Egan & another (Suing as the personal representative of the Estate of David Ongeta Matunda) v Barclays Bank of Kenya (Civil Appeal 140 of 2022) [2024] KEHC 12129 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12129 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 140 OF 2022

RN NYAKUNDI, J

OCTOBER 11, 2024

BETWEEN

ISAAC O ONSOTI FLORENCE EGAN & AVIN EGAN (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID ONGETA MATUNDA) ..... APPELLANT

AND

BARCLAYS BANK OF KENYA ..... RESPONDENT

(Being an appeal from the decision and judgement of Hon. Dennis Mikoyan delivered on 28th September 2022 in Eldoret CMCC No. 654 of 2005;)

JUDGMENT

1. The brief background of this case is that the respondent sued the appellant's Isaack O. Onsoti and David Ongeta (now deceased) on 20/2/2002 seeking Judgement in its favour for a sum of Kshs. 1,878,818.90 together with interest and costs.

2. In the plaint before the trial court, it was the respondent's claim that they had advanced a loan facility of Kshs. 680,000/= and an overdraft facility of Kshs. 600,000/= to the appellants and that they had defaulted in repayment. In their defence, the appellants indicated in their amended joint statement of defence and counterclaim dated 7/5/2022 that they had indeed applied for an overdraft facility of Kshs. 600,00/= which overdraft was granted on 15/5/1997 and which was later on converted to a loan of kshs. 680,000/= and the request of the respondent herein. The appellants essentially averred that they were not granted two separate loan facilities as alleged by the Respondent. They further indicated that the defaultment occurred because the agreement between them and the respondent was breached when the chargeable interest rate of 20% was increased to 38% thus making it untenable to keep up with the payment demand of the respondent.

3. As noted by the Respondents in paragraph 6 of their plaint, the subject matter loan of kshs. 680,000/= had been secured by a legal charge over Eldoret Municipality Block11/741 which was in the name of the appellant. Even before bringing a case before the trial court, the respondent had sold the said property in exercise of their statutory power of sale and the proceeds thereof had been used to repay the loan and the appellants account with the respondent was accordingly closed on 17/1/2000 and that the appellants were duly notified of the position. It was after the said sale had been conducted that a case was brought against the appellants demanding for the repayment of the supposed loan of Kshs. 680,000/= plus overdraft facility of Kshs. 600,000/= whereas the security had already been sold and the loan amount fully recovered.

4. Essentially, in line with the counterclaim presented by the appellants in their amended joint statement of defence and counterclaim, the appellant averred that sale of the security was made without taking into account that the interests of the chargor since the said property was sold at a throw away price of Kshs 337,756/= or thereabout when the security was valued at over kshs. 1,200,000/= at the time of sale. Apprehensive that the appellants were likely to present a suit against them for the manner in which they conducted the sale of the security and the amount the security was sold at, the respondents brought a suit against the appellant's demanding for the repayment of a loan which had already been repaid using funds obtained from the sale of the security.

5. Eventually the appellants still made a claim against the respondent albeit through a counterclaim. In the said counterclaim, the appellants prayed for a declaration that the sale of the security i.e. Eldoret Municipality Block11/741 was unlawful and that the respondent be ordered to pay full indemnity for the loss occasioned by the sale. On 1/8/2012, the Plaintiff's suit and counterclaim were allegedly withdrawn by consent. The appellants were aggrieved by the said order and an application for review was made. The same application was dismissed by the trial court. The appellants appealed against the said ruling in the High Court which appeal was allowed and the appellant's counterclaim was reinstated. The counterclaim proceeded for hearing when Alvin Ongeta (the legal representative David Ongeta Matunda) testified and closed the counter claim.

6. The trial magistrate delivered his judgement dated 28/9/2022 in which he stated that the counterclaim is dismissed with cost to the Defendant.

7. Being dissatisfied with the aforementioned judgement of Hon. Dennis Mikoyan delivered on 28th September 2022 in Eldoret CMCC No. 654 of 2005; between Barclays Bank of Kenya v Isaac Ogoti Onsoti and Florence Egan & Alvin Egan suing as personal representative of the estate of David Ongeta Matunda (DCD), the Appellant filed his Memorandum of Appeal dated 5th October 2022, where he proffered his appeal on the following grounds:

    1. That the Learned Trial Magistrate erred in law and fact by failing to hold that the Appellants' counterclaim dated 23/10/2012 was meritorious and supported by law.

