CM ADVOCATES LLP



KENYA'S IN DUPLUM RULE AND INTEREST RECOVERY ON NON-PERFORMING LOANS: IMPLICATIONS OF THE 2026 CBK REGULATIONS FOR EXISTING LOANS, DIGITAL LENDERS AND BORROWERS

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Legal and regulatory implications for banks, non-deposit-taking credit providers, digital lenders, buy-now-pay-later (BNPL) platforms, peer-to-peer lending businesses, borrowers, guarantors, secured creditors and distressed debt investors.

EXECUTIVE SUMMARY

Kenya's restrictions on interest recoverable from non-performing loans are an important safeguard against excessive indebtedness, unfair lending practices and the indefinite accumulation of default interest. The statutory in duplum rule limits recoverable interest on qualifying non-performing loans while preserving creditors' rights to recover outstanding principal and legally permissible recovery expenses.

Under section 44A of the Banking Act, regulated banking institutions are subject to statutory limits on interest recovery. Similar protections were introduced for licensed digital credit providers under the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022 (Legal Notice No. 46 of 2022). The Central Bank of Kenya (Non-Deposit Taking Credit Providers) Regulations, 2026 (Legal Notice No. 191 of 2026), published in the Kenya Gazette and in force from 29 September 2026, revoke the 2022 Regulations and establish an expanded regulatory framework covering qualifying non-bank lenders, including digital credit providers, BNPL businesses, peer-to-peer lending platforms and consumer finance companies. Regulation 29 of the 2026 Regulations carries the in duplum limit forward to all licensed and registered non-deposit taking credit providers and, in certain respects, extends it.

A particularly significant issue is the application of interest recovery restrictions to existing loans, accrued interest, facilities already classified as non-performing, restructured debts, pending recovery proceedings and outstanding judgments. The commencement of a new regulatory framework does not automatically extinguish existing debts, invalidate interest lawfully accrued or reopen concluded litigation. Equally, lenders cannot rely on pre-existing contractual terms to circumvent mandatory statutory restrictions applicable to continuing interest accrual or debt recovery.

For banks, non-bank lenders, borrowers, guarantors and distressed debt investors, the critical considerations are the lender's regulatory classification, the date the loan became non-performing, the applicable statutory interest ceiling, the treatment of existing obligations and the enforceability of outstanding loan balances.

This CM Regulatory Alert examines Kenya's *in duplum* rule, the scope and commencement of the 2026 CBK Regulations, their implications for existing and future credit facilities, and practical measures for lawful interest recovery, loan restructuring, regulatory compliance and debt enforcement.

1. THE IN DUPLUM RULE UNDER KENYAN LAW

The *in duplum* rule is a statutory safeguard against the unlimited accumulation of interest on non-performing loans.

Section 44A(2) of the Banking Act limits the amount recoverable by a regulated banking institution in respect of a non-performing loan to the aggregate of:

a) The principal outstanding when the loan became non-performing;
b) Contractual interest not exceeding that outstanding principal; and
c) Expenses incurred in recovering the debt.

The statutory interest ceiling is therefore calculated by reference to the outstanding principal when the loan becomes non-performing, rather than necessarily the original amount advanced.

The rule does not extinguish the principal debt, invalidate security or automatically prevent enforcement proceedings. It limits the amounts legally recoverable under the applicable statutory framework.

Section 44A further provides that where a borrower resumes payments and the loan later becomes non-performing again, the limit is determined by reference to the time the loan last became non-performing (section 44A(3)); that the limit does not apply to interest under a court order accruing after the order is made (section 44A(4)); that "debtor" includes a guarantor and "loan" includes any advance, credit facility, financial guarantee or other liability incurred on behalf of any person (section 44A(5)(a) and (b)); and that a loan becomes non-performing in the manner stipulated in guidelines prescribed by the Central Bank (section 44A(5)(c)).

An analogous restriction was introduced for licensed digital credit providers under regulation 19 of the Digital Credit Providers Regulations, 2022 (Legal Notice No. 46 of 2022). That provision has been carried forward, in expanded form, as regulation 29 of the 2026 Regulations, which applies to every licensed and registered non-deposit taking credit provider. Regulation 29 adopts the same three-part formula as section 44A(2), but limits recoverable expenses to "reasonable" expenses (regulation 29(2)(c)), provides that, save for post-judgment interest under a court order, a person shall not recover any interest in excess of the outstanding principal amount (regulation 29(5)), and prohibits the recovery through a judicial process of interest that is not directly recoverable under regulation 29(2)(b) (regulation 29(6)).

