



REPUBLIC OF KENYA



KENYA LAW
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**Lewar Ventures Limited v Equity Bank Kenya Limited (Civil Case
5 of 2019) [2025] KEHC 11174 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL CASE 5 OF 2019
RPV WENDOH, J
JULY 24, 2025**

BETWEEN

LEWAR VENTURES LIMITED PLAINTIFF

AND

EQUITY BANK KENYA LIMITED DEFENDANT

JUDGMENT

1. By an amended plaint dated 20/1/2021, the plaintiff, Lewar Ventures Limited filed this suit against the defendant, Equity Bank (K) Ltd seeking the following orders;
 1. A declaration that the plaintiff's right of redemption of the land Title No. Suna East/Wasweta 1/9151 has not been extinguished and as such, the Defendant's right of sale has not accrued;
 2. An extension of the period of time for compliance by the plaintiff in clearing the loan herein; and
 3. A declaration that the suit premises was sold below market value and hence the plaintiff be compensated for the loss incurred as a result of the under valuation and sale of her property to the third party;
 4. Costs of the suit and/or any other relief as the Honourable court may deem fit to grant.
2. On or about 22/9/2015, the plaintiff was granted a loan facility of Kshs.30,000,000/= by the defendant, for purposes of financing a project. The plaintiff secured the said loan via a legal charge registered in his name as a guarantor and in favour of the defendant over property title Suna East/Wasweta 1/9151. A further personal guarantee and indemnity was executed supported by a legal charge over the suit property and title number Ruiru/Kiu/Block 5/442 and a director's personal guarantee of Kshs.30,000,000/=.



3. The plaintiff made some repayments towards the said loan up to 2017, but, due to financial constraints, the plaintiff failed to make further payments; that the defendant unlawfully exercised its statutory power of sale without due notice of subsequent sales to the plaintiff, and by failing to conduct the obligatory statutory valuation, sold the suit property at Kshs.19,500,000/=; that the plaintiff surrendered the ownership of the property on 31/10/2018 upon receiving notification of sale which was to take place on 31/1/2019. However, the sale did not take place till 3/10/2019 without notice to the plaintiff thus the first sale had not materialized. The plaintiff was represented by Mr. Obach Advocate.
4. The Defendant through the firm of Ogejo Advocate, filed a defence dated 22/9/2022. It is worth noting at this stage that the defendant did not file any counterclaim. They may have intended to do so and served the plaintiff's counsel with a draft but did not file it.
5. The defendant admitted to according a facility of Kshs.30,000,000.00 as working capital to the plaintiff vide letter of offer dated 22/9/2015 and the loan was secured by a first legal charge over Suna East/Wasweta 1/9151 with the Chargor as guarantor, a personal guarantee and indemnity dated 25/10/2015 supported by a legal charge on Ruiru Kiu/Block 5/442 and a Director's personal guarantee of Kshs.30,000,000.00;
 1. that the charge was registered, and the chargor made some payments but defaulted following which a demand notice was issued on 7/11/2017. Later, a three months' notice of exercise of statutory power of sale of the suit property dated 11/4/2018 was issued to the plaintiff (Chargor) demanding the total outstanding balance;
 2. that there was no response from the plaintiff and a redemption notice over the charged property was issued on 4/8/2018;
 3. that forty five (45) days redemption notice was issued through Purple Royal Auctioneers;
 4. that they conducted a forced sale valuation through Acumen Valuers Limited, which found the market value to be 29,300,000/= and a forced sale value at 21,975,000/=;
 5. that the valuation was in compliance with the law;
 6. that again the defendant instructed the firm of Acumen valuers limited who are qualified valuers who conducted a valuation on 27/11/2021 and it is upon their valuation report that the auctioneers conducted an auction on 12/8/2021;
 7. that the purchaser paid the purchase price;
 8. that the defendant acted diligently and within the law.
6. PW1 Elvine Leware Macager testified on behalf of the plaintiff. He adopted his written statement in which he admitted taking a loan facility from the defendant in 2015 and the suit property Suna East/Wasweta1/9151 was charged as security for the loan of Kshs.30,000,000.00 including other securities. He admitted to defaulting in repayment due to factors beyond his control; that he had done a valuation over the property whereby it was valued at Kshs.88,200,000/= with a forced sale value of Kshs.66,150,000/= whereas the defendant put the value at Kshs.52,000,000/= yet the property was sold at Kshs.19,500/= through public Auction; that the decrease of the value from 52,000,000/= to 19,500,000/= was illegal and unlawful. He admitted that the court did order and the parties agreed to a valuation to be done by a court appointed valuer and the said valuer, ADD Property Consultants by their report dated 24/7/2020 placed the market value of the property at Kshs.52,000,000/= and forced



value at 41,600,000/=. In cross examination, PW1 conceded that he would be acceptable to the value given to the property by ADD valuers who are neutral valuers.

