Muganda v Sidian Bank Limited (Formerly K-Rep Bank Limited) (Civil Case 36 of 2020) [2024] KEHC 1603 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1603 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 36 OF 2020

JRA WANANDA, J

FEBRUARY 23, 2024

(FORMERLY ELDORET ENVIRONMENT & LAND COURT CASE NO. 459 OF 2008

AND FORMERLY ELDORET HIGH COURT CIVIL CASE NO. 145 OF 2008)

BETWEEN

MARTHA GATHONI MUGANDA ..... PLAINTIFF

AND

SIDIAN BANK LIMITED (FORMERLY K-REP BANK LIMITED) DEFENDANT

JUDGMENT

1. This is an old matter and it is unfortunate that it has taken this long to be concluded. The suit has had a long and chequered history. It was initially filed before this High Court, later transferred to the Environment & Land Court and subsequently, again, re-transferred back to this High Court. This partly explains the delay. Whatever the explanation, it is regrettable that a commercial suit of this magnitude should be held up in Court for almost 16 years. Be that as it may, the task of bringing the matter to an end now finds itself in my hands.

2. This suit was initially filed as Eldoret High Court Civil Case No. 145 of 2008 *vide* the Plaint dated 27/10/2008 and filed in Court on 28/10/2008 through Messrs Machio & Co. Advocates. The Plaintiff described herself as the registered proprietor of the leasehold interest in land parcel L.R. No. Eldoret Municipality/Block 9/510 (hereinafter "suit property"), that in 2007 or thereabouts the Defendant loaned to the Plaintiff some money and as security therefor, the Plaintiff offered to the Defendant the suit property against which the Defendant then registered a charge pursuant to the provisions of the *Registered Land Act*, Cap. 300, and that the Plaintiff has from time to time serviced the loan until commencement of the post-election violence which completely destroyed her poultry business for which she had borrowed the money.

3. The Plaintiff pleaded further that in breach of the terms of the aforesaid charge and contrary to the provisions of section 71 of the said Act and the *Central Bank of Kenya (Amendment Act*, 2000 and the *Banking Act*, the Defendant has from time to time without the consent of the Plaintiff varied the rate of interest on the loan resulting in the burdening of the Plaintiff with arbitrary, capricious, extortionate and unlawful charges not due from the charge and the law but from the Defendant's own fictitious contract aimed at unjustly enriching itself, that the Defendant has also levied various penalties and rates of interest on the same outside the terms of the charge and contrary to the said *Central Bank of Kenya (Amendment) Act* 2000 and the *Banking Act* resulting in the violation of the in duplum rule, that the said levies, penalties and interest are unreasonable, unconscionable and illegal, and are not enforceable and to allow the Defendant to enforce the same is to unjustly enrich the Defendant outside the terms of the contract.

4. The Plaintiff pleaded further that the said unlawful charges which have been foisted on her amount to a clog on the Plaintiff's equity of redemption, that the Defendant in the purported exercise of its remedies as charge, has through its agent - Igare Auctioneers - threatened to sell the suit property by public auction, that the Defendant in embarking upon the said exercise has failed to issue and serve upon the Plaintiff any or any valid and lawful 3 months statutory notice as required by the mandatory provisions of section 74 of the *Registered Land Act* and in the absence of such compliance the threat is unprocedural, invalid and unlawful, that the sum of money secured by the charge is repayable over a period of years and the same does not fall due for repayment by the provisions of section 65(2) of the *Registered Land Act*, that the Defendant has never made any such demand and therefore the threat to auction the suit property is premature and unlawful, that in threatening to auction the suit property the Defendant and its agents have failed to observe and to comply with the provisions of the *Auctioneers Act* 1996 and the *Auctioneers Rules* 1997 and in the circumstances the said threat is unlawful and invalid.

5. The Plaintiff then sought Judgment against the Defendant in the following terms:

    a. A declaration that all the interest, charges, levies and penalties imposed upon the Defendant contrary to the terms of the charge and the law are not enforceable.

    b. An order that the Defendant do recalculate the account with the Plaintiff without the unlawful charges.

    c. An injunction restraining the Defendant from selling by public auction or otherwise land parcel L.R. No. Eldoret Municipality/Block 9/510 unless and until there is full compliance with the law.

    d. The Defendant be condemned to pay costs of this suit and the incidentals thereto.

