



**Okeyo & 2 others (Suing as the administrators to the Estate of Andrew Odongo Okeyo (Deceased))
v Kenya Deposit Insurance Corporation As The Liquidator Of Thabiti Finance Limited (In
Liquidation) (Civil Case 5 of 2021) [2023] KEHC 24445 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL CASE 5 OF 2021
RPV WENDOH, J
OCTOBER 26, 2023**

BETWEEN

**MARK ODONGO OKEYO 1ST PLAINTIFF
BILLY OKEYO 2ND PLAINTIFF
MOSES ODONGO OKEYO 3RD PLAINTIFF
SUING AS THE ADMINISTRATORS TO THE ESTATE OF ANDREW
ODONGO OKEYO (DECEASED)**

AND

**THE KENYA DEPOSIT INSURANCE CORPORATION AS THE LIQUIDATOR
OF THABITI FINANCE LIMITED (IN LIQUIDATION) DEFENDANT**

JUDGMENT

1. Mark Odongo Okeyo, Billy Okeyo & Moses Odongo Okeyo (plaintiffs) suing as the administrators of the estate of Andrew Odongo Okeyo (deceased) filed this suit against The Kenya Deposit Insurance Corporation as the liquidator of Thabiti Finance Limited (in liquidation) (defendant).
2. The plaintiffs' case is set out in the plaint dated 24/2/2020. The plaintiffs pleaded that at all times material to this suit, the deceased was the lawful and registered owner of L.R. No. Kanyamkago/Kawere II/958 (suit property). The plaintiffs' alleged that by a letter dated 21/11/2019, addressed to one Gilbert Oginga Okeyo also deceased and copied to the deceased herein, the defendant issued a statutory notice to sell the suit property by way of public auction to recover Kenya Shillings Fourteen Million, Five Hundred and Forty-Three Thousand One Hundred and Thirty-Eight and Forty Cents (Kshs. 14, 543,138.40) allegedly due to the defendant from the said Gilbert Oginga Okeyo.



3. It was the plaintiffs' case that the said notice was based upon a legal charge over the suit property purportedly for the benefit of the defendant to secure the loan advanced to Gilbert Okeyo; that the plaintiffs requested from the defendant a copy of the charge document, complete statement of accounts on the demanded loan and correspondences between the alleged charger and the defendant to ascertain the validity of the charge, which documents were not supplied to them. Instead the defendant issued a 45 days statutory notice dated 29/1/2020 to the deceased with the intention of selling the property by way of public auction to recover a sum of Kenya Shillings Fourteen Million Five Hundred and Forty Three Thousand One Hundred and Thirty Eight and Forty Cents (Kshs. 14, 543,138.40) as at 29/1/2020.
4. It was further the plaintiffs' case that they conducted their due diligence on the claim of the defendant and found that there is no charge registered against the suit property as defined under Section 56 of the Registered Land Act; that there are no records available to show that the relevant Land Control Board consented to the purported charge under the *Land Control Act* as the suit property is agricultural land; that the defendant in the year 1991 registered a caution over the suit property claiming chargor's interest in the lifetime of the deceased but waited for 28 years to auction the property; that the alleged borrower is Gilbert Oginga Okeyo (the borrower), also deceased, having died in 2009 more than 10 years ago.
5. The plaintiffs contended that even assuming that there is a legal charge over the suit property, the defendant has not issued to the estate of the deceased the requisite statutory notice thereby rendering the intended auction of the suit property illegal, null and void. The plaintiffs pleaded that their claim against the defendant is for a declaration that the issuance of the purported statutory notices dated 21/11/2019 and 29/1/2020 be deemed unlawful and void as the defendant holds no legal charge or any charge over the suit property capable of being realized by way of exercise of statutory power of sale by public auction.
6. The plaintiffs prayed for judgement against the defendant for:-
 1.
 - a. Permanent injunction restraining the defendant from selling, auctioning, disposing of and/or interfering in any way with L.R. No. Kanyamkago/Kawere II/958, Migori County.
 - b. An order removing the caution registered on the 16/10/1991 in favour of the defendant, claiming a chargee's interest and immediate surrender of the title document (s) of L.R. No. Kanyamkago/Kawere II/958 to the plaintiffs by the defendant.
 - c. Damages for unlawful lodging and maintenance of a caution on the suit property for twenty (28) years.
 - d. Costs of the suit and interest at court rates.
7. The defendant entered appearance and filed a defence and a counterclaim dated 29/4/2021. The defendant averred that it advanced a loan of Kshs. 400,000/= to one Gilbert Oginga Okeyo which facility was secured by a charge over the suit property. The defendant admitted that it issued a 90 days' statutory notice to the borrower Gilbert Oginga Okeyo and copied to the



deceased herein to pay the outstanding defaulted loan advanced to the borrower which the deceased guaranteed and secured by the suit property; The defendant further averred that the statutory notices were issued in compliance with the law. The defendant denied being informed of the death of the deceased herein.

