

# From Default to Recovery

The Legal Framework Governing the Exercise of  
the Statutory Power of Sale in Kenya



- 90 Day Notice of Default
- 40 Day Notice of Sale
- 45 Day Redemption Notice

# Introduction

In simple terms, a chargor is the borrower or the party that offers their property (whether real or movable) as collateral to a chargee (usually a lender or financial institution). The chargor remains the owner of the property, but the charge creates a security interest for the chargee.

A chargee is a person or entity that holds a legal interest in property (usually as collateral) as security for a loan or debt. The chargee has the right to take action against the charged property if the borrower (the chargor) defaults on the repayment of the loan or debt as per the terms of the Charge.

In a typical scenario, the chargee is usually a lender, such as a bank or financial institution, that holds a charge (a legal right) over the property until the borrower repays the debt.

In the world of secured lending, the relationship between a chargor and a chargee often begins on a foundation of mutual trust and goodwill. It starts with the issuance of a letter of offer, where the chargee extends financial support to the chargor, often to fulfill aspirations such as acquiring property, financing a business, or addressing other financial needs. Upon acceptance of the terms, the arrangement solidifies through the creation of a charge with a property as a security, a legal instrument that binds the parties to their obligations. The execution of the charge symbolizes an agreement rooted in good faith, with both parties intending to uphold their respective commitments.

However, this harmony can be disrupted when the chargor defaults on their obligations, such as failing to make periodic payments or honor terms under the charge. Default represents a pivotal moment in this relationship, marking a shift from collaboration to contention. The chargee, faced with mounting losses, may seek to exercise their statutory power of sale, a remedy provided under Kenyan law to recover the outstanding debt through the sale of the charged property.

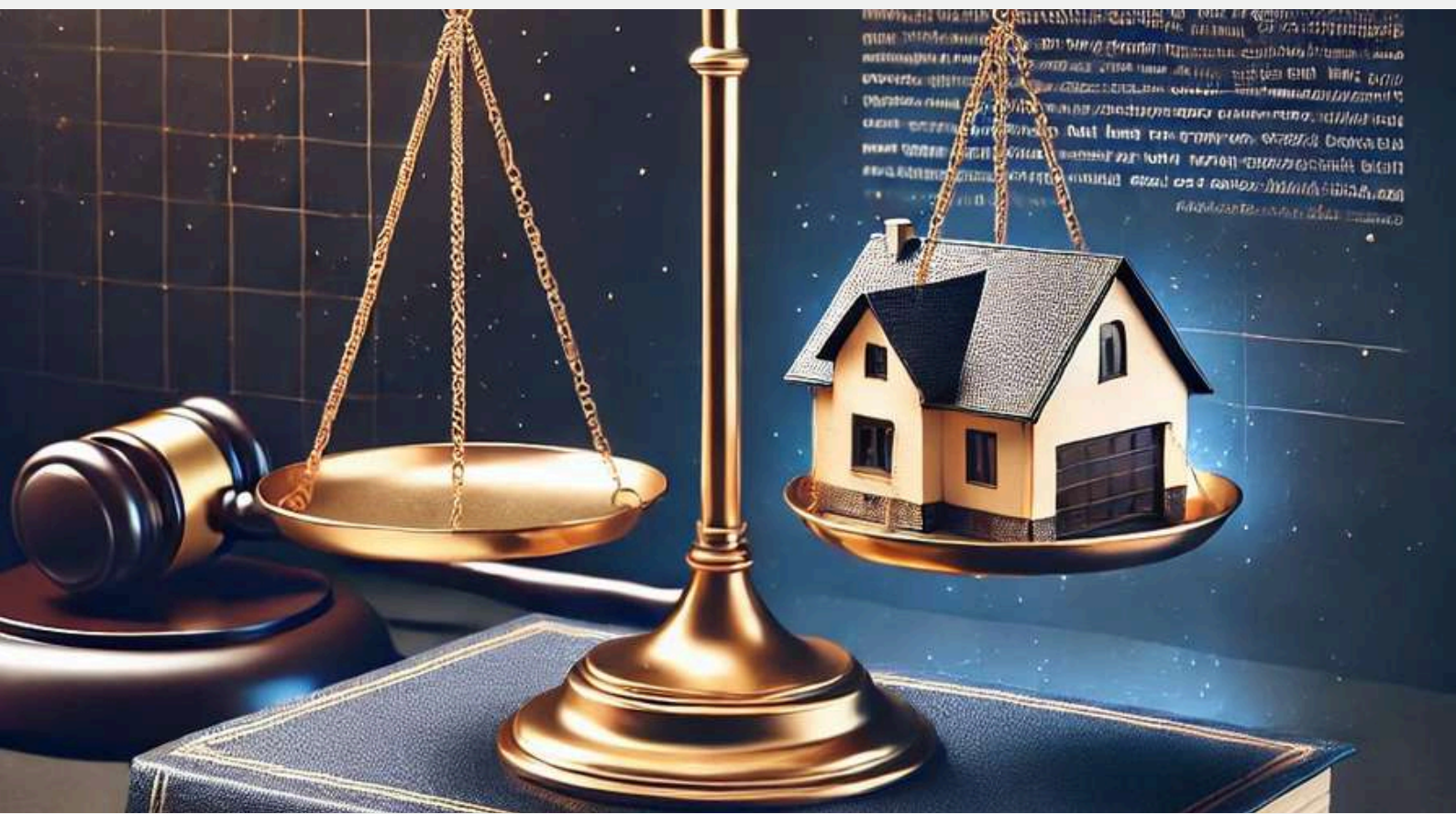
This legal update provides the necessary legal steps that a chargee must follow before exercising its statutory power of Sale.

