



REPUBLIC OF KENYA



Mwangi (Suing as the Administrator of the Estate of Rushia Nyokabi Mwangi) v M-Oriental Bank Limited (Civil Suit 6 of 2023) [2025] KEHC 8734 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL SUIT 6 OF 2023
AC MRIMA, J
JUNE 20, 2025**

BETWEEN

PETER NJAU MWANGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF RUSHIA NYOKABI MWANGI) PLAINTIFF

AND

M-ORIENTAL BANK LIMITED DEFENDANT

JUDGMENT

1. Peter Njau Mwangi, the Plaintiff herein, is the Administrator of the Estate of the Rushia Nyokabi Mwangi, (hereinafter ‘the deceased’). M-Oriental Bank Limited (hereinafter ‘The Bank’ or ‘The Lender’ or ‘the Defendant’) is an incorporated company carrying business as a bank in Kenya.
2. The dispute before this court revolves around a Bank’s or any lender’s right to exercise Statutory Power of Sale over a chargor’s property provided as security.

Background.

3. Through the Plaint dated 18th May 2023, the Plaintiff pleaded that the bank issued the deceased a letter of offer dated 21st February 2017, making funds in the sum of Kshs. 15,000,000/- available to her at its Branch in Kitale.
4. It was his case that upon execution of the letter of offer, the deceased offered as security, parcels of land known as Nakuru Municipality Block 24/265 and 2X7, held by the Bank as security for previous facilities, to cover Kshs. 5,600,000/-, Uasin Gishu/El Lahre/X5 to cover Kshs. 5,400,000/- and Land Reference No. 13637/10(I.R No. 63XXX7 to cover Kshs. 5,000,000/-.
5. It is the Plaintiff’s case that as at 30th September 2020, the deceased had paid up the loan facility of Kshs. 15,000,000/- (hereinafter ‘Loan 1’) leaving an outstanding balance of Kshs. 5,574,309.15/-.



6. The Plaintiff pleaded that the deceased had another facility of Kshs. 6,000,000/- (hereinafter 'Loan 2') which, as of 30th September 2020, had an outstanding balance of Kshs. 4,158,137.50/-.
7. In the said month of September 2020, the Plaintiff posited that the deceased took an overdraft facility of Kshs. 1,000,000/- (hereinafter 'The Overdraft'). To that end, there was a letter of offer dated 30th September 2020 which sanctioned the overdraft on the terms and conditions of Loan 1 and 2.
8. On the 7th November 2020, the deceased died. It is the Plaintiff's case that the Bank was notified on the 23rd November 2023 by sharing a burial permit, a fact, he claimed, the bank acknowledged receipt.
9. It is the Plaintiff's case that on 10th June 2021, the bank Cited the son of the deceased to take out letters of Administration. Accordingly, on 20th January 2023, he was granted Letters of Administration to administer the Estate.
10. The Plaintiff pleaded that on 22nd February 2023, the Bank issued a Statutory Notice pursuant to section 90 of the *Land Act* of 2012. It demanded payment of Kshs. 1,626,859.81/- on the overdraft, Kshs. 5,674,391.39/- on loan 1 and Ksh. 7,697,155.20/- on loan 2.
11. The Plaintiff acknowledged receipt of the demand through its letter dated 27th February 2020. He requested for the letter of offer, all correspondence, list of insurance companies on its panel and the one chosen by the deceased, copy of proposal forms sent to the deceased, receipts of payment made by the deceased, the charge dated 5th December 2013 over the land parcel Title No. Uasin Gishu/El Lahre/X5 for Kshs. 5,400,000/-, further charge dated 15th March 2017 over Land Reference No. 10 (I.R No. 63XXX7) for Kshs. 5,000,000/-, statement for the account No. 100XXXX69 and 100XXXXX115 and an indication which account the insurance premiums were deducted from, loss adjuster's reports, any demand notices or statutory notices sent to the deceased before the referral to Credit Reference Bureau (CRB) and the letter referring the deceased's information regarding non-performing accounts to CRB.
12. It was the Plaintiff's case that as of 14th April 2023, the Defendant had not provided the documents. It wrote a reminder of the same date. Eventually, through the letter dated 25th May 2023, the Defendant wrote to the Plaintiff informing him that his request was not practical due to the bulk of documents and confidentiality issues.
13. The Plaintiff posited that due to the Bank's non-disclosure on the loans, he was unable to fully appreciate the claim in the statutory notice. He asserted that the Bank failed in its duty towards the deceased and him as the representative of her estate by; charging illegal interest on the various loan facilities despite having been notified of the death of the deceased, failing to register a legal charge and a further charge as per the letter of offer dated 30th September 2020 over the properties Nakuru Municipality Block 24/265 and 2X7 and Land Reference No. 13637/10(I.R No. 63XXX7) for Ksh. 5,600,000/- Ksh. 5,400,000/-, Kshs. 1,000,000/- and Kshs. 5,000,000/-, issuing statutory notice based on non-existent legal charges, threatening to sell the suit lands whose titles have been deposited by the deceased under an informal charge, failing to comply with statutory law and issuing statutory notice based on repealed laws and that does not adequately inform the chargor of the remedies to apply to court for relief.
14. The Plaintiff contended that the representation made by the Statutory Notice dated 17th February 2023 and letter dated 25th May 2023 were inaccurate and misleading and done without probable consequence. It isolated the misrepresentations to include; that loans were outstanding despite knowing that they were not supposed to accrue interest after the deceased's demise; failing to take any steps to ascertain the true status of the deceased's loans; failure to render sound financial advice leaving



