



Ali & 2 others v Diamond Trust Bank (K) Limited & another (Civil Case 3 of 2018) [2022] KEHC 14202 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL CASE 3 OF 2018
DK KEMEL, J
OCTOBER 19, 2022**

BETWEEN

SAHRA HERSI ALI 1ST PLAINTIFF

ULTRA HOLDINGS (K) LTD 2ND PLAINTIFF

BUNGOMA CALTEX SERVICE STATION LTD 3RD PLAINTIFF

AND

DIAMOND TRUST BANK (K) LIMITED 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 9th May, 2018, the Plaintiffs sued the Defendants, seeking prayers for: permanent injunction restraining the Defendants, its auctioneers, agents, employees and servants from selling or interfering with the Plaintiffs property, First Legal Continuous Charges over LR Numbers South-Teso/Osurette/1182 and 1183, LR Bungoma/Township/336 and 339 or any other property owned by the Plaintiffs in relation to various facilities; costs of this suit and interest on costs at court rates.
2. The 1st Defendant herein entered into an agreement with the 2nd and 3rd Plaintiffs where they were to extend facilities to them. The facilities were in form of bank guarantees and overdraft to finance the working capital for the borrowers and the same was scrutinized by:
 - i. Fixed and floating debentures over the assets of the borrowers.
 - ii. First Legal Continuous Charges over LR Numbers South-Teso/Osurette/1182 and 1183, LR Bungoma/Township/336 and 339 all registered in the name of the 1st Plaintiff.
 - iii. Joint several and personal guarantees of the Directors of the borrowers in support of borrowings.



- iv. Deed of Rental Assignment over properties mentioned hereinabove.
- v. Agreement establishing the consideration between the applicant and the borrowers.
3. The facilities were aggregating to Kenya Shillings One Hundred and Twenty-Eight Million (Kshs. 128,000,000/=) after rescheduling and amalgamation.
4. The Plaintiffs pleaded that they heard of the 2nd Defendant orally advertising the charged properties and on inquiry from the 1st Defendant they were given copies of:
 - i. Statutory notices from the 1st Defendant dated 23rd May, 2017.
 - ii. Notifications of sale form the 1st Defendant dated 6th October, 2017.
 - iii. Auctioneer's Notification of Sale dated 23rd February, 2018.

All the above notices were supplied to the Plaintiffs on 2nd May, 2018 upon enquiry after hearing rumours of impending sale of the charged properties.

5. Pursuant to the Auctioneers notice, in the Plaintiffs possession, the Properties were earmarked for sale on 10th May, 2018 barely a week after the Plaintiffs got information of the impending sale. None of the Plaintiffs were served with either the statutory notice, the notification of sale from the 1st Defendant or the 2nd Defendant's notification of sale.
6. It was the Plaintiffs case that the impending sale of the 1st Plaintiff's property is not only unfair but illegal as the law requires that a chargor must be served with the crucial notices as listed above and in the prescribed time before the chargee can move in to exercise its right of sale.
7. The Plaintiffs allege that none of the guarantors of the facility and directors of the 2nd and 3rd Plaintiffs were served with the notices and according to the 3rd Plaintiff, the figures indicated in the notices are incorrect and not a true reflection of what is actually owed. It was alleged that the 1st charge was registered in favour of the 1st Defendant as the same was to securitize the facility extended to the 2nd and 3rd Plaintiffs in the year 2009 in form of continuation of overdraft facility and bank guarantees. According to the 3rd Plaintiff, they subsequently cleared payments for the said facility but that the 1st Defendant indicated that the same was still in arrears.
8. The further charge dated 24th February 2012 and second further charge dated 8th May, 2013 were registered in favour of the 1st Defendant to securitize facilities extended to the 2nd Plaintiff only. The 3rd Plaintiff never executed the charge documents for the further charge dated 24th February, 2012 and second further charge dated 8th May, 2013 as no such facilities were extended to it. It was contended that the notices to clear arrears meant for the 3rd Plaintiff were not only malicious but baseless.
9. It was also contended that the amount the 1st Defendant claims to be in arrears is inaccurate as the 2nd Plaintiff has made regular payments towards settlement of the facility.
10. Despite interminable oral and formal written requests to the 1st Defendant, to furnish the Plaintiffs with the charge, further charge documents and copies of letters of offer to enable them understand the facilities in view of the notices and imminent sale of their properties, the 1st Defendant has blatantly refused to supply the same.
11. The Plaintiffs alleged that they are entitled to these crucial pieces of information as this would help demonstrate to the 1st Defendant a true reflection of the amounts owed and that the 2nd Plaintiff being the borrower has made efforts towards servicing the facility.



