



**Kenya Union of Savings and Credit Cooperative Ltd & another v Wamalwa (Suing as the Legal Representative to the Estate of Wilycster Noel Nyongesa) (Environment and Land Appeal E007 of 2023) [2025] KEELC 4703 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4703 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

**DO OHUNGO, J  
JUNE 25, 2025**

**BETWEEN**

**KENYA UNION OF SAVINGS AND CREDIT COOPERATIVE  
LTD ..... 1<sup>ST</sup> APPELLANT  
ONESMUS MACHARIA T/A WATTS AUCTIONS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JORAM WAMALWA (SUING AS THE LEGAL REPRESENTATIVE TO THE  
ESTATE OF WILYCSTER NOEL NYONGESA) ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (L. Kassan, Chief Magistrate) delivered on 12th July 2023 in Kakamega MCELC No. E062 of 2021)*

**JUDGMENT**

1. Litigation leading to this appeal was commenced in the Subordinate Court on 19<sup>th</sup> April 2021 by Wilycster Noel Nyongesa through Plaintiff dated 19<sup>th</sup> April 2021. The suit was brought against the Appellants herein as First and Second Defendants, respectively. Wilycster Noel Nyongesa later passed away on 18<sup>th</sup> August 2021 and was substituted by Joram Wamalwa [the Respondent]. The original Plaintiff was replaced by Amended Plaintiff dated 16<sup>th</sup> November 2021.
2. The Respondent averred in the Amended Plaintiff that Wilycster Noel Nyongesa [deceased] was the registered proprietor of the parcel of land known as Kakamega/Municipality Block 1/599 [the suit property] which she charged in favour of the First Appellant to secure a loan facility of KShs 5,000,000. That despite the loan facility being waived and the suit property discharged, the Second Appellant unlawfully sold it by public auction on 16<sup>th</sup> April 2021.



3. Consequently, the Respondent sought judgment against the Appellants jointly and severally for a declaration that the sale was illegal, fraudulent, irregular and unprocedural; a permanent injunction restraining the Appellants, their agent and or assigns from interfering with, entering, trespassing upon, alienating, converting, transferring the suit property, evicting the tenants in the suit property and or dealing in any way with the suit property; and an order nullifying the sale of the suit property. He also sought costs of the suit.
4. The Appellants reacted to the suit by filing a Memorandum of Appearance dated 26<sup>th</sup> April 2021 followed by Defence and Counterclaim dated 10<sup>th</sup> February 2022 through which the First Appellant admitted that the deceased was the registered proprietor of the suit property and that she charged it in its favour. It denied that the loan had been waived and that it had discharged the suit property.
5. The First Appellant further averred that the discharge and the ensuing title were forgeries and that the discharge was procured illegally and fraudulently. The First Appellant therefore prayed that the Respondent's case be dismissed with costs to it and that judgment be entered in its favour against the Respondent for a declaration that the deceased dealt fraudulently in discharging the suit property, cancellation of the fraudulent entries in the Certificate of Lease in respect of the suit property and a declaration that the sale of the suit property by the First Appellant in exercise of its statutory power of sale was lawful and in accordance with the charge instrument. It also prayed for general damages, exemplary damages, costs of the suit and interest.
6. Upon hearing the matter, the Subordinate Court [L. Kassan, Chief Magistrate [as he then was] delivered judgment on 12<sup>th</sup> July 2023 in which it held that the allegation that the discharge was a forgery had not been established and that the Appellants had not issued a fresh statutory notice before exercising power of sale. The Court therefore ordered as follows:
  - a. an order is issued placing a permanent injunction against the defendants, their agents and or assignees from interfering, entering, trespassing, alienating, converting, transferring evicting six tenants currently residing on suit property and or dealing in any way in land parcel known as Kakamega/Municipality Block 1/599
  - b. A declaration that the acts of the sale by public auction by the 2nd defendant was illegally, fraudulently, irregularly and unprocedural
  - c. An order is issued to nullify the sale of that property known as Kakamega/Municipality Block 1/599
  - d. Accordingly, the Plaintiff shall be awarded costs of the suit.
7. Dissatisfied with the outcome, the Appellants filed this appeal on 24<sup>th</sup> July 2023, through Memorandum of Appeal dated 19<sup>th</sup> July 2023. They prayed that the appeal be allowed, the judgment of the Subordinate Court be set aside and be substituted with appropriate orders of this Court. They further prayed for costs.
8. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
  1. The Learned Magistrate erred in law and fact by relying on its own assumptions in delivering the Judgment instead of relying on the evidence adduced before it.
  2. The Learned Magistrate erred in law and fact in misinterpreting the evidence adduced before it by the 1<sup>st</sup> Appellant/Defendant.