the deceased over exposed and the claim that the bank documents could not be availed due to claimed bulkiness and confidentiality issues.

15. The plaintiff pleaded that the deceased's estate is likely to suffer loss and that the Bank was not entitled to proceed with the sale of properties as they were negligent and indolent in ensuring that the properties were properly secured.
16. On the foregoing factual matrix, the Plaintiff prayed for the following reliefs;
 - a. A declaration that the Statutory Notice dated 17th February 2023 is unlawful for failure to meet the strict and mandatory requirements of the law, especially section 90(2)(e) of the Land Act No. 6 of 2012 and in the result should be set aside.
 - b. A declaration that the usurious and exorbitant interest being charged by the Defendants as contained in the statutory notice dated 17th February 2023, on the accounts of the late Rushia Nyokabi Mwangi is unlawful and unconscionable and in the result should be set aside.
 - c. A declaration that there were no legal charge registered in favour of the Defendant for the loan facilities advanced to the late Rushia Nyokabi Mwangi pursuant to the agreement contained in the letter of offer dated 30th September 2020.
 - d. An Order directing the Defendant to fully disclose all correspondence between it and the late Rushi Nyokabi Mwangi, either prior to the execution of any letters of offer or after, especially before the disbursements of the various loan to the deceased loan account and all charges registered in its favour to secure any loan facility taken by the late Rushia Nyokabi Mwangi.
 - e. Failure or consequent to (c) above such consequential orders and directions as are necessary to be given.
 - f. An order directing the Defendant to render true and full accounts to the Plaintiff.
 - g. An injunction restraining the Defendant their servant and or agents from alienating, transferring, charging, leasing or in any manner whatsoever dealing with the late Rushia Nyokabi Mwangi's assets that constitute the estate or alienating, transferring, charging, leasing or in any manner whatsoever dealing with any other securities held by the defendant in respect of the accounts of the late Rushia Nyokabi Mwangi, pending the disclosure sought herein above and int rendering full accounts to the Plaintiff.
 - h. Costs of this suit together with interests thereon at such rates and for such period of time as this Honourable Court may deem fit to grant.
 - i. Any other such relief as this Honourable Court may deem appropriate.

The oral evidence.

17. The Plaintiff was the sole witness for his case. Upon adopting his written statement, he produced the documents annexed therein as PExh 1-16. In reference to Clause 5 of the letter of offer dated 30th September 2020, it was his evidence that there was a requirement for personal life insurance cover for KShs. 10.7 million with the Bank as the nominee.
18. It was his evidence that as at the time of the deceased's death, there were no arrears on all the monies advanced. He stated that the bank issued him with the Statutory Notice after he obtained letters of Administration and responded to the Statutory Notice vide the letter dated 27th April 2023, with a follow up letter dated 14th April 2023.