12. The 1st Defendant has only done a forced sale valuation for only one of the properties earmarked for sale i.e. title No. Bungoma Town/339 and that they intend to sell all the charged properties. Despite numerous requests to the 1st Defendant to furnish the Plaintiffs with the forced valuation reports, the same prove to be futile. It was alleged that the Plaintiffs are within their right to be furnished with the information of the said forced sale reports.
13. The Plaintiffs averred that there are developments that have been done on the properties earmarked for sale an indication that the facility is over securitized and that the intended sale is simply unfair, unprocedural, illegal and only this court can intervene to safeguard the rights of the Plaintiffs.
14. The Plaintiffs also filed a notice of motion application dated 9th May, 2018 seeking:
 - i. That this Hon. Court be pleased to issue orders restraining the Respondents, their workers, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling or in any other way interfering with the properties known as Title No. South-teso/osurette/1182 And 1183 And Title No. Bungoma Town/336 & 339 any other property of the Applicants pending the hearing and determination of this application.
 - ii. That this honourable court be pleased to issue an order restraining the 1st Respondent from listing the Applicants with the Credit Reference Bureau pending the hearing and determination of this application.
 - iii. That pending the hearing and determination of this application, this court do issue an order compelling the Respondents to furnish the Applicants with:
 - a. Statements of the 3rd Applicant's loan account showing the repayment schedule of the facility.
 - b. Copies of the charge or further charge documents of the facilities issue to the borrowers.
 - c. Copies of the forced sale valuation reports for the above-mentioned properties; Title No. South-teso/osurette/1182 And 1183 And Title No. Bungoma Town/336 and 339 earmarked for sale.
15. Vide the ruling delivered on 20th January 2021, this court was satisfied that the balance of convenience tilts towards preserving the status quo pending the hearing of the main suit. It allowed the application for injunction to issue against the Respondents not to sell, alienate or auction the Applicant's property for 90 days pending the hearing of the main suit which must be heard and concluded within 90 days from the date of the ruling.
16. Both the 1st Defendant did file their statement of defence dated 17th June 2021, where it deponed that the suit herein is defective for failure to comply with the mandatory provisions of Order 4 Rule 1 of the Civil Procedure Rules, 2010. Counsel averred that the suit was abated by operation of law for having failed to serve the 1st Defendant with summons to enter appearance and/or apply for extension of time within the prescribed time under law.
17. Counsel concurred that indeed the 1st Defendant advanced various facilities to the Plaintiffs under contractual terms and conditions as particularized here: pursuant to a letter of offer dated 21st April, 2009, hereinafter referred to as the 1st letter of offer, the 1st Defendant extended to the 2nd and 3rd Plaintiffs the following financial facilities: 2nd Plaintiff-an overdraft facility of Kshs 3,000,000/-, hereinafter referred to as facility (i); a bank guarantee of Kshs. 2,000,000/=, hereinafter referred to as