3. The Learned Magistrate erred in law and fact in failing to properly consider the evidence adduced by the 1<sup>st</sup> Appellant/Defendant and rendering that the 1<sup>st</sup> Appellant/Defendant did not meet the threshold under Section 107[1], CAP 80 of the Laws of Kenya, in disproving the fact that the Discharge of Charge was the product of forgery and yet ample evidence was adduced by the 1<sup>st</sup> Appellant/Defendant, shows that the contrary is true.
4. The Learned Magistrate erred in law and fact in heavily applying itself to circumstantial evidence in rendering its decision in favor of the Respondent/Plaintiff, while the direct evidence adduced by the 1<sup>st</sup> Appellant/Defendant undoubtedly held more weight.
5. The Learned Magistrate erred in fact and law in issuing a permanent injunction against the Appellant/Defendants, their agents and or assignees from interfering, entering, trespassing, alienating, converting, transferring, evicting six tenants currently residing on the suit property and or dealing on the suit parcel Kakamega/Municipality Block 1/599 and yet the Respondent/Plaintiff's case does not fully satisfy the ingredients set out in *Giella v Cassman Brown* 1973. EA 360, warranting the granting of an interlocutory injunction to the Respondent/Plaintiff.
6. The Learned Magistrate erred in law and fact in issuing an order to nullify the sale of the suit parcel Kakamega/Municipality Block 1/599.
7. The Learned Magistrate erred in fact and in law in declaring the 2<sup>nd</sup> Appellant/Defendant's act of sale by public auction, illegal, fraudulent and irregular.
8. The Learned Magistrate utterly misdirected himself in delivering the Judgment in favor of the Respondent/Plaintiff, failing to appreciate the evidence on record, thus reaching a wrong and unfair conclusion, which has costed the 1<sup>st</sup> Appellant/Defendant its right to repayment and consequently, costed the 1<sup>st</sup> Appellant/Defendant its right to rightfully exercise its statutory power of sale over the charged parcel Kakamega/Municipality Block 1/599, pursuant to Section 96[1] of the [Land Act](#), 2012.
9. The appeal was canvassed through written submissions. The Appellants filed submissions dated 5<sup>th</sup> March 2024 in which they identified two issues for determination: whether the Learned Magistrate erred in determining that the Discharge of Charge was not established to be a forgery and whether the Learned Magistrate erred in holding that a fresh notice was not issued by the First Appellant before exercising its statutory power of sale. They argued that the letterhead on which the alleged waiver letter dated 25<sup>th</sup> September 2015 was purportedly written by the First Appellant significantly differed from the First Appellant's actual letterhead. To further support their contention that they had established forgery, they argued that the First Appellant did not have a policy for waiver of defaulted loans.
10. The Appellants also faulted the procedures leading to the Discharge of Charge and termed them an irregularity since the Discharge of Charge was conducted on site at the suit property after the alleged waiver letter was presented to the deceased who later paid a sum of KShs 200,000 as 'discharge fee' contrary to the provisions of Sections 85 and 102 of the [Land Act](#). Further, that the discharge was registered in the absence of the original of the title of the suit property which was in the First Appellant's custody since the deceased had not repaid the loan together with accrued interest. They argued that the Learned Magistrate erred by disregarding the evidence of forgery which they had adduced and instead based his decision on sympathy for the deceased.
11. Relying on the cases of *Donald Omuyaku Okinami v Luanda Revival Worship Centre* [2021] eKLR and *Kinyanjui Kamau v George Kamau* [2015] eKLR, the Appellants contended that they pleaded and



proved their allegation of fraud to the required standard. They added that the issue of forgery was subject of criminal proceedings in Kakamega CM Criminal Case No.3551 of 2015 where the Trial Magistrate agreed with them that the discharge of charge was a forgery.

