Njer v Kenya Commercial Bank Limited & another (Civil Case 24 of 2018) [2025] KEHC 8705 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8705 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 24 OF 2018

JRA WANANDA, J

JUNE 20, 2025

BETWEEN

RICHARD AKETCH NJER ..... PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED ..... 1ST DEFENDANT

SADDABRI AUCTIONEERS ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff's claim is contained in the Plaint dated 13/06/2018 filed through Messrs Nyambegera & Co. Advocates. The Judgment sought is as follows:

    a. An order of injunction against the Defendants by themselves, their agents, servants or anybody acting for and on their behalf from selling, alienating, transferring and or doing any other thing to dispose of the interest of the charged property known as land parcel L.R. No. Uasin Gishu/ Kimumu/2694.

    b. An order that the 1st Defendant do render a comprehensible account of the loan repayment it has so far received from the Plaintiff and the interest and other levies charged on the loan.

    c. Costs of this suit.

2. The Plaintiff pleaded that on or about 17/09/2012, the Plaintiff took a loan to the tune of Kshs 5,730,000/- and charged the suit property in favour of the 1st Defendant in order to secure the loan facility, that on diverse dates being 22/10/2014 and 25/05/2016, the Plaintiff took additional mortgage facilities to the tune of Kshs 20,000,000/- and Kshs 4,000,000/-, respectively, with further legal charge on the suit property in favour of the 1st Defendant to secure the same, that the Plaintiff has been servicing the loan without hitches but defaulted because of slow business due to constant unpredictable fluctuation in business. He pleaded further that the 1st Defendant has deliberately and

without regard to the Plaintiff's interest charged and maintained an unconscionable interest rate and debited the Plaintiff's loan account with other charges thereby making it impossible for the Plaintiff to service the loan and further clogging his equity of redemption. He also pleaded that he is ready and willing to pay the correct amount found to be outstanding but not the sum currently claimed by the 1st Defendant which is excessive, extortionist and oppressive and in violation of the law and the objective of capping interest rates as directed by the Central Bank of Kenya upon enactment of the relevant legislation.

3. He added that the 1st Defendant, without first issuing mandatory notices under Section 90(1) of the *Land Act*, 2012, instructed the 2nd Defendant to sell the charged property by public auction upon which the 2nd Defendant advertised the suit property for sale by public auction on 19/06/2018 (now past) although no relevant notices of sale have been served under the Auctioneers' Rules. According to the Plaintiff, the Defendant's acts are unlawful, unprocedural and amount to blatant disregard of due process of the law.

4. In response, the 1st Defendant, through Messrs Kalya & Co. Advocates, filed the Statement of Defence dated 5/11/2018 but by my Ruling dated 3/11/2023, I allowed the 1st Defendant new Advocates, Messrs G&A Advocates LLP, to withdraw the said Statement of Defence, and replace it with its own subsequently filed Defence & Counterclaim dated 14/02/2022.

5. In the Defence & Counterclaim, the 1st Defendant admitted the advancement of the loan facilities which it aggregated at Kshs 29,730,000/- secured vide a Legal Charge dated 5/07/2012, a Further Legal Charge dated 22/10/2014, and a Second Charge dated 25/05/2016, all registered over the suit property. The 1st Defendant then confirmed that indeed the Plaintiff defaulted in repayments of the loan, including interest, and pleaded that as at 28/09/2017, the amount due was Kshs 44,145,659.43. It was further pleaded that the 1st Defendant has always operated within the Kenya Bank Reference Rate as published, even with the enactment of Section 33B of the *Banking Act* which came into effect in September 2016 and which provided for the capping of interest rates and which, it was pleaded, was repealed by the Finance Act, 2019. The 1st Defendant further pleaded that, in any event, the Plaintiff does not specify to what extent the interest charged was unconscionable nor does he indicate the period which such interest was charged nor does he specify the other charges that he claims to have been levied irregularly. Regarding the statutory notices, The 1st Defendant insisted that it served the Plaintiff with all of them prior to advertisement of the suit property for sale.