- facility (ii) and to the 3rd Plaintiff-an overdraft facility of Kshs. 4,000,000/= hereinafter referred to as facility (iii) and a bank guarantee of Kshs. 3,000,000/= hereinafter referred to as facility (iv).
18. It was expressly provided in aforementioned 1st Letter of offer that: facility (i) and facility (iii) were repayable on demand; interest on facility (i) and facility (iii) was payable at the Banks Base Lending rate (15.5% per annum at the time) plus 1% annum (16.5% per annum); in the event of default in payment the facilities would attract an additional default interest rate at 10% per annum; and in the event of default on the facilities, the total outstanding amounts would be due and payable immediately.
 19. The said facilities were secured by: charge dated 31st July, 2009 over LR No. South-Teso/Osurette/1182; LR No. South-Teso/Osurette/1183; Bungoma/Township/336 and Bungoma/Township/339 (collectively referred to as “suit properties”); Deed of Guarantee by 1st Plaintiff; and Personal Guarantees by the directors of the 2nd and 3rd Plaintiff.
 20. According to the 1st Defendant, a further letter of offer dated 25th August 2011, hereinafter referred to as the 2nd Letter of Offer dated 25th August 2011, hereinafter referred to as 2nd Letter of Offer, the 1st Defendant continued the earlier facilities and extended to the 3rd Plaintiff an additional facility in the following manner: Enhancement of Facility (iii) to Kshs. 10,000,000/= and Enhancement of Facility (iv) to 5,000,000/=.
 21. It was expressly provided for in the aforementioned 2nd letter of offer that: Facility (i) and facility (iii) were repayable on demand; interest on facility (i) and facility (iii) was payable at the Banks Base Lending rate (15.75% per annum at the time) plus 1% annum (16.75% per annum); in the event of default in payment the facilities would attract an additional default interest rate at 10% per annum; and in the event of default on the facilities, the total outstanding amounts would be due and payable immediately.
 22. The said facilities were secured by: Further Charge dated 24th February, 2012 over LR No. South-Teso/Osurette/1182 and LR No. South-Teso/Osurette/1183; Further Charge dated 24th February, 2012 over Bungoma/Township/336 and Bungoma/Township/339; Deed of Guarantee by 1st Plaintiff; and Personal Guarantees by the directors of the 2nd and 3rd Plaintiff.
 23. Pursuant to another Letter of Offer dated 14th January 2013, hereinafter referred to as 3rd Letter of Offer, the 1st Defendant continued the earlier facilities and extended to 2nd Plaintiff an additional facility in the following manner: Enhancement of Facility (iii) to Kshs. 22,000,0000/= and Continuation of Facility (iv) to Kshs. 5,000,000/=.
 24. It was expressly provided in the 3rd Letter of Offer that: Facility (i) and facility (iii) were repayable on demand; interest on facility (iii) was payable at the Banks Base Lending rate (19% per annum at the time) plus 1% annum (20% per annum); in the event of default in payment the facilities would attract an additional default interest rate at 10% per annum; and in the event of default on the facilities, the total outstanding amounts would be due and payable immediately.
 25. The above said facility was secured by Second Further Charge dated 8th May, 2013 over LR No. South-Teso/Osurette/1182 and LR No. South-Teso/Osurette/1183; a Second Further Charge dated 8th May, 2013 over Bungoma/Township/336 and Bungoma/Township/339; Deed of Guarantee by 1st Plaintiff; and Personal Guarantees by the directors of the 2nd and 3rd Plaintiff.
 26. The 1st Defendant deponed that in addition to the above facilities extended, the bank through letter of Offers dated 9th May, 2014 extended aggregate facilities totaling to Kshs. 31, 350,000/= to the 2nd Plaintiff and through a Letter of Offer dated 22nd October, 2014 extended a Term Loan of Kshs. 30,000,0000/= to the 2nd Plaintiff.