The application of the principle to other non-bank lenders must be determined by reference to the legislation governing the particular lender and loan.

2. COMMENCEMENT AND SCOPE OF THE 2026 CBK REGULATIONS

The Central Bank of Kenya (Non-Deposit Taking Credit Providers) Regulations, 2026 were made on 4 September 2026 and published on 29 September 2026.

The Regulations do not specify a commencement date. Under section 23(1) of the Statutory Instruments Act (Cap. 2A), a statutory instrument that does not specify a commencement date comes into operation on the date of its publication in the Gazette, subject to annulment where applicable. The Regulations therefore came into operation on 29 September 2026. On the same date, regulation 97 revoked the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022.

The framework expands CBK supervision beyond conventional digital lenders to qualifying non-deposit-taking credit businesses.

Depending on the nature of their activities, regulated entities may include the following, reflecting the permissible activities listed in regulation 17(1):

a) Digital credit providers operating through mobile applications, websites and other electronic platforms;
b) Non-bank consumer and commercial lending companies;
c) Buy-now-pay-later (BNPL) arrangements, as determined by CBK (excluding hire-purchase agreements under the Hire-Purchase Act (Cap. 507));
d) Peer-to-peer lending platforms, including peer-to-peer lending under collective investment schemes regulated under the Capital Markets Act (Cap. 485A), for which a letter of no objection from the Capital Markets Authority is required before CBK approval;
e) Stock-now-pay-later arrangements, as determined by CBK;
f) Asset financing and pay-as-you-go credit providers;
g) Providers of credit guarantees, except as prohibited by any other written law; and
h) Other businesses undertaking non-deposit-taking credit activities within the statutory regulatory perimeter.

Regulation 3(3) expressly excludes institutions licensed under the Banking Act (Cap. 488) and the Microfinance Act (Cap. 493C), credit guarantee companies or providers regulated under the Central Bank of Kenya Act (Cap. 491), co-operative societies registered under the Co-operative Societies Act (Cap. 490), Sacco societies licensed under the Sacco Societies Act (Cap. 490B), and any person whose non-deposit taking credit business is regulated under any other written law.

Regulation 3(3) also excludes credit that is merely incidental to the sale of goods or provision of services by a person whose primary business is the provision of those goods or services, lease finance transactions regulated under any written law, and hire-purchase arrangements involving the bailment of goods under the Hire-Purchase Act (Cap. 507). Whether a particular arrangement falls within the Regulations or one of these exclusions requires individual assessment.

The substance of the credit transaction, rather than the description adopted by the business, determines the applicable regulatory classification.

The Regulations also provide transitional arrangements for existing providers. Under regulation 96(1), a person who was conducting non-deposit taking credit business at commencement that is not regulated under any other written law must apply to CBK for a licence or registration within six months of publication, that is, by 29 March 2027. As 29 March 2027 is Easter Monday, a public holiday, section 57(b) of the Interpretation and General Provisions Act (Cap. 2) would extend the period to 30 March 2027; applicants should nonetheless file before 29 March 2027. Pending determination of its application, an applicant may continue to conduct business, subject to the Central Bank of Kenya Act, the Regulations and any conditions issued by CBK (regulation 96(2)).

3. IMPLICATIONS OF THE 2026 REGULATIONS FOR EXISTING LOANS

The treatment of existing credit facilities is among the most commercially significant issues arising from the expanded regulatory framework.

A distinction must be drawn between loans issued by banks, facilities advanced by previously licensed digital credit providers and loans issued

by businesses newly brought within CBK supervision.

3.1 Existing Bank Loans

Existing bank loans remain governed by section 44A of the Banking Act.

The Court of Appeal in ***Kenya Hotels Limited v Oriental Commercial Bank Limited (formerly Delphis Bank Limited) [2019] eKLR***, Civil Appeal No. 252 of 2009 ([2019] KECA 250 (KLR), judgment delivered on 25 October 2019), held, by a majority (Ouko P and Kantai JA; Kairu JA dissenting on whether the point could be raised for the first time on appeal), that by virtue of section 44A(6) the section applied to a facility advanced, and in default, before it came into operation on 1 May 2007.

