REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL SUIT NO 16 OF 2019

SAMSON M. AKETCH.....1ST PLAINTIFF

KENYA AERONAUTICAL COLLEGE LIMITED.....2ND PLAINTIFF

VERSUS

SIDIAN BANK LIMITED.....DEFENDANT

JUDGMENT

1. The 1st Plaintiff is a director of the 2nd Plaintiff, a limited liability company. He guaranteed a loan of Kshs. 10,000,000 the 2nd Plaintiff obtained from the defendant in February, 2016 to enable the 2nd plaintiff expand its business. The 1st plaintiff also charged his property, Title Number Kajiado/ Lorngusua/2299 as security for the loan. The 2nd plaintiff was to repay the loan for **sixty (60) months** at a monthly installment of **Kshs. 284,785.**

2. On 21st May, 2015, the 1st Plaintiff received a letter from Keysian Auctioneers informing him of an intended sale of his property by public auction scheduled for 28th May, 2019. His inquiry on what was happening and request through his advocates that the sale be cancelled elicited no response. It was their case that they were not served with the statutory. They were also not aware that the property had been valued before it was advertised for sale by public auction.

3. The plaintiffs asserted that they had always serviced the loan and were at some point even ahead of the repayment schedule by a year. They also took issue with the defendant's action of listing them with the Credit Reference Bureau **(CRB)**. They asserted that their requests for revised repayment schedule and statements showing the outstanding loan amount after the interest had been caped had been in vain.

4. They filed a plaint dated 24th May, 2019 and sought judgment against the defendant for:

> ***a) a declaration that the scheduled sale of Title Number Kajiado/ Lorngusua/2299 on 28.05.2019 or any other time later is null and void.***
>
> ***b) An order of permanent injunction to restrain the Defendant, their servants, auctioneers, licensees, agents or any other persons acting on their behalf from howsoever advertising for sale, selling, auctioning, alienating, transferring, disposing, further charging, dealing, dispossessing or in any way interfering with the 1st Plaintiff right of ownership and proprietorship to Title Number Kajiado/ Lorngusua/2299.***
>
> ***c) An order compelling the defendant to provide full account statements for the loan account and a loan repayment schedule after the interest cap rates law came into effect on 14th September, 2016.***
>
> ***d) An order against the defendant indemnifying the plaintiffs against any costs and losses incurred by them on account of the defendant' s illegal actions***
>
> ***e) General damages***
>
> ***f) Cost of the suit plus interest.***

Defendant's defence

5. The defendant filed a statement of defence dated 6th June, 2019. It admitted that the 2nd plaintiff was its customer but denied the plaintiffs' allegations against it. It averred that relevant statutory notices were issued and served and that presale valuation was conducted for the property.

6. The defendant further stated that the plaintiffs were well informed when the interest rate capping law came into force and were invited for meetings held between its officials and the plaintiffs. It averred that there was communication through email between the plaintiffs and its officials on the amount repayable after the law capping interest came into force.

7. The defendant pleaded, therefore, that the intended sale was legal since its statutory right of sale had crystallized as a result of the plaintiffs' breach of their obligations under the charge. It urged that the suit be dismissed with costs.

Plaintiffs' evidence

8. The 1st plaintiff, ***Samson Aketch (PW1),*** adopting his witness statement dated 24th May, 2019 filed together with the plaint and produced his list of documents of the same date as exhibits. He told the court that the 2nd Plaintiff took a loan of Kshs. 10,000 from the defendant in 2016. The loan was to be repaid in sixty months. He executed a personal guarantee for the loan and also charged his property Parcel No. Kajiado/ Lorngusua/ 2299 as security for the loan. The 2nd plaintiff paid Kshs. 6 million within the first 3 years and was not only ahead of repayment schedule, it was still repaying the loan when the defendant initiated the process to realize the security.