Statement of Defence

6. For the Defendant, the Statement of Defence dated 3/11/2008 was filed on 10/11/2012 through Messrs Manani, Lilan & Co. Advocates. In the Defence, it was denied that the Plaintiff regularly serviced the loan prior to the post-election violence in January 2008 or that the Defendant breached the alleged statutes or that it has varied the rate of interest arbitrarily, or capriciously or that it has charged interest outside the contractual terms of the charge. The Defendant averred further that the in duplum rule has no relevance herein as the Plaintiff does not state the amount in excess. The Defendant further pleaded that all statutory provisions as required under section 65(2) and 74 of the *Registered Land Act* were fully complied with prior to advertisement of sale of the suit property and that the Auctioneers

fully adhered to the *Auctioneers' Rules* to the letter. The Defendant therefore prayed that the suit be dismissed.

7. Together with the Plaint, the Plaintiff filed an Application seeking interlocutory injunction. By the Ruling delivered on 25/05/2010 by Hon. Lady Justice Mwilu J (as she then was) , after inter partes hearing, granted the injunction pending hearing and determination of the suit.

8. By the Notice dated and filed on 4/07/2012, Messrs Mwinamo Lugonzo & Co. came on record for the Plaintiff in place of the initial Messrs Machio & Co.

9. After the creation of the Environment & Land Court in the year 2011, the suit was transferred to that new Court and assigned the case number, Eldoret ELC No. 459 of 2012. The suit then proceeded to trial.

Plaintiff's Evidence

10. The Plaintiff (PW 1) gave his evidence on 3/07/2014 before S. Munyao J, Judge of the Environment & Land Court. In her evidence-in-chief, led by her Counsel Mr. Mwinamo, she produced exhibits and stated that the demand letter was sent to a wrong address, namely "560 Eldoret", that her correct address is "810 Eldoret". She then stated that her main problem is the interest, Auctioneers' fees and Lawyer's fees which according to her, were against the *Central Bank* and *Banking Acts*.

11. Under cross-examination by Mr. Mwetich (Counsel for the Defendant), PW1 confirmed that she took a loan from the Defendant at the sum of Kshs 1.5 Million. She admitted that by 2008 and even to the time of the trial, she had not paid the loan. She stated that when she filed the suit in 2008, the Bank was demanding Kshs 1,451,271/-, that she borrowed the loan in the year 2007 and the loan was to take about 8 years, that she never saw the demand from the Defendant but later received the same from the Auctioneers, the address used was wrong, that she had 2000 chicken, during the COVID 19 pandemic, shops remained closed and she could not get medicine for the chicken, they all died and her business went down. In Re-examination, she reiterated that she never received the demand letter from the Defendant.

12. Subsequently, the Plaintiff applied to be recalled to produce a copy of her National Identity Card to demonstrate that there was a discrepancy between the name used in the demand letter and the Plaintiff's correct name. The matter had by then been taken over by Ombwayo J. The Application was not opposed and the Plaintiff was recalled as prayed. She then appeared before Ombwayo J on 15/11/2016 and produced a copy of the Identity Card.

13. In cross-examination, she stated that "Muganda" is her father, that "P.O. Box 560" belongs to Kenya Commercial Bank (KCB) where she used to be an employee, that it is not the address she gave to the Defendant, she left KCB in the year 2000. She admitted her awareness that she owes the bank and that what she owes is Kshs 1.5 Million with interest of Kshs 2,000,000/-. In cross-examination, the Plaintiff insisted that she is "Muthoni Muganda", not "Gathoni Muganda".

14. The Plaintiff then closed her case. Subsequently however, by the consent orders made on 21/10/2020, the suit was re-transferred back to this Court as the same was deemed to be of a commercial nature. The suit was then assigned the current case number Eldoret HCCC No. 36 of 2020. The parties then, by the consent recorded on 26/04/2022 before Ogola J, Judge of the High Court, agreed to adopt the Plaintiff's testimony as was given before S. Munyao J and A. Ombwayo J, Judges of the Environment & Land Court, and to proceed with the trial from where it stopped.