8. The defendant admitted that the charge over the suit land was not registered but the relevant Land Board consent was obtained and the plaintiff was informed of the defaulted loan facility. The defendant reiterated that the statutory notices issued were done in accordance with the law; that the plaintiffs are not entitled to the orders sought herein as they have defaulted on the repayment of the loan facility and the defendant is entitled to recover the suit property offered as security; that the caution placed over the suit property was to secure the defendant's interests as a lender and from the conduct of the plaintiff releasing the title document to the defendant, the intention was to create an informal charge over the suit property.
9. In its counterclaim, the defendant pleaded that on or about 13/4/1985, Gilbert Oginga Okeyo applied for a loan of Kenya Shilling Four Hundred Thousand (Kshs. 400,000/=) from the defendant; that the security for the facility was the suit property which is in the name of the deceased who issued a power of attorney in favour of the borrower for purposes of pledging the suit property; that vide a letter dated 24/5/1985, the defendant approved the borrower's application and on 29/5/1985, the deceased and the defendant executed a charge over the suit property where the loan facility advanced was to be repaid in 24 monthly instalments of Kshs. 20, 164/= each at an interest rate of 19% per annum.
10. The defendant further stated that the certificate of the suit property was released and deposited with it; that the borrower defaulted in repaying the monthly instalments causing the loan to accrue arrears and penalties as at 21/11/2019 and the loan balance stood at Kenya Shillings Fourteen Million, Five Hundred and Forty-Three Thousand, One Hundred and Thirty Eight and Forty Cents (Kshs. 14, 543, 138.40/=); that despite several calls to repay the loan, the borrower failed, refused and/or neglected to make the due payments. The defendant therefore prayed: -
 - a. The plaintiffs' suit be dismissed with costs to the defendant.
 - b. A declaration that an informal charge was created by Andrew Odongo Okeyo by depositing the certificate of title to Parcel L.R. No. Kanyamkago/Kawere II/958 with the defendant to secure a term loan facility of Kenya Shilling Four Hundred Thousand (Kshs. 400,000/=) advanced to Gilbert Oginga Okeyo.
 - c. A declaration that an informal charge was created by Andrew Odongo Okeyo by the execution of the informal charge over Parcel L.R. No. Kanyamkago/Kawere II/958 with the defendant to secure a term loan facility of Kenya Shilling Four Hundred Thousand (Kshs. 400,000/=) advanced to Gilbert Oginga Okeyo.
 - d. Leave be and is hereby granted to the defendant to exercise its statutory power of sale over Parcel L.R. No. Kanyamkago/Kawere II/958 to recover the outstanding loan arrears in the sum of Kenya Shillings Fourteen Million, Five Hundred and Forty-Three Thousand, One Hundred and Thirty-Eight and Forty Cents (Kshs. 14, 543, 138.40/=) as at 21/11/2019.



- e. An order for vacant possession on Parcel L.R. No. Kanyamkago/Kawere II/958 to enable the defendant to sell the property.
 - f. Costs of the counterclaim.
11. The suit was heard by way of viva voce evidence. Odongo Mark Okeyo (PW1) testified on behalf of the plaintiffs. He adopted his witness statement dated 12/3/2021 as his evidence in chief and produced the documents listed in his list of documents dated evenly as PEXH 1 - 9.
 12. PW1 testified that he was appointed together with his brothers Billy Okeyo and Moses Odongo Okeyo as the legal administrators of the estate of their deceased father Andrew Okeyo Odongo; that the estate of the deceased owns the suit property registered under the name of the deceased herein; that on or about 10/12/2019, they received a notice vide a letter dated 21/11/2017 from the defendant addressed to one Gilbert Oginga Okeyo and copied to the deceased stating its intention to sell the suit property by way of public auction to recover Kenya Shillings Fourteen Million, Five Hundred and Forty-Three Thousand, One Hundred and Thirty-Eight and Forty Cents (Kshs. 14, 543, 138.40/=) allegedly due to the defendant from the said Gilbert Oginga Okeyo on account of a loan facility allegedly advanced on security of charge of the suit property.
 13. It was his further testimony that they were not aware of the alleged loan and charge; that the defendant has now issued a 45 days statutory notice to sell the suit property should the estate not pay the alleged outstanding debt; that there is no registered charge over the suit property to warrant issuance of the purported statutory notice; that a chargee's statutory power of sale can only arise where the chargee holds a legally registered charge of the property to be sold and not otherwise.
 14. PW1 testified that the caution under Section 71 of the *Land Act* does not entitle the party lodging the same to sell the property by way of auction under Section 90 of the *Land Act* and the defendant does not hold a charge over the property within the meaning of Section 58 of the *Land Registration Act*; that any sale of the suit property by public auction is unlawful and void.
 15. On cross - examination, PW1 testified that Gilbert Oganga Okeyo was his step brother who took a loan; that the deceased was his father who died on 18/12/2012; that he was not aware that Gilbert took a loan from the defendant and he came to learn of it in 2019 or 2020. PW1 admitted that there was a loan application form dated 13/4/1985 and the facility was for Kshs. 200,000/= to purchase a vehicle; that there is also a power of attorney which appointed Gilbert Okeyo to use the suit land as security for the loan facility.
 16. PW1 stated that there was a consent which refers to an application dated 29/5/1985 in respect to the suit property for a charge in favour of the defendant but the charge was not registered; that there is a caution over the suit property put by the defendant.
 17. On re-examination, PW1 testified that "PEXH 7" is the registration of a caution; that on the charge document, there is no registration with the Registrar of Land and neither is it signed by the Registrar; that the registration of the power of attorney is not registered against the property. PW1 stated that he has not been shown documents with his late father's signatures.
 18. The plaintiffs filed written submissions dated 12/6/2023. The plaintiffs are of the view that the sole issue for determination is whether they are entitled to their prayers in the plaint and whether the defendant is entitled to the prayers in the counter-claim.