9. The 1st plaintiff denied that statutory notices were served them before the defendant's action to sale the property. He also denied receiving notice from the defendant changing the loan period from sixty (60) to forty-eight (48) months. He told the court that the loan was performing and, therefore, the defendant could not sell his property. He also blamed the defendant for listing him with the **CRB** yet the 2nd plaintiff was not in default on loan repayment. He told the court that they only received the auctioneers' notification of sale and it was on that basis that they filed this suit.

10. In cross-examination, he admitted that he was the chargor and that his postal address was P.O. Box 6372-00200, Nairobi. He admitted that the defendant's official by the name Irene informed him through an email of 8th September, 2016 that interest rate would come down to 14.5%. She also informed him that the amount servicing the loan had been exhausted. He however stated that his request for statements of account was not responded to and, therefore, he did not know how and why the amount had been exhausted. He denied receiving an email of 23rd September, 2016 from Irene informing him that the rate had reduced 14.5% and that the loan period was to change from 60 to 48 months.

11. The witness further denied receiving any notices on the sale of his property except the one from Keysian Auctioneers. He again denied receiving a letter addressed to Credit Risk Management Unit (Sidian Bank) forwarding a copy of newspaper advertisement; letter addressed to Kenya Aeronautical college through P.O. box 6372-00200, or receiving a letter dated 13th June, 2018 addressed to director of the 2nd plaintiff and him. He similarly denied receiving a statutory notice dated 8th January, 2019 addressed to the plaintiffs or a valuation report by Acumen valuers Limited dated 27th June, 2018. He admitted that the loan statements attached to the defendant's list of documents showed that as at 28th May, 2019 there were arrears of Kshs. 327, 546. 93.

12. In re-examination, the witness stated that they had paid 80% of the loan and that he did not have any arrears as at May, 2019. He also stated that the security had been valued at Kshs. 16 Million when the 2nd plaintiff applied for the loan yet it was valued by Acumen Valuers Limited on 28th June 2018 at Kshs. 10,000,000 while forced sale value put at 7,500,000, which was a gross under value.

13. DW1, ***Duncan Mutembete***, the defendant's employee, adopted his witness statement dated 28th November, 2019 and produced documents in the defendant's list of documents dated 11th September, 2019 (except document No.4 at page 45 email of 23 September 2016) as exhibits. He told the court that the 2nd plaintiff was granted a loan of Kshs. 10,000,000 but later fell into arrears. As at 9th May 2019, the arrears were Kshs. 327, 546.93. As a result of the default, the defendant issued necessary statutory notices and moved to exercise its statutory power of sale.

14. In cross-examination, he stated that the 1st Plaintiff executed a personal guarantee and also charged his property to secure the loan. He admitted that the repayment period of the loan was 60 months and that the loan was initially regularly being serviced and had at some point repayment been ahead of schedule for several months. He stated that when the loan was taken in February 2016, interest rate was 23.45% p.a. However, in September, 2016, a law was passed reducing and capping interest rate. He admitted that the plaintiffs wrote to the defendant requesting for recalculation of the loan based on the newly capped interest and that the defendant responded to the plaintiffs' request on 8th September, 2016. He however did not have the response sent to the plaintiffs on recalculation of the loan repayment schedule in terms of the new rates.

15. The witness again admitted that he was not sure whether the defendant responded to the plaintiffs' emails of 9th May, 2019 and 10th May, 2019 requesting for repayment schedule given that the interest rates had been reduced. He further admitted that the bank statements showed that the loan period was 48 months, but he was not sure whether the plaintiffs requested for reduction of the loan period and he did not he have any document to show that the plaintiffs had agreed to reduction of the loan repayment period.

16. He again admitted that the plaintiffs requested for statements of account through email of 23rd September, 2016, and although the bank sent an email dated 28th September, 2019 informing them that it had already sent the statements, he had not seen a bank statement as at 25th September, 2016. He further admitted that the email of 28th September, 2016 had no attachments and that although it was addressed to the director, there was no email address of the recipient. He further admitted that bank statements for repayment of 48 months would have different loan balances from those for 60 months. He confirmed that the defendant used the 48 months' repayment period on 12th April, 2018

when it stated that the plaintiffs were in default and moved to realize the security.