    2. That the Learned Trial Magistrate erred in law and fact in failing to hold that there was in existence letters of administration taken out on behalf of the estate of the deceased appellant.

    3. That the Learned Trial Magistrate erred in law and fact by making a determination that there was no testimony by the Appellants' witnesses and yet the same remains on record.

    4. That the Learned Trial Magistrate erred in law and fact in holding that the Appellants' testimony did not meet the legal requirements of the *Evidence Act* and therefore remained to be of no probative value to the suit.

5. That the Learned Trial Magistrate erred in law and fact by misdirecting himself on the application of section 107 of the *Evidence Act*.

6. That the Learned Trial Magistrate erred in law and fact by holding that the Appellants' counterclaim stood dismissed and yet the same was prosecuted fully.

7. That the Learned Trial Magistrate erred in law and fact by disregarding the testimony by the legal representative of the estate of the deceased appellant.

8. That the Learned Trial Magistrate erred in law and fact by failing to recognize and appreciate that the overriding objective of the court is to hear and determine matters before it on merit.

9. That the Learned Trial Magistrate erred in law and fact by making a decision that is an affront to *the Constitution* of Kenya 2010, the *Civil Procedure Act* and the rules of the natural justice.

8. The Appellant sought the following orders from his Memorandum of Appeal:

a. That this appeal be allowed

b. That the decision/judgement of the trial court delivered on 28/9/2022 be set aside.

c. That judgement be entered in the counter-claim as prayed for in favour of the appellants.

d. That the costs of this appeal be awarded to the appellants.

9. The appeal was canvassed through written submissions.

Appellant's written Submissions

10. The Appellant filed his submissions dated 8th July 2023, in which he listed 2 issues for determination as follows;

a. Whether the learned trial magistrate erred in law and fact in failing to consider the appellant's counterclaim on merit based on the facts presented by the appellants.

11. The learned counsel for the appellant submitted that in their counterclaim the respondent was reckless in the sale of the security given to them and they failed to take into account the interest of the chargor when they sold the security at a thrown away price of Kshs. 337,756/= or thereabout when the security was valued at over Kshs 1,200,000/= at the time of sale. Moreover, he stated that the appellant's claim against the respondent in the counterclaim was for a declaration that the sale of their security Eldoret Municipality Block11/741 was unlawful and the respondent be ordered to pay full indemnity to the appellants for the loss suffered plus costs of their counterclaim.

12. Counsel stated that since at the time of the hearing of the counterclaim David Ongeta Matunda was now deceased, Alvin Ongeta (the individual who had taken out letters of administration on behalf of the estate of the deceased who was his father) continued prosecuting the claim and that Alvin Ongeta testified and produced a statement dated 8/6/2012 which had been signed by his late father David Ongeta Matunda.

13. The learned counsel noted that in the said statement, David Ongeta Matunda (deceased) recounts how his property was secretly, illegally, unlawfully and unreasonably sold at a thrown away price of Kshs. 337,456/= and the monies shared between the bank and the agents without the interests of the chargor. He also noted that the chargee did not take into account the current value of the property when the auction was conducted, thereby prejudicing the interest of the chargor. He added that apart from the aforesaid statement, numerous documents have been produced by PW1 as exhibits in

support of their case and one of the documents is a letter dated 5/11/1996 from the appellants to the respondent requesting for a loan of Kshs 600,000/= and a response was made to the aforesaid letter by the respondent via a letter dated 15/5/1997, agreeing to the remission of the requested amount as an overdraft.

14. The learned counsel submitted that resultantly with the consent of the Appellants, the respondents sought to register a legal charge over the property known as Eldoret Municipal/Block11/741 and vide a letter dated 24/3/1997, the respondent wrote to their advocates (M/s Nyairo & Co. Advocates) requesting them to proceed and register a charge over the property for Kshs. 600,000/= and the subject overdraft of Kshs. 600,000/= was converted to a loan of Kshs. 680,000/=. He further submitted that under the subheading of purposes of loan, the loan agreement specifically indicated that the purposes thereof were conversion of overdraft to loan and the overdraft was converted to a long term loan payable in 3 years (36 months) at Kshs 29,000/= per month with 22% to 7% above the banks base rate.