19. On cross- examination, it was stated that he was aware of Central Bank of Kenya conditions. He admitted that clause 5(b)(iii) of the letter of offer dealt with additional security and the clause 5(c) is on consolidation of the deceased's accounts.
20. Upon being referred to paragraph 9(iv) of the Complaint which contains particulars of the letter of offer on personal insurance cover of Kshs. 10.7 million, he admitted that it was the deceased who was supposed to take out the insurance cover.
21. The Plaintiff stated that he was not aware if the deceased took out personal insurance cover. In reference to section 71A subsection (b) of the *Insurance Act* on insurance cover, he confirmed that it was the deceased who was supposed to take out insurance cover.
22. Further, it was his evidence that he asked for information from the Bank in order to ascertain if the deceased had taken out any cover from the insurance companies in the Bank's panel. He stated that there was a charge by the deceased upon her property in favour of the Bank. He conceded that there is an affidavit by the deceased sworn on 5th December 2013 that she was not covered with the charge.
23. He also agreed that there was another charge and another affidavit by the deceased on her role in charging the property which she was fully aware of. He admitted that the charges were not illegal.
24. The witness further agreed that contrary to paragraph 13(h) of the Complaint, he was supplied with statement of accounts. It was his evidence that the letter of offer and the charge contained interest rates. He stated that he was not aware if the deceased challenged the interest rates but acknowledged that penalties only arise in cases of default.
25. The Plaintiff asserted that the defendant has a right to liquidate the charged property on default. He stated that he had not applied for any reliefs on the charge pursuant to section 103 of the *Land Act* as read with Clause 9(3)(b) of the Charge.
26. In conclusion it was his evidence that he was invited to go to Kitale Branch to collect the documents and that he received the Statutory Notice which contains the default sum and period of settlement.
27. On re-examination, the witness stated that there was no any other letter of offer past the one dated 30th September 2020. He asserted that there was no legal charge on the basis of the letter of offer dated 30th September 2024. He claimed that the second and third charge were legal further charge but there was none that was registered. He reiterated the deceased was not in default as at the time of his death.
28. He testified that Clause 5 of the Letter of Offer dated 30th September 2020 is on condition precedent. He stated that according to the *Insurance Act*, the deceased ought to have taken out insurance cover and Clause 5 made the provision that no formal disbursement was to be made but despite the deceased not taking out the insurance cover, monies were disbursed. It was his case that the Defendant was negligent and the statutory Notices that followed the death of the deceased were unlawful.

The Defendant's Case.

29. The Bank defended the suit through a statement of defence dated 13th June 2023. It admitted the particulars of the terms and conditions on the letter of offer dated 21st February 2017.
30. It was its case that apart from the amount of Kshs. 5,600,000/- and Kshs. 5,000,000/- advanced to the deceased, she was also advanced a further charge dated 9th April 2019 registered against Title No. Uasin Gishu/ El Lahre/X5 .



31. It denied that the deceased paid up the facility of KShs. 15,000,000/- and denied that the balance outstanding was Kshs. 5,574,309.15/-.
32. The defendant averred that it is the Plaintiff who failed to call on its offices in Kitale Branch with a view to having the information he sought availed to him. It pleaded that there is nothing to hide about the loans due to it from the deceased when it followed due process.
33. It further denied that it had failed in its duty as a bank and that it had occasioned any breach of a legal duty. It denied that the representation it had made contained in the statutory notice of 17th February 2023 and the letter of 25th May 2023 were inaccurate and misleading. It put the Plaintiff to strict proof.
34. The defendant denied the Plaintiff's assertion that the deceased had undertaken on its advice to take out a life insurance policy from her insurers and have the defendant endorse as beneficiaries in the event of her death. It was its case that no policy existed and it was not an option for the defendant to recover the loan from the alleged policy.
35. The Defendant pleaded that Life Assurance Cover was only an additional security which was to be provided by the deceased but was not held by the bank as at the time of her death.
36. It denied the claim that the interests charged were usurious and exorbitant by pleading that the procedure regarding charging of interest and penalties were laid down in the letter of offer and the Charge Instruments the were duly executed by the deceased.
37. The defendant asserted that it discharged its duty of care in line with the deceased best interest. It was its case the prayers sought are unobtainable since this court ought not to take away its right of exercising statutory power of sale in recovery of the amounts properly due to it, having followed all the relevant rules and regulations.
38. It claimed that the statutory notice is valid and since it met all the requirement of section 90(2) of the Land Act. It claimed that and the interest rates applied were lawful, regular and approved by the Letter of Offer and the Charge instruments that were duly executed voluntarily.
39. The defendant intimated that it was ready to fully cooperate and disclose all correspondence between it and the deceased before and after execution of any letter of offer and all legal charges registered in its favour for loans advances to the deceased.
40. It further asserted that it was ready to render true accounts in respect of the loans advanced to the deceased borrower.
41. In conclusion, it was its case that the Plaintiff is not entitled to an order of injunction since the loans were applied for and advanced to the deceased and since they remain unpaid, it conferred it with statutory power of sale.