17. According to the witness, the defendant issued a notice to the 1st Plaintiff; that the notice was addressed to four parties and was served through registered mail on 27th July, 2018. He again admitted that although the notice was sent to four people, only the 2nd Plaintiff appeared on the list of recipients. He stated that the Forty (40) days' notice dated 8th January, 2019, was addressed to four parties and was copied the County Lands Commission. He maintained that the loan was in arrears of over Kshs. 300,000 when the notices were issued, but admitted that there were repayments between January 2018 and March 2018 but for small amounts and, therefore, the loan was still in arrears.

Plaintiffs' submissions

18. The plaintiffs submitted through their written submissions dated 21st September, 2021, that the defendant was wrong when it changed the loan term from sixty (60) to forty (40) months. They argued that they did not request for variation of the loan terms and the defendant did not serve them with notice of intention to vary the period. They pointed out that the defendant's witness admitted this fact and the bank/loan statements produced were clear that the loan period had been changed to 48 months without notice.

19. The plaintiffs relied on ***Surya Holdings Limited & 4 others v ICICI Bank ltd & another*** [2015] eKLR, to argue that a party cannot unilaterally change the terms of a loan agreement without consent of the other party. They also relied on ***Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited*** [2014] eKLR for the argument that the defendant (bank) needed to give notice when varying terms of the contract to give the borrower a chance to either accommodate the new terms or bring the contract to an end.

20. The plaintiffs again submitted that there was no default in loan repayment. They maintained that the defendant's allegation that the loan was in arrears was its own creation based on its repayment scheme of 48 months instead of the contractual 60 months.

21. On whether the defendant was right to invoke its exercise of statutory power of sale, the plaintiffs argued in the negative. They submitted that the defendant unilaterally varied the loan terms by reducing repayment period from sixty to forty-eight months without their knowledge. They were not in default and, therefore, there was no basis for recalling the loan or purporting to exercise its statutory power of sale of the security.

22. The plaintiffs asserted that statutory notices were not served and the certificates of postage produced did not relate to the letters or notices purportedly sent. They relied on ***Stephen Boro Gitiha v Nicholas Ruthiru Gatoto & 2 others*** [2017] eKLR for the argument that the burden of proving service of notice lay on the defendant. They urged the court to allow their suit with costs.

Defendant's submissions

23. The defendant submitted through its written submissions dated 21st September, 2021, that the plaintiffs breached their obligations under the charge and that the loan was in arrears of Kshs. 327, 546. 93 when it moved to realize the security. On that basis, it argued, its right of statutory power of sale had crystallized.

24. It was the defendant's case that it complied with the law and served statutory notices before exercising the statutory power of sale. It maintained that it issued statutory notices dated 13th June, 2018; 8th January, 2019 and letter from Keysian Auctioneers dated 13th March, 2019. It asserted that there was also evidence on the service of notices on the plaintiffs by registered mail. It relied on ***East Africa Ventor Co. Ltd v Agricultural Finance Co-op Ltd & another*** [2017] eKLR (ELC 287 of 2017) on the procedure and obligations of the chargee when exercising a statutory power of sale. It also relied on ***Edds Designers Limited v United Credit Limited & another*** (Civil case No. 14 of 2018 [2020] eKLR, on the same point, and urged the court to find that there was proof of service of the notices.

25. Regarding change of the loan period, the defendant maintained that the 1st plaintiff sent an email to its official expressing their expectations regarding the new interest rates which was basically a restructuring of the then existing loan terms. In any case, it argued, it was complying with the law and needed not to have obtained express consent from the plaintiffs as maintaining the structure of the loan then in place, would have amounted to an illegality. It prayed that the suit be dismissed with costs.

Determination

26. I have considered the pleadings; evidence, submissions and the decisions relied on by both sides. The 2nd plaintiff obtained a loan of Kshs. 10,000,000 from the defendant, in February 2016. The loan was to attract interest at 23.5 % pa and was to be repaid for a period of sixty (60) months at Kshs. 284, 785. per month. The 1st plaintiff guaranteed the loan by executing a personal guarantee and a legal charge over his property Kajiado/ Lorngusua/2299 in favour of the defendant. Both parties agree that the 2nd plaintiff duty fully serviced the loan for some time and was at one point ahead of repayment schedule for several months.

27. Sometime in 2018, the defendant initiated the process of realizing the security on grounds that the 2nd plaintiff was in default. It advertised for sale by public auction which was to take place on 28th May, 2019.

28. The plaintiffs argued that they were not in default; that they had been ahead of repayment schedule and that the defendant had unilaterally altered the loan repayment period without their knowledge or consent. They also argued that the defendant had not served statutory notices as required. The defendant on its part, maintained that there was default; that the plaintiffs were aware of the change of the loan repayment period and that statutory notices were issued and served.

Whether change of loan repayment term was lawful

29. The plaintiffs' case was that the defendant unlawfully altered the loan repayment term from sixty months to forty-eight months. This, they argued, was done unilaterally and without notice to them. According to the plaintiffs, the unilaterally change of the loan period must have affected the loan repayment to their disadvantage. The defendant admitted changing the loan term period from sixty to forty-eight months but maintained that this was done with the plaintiffs' knowledge.

30. I have considered the evidence on record and the exhibits produced with regard to this issue. The letter of offer dated 9th February 2016 and the legal charge are clear that the loan was to be repaid for a period of sixty months at an interest rate of 23.5%. The initial bank statements from the defendant also confirm that the loan was for sixty months.

31. In September 2016, the law was amended to cap interest rate. This led to readjustment of interest rate downwards to 14.5%, a fact admitted by the defendant's witness. This, the witness admitted, had an overall effect on the interest payable on the loan. According to the defendant, there were email exchanges between its officials and the plaintiffs regarding the change in loan repayment period, which was basically a restructuring of the then existing loan terms.

32. There is no denial by the defendant that it changed the repayment period from sixty to forty-eight months. Although the defendant argued that this was done with the plaintiffs' knowledge, its witness was at pains to show the court that the plaintiffs were aware of that change, given that the loan repayment period was a key term of the contract between the parties. Its alteration would have an effect on the loan repayment and, therefore, performance of the loan. The letter of offer outlines the loan term, interest rate, and other details that bind would bind parties on being accepted. Once accepted and the charge is executed and registered, the loan term, interest rate and other obligations in the charge become express terms binding on parties thereto. A chargee cannot unilaterally change those terms except as provided for under the charge or the law.

33. In that regard, the court stated in ***Spares & Services & 2 Others vs. Trans-National Bank Kisumu*** (HCCC NO. 439 of 1994), that the contract between the parties is the charge as it is the one which spells out the terms and conditions which the parties are obliged to adhere to during the existence of their relationship.

34. It is also admitted by both sides that in September of the same year, 2016, the law was passed capping interest rate payable on loans. According to the defendant, the interest payable was adjusted downwards to 14.5 % pa. The documents filed by the defendant show more so the email of 8t September 2016 to the 1st plaintiff as director of the 2nd plaintiff, that after adjustment of the interest rate, the monthly installment of Kshs. 288,000 which was higher than the Kshs. 284, 875 the 2nd plaintiff was paying prior to the reduction of the interest rate, was to fall due on 27th September. The email was not a notice that terms of monthly loan repayment would change within a certain period, but that it had changed and was due. It seemed again to make reference to a communication from the 1st plaintiff which the defendant did not produce in court. This was again an alteration of another key term of the contract without evidence that the plaintiffs had consented to the change.

35. It is clear from the evidence that the defendant made two key changes regarding the loan repayment; first by reducing the repayment period and, second; by increasing the monthly installment payable. The defendant offered no evidence that the plaintiffs were served with notices of the intended changes or were agreeable to the changes. The defendant's witness admitted that the amount payable when the loan period was sixty months would be different from the amount payable after the period was reduced to forty-eight months. The plaintiffs' argument that the default was the defendant's own creation since it applied the wrong period of repayment and also used different amount is not farfetched. This is so given that the plaintiffs and the defendant agree that the loan repayment had been ahead of schedule for some time and without any problem. It was difficult for the defendant to explain why the plaintiffs were paying Kshs. 284,875 per month when interest was 23.5% but were to pay Kshs. 288,000 after interest had come down to 14.5%.

36. The plaintiffs having denied that they were informed of the intended changes, the burden shifted to the defendant to prove that it served requisite notices prior to the impugned changes. This, it did not do to the satisfaction of the court. There was no notice shown to have been served, when and how. There was, therefore, no evidence that the defendant complied with the law when altering not only the loan repayment period, but also the monthly installment payable.

1. Section 84 (1) of the Act provides that;

> ***(1) Where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee,—***
>
> ***(a) giving the chargor at least thirty days notice of the reduction or increase in the rate of interest; and***
>
> ***(b) stating clearly and in a manner that can be readily understood, the new rate of interest to be paid in respect of the charge.*** (emphasis)

37. In ***Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited*** [2014] eKLR, the court observed that in the absence of any express provision in a charge the chargee could only levy whatever other charges with the consent of the chargor.

38. In ***Givan Okallo Ingari & Another v Housing Finance Co. (K) Ltd*** [2007] 2 KLR 232; [2007] eKLR, **Warsame J** (as he then was), stated:

> ***There is no dispute that the defendant varied the rate of interest without the consent, knowledge and permission of the plaintiffs. There is no evidence that each time there was variation, the plaintiffs were informed. In my view any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties' agreement***

39. In the present case, the defendant did not point out any clause in the charge instrument that gave it discretion to change the loan term or monthly instalment payable without the plaintiffs' consent. This was even more grave where in the case of monthly instalment, the change had the singular effect of increasing the amount payable. The changes applied on the loan account erroneously increased the plaintiffs' indebtedness thus frustrating and/or clogging their efforts to redeem the charged property. This was clearly not contractual and illegal. I find and hold that the changes on the loan repayment period and the instalment payable were made unlawfully.

Whether there was default

40. The next issue is whether there was default. The plaintiffs argued that there was no default in loan repayment. They submitted that the loan was to be repaid within sixty months at a monthly installment of Kshs. 284,875. They stated that the 2nd plaintiff had paid up to Kshs. 6 million within the first 3 years, and that it had not only been ahead in loan repayment schedule, but was still repaying the loan when the defendant moved to realize the security. The defendant argued that the 2nd plaintiff was in default and the loan had fallen into arrears of Kshs. 327, 546. 93. For that reason, it properly moved to exercise its statutory power of sale.

41. Default is a question of fact. The plaintiffs' case was that the 2nd defendant was repaying the loan even when the defendant sought to realize the security. They asserted that their requests for revised repayment schedule and statements showing the outstanding loan amounts after the interest rate had been caped were ignored by the defendant.

42. There is no doubt that the plaintiffs were servicing the loan and as the defendant admitted, loan repayment was at some point ahead of schedule. There is also no doubt that interest on loans was capped by law, leading to lowering of the interest from 23.5% to 14.5%. The defendant's witness admitted that the plaintiffs requested for statements of account after the capping of interest and that the statements were sent to the plaintiffs by email. He was however unable to show when that was done. The email he relied on did not have the recipient's address. It also did not show that any attachments were sent. When asked whether he had the email in court his answer was in the negative.