6. In the Counterclaim, the 1st Defendant then prayed for Judgment in the following terms:

    a. The total outstanding balance in the sum of Kshs 44,145,659.43.

    b. Costs of the Counter-claim.

    c. Interest until payment in full.

    d. Any such other relief as this Court may deem fit.

7. No Memorandum of Appearance or Statement of Defence was filed by or for the 2nd Defendant.

8. After close of pleadings and determination of several interlocutory Applications, the matter was fixed for full hearing. I may however mention that I had dismissed the Plaintiff's case on 20/02/2024 when neither he nor his Advocates attended Court on that date for the trial. I then allowed the 1st Defendant to proceed with its Counterclaim, which it did and presented 1 witness. I then fixed a date for Judgment but before that date, the Plaintiff applied for setting aside of the above orders and proceedings. The Application was then allowed by consent and the case fixed for trial afresh

9. When the matter eventually proceeded for the fresh trial, both the Plaintiff and the 1st Defendant called 1 witness each.

Plaintiff's Oral Testimony

10. PW1 was the Plaintiff, Richard Aketch Njer who testified before me on 15/07/2024 and on 19/11/2024. Led by his Counsel, Paul Magolo, he adopted his Statement and reiterated matters contained therein. He also produced a copy of the Certificate of Title for the suit property and the Newspaper notice advertising the sale of the suit property, as contained in his List of Documents. He then stated that the term was that repayment was to be done from proceeds from his business by monthly instalments of Kshs 800,000/-, but he lost his property (2 premises) to fire. He added that the Valuer sent by the 1st Defendant undervalued the property, that the Auctioneer also quoted a figure that was higher that what the 1st Defendant had asked, Kshs 52 Million instead of Kshs 35 Million, and that his failure to pay was because of the loss of his property. According to him, the amount demanded has never been particularized as he does not have any Statements of Accounts and he does not also know how the interest was computed, which computation was arbitrary. He also stated that for the sale by auction, the Auctioneer did not disclose whether they had placed a reserve price. He also stated that although he requested for a loan of Kshs 27 Million, he was only given Kshs 20 Million which was not enough, that when he went back to the 1st Defendant for additional funding but he was only given Kshs 4 Million, and that he has met with the 1st Defendant's officials many times but they have refused to assist him. He however conceded that the loan must be paid. Under cross-examination by Mr. Mwangi Kan'gu Advocate, the Plaintiff stated that he took two different loan facilities, for Kshs 4 Million and Kshs 20 Million, respectively. When shown his Application for the 2nd loan, he confirmed that it was for Kshs 20 Million and was purpose of "construction". He agreed that the interest rate for the loans was 24 per cent and also agreed that he has not been repaying the loan as agreed. He also agreed that he received statutory notices and he mentioned the one dated 30/05/2017.

11. Regarding the rest of the notices, he stated that he could not recall whether he received them although he confirmed his postal address to be "2008-30100 Eldoret" as indicated in the notices and again stated that it is possible that he also received the notice dated 13/10/2017. When shown the letter dated 5/02/2018, he confirmed that the outstanding amount indicated therein is Kshs 45,630,477.13 and he then stated that he most probably received the letter. Regarding valuation, he confirmed that he has seen the one procured by the 1st Defendant and agreed that he had not also procured his own. He then confirmed that he received the 45 days Redemption Notice dated 28/03/2018. Regarding repayments, he stated that he made a few payments though not significant and which he paid after receiving the notices. He reiterated that the interest was too high and that he was not given any Statements to enable him study the rates applied. He stated that from the 1st Defendant's current letters, the amount outstanding is indicated as Kshs 51,147,650.78. In re-examination, he pointed out that although the letters/notices referred to above are correctly addressed to him, there is nothing to show that they were posted as there is no evidence of receipt nor Certificate of Postage. To the question why he did not conduct his own valuation, he answered that he was not asked to do so and that he needed authority to do so. Regarding the Valuation Report submitted by the 1st Defendant, he stated that he was not involved in its preparation.

