



Owiny (Administrator of the Estate of Getrude Anyango Owiny) v National Bank of Kenya (Civil Suit E009 of 2025) [2025] KEHC 12661 (KLR) (17 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT E009 OF 2025
A MABEYA, J
SEPTEMBER 17, 2025**

BETWEEN

**GEORGE OJWANG OWINY (ADMINISTRATOR OF THE ESTATE OF
GETRUDE ANYANGO OWINY) PLAINTIFF**

AND

NATIONAL BANK OF KENYA DEFENDANT

RULING

1. In or about September, 1991, Getrude Anyango Owiny ('the deceased') took a facility of Kshs.4 million from the defendant. She gave her property known as Kisumu Municipality/Block No. 6/75, ('the suit property') as security thereto. It is not clear when she passed on but a grant confirmed on 28/10/2024, shows that one George Ojwang Owiny ('the plaintiff') had been appointed as the administrator of the estate.
2. By a Motion on Notice taken out on 16/5/2025, the plaintiff sought an injunction against the defendant to restrain the interference with the suit property and for a mandatory order to deliver certain information and documentation to the plaintiff. He also sought declarations to nullify redemption notice dated 3/4/2025 and nullification of the debt. Those declarations however, cannot be granted at an interlocutory stays. They have to await the trial of the suit.
3. Since the plaintiff is acting in person, this Court will overlook the infractions committed by him in the drafting of the Motion and determine the same as an application for injunction pending trial of the case.
4. In the Motion, the plaintiff contended that he was the administrator of the estate of the deceased. That the debt in question was 30 years old and therefore unrecoverable. That he had tried to have the debt verified but without success. That on 16/4/2025, the defendant issued a redemption notice demanding Kshs. 36 million and threatened to dispose off the suit property. That it was not clear how the claimed



- sum of Kshs.36 million was arrived at. That the defendant had charged unconscionable interest. That no statutory notice of sale had been issued under section 90(2) of the *Land Act*. That if the orders sought were not granted, the suit property would be sold thereby exposing the estate to irreparable loss.
5. The Motion was opposed vide the replying affidavit of Onesmus K. Mbuvi sworn on 26/5/2025. He stated that the debt in question was valid. That a loan of Kshs.4 million was disbursed and had accrued interest upto Kshs.36,326,099.10. That the deceased was served with a Statutory Notice dated 22/2/1995. That in the premises, the Motion should be declined.
 6. The plaintiff retorted with a further affidavit sworn on 9/6/2025. He contended that the redemption notice had mis-described the property. That there was no current valuation report of the suit property to ascertain the current value in breach of section 97(2) of the *Land Act*. That the bank statement produced did not show how the repayments were made although there was a single entry of Kshs.1,735,334/-. That in the absence of an explanation how the sum of Kshs.1,735,334/- was paid, it was imperative to seek the documents sought in the Motion.
 7. This is an application for interlocutory injunction. The principles applicable are well known as per the case of *Giella vs Cassman Brown* [1973] EA 358. That an applicant must establish a prima facie case with a probability of success, that an injunction will not normally issue unless an applicant demonstrates that he will suffer loss and damage that cannot be compensated by damages and finally, if the Court is in doubt, it will determine an application on the balance of convenience.
 8. On prima facie, the plaintiff contended that there was no statutory notice that was served, that the claim of Kshs.36 million was unsubstantiated, that the repayments of Kshs.1.7 million was not verifiable, that the debt was irrecoverable as it was time barred under the Limitations Act Cap 22 Laws of Kenya. Finally, that the redemption notice mis-described the suit property and there was no valuation report.
 9. The response by the defendant was that the debt was due; that the sum of Kshs.36 million was borne from the statement of account produced and that a statutory notice of sale was issued in 1995.
 10. The Court has seen the Statutory Notice of sale dated 22/2/1995. It read in part:-