43. The statements the defendant relied on to demonstrate that the plaintiffs were in default showed that the loan period was forty-eight months instead of the sixty months' loan period parties had agreed on at the time of advancing the loan. The defendant's witness again admitted in cross examination that the monthly installment payable when the loan period was sixty months would be different from that to be paid if the period was forty-eight months. In other words, the defendant admitted that the changes in the loan repayment period affected the monthly installment payable. The defendant did not show that the loan default, the 2nd plaintiff was said to have fallen into, if any, was not caused by its actions. Even its witness admitted that loan repayment was being received at the time it moved to realize the security, maintaining though, that there was default.

44. There defendant did not tender clear evidence when the 2nd plaintiff fell into arrears. Since the plaintiffs showed that the defendant's actions affected the loan repayment, the defendant was called upon to show that its actions were not the cause of the problem, and that the plaintiffs were genuinely in default to give rise to its statutory power of sale of the security. I find and hold that the defendant did not show to the satisfaction of the court that the 2nd plaintiff was in default and for how much given that it was responsible for the position the plaintiffs found themselves in.

Whether statutory notices were served

45. The plaintiffs' other complaint was that they were not served with statutory notices before the defendant advertised the property for sale. They argued that if statutory notices were ever issued, there was no evidence that they were served. They maintained that the certificates of posting produced were not related to the letters purportedly addressed to them and that if the letters were ever posted, they did not receive them. They also argued that original documents or certified copies were not produced in court either.

46. The defendant on its part maintained that statutory notices including the auctioneer's notices were served through the plaintiffs' postal address and that the postal address had not been disputed. It relied on ***Edds Designers Limited v United Credit Limited & another*** (Civil case No. 14 of 2018 [2020] eKLR, to argue that there was proof of service of the notices.

47. I have considered respective parties' arguments, the evidence and perused the documents filed by the defendant on the issue. Section 90(1) of the Land Act is clear that before a chargee can exercise its statutory power of sale in the event of default by the borrower, it must serve a notice on the chargor requiring him to regularise the default and pay the money owing, or to perform and observe the terms of the agreement. The chargee should also inform the chargor of the consequences to follow if the default is not rectified. The period of such notice should not be less than three months.

48. Section 96(2) further provides that before exercising the power to sell the charged land, the chargee should serve on the chargor a notice to sell in the prescribed form and should not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice. That is to say, a chargee must serve two notices; the three months' notice notifying the chargor of the default, the nature of default, requiring the chargor to rectify the default and consequences for none compliance. Second, the forty days' notice before the advertising the property for sale.

49. The respondent was required by law to serve the plaintiffs with a statutory notice calling on them to rectify the default. The plaintiffs argued that the statutory notice required under section 90(1) (2) and 96(2) of the Land Act were not served while the defendant maintained that it served the plaintiffs with all statutory notices.

50. I have perused the documents filed by the defendant in its list of documents, more so, the notices it argued were issued and served under sections 90 and 96. There is a demand letter dated 12th April 2018 from the defendant to the 2nd plaintiff, demanding payment of the outstanding loan of Kshs. 6, 846,560.69 within 14 days. This is not the notice contemplated under section 90 of the Act. However, the certificate of posting at page 50 of the defendant's list of documents does not show the name of the borrower or chargor. Even then, it is not

clear whether this demand letter was sent to the plaintiffs.

51. At page 51 of the same list of documents, is a statutory notice dated 13th June 2018 issued under section 90 of the Act addressed to the 1st and 2nd plaintiffs and one Abysacky Atema Ekhalie. It shows that it was sent "BY REGISTERED POST." It shows arrears of Kshs. 504, 985.28. The list of various persons to whom letters were supposedly sent, as well as the certificate of posting is at page 53 of the list. The document does not however have the plaintiffs' names. There is no evidence the statutory notice was sent to the plaintiffs.

52. Again at page 54 of the list of documents is another statutory notice dated 8th January 2019 (the Forty days' notice) issued under section 96(2) and addressed to the plaintiffs**.** At page 56 is a list of 39 names of people and a certificate of posting. This time, the plaintiffs' names appear on that list. The question, however, is: whether the letters were sent to the plaintiffs given that the certificate of posting only shows the defendant as the sender.