19. It was submitted that the regime under which the caution was registered is the repealed Registered Land Act Cap 300 (RLA); that under Section 31 of the RLA, the law provided that a person who claims an interest in land whether contractual or otherwise, may lodge a caution with the Registrar forbidding the registration of disposition of the land, lease or charge; that according to the defendant there was a charge document dated 24/5/1985 allegedly executed over the suit property and consent by the relevant Land Control Board on the 30/5/1985 guaranteeing the loan of Kshs. 400,000/=; that the defendant did not explain why it failed to register the executed charge whilst it placed a caution dated 17/10/1991.
20. The plaintiff questioned the relevance of the caution while there was a duly executed charge from the year 1985 and submitted that having failed to register the charge, there was no reason to register a caution over the suit property; that under Section 131 1(a) of the RLA, a caution comes into play when there is no charge document executed by the chargor or where there is a charge document but for the fault of the chargor, the chargee is not able to register the charge instrument. Further, the plaintiffs submitted that the defendant did not notify the owner of the property of the caution registered as is required by the law; that the plaintiffs only came to know of it during the administration of the estate.
21. On the power of the attorney, it was submitted that the document was to enable the donee, Gilbert Oginga Okeyo to execute the charge in the place of the donor Andrew Okeyo and once the donor executes the charge document, the power of attorney has no value or relevance; that the power of attorney lapses with the death of the donor who in this instance, died on 18/10/2012 while the party to whom it was donated, died in the year 2019; that the defendant cannot therefore enforce the power of attorney. The plaintiff argued that the letter dated 23/11/1990 stated that the defendant had initiated the process of the registration of the charge on 23/11/1990 thereby overtaking the purpose of the power of attorney and invalidating the same.
22. The plaintiffs submitted that the documents (DEXHs 11 and 12) describe Andrew Okeyo as the guarantor while the borrower is Gilbert Oginga Okeyo but there is no description of the deceased herein as a chargor to the defendant; that in departure from the law and practice, the defendant failed to have the deceased execute a guarantee document; that the defendant having failed to register the charge document and failing to have the deceased execute a guarantee, the court cannot be called upon to make the declarations sought by the defendant because the charge document is invalid.
23. On the creation of an informal charge, the plaintiffs submitted that it is not possible to have both formal and informal charges over the same suit property; that under the Registered Land Act, Cap 300, under which the suit property was registered when the parties transacted, there was no provision for the creation of an informal charge; that what the defendant pleaded was that a formal charge was created and now it cannot be said that an informal charge was created. The plaintiffs submitted that the Land Act 2012 which provides for informal charges, cannot apply retrospectively.
24. On the limitation of the action brought before this court, it was submitted that the action for recovery of money cannot be brought after the expiry of six years as provided for under Section 4 of the Limitation of Actions Act; that the charge document having been executed on 29/5/1985, the cause of action extinguished in May 1991. Further, it was submitted that the defence's counterclaim was filed on 29/4/2021 more than 30 years after the expiry of the limitation period and such claims by the defendant against the plaintiffs are statute barred; that



even assuming that there was a mortgage/charge in place, the same cannot be enforced after expiry of 12 years under section 19 of the *Limitation of Actions Act*.