The oral evidence

42. Celine Waweru, the Defendant's Assistant Branch Manager was the sole witness. She adopted her statement and stated that the deceased applied for a loan for business ventures and eventually, a charge was prepared. She produced the said Charge as DExh. 1 and the rest of the documents annexed to her statement as DExh. 2 – 32 respectively. She also produced further documents annexed to her list dated 18th November 2023 as DExh. 33a, 33b, and 33c respectively.
43. It was her evidence that the loan was secured by property and a charge was created over the property known as Uasin Gishu/ Lahre X5. She stated that clause 13 of the charge creates room for additional advancement of money without the need of creating a further charge.



44. It was her case that if it is a loan, a separate cover is created but if it is an overdraft, then the same cover is maintained. It was her evidence that accounts can however be consolidated pursuant to Clause 13.
45. She claimed that the legal charge acts as a continuing security for further advances. To that end, she referred to the letter of offer dated 30th September 2020, and stated that it was evidence of further advance to be disbursed. She claimed that there was no need for a fresh charge over the same property since it was an overdraft.
46. It was her evidence that since the year 2012, there were several letters of offer and the Bank made several other offers. She referred to DExh. 21, the letter of offer dated 29th March 2019 and was accepted vide a form of acceptance and the process used to replicate itself going forward.
47. Regarding insurance, it was her position that the deceased was under no obligation to take out any cover but she was given the option as communicated to her in Clause 5 of the letter of offer dated 30th September 2020. She testified that the bank was already secured adequately through the properties Nakuru Municipality Block 24/265 and 2X7 which covered Kshs. 5.6 million, Uasin Gishu/El Lahre/X5 to cover Kshs. 5,400,000/- and Kshs. 1 million and Land Reference No. 13637/10 (I.R No. 63XXX7 which covered. 5,000,000/-). Hence, there was no need to take another insurance cover.
48. She testified that under Clause 8 of DExh 1, the Charges had provisions for default including suing for any money owing, sell the properties. It was her position that the deceased used to make prompt instalments when she was alive. But when she died default arose and begun recovery proceedings by serving a 90-day statutory notice and a further 40-day redemption notice but there was no repayment.
49. It was her position that the Plaintiff was given all the documentation at the Kitale Branch but did not settle the loans.
50. On cross-examination, she was of the position that as for the balance owing, the amount as presented in the statement of accounts prevails. She explained that the difference between the amounts in the statutory notice and the ones in the overdraft and loan 1 and 2 is attributed to penalty interest.
51. It was her case that it was indeed true that there were 2 charges in 2013. She stated that there was a legal charge and further charge. She admitted that there was an informal charge.
52. She testified further that the initial charge had provision for further advancement based on continuing security and that she was not aware if the deceased took out an insurance cover.
53. She asserted that the Bank was not negligent in disbursing the loans in absence of insurance covers since the covers were an option of the deceased.
54. In conclusion she stated that the death of a borrower does not stop the interest and penalties. She asserted that the remedy to sue by the bank only arises if no charge is created.

The submissions

55. The Plaintiff and the Defendant filed written submissions dated 20th September 2024 and 18th and October 2024 respectively. They were primarily an analysis of the evidence presented in Court and the law. The arguments therein are synthesized in the analysis section of this Judgment.

Issues for Determination.

56. From a comprehensive appreciation of the respective parties' pleadings, documentary and oral evidence as well as rival written submissions, the issues that arise for determination are;



- i. Whether there arose a valid contractual relationship between the Bank Rushia Nyokabi Mwangi.
- ii. Depending on (i) above, whose obligation it was to take out insurance cover.
- iii. The validity of the Statutory Notice dated 17th February 2023
- iv. Reliefs

Analysis and Determination

i. Whether there arose a valid contractual relationship between the Rushia Nyokabi Mwangi and M-Oriental Bank.