27. The 1st Defendant denied the assertions by the Plaintiffs in paragraphs 9, 10, 11, 12 and 13 of the Plaintiff and put them to strict proof.
28. The 1st Defendant deposed that it served the Plaintiff with all the requisite notices required of it under the law and any averments to the contrary is put to strict proof.
29. The 1st Defendant contended that the 2nd Plaintiff as at 23rd January, 2018 was indebted to the bank to a tune of Kshs. 37,183,489.50/= and the 3rd Plaintiff to a tune of Kshs. 22, 096, 050.36/= which continues to accrue interest at the respective contractual rates and put the 2nd and 3rd Plaintiffs averments to strict proof.
30. The 1st Defendant averred that the valuation of the said properties will be carried out prior to any auction of the properties and puts the Plaintiffs to strict proof with regard to the averments in paragraph 26, 28, 29, 30, 31 of the Plaintiffs Plaintiff.
31. The 1st Defendant urged this court to dismiss the suit against it with costs.
32. The matter initially had been before Riechi J before the same was transferred to this court on the 13/10/2021. The suit commenced for hearing in earnest on the 27/10/2021. I do wish to apologize to parties for the delay in hearing and determining the matter within 90 days as was decreed. Any inconvenience as a result thereof is sincerely regretted.
33. The Plaintiffs called one witnesses in support of its case. PW1, Asha Hersi Moghe, adopted her recorded witness statement as her evidence in chief. It was her evidence that she is a director of the 2nd and 3rd Plaintiffs herein and that the 2nd and 3rd Plaintiffs entered into an agreement with the 1st Defendant for extension of various facilities to the 2nd and 3rd Plaintiffs. The facilities were in form of bank guarantees and overdraft to finance the working capital of the borrowers. That through rumors they came to learn of the impending sale of the charged property earmarked for sale on 10th May, 2018 barely a month after their knowledge. She testified that all the requisite notices were only supplied to the Plaintiff on April 2018 upon inquiry after hearing of the rumors. She relied on her supplementary affidavit and the accompanying documents filed on 30th July, 2018 while giving her evidence. On cross-examination by Counsel for the 2nd Plaintiff she testified that, a cheque of Kshs. 280,0000/= was drawn by the 2nd and 3rd Plaintiffs and which was deposited with the 1st Defendant but that the same was refused prompting them to write a letter dated 19th March, 2021 protesting the conduct of the 1st Defendant. She further instructed the firm of Abutika to send another letter to the bank to which the 1st Defendant replied to respond through the firm of Shah & Co. Advocates. The court proceeded to adopt the list of documents dated 12th November, 2021. On cross-examination by Counsel for the 1st Defendant, she told the court that the bank did advance facilities to the 2nd and 3rd Plaintiffs and that the securities offered were Title No. South-Teso/Osurette/1182 and 1183 owned by the 1st Plaintiff who also own parcels No. Title No. Bungoma Town/336 and 339. It was her evidence that an initial facility was secured by the Malaba Plots South Teso/Osurette/1182 and 1183. She confirmed that she had seen the legal charge in the defendants bundle of documents indicating that the borrower is deemed to have been served as per page 42 of the Defendants documents. She maintained that she was never served with the demand notices and was made aware of the same in 2018 after hearing rumors and seeing the letter by Mutunga & Muindi Advocates dated 4th July, 2017 indicating that the 1st Plaintiff had come to know of the alleged sale of the four properties. She was categorical that she is defending the rights of the 2nd and 3rd Plaintiffs which were infringed upon. She also testified that she is aware that the 1st Defendant responded to the suit and filed statements. She confirmed that the statement of account as at 23rd November, 2018 was reading negative and that she has been paying money into



- the bank account but that the bank has frustrated her efforts. She told the court that the bank should release to her the other securities to enable her seek assistance from other banks to pay the loan.
34. On re-examination by Counsel for 1st and 3rd Plaintiff, she told the court that she made several attempts to have the bank share with her status on the facility payment statements and copies of the charge and other relevant documents in relation to the loan to no avail and that the 2nd Plaintiff's account is a current account and not a loan account and its closure was without her knowledge and thus erroneous. On re-examination by Counsel for the 2nd Plaintiff, she told the court that the 2nd and 3rd Plaintiffs never received the statutory notices until 2018 when they filed responses and that the 2nd and 3rd Plaintiffs are borrowers while the 1st Plaintiff is the guarantor. She was not shown any evidence of certificate of postage as evidence of service of the said notices and that the 2nd charge though not signed by the 3rd Plaintiff the bank demanded that it pay the loan.
35. On their part the Defendants also called one (1) witness. DW1, Francis Kariuki, who told the court that he is the manager of the 1st Defendant and wished to adopt his witness statement dated 22nd November, 2021 as his evidence in chief. He told the court that sometime in 2009, the Directors of the 2nd and 3rd Plaintiffs approached the 1st Defendant seeking financial facilities to finance their working capital requirements. The same was considered and approved and pursuant to the 1st Letter of Offer dated 21st April, 2009 the 1st Defendant extended to the 2nd and 3rd Plaintiffs facilities totaling to 12,000,000/= . To the 2nd Plaintiff- an overdraft facility of Kshs. 3,000,000/= hereinafter referred to as facility (i) and a bank Guarantee of Kshs. 2,000,000/= hereinafter referred to as facility (ii) while to the 3rd Plaintiff- an overdraft facility of Kshs. 4,000,000/= hereinafter referred to as facility (iii) and a bank Guarantee of Kshs. 3,000,000/= hereinafter referred to as facility (iv).
36. According to him, the 1st Letter of Offer the terms and conditions under the same were: Facility (i) and facility (iii) were repayable on demand; interest on facility (i) and facility (iii) was payable at the Banks Base Lending rate (15.5% per annum at the time) plus 1% annum (16.5% per annum); in the event of default in payment the facilities would attract an additional default interest rate at 10% per annum; and in the event of default on the facilities, the total outstanding amounts would be due and payable immediately.
37. In consideration of the 1st Defendant granting the above-mentioned facilities, the borrowing was secured by: charge dated 31st July, 2009 over LR No. South-Teso/Osurette/1182; LR No. South-Teso/Osurette/1183; Bungoma/Township/336 and Bungoma/Township/339 registered in the name of the 1st Plaintiff; Deed of Guarantee by 1st Plaintiff; and Personal Guarantees by the directors of the 2nd and 3rd Plaintiff.
38. He told the court that sometime in 2011, the Plaintiffs sought a renewal and enhancement of the foregoing facilities and the 1st Defendant approved the request and pursuant to a Letter of Offer dated 25th August, 2011 (hereinafter referred to as the 2nd Letter of Offer) the Bank continued the earlier facilities and extended to the 3rd Plaintiff an additional facility as follows: to the 2nd Plaintiff- Renewal of facility (i) and continuation of facility (ii) and to the 3rd Plaintiff- Renewal and enhancement of facility (iii) to Kshs. 10,000,000/= and Renewal and enhancement of facility (iv) to Kshs. 5,000,000/= . It was expressly provided in the 2nd Letter of Offer that: Facility (i) and facility (iii) were repayable on demand; interest on facility (i) and facility (iii) was payable at the Banks Base Lending rate (15.75% per annum at the time) plus 1% annum (16.75% per annum); in the event of default in payment the facilities would attract an additional default interest rate at 10% per annum; and in the event of default on the facilities, the total outstanding amounts would be due and payable immediately.