12. On the issue as to whether the trial Court erred in holding that a fresh notice was not issued by the First Appellant before exercising its statutory power of sale, the Appellants relied on Sections 90 and 96 of the *Land Act* and argued that despite issuing to the deceased the requisite statutory notices, the deceased did not comply. They therefore contended that the sale of the suit property on 16<sup>th</sup> April 2021 was lawfully conducted and that there was no need for a fresh notice. Relying on the cases of *Anne Wachisi Situma & another v I & M Bank Limited & 2 others* [2021] eKLR and *Mbuthia v Jumba Credit Finance Corporation* [1988] eKLR, the Appellants argued that issuance of a fresh notice of sale would have clogged the First Appellant's statutory right of sale. They therefore urged the Court to allow the appeal.
13. In reply, the Respondent filed submissions dated 8<sup>th</sup> October 2024 in which he argued that the Appellants' sole witness testified that the registered proprietor of the suit property as of the date of trial was one Bartholomew. He contended that in those circumstances, the suit property had changed hands and that the counterclaim was superfluous. That at the time the First Appellant instructed the Second Appellant to sell the suit property, the suit property had been discharged much earlier on 10<sup>th</sup> September 2015 and could no longer be sold in exercise of a chargee's power of sale since it was not charged.
14. The Respondent went on to argue that from the Notification of Sale dated 2<sup>nd</sup> March 2021, the Second Appellant received instructions on 15<sup>th</sup> February 2021 and that the Second Appellant failed to give the deceased 45 Day Redemption Notice as required by Rule 15 of the Auctioneers Rules. The Respondent further relied on the cases of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR and *Koinange & 13 others v Charles Karuga Koinange* 1986 KLR and argued that the Appellants did not prove fraud or forgery on the part of the deceased.
15. On the question of whether a fresh statutory notice was required, the Respondent argued that although a statutory notice was issued 9 years earlier, a fresh one ought to have been issued. He also argued that no notices were issued under Section 96 [2] of the *Land Act* and Rule 15 of the Auctioneers Rules. He relied on the cases of *Esther Cherop Chebelyo & another v Oriental Commercial Bank Ltd & 3 others* [2021] eKLR and *Albert Mario Cordeiro & another v Vishram Shamji* [2015] eKLR in support of those arguments. The Respondent therefore urged the Court to dismiss this appeal with costs for want of merit.
16. This is a first appeal. The remit of a first appellate court was restated by the Court of Appeal in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR thus:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority versus Kuston [Kenya] Limited* [2009] 2EA 212 wherein the Court of Appeal held inter alia that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on



the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

17. I have carefully considered the grounds of appeal, the entire record and the parties’ submissions. The issues that arise for determination are whether fraud and forgery were established in respect of the Discharge of Charge and whether the reliefs sought were available.
18. There is no dispute that the deceased was the registered proprietor of the suit property and that she charged it in favour of the First Appellant on 16<sup>th</sup> October 2009 to secure a loan facility of KShs 5,000,000 which was used to purchase the suit property. It is also not in dispute that the deceased defaulted in her repayment obligations and that the suit property was sold by public auction on 16<sup>th</sup> April 2021.
19. The auction sale is what catapulted the deceased into filing the suit before the Subordinate Court. She challenged the sale primarily on the ground that the charge had been discharged on 10<sup>th</sup> September 2015, the loan facility waived and that there was therefore no basis for the subsequent auction sale.
20. The First Appellant challenged the discharge of charge on grounds of forgery and fraud. Both fraud and forgery are serious allegations which must be established through cogent evidence. Courts have persistently emphasised that a party alleging fraud is required to plead it, particularise it, and strictly prove it to standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. Further, where fraud is alleged, it is not enough to simply infer it from the facts. The party alleging fraud has to connect the allegations and the facts in a way that reveals actual fraud. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR. The standard required to prove fraud is the same required to prove forgery.
21. The dispute concerning legality of the discharge and whether it was forged was the subject of criminal proceedings in Kakamega CM Criminal Case No. 3551 of 2015 where the deceased was charged inter alia with the offence of forgery contrary to Section 345 of the *Penal Code* as read with Section 349 of the said statute. The case was heard and determined through judgment delivered on 29<sup>th</sup> July 2021. A perusal of a copy of the judgment which the Respondent produced in evidence shows that the Trial Court concluded that both the discharge of charge and the documents that supported it were forged and did not belong to the First Appellant.
22. The Court held thus:

“The prosecution indeed did prove that the discharge was forged through PW5, CPL Martin Kitai, who in his statement confirmed that when he compared the discharge of charge documents to a known machine prints, they were made by different machines. This corroborated evidence given by PW3, Julius Owino Odero, who stated that the documents was fake due to the fact that the stamp and the signature did not belong to KUSCCO and there was no seal.”
23. Notwithstanding that the deceased was acquitted, a reading of the judgment reveals that the acquittal was due to the fact that the prosecution did not prove that she was the maker of the forged or false documents. All said, the fact remains that there was proof of forgery.
24. While both the Civil Trial Court and this Court are not bound by the findings of the Criminal Court, I am persuaded that the material that was before the Civil Trial Court affirmed the finding of forgery. Foremost, the Respondent who stated in his testimony that he was a Bishop, testified that despite obtaining a loan facility of KShs 5 million, the deceased repaid only KShs 1.2 million. He further



testified that they did not seek any waiver of the loan but only received a phone call on 9<sup>th</sup> September 2015 requiring them to go to the suit property for a meeting the following day. For a Bishop, that kind of a phone call, if it took place, must have been miraculous. I say so because according to the Respondent's testimony, when the deceased went to the suit property on 10<sup>th</sup> September 2015, she met a total stranger by the name Radion Ntabo who arrived there with a registered discharge of charge, a certificate of official search vouching for the discharge and certificate of lease. It is incredible that a chargee who is owed KShs 7,005,100.81 as captured in the Notification of Sale dated 18<sup>th</sup> June 2015 would discharge the subject charge unconditionally, in unsolicited circumstances and without prior discussion with the chargor.

25. Even more curiously, the deceased and the Respondent made unreceipted payments of up to KShs 200,000 to the said Radion Ntabo personally, purportedly to refund what he claimed the First Appellant had incurred in discharging the suit property. Some of the payments were made by Mpesa to Radion Ntabo's personal mobile number.
26. At the trial, the First Appellant's witness testified that the First Appellant still had in its custody the original of the certificate of lease which the deceased deposited with it for purposes of being charged. I have perused the copy of certificate of lease which the Appellants produced and compared it with the one that the Respondent produced. There is a marked difference between the two. The entries relating to the charge and discharge in the Respondent's version are handwritten while in the First Appellant's version entries relating to the charge are typed and there is no entry of a discharge. The signature of the land registrar in both versions are different.
27. The Appellants also produced a certified copy of register in respect of the suit property as of 18<sup>th</sup> November 2015. A perusal of the document reveals at Part B – Proprietorship Section entry number 4 dated 16<sup>th</sup> October 2009 which states “The agreement in terms of Section 70 is reserved.” It must be recalled that the charge was registered on 16<sup>th</sup> October 2009 when the Registered Land Act [repealed] was still in force. Section 70 of the Registered Land Act [repealed] provided as follows:

“Where a charge contains an agreement, express or implied, by the chargor with the chargee that he will not transfer the land, lease or charge charged or any part thereof without the written consent of the chargee, the agreement shall be noted in the register, and no transfer by the chargor shall be registered until the written consent of the chargee, verified in accordance with section 110, has been produced to the Registrar.”
28. Thus, the certified copy of register confirms that the charge was still in force as of 18<sup>th</sup> November 2015.
29. Pursuant to Sections 85 and 102 of the Land Act, a discharge is to be registered only upon payment by the chargee of all money secured by the charge and the performance of all other conditions and obligations under the charge. The deceased neither paid the sums due nor demonstrated performance of all her obligations under the charge. Instead, there is a clear admission of default. The letter dated 25<sup>th</sup> September 2015 which purported to communicate a waiver was found by the Criminal Court to be a forgery. In any case, in the normal sequence of events, a valid waiver would have to precede a discharge. A discharge of charge cannot be registered before waiver is granted as that would be contrary to Sections 85 and 102 of the Land Act.
30. The Respondent's claim of an unconditional and unsolicited discharge is further not supported by the relationship that existed between the deceased and the First Appellant prior to the purported discharge. The deceased had filed suits against the First Appellant in Co-operative Tribunal case No. 12 of 2012 [Kakamega], ELCC No. 206 of 2015 [Kakamega] and ELCC No. 290 of 2015 [Kakamega] and even



obtained orders against it. It was hardly a relationship that would lead to such an unexplained, sudden and unconditional turn of events.