15. The Plaintiff had by then then filed the Amended Plaint on 24/02/021. All that was amended to replace the name of the initial Plaintiff, "K-Rep Bank Limited" with "Sidian Bank Limited". After some further delay caused by various factors, the hearing eventually continued before me on 4/05/2023.

16. Mr. Patrick Koech gave evidence as DW1 on behalf of the Defendant. In his evidence-chief, led by Ms Jeruto Advocate, he stated that he is a Relationship Manager at the Defendant bank and then adopted his Statement and the Defendant's List of documents. He denied that interest alone was above Kshs 1.5 Million before issuance of the Statutory Notice and stated that since 2009 no payments have been made by the Plaintiff. He stated further that the Plaintiff has not made any plans with the bank on repayment.

17. Under cross-examination by Mr. Mwinamo (Counsel for the Plaintiff), DW1 admitted that the Statutory Notice dated 21/04/2008 was addressed to "Muthoni Muganda t/a Visions Point Farm" and that the addressee is not "Martha Gathoni Muganda". He however averred that the Defendant was never notified of the Plaintiff's change of address, that the loan was for Kshs 1.5 Million repayable in 60 equal instalments and that the date of commencement of repayment was not indicated. He then referred to the Notice dated 6/07/2010 and stated that it was the 2nd Notice, that it was demanding a sum of Kshs 1,993,377/- being principal plus interest, that the current outstanding balance is Kshs 2,614,991.70, that the letter of offer is dated 9/02/2007, that it has no date of commencement of repayment but that it is normally 30 days from date of advancement of the loan, that the notices and demand letters were sent via Registered Post although he did not have the Certificate of Posting. In re-examination, DW1 stated that no specific notice specifying when repayment was to be commenced was issued to the Plaintiff but that she paid the 1st instalment in time – within the 30 days period.

18. The Defendant then, too, closed its case. Pursuant to directions given, the parties then filed written submissions. The Plaintiff's Submissions was filed on 11/05/2020 while the Defendant's was filed on 6/07/2023.

Appellant's Submissions

19. Counsel for the Plaintiff submitted that the Plaintiff produced the Statutory Notice dated 21/04/2008 addressed to "Muthoni Muganda t/a Vision Poultry Farm" of "P.O. Box 560 Eldoret", that the Plaintiff was categorical that her full name is "Martha Gathoni Muganda" and not "Muthoni Muganda", that she used to be an employee of KCB whose postal address is "P.O. Box 560-30100 Eldoret" but was no longer using the address as she resigned from KCB and did not receive the letter dated 21/04/2008 addressed to "Muthoni Muganda" and that she did not know who "Muthoni Muganda" was. Counsel submitted that the defect of the statutory notice was not challenged by the Defendant and to remedy the defect the Defendant issued a fresh statutory notice dated 6/07/2010 to the right person, that before the Defendant could exercise its statutory power of sale there was to be compliance with section 74(1) of the *Registered Land Act* which section obligates the bank to serve by Registered Post the relevant statutory notice and upon receiving such notice the bank's power of sale would accrue upon the lapse of the notice, that the obligation to comply with the mandatory statutory notice of sale lay with the Defendant and that the burden is not in any manner on the Plaintiff. He cited the Court of Appeal case of *Nyangilo Ochieng & Another v Fanuel B Ochieng & 2 others*, Civil Appeal No. 148 of 1995.

20. Counsel contended further that the statutory notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished, that the law clearly intended to protect the mortgagor in his right to redeem and be warned of the intended right of sale, that the right to accrue takes place 3 months period from the date of service of the notice,

that once the notice is defective the right of sale does not accrue. He cited the Court of Appeal case of *Trust Bank Ltd v Eros Chemists Ltd & Another*, Civil Appeal No. 133 of 1999 and submitted that the noticed was issued to a party other than the Plaintiff and an invalid notice does not give rise to an accrual of a right of sale, that the failure to serve a valid statutory notice is fatal to the exercise of the statutory power of sale by the charge and it is an irregularity or impropriety that cannot be remedied in damages as it derogates from the chargor's equity of redemption. He cited the case of *Samuel Kiarie Muigai v Housing Finance Co. Kenya Ltd* and submitted that from the foregoing, it is clear that the Defendant breached the mandatory provisions of section 65(2) and 74(2) of the *Registered Land Act*.