25. The plaintiffs submitted that even if there was a registered charge against the suit property or that the defendant was entitled to foreclose on an informal charge, the defendant is seeking to recover an amount of Kshs. 14, 543,138.40 as at 21/11/2019 despite the fact that as at December 1990 the loan account became dormant with a debt of Kshs. 1,071,105 as per the defendant's records.
26. It was further stated that the loan disbursed was Kshs. 304, 943/= against the alleged guarantee of Kshs. 400,000/= and the repayments as at December 1990 stood at Kshs. 260, 146/=; that in the month of December 1991, the interest stopped being charged on the account when the amount allegedly in the account was Kshs. 1, 436,964/=; that there is no contractual document enforceable against the deceased where he undertook to pay the interest on the alleged guaranteed sum of Kshs. 400,000/=; that even assuming the deceased had an enforceable guarantee, the defendant can only enforce to the tune of Kshs. 304,943/= less any amounts already paid that is to say Kshs. 44,797/=. The plaintiff submitted that the alleged loan was first secured by a motor vehicle which was repossessed by the defendant on 17/9/1986; that the defendant has not accounted for and/or credited the sale amount realised to the loan account.
27. On the counterclaim, the plaintiffs submitted that it should be dismissed for the reason that there was no contract of guarantee between the estate of the deceased and the defendant; that there is no informal charge created between the estate and the defendant over the suit property as pleaded; that there is no proof by the defendant for the claim of Kshs. 14, 543, 138/= against the estate or any lesser or greater sum for that matter; that there is no legal justification for the defendant to claim that the borrower was lent Kshs. 400,000/= when the defendant's records show that the amount disbursed in 1985 was Kshs. 304, 954/=; that there is no legal justification for the defendant to lump interest charges on the estate on account of a charge document that was never registered and became obsolete in the year 2012; that the defendant failed to render true, correct and legal account in line with the duplum rule; that the caution registered against the suit property was illegal. On that basis, the plaintiffs asked this court to allow their claim with costs and dismiss the defence and counterclaim with costs.
28. Peter Kilonzo, the liquidation agent of defendant testified as DW1. He adopted his witness statement dated 16/4/2021 as his evidence in chief and he produced the documents dated 29/4/2021 as "DEXHs 1-21." He testified that on or about 13/4/1985, Gilbert Oginga Okeyo (the borrower) applied for a loan of Kshs. 400,000/= which was approved by a letter dated 24/5/1985; that the security offered for the loan facility was the suit property registered in the name of the deceased Andrew; that the deceased issued a power of attorney in favour of the borrower for purposes of pledging the suit land as security for the loan taken; that the deceased also offered a personal guarantee as further security.
29. DW1 further testified that on 29/5/1985, the deceased and the defendant executed a charge over the suit property where the defendant agreed to advance the borrower a loan of Kshs. 400,000/=; that on 30/5/1985, the Land Control Board issued the consent to charge the suit property; that the deceased released and deposited the certificate of title of the suit property with the defendant; that the borrower subsequently defaulted in repaying the monthly instalments beginning the year 1985 which default he was notified and called upon to rectify.
30. It was testified that as a result of the default, the accrued penalties and interest stood at Kshs. 14, 543, 138.40/= as of 21/11/2019; that the defendant issued a 90 days' statutory notice on



21/11/2019 to the borrower and copied to the plaintiffs' through their last known address and on 29/1/2020 issued a 40 days' statutory notice. DW1 testified that the defendant is entitled to repossess the suit land offered as security for the loan.

31. On cross examination, Mr. Kilonzo testified that he became seized of this matter after it was filed in court; that the documents came into his possession as a liquidator of the defendant but he was not party to the execution of the loan between the parties; that the power of attorney was registered for the purposes of the loan and it was to give the borrower; that the charge was not registered against the suit property but the loan was advanced to purchase public service vehicles; that the motor vehicles were not used as security; that the vehicles were jointly registered in the name of the defendant and the borrower. PW1 could not tell whether the motor vehicles were repossessed.
32. The defendant further testified that the loan became non - performing in 2005 and the last payment was made in June 1986. DW1 stated that he did not know that Gilbert died in the year 2006 while Andrew died in the year 2012; that all the letters in relation to the loan were addressed to the borrower.
33. On re-examination, DW1 testified that the charge document is not disputed but he does not know what happened to the vehicles; that the borrower informed the defendant that it was in an accident yet someone else claimed that it was sold to him; that value of a guarantee is the money owing when the notice was issued; that there are many letters notifying the borrower of the debt and the deceased herein also knew that he was a guarantor; that as at the time of sending the letters, they did not know that the deceased herein had died but the last letter was copied to the estate of the deceased. DW1 stated that the loan was not paid but they stopped the interest and the last balance was Kshs. 14,500,000/- in 2005 which they wish to recover.
34. The defendant also filed written submissions dated 4/7/2023 and submitted on 4 issues. On whether there is an informal charge created by the plaintiff by depositing with the defendant the certificate of title to the suit land, the defendant referred the court to the definition of a charge under Section 2 of the *Land Act*; that Section 79 of the *Land Act* also defines what an informal charge is. The defendant supported his submission with the findings in *Tassia Coffee Estate Limited & Another vs Milele Ventures Limited (2014) eKLR* where the court made a finding on when an informal charge is created and found that it is when a borrower deposits a title with the lender.
35. The defendant further referred the court to the case *Lincoln Kivuti Njeru vs Insurance Company of East Africa (2017) eKLR* where the court held that informal charges must be by way of instruments and evidenced in writing and that the defendant must enter into further charges or agreements in the event that they want security provided for other monies owed. The defendant also referred to the case of *Jamii Bora Bank Limited vs Wapak Developers (2018) eKLR* where the court affirmed the existence of informal charges. The defendant submitted that although the informal charge was not registered, it is valid in law and as per Section 65 (1) of the *Land Act*.
36. On the failure to have the deceased execute a guarantee document, it was submitted that it has never been a requirement under the law that for a charge to be valid, a deed of guarantee has to be executed by the chargor; that the deceased executed the charge document which has not been disputed by the parties. On the place of the power of attorney in the execution of the charge, it was submitted that it had no relevance since the power of attorney terminated with the death of the donor and therefore cannot be enforced after the death of the donee; that in



this instance, the power of attorney was to confirm the willingness of the chargor to subject the property to secure the loan for the borrower.