31. In view of the foregoing, I am persuaded that the Appellants sufficiently discharged the burden of proof and established that the Discharge of Charge was fraudulent and forged. The Learned Magistrate misdirected himself in focusing on the acquittal and in the process losing sight of the implication of a forged discharge on the rights and obligations of parties under the charge document. The issue before the Learned Magistrate was whether the discharge was forged as opposed to the identity of the person who forged it.

32. I now turn to the issue of whether notices under Section 96 [2] of the Land Act and Rule 15 of Auctioneers Rules were not issued. As stated earlier in this judgment, there is no dispute as to the existence of the charge and default by the deceased chargor.

33. The Learned Magistrate stated as follows in the judgment:

“It is trite, that the power of sale was exercisable under the legal instrument but with no notice to the plaintiff. It is to be noted subsequent in that notice of 14<sup>th</sup> May 2012 which was later retracted by the defendant, there is no subsequent notice issued to the plaintiff. The defendant did not provide any evidence to demonstrate that it had issued a fresh statutory notice after the previous instruction that had given the auctioneers not to execute the decree.”

34. The law as spelt out under Section 90 [1] of the Land Act is that when a chargor is in default of any obligation in a charge, or fails to pay interest or any other periodic payment or any part thereof due under the charge or fails to perform any covenant in the charge and continues in default for one month, then the chargee may serve on her a notice, in writing, to pay the money owing or to perform the obligation. In view of the acknowledged default, the Respondent cannot dispute that occasion had properly arisen for issuance of a notice under Section 90 [1]. He in fact admitted that a statutory notice dated 14<sup>th</sup> May 2012 had been issued. The deceased neither regularised the account nor reversed the default after receiving the statutory notice of 14<sup>th</sup> May 2012. Consequently, in terms of Section 96 [1] of the Land Act, there was no need for a fresh statutory notice under Section 90 [1] of the Land Act. The notice itself expressly stated that any subsequent proposal or payment would not constitute a waiver unless the sums due under the charge together with recovery expenses were paid in full. My perusal of the record has not revealed any withdrawal by the First Appellant of the statutory notice dated 14<sup>th</sup> May 2012.

35. The Respondent’s contention in the Amended Complaint was that notices under Section 96 [2] of the Land Act and Rule 15 of Auctioneers Rules were not issued and that the Appellants nevertheless proceeded to sell the suit property by public auction on 16<sup>th</sup> April 2021. Among the documents that the Appellants produced was a Certificate of Sale issued by the Second Appellant and stating that the suit property was sold by public auction on 16<sup>th</sup> April 2021 to Batholomew Nandwa Mabango. Despite being aware of the sale, neither the deceased nor the Respondent bothered to make the said purchaser a party to the suit which she filed on 19<sup>th</sup> April 2021, after the sale.

36. In view of the acknowledged sale, it is apposite to restate the protection accorded to a purchaser under Section 90 [3] and [4] of the Land Act provides:

[3] A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular,



except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

- [4] A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.
37. In view of the foregoing provisions, and the Respondent having failed to join the purchaser to the suit, the auction sale could not be nullified by the proceedings before the Subordinate Court. Equally, the question of whether notices under Section 96 [2] of the Land Act and Rule 15 of Auctioneers Rules were issued could not reverse the sale. Nevertheless, the issue is relevant as between the chargee and the chargor to the extent that the Respondent sought a declaration that the sale was illegal, irregular and unprocedural.
38. Section 96[2] of the Land Act provides as follows:
- “Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”
39. On the other hand, Rule 15 of Auctioneers Rules provides:
- “Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property –
- [a] record the court warrant or letter of instruction in the register;
  - [b] prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
  - [c] locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
  - [d] give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
  - [e] on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.”
40. I have read the Respondent’s witness statement as well as his testimony. He did not state anywhere either in the statement or his testimony that the notices required under Section 96 [2] of the Land Act and Rule 15 of Auctioneers Rules were not served upon the deceased. His case focused entirely on the issue of whether the sale was proper in the face of the purported discharge. On the other hand, the Appellants’ witness testified that the notices were served. The legal obligation to issue the said notices and the corresponding burden of proof that they were issued rests upon the First Appellant. I have perused the record, and I note that the First Appellant produced a copy of Notification of Sale dated 18<sup>th</sup> June 2015.
41. It will also be recalled that the deceased sued the First Appellant in Co-operative Tribunal case No. 12 of 2012 [Kakamega] and filed an application for injunction in the said case to restrain the exercise of the



