



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 416 OF 2012**

**BENSON KABUGI MURIUKI ..... PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION ..... DEFENDANT**

**JUDGMENT**

1. Benson Kabugi Muriuki (the Plaintiff or Muriuki), a farmer in Nyeri, brings this suit against Agricultural Finance Corporation (the Defendant or AFC) in respect to a loan of Kshs.592,500/= advanced to him.

2. AFC is a state corporation set up under the Agricultural Finance Corporation Act (Chapter 323 Laws of Kenya) with a mandate to assist in the development of Agriculture through, inter alia, advancing of loans to farmers. It granted financial accommodation to Muriuki through a letter of offer dated 9<sup>th</sup> January 2004 (P Exhibit 1-5). As security for the loan, AFC registered a notification of charge against Muriuki's land known and described as Nyeri/Warazo/134 on 15<sup>th</sup> January, 2004 (P. Exhibit Pages 6 and 7). Further, the Corporation, on 29<sup>th</sup> January 2004 registered a notification of charge on chattels under the Chattels Transfer Act (P. Exhibit Pages 8 and 9).

3. Some of the terms and conditions of the facility were that it would be repaid within a period of 5 years with interest at 10% p.a and that the borrower would sign a bankers order of Kshs.14,850/= per month on acceptance of the loan offer.

4. It is Muriuki's case that the loan was disbursed as follows:-

|                               |   |                   |   |         |
|-------------------------------|---|-------------------|---|---------|
| 3 <sup>rd</sup> February 2004 | - | Cheque No. 419603 | - | 250,000 |
| 10 <sup>th</sup> March 2004   | - | Cheque No. 419626 | - | 169,000 |
| 10 <sup>th</sup> March 2004   | - | Cheque No. 419627 | - | 33,000  |
| 22 <sup>nd</sup> March 2004   | - | Cheque No. 419640 | - | 37,000  |
| 22 <sup>nd</sup> March 2004   | - | Cheque No. 419639 | - | 155,500 |

592,500

5. He asserts that he commenced repayment of the loan on 2<sup>nd</sup> April 2004 and has repaid the loan in full.

6. Muriuki complains that AFC has deviated from the terms of the letter of offer and has imposed unexplained charges on the loan account. One such is charge christened "late fee" which Muriuki alleges is not provided for in the loan agreement. The other is inspection fee of Kshs.1,500/= and Kshs.1,600/= for inspections allegedly carried out on the suit property on 12<sup>th</sup> January 2006 and 19<sup>th</sup> September 2007 respectively but which is disputed by Muriuki.

7. Muriuki's further grievance is in respect of fee of Kshs.3,000/= levied on 13<sup>th</sup> April 2005. He argues that there was no default on payment to warrant that charge. He also complains of auctioneers fees of Kshs.16,630.40/= charged on 6<sup>th</sup> July 2007 and Kshs.1,872,75/= on 14<sup>th</sup>

July 2008. Lastly, he takes issue with a charge referred to as a loan fees.

8. As regards the securities, the contention of Muriuki is that the Notification of the Charge is null and void and of no legal effect as it was not properly or validly executed in accordance with Section 15 of the Chattels Transfer Act (now repealed) and that it was not properly or registered at all. For the Notification of Charge on the Chattels over moveable properties, it is impugned allegedly because it does not contain a schedule/inventory of the assets for the time being of the Plaintiff and that it was not properly or registered at all.

9. Prior to the presentation of this action, Muriuki had filed two previous suits being Nyeri – CMCC No. 755 of 2005 and Nyeri CMCC No. 124 of 2010 challenging previous attempts by AFC to realize the securities held. The former was dismissed for want of prosecution and the latter struck out for want of jurisdiction.

10. The current proceedings were triggered by an advertisement taken out by Keysian Auctioneers acting on behalf of AFC to sell the suit property on 29<sup>th</sup> June 2012. That intended auction was challenged for the following reasons:-

- i. The Defendant has instructed an auctioneer to advertise and sell the suit property without issuing the mandatory statutory notice to the Plaintiff.
- ii. The notice was issued for a period less than the period prescribed under the law.
- iii. The Defendant has instructed the auctioneer to advertise and sell the property knowing that it has fettered and clogged the Plaintiff's equity of redemption.
- iv. The Defendant has offered the Plaintiff's property for sale without conducting a valuation to determine its market value prior to the sale and the property has not been valued for the last twenty four months.
- v. The amount claimed by the Defendant is not due and owing neither is any sum owing to the Defendant.
- vi. The Notice of charge on the Plaintiff's property does not confer power of sale of the Plaintiff's property to the Defendant for want of execution and registration.