21. Counsel added that from the admission by the Defendant's witness, DW1, the charge document and the letter of offer did not have a particular date for repayment of the loan, that it was obligatory for the Defendant to issue to the Plaintiff a written demand for payment preceding the statutory notice for payment within 90 days. Counsel argued further that the Plaintiff was advanced the sum of Kshs 1,500,000/-, that the letter (DExh 6 - letter dated 9/09/2011) demands a sum of Kshs 3,492,259.45 made up of arrears for Kshs 2,086,006 and a loan balance of Kshs 1,406,253.45, and that clearly the sums being demanded are more than half of what was loaned.

22. It was also Counsel's contention that the Defendant has without consent of the Plaintiff raised the rate of interest on the loan resulting in the burdening of the Plaintiff's account with arbitrary, capricious, extortionate and unlawful charges not due from the charge and law but from the Defendant's own fictitious contract aimed at unjustly enriching itself, that due to the penalties and rates of interest outside the terms of the charge and contrary to the provisions of the *Central Bank of Kenya (Amendment) Act*, 2000 and the *Banking Act*, Cap 488, the amount claimed is more than half the principal sum which results in violation of the in duplum rule, and that the unlawful charges which have been foisted on the Plaintiff's account amounts to a clog on the Plaintiff's equity of redemption. According to Counsel therefore, the Plaintiff had proved her case on a balance of probabilities.

Defendant's Submissions

23. On his part, Counsel for the Defendant submitted that the Plaintiff confirmed being in default, that the Defendant's witness confirmed that the Plaintiff only repaid the loan for the first 3 instalments and then stopped. Regarding the Plaintiff's allegation that she never received the statutory notice and that the same was wrongly addressed to "Muthoni Muganda", Counsel contended that although the first name had an error, the notice was correctly posted to the Plaintiff's last known address "Muthoni Muganda t/a Vision Poultry Farm P.O. Box 560 Eldoret", that the Plaintiff never notified the Defendant of any change to her address, that the Plaintiff did not deny that the notice was related to her business, that the Ruling of the Court delivered in this matter delivered on 25/01/2010 agreed with the Plaintiff's claim of not having been served with a valid notice and that as such the Defendant issued another statutory Notice dated 6/07/2010 which notice though properly issued has never been enforced due to an injunction orders in place, that with the Plaintiff's own admission of indebtness, the Defendant is within its right to exercise its right of sale, that the mistake of issuing notice with a wrong name cannot extinguish statutory right as the same can be remedied by issuance of necessary notices.

Analysis & Determination

24. Upon carefully considering the record including the Pleadings, oral testimonies, Submissions and authorities presented, I find that the issues that arise for determination to be as follows:

    i. Whether the Defendant lumped the loan account with illegal interest, varied interest rates, penalties or levies and whether the Defendant was in breach of the in duplum rule.

    ii. Whether the Plaintiff is indebted to the Defendant.

iii. Whether the statutory notice was defective and whether it was received by the Plaintiff.

iv. Whether therefore the Defendant should be barred from exercising its power of sale

25. I now proceed to analyze and answer the said issues.

i. Whether the Defendant lumped the loan account with illegal interest, varied interest rates, penalties or levies and whether the Defendant was in breach of the in duplum rule

26. The Plaintiff contended that in breach of the terms of the charge and contrary to the provisions of section 71 of the *Registered Land Act* and the *Central Bank of Kenya (Amendment Act*, 2000 and the *Banking Act*, the Defendant from time to time and without the consent of the Plaintiff varied the rate of interest on the loan resulting in burdening of the Plaintiff with arbitrary, capricious, extortionate and unlawful charges, and that the Defendant has also levied various penalties and rates of interest outside the terms of the charge and contrary to the said statutes resulting in violation of the in duplum rule. The Plaintiff alleged that the amount claimed is more than half the principal sum and which results in the violation of the in duplum rule. The Plaintiff argued that the loan advanced was Kshs 1,500,000/-, and that the Defendant's demand was for a sum of Kshs 3,492,259.45 (made up of arrears for Kshs 2,086,006 and a loan balance of Kshs 1,406,253.45), and that clearly therefore the sums being demanded are more than half of what was loaned. She contended further that the alleged levies, penalties and interest are unreasonable, unconscionable and illegal, are not enforceable and amount to a clog on the Plaintiff's equity of redemption.