15. The learned counsel opined that as a result of the interest rates being increased to 38% contrary to the loan agreement coupled with the high inflation rates at the time, the appellants were unable to keep up with the bank's payment demands and when the appellants defaulted in the repayment of the loan, the respondent wrote to the appellants vide a letter dated 3/4/1998 demanding for the payment of Kshs 759, 385/= with 14 days' failure to which action would be taken. He furthermore opined that another demand letter demand letter dated 4/5/1998 was received by the appellants from Nyairo & Co. Advocates demanding for the payment of kshs 783,518/= within 14 days to which action would be taken.

16. The learned counsel stated that because of the unlawful high interest coupled with the inflation being experienced at the time the appellants wrote a proposal for payment plan which proposal was rejected by the respondent and they further indicated that the appellants should deposit Kshs. 480,000/= within 14 days' failure to which the bank would proceed with the auction. He added that unknown to the appellant's however, by the time the respondent was rejecting the payment proposal made by the appellants, the auction had already been conducted on 3/2/1999 and that the auction was conducted secretly because neither the respondent's advocates nor the auctioneers (M/s KEDO Auctioneer) had notified the appellants concerning the impending action. He noted that the appellants only came to realize later on that the said property had been secretly, illegally unlawfully and unreasonably auctioned at a throw away price of Kshs 337,756/=.

17. Further, counsel stated that the appellants lodged a complaint at the bank concerning the illegal auction because the loan was 100% secured and the bank accepted to clear the appellants and that on the 18/7/2000, six months after getting cleared, the appellants received a letter from Nyairo & Co. advocates demanding for the payment of the supposed loan of Kshs 680,000/= and overdraft of Kshs 600,000/=. Moreover, he noted that the appellants instructed a private Valuers, M/s Prime Valuers to take a fresh valuation of the property at the time of the auction and it was determined that the property was valued at Kshs. 1,100,000/= the appellants essentially lost Kshs. 762,244/= as a result of the irregular auction. He stated that despite the availability of overwhelming evidence in support of the appellant's counterclaim, none of the exhibits produced by PW1 during trial were considered.

18. It was the counsel's final submission on this issue that the learned trial magistrate erred in law and in fact in failing to consider the appellant's counter claim on merit based on the facts presented and that the counterclaim was meritous since based on the uncontroverted evidence presented by the appellants at trial, the appellants property was secretly and illegally auctioned significantly below the market value at the time and as a result, the interest of the chargor were prejudiced.

19. On the second issue whether the learned trial magistrate erred in law and in fact in holding that the appellant's testimony did not meet the legal requirements of the *Evidence Act* and therefore remained to be of no probative value to the suit, the learned counsel argued as follows;

20. That the fundamental reason that was fronted by the learned trial magistrate in his judgement was that since the present case did not fit amongst the circumstances contemplated under section 33 of the *Evidence Act* Cap 80 Laws of Kenya there was no evidence in support of the case and as such the case was dismissed. Counsel made reliance to section 33 of the *Evidence Act* which provides for the instances the statement made by a deceased person can be admissible as evidence.

21. He stated that the position adopted by the learned trial magistrate in his judgment was that since the statement of the deceased does not fit among the circumstances contemplated by section 33 of the *Evidence Act*, no evidence had been presented by the appellants during trial. He noted that such a proposition goes against the overriding objective of the court, essentially, the interpretation adopted by the learned trial magistrate takes us back to the time when more emphasis would be pleaded on the rules of procedure to the extent that substantive justice was denied.

22. Moreover, counsel stated that a time when procedural law would be given exceedingly more emphasis than the substantive law so that at the end of the day, litigants would fail to obtain substantive remedies on the ground that procedure has not been fully complied with and essentially, the interpretation of the learned trial magistrate leads to an unjust outcome and this is happening at a time when courts are mandated to ensure substantive justice is given more emphasis.