39. The forgoing renewed and/or enhanced facilities pursuant to the 2nd Letter of Offer were secured by: Further Charge dated 24th February, 2012 over LR No. South-Teso/Osurette/1182 and LR No. South-Teso/Osurette/1183; Further Charge dated 24th February, 2012 over Bungoma/Township/336 and Bungoma/Township/339; Deed of Guarantee by 1st Plaintiff; and Personal Guarantees by the directors of the 2nd and 3rd Plaintiff.
40. The 2nd Plaintiff approached the Bank seeking renewal and/or enhancement of its existing facilities and the 1st Defendant approved the same pursuant to the 3rd Letter of Offer dated 14th January, 2013. The 1st Defendant continued the earlier facilities and extended to the 2nd Plaintiff an additional facility in the following manner: Enhancement of Facility (iii) to Kshs. 22,000,000/= and Continuation of Facility (iv) to Kshs. 5,000,000/=. The salient terms of the forgoing were: Facility (i) and facility (iii) were repayable on demand; interest on facility (iii) was payable at the Banks Base Lending rate (19% per annum at the time) plus 1% annum (20% per annum); in the event of default in payment the facilities would attract an additional default interest rate at 10% per annum; and in the event of default on the facilities, the total outstanding amounts would be due and payable immediately.
41. The above mentioned were secured by the following: Second Further Charge dated 8th May, 2013 over LR No. South-Teso/Osurette/1182 and LR No. South-Teso/Osurette/1183; a Second Further Charge dated 8th May, 2013 over Bungoma/Township/336 and Bungoma/Township/339; Deed of Guarantee by 1st Plaintiff; and Personal Guarantees by the directors of the 2nd and 3rd Plaintiff.
42. He told the court that sometime in 2014 the 2nd Plaintiff also requested the 1st Defendant for continuation/renewal of its facilities and an additional term loan which was approved vide a letter of Offer dated 9th May, 2014 and the same was extended to the 2nd Plaintiff to a tune of Kshs. 31, 350,000/= and vide another Letter of Offer dated 22nd October, 2014 the 1st Defendant extended a term loan of Kshs. 30,000,000/= to the 2nd Plaintiff.
43. He told the court that in addition to the Letters of Offer and Charge, the 1st Plaintiff also signed a Memorandum of Acceptance of the Bank's Lending Terms and Conditions and having disbursed the facilities sought to the borrowers, the 1st Defendant expected the Plaintiffs to also perform their part of the contract and repay the facilities when they became due. However, in breach of the same the Plaintiffs failed to make the scheduled monthly repayments on the said facilities when due thus falling into arrears.
44. He told the court that in order for the 1st Defendant to recover its funds it issued a Statutory Notice dated 23rd May, 2017 under Section 90(3) of the *Land Act* No. 6 of 2012 to the 1st Plaintiff while the 2nd and 3rd Plaintiffs were copied according to their respective borrowings. According to the firm of Mutunga & Muindi Advocates it was clear to the 1st Defendant that the Plaintiffs received the Notice as the firm vide letters dated 4th July, 2017 challenged the basis of the Statutory Notices issued and in response the 1st Defendant through letters dated 22nd September, 2017 explained the basis of the Statutory Notices that were issued.
45. He told the court that despite the foregoing, the Plaintiffs failed to rectify the default on their respective facilities and as a result the 1st Defendant through its advocates on record issued a 40 day Notification of Sale dated 6th October, 2017 pursuant to Section 96 of the *Land Act* to the 1st Plaintiff and copied the same to the 2nd and 3rd Plaintiffs through the same addresses declared in the Charge and Letters of Offer while issuing the 90 days' Statutory Notice.
46. He told the court that it is clear that the Plaintiffs were duly served with the foregoing Statutory Notices in 2017 and not on 2nd May, 2018 as alleged by the Plaintiffs. The 1st Defendant still waited patiently for