1st Defendant's Oral Testimony

12. Bruce Kiplangat Chemweno, DW1, testified before me on 19/11/2024. He described himself as the Branch Manager of the 1st Defendant's Kapsowar Branch and that he previously worked at the 1st Defendant's Mortgage Centre at the Eldoret Branch. He, too, adopted his Statement and reiterated

the matters already contained therein. He also produced the bundle of documents contained in the 1st Defendant's List of Documents. Regarding the respective notices, he pointed out the Certificates of Postage showing that the letters were indeed sent to the Plaintiff's postal address. Under cross-examination by Mr. Magolo Advocate, he stated that the interest rate was 24 per dent but the Charge allowed for variation thereof although he did not have any proof of any communication notifying the Plaintiff of such variation. He however agreed that the statutory notices indicate a rate of 14 per cent. Regarding the notice dated 5/02/2018, he conceded that there was no evidence of postage. He however pointed out that the copy before Court is signed thus acknowledging receipt. He insisted that the signature is similar to the one on the Charge document. In re-examination, he pointed out that the right provided in Clause 2 of the Charge document permitting the 1st Defendant to vary the interest rate does not require any notice or notification to be sent to the debtor prior to such variation

Written Submissions

13. Upon close of the hearing, the parties filed written Submissions. The Plaintiff filed the Submissions dated 19/01/2025, while the 1st Defendant filed the Submissions dated 28/01/2025.

14. I may mention that I am greatly impressed by the brevity and conciseness with which both Counsels have presented their Submissions. Unlike the now common unnecessarily verbose, voluminous, unfocussed, repetitive and duplicitous Submissions that I keep seeing from many Advocates, the Submissions filed herein are straight to the point, accurate and brief. They are also supported by only few but relevant authorities. I wish other Advocates could take a cue from Mr. Magolo and Mr. Mwangi Kan'gu on how to draft and present Submissions.

Plaintiff's Submissions

15. The Plaintiff's Counsel submitted that the existence of the debt is not in dispute and that what is in issue is whether the action taken by the Defendants is lawful and justified. He cited the provisions of Section 89(2) of the *Land Act*, 2012 and also the case of David Limo Bundotich vs Housing Finance Company of Kenya Limited [2022] eKLR on the holding that "the statutory power of sale is not a base power. There are limits, rules and procedures that apply to it ….". According to him, the 1st Defendant's actions went contrary to and beyond what the law permits. He submitted that the statutory notices alleged are not supported by any evidence of delivery. Regarding the Auctioneer's 45 days' notice, he pointed out that the date of the 2nd mandatory notice (intention to sell) is dated 5/02/2018, the instructions to the Auctioneers is indicated to have been given on 26/03/2018, and the Auctioneer's notice is then dated 28/03/2018. He submitted that the period between 5/02/2018 and 28/03/2018 is 38 working days, which is less than the 40 days threshold and which also breached the requirement under Clause 9 of the Charge document and Section 96(2) of the *Land Act*.

16. He also submitted that there was no explanation on how the outstanding amount was arrived at. Regarding the Counterclaim, he submitted that the *Land Act* obligates the 1st Defendant to make a choice between exercising its statutory power of sale and filing a suit, and the 1st Defendant cannot therefore seek to sell and at the same time also seek judgment and a Decree from this Court, which Decree is executable under a different process. He submitted that the use of the word "or" in Section 90(3) of the *Land Act* shows that the relief of selling the suit property is an alternative. According to him therefore, the Counterclaim is untenable.

1st Defendant's Submissions

17. On his part, regarding service of the two statutory notices as well as the 40 days' notice, Counsel for the 1st Defendant submitted that there is evidence of their service as demonstrated by the Certificates

of Postage produced in evidence, and that they were served by registered post through the Plaintiff's correct postal address. Regarding the Notification of Sale and the 45 days' notice Redemption Notice, he submitted that receipt of these was acknowledged by the Plaintiff and there is also an Affidavit of Service produced in evidence. He cited the case of Moses Kibiego Yator v Eco Kenya Limited, Nku E&L No. 426 of 2013 [2014] eKLR, and also the case of Josphat Richard Thumbi v Housing Finance Company (K) Limited & Naomi Wanjiru Njuguna (Civil Case No. 447 of 2005) [2016] KEHC 5836 (KLR).