23. Counsel opined that the overriding objective principle has clearly been outlined in statute under Section 1A of the *Civil Procedure Act* Cap 21 Laws of Kenya and provides that the overriding objective of the Act and the rules made there under is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. He also opined that section 1B of the Act provides that among other things, the purpose of furthering the overriding objective is ensuring the just determination of proceedings and emphasis is on achieving a just outcome. He made reliance to the case of Samuel Mbugua Githere v Kimungu [1984] eKLR.

24. Counsel submitted that apart from the statutes and the stare decisis, the overriding objective principle has been captured under *the Constitution* of Kenya 2010 and in relation to judicial authority, Article 159(2)(d) states as follows; "Justice shall be administered without undue regard to procedural technicalities." He noted that in the present case, it is clear that the overriding objective principle has been trumped and inadvertently, the learned trial magistrate has sacrificed, substantive justice at the altar of procedure and that this adverse procedure can be cured when this Honourable court grants the prayers sought in the appellants' memorandum of appeal.

25. The learned counsel moreover stated that section 33 of the *Evidence Act* should be read in context of whole statute so as to be in the tune with the spirit and letter of the statute. He noted that in order to achieve the overriding objective principle, it is important to be inclined towards purposive interpretation as opposed to a literal interpretation and when a purposive interpretation of section 33 of the *Evidence Act* is done, it can concluded that whereas in the present circumstances the witness statement produced by PW1 may not literally qualify among the circumstances listed under section 33 of the *Evidence Act*, when the provision is read in the context of the wider statute and particularly when it is read together with section 35 of the same statute, the said evidence is admissible. He also made reliance to section 35 of the *Evidence Act* which provides for instance when documentary evidence will be admissible.

26. He furthermore submitted that a purposive interpretation of the *Evidence Act* would therefore lead to the conclusion that the statement produced by PW1 was admissible as evidence and that the learned trial magistrate therefore erred in law and in fact in concluding that there was no evidence to support this suit. He also submitted that the learned trial magistrate erred in law and in fact in declaring at judgement that the witness statement of PW1 was inadmissible whereas the same had already been admitted as evidence at trial.

27. Counsel noted that from the typed proceedings, the witness statement of David Ongeta was adopted as his evidence in chief and that no objection was raised against the admissibility of the evidence and the said statement was admitted. He also noted that the trial court was therefore in error in indicating during the judgement that the statement was inadmissible, while it had in fact been admitted as evidence is declaring the statement inadmissible while it had in fact been admitted as evidence is tantamount to defeating the ends of justice.

28. It was the learned counsel's closing submission that for the sake of justice and fairness, this court issues a declaration that the sale of the property known as Eldoret Municipality Block11/741 was unlawful and that the respondent be ordered to pay full indemnity to the appellants for the loss suffered plus costs of the counterclaim and the appeal.

Respondent's Written Submissions

29. The Respondent filed its written submissions dated 14th November 2023 in which 2 issues for determination were listed and discussed as follows;

a. Whether the Appellants' counterclaim was merited and backed up by oral evidence?

30. On this issue, the learned counsel for the respondent submitted that the appellants in this matter did not file any witness statements in court nor did they attend court to testify and they only produced a witness statement filed by the deceased person and directed that the same be taken as their evidence. He made reference to section 107 of the *Evidence Act* Cap 80, Laws of Kenya on burden of proof which states that

    1. Whoever desires any court to give judgement 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.

31. The counsel stated that equally, section 108 of the *Evidence Act* provides that, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given to either side and that the appellants despite taking out letters of Administration did not file their witness statements nor testify in court to back up the witness statement by the deceased. He made reference to section 33 of the *Evidence Act* which provides that;

> Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases-
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> a. when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in

> which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;

32. Moreover, counsel made reference to the cases of Dickson Mbeya Marende alias Dickie & another v Republic [2017] eKLR and Republic v John Ng'ang'a Njeri [2018] eKLR. He stated that he who alleges must proof and that the appellants despite reinstating the counterclaim did not testify in court nor file their independent witness statements. Further that they only relied on the witness statement of the deceased which ofcourse does not fall on the exceptions of section 33 of the *Evidence Act* and that this is to say that the evidence of the deceased was not corroborated by any other evidence hence the same should fail automatically.

