost opportunity suffered by the government in this case.

In the Kenyan context, Section 44A of the Banking Act explicitly excludes the application of the *in duplum* rule from tax debts as it reads: 'An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan…'[111] and further goes on to describe an 'institution' to mean a bank or financial institution or a mortgage finance company.[112] The wording of the legislation consciously restricts the real realm of application of the rule to non-performing loans given by banks, financial institutions or mortgage finance companies.

The provisions of the Banking Act notwithstanding, the *in duplum* rule ought to be applied to tax debts as its failure to do so would leave the taxpayer in the exact same situation that Amendment No 9 of 2006 was meant to protect

107 It may be argued that the payment of tax has its roots in the Social contract theory which posits that citizens cede some of their rights to the state in order for protection. The payment of tax facilitates the provision of services by the state. *See* Tuckness A, 'Locke's Political Philosophy' in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy,* 2012 http://plato.stanford.edu/entries/locke-political/ on 23 October 2015.

108 Wood PR, *Law and Practice of International Finance,* Comparative Financial Law, Sweet & Maxwell, London, 1995, 194.

109 Turnovsky SJ, *International macroeconomics dynamics*, 299.

110 The importance of timely tax remittance is intimately linked with the government's financial planning as expressed in Turnovsky SJ, *International macroeconomics dynamics*, 299.

111 Section 44A (1), *Banking Act* (Chapter 488, Laws of Kenya).

112 Section 2, *Banking Act* (Chapter 488, Laws of Kenya).

the consumer of credit from; exploitation by the creditor. Although in matters tax related, the government does not afford credit to the taxpayer, the taxpayer assumes the role of a debtor as he or she is obliged to pay the taxman just as a debtor has an obligation to his or her creditor.[113] Continuous accrual of penalty interest will lead to the debtor finding himself or herself in a bottomless pit of debt owed to the government.

iv. Lump sum payments

In certain instances an agreement may be reached that the loan will not be serviced regularly, but that payment of both interest and capital will be effected in lump sum. It has been posited by scholars[114] that the creditor is not precluded, in this particular arrangement, from making double the principal advanced in return and furthermore the interest calculation is compounded.[115]

This seems to be a lacuna in consumer credit law that requires the application of the *in duplum* rule in order to prevent the exploitation of debtors in this regard. Further recommendations on the same will be extensively explored in the following Section.

v. The implication of technological advancements on the in duplum *rule*

The Banking Act defines 'loans' to include any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person.[116] This thereby increases the scope of application of the rule to credit cards.

The application of the rule to credit cards is pertinent. Interest on credit card transactions accrues compound interest on a daily basis that commences on the date of the transaction.[117] Furthermore, penalty interest is charged on the outstanding amount owed every month and is subjected to compound interest.

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[113] See generally *Income Tax Act* (Chapter 470, Laws of Kenya).

[114] See generally Vessio ML 'The effects of the *in duplum* rule and clause 103 (5) of the National Credit Bill 2005 on Interest'.

[115] It may amount to more than double: 'It was therefore regarded in our customs as not unfair for the obligation for interest to last until the principal sum had been repaid, even though the interest should overtop three or four times the amount of the principal sum, provided that it were paid piecemeal'. (Gane's Translation of the Afrikaans original, quoted with approval by Joubert JA in *LTA Construction Bpk v Administrateur van Transvaal (*112/90) [1991] ZASCA 147).

[116] Section 44A (5) (b), *Banking Act* (Chapter 488, Laws of Kenya).

[117] Ellis D, 'The effect of consumer interest rate deregulation on credit card volumes, charge-offs, and the personal bankruptcy rate' Bank Trends no 98-05, March 1998.

This means that with every late payment the nature of financial debt tends to become more and more insurmountable – a snowball effect.[118]

Failure to apply the *in duplum* rule to such transactions would lead to a drastic increase in cases of personal bankruptcy as debtors would find themselves on the perpetual ascent of a mountain of debt whose gradient continuously becomes steeper.

V. Conclusion and Recommendations

The application of the *in duplum* rule in Kenya ought to be subjected to a number of measures to ensure its efficient, just and equitable application. Proportionate regulation ought to be applied to the rule. There are three pillars pivotal to this approach. Firstly, the rule ought to apply to all transactions involving an advancement of credit as opposed to maintaining the status quo which only allows for the rule's application to loans issued by financial institutions as defined by the Banking Act.[119] The changes ought to ensure better consumer protection for debtors in advancements of credit or credit equivalents such as tax debts.

Secondly, the application of the rule during litigation is one that ought to be reviewed in line with the unhurried turn-around-time of the Kenyan courts.[120] Despite the argument that the application of the rule would be prejudicial towards the judgment creditor, failure to apply it – taking into consideration the sluggish pace at which civil disputes are resolved – would in fact be detrimental to the judgment debtor as they would be paying interest that he or she would otherwise have not paid. Perhaps a provision ought to be made for a period *pendente lite* during which the rule will be suspended and after such a period elapses, the rule may begin to apply.[121] This would be another avenue of applying pressure on the judicial system to resolve litigation disputes in a timely manner.

Robust regulation is lacking thereby hindering the optimal application of the rule. Section 44A (2) of the Banking Act ought to be expanded in order to provide clarity on the maximum amount an institution shall be limited to when

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118 Ellis D, 'The effect of consumer interest rate deregulation on credit card volumes, charge-offs, and the personal bankruptcy rate'.

119 Section 44A (1) as read with (5), *Banking Act* (Chapter 488, Laws of Kenya).

120 As of June 2012 there were 299,472 pending cases at the High Court of Kenya as per The State of the Judiciary 2011-2012 report, 18.

121 It is the author's opinion that the exact duration of such a period and at what stage of the litigation process it ought to occur would be better assessed in a forum whose focus is the dispute resolution process and is concerned with means of ameliorating the same.

recovering from a debtor with respect to a non-performing loan. Clarity in this regard will have a twofold effect: protecting debtors from overreaching by financial institutions as well as giving institutions defined boundaries that provide certainty as to what they can recover with respect to non-performing loans.

Thirdly, the harmonisation of the laws surrounding the *in duplum* rule is primordial in obtaining the rule's easy and unhindered application in the Kenyan context. An example of this is the fact that any contravention of the provisions of the Banking Act does not invalidate any contractual obligation between an institution and any other person as elaborated in Section 52 of the Act. However, the same Section of the legislation states that no institution is permitted to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of the Banking Act or the Central Bank of Kenya Act. The question that arises from such conflicting Sections is whether the recovery of interest exceeding the principal owing at the time of default is valid if pursued outside a court of law.

Summarily, the inclusion of the aforementioned recommendations will lead to the fair and just treatment of both the creditor and the debtor. In the year 2000 Onyango-Otieno J advocated, through the judgment issued in *Pelican Investment Ltd v National Bank of Kenya Ltd*,[122] for the introduction of the *in duplum* rule in Kenya. The learned judge stated:

> '…such a legal proposition might be ideal in this country as it will ensure that debtors do not suffer the requirements upon them to pay extra-large interests caused by the indolence and lapse or deliberate failure by the creditors so as to let the unserviced loans accumulate interest to unimaginable levels. It will protect the debtors as well as ensuring that the creditors get their money back for further circulation and hence the economy will be healthy…'

This is a worthwhile goal whose pursuit requires our each and every effort.

[122] [2000] 2 EA 488.