37. On the registered caution over the suit land, the defendant referred the court to Section 131 1(a) of the [Land Registration Act](#) which provides for the purposes of a caution; that the act of registration of the caution over the suit property was to forbid transactions over the suit property which the chargor and the borrower could have conducted thus jeopardising the interests of the defendant. The defendant submitted that the plaintiffs even after knowing that both the borrower and the guarantor are deceased, they never attempted to remove the caution as per provisions of Section 133 of the Registered [Land Act](#).
38. On whether leave should be granted to the defendant to exercise its statutory power of sale, it was submitted that the outstanding loan as per the statement of account was Kshs. 14,543,138.40/=; that the defendant cannot exercise its statutory power of sale without consent of the court as per the provisions of Section 79 of the [Land Act](#) to realise the remedies envisaged under section 90 of the [Land Act](#). The defendant relied on the findings in Ibrahim Seikei T/A Masco Enterprises vs Delphis Bank (2004) eKLR and Jamii Bora Bank Limited (supra). The defendant submitted that it has proved that it has lien over the suit property and issued the required statutory power of sale and redemption notices.
39. On the issue of limitation of time, the defendant submitted that as per Section 19 (1) (4) of the [Limitation of Actions Act](#), an action to recover principal sum of money secured over a mortgage on land or movable property cannot be brought at the end of 12 years; that in this instance, there existed a debt upto the year 1990; that the defendant went into liquidation in the year 1998 which is within the 12 year period when the debt was acknowledged; that any transactions which occur without the consent of the liquidator during the period of liquidation, is void; that the Third Schedule of the [Insolvency Act](#) 2015 provides that the liquidator has the power to sell any of the company's property through public auction.
40. The defendant relied on the writings of the learned authors in Limitation Act 7th Edition (1997) by V.R. Manohar where it was opined that where there is a continuing breach of contract, a fresh tort arises and time begins to run afresh. The defendant stated that the liquidator has the powers to suspend the running of time in order to discharge its obligations; that the duty of the liquidator to collect debts is not subjected to time limitation.
41. In conclusion, the defendant submitted that it has sufficiently demonstrated that the deceased guaranteed the loan which the borrower defaulted; that the security of the loan facility was the suit land over which it has the right to exercise its statutory power of sale and the suit should be dismissed with costs to the defendant.
42. I have certainly considered the pleadings herein and the respective parties' submissions. The issues for determination arising therefrom are:-
 - i. Whether the suit is competent.
 - ii. What is the applicable law of the instant charge instrument.
 - iii. Whether or not the present charge can be termed as an informal charge.
 - iv. Whether the defendant applied the proper procedure in law in serving the statutory notices.



43. The evidence on record is that by a letter dated 24/5/1985 (DEXH 3), the defendant advanced a loan of Kshs. 400,000/= to Gilbert Okeyo. The terms of the loan were that it would be repaid in 24 months in instalments of Kshs. 20,164/= which includes financial charges and interest at the rate of 19% per annum subject to adjustments as may be directed by the Kenya Monetary Authorities. It was also a term of the loan agreement that a penalty of 3% per month shall be charged on any arrears of more than 14 days.
44. The security for the loan as per the letter of offer was the new vehicle to be purchased plus the title to the suit property, Savermatic Account 01 - 000 - 2413 and CCS/S28/85. There is also a duly executed charge document dated 29/5/1985 (DEXH 4) between Andrew Okeyo (deceased herein) as the chargor and the defendant as the lender over the suit property. The charge stated that the amount to be secured over the title was Kshs. 400,000/=.
45. The charge document was duly executed by the deceased. The plaintiffs did not challenge the execution of the charge document. Further, there is a letter of consent to charge the suit property from the Lands Board dated 30/5/1985 (DEXH5). By a letter dated 23/11/1990, the defendant wrote to the firm of Advocates who were handling the registration of the charge, informing them that they have noted the charge was not formally registered.
46. None of the parties raised the issue of the competence of the suit as filed before this court but by dint of the provisions in Order 15 Rule 2, this court in addressing the matters in controversy between the parties, may frame its own or additional issues.
47. The defendant is in liquidation. For all intent and purposes, all dealings with the defendant now fall under the [Kenya Deposit Insurance Act, 2012](#) (hereinafter KDI Act) which was enacted to establish the deposit insurance system and for receivership and liquidation of deposit taking institutions.
48. Section 55 of the KDI Act provides for powers of the liquidator. One of the powers of the liquidator as per Section 55 (e) is to discharge all the debts on behalf of the institution. Section 56 (2) of the KDI Act provides:-
- “No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.”
49. My understanding of the above provision is that before filing civil claims against the liquidator, a party must seek leave of court. In *Rashik Kumar Punja Shah & another v Chase Bank Limited (In Liquidation) & another* (2021) eKLR the court discussed the rationale of seeking leave of court prior to filing proceedings against an institution under liquidation as follows:-
- “Sub-section (2) bars filing injunctions or commencing any other action or civil proceedings against the financial institution or in respect of its assets without the sanction of the court. The bar contemplated by sub-section (2) is wide and all-embracing, extending to injunctions, or any other action or civil proceedings against the institution or in respect of its assets. As was held in *Kwanza Estates v Dubai Bank of Kenya Ltd & Another* (2016) eKLR this provision bars any fresh suit from being commenced without court sanction and forbids continuing with any subsisting litigation without the same sanctions...The intent and purpose of section 56 (2) is to eliminate any applications which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to institute the



