



**Paramount Bank Limited & another v Onyona (Civil Appeal  
E050 of 2022) [2025] KEHC 8431 (KLR) (16 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8431 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E050 OF 2022  
BM MUSYOKI, J  
JUNE 16, 2025**

**BETWEEN**

**PARAMOUNT BANK LIMITED ..... 1<sup>ST</sup> APPELLANT**

**KEYSIAN AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JUSTUS ONDU ONYONA ..... RESPONDENT**

*(Being an appeal from judgment and decree of the Chief Magistrate's Court at Kisumu  
(Beryl M.A. Omollo RM) in civil case number 129 of 2020 dated 11th May 2022)*

**JUDGMENT**

1. Before the trial court was a suit commenced by the respondent vide plaint dated 8-04-2020 in which the respondent accused the appellant of irregularly and illegally purporting to sell his land parcel known as South Nyakach/Koguta East/1066 (hereinafter referred to as 'the suit property'). The background of the matter was that the respondent was advanced financial facility of Kshs 450,000.00 by the 1<sup>st</sup> appellant for which he charged the suit property to the 1<sup>st</sup> appellant. Due to admitted default, the 1<sup>st</sup> appellant set in motion its statutory power sale and put up the suit property for sale by public auction which was slated for 14<sup>th</sup> April 2020.
2. The respondent accused the 1<sup>st</sup> appellant of intending to exercise its statutory power of sale without strict compliance with Sections 90, 96, 97 and 98 of the Lands Act. The 2<sup>nd</sup> respondent was joined in the suit because it had been appointed by the 1<sup>st</sup> respondent to conduct the sale of the suit property. The appellants filed their defence dated 21<sup>st</sup> August 2021.
3. The matter went on for trial and by judgment dated 11<sup>th</sup> May 2022, the trial court allowed the suit in favour of the respondent and issued a permanent injunction restraining the appellants from selling the suit property, a declaration that the intended sale was illegal and an order directing the 1<sup>st</sup> appellant



- to provide a current loan statement for the facility to inform a court mandated audit and taking of accounts and determination of the true level of indebtedness.
4. It is the above judgement which sparked this appeal which has raised the following grounds of appeal;
    1. That the learned Magistrate erred both in law and in fact by holding that the statutory notice issued by the appellant under Section 90 (2) of the Land Act was improper and not in accordance with the Act.
    2. That learned Magistrate erred in law and in fact by holding that the statutory notice issued by the appellant under Section 96 (2) of the Land Act should have been gazetted.
    3. That the learned Magistrate erred in law and in fact by holding that the appellant failed to comply with the issuance and service of the requisite statutory notices.
    4. That the learned Magistrate erred in law by failing to consider the valuation report dated 26<sup>th</sup> October 2020 which was produced during the hearing and marked as exhibit 14.
    5. That the learned Magistrate erred both in law and fact in declaring the intended public auction sale as untenable in law, unlawful and illegal despite the appellant complying fully with the legal requirements leading up to the intended auction.
    6. That the learned Magistrate erred in both law and in fact in granting the orders of permanent injunction restraining the appellant from selling South Nyakach /Koguta East/1066, Kisumu County by way of public auction despite recognizing the admission of debt and the persistent default by the respondent.
    7. That the learned Magistrate erred in law and fact by issuing the relief of permanent injunction restraining the appellant from selling the property known as South Nyakach/ Koguta East/1066, Kisumu County by way of public auction and as such leaving the appellant without a remedy to recover the outstanding loan amount.
    8. That the learned Magistrate erred both in law and in fact by ordering a Court mandated audit into accounts of the respondent, yet the relief was not sought by either party in their respective pleadings.
  5. This is a first appeal. It is trite that in a first appeal, the court must subject the evidence which was produced before the trial court to a fresh scrutiny by evaluating and analysing the same and coming to its own independent conclusion but always keeping in mind that it did not hear or take the evidence of the witnesses first hand and did not have an opportunity to observe their demeanour and therefore give due allowance for that.
  6. According to the proceedings availed to this court, the respondent was the only witness for his case. He told the court that in the month of March 2018, he approached the 1<sup>st</sup> appellant for a loan of Kshs 450,000.00 which was granted and for which he offered the suit property as security. He alleged that the suit property was valued at Kshs 800,000.00 and during the period of indebtedness, he made substantial payments despite of which the 1<sup>st</sup> appellants advertised the suit property for sale on 14<sup>th</sup> April 2020. He denied having been served with a statutory notice or redemption notice or notification of sale as required by the law.
  7. He added that a person unknown to him had on 31-03-2020 mounted onto the fence of the suit property a notice indicating that the sale of the suit property would be on 14<sup>th</sup> April 2020. The respondents also advertised the sale in Daily Nation newspaper of 6<sup>th</sup> April 2020. He alleged that there were minimal arrears which had been caused by financial constraints that affected his business due to