18. Regarding the issue of computation of time in respect to the 40 days' notice, Counsel submitted that at the time that the 2nd Defendant was instructed to prepare and serve the Redemption Notice, 40 days had already lapsed, and that the period between 5/02/2018 and 28/03/2018 when the notice was issued is 48 days, and not 38 as alleged. He urged that while the Plaintiff's argument is that computation of time is based on "working days", the 1st Defendant's submission is that computation is based on "calendar days", inclusive of weekends. He submitted that noting that the *Land Act* is silent on computation of time, reliance should be placed on the provisions of Section 57 of the Interpretation and General Statute Act. He submitted further that where the debtor, as herein, has duly acknowledged the debt, the Court cannot stop the lender from realizing its statutory power of sale. He observed that as a matter of fact, the Plaintiff has been asking to be granted additional time to make good the debt. He cited the case of Quantum Petroleum Limited v Diamond Trust 1st Respondent Kenya Ltd [2017] KEHC 6673 (KLR) and also the case of Mrao Ltd vs First American 1st Respondent [2003] eKLR.

19. In regard to the 1st Defendant's Counterclaim, he submitted no Defence to the Counterclaim was filed by the Plaintiff and the issues raised in the Counterclaim were therefore not based on the pleadings. He cited Order 7 Rule 11 of the Civil Procedure Rules. On the Plaintiff's submission that the list of reliefs provided to a Chargor under Section 90(3) of the *Land Act* upon default by a borrower are exercisable only in the alternative, he submitted that the provision gives the Chargor the leeway to exercise the options and in this case, the 1st Defendant has chosen to file a suit. He cited the case of First Choice Mega Store Limited v Ecobank Kenya Limited [2017] e KLR.

20. He submitted further that the Plaintiff's interpretation of Section 90(3) of the *Land Act* is restrictive and attempts to curtail the rights of the 1st Defendant, contrary to what the law intended, that the word "or" as used therein has been deployed to join the alternatives as opposed to an alternative that corresponds to the word "either." He cited the Supreme Court of India's interpretation of the meaning of the word "or" in the case of J. Jayalalitha vs Union of India as cited in Badawi v Kenya School of Law (Constitutional Petition E033 of 2019) and also the case of Republic v Kenya School of Law [2019] eKLR. According to Counsel therefore, the usage of the term "or" in Section 90(3) above is inclusive, thus giving the Chargor the opportunity to pursue its remedies simultaneously. In conclusion, he prayed that the suit should be dismissed and the Counterclaim granted with costs as "costs follow the event>. He also cited authorities for this principle.

Determination

21. The issues arising herein for determination can, in my view, be broadly summarized as the following:

    i. Whether there was an outstanding debt giving the 1st Defendant the right to exercise its statutory power of sale.

    ii. Whether the statutory notice, redemption notice and 45 days notification of sale were served, or properly served, prior to exercise of the power of sale.

    iii. Whether the Notification of Sale failed to meet the 40 days threshold.

iv. Whether the 1st Defendant's Counterclaim should be granted.

22. I now proceed to analyze and answer the said issues.

Whether there was an outstanding debt

23. In this case, the 1st Defendant has alleged, and the Plaintiff has not denied, that the total amount that was advanced to the Plaintiff, including the successive top-ups, aggregated, in total, to the sum of Kshs 29,730,000/-. In Clause 2(a) of the Charge document dated 5/07/2012 that secured the loan, the rate of interest indicated is 24 per cent per annum. In the absence of any contrary submission, it is presumed that this interest rate continued in effect in the Further Charge dated 22/10/2014, and in the Second Further Charge dated 25/05/2016. The Charge also provided for further interest, penalties and other charges on default in repayment.

24. I note that the loan outstanding amount indicated by the 1st Defendant in the Statutory Notice dated 30/05/2017 was Kshs 26,233,693.55, in the Statutory Notice dated 13/10/2017 it had increased to Kshs 44,145,659.43, in the Notice to Sell dated 5/02/2018 it had increased further to Kshs 45,630,477.38, and in both the 45 days Redemption Notice dated 28/03/2018, and the Notification of Sale, it had escalated even further to Kshs 51,147,650.28. My understanding is that the amount allegedly escalated due to interest charged upon default in repayment within the agreed timelines and also resultant charges and penalties.