- the Plaintiffs to address the Statutory Notice for a period over 3 months but they failed to do so and the 1st Defendant instructed the 2nd Defendant to sell the charged properties by way of public auction after issuing the Plaintiffs with the requisite Redemption Notices, which were duly served on 27th February, 2018(copies annexed as AHM-15 in the Plaintiffs Application dated 9th May, 2018)
47. He told the court that upon receiving the aforementioned Redemption Notices did the Plaintiffs approach this court seeking injunctive reliefs but failed to disclose that; as at 23rd January, 2018 the 2nd Plaintiff was indebted to the 1st Defendant to the tune of Kshs. 37, 183, 489.50/= which continues to accrue interest at the respective contractual rates and that as at 23rd January, 2018 the 3rd Plaintiff was indebted to the Bank to the aggregated sum of Kshs. 22, 096, 050.36/= which still accrues interest at the respective contractual rates.
 48. He told the court that the 1st Plaintiff was only served with the statutory notice under section 90 of the Land Act as per the letter dated 23rd May, 2107 as per page 154 of their bundle of documents. The firm of Mutunga & Muindi Advocates had been acting for the Plaintiffs. He insisted that both 1st plaintiff and PW1 all received the notification of sale under Section 96(2) of the Land Act dated 6th October, 2017.
 49. On cross examination by Counsel for the 1st and 3rd Plaintiffs, he told the court that indeed the 2nd charge was executed by 1st and 2nd Plaintiff only and all the Plaintiffs executed the other 1st charge and the additional further charge was to cater for the enhancement of the facility and that the 3rd Plaintiff is not liable for the enhancement of the facility. He told the court that it is not true that the 3rd Plaintiff had cleared the loan outstanding as there is an overdraft account in the name of Bungoma Service Station Ltd and that the 1st Defendant failed to specify the amounts owed by all the respective borrowers in the respective Statutory Notice.
 50. On re-examination by Counsel for the 1st Defendant, he testified that the guarantors only accepted the offer and guaranteed the loan and that notification was sent to the guarantors.
 51. Parties were directed to file and exchange submissions. The Plaintiffs submitted that the statutory notices allegedly issued against them for allegedly defaulting in loan repayments were irregular and baseless. They submitted that they were not issued with any statutory notice yet the Defendants purport to have complied with Section 90(1) of the Land Act.
 52. The Plaintiffs submitted that the intended sale by public auction was marred with irregularities, lack of service of statutory notice and lacked the forced valuation report on all the charged properties. They urged this court to grant the orders.
 53. The Respondents filed no submissions.
 54. I have now considered the pleadings, the rival evidence and the submissions filed. Having done so, I take the following view of the matter. It appears to me that the survival of this suit depends largely on whether or not the Plaintiffs were served with the statutory notice required by law and whether this court should grant the permanent injunction.
 55. The 1st Defendant did elaborate that the Plaintiffs fell into arrears with servicing their loans and it also elaborate that the same Defendant has been frustrating the Plaintiffs by refusing to bank their cheques for purposes of servicing the same facility. The lack of cooperation by the 1st Defendant clearly indicated that they were not interested in ensuring that the 2nd and 3rd Plaintiffs do service their facility. Withholding of vital information and various essential documents that would assist the Plaintiffs furnish the facility through other banks was also clearly demonstrated by the 2nd and 3rd Plaintiffs. The