his son's illness and eventual death and the death of his mother. He blamed covid-19 pandemic for the fall of his business. He produced a copy of letter of offer dated 16-03-2018, title deed for the suit property, copy of official search dated 30-05-2017, valuation report dated 7-03-2018, undated auction notice and newspaper advertisement for 6-04-2020 as exhibits.

8. In cross-examination, the respondent said that he understood the letter of offer and confirmed that the postal address in the charge and the letter of offer were the same. He also confirmed that the certificate of postage shown to him was addressed to Peter Ondu and himself on 28-05-2019 and 17-10-2019 respectively. He added that the valuer came to his property before he took the loan and that he was supposed to pay installments of Kshs 21,606.00 per month and that he never paid the said sum in any month. He confirmed that he paid Kshs 8,000.00 as the first installment and nothing in the year 2020. He also stated that he had financial difficulties even before the covid-19.
9. The appellants called one witness by the name Dinna Adhiambo Abwao who described herself as a senior officer with the 1<sup>st</sup> appellant's Kisumu branch. She told the court that the respondent was advanced a loan facility of Kshs 450,000.00 by the 1<sup>st</sup> appellant which was to be paid within 24 months in installments of Kshs 21,606.00 per month. The respondent charged the suit property to the 1<sup>st</sup> appellant. She testified that the loan had an outstanding balance of Kshs 614,642.06 as at 21-8-2020 which continued to accrue interest. She added that the respondent defaulted as from 2018 which was two years before the break out of covid-19 pandemic.
10. She further told the court that the loan arrears notice was sent to the plaintiff on 13-11-2018 and statutory notice on 28-05-2019. The notice to sell was sent on 17-10-2019 and an amended notice of 45 days was also sent. The appellant instructed a valuer to conduct a valuation report on 4-02-2020. She produced a total of 15 exhibits which were, a letter of offer 16-03-2018, certificate of title for the suit property, the charge instrument dated 30-04-2018, affidavit of spousal consent dated 30-04-2018, statutory notice dated 24-05-2019 and its certificate of postage dated 28-05-2019, notice to sale dated 15-10-2019 and certificate of postage dated 17-1-2019, redemption notice dated 6-02-2020, notification of sale of movable property dated 2-12-2019, certificate of service of notice of sale of property dated 18-02-2019, demand notices dated 13-11-2018 and 18-12-2018, statement of account from 7-01-2019 to 30-07-2020, valuation report dated 7-03-2018, advertisement for sale dated 6-04-2020, valuation report dated 20-10-2020 and bank statements for respondent's account number XXXXXXXXXXXX for the period 16-04-2018 to 30-01-2019.
11. In cross-examination, the witness stated that she understood the procedure of forced sale and that they always did valuation before sale. She added that demands were sent to the respondent by way of postage and admitted that the 1<sup>st</sup> demand and the redemption notice had no certificates or proof of postage. She added that the certificates of postage she produced had no postal address and insisted that the letters were sent by an agent of the bank. She also admitted that the bank had a duty to carry out a valuation but it did not carry out one and a forced sale valuation was done on 30-09-2020 after advertisement.
12. She in re-examination clarified that the address on the certificate of postage was 9732-40100 Kisumu. She also stated that the certificate of posting dated 28-05-2019 showed destination of posting as Kisumu and it bore the name of the borrower. She also stated that they instructed Llyod Masika to conduct the valuation before and in September 2020.
13. This appeal was argued by way of written submissions. I have seen and read submissions of the appellants dated 31<sup>st</sup> October 2023 and those of the respondent which are obviously wrongly dated as the date shown therein predates the filing of this appeal. The same show that they are dated 4-11-2020. Reconciling the memorandum of appeal and the submissions of the parties, I discern that the bones of contention in the appeal are;