27. On its part, the Defendant denied that it breached the alleged statutes or that it has varied the rate of interest arbitrarily, or capriciously or that it has charged interest outside the contractual terms of the charge. The Defendant averred further that the in duplum rule has no relevance herein as the Plaintiff has not stated the amount alleged to be in excess. The Defendant's witness, Mr. Patrick Koech, strongly denied that interest alone was above Kshs 1.5 Million before issuance of the Statutory Notice. He stated that the 2nd Notice dated 6/07/2010 demanded a sum of Kshs 1,993,377/- being principal plus interest and that the current outstanding balance is Kshs 2,614,991.70.

28. The term in *duplum* is derived from ther Latin phrase "in duplo" denoting "in double." The Rule provides that interest on a non-performing facility stops running the moment accrued interest equals the principal amount owing. The Rule is a common law doctrine which was introduced in Kenya in 2007 through an amendment that gave rise to section 44A of the *Banking Act*. The amendment was meant to tame the appetite of financial institutions of unreasonably lumping accrued excessive interest on non-performing loans thus rendering the loans beyond reach of redemption. The relevant portions of section 44A aforesaid provides as follows:

> " 44A. Limit on interest recovered on defaulted loans.
>
> 1. An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).
>
> 2. The maximum amount referred to in subsection (1) is the sum of the following—
>
> a. the principal owing when the loan becomes non-performing;

b. interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

c. expenses incurred in the recovery of any amounts owed by the debtor."

29. Regarding the law, it is and has always been that it is a Plaintiff who bears the burden of proof. The *Evidence Act*, Cap 80 is clear on this insofar as sections 107 and 108 of thereof provide as follows:

"Section 107

(1) Whoever desires any court to give judgment 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.

Section 108

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

30. It is the Plaintiff who alleges that the Defendant has lumped illegal charges on the loan. Applying the provisions of section 108 of the *Evidence Act* above, it is therefore the Plaintiff who would fail if no evidence was presented to prove that allegation. Regrettably, the Plaintiff did not make any effort to demonstrate the accuracy of the claim that the Defendant levied illegal charges or varied interest rates. Merely alleging that the amount demanded is more than half of the principal sum or that the interest rates were varied, without going further to demonstrate and prove this alleged position is not and cannot be sufficient.

31. In any case, I have looked at documents issued by or on behalf of the Plaintiff and noted that both the letter dated 15/01/2008 and the 1st Notice dated 21/04/2008 demand a sum of Kshs 1,451,271 (as at 14/01/2008) while the 2nd Notice dated 6/07/2010 demands a sum of Kshs 1,993,377/- as at (30/06/2008). The 45 days Redemption Notice and the Notification of Sale both dated 29/07/2008 then demand a sum of Kshs 1,543,618.20. The sums demanded are all-inclusive and no breakdown is given. Under these circumstances, it is not clear how the Plaintiff reached the conclusion that within the mentioned all-inclusive figures, were some illegal charges. Although the Defendant produced Statements of the bank Account, the Plaintiff made no effort whatsoever to take the Court through the statements and identify the illegal charges or even state how much they amounted to or even explain in what manner such charges were illegal.

32. I note that the Plaintiff clutched so much on the subsequent letter dated 9/09/2011 from the Plaintiff and which indicated that the arrears was Kshs 2,086,006/- and the loan balance as Kshs 1,406,253.45. The Defendant took the said figures at face value, added the aggregate amount thereof and submitted that the total amount demanded was therefore Kshs 3,492,259.45 and which was more than half of the amount loaned. While it is true that the loan advanced was Kshs 1,500,000/- it is not clear what exact items were included in the mentioned balance of Kshs 2,086,006/-. In the circumstances, the Court is unable to ascertain what portion of the balance constitutes interest, penalties, levies, Auctioneer's fees, or legal fees, respectively.

33. Perhaps the Plaintiff should have presented to the Court her own version of what she deemed to be the correct computation after deducting what she deemed to be the illegal charges. Indeed, I notice that in prayer 2 of her Plaint, she sought an order that the Defendant be compelled to recalculate the account without the unlawful charges. To lay a basis for this prayer, the Plaintiff ought to have first presented her own version for scrutiny.