- 1st Defendant on the other hand did not show to the satisfaction of this court that the allegations by the Plaintiffs were mere tales and their failure to elaborate avenues were adopted to walk the Plaintiff through the status of their respective loan accounts indicates it is responsible for the position the plaintiffs found themselves in.
56. The plaintiffs' other complaint was that they were not served with statutory notices before the defendant advertised the properties for sale. They argued that if statutory notices were ever issued, there was no evidence that they were served. They maintained that the 1st Defendant failed to avail any certificates of posting. The 1st Defendant on its part maintained that statutory notices including the auctioneer's notices were served through the Plaintiffs' postal address and that the postal address was similar to the one provided in the charge documents.
57. I have considered respective parties' arguments, the evidence and perused the documents filed by the defendant on the issue. Section 90(1) of the *Land Act* is clear that before a chargee can exercise its statutory power of sale in the event of default by the borrower, it must serve a notice on the chargor requiring him to regularize the default and pay the money owing, or to perform and observe the terms of the agreement. The chargee should also inform the chargor of the consequences to follow if the default is not rectified. The period of such notice should not be less than three months.
58. It was the evidence of the Plaintiffs that it was only through rumours and public announcement by the 2nd Defendant that they came to learn about the intended sale. The same was in the month of May, 2018 and the intended sale was to be conducted on 10th May, 2018. The 1st Defendant on the other hand claimed that the Statutory Notice was served in 2017 and not on 2nd May, 2018 as alleged by the Plaintiffs. Furthermore, the 1st Defendant averred that it still waited patiently for the Plaintiffs to address the Statutory Notice for a period over 3 months but they failed to do so and that the 1st Defendant instructed the 2nd Defendant to sell the charged properties by way of public auction after issuing the Plaintiff with the requisite Redemption Notices, which were duly served on 27th February, 2018. It was the evidence of the 1st Defendant that the Plaintiffs were properly served with the Statutory Notice as the firm of Mutunga & Muindi Advocates, which was representing the Plaintiffs at that time, vide letters dated 4th July, 2017 challenged the basis of the Statutory Notices issued and in response the 1st Defendant through letters dated 22nd September, 2017 explained the basis of the Statutory Notices that were issued.
59. Section 96(2) further provides that before exercising the power to sell the charged land, the chargee should serve on the chargor a notice to sell in the prescribed form and should not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice. That is to say, a chargee must serve two notices; the three months' notice notifying the chargor of the default, the nature of default, requiring the chargor to rectify the default and consequences for none compliance. Second, the forty days' notice before the advertising the property for sale.
60. The 1st Defendant was required by law to serve the Plaintiffs with a statutory notice calling on them to rectify the default. The Plaintiffs argued that the statutory notice required under section 90(1) (2) and 96(2) of the *Land Act* were not served while the 1st Defendant maintained that it served the Plaintiffs with the Statutory Notice. I have had the opportunity to peruse the 1st Defendant's bundle of documents and duly note that the 1st Defendant failed to avail before this court the requisite certificates of postage to confirm that indeed the same were served.
61. The 1st Defendant did not show that the Statutory Notice was sent to the Plaintiffs. All it did was to file a list of supposed response from the firm of Mutunga & Muindi Advocates challenging the basis of