33. On the second issue; Who bears the cost of the Appeal, the learned counsel submitted that it is trite law that costs follow event and that section 27 of the *Civil Procedure Act*, Cap 21 gives the court the unfettered judicial discretion to award costs and that they have demonstrated that this appeal herein as drafted and filed is not merited. The learned counsel urged the court to award the Respondent with the costs of the Appeal.

34. It was the counsel's closing submission that this court be pleased to dismiss the appeal by the appellants and hold the lower court's decision of dismissing the counterclaim with costs to the Respondent and made reference to the case of Meru HCCR Case No. 28 of 2014- Republic Vs Mark Mungathia & Another.

Analysis and Determination

35. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions. See: Court of Appeal for East Africa in Peters v Sunday Post Limited [1958] EA 424]. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> "i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
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> ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
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> iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

36. Therefore, it is the duty of this court as a first appellate court to re-evaluate the evidence and arrive at its own conclusions. In so doing the court must take into account that it had no opportunity to hear and see witnesses, and therefore must make an allowance for that. (See: Selle & Another v Associated Motor Boat Co. Ltd & Another [1968 (E.A. 123].

37. Vide this court's ruling dated 3rd July, 2020 the Appellant's counterclaim which has been dismissed was reinstated and on hearing, Alvin Ongeta testified as PW1 and stated that he is not part of the defendants. That Isaac Ogoti was a partner to his late father who passed on in the year 2014. He testified that on 20th September, 2021 they did a substitution. He stated that he has since looked at the statement

of his late dad and wishes to have it adopted as evidence together with the documents as per the list of documents dated 5th June, 2012.

38. On cross examination, he stated that David was in business. That he is not aware why he was sued but he is aware that their property was sold at a throw away price to recover the loan.

39. The trial court considered the counterclaim and decreed as follows:

> " there is a justification to addressing this cause in line with Section 33 of the *Evidence Act*. It does qualify when a statement made can be admitted where the maker is deceased. I am inclined to rule that the present case does not fit amongst the circumstances contemplated and for lack of that there is no evidence in support of this suit. Alvin (PW1) never recorded any statement in respect of the transaction in question and the 2nd defendant made it to testify. It is paramount principle of evidence under Section 107 of the *Evidence Act* that he alleges must prove. The counterclaim stands dismissed."

40. The trial court essentially dismissed the counterclaim for lack of tangible evidence. Did the appellant prove the counterclaim on a balance of probabilities? That is what in my view this court ought to determine.

41. This degree of proof is well enunciated in the case of Miller v Minister of Pensions [1947] cited with approval in D.T. Dobie Company (K) Limited v Wanyonyi Wafula Chabukati [2014] eKLR. The court stated: -

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

42. Further, Section 107 of the *Evidence Act* Cap 80 places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favor, to prove those facts. I have perused through the trial court record with a view to gather the pieces of evidence as filed by the Appellants to support their defense and counterclaim. The Appellants at the trial produced. My attention was drawn to the valuation report filed by the Appellants dated 16th October, 1996 which valued the suit property at Kshs. 520,000/=. The Appellant also conducted another valuation through Prime valuers and vide the report dated 15th August, 2002 the subject property was valued at Kshs. 1,100,000/=. I have equally perused through the documents as filed by the Respondent and I have not seen any valuation conducted from their side. They have only attached the reports as relied on by the Appellants. Is a valuation report necessary by the chargee?

43. The starting point has to be Section 97 of the *Land Act*, *Act No 6 of 2012* which is part of why the appellant is aggrieved that his parcel of land was not unfairly sold at a throw away price. It 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).

(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.

44. The above section, embodies the duty of care owed to the chargor by the chargee. The duty therein is no more than "to obtain the best price reasonably obtainable at the time of sale." Apart from this, there is no other duty imposed. Section 97 (2) requires the chargee to undertake a valuation of the property. The purpose of the valuation is to enable the chargee discharge the duty of care required by Section 97 of the Act. The rationale of course is that the valuation report will guide the chargee as to the forced sale value and the price under which such sale may prima facie be taken to be have breached the duty to obtain the best price reasonably obtainable at the time of sale.