“Our instructions are that you are indebted to our client in the sum of Kshs.5,913,175.85 being the sum outstanding as at 1st January, 1995: Our further instructions are to GIVE YOU NOTICE which we HEREBY Do that unless the said monies, which excluded our legal fees are paid in full at our offices within the next three (3) months from the date hereof, we shall commence legal (sic) proceedings to enforce our clients rights under the charge without further reference to you.”
 11. To say the least, that notice was defective. It sought to give the debtor less period than stipulated by the law. The then operative law, section 74 of the Registered *Land Act*, as is with the current Law provided for a period of 3 months after service of the Statutory Notice. The said notice stated within 3 months of the date of the notice. That was a lesser period. In view thereof, that notice could not be the basis of the attempted exercise of the statutory power of sale.
 12. The other issue is the amount due. The defendant claimed Kshs.36 million on the basis of the statement of account dated 10/7/2024. The same was for the period 3/10/1991 – 10/7/2007. The amount loaned was Kshs.4 million. There is no evidence how the repayments totalling Kshs.1,735,334/- was made and received. The repayments should have affected the interest charged as the same was on a reducing balance. The tabulation in the statement of account does not disclose this fact. It is arguable if at all the amount shown is correct. Although a dispute on accounts would not warrant an injunction, the Court cannot turn a blind eye where such is used as a tool of oppression.



13. Further, although the in duplum rule became statutorized much later after the loan was disbursed, it is arguable if the defendant will be permitted to claim a whopping sum of Kshs.36 million from a loan of Kshs.4 million. The spirit of the rule is clear. A lender is not to be permitted to wait for the interest to outstrip the principle before pouncing on the distressed borrower. The defendant here went to limbo for over 30 years!
14. There was the complaint of mis-description of the property as having 2 shops and 12 self-contained rooms instead of 2 shops and 48 self-contained rooms. The plaintiff contended that that mis-description clearly showed that no recent valuation report had been prepared to ascertain the current value of the property. Section 97 of the Land Act provides:-
- “(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).
- (4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.
- (5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).
- 6) The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.
- (7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.”
15. In the absence of a current Valuation Report in terms of the law, the Statutory Power of Sale had not yet arisen. The redemption notice was therefore premature.



16. For the foregoing reasons, this Court is satisfied that a prima facie case with a probability of success has been established.
17. As regards irreparable loss, unless an injunction is issued, the suit property may be sold contrary to the provisions of the law. No amount of damages can restore an applicant to a position he should have been were the provisions of the law properly safeguarded. The estate will suffer irreparable loss and damage.
18. As regards the balance of convenience, the same tilts in favour of the estate. It is proper to preserve the status quo to allow the defendant firstly demonstrate how its claim arises. Having in mind that it waited since 1995 to 2025 to attempt to claim the debt, a delay of a few months or so will not be prejudicial to it.
19. As regards the mandatory injunction sought, there must exist a clear case and special circumstances. See *Kenya Breweries Ltd vs Washington Okeyo* [2002] E.A 109, *Locabail International Finance Ltd vs Agro Export & Others* [1986] ALL ER 906.
20. In the present case, the deceased took the loan in 1991. The defendant did not attempt to recover the same during her lifetime. She is now deceased. The defendant produced a statement of account that is not verifiable. The attempt by the plaintiff to seek clarification from the defendant have hitherto fell on deaf ears. The information and documents being sought would be able to resolve the matter justly and swiftly. This is a good case to grant a mandatory injunction sought.
21. Accordingly, the Court finds the Motion dated 16/5/2025 to be meritorious and allows the same as follows:-
 - a. Pending the hearing and determination of this suit, the defendant by itself, its servants or agents, is hereby restrained from in anyway whatsoever dealing with, selling or advertising for sale the property known as Kisumu Municipality/Block 6/75.
 - b. A mandatory injunction hereby issues directing the defendant to provide and supply the plaintiff with certified copies of manual and computer generated Day Book entries on the loan account from inception todate, detailed full loan account from inception todate showing principal disbursed, monthly interest charged, repayments received and any penalties or fees charged and applied.
 - c. The plaintiff will have the costs of the application in any event.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF SEPTEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE

