

Bankers Beware: Consumer Protection in Kenya, Limits on Interest Recovery



Introduction

Prior to 2013, there was no specific law dealing with consumer protection in Kenya. Rather, it was covered piece-meal in various pieces of legislation including the Banking Act (Cap 488) of the Laws of Kenya.

2010 saw the start of more elaborate consumer protection laws with the coming into force of the Competition Act, 2010 which unusually captured provisions more typically found in specific consumer protection legislation. The Competition Act makes it an offence to make false and misleading representations to consumers or engage in unconscionable conduct in relation to the supply of goods and services: broad restrictions that afford the Competition Authority wide investigative discretions.

In 2013, the Consumer Protection Act No.46 of 2012 (“CPA”) came into effect pursuant to the provisions of Article 46 of the Constitution which provides for the right to goods and services of reasonable quality; to the information necessary for consumers to gain full benefit from the goods and services; to the

protection of consumer health, safety and economic interests; and to compensation for loss or injury arising from the defects in goods and services.

The CPA is currently seen as a far-reaching piece of legislation that affects different sectors of the Kenyan economy including real estate, e-commerce, manufacturing, agriculture, banking and finance, aviation, among many others.

Who is a Consumer?

The CPA defines “consumer” broadly to include not only the person who buys the goods or services but also a person who uses the goods or services irrespective of whether they were party to the transaction or not.

Rights of a Consumer under CPA

Part II of the CPA gives consumers a wide range of rights including the right to commence legal action on behalf of a class of persons in relation to any contract for the supply of goods or services to the consumer. The right to commence legal action cannot be ousted by any agreement between the parties. Other consumer rights provided for in the CPA include the right to full pre-contractual information for the consumer to make an informed choice, the right to complain with regard to quality, delays in provision of rectification, quantity and price of such goods or services as are offered and the right to a reasonable notification of termination of service.

CPA & the Banking and Finance industry

Part VII of the CPA specifically deals with credit agreements, defined as a consumer agreement under which a lender extends credit or lends money to a borrower but does not include a facility under which a lender extends credit or lends money on the security of a mortgage over real property. This means that to the extent that the facility agreement is unsecured, (and in particular is not secured by a charge over immovable property), it would constitute a “credit agreement” for the purposes of the CPA. Of particular note is: following the enactment of new land legislation in Kenya, the law no longer provides for security in the form of “mortgages”, but rather “charges”. While in practice these two instruments have much the same effect and share similar DNA – in terms of provisions for sale under statutory power – they are, strictly speaking, different animals. Given that statute effectively replaced “mortgages” at much the same time as the CPA came into force, the logical proposition is that a loan agreement which provides for the lending of money on the security of a charge over real property, is not a credit agreement for purpose of the CPA. However, this remains untested in Kenyan courts and remains a source of anxiety in the sector.

Quirks faced by the Banking & Finance industry

The CPA has definitely set the ball rolling in the banking and finance industry where the CPA seeks to afford a consumer with sufficient protection in relation to a credit agreement. Headline items include the following:-

- ❖ Pre-payment charges - a borrower is entitled to pay the full outstanding balance under a credit agreement at any time without any prepayment charges

or penalties. A borrower is also entitled to prepay a portion of the outstanding balance on any scheduled repayment date or on a monthly basis without prepayment charge or penalty. Furthermore where a borrower repays the full outstanding amount of a fixed credit, the lender is obliged to refund a portion of the cost of borrowing (paid by the borrower or added to the outstanding balance) excluding (i) interest payments and (ii) prescribed charges (which have not yet been prescribed).

- ❖ Notice on deferment of payment - where a lender invites a borrower to defer making payment the lender must disclose whether or not interest would accrue on the unpaid amount and if such interest is accruing the lender must disclose the interest rate, in the absence of which the Lender is treated as having waived the interest.
- ❖ Default charges - a lender is not entitled to impose on a borrower under a credit agreement default charges other than (a) reasonable charges in respect of legal costs that the lender incurs in collecting or attempting to collect a required payment by the borrower under the agreement; (b) reasonable charges in respect of costs including legal costs, that the lender incurs in realising a security interest or protecting the subject-matter of a security interest after default under the agreement, or (c) reasonable charges reflecting the costs that the lender incurs because a cheque or other

instrument of payment given by the borrower under the agreement has been dishonored. However it is important to note that the definition of a "default charge" under the CPA

excludes interest on an overdue payment.

While lenders domiciled in Kenya have moved towards complying with CPA where necessary – though admittedly, the impact of the provisions above is mitigated by the fact that most local lending tends to be secured by immovable property – international lenders who follow a less traditional path to collateral do query whether a non-Kenya choice of law clause is a means of getting round the restrictions of the CPA. It is the authors' view that the CPA is a statute of public policy and reliance on ability to "oust" of domestic statute through choice of law provisions is likely misplaced.

Limits on Interest Recoverable: The Banking Act

Section 44A of the Banking Act (Cap 488) of the laws of Kenya has also placed a limit on interest recoverable from a debtor by institutions with respect to non-performing loans. The maximum limit/amount is the sum of (i) the principal owing when the loan becomes non-performing; (ii) interest in accordance with the contract which is not exceeding the principal owed when the loan becomes non-performing and (iii) expenses incurred in the recovery of any amounts owed by the debtor.

It is important to note that in Kenya an institution is one which is licensed under the Banking Act to transact banking or financial business and thus lenders who are not so licensed – typically lenders with an

international domicile - will not be subject to the above provisions.

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