7. The defendant called two witnesses, DW1 John Gateru, Head of Credit Branch in Equity Bank. DW1 adopted his written statement. He admitted that the suit land was first sold on 3/10/2019 to the highest bidder at 19,500,000/= one Stephen Sangira but that later, the sale was rescinded and another sale done on 12/8/2021 to the highest bidder, who was the same Stephen Sangira and that before the sale, he had instructed Acumen Valuers to do a valuation of the suit property. He also admitted that the sale was done after the court had appointed a valuer; that the said Stephen Sangira paid the 25% deposit on the same date and that the balance was made on 10/2/2022, 150 days later. DW1 agreed that if payment is delayed then the borrower suffers loss because the loan continues to attract interest.
8. DW1 was unable to show the notices issued to the plaintiff regarding the second sale of the property on 12/8/2021.
9. DW2 Clement Mwangi Ngige, a valuer with Acumen Valuers Limited confirmed having been instructed by the defendant to visit the property Suna East /Wasweta/ 1/9151 to inspect and do a valuation of the property which they did on 21/4/2021 and valued market value to be 29,300,000/- and forced sale of Kshs.21,975,000/= and put a disclaimer that they did not get survey maps from County Officers and did not get access to the whole property because some doors were locked. He admitted to there being a report by Zenith Valuers (PEX.NO.1) which was dated 24/10/2018 where the estimated market value was 26,000,000/= and forced value is 19,500,000/=; that he only referred to the said report for purposes of identifying the suit property; that the projected market value was Kshs.37,000,000.00. He agreed that a valuation report is supposed to represent the value of the property and the value should be close to any other valuation done by any other valuer because the parameters used are the same. He also told the court that the valuer owes a duty of care to both the client and borrower. He denied that there was any hurry in preparing the report as it was required within ten (10) days but he prepared it within one month.
10. Luka Okeyo Madende testified as the court appointed valuer and is proprietor of ADD Consultants. He was nominated by the Institute of Valuers of Kenya following this court's order of 13/3/2020. He told the court that pursuant to the court order, he inspected the property on 15/6/2020 for 2015 pre-empting value, 2018 when the first attempted sale took place and 2020. He found the total market value to be Kshs.52 million while forced sale value was Kshs.41.6 million; that in 2018, market value should have been 50 million and forced sale value 40 million i.e. 80% of the market value.
11. The witness admitted that there were differences between his report and that of Acumen Valuers and Zenith Valuers. Whereas he found that in 2022 the property was at 82% stage of completion, Acumen indicated that it was 60%; that while Acumen found that the property was 2376 square metres, Zenith found that it was on 1820 square metres. He said that a margin of error between valuers should not exceed 15% but that in the two reports, his and that of Acumen the error exceeds 15%.
12. After the proprietor of ADD valuers testified, the court directed that the two valuers, Acumen and ADD Valuers do a joint report to try and bridge the gaps in the reports and assist the court in arriving at a fair decision in this matter. That was not done despite the court allowing them a substantial period of time.
13. The court allowed the parties time to file written submissions. The plaintiff filed their submissions on 17/4/2024. By the time the file was forwarded to this court for purposes of writing the Judgment later in 2024, the defendant had not filed their submissions.



Issues for Determination

14. Mr. Obach submitted that the issues for determination are,
 1. Whether the suit premises were sold below market value
 2. Whether the defendants counter claim is merited.
 3. Whether the plaintiff is entitled to costs.

