

CREDIT PROVIDERS' RECOVERY OPTIONS FOR LOANS ADVANCED IN NON-COMPLIANCE WITH SECTION 33S OF THE CBK ACT: A POSSIBLE WAY FORWARD

The Digital Credit Providers ("DCP") regulation, now referred to as Non-Deposit Taking Credit Businesses ("NDTB") regulation following the Business Laws (Amendment) Act, 2024, has undergone significant evolution. This regulatory shift was driven by public outcry over unethical debt recovery methods, customer harassment, data breaches, and predatory lending practices.

With the enactment of the Central Bank of Kenya (Digital Credit Providers) (now "NDTB") Regulations, 2022, credit providers must now obtain a license from the CBK and comply with the Data Protection Act, 2019. As of March 2022, the CBK had received 730 applications from NDTBs, yet by October 2024, only 85 licenses had been issued due to rigorous vetting processes. This slow approval rate has severely impacted the operations of these businesses, as licensing is a prerequisite for their legal operation.

Recently, the Small Claims Court dismissed 139 cases due to non-compliance with Section 33S of the CBK Act, which mandates licensing for credit providers. Beyond dismissals, other challenges have emerged, including the refusal of Land Registries to register charges and bans from the Google Play Store due to non-compliance.

The Business Laws (Amendment) Act, 2024, which took effect in December 2024, expanded the CBK Act's scope by including non-digital credit service providers such as "Buy Now, Pay Later" and peer-to-peer credit providers. Under this framework, all non-deposit-taking credit businesses must secure a license by June 2025. While most providers have submitted applications, delays by the CBK have led to financial losses, as courts refuse to enforce loan agreements due to a lack of licensing.

The delay in licensing has emboldened loan defaulters, as some land registries refuse to register charges, and courts dismiss suits from unlicensed businesses which as discussed herein below should not be the case.

WAY FORWARD FOR CREDITORS ON DEFAULT AND NON-PAYMENT

In *SR Projects Ltd v Rampersad Re Hindu Credit Union Co-Operative Society (Trinidad and Tobago) [2022] UKPC 24*, a majority of the Privy Council held that despite the illegality of a loan agreement, it was still enforceable against the borrower, as long as it met the test parameters. Also, close home, is the case of ***Jordan Properties Limited v Maragret Njoki***

Migwi [2020] eKLR wherein the court confirmed that funds under an illegal and/or void contract are recoverable under the principles of unjust enrichment and money had and received principle. Further, loan agreements constitute legally binding contracts and as such even absent of licensing the principles of contract would still apply.

As such, the following potential remedies exist for creditors caught up with section 33S non-compliance:

1. Claims based on unjust enrichment and money had and received principles;

Credit providers can mount claims under the unjust enrichment and money had and received principles. More specifically, for the debtors to retain the loans so advanced, they would be benefiting unfairly at the expense of the creditors.

2. Sue for Breach of Contract

Credit providers should pursue legal action for breach of contract. Licensing requirements should not negate the enforceability of a valid loan agreement. Under Kenyan law, a binding contract entitles the creditor to remedies such as:

- **Specific Performance** – A court order compelling the debtor to fulfill contractual obligations.
- **Damages** – Compensation for financial losses suffered due to non-payment.
- **Rescission** – Termination of the contract with restitution where applicable.

3. Appeal Dismissed Cases

Credit providers should appeal dismissed cases based on the following legal grounds:

- **Unjust Enrichment:** Debtors should not be allowed to benefit unfairly at the expense of creditors as aforesaid. The enrichment is unjust and should be remedied.
- **Principles of Contract Law:** Loan agreements constitute legally binding contracts. Dismissing cases solely due to a lack of a license disregards the enforceability of contracts under Kenyan law.

CONCLUSION

While regulatory compliance remains crucial, credit providers have the fore stated remedies available for them which they ought to utilize. More particularly, lodging claims for unjust enrichment, appealing the dismissed cases and filing of breach of contract suits offer viable solutions to mitigate financial losses caused by licensing delays. A balance must be struck between enforcing regulations and protecting the interests of credit providers to ensure a stable financial lending environment.



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