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# 90- DAY NOTICE *of Default*

The 90-day notice of default is rooted in Section 90(1) of the Land Act, 2012, which provides that when a chargor defaults in the payment of interest or any periodic payment under the charge, and such default continues for a period of one month, the chargee is obligated to serve a 90-day notice of default in writing upon the chargor.

This notice must specify:

- The nature and extent of the default.
- The action required to remedy the breach.
- The consequences of failing to remedy the default, including the potential sale of the charged property.

Justice Nyakundi, in the case of **Joseph Mutua v Absa Bank PLC and 2 Others (2024) eKLR**, underscored the purpose of this notice, emphasizing that it is to afford the chargor reasonable time to remedy the breach or otherwise redeem the property provided as security. This ensures fairness and offers the chargor an opportunity to avert the drastic consequences of a forced sale.

Upon the lapse of the 90 Days, the Chargee is not still allowed to exercise its statutory power of Sale. The Chargee must thereafter issue a 40- Day Notice of Sale.

# 40-Day Notice to Sell

## The power of Sale

The power of sale, which allows a chargee to sell the charged property in the event of default, is anchored in Section 96 of the Land Act, 2012. This statutory provision outlines the conditions and procedural safeguards to ensure fairness in the exercise of this remedy. Under Section 96(1), a chargee gains the right to sell the charged property after a chargor defaults and proper statutory notices have been served. This remedy is available only after the chargee has complied with the notice requirements stipulated under the Land Act.

## 40 day Notice to Sell

Before exercising the power of sale, the chargee must issue a 40-day Notice to Sell as required under Section 96(2). This notice must:

- Be issued in writing.
- Clearly communicate the chargee's intention to sell the charged property.
- Be served on the chargor and any guarantors at least 40 days before initiating the sale.

## Notification to Interested Parties

In addition to notifying the chargor and guarantors, Section 96(3) imposes a duty on the chargee to notify any other persons with an interest in the property. These include:

- Spouses of the chargor, where the property constitutes a matrimonial home.
- Dependents or other occupants residing on the property.
- Third parties with registered interests, such as tenants or co-owners.



This means that in a third party charge, the Chargee must issue the Notice to Sell to the borrower, the chargor, the spouse to the chargor and any other party with interests on the suit property.

## Valuation

Section 97 of the Land Act mandates the chargee to value the property before the sale to ensure it is sold at the best reasonably obtainable price. This provision seeks to protect the chargor from a forced sale at an undervalued price.

# 45-Day Redemption Notice

In addition to the statutory notices required under the Land Act, 2012, the 45-day Redemption Notice is governed by the Auctioneers Act (1996) and the accompanying Auctioneers Rules (1997). This notice serves as a final opportunity for the chargor to redeem the charged property before it is sold through public auction.

## Issuance of the Redemption Notice

Once the 90-day Notice of Default (Section 90) and the 40-day Notice to Sell (Section 96) have been served, and the chargor fails to remedy the default, the chargee may instruct an auctioneer to sell the property. At this stage, the auctioneer is required to serve the 45-day Redemption Notice in compliance with the Auctioneers Rules.

Key aspects of this notice include:

- The notice gives the chargor 45 days to redeem the property by paying the outstanding amounts, including any accrued interest, penalties, and costs.
- The notice must be served in writing and in a manner that ensures the chargor and any other affected parties are fully informed of the impending sale.
- This notice acts as a final opportunity for the chargor to prevent the sale by settling the debt in full or making acceptable arrangements with the chargee.

## Procedural Compliance

Failure to issue the 45-day Redemption Notice renders the auction invalid, as courts have strictly upheld compliance with this requirement.



## Integration with Other Notices

The 45-day Redemption Notice is part of the layered safeguards provided under Kenyan law to protect the rights of a chargor. Together with the 90-day Notice of Default (Section 90) and the 40-day Notice to Sell (Section 96), it ensures that the chargor is afforded ample time and opportunity to redeem the property or seek alternative solutions.





# *Proof of service and Injunctions*

The burden of proving that the notices were duly served to the chargor lies with the chargee

In matters relating to legal charges and the subsequent exercise of statutory Power of Sale, once a chargor alleges non - receipt of the Notices, they are obliged to seek legal redress and pray for an injunction halting the intended auction of the charged property.

It is the position of the law that once a chargor alleges non-receipt of the Statutory Notices, then it is upon the chargee to prove service of the same without which the intended exercise of power of sale by the chargee becomes invalid.