57. Before this Court are copies of Charge documents registered in favour of the Bank over the property Title No. UasingishuEl Lahre/X5 and Land title No. Nakuru Municipality Block 24/265 and Nakuru Municipality Block 24/2X7 belonging to the deceased. They are dated 5th December 2013 and 18th December 2013 in respect of loan facility of Kshs. 5,400,000/- and Kshs. 5,600,000/- advanced her. They were produced as DExh. 1 and DExh. 2 respectively.
58. Through the letter dated 14th August 2014, the deceased requested the Bank for renewal of Bank facility of KShs. 11,000,000/- Account No. 0060069\ which she claimed would expire on 30th September 2015.
59. In response, the Bank wrote to the deceased vide its letter dated 25th September 2014 indicating that it had agreed to make the funds available subject to its general terms and conditions and subject further to terms and conditions it set out in the letter. This letter was produced as DExh. 4. The deceased accepted the Bank's offer through her the form dated 29th September 2014 she executed, produced as DExh. 5.
60. On 9th November 2015, the deceased applied for an overdraft facility of Kshs. 11,000,000/requested for an overdraft facility. the letter of offer is dated 8th December 2015 and she accepted the offer signing the acceptance form dated 11th December 2015.
61. Subsequently, there are various correspondence between the deceased and the Bank including the letter dated 31st January 2017 where the deceased requested for renewal of overdraft facility, The Bank made the offer through its letter dated 21st February 2017. It was accepted by the deceased through the executed form dated 24th February 2017.
62. The deceased further made application for renewal of overdraft facility of Kshs. 1,000,000/- dated 9th October 2018, an offer was made by the Bank on 18th October 2018 and the deceased executed the acceptance form dated 20th October 2018.
63. The deceased requested an overdraft facility on 27th November 2018. It was accepted by the deceased through the executed form of acceptance dated 6th December 2018. A further request was made on 12th March 2019. An offer was made on 29th March and the deceased made the acceptance on 1st April 2019.
64. On 14th October 2019, the deceased applied for a loan facility of Kshs. 1,000,000/-. The Bank made the offer on 24th October 2019 and the deceased accepted on 2nd November 2019.
65. The foregoing correspondence is an elaborate exchange between the deceased and the Bank in respect of loan facilities.



66. In consideration for the money's worth, the deceased offered as security her pieces of land. It is evidenced by the Charge documents dated 5th and 18th December 2013, 15th March 2017 and 9th April 2019.
67. With the foregoing, to answer the important question whether there came into existence a contractual relationship, I will refer to the Supreme Court decision in *Moi University -vs- Zaippeline & another* (Petition 43 of 2018) [2022] KESC 29 (KLR) (17 June 2022) (Judgment). The learned Apex Court Judges, in reference to the Court of Appeal decision, discussed the elements that mark a valid contract as follows;

It is trite that for any contract to be valid at law, it must meet certain elements commencing with offer and acceptance. The essential components of a contract as was observed by Harris JA in *Garvey v Richards* [2011] JMCA Civ 16 ought to ordinarily reflect the following principles:

“[10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.

”In terms of the evidentiary value of the contract, section 97(1) of the [Evidence Act](#) which provides that:

“When the terms of a contract or a grant or any other disposition of property have been reduced to the form of a document, and in all other cases which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act suffices.

68. Coming back to the instant dispute, from the deceased's letters requesting for loan facility, the bank's response making an offer and including the terms and conditions therein, is clear indication of both parties intended to pursue a contract.
69. Subsequently, the deceased's acceptance to the loan is signified by the execution of the acceptance form. It is indicative of her positive, unqualified assent to all the terms of the offer. It was final and unconditional and was communicated to the bank in writing.
70. Thirdly, the deceased's pieces of land offered as security, before the eyes of this court, were valuable Consideration.
71. Finally, the intention to create legal relations is evidenced by the will of the parties to assent to the terms and conditions of the loan facility by executing the various charge instruments. Generally, in view of the commercial nature of the engagement, there is a presumption that the parties intended to create a legal relationship.
72. This Court is, therefore, satisfied that there existed a valid contract enforceable in law.



ii. Whose obligation it was to take out Insurance cover.