11. As I understand it a substantial claim by Muriuki is that a recalculation of the loan account has revealed that he has been overcharged a sum of Kshs.271,557.21/= from inception upto 31<sup>st</sup> March 2010 and that not only has he repaid the loan in full but that there is a difference of Kshs.624,138,03/= in his favour.

12. The Plaintiff seeks the following orders:-

- a) A permanent injunction restraining the Defendant whether by itself, its agents, employees, auctioneers, advocates or whomsoever from selling, purporting to sell, offering for sale whether by public auction or otherwise, advertising for sale or in any way whatsoever interfering with all that property known as land reference number Nyeri/Warazo/124.
- b) An order that the Defendant do render true and proper, complete and accurate accounts of the payments made and an order that any amount paid in excess of the lawful indebtedness be refunded to the Plaintiff.
- c) A declaration that the notification of charge on the suit property known as land reference number Nyeri/Warazo/124 is null and void and unenforceable.
- d) A declaration that the notification of charge on chattels on the suit property known as land reference number Nyeri/Warazo/124 is null and void and unenforceable.
- e) A declaration that the Plaintiff is discharged from his financial obligation under the charge and the chattels mortgage and the Defendant be compelled to discharge and release the title on land reference number Nyeri/Warazo/124 and all the moveable assets thereon unconditionally.
- f) Costs of the suit and interest at Court rates.

13. The suit is resisted through a Statement of Defence dated 11<sup>th</sup> July 2012 and filed on the same day. AFC states that it granted the loan and that the securities created complied with all legal requirements in execution, attestation and registration.

14. AFC states that Muriuki breached the terms of the loan agreement by failing to repay the loan advanced, appointment costs, charges and interest despite numerous reminder. It cites clause 19 of the letter of offer as allowing it to recall the loan upon default. It states that it is entitled to exercise its statutory power of sale in accordance with the charge after serving the requisite statutory notices upon the Plaintiff.

15. In answer to the allegation made in respect to late fees, inspection fees, foreclosure fees and auctioneer fees, AFC states that in accordance with clause 14 of the letter of offer all costs incurred in administration of the borrowers loan(s) together with interest thereon at the rate chargeable on the loan would be a charge on the security and recoverable immediately after disbursement.

16. The hearing of the suit commenced before Gikonyo J on 6<sup>th</sup> May 2015 and it fell on me to finalize it as a partly heard matter. In his

testimony, Muriuki states that, although, he was required to make his first repayment on 28<sup>th</sup> February 2005, AFC forced him to make the payment on 2<sup>nd</sup> February 2004 even before the loan had been disbursed and maintained that he was not in default. It is his firm position that the Defendant never granted him a moratorium as required in the loan agreement and thus disorganized him right from the outset of the facility.

17. Further details of his testimony and that of his witness, one Wilfred Abincha Onono are considered as they are relevant to determining the issues that have arisen. So too will the evidence of Erick Muita who was the only witness for the Defendant. The identified issues are:-

- i. Was AFC in breach of the terms of the offer letter?
- ii. Did AFC charge fees outside the terms of the contract?
- iii. Did AFC have a basis of charging late fees?
- iv. Are the securities taken properly executed and registered?
- v. Was the Plaintiff in default of repayment?
- vi. Is AFC entitled to enforce the securities it holds?
- vii. What is the appropriate order on costs?

18. It is common ground that the loan was disbursed as follows:-

|                               |   |                   |   |         |
|-------------------------------|---|-------------------|---|---------|
| 3 <sup>rd</sup> February 2004 | - | Cheque No. 419603 | - | 250,000 |
| 10 <sup>th</sup> March 2004   | - | Cheque No. 419626 | - | 169,000 |
| 10 <sup>th</sup> March 2004   | - | Cheque No. 419627 | - | 33,000  |
| 22 <sup>nd</sup> March 2004   | - | Cheque No. 419640 | - | 37,000  |
| 22 <sup>nd</sup> March 2004   | - | Cheque No. 419639 | - | 155,500 |

592,500

19. The contract between Muriuki and AFC is the letter of offer dated 9<sup>th</sup> January 2004 and signed by Muriuki on 15<sup>th</sup> January 2004. Clause 8 of the Agreement provides as follows in respect to repayment:-

“[8] The loan shall be repaid together with the prescribed interest calculated as each sum on account of the loan in the manner provided in clause (6) above by equated \*Annual/Half Yearly/Quarterly/Monthly payments of principal and interest combined, the first to be made on the 28<sup>th</sup> day of February 2005”.