45. The said section imposes such a duty but does not state how current such valuation report needs to be or whether a valuation must be conducted before every other sale. In Palmy Company Limted v Consolidated Bank [2014] eKLR, Gikonyo J, while determining an application for injunction, asserted himself as follows on this point: -

> " The duty under Section 97 (2) of the *Land Act* is therefore, a serious legal requirement which will entitle the chargor to apply to court under Section 97 (3) (b) of the *Land Act* to have any sale based on such breach to be declared void, and the court on the required proof, should declare such sale to be void. That is the onerous nature of the duty."

46. The sale cannot be set aside but the Appellant's claim lies on damages. This is the case in Gabriel Ndung'u Githua v National Bank of Kenya & 2 other [2009] eKLR held that:

> " The only remedy available to the Plaintiff, if he was aggrieved by the said exercise of the statutory power of sale, is to sue for damages. As regard whether the Plaintiff's equity of redemption is still in existence, I need not look further than to cite with approval the decision of Nyamu J (as he was then) in Nairobi HCCC No. 9 of 2003 Ze Yu Yang v Nova Industrial Products Limited (unreported) where at page 9 of his ruling he held as follows:
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> Turning to the issue of the equity of redemption where there is a valid contrast of sale in existence, there is a galaxy of cases starting with celebrated case of George Mbuthia & Jumba Credit Corporation Civil Appeal 111 of 1986. In that case the decision of chief justice Apaloo at pg. 5 clearly states that the equity of redemption is extinguished by a valid contract under S. 60 of the Transfer of Property Act...."

47. The Court of Appeal in the Elijah Kipngeno Arap Bii v Samwel Mwehia Gitau & another [2009] eKLR adopted with approval the finding by the privy council in Tse Kwong Lam v Wong Chitsen [1983] 1 WLR 1349 where it stated:

> " Where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between the borrower and the purchaser for sale to be set aside."

48. These principle guidelines and cited authorities underpins the counterclaim which was being prosecuted before the trial court by the defendant Plaintiff. However, from the record the evidence in support of the counterclaim was given by Alvin Ongeta and not David Ongeta Matunda (the deceased). It is also crystal clear that the alleged partner to the deceased never submitted himself to tender evidence on oath within the statutory framework of the *evidence Act*. In this respect, the applicable provisions on admissibility of the evidence of Alvin Ongeta, is premised under Section 33 and 35 of the *Evidence Act* both of which provide as follows:

> " 33. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases.
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> 35. 1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
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> a. If the maker of the statement either—
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> i. Had personal knowledge of the matters dealt with by the statement; or

ii. Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

b. If the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

49. I have considered the circumstances of this case and it is trite as a general rule pursuant to the provisions of sections 33 and 35, documents can be produced in evidence without calling the maker in exceptional circumstances where the maker is dead or cannot be found or is incapable of giving evidence or his/her attendance cannot be procured without an amount of delay or expense. The court has the discretion to evaluate the specific circumstances of each case when a litigant or a witness is desirous of invoking the provisions of section 33 as read with Section 35 of the *Evidence Act*. Going by the above express statutory provisions, the valuation reports prepared by the two valuers in support of the Defendant counterclaim in the instant suit are admissible within the exceptions provided in Section 33 and 35 of the *Evidence Act* save that the following criteria must be satisfied:

That the valuers who are the makers of the valuation reports cannot be produced in court as witnesses without delay.

That they cannot be produced without unreasonable expenses and the reports in question were made in the discharge of their professional duty.

50. The main issue of contention which arises from the impugned judgment of the trial court is whether the learned trial magistrate erred in dismissing the counterclaim of the defendant by placing more weight to the provisions of section 33 of the *Evidence Act* than what the legislature could have intended to be the proper interpretation of the provisions in the administration of justice. First and foremost, I bear in mind the valuation reports of this nature constitute expert opinion under Section 48 of the *Evidence Act* which as a general rule should be relevant, direct and suitably designed to keep the trial court to make informed inferences as to the truth of facts in issue. I also take judicial notice in matters of adjudication of cases that it is not in every case or proceedings that the expert is available to testify and his/her evidence be tested on cross examination on the contents of the scientific evidence, expertise and opinion. However, it is worth noting that any such state opinion by the expert witnesses is always subject to the rule against hearsay evidence. It is settled law that a statement made to a witness by a person who is not himself/herself called as a witness is hearsay and inadmissible when the objective of that evidence is to establish the truth of what is contained in the statement. In the persuasive case

from the Supreme Court of India, the learned judges in Arjun Panditrao Khoktar v Kailash kushanrao [2020] 3 SCC 216 observed as hereunder:

> " 2. Documentary evidence in contrast to oral evidence, is required to pass through certain check posts, such as –
>
> Admissibility
>
> Relevancy
>
> Proof, before it is allowed entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three check posts, changes. Generally, and theoretically, admissibility depends on relevancy. Under Section 136 of the *Evidence Act*, relevancy must be established before admissibility can be dealt with.'