25. The Plaintiff, in his Plaint, had pleaded that the 1st Defendant charged and maintained an unconscionable interest rate and debited the loan account with other charges thereby making it impossible for the Plaintiff to service the loan and thus clogging the Plaintiff's equity of redemption. He also pleaded that he is ready and willing to pay the correct amount found to be outstanding but not the sum currently claimed by the 1st Defendant which is excessive, extortionist and oppressive and in violation of the law and of the objective of capping interest rates as directed by the Central Bank of Kenya upon enactment of the relevant legislation. The Plaintiff also claimed that the 1st Defendant's undervalued the property for purposes of the sale by public auction. From my understanding of the above, the Plaintiff does not dispute owing loan arrears or that he is indebted to the 1st Defendant but what he. From my understanding of the above, the Plaintiff is not disputing that he is in default or that the loan is in arrears, but what he is disputing is the computation of the amount claimed to be in arrears, including the rate of interest applied. He is therefore disputing the computation of the aggregate amount of the debt alleged. These therefore are the matters that I expected the Plaintiff to tackle at the trial, and also in his final Submissions.

26. However, the Plaintiff, in his evidence, did not seriously touch on his above claims and neither did he attempt to demonstrate their veracity. The Plaintiff's Counsel, too, when cross-examining the 1st Defendant's Counsel, apart from only asking about the legality of the variation of interest, did not ask the witness to demonstrate how the amount demanded by the 1st Defendant was computed nor did he ask any questions regarding the Plaintiff's contention that the amount demanded is excessive, extortionist or oppressive or that it violated the law on capping of interest rates. No questions were also asked on the Plaintiff's allegation of application of an unconscionable interest rate or the debiting of the Plaintiff's loan account with other charges. Similarly, no questions were put across in respect to the allegations of undervaluation of the suit property. These issues were therefore not seriously canvassed at the trial and thus the Court was deprived of the arguments or counter-arguments thereon. Further, Counsel for the Plaintiff did not pursue or argue the said allegations in his Submissions. By conduct therefore, I presume that the Plaintiff "abandoned" the said limbs of his case.

27. In any event, under Section 107, 108 and 109 of the *Evidence Act*, it is the Plaintiff who bears the burden of proving his said allegation. The Sections provide as follows:

> " 107. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

28. By choosing not to offer any evidence or even to present any arguments to demonstrate that the amount demanded by the 1st Defendant was excessive, extortionist or oppressive or that it violated the law on capping of interest rates, or that it included unlawful charges or applied unconscionable interest rates, or that there was any undervaluation of the suit property, the Plaintiff has presumably "abandoned" that line of litigation or in the alternative, has deprived the Court of the ability to make a determination in his favour. The Plaintiff also did not demonstrate how the amount demanded is incorrect as he did not even state how much he has so far paid and thus how much may not have been credited into the loan account. He also did not bring, for purposes of comparison, his own computation of what he believes to be the correct amount outstanding. He also did no produce any evidence that he has at any time asked to be supplied with statements and that the 1st Defendant refused to supply the same. He has therefore also failed to lay a basis for his prayer for an account.

29. In the end, I hold that the indebtness of the Plaintiff to the 1st Defendant is admitted and is therefore not in contention. Similarly, the allegation that the amount demanded is excessive or based on unlawful charges or arbitrary rate of interest has also not been demonstrated. The amount demanded by the 1st Defendant has therefore not been controverted. Accordingly, I find that the 1st Defendant was entitled to exercise its statutory power of sale.

Whether the statutory notice, redemption notice and 45 days notification of sale were served or properly served prior to exercise of the power of sale

30. The Plaintiff, in his Plaint, pleaded that the 1st Defendant, without first issuing mandatory notices under Section 90(1) of the *Land Act*, 2012, instructed the 2nd Defendant to sell the charged property by public auction upon which the 2nd Defendant advertised the suit property for sale by public auction although no notices of sale were served under the Auctioneers' Rules. According to the Plaintiff therefore, the Defendants' acts are unlawful, unprocedural and amount to blatant disregard of due process of the law.