proceedings if the court is satisfied that there is a case for further consideration. The requirement that the court sanctions the proceedings is designed to shield the liquidator from busy bodies with misguided or trivial complaints, and to remove the uncertainty as to whether a liquidator could safely proceed with his functions while court proceedings pend in court even though misconceived. The court is called upon to identify and filter out, at an early stage, claims which may be trivial or without merit.”

50. The Court of Appeal made an observation while granting injunctive orders on the competence of the appeal before it in *Bougainville Estate Limited v Kenya Deposit Insurance Corporation (KDIC) (Suing in their capacity as Receiver Managers of Imperial Bank Limited-(In Receivership) & 3 others (Civil Application 34 of 2021) [2021] KECA 132 (KLR) (5 November 2021) (Ruling)* as follows:-

“Moreover, given the express bar in Section 56(2) of the *Kenya Deposit Insurance Act* against institution of suits in the nature of which the applicant had filed without sanction of the court and the concession by the applicant that leave had not been sought prior to the institution of the suit, the intended appeal would appear somewhat tenuous.”

51. It is my finding that the suit instituted against the defendant was done without leave of court. The plaintiffs did not plead that leave was given and therefore, it is premature. As matters stand, this court has no jurisdiction to pronounce itself on the prayers being sought by the plaintiffs. The suit is incompetent and ripe for striking out. However, for the completeness of the record, this court will make its determination on the other issues.
52. It is not in dispute that the transaction was entered into when the Registration *Land Act* Cap 300 was in force. At the time when the defendant sought to exercise its statutory power of sale, the *Land Registration Act* was repealed by the enactment of the *Land Act* 2012. The plaintiffs took the position that the law under which the charge was executed, did not provide for formal charges and therefore, the unregistered charge cannot be presumed to be an informal charge. The defendant took the position that since the deceased had executed a charge and deposited the original title with it, the assumption is that an intention to charge the property was created and an informal charge was created pursuant to Section 79 of the *Land Act*.
53. To begin with, the charge executed and dated 29/5/1985, was pursuant to the Registration of *Land Act* Cap 300. The *Land Act*, 2012 repealed The Registration of *Land Act* Cap 300. Section 162 (1) and (2) of the *Land Act* provides:-

“(1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided in this Act or the circumstances are such that the contrary must be presumed, if any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance



with the law applicable to it immediately prior to the commencement of this Act.”

54. The transitional clause provides that any land transaction entered into under the previous land regime will still be governed by the same law unless the contrary is proven. Part VII of the [Land Act](#) provides for the application of charges. Section 78 (1) and (2) of the [Land Act](#) provides: -

“(1) This part applies to all charges on land including any charge made before the coming into effect of this Act and in effect at that time, any other charges of land which are specifically referred to in any section in this part.

(2) Reference to this Part to “the charged land” shall be taken to mean and include a charged land, a charged lease and sublease and a second or subsequent charge.”

55. As per the provisions of Section 162 (1) and (2) of the [Land Act](#), unless the contrary is proven, previous transactions under the Registration of [Land Act](#), Cap 300 and any other laws touching on land issues remain to be governed by those laws. Section 78 (1) and (2) of the [Land Act](#) applies to all charges used to secure loan facilities over properties including those made before the enactment the [Land Act](#) 2012.

56. In Overseas Private Investment Corporation & 2 others -vs- Attorney General (2013) eKLR on the rationale of the transitional provisions it was stated:-

“These transitional provisions I have cited are intended to mitigate the full rigor of the retrospective effect of the provisions of Part VII. Section 162 of the Act permits the application of the repealed law to specific instruments made or any rights or interests accrued prior to the Act coming into force. Specifically section 162 (2) of the Act permits transactions commenced prior to the Act to continue in accordance with the repealed law”.