34. The Plaintiff ought to have clearly identified and taken the Court through the items or entries that she alleges were illegally included by the Defendant in the computation and the manner in which she deems them to be illegal. In the event that she did not have these particulars, then nothing would have been easier for her than to demand the same from the Defendant. Should the request have been ignored, then the Plaintiff could have sought the Court's intervention. She could have also hired or commissioned an expert in accounting matters to scrutinize, dissect and interpret the bank statements and present a Report to the Court.

35. Had the Plaintiff sufficiently established the above matters, then the evidential burden could have shifted to the Defendant. On this point, I refer to the Court of Appeal case of *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR in which the following was stated:

> "(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced." (Emphasis mine)

36. The above principle is also aptly captured in The *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14 in the following terms:

> "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence"(Emphasis mine)

37. In this instant case, the Plaintiff having failed to establish her allegations, the evidential burden never shifted to the Defendant. I therefore find that the Plaintiff has failed to prove her claim that the Defendant lumped the loan account with illegal interest, penalties or levies or that the Defendant was in breach of the in duplum rule.

38. In any event, the said subsequent letter dated 9/09/2011 was internal communication between the Defendant bank and its Lawyers and my belief is that the Defendant only produced it here to demonstrate the frustrations that it was going through by virtue of the injunction being in force. As regards the amount due, the documents formally communicated to the Plaintiff are those that I have already set out above, namely, demand letter, statutory notices, redemption notice and the notification of sale. The said internal Advocate-client letter dated 9/11/2011 was not part of them. Since the letter was not copied to any third party, not even the Plaintiff, my view is that it will be unsafe to rely on it as pertains to the amount due.

39. Despite the finding above, the Defendant is forewarned that it has a legal duty to unconditionally and at all times to comply with and observe the in duplum rule in full. It is not a matter of choice or a discretion but a legal obligation on lenders. If at all therefore the Defendant has breached the said rule,

then this will be the best opportunity for it to remedy the situation at this early stage before seeking to exercise its statutory power sale. Imposing any unlawful charges will amount to a clog on the Plaintiff's equity of redemption and which the law does not permit.

Whether the Plaintiff is indebted to the Defendant

40. The Defendant's witness Mr. Patrick Koech testified that since 2009, no payments have been made by the Plaintiff and that to date, the Plaintiff has not made any plans with the bank on how to repay. It was also the Defendant's contention that the Plaintiff only repaid the loan for the first 3 instalments and then stopped. Indeed, this default is vindicated by the bank statements produced in evidence.

41. On her part, the Plaintiff did not seriously deny default but alleged that she from time to time serviced the loan until commencement of the post-election violence in early 2008 which completely destroyed her poultry business for which she had borrowed the money. In cross-examination, she confirmed that she took the loan of Kshs 1,500,000/- from the Defendant in 2007 and admitted that by 2008 when she filed the suit and even up to the time of the trial, she had not paid off the loan. She alleged further that she defaulted because she used to operate a poultry business and had 2000 chicken but that during the COVID 19 pandemic, shops remained closed and she could not get medicine for the chicken and as result, they all died and her business went down.

42. From the foregoing, it is clear that the Plaintiff is indeed in default and was so even at the time when the demand letter and statutory notices were issued.

Whether the statutory notice was defective and whether it was received by the Plaintiff

43. Regarding the law that applies to this matter as pertains to exercise of the power of sale, including issuance and service of the Statutory Notice and redemption of the security, it is not in dispute that the applicable statute is the *Registered Land Act* (Cap 300) which was subsequently repealed by the *Land Registration Act*, 2012. This is because when the cause of action arose and when this suit was filed in the year 2008, the *Registered Land Act* was still in force since its repeal came later on 2/05/2012 when the *Land Registration Act*, 2012 came into force.

44. Regarding the lender's remedies when the borrower defaulted, section 74 of the *Registered Land Act* provided as follows.

> "(1) If default is made in payment of the principal sum or if any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be".
>
> (2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may:
>
> (a) appoint a receiver of the income of the charged property; or
>
> (b) Sell the charged property: Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that sub-section.