Whether the premises were sold below market value

15. Counsel submitted that after the plaintiff defaulted, the defendant moved in to sell the suit premises. When they came to court, they had been informed that the property had been sold and were never informed that the first auction had failed in order for the plaintiff to exercise his right of redemption; that the law imposes a duty on the chargee to attain the best possible price for the property and in support, Counsel relied on the case of *Patrick Kangethe Edward v Co-operative Bank of Kenya Ltd and Another* (2016) eKLR; that the property was not supposed to be disposed off as punishment to the plaintiff and for this proposition he relied on the decision of *NCBA Bank PLC v Cyrus Ndungu Njeri t/a Digital Tours and Logistics* (2021) eKLR. The above cited Article 46 of the *Constitution* on rights of consumers; that consumers of services including banking services are entitled to protection of their economic interests which includes the right to the best price; that the defendant undervalued the suit property by quoting the market value to be Kshs.29 million while the forced sale price at Kshs.21,975.000/= and that when the plaintiff did its own valuation, the defendant complained that the valuation was exaggerated and the court ordered for valuation by court appointed valuer; though the plaintiff was aware that a sale had taken place on 3/10/2019, It turned out that it did not take place and a second sale was done on 12/8/2021 but the plaintiff was not informed of the failure of the first sale so that the plaintiff could exercise its right of redemption. The Counsel cited the case of *David Limo Bundotich v Housing Finance Company of Kenya Limited* (2022) eKLR which discussed when the right of redemption ceases; that the court appointed valuer put the market value at 52 million and forced sale value at 41.6 million; that the defendant's valuer, DW2 did not take into account the entire space and improvements made to the suit property and that DW2 admitted that his was a tentative report because he had not accessed the whole property, that in gross violation of the duty of care owed to the plaintiff, the defendant auctioned the property based on the said incomplete report. Counsel urged the court to rectify the breach occasioned by the defendant, the court should adopt ADD Valuers report; that the sum owed to the bank was Kshs.27,978,435/= and the balance after settlement of the sum due, is the forced sale value less the outstanding loan amount plus interest (41,600,000 – 27,978,435) which totals 13,621,565;

Whether the plaintiff is entitled to damages;

16. Counsel submitted that the defendant's actions are tainted with mala fides because of the manner in which they were eager to sell the plaintiff's property and then sold it at a loss. Further, the mala fides is evidenced by the fact of depreciation of the property once the defendants took over. As to whether exemplary damages can be awarded, Counsel relied on the decision of *David Bundotich* (*supra*).
17. It was further submitted that the defendant used a tentative report (Acumen Report) to auction the plaintiff's property and even after the sale at a loss, the defendant still intends to impose interest on the plaintiff at 13% per day.
18. I have now considered the pleadings, the evidence and submissions filed herein. I wish to start by observing that though the defendants had indicated that they wished to file a counterclaim, they did



not do so. It was not paid for and received in the court registry in the portal. What the defendants therefore rely upon is the defence dated 22/9/2022 and filed in court on 23/9/2022.

19. It is not in dispute that the plaintiff executed a charge over the suit property LR Suna East/Wasweta 1/9151, Migori Town for a loan of Kshs.30,000,000/= as per the loan agreement dated 20/10/2015. It is also not in dispute that the plaintiff defaulted in the repayment of the loan in November 2017 following which a demand was made on 7/11/2017 and upon failure by the plaintiff to repay, the defendant issued a three (3) months' notice in exercise of the statutory power of sale over the suit property. The property was sold to the highest bidder Stephen Sangira, at Kshs 18,700,000/= on 12/8/2021 and he paid the 25% deposit of Kshs.4,589,500/=.
20. As required of the chargee, a valuation was conducted of the suit property before the auction DW2 a valuer with Acumen Valuers Ltd confirmed having been instructed vide letter dated 25/3/2021, to do a valuation of the suit property. They returned a market value of Kshs.29,300,000/= and forced sale value of Kshs.21,975,000/= According to DW2, their report was tentative for purposes of appraising the client but was not supposed to be used in an auction.
21. Having been entered into in 2015, the agreement is governed by the *Land Act* of 2012. Section 97(1) of the *Land Act* places a duty of care on the chargee who exercises his right of sale, a duty to ensure that the best price achievable is realized and the chargor is not exposed to unnecessary expenses or costs. Section 97 of the *Land Act* provides as follows:-

Duty of chargee exercising power of sale.

97.