31. As held above, the default in repayment not been denied, and it is consequently not in doubt that the 1st Defendant was entitled to exercise its statutory power of sale. However, before doing so, the law required the 1st Defendant to chronologically issue notices to the Plaintiff as follows:

    a. 90 days' statutory notice of default, pursuant to Section 90(1) and (2) of the *Land Act*, 2012.

    b. 40 days' notice of intention to sell, pursuant to Section 96(2) of the *Land Act*, 2012.

    c. 45 days' redemption notice pursuant to Rule 15(d) of the Auctioneers' Rules, 1997.

    d. 14 days' notification of sale, pursuant to Rule 25(e) of the Auctioneers' Rules, 1997.

32. In the case of Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited [1996] eKLR, the Court of Appeal when dealing with the issue of service of statutory notices, made the following observation:

> " ..... Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya."

33. Although the Plaintiff, as aforesaid, had pleaded that he was never served with the above notices, in his testimony, he was very evasive on this issue. In cross-examination, he admitted that yes, he received the notices. He was in fact taken through the notices, one by one, and he eventually admitted receipt of each, individually. I therefore found it very curious when in cross-examination, he suddenly changed tune and advanced the contrary position that he never received nor was he served with any of the notices. To this extent, the Plaintiff did not impress me as a candid, honest or reliable witness. He was clearly concealing the truth.

34. Be that as it may, in respect to the two successive 90 days' statutory notices dated 30/05/2017 and 13/10/2017, respectively, issued pursuant to Section 90(1) and (2) of the *Land Act*, both supported with Certificates of Postage indicating that they were indeed sent to the Plaintiff's postal address appearing in the Charge document, namely, "P.O. Box 2008-30100 Eldoret".

35. The 40 days' notice of intention to sell dated 5/02/2018 issued pursuant to Section 96(2) of the *Land Act*, 2012 does not however seem to be supported by any evidence of postage.

36. The 45 days' redemption notice issued pursuant to Rule 15(d) of the Auctioneers' Rules, 1997 and the 14 days' notification of sale, issued pursuant to Rule 25(e) of the Auctioneers' Rules, 1997, both bear a signature said to be the Plaintiff's and indicating that he was served on 6/04/2018 with both the two notices. This alleged service is then supported by an Affidavit of Service. The said Affidavit of Service is sworn by one Denis Kirui who described himself as a Licenced Auctioneer trading as the 2nd Defendant herein, instructed by the 1st Defendant to sell the suit property by public auction. He deponed that on 6/04/2018, using information provided in the Valuation Report produced herein, he proceeded to and located the property for purposes of service of the Redemption notice and the Notification of Sale upon the owner. He deponed further that upon arrival, he met a gentleman who described himself as the caretaker of the property and who gave the Auctioneer the phone number for the property owner. The Auctioneer deponed that he phoned the owner who asked the Auctioneer to go to and meet him at his hotel business by the name "Prime Chic Inn" located in Eldoret Town. According to the Auctioneer, he proceeded to the hotel and met the Plaintiff whom he served with the notices and who acknowledged receipt by signing a copy thereof.

37. I find this Affidavit of Service to be quite elaborate, detailed and credible. Although the 2nd Defendant did not enter Appearance or file a Defence or participate in this matter, the Plaintiff, too, did nothing to disprove the contents of the Affidavit. Although the Plaintiff purported to disown the signature and claimed that it was not his, in view of his earlier demonstrated lack of candour and his obvious evasiness during cross-examination, in flip-flopping by admitting receipt of all the statutory notices and then subsequently during re-examination, purporting to deny the same service of the notices, I take the Plaintiff's denials with a pinch of salt and with a lot of skepticism. I just do not trust him at all. My finding is that he was personally served with the Redemption notice and the Notification of Sale as well.

38. It is therefore evident that, save for the 40 days' notice of intention to sell dated 5/02/2018 issued pursuant to Section 96(2) of the *Land Act*, 2012 which does not seem to be supported by any evidence of postage, the rest of the notices are supported by either Certificates of Postage or by the Plaintiff's signature appearing thereon in acknowledgment of service. Even regarding the 40 days' notice of intention to sell dated 5/02/2018 not supported with a Certificate of Postage, I note that in cross-examination, the Plaintiff expressly admitted that he received it. Further, the Plaintiff's evasiveness and display of lack of candour in admitting, then later purporting to deny service of the statutory notices, also persuades me that he received all the notices. It is also not lost on me that during cross-examination, the Plaintiff stated that he made some payments after receiving the notices. This is by itself further admission of service. How then can he turn around and claim that he was never served?