- a. Whether the appellants followed the correct mandatory legal procedures in their attempted exercise of the 1<sup>st</sup> appellant's statutory power of sale.
  - b. Whether the orders issued by the trial court were appropriate in the circumstances.
14. It is not contested that the loan was granted and the suit property was charged to the 1<sup>st</sup> appellant as security for the loan. It is also not disputed that the respondent was in default. The statement of accounts and the respondent's own testimony show that he was in default since January 2019. What is in dispute in regard to the 1<sup>st</sup> appellant's right to exercise its statutory power of sale is whether the appellants served the statutory notices, the notification of sale and redemption notices and carried out valuation as required under Sections 96, 97 and 98 of the Lands Act.
15. The position of the law is that where a chargee does not comply with the requirements of service of any of the notices referred to above, the intended sale is in law irregular and liable to be stopped. The Court of Appeal held in *Romanus Okeno v Bank of Baroda* (2015) KECA 710 (KLR) that;
- 'Failure to serve a valid statutory notice of sale meant that the right to sell the charged property was not exercisable. To exercise the right would deny the appellant the right conferred upon him by statute.'
16. The appellants produced notices dated 24-05-2019, 15-10-2019 and 6-02-2020. These were accompanied by receipts for postage which the appellants claimed to be certificates of postage. These alleged certificates are in my view acknowledgment that whatever was being sent were received by the post office for transmission to the addressees. There is nothing in those receipts that suggest that what was posted reached the addressees and if so when. It was important for the appellants to establish the real date of delivery of the notices as they become effective upon receipt and not upon posting. In *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (2017) KECA 79 (KLR), the Court of Appeal held that;
- 'In this case, the material before court lends credence to the possibility or likelihood that the procedure might have been flouted. This is because, the statutory notice under Section 90 of the *Land Act* becomes operational upon service of the same upon the mortgagor.'
17. Of more concern to this court is the appellants' exhibit 8 which is referred to as certificate of service drawn by one Muganda Wasulwa. At paragraph 5 of the said certificate, it is stated that the notice was served personally and the borrower signed for it yet at page two of the same certificate, it is indicated that the service was by mail.
18. Due to the inconsistency of the certificate of service and lack of evidence that the notices were received by the respondents, I am not convinced that the appellants had proved on a balance of probabilities that the respondent was served with the statutory notices. Going by the evidence especially the purported certificate of service, the appellants knew the respondent's physical address and, in my view, personal service would have been easy for the appellants to do. In absence of personal service, the appellant should have provided a certificate from the postal authority that the notices reached the respondent. In view of this, it is my holding that the statutory notices were not served upon the respondent. The onus of proving that service was done lied with the appellants which I find they failed to discharge.
19. I do not need to go to the issue of the effect of lack of valuation before the sale save to mention that the valuation report produced by the appellants as exhibit 14 shows that the valuation was undertaken on 26-10-2020 when the suit was actively in court and therefore an afterthought meant to sanitize the process.