73. Whereas the Plaintiff pleaded that the Defendant was negligent in disbursing the facility without first ensuring that the deceased had taken out insurance cover, a condition, he claimed was precedent in the charge, the Defendant was of the position that it was an additional security and it was not an option for it to recover the loan from the alleged policy.
74. Clause 3 as read with Clause 5 of the Letter of Offer dated 30th September 2020 provide useful insights into this issue.
75. Clause 3 is on Insurance. It provides as follows;
- ...the borrower is hereby informed of their rights under section 71A of the said Act (*Insurance Act*), interalia;
- a. The right to choose an underwriter or broker from the list of Underwriters of Brokers licensed by the Insurance Regulatory Authority (IRA); and
 - b. The right to forfeit the option(a) above.
76. Clause 5 provides as hereunder;
- a. The bank shall not be obliged to make any disbursement of any facility until it has received as condition precedent, in each case, in a form and substance satisfactory to it all of the documents, items and evidence required herein (including but not limited to the documents, items and evidence specified in the schedule 3)
 - b. ..
 - c. The Banks Obligation to make any disbursements of the facility is also conditional upon the Borrower's compliance at the relevant time with the terms and conditions of, and there being no breach of or default under the Letter.
77. From the foregoing it is imperative to appreciate section 71A of the *Insurance Act*. It states as follows;
- 71A. Choice of insurer for loans
- (1) A bank shall—
- (a) inform a loanee, in writing, that the loanee has a right to select an underwriter or broker from a list of underwriters or brokers licensed by the Authority;
 - (b) inform a loanee, in writing, that the loanee has an option to forfeit the right to select an underwriter or broker;
 - (c) not prescribe or assign an underwriter or broker to a loanee, unless the loanee forfeits in writing the right to select an underwriter or broker; and
 - (d) update the list of licensed brokers or underwriters availed to loanees regularly and ensure that underwriters or brokers under statutory management are excluded from the list.
- (2) A bank that contravenes the provisions of subsection (1) commits an offence and shall upon conviction be liable to a fine not exceeding five million shillings.



78. From a reading of clause 3 and 5 as well as section 71(A) of the *Insurance Act*, it is evident that the obligation to take out life insurance cover was upon the deceased so as to protect her from exposure in the event of her death.
79. The import of section 71A of the *Insurance Act* is to ensure that a lender passes information to a borrower on the right to take out insurance since its interest is already taken care of by the charged property.
80. Despite the concession by the Plaintiff that taking out of the insurance policy was not a condition precedent to disbursement of the loan, the provisions of Schedule 3 of PExh4 is to the contrary.
81. It provides as follows;
- b. Additional Securities/Documents to be provided
 1. Current personal life insurance cover for Kshs. 10.7M with the bank as nominee.
 2.
 3. ...
82. With the foregoing, this Court is inclined to taking the Defendant's argument that it had no business ensuring the deceased's life as misleading. However, the list of insurance companies in the Bank's panel available the deceased to nominate was among the information the Plaintiff sought, any order to as to whether the was insurance or not is premature.

iii. The lawfulness of the Statutory Notice dated 17th February 2023

83. This issue is at the heart of the dispute herein. It is what set in motion the proceedings herein. The Plaintiff contended that the Statutory Notice was not issued in accordance with the law and as such, could not be the basis upon which the Bank sought to realize its security.
84. I will hence appreciate the hallmarks of a lawful Statutory Notice and pit the same against the circumstances herein.
85. A Chargee's Statutory Power of Sale is a creature of the law. It is a remedy available where the Chargor has defaulted in making good agreed periodic payments. Section 90 of the *Land Act* provides as follows;
90. Remedies of a Chargee
 1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
 2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—
 - a. the nature and extent of the default by the chargor;



- b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - d. the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
3. If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—
- a. sue the chargor for any money due and owing under the charge;
 - b. appoint a receiver of the income of the charged land;
 - c. lease the charged land, or if the charge is of a lease, sublease the land;
 - d. enter into possession of the charged land; or
 - e. sell the charged land;

86. Once the provisions of section 90 have been complied with, section 96 prescribes a Chargee's power of sale in the following terms;

96. Chargee's power of sale

- (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.
- 2) Before exercising the power to sell the charged land, the Chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.
- 3. A copy of the notice to sell served in accordance with subsection (2) shall be served on—
 - a. the Commission, if the charged land is public land;
 - b. the holder of the land out of which the lease has been granted, if the charged land is a lease;
 - c. a spouse of the chargor who had given the consent;



- d. any lessee and sublessee of the charged land or of any buildings on the charged land;
- e. any person who is a co-owner with the chargor;
- f. any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;
- g. any guarantor of the money advanced under the charge;
- h. any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and
- i. any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.

87. From the foregoing, for a Chargee to lawfully exercise its power of sale, it must abide by both the prescription under section 90 and 96 of the Land Act.

88. The pertinent question that arises is; what is the Chargee's Defendant's extent of compliance with section 90 and 96 of the Land Act?

89. The contents of the Statutory Notice dated 17th February 2023, produced as PExh. 13 will suffice.

90. In the said Notice the Chargee indicated that the deceased was advanced loan facilities namely the Overdraft, Loan 1 and Loan 2. It further stated they were secured by the charge dated 18th December 2013 over the Title No. Municipality Block/24/265 and 2X7 for Kshs. 5,600,000/- the charge dated 5th December 2013 over Title No. Uasin Gishu/El Lahre/ X5 for Kshs. 5,400,000/-, further charge dated 9th April 2019 over Title No. Uasingishu/ El Lahre/X5 for Kshs. 1,000,000/- and the charge dated 15th March 2017 over Land Reference No. 13637/10 (I.R No. 63637) for Kshs. 5,000,000/-.