- (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
- (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
- (3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—
 - (a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and
 - (b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

22. In the case of *Patrick Kangethe Edward v Co-operative Bank (K) Ltd* (2010) eKLR the court said;

“Section 97(1) *Land Act* now places a duty of care on a chargee while exercising its power of sale. That duty to this court includes the duty to ensure that the best achievable price is



realized and further that the chargor whose land is to be sold is not exposed to unnecessary and avoidable expense and costs”

23. The defendant had the suit property sold at an auction on 3/10/2019 at Kshs.19,500,000/= following a report by Zennith Valuers dated 18/10/2018 which put the market value at Kshs.26,000,000/= and forced value at Kshs.19,500,000/= but this sale was rescinded and the court will refer to this later in this judgment.
24. On 13/3/2020 the parties recorded a consent order to the effect that;-
1. That the suit property be valued;
 2. That each party to appoint an independent valuer at its own cost;
 3. That a third valuer be appointed by the President of Institution of Surveyors of Kenya (ISK) at the cost of the parties hereto;
 4. The valuers to be subject to the Institution of Surveyors of Kenya (ISK) Professional Code of conduct and Regulations;
 5. That the valuation reports should state the pre-charge value of property and value at the point of the sale by the Defendant.
 6. That the valuation reports be filed and served on all the parties by all valuers within thirty (30) days from the date hereof.
 7. That the matter be mentioned on the 4th of June, 2020 to record a possible settlement.
25. The effect of the above order was that apart from each party appointing an independent valuer, a third valuer was to be appointed through the Institute of Surveyors of Kenya (ISK)
26. The defendant instructed Acumen Valuers who returned a market value of 29,300,000/= and forced sale of Kshs.21,975,000/=. DW2 of Acumen Valuers told the court that this was a tentative report and should not have been relied upon to conduct an auction because he did not have adequate access to the property. The defendant therefore relied on a report that did not represent the true value of the property in conducting the auction.
27. By the time of the Auction, the court had appointed an independent valuer- ADD Consultants. ADD had prepared its report dated 24/7/2020 and put the market value at Ksh.52 million while forced sale value was Ksh.41.6 million. Apart from ignoring the report by the court appointed valuer, the defendant went ahead to sell that land at 18,750,000/= as evidenced by the letter dated 17/2/2021 issued by Purple Auctioneers.
28. Section 97 (3) (b) is clear that the chargee shall not sell the property at an undervalue less than 25% below the market value. In *Kollellen Ole Kipolorika Orumos v Mellech Engineering Construction Ltd & 22 others*, (2018) eKLR, the court stated this

“... The forced valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the chargor to have reasonable value for his property. That is why the duty under section 97 (2) is statutory and obligatory. It is not left to the whims of the chargee and its agents”.

If we are to go by the report by Acumen Auctioneers, the defendant sold the land at an undervalue of about 64% of the market value given by Acumen as 29 million. As was held in the case *NCBA Bank*



PLC v Cyrus Ndungu Njeri t/a Digital Tours & Logistics (2021) eKLR the chargor being a consumer of Bank Services, has rights that must be protected. The court said

“with due respect to the Appellant, it cannot be that the reserve price as advertised loses meaning once the bids are made however low. Article 46 of the *Constitution* provides that; -

- (1) Consumers have the right-
 - a. To goods and services of reasonable quality;
 - b. To the information necessary for them to gain full benefit from goods and services; and
 - c. To the protection of their health, safety, and economic interests; and
 - d. To compensation for loss or injury arising from defects in goods or services;
- (2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and descent advertising.
- (3) This Article applies to goods and services offered by public entities or private persons.

29. The defendant sold the property for Kshs.18,750,000/= which was below the forced sale value. Clearly, the defendant did not protect the plaintiff’s rights to quality service.
30. A consent order had been recorded for a court appointed valuer to carry out the valuation. ADD Valuers did the said valuation and put the market value at Ksh.52 million while the forced value was Ksh.41.6 million. This is the valuation that this court will accept as acceptable, bearing in mind that the Acumen Valuers report was tentative and incomplete. It is the finding of this court that the property was grossly undervalued.
31. The plaintiff also complained that the plaintiff was not accorded a chance to exercise his right of redemption. The equitable right of redemption is the right by a mortgagor to recover his security by discharging his obligations under the mortgage despite the time fixed by the contract for the performance of these obligations passing and even if under the express terms of the agreement, the security may be stated to be the absolute property of the mortgagee.