20. I now turn to consider whether the orders issued by the trial court were appropriate in the circumstances of the case. The court's final orders were couched as follows;
1. A declaration that the intended sale by public auction or any other way disposing of the interest of the plaintiff in the parcel of land known as South Nyakach/Koguta East/1066 is untenable in law, unlawful and improper in as much as it is illegal.
  2. A permanent injunction do issue restraining the defendants/respondents, by themselves or through any of their agents, employees, servants, nominees and/or assigns or any person whatsoever acting on their behalf and/or under their mandate from offering for sale by way of public auction, or purporting to sell by public auction the piece or parcel of land known as South Nyakach/Koguta East/1066, Kisumu County or otherwise howsoever dealing with or interfering in any way whatsoever with the plaintiff's proprietary interests thereof.
  3. An order that the 1<sup>st</sup> defendant be compelled to provide a current loan statement for the facility to inform a court mandated independent audit and or mandated taking of accounts and determination of the plaintiff's true level of indebtedness to the 1<sup>st</sup> defendant.
21. There was admission that the loan was in arrears as the respondent started defaulting right after the loan was disbursed. A chargee has a right to recover its money from the chargor and can be prevented from exercising its statutory powers of sale only to the extent of the illegality or unlawful act which if remedied opens the door for the recovery. The chargee cannot be permanently restrained from releasing the security where the loan remains unpaid. In my considered view, the law must frown on a position where the courts would appear to shield defaulters from payments of the rightful debts or prevent a chargee from exercising its statutory power of sale in a lawful manner.
22. In this case, the trial court exceeded its judicial powers by issuing permanent and perpetual unqualified injunctive orders. What the court was entitled to do was to issue an injunction in relation to the impugned statutory notices and sale planned for 6-04-2020. The order of injunction is therefore for setting aside to that extent. I would follow the holding of Justice PJO Otieno in *Luciana Wakio Nyambu v Equity Bank Limited (2020) KEHC 5495 (KLR)* where he held as follows;
- ‘Since the suit property is to date registered in the names of the Plaintiff and further since the Defendant faulted in exercising its statutory power as provided by the law, I find that it is only just to order an injunction to restrain the defendant from disposing the suit property until the defendant shall have issued and served all the requisite notices in full compliance with the law.’
24. The appellants have claimed that the order for provision of statement and accounts for purposes of audit should not have been issued because it was not prayed for. My look at the plaint shows that prayer ‘iii’ had prayed in exactly the same terms the court granted. However, that order in my view was not justified. The respondent did not lay a basis for taking of accounts leave alone what he had called a court mandated independent audit. A court of law should not be turned into a supervisor of accounts between contracting parties unless the plaintiff demonstrates that there is a basis to take accounts. The basis would be demonstrated by the borrower showing that some of his payments were not taken into account while the chargee was coming up with its statement.
25. The respondent in this matter did not challenge the statement of account produced by the appellants as their exhibit 11. The respondent did to table before the court any payments he made and were not captured in the appellants’ statement of account. He is instead on record saying that he only paid Kshs



8,000.00 and admitting that he had defaulted blaming defaults on his dwindled economic status. I therefore find no basis for this order and the same must therefore be set aside.

26. In the final analysis, this appeal succeeds in that I proceed to set aside orders 2 and 3 of the judgement of the lower court such that the final orders of the court would be as follows;
- a. A declaration is hereby issued that the appellants' intended sale by public auction or in any other way disposing of the interest of the respondent (the plaintiff in the trial court) in parcel of land known as South Nyakach/Koguta East/1066, Kisumu County on 6-04-2020 pursuant to notices dated 24-05-2019, 15-10-2019 and 6-02-2020 was and remains unlawful and improper.
  - b. A permanent injunction is hereby issued restraining the appellants either by themselves or through any of their agents, employees, servants, nominees and/or assigns or any person acting on their behalf and/or under their mandate from offering for sale by way of public auction or purporting to sell by public auction the respondent's parcel of land known as South Nyakach/Koguta East/1066, Kisumu County or otherwise dealing or interfering in any way whatsoever with the respondent's proprietary interest thereof in reliance on notification of sale dated 15-10-2019, statutory notice dated 24-05-2019, redemption notice dated 6-02-2020 and advertisement dated 6-04-2020.
  - c. For purpose of clarity, the 1<sup>st</sup> appellant shall be at liberty to exercise its statutory power of sale upon following the law as provided for in Sections 96 and 97 of the Lands Act Chapter 280 of the Laws of Kenya.
  - d. The appellant shall have the costs of this appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Judgment delivered in presence of Mr. Nyanchwa for the appellant and Mr. Kouko of the respondent.