57. In Jimmy Wafula Simiyu -vs- Fidelity Commercial Bank Ltd (2013) eKLR the court had this to say on the charges created before the enactment of the [Land Act](#): -

“A careful reading of this section will show that there is the use of the words “ Unless the contrary is specifically provided in this Act” section 78 of the [Land Act](#), 2012 which the plaintiff relies on is in my view, express and specific that part VII of the Act on “General provisions on charges” applied to all charges on land including any charge made before the coming into effect of that made before the coming into effect of that Act. That part VII generally deals with the creation, transfer, contents of charges and the remedies thereon part VII extends from section 78 to 106 of the Act. In my view therefore notwithstanding the provisions of section 162 (1) of the Act, the provisions of section 78 of the Act being express and specific as to application of part VII of the Act, that part applies to the charges made before 2nd May, 2012 when the [Land Act](#) 2012 came into effect. In this regard, I hold the view that prima facie, the provisions of the [Land Act](#), 2012 is applicable in this case as regards part VII thereof”.



58. Similarly, in Patrick Waweru Mwangi & Another -vs- Housing Finance Company of (K) Ltd (2013) eKLR the court held:-

“That being said, the question is whether the provisions of the Land Act and Land Registration Act are therefore applicable in the instant suit, given that the charge instruments were executed before the said Acts were enacted. The savings and transitional provisions with respect to rights, actions dispositions etc are provided under section 107(1) & (2) of the Land Registration Act and sections 106 (1) &(2) of the Land Act”. Both regimes of the law provide that “Unless the contrary is specifically provided in this Act”, any rights, interest, obligations acquired, accrued, or established before the commencement of the Act shall continue to be governed by the law applicable. This is the saving transitional clause for the transition into the new laws with the repeal of all previous land laws including the Registered Land Act Cap 300.”

59. This court concurs with the decisions in Overseas Private Investment Corporation & 2 Others (supra), Jimmy Wafula (supra) and Patrick Waweru Mwangi (supra) on the applicability of the law on charge instruments executed by the parties before the enactment of the Land Act, 2012. It is therefore this court’s finding that the applicable law for determining disputes arising from the charge created and executed on 24/5/1985 between Andrew Okeyo (deceased) and the defendant to secure the loan facility of Ksh. 400,000/= advanced to Gilbert Oginga Okeyo is governed by provisions of the Land Act 2012.

60. Having found that the applicable law is the Land Act 2012, the question then becomes what is the validity of an unregistered charge instrument? Section 2 of the Land Act further defines a charge as follows:

“Charge” means an interest in land securing the payment of money or money’s worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge, including-

- a. an informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor’s land with the repayment of money or money’s worth obtained from the chargee....”

61. Section 79 (6), (7) (8) and (9) of the Land Act provides for informal charges as follows:-

(6) An informal charge may be created where –

- (a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor’s land or interest in land, with the repayment of money or money’s worth, obtained from the chargee;
- (b) the chargor deposits any of the following-
 - (i) a certificate of title to the land;



- (ii) a document of lease of land;
- (iii) any other document which it is agreed evidences ownership of land or a right to interest in land.

- (7) A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.
- (8) An arrangement contemplated in subsection (6)(a) may be referred to as an "informal charge" and a deposit of documents contemplated in subsection (6) (b) shall be known and referred to as a "lien by deposit of documents."
- (9) A chargee shall not possess or sell land whose title document have been deposited with the chargor under an informal charge without an order of the Court.

62. The law recognizes that it is not necessary for charges to be registered to be enforceable. Section 2 of the [Land Act](#) provides for creation of informal charges. According to Section 79 (6) - (9) of the [Land Act](#), for a charge to be informal the following conditions have to be fulfilled:-

- a. A chargee should accept a written and witnessed undertaking by the chargor on his/her intention to charge the chargor's land or interest in land for the repayment of money obtained from the charge;
- b. The chargor must deposit a certificate of title of the land, lease of the land or any other document which conferred interest in the land with the chargee.

63. In the case of *Tassia Coffee Estate Limited and Another* (supra) the court stated that; -

"By depositing the title deed with the Plaintiff, the Defendant created an informal charge in favour of the Plaintiff over the suit property as security for payment of the balance of purchase of purchase price and other parcels of land. The Plaintiffs became chargees of an informal charge over the suit property and enjoyed a lien by deposit of the documents."

64. In *Kingdom Bank Limited vs Okotsi* (Civil Suit E004 of 2021) (2022) KEHC 12771 (KLR) (30 August 2022) the court had this to say on whether there was an intention to create and informal charge and the whether a bank can realise its security. The court whilst also referring to Section 79 of the [Land Act](#) held:-