20. The borrower testified that he made at least three payments before the date due for repayment. These are as :-

|          |   |          |
|----------|---|----------|
| 02.04.04 | - | 14,850/= |
| 13.06.04 | - | 14,850/= |
| 18.02.05 | - | 20,000/= |

This is shown in the loan account analysis prepared by AFC in respect to his account (P. Exhibit pages 57-40(b)).

21. In submissions filed on its behalf, AFC states that the account was to fall due on 28<sup>th</sup> February 2005 and for that reason no interest was charged on the account from inception to 28<sup>th</sup> February 2005. Muriuki argues the first repayment was due on 28<sup>th</sup> February 2005.

22. AFC, on the other hand, makes the argument that although payment was due on 28<sup>th</sup> February 2005, Muriuki was expected to pay monthly instalments of Kshs.14,850.00 in the interim and should have paid Kshs.178,167.00 by February 2005. It then argued that Muriuki was in default as by this time he had only paid a sum of Kshs.49,700.00 against the expected sum of Kshs.178,167.00.

23. It is suggested by the lawyers of AFC that Clauses 2 and 8 of the loan agreement should be read together. Clause 2 reads:-

“[2] FURTHER TERMS AND CONDITIONS of this offer shall be:-

To sign a bankers order of Kshs.14,840.00 per month on acceptance of the loan offer”.

While clause 8 was reproduced earlier at paragraph 19 of this decision.

24. In his evidence the witness for AFC said as follows in respect to clauses 2, 6 and 8 of the agreement:-

“Clause 8 - I have seen this. Clauses 2, 6 & 8 confirms when first payment should be made. Repayment was to be monthly to build up to annual repayment due on 28<sup>th</sup> February 2005. Clause 2 took into account when repayment would be made”.

25. This Court has given due regard to the entire letter of offer which constitutes the contract between the parties herein. It would seem that by Clause 2 requiring the borrower to immediately sign a monthly bankers order of Kshs.14,850/= in acceptance of the loan offer, then the terms of that clause placed on obligation on the borrower to repay the loan in monthly instalments of Kshs.14,850/= with effect from 9<sup>th</sup> January 2004. The outcome would be twofold. First, to require the borrower to commence payment of the loan even before drawdown. Second, to force payment on the borrower in a manner inconsistent with Clause 8 of the agreement which provides for the first payment to be due on 28<sup>th</sup> February 2005.

26. It would therefore seem that there is an apparent conflict between the two provisions. It being common ground that it was AFC that drafted the letter of offer then any ambiguity or contradiction would have to be resolved against the draftsman. This would be in accord with the *Contra Proferentem* Rule. For that reason, I hold that the first repayment of the facility was due on 28<sup>th</sup> February 2005.

27. Then again there may be no contradiction between the two clauses given the following explanation by the witness of AFC:-

“It was an agriculture development loan which depended on the seasonality of production in this instance dairy. The production was daily or monthly so customer is given option to build up payment”.

28. This Court understands the arrangement to be that the borrower could opt to make a monthly payment of Kshs.14,850/= upto 28<sup>th</sup> February 2005 or to make one lump sum payment equivalent to the aggregate monthly payments on 28<sup>th</sup> February 2005.

#### **Of late fee?**

29. There is evidence that AFC charged late fee on the account of Muriuki. This was justified by its witness:-

“Clause 20 – This is the authority to charge late fee. Late fee is the same as compound interest”.

30. This Court is shown two debits of the late fees on the loan statement of Muriuki (P. Exhibit Page 60). These are:-

- 20<sup>th</sup> May 2007 - 314,877.52/=

- 31<sup>st</sup> March 2008 - 115,243.42/=

There is then the letter of 18<sup>th</sup> March 2010 from AFC to Muriuki being an analysis of the loan Account (P. Exhibit page 57 – 58). In it I see the following entries on late fees:-

06.07.05 - 7,463.93/=

31.03.06 - 17,960.40/=

15.01.07 - 34,441.09/=

31.03.07 - 32,448.89/=

20.05.07 - 16,193.94/=

31.03.08 - 76,790.46/=

31.03.09 - 118,020.85/=

14.04.09 - 7,443.90/=

16.03.10 - 125,877.10/=

18.03.10 - 700.91/=

31. This Court also sees some repayments on late fees (P. Exhibit Page 60 & 61 and also P. Exhibit 63).

|            |   |              |
|------------|---|--------------|
| 27.04.2010 | - | 691,600.11/= |
| 29.03.2010 | - | 41,286.01/=  |
| 15.02.2012 | - | 43,303.01/=  |
| 25.02.2012 | - | 19,750.00/=  |
| 05.03.2012 | - | 33,240.09/=  |
| 11.07.2012 | - | 16,659.18/=  |