45. Before the chargee could therefore exercise its right of sale, it must have served the relevant statutory notice. 3 months after the chargor receiving such notice, the Bank's power of sale then arose. However, even before sending the statutory notice, the charge must have first served a demand letter, at least 30 days before issuing the Statutory notice. Service of both the demand letter and the statutory sale must therefore be demonstrated by the chargee.

46. The Plaintiff contended that the demand letter was sent to a wrong address, namely "560 Eldoret", that her correct address is "810 Eldoret". that she never saw the demand letter and only later received a copy thereof from the Auctioneers. She contended that "P.O. Box 560" belongs to Kenya Commercial Bank (KCB) where she used to be an employee and that it is not the address she gave to the Defendant, and that she left KCB in the year 2000. She alleged further that the demand letter dated 15/01/2008 and the 1st Statutory Notice dated 21/04/2008 were addressed to "Muthoni Muganda t/a Vision Poultry Farm" of "P.O. Box 560 Eldoret", that her full name is "Martha Gathoni Muganda" and not "Muthoni Muganda", and that she used to be an employee of KCB whose postal address is "P.O. Box 560-30100 Eldoret" but was no longer using the address as she resigned from KCB. She insisted that she never received the letter or the notice and that she did not know who "Muthoni Muganda" was.

47. On his part, the Defendant's witness admitted that the demand letter dated 15/01/2008 and the Statutory Notice dated 21/04/2008 were wrongly addressed to "Muthoni Muganda t/a Visions Point Farm" and that the addressee is not "Martha Gathoni Muganda". He however averred that the Defendant was never notified of the Plaintiff's change of address and that the notices and demand letters were sent via Registered Post although he did not have the Certificate of Posting for the demand letter. The Defendant contended that although the name had an error, the notice was correctly posted to the Plaintiff's last known address "Muthoni Muganda t/a Vision Poultry Farm, P.O. Box 560 Eldoret", that the Plaintiff did not deny that the notice was related to her business, and that the mistake of issuing notice in a wrong name cannot extinguish the Defendant's statutory right as the same can be remedied.

48. I have looked at the Letter of Offer dated 9/02/2007 and note that it indicates the Plaintiff's address as "Martha Gathoni Muganda t/a Vision Poultry Farm, P.O. Box 560 Eldoret". I have also looked at the Charge instrument and note that it similarly indicates the Plaintiff's address as "Martha Gathoni Muganda ....., P.O. Box 560 Eldoret". The Defendant was therefore not at fault for using the address "P.O. Box 560 Eldoret". That was the correct address supplied and was the one required to be used as per the contract. The Plaintiff's allegation that she no longer uses that address is neither here nor there since she never produced any evidence to demonstrate that she notified the Defendant of any change in her address.

49. However, regarding the addressing of both the demand letter and notice to "Muthoni Muganda" instead of "Martha Gathoni Muganda", I find that the Defendant grossly blundered and was clearly at fault. Due to the discrepancy in the names used, the Plaintiff is entitled to the benefit of doubt in respect to her allegation that she never received the letter or notice. It does not matter that the correct postal address was used. It was for the chargee to ensure that there was compliance with the requirements of section 74(1) aforesaid. That burden was not in any manner on the chargor. Once the chargor alleged non-receipt of the statutory notice it was then for the chargee to prove that the notice was in fact received.

50. Regarding denial of receipt of service of the notice, in the Court of Appeal case of *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* [1996] eKLR, it was observed as follows:

> " Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent .....".

51. Clearly, the statutory notice and the demand letter before it had patent defects as they were issued in the wrong name. The Plaintiff having denied that she received the Notice, she is entitled to the benefit of doubt.

52. As submitted by the Plaintiff's Counsel, it is also apparent that after the Ruling delivered in this matter on 25/01/2010 whereof Mwilu J (as she then was) agreed with the Plaintiff's claim of not having been served with a valid notice and issued an interlocutory injunction, the Defendant attempted to remedy the situation by issuing a fresh statutory Notice dated 6/07/2010. Inasmuch as this fresh notice was now addressed in the correct name of the chargor, it could not cure the initial defect. In any case, I find that serving of the fresh notice during the pendency of this suit and before the Court could render its decision on the issues before it, to have been an act done in bad faith and calculated to steal a match on both the Court and the Plaintiff.