Accordingly, banks cannot avoid the statutory interest ceiling merely because the relevant credit facility was advanced before the provision came into operation.

The recoverable amount must nevertheless be calculated in accordance with the applicable statutory and transitional provisions. For loans that were already non-performing on 1 May 2007, the proviso to section 44A(6) limits recovery to the principal and interest owing on that date, plus contractual interest accruing after that date not exceeding that sum, plus recovery expenses.

3.2 Existing Digital Credit Loans

Loans issued by licensed digital credit providers under the 2022 Regulations were already subject to statutory restrictions on recoverable interest under regulation 19 of those Regulations.

Consequently, the replacement of those Regulations should not be treated as validating interest that was unlawfully charged under the earlier regime. Regulation 96(4) deems providers licensed under the 2022 Regulations to be licensed under the 2026 Regulations, and regulation 96(5) provides that any right accrued or liability incurred under the 2022 Regulations continues to exist as if it had accrued or been incurred under the 2026 Regulations.

Lenders should review outstanding balances, particularly facilities that became non-performing before 29 September 2026, and distinguish interest accrued under the previous framework from interest governed by the succeeding regime. Because regulation 19 of the 2022 Regulations and regulation 29 of the 2026 Regulations apply the same ceiling, the principal practical differences lie in the non-performing loan classification date (see section 6 below) and the additional restrictions in regulation 29(5) and (6).

3.3 Loans Issued by Previously Unregulated Lenders

A more complex issue arises where a lender was previously outside CBK's regulatory perimeter but is now subject to the 2026 Regulations.

The legal treatment of such facilities depends on the relevant operative provisions, commencement date and any express transitional arrangements.

The new regulatory framework does not, without a sufficient statutory basis, automatically cancel existing loans, extinguish previously accrued interest or retrospectively invalidate completed contractual transactions.

However, where a statutory restriction applies to continuing interest accrual or future recovery, a lender cannot necessarily avoid compliance merely because the loan agreement predates the Regulations. Regulation 29 contains no transitional formula equivalent to section 44A(6) of the Banking Act. However, regulation 96(2) permits existing providers to continue business pending determination of their applications only "subject to the Act, these Regulations and any conditions issued by the Bank", and regulation 29 is framed as a limit on what a provider "may recover". There is therefore a credible argument that the ceiling applies to recoveries made on or after 29 September 2026, including recoveries on pre-existing facilities. The point has not yet been judicially determined.

Each existing loan portfolio should therefore be reviewed against the applicable legislation.

4. TREATMENT OF INTEREST ACCRUED BEFORE AND AFTER COMMENCEMENT

For existing facilities, lenders should distinguish three categories of interest.

Interest lawfully accrued before the applicable restriction commenced may remain recoverable, subject to the governing legislation and any transitional provisions.

Interest charged in contravention of an existing statutory restriction may be challenged and excluded from the recoverable balance.

Interest accruing after a new restriction becomes applicable must comply with that restriction, where the relevant legislation governs continuing performance or recovery under existing loans.

The commencement of the 2026 Regulations should therefore not be treated as requiring an automatic write-off of all accrued interest.

Equally, lenders should not assume that every amount recorded in their loan management systems remains legally recoverable.

The appropriate approach is a loan-by-loan reconciliation identifying principal, accrued interest, default charges, payments and permissible recovery expenses.

5. CALCULATING THE STATUTORY INTEREST RECOVERY CEILING

Consider a loan advanced for KES 10 million, of which KES 4 million in principal was repaid before the facility became non-performing.

Component	Amount
Original loan advanced	KES 10,000,000
Principal repaid	KES 4,000,000
Principal outstanding when non-performing	KES 6,000,000
Maximum contractual interest under an applicable in duplum ceiling	KES 6,000,000
Maximum aggregate principal and interest	KES 12,000,000
Qualifying recovery expenses	Additional, subject to section 44A(2)(c) or regulations 29(2)(c) and 43, as applicable

The maximum contractual interest is calculated against the KES 6 million outstanding principal, rather than the original KES 10 million advanced.

This illustration assumes that the applicable statutory ceiling has been reached. It does not automatically entitle the lender to charge interest equal to the outstanding principal.

For non-deposit taking credit providers, recovery expenses must be reasonable (regulation 29(2)(c)) and absolutely necessary for the recovery, and the provider must give the borrower a detailed breakdown of, and justification for, the costs and expenses incurred (regulation 43).