- the Statutory Notices issued with no certificate of posting attached. The lack of certificate of posting can only be but an assumption that letters were posted. That, in my respectful view, is not sufficient proof that this particular notice was sent to the Plaintiffs, more so where receipt of the notice is denied.
62. The law is clear that it is the chargee's duty to serve the notices on a chargor before it can exercise its statutory power of sale. That duty would be discharged where it is shown that the notices were served even through registered mail. This can be done by attaching certificates of posting to show that the letter was indeed posted. This ought to be prepared by the Postal Officer who did the posting of the Statutory Notices indicating time, place, sender and receiver of the same. Where this is done, the burden would then shift to the chargor to satisfy the court that he did not receive the registered mail.
63. In *Nyangilo Ochieng & Another v Fanuel B. Ochieng & 2 Others* [1996] eKLR, the Court of Appeal, while dealing with service of notices under section 74(1) of the repealed Registered *Land Act* (Cap 300) the equivalent of section 90 of the *Land Act*, stated:
- “It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the Registered *Land Act* (Cap.300, Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargor receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale...It is for the chargee to make sure that there is compliance with the requirements of s.74(1) of the Registered *Land Act*. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice, it is for the chargee to prove that such notice was in fact sent.”
64. In *Stephen Boro Gitiba v Nicholas Ruthiru Gatoto* [2017] eKLR, the Court of Appeal again held that:
- “Section 74(1) of the RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title.”
65. The 1st Defendant did not prove that first, the notice under section 90(1) was served on the Plaintiffs. It was that notice that would have given rise to service of the notice under section 96(2). Even if it had been proved that the notice under section 96(2) had been served, which was not the case in this instant suit, failure to prove service of the notice under section 90(1) was fatal to the 1st Defendant's case. Service of statutory notices being a legal requirement, service thereof is a matter of fact to be proved by evidence and, therefore, it cannot be left to conjecture or assumption. I find and hold that the 1st Defendant did not serve statutory notices as required by law and, therefore, its statutory power of sale had not crystalized when it moved to exercise that power.
66. The Plaintiffs initially argued that there was no evidence of the forced valued report on all the charged properties when the 1st Defendant purported to conduct a public auction of the said charged properties. The 1st Defendant on the other hand denied the allegations of the Plaintiffs and averred that valuations will be conducted prior to any auction of the charged properties. I find the intention to conduct the public auction without any due regard to the market value by the 1st defendant is in contravention of section 97 of the *Land Act*. The 1st Defendant in its statement of defence made it clear that this step is yet to be done and prior to the auction of the said charged properties the valuation shall be conducted. The 1st defendant has not given any explanation as to why it did not comply with the



provisions of section 97 of the Land Act but went ahead to issue notices for sale of the securities. For that reason, this court cannot address that issue in the absence of that report. The conduct of the 1st defendant in rejecting to receive payments from the plaintiffs even on a without prejudice basis smacks of bad faith towards the plaintiffs. The plaintiffs appear not to have a problem with the payments but for the fact that they needed to be given the requisite information and documents by the 1st defendant which appear not forthcoming. Indeed, this notwithstanding, the plaintiffs are under obligation to meet their part of their bargain as there is evidence that they had been advanced some facilities and that at the end of the day they must give to Caesar what belongs to Caesar. In any event, the plaintiffs haven't advanced evidence to the effect that the transactions entered into between them and the 1st defendant are unconscionable and contrary to law and public policy.

67. Having considered this matter, the pleadings on record, evidence, submissions and the decisions relied on and the law, I am satisfied that the Plaintiffs have proved their case on a balance of probabilities. Consequently, I find merit in the claim and allow the same in the following terms:
- i. A declaration is hereby issued that the scheduled sale of properties known as Title No. Southteso/osurette/1182 And 1183 And Title No. Bungoma Town/336 & 339 and any other property of the Plaintiffs on 10th May, 2018 by public auction (now past) is unlawful and is, therefore, voided.
 - ii. An order is hereby issued directing the 1st Defendant to provide to the 2nd and 3rd Plaintiffs' respective financial representatives the current full statements for their loan accounts and loan repayments schedules with effect from the date interest rate cap law came into effect in 2016.
 - iii. The 1st Defendant is hereby directed to recalculate the outstanding loan amount with interest based on the interest rate applicable at the time of the alleged default on the basis of the agreed loan repayment period to enable the 2nd and 3rd Plaintiffs repay as per the agreed schedule. This should be conducted within the next thirty (30) days from the date hereof and thereafter the 1st Defendant will be at liberty to take necessary steps to exercise its options under the charge should the 2nd and 3rd Plaintiffs fail to repay the correct amount of the loan as per the agreed schedule.
 - iv. Costs of the suit to the Plaintiffs.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF OCTOBER, 2022

D.Kemei

Judge

In the presence of :

M/s. Amutavi for Okach for 1st and 3rd Plaintiffs

..... for 2nd Plaintiff

Janjo for Defendants

Kizito Court Assistant