When does the right of redemption cease?

32. In *Mbuthia v Jimba Credit Finance Corporation* the court observed

“A sale destroys the equity of redemption in mortgaged property and constitutes the mortgagee’s exercising the power of the sale as a trustee of the surplus proceeds of sale, if any, for the persons interested according to properties.

..... This means that the mortgagor’s right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On acceptance of a bid at an auction there is an immediate sale binding on the chargor.”

33. Again in *David Limo Bundotich v Housing Finance Company of Kenya Limited* (2022) Judge Nyakundi discussed the above case. DW1 admitted in his testimony that they conducted a sale of the



suit property on 3/10/2019 and the deposit of 25% was duly paid for but the sale was not completed. The sale was rescinded. They then did a second sale on 12/8/2021. Once the first sale aborted, it meant that the plaintiff still retained his right of redemption to the property and he should have been notified of that fact before the second sale was done over one year later. DW1 admitted that they did not send any notice to the plaintiff as required under Section 96(2) of the *Land Act* and Rule 15 (b) of the *Auctioneers Rules* 1997. It means that the defendant sold the suit property before the plaintiff's equity of redemption had been extinguished which was in breach of the law and therefore the terms of the contract. I find that the defendant did not act in good faith.

34. Further to the above, contrary to the memorandum of sale dated 12/8/2021, that the balance was to be paid within ninety (90) days, The highest bidder did not pay for the balance of the sale price till 10/2/2022 150 days (4 months) later. This was prejudicial to the plaintiff and done in bad faith.

Whether the plaintiff is entitled to damages

35. I have found earlier that the plaintiff's property was undervalued and was not sold at the best price expected from the suit property. The sum owed as of the time the property was set to be sold was Kshs.27,978,435/=. The court appointed valuer who had valued the property at Kshs.52 million as the market price and Kshs.41,600,000/= forced sale. The plaintiff is entitled to the difference between the forced sale value and what was owed 41,600,000/= - 27,978,435/= =13,621,565/=
36. After the hearing of the case and before submissions, the court had asked Acumen valuers and ADD Valuers to do a joint report to breach the gap in their reports but they again preferred separate reports. The court did not have the opportunity to have the two reports interrogated by the parties and therefore the court has not considered them in this judgment.

Is the plaintiff entitled to exemplary damages; -

37. In *David Limo's case*, the court considered the circumstances under which exemplary damages can be awarded.

38. The court said

“as regards the failure to award the Respondent exemplary damages, it is important to interrogate the circumstances under which exemplary damages are awardable. In *Bank of Baroda (Kenya) Limited v Timwood products Ltd* Civil Appeal No. 132 of 2001, the Court of Appeal citing *Obongo & Another v Municipal Council of Kisumu* (171) EA 91 and *Rookes v Banard & others* (1964) AC 1129 held that in Kenya punitive or exemplary damages are awardable only under two circumstances, namely

- i. where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and
- ii. where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.”

39. I find that the defendant's actions were tainted with mala fides in many respects.

40. First, the defendant relied on a valuation report from Acumen Valuers who had clearly indicated to them that the same was not conclusive but was a tentative report;

41. Secondly, the defendant failed to notify the plaintiff of the failed sale of 3/10/2019 so that if the plaintiff so wished and was able, could exercise his right of redemption.



42. Lastly, the defendant went ahead to secretly carry out a second sale using a tentative valuation report yet the parties had agreed to a court appointed valuer. It is obvious that the defendant's actions were calculated to procure for it some benefit at the expense of the plaintiff. After the deposit was paid, the balance of the price was not paid till after 150 days. The plaintiff would have been entitled to exemplary damages had they been pleaded. However, I note that the same were not pleaded and so the court will not award what was not prayed for.
43. In the end, the plaintiff is entitled to general damages for the loss suffered when the property was sold at a loss.
44. I make an award of Kshs.13,621,565/= plus cost, interest at court rates from the date of judgment.

DATED, SIGNED AND DELIVERED AT KAPENGURIA THIS 24TH DAY OF JULY, 2025

HON. R. WENDOH

JUDGE

Judgment delivered virtually in presence of; -

Plaintiff – Mr. Obach

Respondent - N/A

Juma/Hellen- Court Assistants