39. In view of the above, I find that, on a balance of probabilities, the Plaintiff was duly served with all the requisite notices issued under the *Land Act*, 2012 and the Auctioneers Rules.

Whether the Notification of Sale failed to meet the 40 days threshold

40. The Plaintiff's Counsel pointed out that the 40 days' Notice of Intention to Sell is dated 5/02/2018, while the Auctioneer's 45 days Redemption Notice is then dated 28/03/2018. According to him, the interval between the two notices was required to be at least 40 days apart but the period between 5/02/2018 and 28/03/2018 is 38 "working days", which is less than the 40 days threshold and thus in breach of the requirement under Clause 9 of the Charge document and also Section 96(2) of the *Land Act*. In response, Counsel for the Defendant submitted that the time between 5/02/2018 and 28/03/2018 when the notice was issued is actually 48 days, and not 38 as alleged by the Plaintiff's Counsel. He observed that that while the Plaintiff's computation is based on "working days", the correct computation is one based on "calendar days", which would then be inclusive of weekends. It is apparent that the "working days" formula advanced by the Plaintiff's Counsel therefore urges that in computing the 40 days interval, weekends and holidays should be excluded in the computation.

41. Weighing the two arguments, I side with the 1st Defendant's Counsel that computation of the 40 days cannot be confined to only "working days" when Section 96(2) of the *Land Act* does not state so. Indeed, apart from making a bare allegation, Counsel for the Plaintiff did not present any basis of his argument. Had there been any intention to limit the computation of the 40 days to only "working days", nothing would have been difficult than for the Act to expressly provide so. The *Land Act* being silent on computation of time, I do not see how the same can be confined to only "working days". The correct computation must, for all intents and purposes, be made in terms of "calendar days", of course within the confines provided in Section 57 of the Interpretation and General Statute Act in respect to "excluded days".

Whether the Counterclaim should be granted

42. The 1st Defendant has pointed out that the Plaintiff never filed a Defence to the Counterclaim and has submitted that for this reason, the Counterclaim is undefended and Judgment thereon ought to be

entered on that ground. I note that this ground was taken up at the Submissions stage and the Plaintiff, having already filed his Submissions earlier, did not therefore get a chance to respond. I therefore do not have the benefit of the Plaintiff's submissions on this point of law.

43. Be that as it may, it is true that, although a Counterclaim is filed as part of the Defendant's answer to the Plaint, it is by itself an independent suit and/or cause of action introduced by the Defendant against the Plaintiff's claim. For this reason, the rules governing the filing of Statements of Defence by a Defendant apply mutatis mutandis to Counterclaims thus the Defendant is required to file a Reply or Defence to the Counterclaim. Indeed, Order 7 Rule 11 of the Civil Procedure Rules is premised as follows:

> " Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the Court, deliver a reply within fifteen days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit."

44. Although the Court will therefore be dealing with two separate suits in the same proceedings when there is a Counterclaim, it does not mean that the Court will write two separate Judgments. On the contrary, since by its very nature, a Counterclaim must in the first place, be demonstrated to be connected, intertwined or related to the facts forming the foundation of the main suit, the Court will pronounce one Judgment but determining both the Plaint and the Counterclaim.

45. However, unlike in the case of failure to file a Statement of Defence to a Plaint, in which the case the Plaint will be treated as undefended and interlocutory Judgment can be entered in respect to liquidated claims, in the case of a Counterclaim, there are technically two separate suits, although closely connected and related, and arising from the same set of facts, and thus if the matter proceeds to full trial, the matters to be canvassed at the trial are the same that will guide the Court in determining whether to enter Judgment in the main suit or to dismiss it, and at the same timer, also whether to enter Judgment on the Counterclaim or to dismiss it.