91. The Statutory Notice went further to state as hereunder;

Our instructions are to demand, as we hereby do, the immediate payment of the below outstanding amounts together with the accruing interests as at 28th February 2023.

OD- A/c 100XXXX69785Kshs 1,626,859.81/-

Loan A/c 100XXXXX115783Kshs. 5,674,391.39/-

Loan A/c 1006115115617.....Kshs. 7,697,155.20/-

Take notice that pursuant toour client will exercise its statutory power of sale over mortgaged property, if after three (3) months from the date of service of this Notice upon yourself the outstanding amounts above together with accruing interests as aforesaid is not paid in full.

.....our client has submitted information regarding the deceased's non-performing account status to the Credit Reference Bureau in accordance with the Banking (Credit Reference Bureau) Regulations, 2008.

92. In response, the Chargor wrote to the Chargee the letter dated 27th February 2023. It was produced as PExh.14. It asserted that in order to respond to the Statutory Notice, it requested for various pieces of information, among them letters of offer, all correspondence prior to execution of the letters of offer, or after, before disbursement of the loans, list of insurance companies on its panel, all receipts



- of payment, the charge dated 5th December 2013, 9th April 2019, 15th March 2017 and statement of the overdraft and any demand or statutory notices sent to the deceased prior to her death. r in order to respond to the Statutory Notice,
93. When the foregoing did not illicit any response, the Chargor further wrote the letter dated 14th April 2023, produced as PEXh 15. It made reference to the letter dated 27th February 2023. It served as a reminder to its earlier letter and emphasized compliance with its request for information on the deceased's facilities.
94. The Chargee eventually responded through its letter of 25th May 2023. It stated thus;
- ...your client now the administrator of his late mother, who was our customer, may call our client's branch manager at Kitale for all the requested documents and information.
- We are amenable to facilitating the said meeting on such a date as is convenient to your client and your good selves.
- Kindly note that owing to the bulk of the documents and aspects of confidentiality, your request for copies may not be practical at his stage.
- We shall appreciate your understanding and co-operation as we look forward to the amicable settlement of this matter.
95. The crux of the Plaintiff's case is two-pronged, namely; the failure by the Chargee to disclose factual information relating to the loans and more critically, the dispute as to the money owed to the Chargee due to claimed illegal interest charged on the loan facilities, illegal secret penalties, non-existent legal charges and non-compliance with the *Land Act* with respect to Charge instruments.
96. Whereas the Defendant asserted that the outstanding loan was Kshs. 1,626,859.81/- Kshs, 5,674,391.39/- and Kshs. 7,697,155.20/- the Plaintiff disputed the amounts claiming that it was erroneously inclusive of interests that were not supposed to accrue after the demise of the deceased. The Chargor pleaded that the interests were usurious, exorbitant, unlawful and unconscionable.
97. From the foregoing, apart from the Chargor's claim on non-disclosure of information by the Chargee, there is no doubt that they are embroiled in diametrically opposed standpoints on the amount that had been paid up by the deceased and what was owing as at the time of her death.
98. Going back to section 90 of the *Land Act*, subsection (2) makes it a mandatory requirement that a Statutory Notice shall contain nature and extent of the default, subsection (2)(c) entails what the chargor must do to rectify the default and the fact that it must be brought to the Chargor's attention to apply to the court for reliefs.
99. The Court of Appeal in Civil Appeal 400 of 2018, Marteve Guest House Limited -vs- Njenga & 3 others [2022] KECA 539 (KLR) (28 April 2022) (Judgment) crystallized obligation of a Chargee in the exercise of a Statutory Power of Sale. It observed thus;
- The guiding principles with regard to the obligation of a mortgagee in the exercise of a statutory power of sale could be summarized as follows:
- a. a mortgagee had a duty to act in good faith;
 - b. have regard to the interests of the mortgagor;
 - c. obtain the best price for the property realized to pay off the debt for the benefit of both the mortgagor and the mortgagee;