53. The defendant did not show that the notice was sent to the plaintiffs. All it did was to file a list of supposedly recipients of letters and a certificate of posting. The certificate did not have the plaintiffs' names or one of them to show that the notice was posted to them. The list can only be but an assumption that letters were posted. That, in my respectful view, is not sufficient proof that this particular notice was sent to the plaintiffs, more so where receipt of the notice is denied.

54. The law is clear that it is the chargee's duty to serve the notices on a chargee before it can exercise its statutory power of sale. That duty would be discharged where it is shown that the notices were served even through registered mail. This can be done by attaching certificates of posting to show that the letter was indeed posted. Where this is done, the burden would then shift to the chargor to satisfy the court that he did not receive the registered mail.

55. In ***Nyangilo Ochieng & Another v Fanuel B. Ochieng & 2 Others*** [1996] eKLR, the Court of Appeal, while dealing with service of notices under section 74(1) of the repealed Registered Land Act (Cap 300) the equivalent of section 90 of the Land Act, stated:

> ***It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the Registered Land Act (Cap.300, Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargors receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale…It is for the chargee to make sure that there is compliance with the requirements of s.74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent.*** (emphasis)

56. In ***Stephen Boro Gitiha v Nicholas Ruthiru Gatoto*** [2017] eKLR, the Court of Appeal again held that:

> ***Section 74(1) of the RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title.***

57. The defendant did not prove that first, the notice under section 90(1) was served on the plaintiffs. It was that notice that would have given rise to service of the notice under section 96(2). Even if it had been proved that the notice under section 96(2) had been served, failure to prove service the notice under section 90(1) was fatal to the defendant's case. Service of statutory notices being a legal requirement, service thereof is a matter of fact to be proved by evidence and, therefore, it cannot be left to conjecture or assumption. I find and hold, that the defendant did not serve statutory notices as required by law and, therefore, its statutory power of sale had not crystalized when it moved to exercise that power.

Valuation of the property

58. The plaintiffs initially argued that there was no evidence that the property had been valued before it was advertised for sale. They later changed and argued that the property had been undervalued. According to the plaintiffs, whereas the property had been valued for Kshs. 16,000,000 at the time of taking the loan, the pre-sale valuation put the market value at Kshs. 10,000,000 while forced sale value was Kshs. 7,500,000. The defendant did not address this issue in its submissions.

59. I have considered the issue and perused the evidence and exhibits produced by parties. The valuation report by Acumen Valuers Ltd dated 28th June 2018 gave the market value of the property as Kshs. 10,000,000 while forced sale was put at Kshs. 7,500,000. The valuation report before the loan was taken was not produced by any of the parties. For that reason, the court cannot address that issue in the absence of that report.

60. Having considered this matter, evidence, submissions, the decisions relied on by the parties and the law, I am satisfied that the plaintiffs have proved their case on a balance of probabilities. consequently, I allow this suit and make the following orders:

> ***a) a declaration is hereby issued that the scheduled sale of Title Number Kajiado/ Lorngusua/2299 on 28.05.2019 by public auction (now past) is unlawful and is, therefore, voided.***
>
> ***b) An order is hereby issued directing the defendant to provide to the plaintiffs full statements for the loan account and loan repayment schedule with effect from the date interest rate cap law came into effect in 2016.***
>
> ***c) The defendant is hereby directed to recalculate the outstanding loan amount with interest based on the interest rate applicable***

at the time of the alleged default on the basis of the agreed loan repayment period of sixty months to enable the plaintiffs repay.

d) Thereafter, the defendant will be at liberty to take necessary steps to exercise its options under the charge should the plaintiffs fail to repay the correct amount of the loan.

e) Costs of the suit to the plaintiffs.

DATED SIGNED AND DELIVERED AT KAJIADO THIS 10TH DAY OF DECEMBER 2021.

EC MWITA

JUDGE