46. For the above reasons reason, it will be absurd to argue that the Court should shut its eyes to the evidence presented by the Defendant at the trial simply because he did not file a Defence to the Counterclaim yet the same facts and arguments presented before the Court are the same that will determine the outcome of the main suit and also of the Counterclaim. In fact, since as aforesaid, by its very nature, a Counterclaim must in the first place, be connected, intertwined or related to the main suit, the Plaintiff's response to the Counterclaim is, in almost in all cases, based on the same facts already pleaded in the Plaint.

47. For the above reasons, and this matter having proceeded to full trial where both parties presented their cases, I decline to treat the Counterclaim as undefended.

48. The other matter arising out of the Counterclaim is the Plaintiff's contention that the *Land Act* obligates the 1st Defendant to make a choice between exercising its statutory power of sale and filing a suit, and that the 1st Defendant cannot therefore seek to sell the suit property and at the same time also seek judgment and a Decree from the Court which Decree is executable under a different process. He also submitted that the use of the word "or" in Section 90(3) of the *Land Act* indicates that the relief of selling the suit property is an alternative remedy. According to him therefore, the Counterclaim is untenable. I readily accept this contention as I will explain below.

49. Section 90(3) of the *Land Act*, 2012 provides as follows:

> " 90. Remedies of a chargee

.....

(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."

50. Although Section 90(3) above could have been better drafted and the language made express to avoid confusion and differing interpretations, it is clear that the remedies available to the chargee under Section 90(3) cannot be exercised simultaneously and the chargee must therefore make an election on which one of the various available remedies he wishes to pursue at any one time. This is obviously the spirit advanced in that provision.

51. In my view, the adoption of the word "or" in Section 90(3) is not merely accidental or cosmetic, but rather, it is a deliberate choice of word to mean that the remedies available under Section 90(3) are disjunctive and not conjunctive, they are in the alternative, and not concurrent. In other words, the remedies are not cumulative, but distinct against or from each other. The basic reasoning is that it will be evidently prejudicial to a chargor if the chargee is allowed to invoke and commence more than one remedy simultaneously in recovery of the security. To this extent, I agree with the Plaintiff's Counsel that the 1st Defendant's Counterclaim is untenable.

52. Although the Plaintiff did not cite any authority while arguing the above point, I may say that my view above has previously been upheld in various cases. I have in mind for instance, the holding of G. Nzioka J in the case of Clesoi Holdings Limited v Prime Bank Limited [2016] eKLR, the holding of E. Mwita J in the case David Karanja Kamau v Harrison Wambugu Gaita & another [2020] eKLR, the holding of M. Muigai J in the case of Logitac Global Logistics Limited v Stanbic Bank Kenya Limited; Osman Abdullahi Osman & another (Interested Parties) [2021] eKLR, and also the holding of A. Mabeya J in the case of Spire Bank Limited v Obora *& 2 others (Civil Suit E640 of 2021*) [2022] KEHC 13791 (KLR) (Commercial and Tax) (14 October 2022) (Ruling), among others.

53. In view of the foregoing, the 1st Defendant will have to first conclude its already ongoing quest to realise the security by exercise of its statutory power of sale, and only in the event that it fails to fully recover its debt from its exercise of that remedy, can it then at that point fall back to the remedy of filing a suit to recover the balance. The 1st Defendant's other option, if it wishes to file a suit, is to first abandon its current efforts to realize the security by way of the exercise of its statutory power of sale.

54. For the above reasons, I therefore decline to determine the Counterclaim on its merits.

Final Orders

55. The upshot of my findings above is that I rule and order as follows:

a. The Plaintiffs' suit is dismissed in its entirety with costs to the 1st Defendant.

b. The 1st Defendant's Counterclaim is struck out but with no order on costs considering that it is the Plaintiff's admitted default in repayment of the loan that informed the 1st Defendant's filing of the Counterclaim. The Court has also taken into account the Plaintiff's lack of candour and deliberate attempts to mislead the Court on the issue of service of the various statutory notices upon him.

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

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Magolo for the Plaintiff

Mr. Mwangi Kan'gu for the 1st Defendant

N/A for the 2nd Defendant

Court Assistant: Edwin Lotieng