- d. ensure that its power of sale was not exercised fraudulently; and
 - e. ensure that the mortgagor's right of redemption was only lost pursuant to a valid sale.
1. From the foregoing, the Chargee's failure to disclose information but at the same time pursue its power of sale was a demonstration of bad faith. It failed to have regard to the Chargor's interest and importantly, it denied the Chargor the chance to ascertain the indebtedness and make the attendant assessment on whether it can exercise its right of redemption.
 2. Further, the full disclosure would settle at once the dispute as to whose obligation it was to take out insurance cover for the loans.
 3. A court cannot allow a Statutory Notice to be issued and the security therein realized when the amount to be recovered is in dispute.
 4. The need for disputants to first calculate and settle the amount in contention was discussed by the Court in Civil Suit 414 of 2004, Francis Joseph Kamau Ichatha -vs- Housing Finance Company of Kenya Limited [2014] eKLR when the learned Judge observed thus;

That brings me to the issue whether the Defendant's calculations were free from error. Apart from what I have held hereinabove, it was clear from the evidence of DW2 that he was unable to properly explain how certain sums levied on the plaintiff's accounts were arrived at. In fact according to him from the information available he was unable to explain how certain figures were arrived at. In my view since the calculations were peculiarly within the knowledge of the Defendant the onus shifted to it to explain the basis upon which these figures were arrived at. In fact in at least one instance DW1 conceded that the figure in the statement was incorrect though in his view that was a minor error. However taking into account the fact that the plaintiff's position was that the errors pointed out by him were but just a sample one cannot state with certainty how many "minor errors" were committed by the Defendant and their cumulative effect on the loan repayment. I am therefore satisfied that the Defendant's calculations were not free from error.

104. It came out in the evidence of the Defendant's witness that there was a discrepancy in the amount in the statutory notice and the ones in the overdraft, loan 1 and 2.
105. If the sale of a collateral were to occur in a scenario where amount is in dispute, it would, in the first instance, be a fetter to the Chargor's right of redemption and secondly, a purchaser of such property would have their title tainted with impropriety in the sense that the Chargor did not get an opportunity to redeem itself for having not known what was due to the Chargee.
106. The Court of Appeal illustrated the foregoing scenario in Marteve Guest House Limited -vs- Njenga & 3 others (supra) when it observed thus;

Since the appellant's title had its roots in the bank's flawed process in the exercise of its statutory power of sale on the basis of which the appellant got title to the suit property,



the title was tainted with fraud, nullity, irregularly and illegality. The appellant's plea of an innocent purchaser for value without notice to either title or the process resulting in it being vested with title to the suit property was unsanctionable.

107. The orderly disposal of such a dispute requires first that the amount owed is agreed upon, amicably, through full disclosure of information and in the event of a dispute, through court process.
108. Thereafter, the power of sale takes its course, if the Chargor is unable to make good the amount after expiry of 90 days.

Disposal.

109. In the premises, this court finds merit in the Plaintiff's argument that information is availed in order for it to ascertain the extent of indebtedness which in any event is not denied by the Defendant. In its Statement of Defence it intimated that it was ready to fully cooperate and disclose all correspondence between it and the deceased before and after execution of any letter of offer and all legal charges registered in its favour for loans advanced to the deceased.
110. It further asserted that it was ready to render true accounts in respect of the loans advanced to the deceased borrower.
111. This Court finds and hereby holds that a lender's Statutory Power of Sale can only lawfully commence once it is clear, and there is no dispute as between the Chargee and the Chargor of the debt owed.
112. Deriving from the foregoing, following final orders hereby lend themselves to this Court;
 - i. The Statutory Notice dated 17th February 2023 is hereby found to be premature and defective to the extent that the amount it purports to realize; being, the overdraft, A/c 100XXXX69785 of Kshs 1,626,859.81/-, Loan A/c 100XXXXX115783 of Kshs. 5,674,391.39/- and Loan A/c 1006115115617 of Kshs. 7,697,155.20/- is in dispute.
 - ii. Within 90 days of this Judgment, the Defendant is hereby Ordered to render to the Plaintiff a true, full and accurate disclosure of all information in its custody including but not limited to; the correspondence with the deceased, letters of offer, loan statements in respect of every account held by the deceased, the charge documents, the Insurance companies in the Bank's panel presented to the deceased for nomination, a tabulation of the loans and the interest rate charged from inception to the time the deceased died, the amount of insurance premiums deducted, the demand notices sent to the deceased before referral to the Credit Reference Bureau (CRB) and the letter referring the deceased's non-performing accounts to CRB.
 - iii. The defendant shall bear the costs of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

A. C. MRIMA

JUDGE