Whether the Defendant should be barred from exercising its power of sale

53. In the case of *Nicholas Ruthiru Gatoto v Ndarugu Merchants & 2 others* [2014] eKLR, E. Ogola J, whose finding was subsequently upheld by the Court of Appeal in the case of *Stephen Boro Gitiha v Nicholas Ruthiru Gatoto & 2 others* [2017] eKLR, held as follows:

> " 34 ... It was his testimony that a notice had been posted to the Plaintiff's address. However, he did not produce a certificate of posting or any documentary evidence to show that the Statutory Notice was indeed served on the Plaintiff. See: *Ochieng and Another v Ochieng and others*, Civil Appeal No. 148 of 1995 EALR [1995-98] at pg 260. In the circumstances, it is plain that the Plaintiff was not served in terms of section 153 of the *Registered Land Act* (Cap. 300).
>
> 35 It is trite law that non-service of a statutory notice is a fundamental breach of the provisions of section 74 of the *RLA* which derogates from the chargor's equity of redemption. In essence without service of valid statutory notice, the power of sale does not crystallize and any act done by the bank to dispose the suit property amounts to an illegality."

54. In this instant case too, I am not persuaded that the error or defect was one of mere simple form. It was a material statutory defect that cannot lay a foundation for sale of the charged property. If the statutory provisions were not followed, the substratum upon which the bank's right to sell was founded collapsed. Insofar as they were addressed in the wrong name and therefore potentially to a stranger, the statutory notice and also the prior demand letter issued on behalf of the Defendant under section 74 of the *Registered Land Act* (now repealed) were not valid notices.

55. I agree with the Plaintiff's Counsel that the statutory notice procedure is meant to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. I similarly agree that the intention of the law was to protect the mortgagor's right to redemption and to be warned of the intended right of sale, and that once the notice is defective, the right of sale cannot accrue (see also the Court of Appeal decision in the case of *Trust Bank Ltd v Eros Chemists Limited & Another* [2000] eKLR).

56. My finding is therefore that the notice in this matter was potentially issued to a party other than the Plaintiff. An invalid notice does not give rise to an accrual of a right of sale and is fatal to the exercise of the statutory power of sale by the chargee. It is an irregularity or impropriety that cannot be remedied in damages as it derogates from the chargor's equity of redemption (see decision of Ringera J (as he then was) in the case of *Samuel Kiarie Muigai v Housing Finance Co. Kenya Ltd* [2006] eKLR).

57. In the same Court of Appeal case of *Stephen Boro Gitiha v Nicholas Ruthiru Gatoto* (supra), the following was stated

> " The case at bar is on all fours with that decision and the conclusions the learned Judge arrived at were therefore correct in law. 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. The learned Judge was right to find and hold that innocence of Gitahi's purchase was not curative of the fundamental defect in the title due to the absence of the requisite notice."

58. It is therefore clear that service of a valid notice upon the chargor is a prerequisite for the exercise of the chargee's statutory power of sale. A notice addressed to the wrong chargor is no notice at all. It is trite law that non-service of a statutory notice or service of an invalid notice for that matter, was a fundamental breach of the provisions of section 74 of the *Registered Land Act* and which derogates from the chargor's equity of redemption. In essence, without service of valid statutory notice, the power of sale does not crystallize and any act done by the chargee to dispose the suit property amounts to an illegality.

Final Orders

59. The upshot of the findings above is that this suit partially succeeds and accordingly, I enter Judgment in favour of the Plaintiff in terms of prayer (c) of the Plaint dated 24/02/2021 as follows:

    i. An injunction is hereby issued restraining the Defendants and/or their agents or servants, from selling by public auction or otherwise, the land parcel L.R. No. Eldoret Municipality Block 9/510 unless and until there is full compliance with the law.

    ii. Since I have found that the Plaintiff was and is still in default in her repayment obligations and that the loan is therefore still outstanding, the Defendant is at liberty to commence the process of exercising its statutory power of sale afresh by issuing valid notices.

    iii. Further, since I have found that the Plaintiff was and is in default in her repayment obligations, I decline to award costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF FEBRUARY 2024

WANANDA J. R. ANURO

JUDGE