

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E051 OF 2025

HULDA AWINO OBEDE (suing as the Administrator of the estate of the late NATHANIEL OBEDE OLUOCH) 1ST APPELLANT
REMJUS COSMUS RACHUONYO 2ND APPELLANT

- VERSUS -

NATIONAL BANK OF KENYA LIMITED RESPONDENT

(Being an appeal from the judgment and decree of **Hon. D. K. Matutu PM**
delivered on **21/11/2024** in **Kisumu MCELC No. 18 of 2017**)

J U D G M E N T

1. The appellant sued the respondent by a Plant dated **10/12/2024**. They sought a permanent injunction against the respondent from interfering with **Ahero Market/61** ‘the suit property’, or selling it and for accounts. The defendant denied the claim and contended that the 1st appellant had no *locus standi* to bring the suit and that the same was *res judicata*.
2. By a judgment made on **21/11/2024**, the trial court found that the appellant had not proved their case and dismissed the same.
3. Aggrieved thereby, the appellants appealed to this Court vide a Memorandum of Appeal dated **10/12/2024**. It set out 4 grounds of appeal which can be summarized thus: -

- a) *the trial court erred in failing to find that the appellants had proved their case to the required standard.*
- b) *the trial court failed to find that the appellants had dutifully repaid the loan and the respondent had not produced any contrary evidence.*
4. This being a first appellate court, its jurisdiction was well set out in the case of **Selles & Another vs Associated Motor Boat Company & Others (1968) EA 123**. This is that the Court must re-appraise the evidence tendered in the court below afresh and arrive at its own independent conclusions and findings but at all times having in mind that it did not see the witnesses testify.
5. The case below was that **Hulda Awino Obede ('Pw1')** was the widow of **Nathaniel Obede Oluoch 'the deceased'**. The deceased and the 2nd appellant **'Pw2'** had taken a loan of **Kshs.50,000/-** from the respondent in 1989. That the loan was partially repaid. **Pw1** was not aware of the loan. She came to know of it when the respondent served her with the notification of sale in **2011** yet the deceased had passed on in **2000**.
6. In his testimony, **Pw2** could not remember when he last repaid the loan. The respondent called **Onesmus Mbuvi** its Credit analyst to testify on its behalf. He told the Court how the two were granted a loan of **Kshs.50,000/-** each on

the security of the suit property. He produced the letters of offer signed by both borrowers. He also produced all the Statutory Notices issued to the chargors. He also produced the pleadings filed in **Nakuru HCCC No. 460 of 1995** lodged by the Chargors against the respondent but had been dismissed for want of prosecution.

7. In its judgment, the trial court found that there was a contract between the parties. The appellants were in default. That the appellants were aware of the default since **1995** yet they had done nothing to redeem the loan. That the process of exercising the statutory power of sale by the respondent could not be termed as illegal.
8. The loan was taken in **1989**. However, by **1995** it would seem that the loan was already in arrears. It is not clear when it became un-performing. Since the exercise of the statutory power of sale was sought after 2007, the appellants could have sought refuge under **section 44A of the Banking Act** and pay the amount that would have been double as at the time of the loan becoming un-performing. This issue was not pursued either in the Court below or before this Court and this Court will not venture into it.
9. The other issue which was validly raised by the respondent but not considered by the trial court was the *locus standi* of the first appellant.

Admittedly, she is the widow of the deceased. However, that does not give her any legal standing to bring a suit against the bank on a contract in which she was not a party. She admitted that she had not taken out any letters of administration for the estate of her late husband.

10. It is trite law that the only person who is legally entitled to act for and on behalf of an estate of a deceased person is the administrator who has been duly appointed by a family court. See ***section 83 of the Law of Succession Act***. To the extent that the 1st appellant had not taken out any letters of administration, she had no authority to lodge the suit on behalf of her late husband. However, since this issue was not raised, this Court will not determine the appeal on it.
11. Having made the foregoing observations, I now venture to the appeal proper. The first ground was that the trial court erred in failing to find that the appellants had proved their case to the required standard. The trial court found that there was a contract between the parties. That the appellants had not kept their part of the bargain. That they were bound by the terms of the contract including the payment of interest in case of default.
12. The record shows that the deceased and the 2nd appellant took a loan from the respondent. There was default and as far back as in 1995, they sued the

respondent in **Nakuru HCCC No. 460 of 1995**. They sought to restrain the respondent from realizing the security for **Kshs.560,000/-** then outstanding. That suit is said to have been dismissed for want of prosecution. These were followed with statutory notices and redemption notice issued in August and December, 2011. It culminated with the undated Notification of Sale that showed that the sale would take place on **29/2/2012**. This is what triggered the filing of the suit before the court below.

13. With all the foregoing, there is no evidence of repayment having been made by any of the appellants. The demand was for **Kshs.1,739,902/85**. When asked about the repayment, the 1st appellant responded at the trial: -

“From the time I received the letter I went to the Bank to pay money using the account my husband was using but the transaction did not go through. That day I had Kshs.5,000/- subsequently I filed this suit.. I did not make payments through the advocate...”

The second appellant stated in his testimony: -

... We were served noticed by the bank. We were served in the year 2011. That is 11 years ago. When I received the notification of sale. I have not made any payment

from the time I filed the suit. I have not made any payments.

...I can't remember the last time I made payments. I have not finished paying the loan. I don't know what the balance is..."

14. With the foregoing admissions, can it be said that the appellants had proved their case on a balance of probabilities. I do not think so. There was a contract between the parties. The loan was admittedly taken to be repaid in 36 monthly instalments. There was default which was not disputed. Can a Court of law or even equity aid such a borrower? I do not think so. The Court cannot re-write a contract for the parties. See **National Bank of Kenya Ltd vs Pipilastic Samkolit (K) Ltd & Another 2001 eKLR.**
15. The deceased and the 2nd appellant had taken a loan on the security of the suit property. The purpose of the property was to act as security and no more. In the event of default, as it was here, it had to be realized. See **First Choice Mega Store Ltd vs Ecobank Kenya Ltd (2017) eKLR.** In this regard, by declining to bar the respondent from realizing its security, the trial court cannot be faulted.

16. The only proper complaint that can be laid is that the respondent did not carry out a valuation. That is mandatory under *section 97 of the Land Act* which provides: -

“(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

17. The requirement for valuation is not optional. It is mandatory. It is meant to safeguard the interests of the chargors. A lender must act in good faith and not to the detriment of a chargor.
18. From the record, it is clear that the Notification of Sale at **pages 78 and 79** of the Record of Appeal does not disclose the open market value or the forced sale value of the suit property. That is because no valuation had been undertaken within 12 months of the proposed sale as required by law.

Indeed, **Dw1** admitted that he was unaware of any valuation having been done.

19. Accordingly, the appeal is without merit and is hereby dismissed with costs with a rider that, if the suit property has not been sold, there should be a valuation before it is put up for sale. There will be no need for the respondent to issue any other notices save for the Notification of Sale after having undertaken the valuation.

It is so decreed.

DATED and **DELIVERED** at Kisumu this 30th day of **April, 2026**.

A. MABEYA, FCI Arb

JUDGE