Where a facility was already non-performing when the relevant statutory regime commenced, any specific transitional calculation must be applied. For bank loans that were non-performing before 1 May 2007, this is the formula in the proviso to section 44A(6) of the Banking Act. The 2026 Regulations contain no equivalent formula.

6. NON-PERFORMING LOAN CLASSIFICATION AND THE RELEVANT CALCULATION DATE

The date on which a facility becomes non-performing is critical to calculating recoverable interest.

Lenders should maintain accurate records of repayment obligations, arrears, default notices, loan classification dates, payments received and restructuring arrangements.

The applicable classification requirements differ depending on the lender's regulatory framework and the tenor of the facility. For banks, a loan becomes non-performing in the manner stipulated in CBK prudential guidelines (section 44A(5)(c) of the Banking Act). For non-deposit taking credit providers, regulation 57(1) treats a loan with a specific repayment date as non-performing where principal or interest remains outstanding after 30 days (for a loan contracted for 30 days or less) or after 90 days (for a loan contracted for more than 30 days), or where a contractual payment obligation has been due and unpaid for the period specified in the loan agreement. Regulation 57(2) and (3) require the default period to be specified in both the provider's credit policy and the loan agreement.

This differs from the 2022 Regulations, which defined a non-performing loan as a loan in which the principal or interest is due and unpaid after the due date under the contract. For digital credit facilities that fell into default before 29 September 2026, the relevant classification date may therefore be earlier than it would be under regulation 57.

An incorrect classification date can materially distort the outstanding principal and interest calculation.

Accordingly, lenders should ensure that automated loan management systems accurately identify non-performing facilities and apply the relevant statutory restrictions.

7. LOAN RESTRUCTURING, REFINANCING AND CAPITALISATION OF INTEREST

Loan restructuring may involve extending repayment periods, revising instalments, capitalising accrued interest, consolidating facilities or refinancing existing debt.

These arrangements should not be used artificially to circumvent statutory interest restrictions.

Where a borrower resumes repayments and subsequently defaults again, the limit is determined by reference to the time the loan last became non-performing (section 44A(3) of the Banking Act; regulation 29(3) of the 2026 Regulations).

The legal consequences of a restructuring depend on its substance, the governing contractual terms and the applicable statutory regime. For non-deposit taking credit providers, regulation 28(3) permits restructuring of the instalment amount, payment period or other terms, subject to the provider's credit policy, upon the borrower's request or on prior notification to the customer, and regulation 25 requires the credit policy to set out the criteria and procedure for restructuring loans.

A debt acknowledgment, revised repayment schedule or restructuring agreement should not be assumed to extinguish mandatory statutory protections.

Lenders should maintain transparent records distinguishing genuine principal advances from capitalised interest, fees and recovery expenses.

8. IMPLICATIONS FOR PENDING LITIGATION, JUDGMENTS AND DEBT ENFORCEMENT

The statutory interest restrictions may materially affect ongoing debt recovery proceedings.

Lenders should ensure that demand letters, pleadings, statutory notices and statements of account accurately identify the principal, contractual interest, default charges and recovery expenses claimed.

Borrowers and guarantors may challenge excessive interest demands and seek reconciliation of disputed loan accounts where the applicable law supports such relief.

However, the introduction of new regulations does not automatically reopen concluded judgments or invalidate existing decrees.

A distinction must also be maintained between contractual interest accruing before judgment and interest awarded by a court.

Section 44A(4) of the Banking Act and regulation 29(4) of the 2026 Regulations provide that the limit does not apply to interest under a court order accruing after the order is made. However, regulation 29(6) provides that interest that is not directly recoverable from a borrower under regulation 29(2)(b) shall not be recovered through a judicial process. A non-deposit taking credit provider therefore cannot use litigation to recover pre-judgment interest above the ceiling.

The treatment of post-judgment interest must therefore be assessed under the applicable statutory framework and the terms of the relevant court order.

9. IMPLICATIONS FOR SECURED LOANS, GUARANTEES AND STATUTORY POWER OF SALE

Interest recovery restrictions may affect the amounts recoverable through charges, guarantees and other security arrangements. Under section 44A(5)(a) of the Banking Act, “debtor” includes a person who becomes indebted to an institution because of a guarantee, so the limit protects guarantors as well as principal borrowers.