- statutory power of sale. The Appellants produced copies of the Statement of Claim and the application for injunction. I have perused the affidavit in support of the application, and I note that the deceased deposed therein that the First Appellant served her with notification of sale. I am therefore satisfied that the notice required under Rule 15 of Auctioneers Rules was issued.
42. I have further perused the record of the Subordinate Court in search of the notice required under Section 96 [2] of the *Land Act*. I have found none. Despite their insistent submissions in this appeal that the notice was issued, the Appellants did not point to any page of the Record of Appeal where such a notice could be found. I therefore find and hold that the notice required under Section 96 [2] of the *Land Act* was not issued.
43. As was held in *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] KEHC 4811 [KLR], failure to issue the notice required under Section 96 [2] of the *Land Act* renders the instructions to auctioneer and subsequent sale improper. The Court held:
- “The Statutory Notice issued on 19<sup>th</sup> September, 2013 was properly issued and is not vitiated by the failure by the Defendant to issue a proper notice to sell the charged premises under section 96[2] of the *Land Act*. However, in the absence of a proper notice under section 96[2] of the *Land Act*, the instructions to the auctioneer herein were not proper and all the subsequent processes issued upon those instructions are accordingly vitiated in law, and in particular, the Notification of Sale and the ensuing advertisements of the suit premises.”
44. A similar approach was taken in *Nyando Enterprises Limited v Barclays Bank Kenya Limited* [2018] KEHC 7021 [KLR] where the Court held:
- “... I would accordingly agree with the Plaintiff that a violation of Section 96 in whatever form does render the subsequent processes invalid; so that, it is inconsequential that valid instructions were given to Garam Investments Auctioneers; or that the Redemption Notice under Rule 15 of the Auctioneers Rules and a Notification of Sale was thereafter served by the Auctioneer.”
45. In view of the foregoing, I find that the auction sale held on 16<sup>th</sup> April 2021 was not validly and lawfully held. In view of the provisions at Section 90 [3] and [4] of the *Land Act*, that finding is only relevant to the extent that the estate of the deceased may have a recourse in damages against the First Appellant. The sale to Batholomew Nandwa Mabango remains undisturbed. Since the Respondent did not seek any damages for a wrongful sale, the matter will rest there.
46. On the issue of whether the reliefs sought were available, the starting point is that the discharge of charge having been held to be a forgery, it is an invalid document and a nullity. It is void and cannot deliver the estate of the deceased from obligations under the charge document. See *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169. Consequently, reliefs of permanent injunction and nullification of the sale are not available to the Respondent. On the other hand, the First Appellant has made its case by demonstrating that the discharge was fraudulent and forged. It is entitled to cancellation of the fraudulent entries. The Appellants did not however lead evidence and make submissions on general damages and exemplary damages. I will not make any award under those heads.
47. In view of the foregoing discourse, the Learned Magistrate misdirected himself and made erroneous findings in the matter before him. In the premises, this Court is empowered to interfere with the decision. I find merit in this appeal, and I allow it in part. I set aside the judgment and replace it with the following orders:



- a. A declaration is hereby issued that the sale by public auction on 16<sup>th</sup> April 2021 in respect of the parcel of land known as Kakamega/Municipality Block 1/599 was illegal, irregular and unprocedural.
- b. For the avoidance of doubt and in view of the provisions of Section 90 [3] and [4] of the [Land Act](#), the purchaser is not affected by the above declaration.
- c. A declaration is hereby issued that Wilycster Noel Nyongesa [deceased] dealt fraudulently in discharging the parcel of land known as Kakamega/Municipality Block 1/599 from the charge held by the First Appellant.
- d. All entries in the register and Certificate of Lease in respect of the parcel of land known as Kakamega/Municipality Block 1/599 purporting to discharge the charge are hereby cancelled.
- e. Each party shall bear own costs of this appeal and of the proceedings before the Subordinate Court.

**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 25<sup>TH</sup> DAY OF JUNE 2025.**

**D. O. OHUNGO**

**JUDGE**

Delivered in the presence of:

Ms Maina holding brief for Ms Nungo for the Appellants

Ms Luseno holding brief for Ms Namenge for the Respondent

Court Assistant: B Kerubo