"I discern and consider the provision to create prerequisites for the creation of both formal and informal charges. For informal charges what is required is writing to disclose clear intent to offer the title out laid or an interest in land to secure the payment of a debt whether existing, contingent or future, which instrument is then accepted by the chargee as a written commitment and the deposit of any document



agreed to evidence the ownership of the land by the chargor. In this matter, the only document exhibited to demonstrate the agreement between the parties is the letter of offer dated November 13, 2018 and duly signed and witnessed by the advocate on the November 30, 2018. To establish if the parties did intend to create an informal charge one must peruse that document and establish if the requirements of section 79 (6 – 9) Land Act have been established. The intention must be that the chargor and the chargee agreed that the document deposited with them was to secure the payment of the debt. While there has not been exhibited any document to show what document of title was pledged or deposited, the letter of offer at the clause headed “principal covenants” show that the facility would not be availed until and unless all security documentation would have been finalized and pledged in favour of the bank. In addition, the respondent has unequivocal and on oath sworn of paragraph 3 of the replying affidavit that he ‘deposited his title deed with the plaintiff bank to serve (sic) the repayment of a loan borrowed from it’. I do find, on the documents filed, that there was a demonstration in the letter of offer to clearly show the intention to charge the property, informally, to secure the payment of any amount that would be availed to the defendant in the form and nature of a temporary overdraft facility.”

65. Reviewing all the facts and the evidence before this court, it has not been denied that Andrew Okeyo (the deceased herein) deposited the original title deed of the suit land with the defendant and in addition, executed a charge document with the defendant as security over the loan facility advanced to Gilbert Okeyo (the borrower). The actions of the deceased automatically created an informal charge over the suit property and the defendant held the certificate of title as lien for the performance of the loan facility. Therefore, the conditions under Section 79 (6) - (9) of the Land Act were fulfilled. The only oversight was the failure to complete the registration of the charge for it to be a formal charge. This court is satisfied and finds that on a balance of preponderance, there was an informal charge that was created over the suit property to secure the loan of Kshs. 400,000/= advanced to Gilbert Okeyo.
66. Before effecting its rights of sale under an informal charge, the law provides that the chargee must first seek leave of court. Section 79 (7) of the Land Act provides:-

"A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect."
67. The defendant wrote to the deceased herein on 27/10/1987 informing him as a guarantor of the loan arrears on the loan account. The defendant wrote subsequent letters to Gilbert Okeyo (the borrower) on 12/11/1987, 3/10/1988, 7/11/1990, 18/4/1993 and 10/11/1993 asking him to settle the loan arrears. During this period, the defendant did not attempt to recover the loan from the guarantor.
68. The defendant again sent a 90 days statutory notice letter to Gilbert Okeyo on 21/11/2019 and a 45 days redemption letter on 29/1/2020. PW1 testified that the said Gilbert Okeyo was his stepbrother and he died in the year 2009 while the guarantor who is the deceased herein, died on 18/10/2012. The plaintiffs did not produce the death certificate of Gilbert Okeyo but the assertion that he might have been deceased was not objected to by the defence. On the part of the guarantor, even in the absence of a death certificate, the letters of administration issued to the plaintiffs is proof enough that Andrew Okeyo is deceased.



69. In the event that Gilbert Okeyo is deceased, it could only mean that the statutory notices were sent to a deceased person. The statutory notices can only be valid if they were addressed to the estates of the deceased persons. Section 66 of the Law of Succession Act gives the chargee the right to apply to the court for letters of administration to enable it carry out its statutory power of sale. The Court of Appeal in *Martevé Guest House Limited v Njenga & 3 others* (2022) eKLR held:-

"As Chargee, the bank had the option under section 66 of LSA to apply for letters of administration for the estate of the deceased to enable it to exercise its statutory power of sale. Nevertheless, in light of the bank's interest in the suit property, and the rights of the deceased's beneficiaries, the bank could only exercise that option by applying to have a person or persons entitled to a grant of letters of administration for the estate of the deceased chargor appointed as such by the court. That would have enabled the bank to serve the estate of the deceased with the necessary notices through the appointed administrators, to give an opportunity for the estate to pay the debt failing which the bank would be able to pursue its statutory right of sale, the administrators stepping into the shoes of the deceased chargor. The bank did not follow that avenue and the estate of the deceased was not given an opportunity to redeem the suit property before the sale. To that extent the bank's statutory power of sale had not accrued."

70. To answer the question whether the defendant applied the proper procedure in law in serving the statutory notices, the answer is in the negative. First, before sending the 90 days statutory notice and the 45 days redemption notice to Gilbert Okeyo, the defendant had to first seek leave of the court which it did not. Secondly, the statutory notices were sent to deceased persons as opposed to the estate of deceased persons were invalid. Hence, the defendant's right to exercise its statutory power of sale, cannot be said to have crystallized.
71. In conclusion, this court finds that the suit herein is premature for want of leave to institute proceedings against the defendant by dint of the provisions of Section 56 (2) of the Kenya Deposit Insurance Act. This court also finds that the service of the notice of statutory power of sale by the defendant was premature as it did not also seek leave of court pursuant to the provisions of Section 79 (7) of the Land Act. The defendant did not also do proper service of the statutory notices, by serving them upon already deceased persons. Both parties in these proceedings were at fault.
72. Flowing from the above, the plaintiffs' suit dated 24/2/2020 and the counterclaim dated 29/4/2021 are hereby struck out with no orders as to costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 26TH DAY OF OCTOBER 2023.

R. WENDOH

JUDGE