51. From the record of the trial court, the criteria set out under Section 33 as read with Section 35 of the *Evidence Act* was never complied with by the Plaintiff. More specifically as it relates to the makers of the valuation reports dated 16th January, 1996 and 15th August, 2002. The two valuers should have been availed for their reports formed the basic structure and foundation of the defendant's counterclaim in seeking damages against the Plaintiff that the sale of the suit property Eldoret Municipality/Block 11/741 was undervalued. The admission of the defendant's list of documentary evidence including the critical valuation reports are to meet two tests; one on admissibility and the respective probative value evidence.

52. Evidence as stipulated in law is information or opinion given by any person that proves the allegation to be true or not to be true. So under Section 48 of the *Evidence Act*, there is a provision for the court to call for expert evidence related to such a field in which a witness has extraordinary knowledge and skill in any field that person is specialized in to assist the court in arriving at a just decision. Generally speaking, expert opinion is admissible only when an expert is examined as a witness in court and his/her evidence tested in cross examination. The appellant sought to rely on the valuation reports to impeach the statutory power of sale exercised by the defendant bank. In my view, the provisions of the statute to be interpreted liberally but the benefit cannot be granted to the Appellant who approached the trial court without first laying a basis within the spectrum of Section 33 and 35 of the *Evidence Act*.

53. The submissions by the Appellant mainly hinge on the duty owed by the mortgagee to the mortgagor when exercising the power of sale of the security to realize the outstanding loan amount. The obligation vested with the mortgagee against the mortgagor is to act in good faith and to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he elects to sell it. The comparative dicta in the case Cuckmere Brick Co. Ltd v Mutual Finance Ltd [1971] 2 ALL ER 633 put it more succinctly that:

> " it is well settled that a mortgagee is not a trustee of the power of sale for the Mortgagor. Once the power has accrued the mortgagee is entitled to exercise it for its own purposes whenever it chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realize his security by turning it into money when he likes. Nor in my view is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests as he sees them conflict

with those of the mortgagor, the mortgagee can give preference to his own which of course he could not do were he a trustee of the power of sale for the mortgagor."

54. A helpful summary of the facts of this case in this appeal shows that the sale was by way of a public auction and not a private treaty. There is no evidence even with the allegations of the property having fetched a low price at the auction the mortgagee did not take reasonable care to sale at the best reasonable price reasonably obtainable at the auction. I consider one of the key components which is not disputed in this appeal that in exercising the statutory power of sale the property should be advertised sufficiently, frequently with widespread information to reach the appropriate pool of prospective purchasers. That is not the complaint here by the appellant. The mere fact that going by the valuation reports that a higher price might have been obtained at the public auction does not means that the duty of care of the mortgagee against the mortgagor was or has been breached.

55. For all purposes except execution a claim and a counterclaim are tow independent cause of actions. Therefore, it is settled law that a claimant to a counterclaim must adduce cogent evidence on the issues in order to secure judgment or ruling in his favor. Whether the property in question was capable of attracting a higher value than what it was sold for as intimated by the appellant is moot. This being an independent and separate action as a remedy in respect of the appellant, it is the basic principle of the Law of Evidence that a party who bears the burden of proof on a balance of probabilities is to produce the required evidence of the facts in issue that has the quality of credibility and of which his/her claim may succeed or fail. As for the Appellant, he has miserably failed to demonstrate that the trial court erred in law and fact within the guidelines set out in Peters v Sunday Post Limited (supra).

56. For those reasons, the law does not call for any interference in the present appeal to warrant setting aside of the trial court's judgment. Accordingly, the appeal is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF OCTOBER 2024

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R. NYAKUNDI

JUDGE