A secured lender must ensure that its recovery demands reflect legally recoverable amounts.

Where a statutory notice (including a notice served under section 90 of the Land Act) includes interest exceeding an applicable statutory ceiling, the borrower or guarantor may have grounds to challenge the calculation.

Nevertheless, an interest dispute does not automatically discharge a charge, invalidate a guarantee or extinguish the underlying debt.

The consequences depend on the relevant legislation, contractual terms, statutory notices and circumstances of enforcement.

Lenders should therefore reconcile outstanding balances before commencing or continuing enforcement proceedings.

10. IMPLICATIONS FOR DISTRESSED DEBT INVESTORS AND LOAN PORTFOLIO ACQUISITIONS

The restrictions are particularly relevant to investors acquiring non-performing loan portfolios.

The contractual face value of a debt may differ materially from the amount legally recoverable.

Regulatory and transactional due diligence should examine the lender’s regulatory status, loan classification dates, outstanding principal, accrued interest, restructurings, payments, recovery expenses, judgments and securities.

Investors should also assess whether existing portfolios contain interest or charges exceeding applicable statutory limits. Regulation 29(5) provides that “a person” shall not recover any interest in excess of the outstanding principal amount. This wording suggests that the limit may bind assignees and purchasers of receivables originated by non-deposit taking credit providers, and not only the originating lender.

Failure to undertake this analysis may result in overvaluation of receivables, disputes over assigned debts and unexpected enforcement risks.

11. JUDICIAL INTERPRETATION AND RETROSPECTIVE APPLICATION

In ***Kenya Hotels Limited v Oriental Commercial Bank Limited (formerly Delphis Bank Limited) [2019] eKLR***, Civil Appeal No. 252 of 2009, the Court of Appeal, by a majority, recognised the retrospective application of section 44A of the Banking Act to qualifying existing bank loans, consistent with Parliament's express transitional provisions.

However, that decision does not automatically make the 2026 CBK Regulations retrospective. The distinction is between interest lawfully accrued before commencement and interest accruing or recovered after the new regulatory requirements become applicable.

Regulation 96 of the 2026 Regulations provides a six-month transitional period for existing non-deposit-taking credit providers to apply for licensing or registration, preserves the status of previously licensed digital credit providers, preserves rights accrued and liabilities incurred under the 2022 Regulations (regulation 96(5)) and addresses pending applications. It does not expressly provide for the retrospective recalculation of interest on existing loans. Under section 28 of the Interpretation and General Provisions Act (Cap. 2), subsidiary legislation operates retrospectively only where it is made to do so, and no person may be made liable to a penalty for an act or omission before its publication.

Accordingly, existing loans remain enforceable, but continuing interest accrual and recovery must comply with applicable statutory limits. Interest lawfully accrued before the new restrictions became applicable is not automatically extinguished. Lenders should nevertheless review outstanding loan balances, particularly non-performing facilities, to ensure compliance with the applicable in duplum provisions. Because regulation 29 limits what a provider "may recover", rather than only the interest that may accrue, lenders should not assume that pre-commencement interest above the ceiling remains recoverable after 29 September 2026. This point remains untested and should be assessed facility by facility.

12. PRACTICAL COMPLIANCE RECOMMENDATIONS

Lenders should undertake a comprehensive review of their existing loan portfolios, focusing particularly on facilities already classified as non-performing.

The review should establish the applicable statutory regime, relevant classification date, outstanding principal, accrued interest, default charges, recovery expenses and any transitional requirements.

Credit providers should also review loan agreements, interest calculation systems, debt collection procedures, restructuring arrangements and enforcement documentation.

Non-deposit taking credit providers should ensure that their credit policies and loan agreements specify the default period after which a loan becomes non-performing (regulation 57(2) and (3)), and that recovery expense claims are reasonable, necessary and itemised (regulations 29(2)(c) and 43).

Borrowers and guarantors should request detailed statements of account and assess whether the interest claimed complies with the applicable statutory ceiling.

Investors and purchasers of distressed loan portfolios should independently verify legally recoverable balances before completing transactions.

For newly regulated providers, regulatory classification and the treatment of pre-existing credit facilities should form part of the broader CBK licensing and compliance review.

Existing providers that are not yet licensed or registered should apply to CBK under regulation 96(1) before 29 March 2027.

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