32. The Plaintiff argues that the charge for “late fee” was not provided for in the contract and seeks to rely on the ruling of Mabeya J of 3<sup>rd</sup> December 2012, where the Judge, partly, observed:-

“Nowhere does it state that the Defendant will charge late fees. In my view, the late fees and the item referred to as instalments alone account for over Kshs.1,580,000/= of the amount debited to the Plaintiff’s account. If it is finally established that none of these items were chargeable then the amount of Kshs.756,652.71 demanded as balance would not be due to the Defendant”

33. It is clear to this Court that the finding of the Judge was a tentative view and there was no final determination of the legality or otherwise of the late fee. A provisional finding made in determination of an interlocutory application does not bind a trial Court when making a final determination. Indeed, the Judge was clear that the final call on the matter would be made by the Court after the trial. I now turn to render my view of the issue.

34. Clause 20 of the letter of offer reads:-

“The corporation shall be at liberty to charge compound interest at prevailing market rates on any sum that remains outstanding after the instalment due date”.

35. The Court agrees with counsel for AFC that this was a basis for his client to charge compound interest on default. According to Black’s Law Dictionary 10<sup>th</sup> Edition compound interest means:-

“Interest paid on both the principal and the previously accumulated interest”.

36. AFC was therefore entitled to charge interest on interest on the prevailing market rates once any sum remained outstanding after the due date. As to what was the prevailing market rates, reference would be clause 6 which fixed the interest on the loan at the rate of 10% per centum per annum with a right to the Bank to vary it from time to time. But as there is no evidence that this rate was varied, the Court holds that the prevailing interest rate remained at 10% per annum. AFC could therefore charge compound interest at 10% per annum on any sum that remained outstanding after the due date for payment of the instalment.

37. Now in respect to whether there was default on the part of the borrower, there is fairly strong evidence that there was default on the first repayment due on 28<sup>th</sup> February 2005. On this date he ought to have paid Kshs.178,200.00 (14,850.00 x 12) but had only paid Kshs.49,700.00. Once there was default then AFC was entitled to charge compound interest at 10% on the sum that remained unpaid.

38. Having reached that conclusion, the Court does not accept that the recalculation undertaken by Mr. Onono (PW 2) is a true reflection of the account of Muriuki because it did not factor in the compound interest when there was default.

39. On the other hand, two analysis of the same account have been provided by AFC. That found in the Plaintiffs’ bundle (pages 57-58) and that in the Defendant’s bundle (Pages 77-79). While they cover periods that overlap, the two analysis are not exactly the same. It is not explained to this Court why they would be different, even slightly, if they are for the same account for the same period.

40. The Court will be proposing that the solution is to subject the Plaintiff’s loan account to the taking of accounts so as to establish whether the Plaintiff continues to be truly indebted.

41. If there was default, then AFC would be entitled to seek a reimbursement of costs properly and reasonable incurred in its effort to recover the debt. This is within the contemplation of clause 14 of the letter of offer:-

“All monies expended by the corporation in paying the insurance premiums, rent and all other outgoings as aforesaid, or in repairing or keeping in repair any of the building, improvements and other items forming part of the security as aforesaid or in the insurance thereof or in attempting to exercise any power right or remedy herein contained or implied in favour of the corporation, TOGETHER with all costs incurred in the administration of the borrowers loan(s) together with interest thereon at the rate chargeable on the loan shall be a charge on the security and shall be recoverable immediately after disbursement”.

42. Inspection, foreclosure and auctioneer fees would therefore be justified in the event of default and if properly incurred.

43. Before I conclude this Court must consider the legality and validity of the securities taken.

44. I start with the notification of charges registered on 15<sup>th</sup> January 2004. That charge on land was taken under the provisions of Section 20(2) of the Agricultural Finance Corporation as then existing it read:-

“(2) Where the conditions of the loan are such that the Board is satisfied that the execution of a formal first mortgage is not necessary, or where the Board otherwise directs, the borrower shall not be required to execute such a document, and instead the General Manager shall—

(a) deliver a written notification of the loan in the prescribed form to the land registrar, who shall register it against the title to the borrower’s land and, where appropriate, endorse a memorandum of the loan on the grant or certificate of title, and thereupon the land shall stand charged with the repayment of the loan and the interest thereon subject to any prior registered charge; and

(b) upon repayment of the loan and all interest due on it, give written notice of the repayment to the land registrar, who shall register it against the title to the borrower’s land and cancel any memorandum of the loan which is endorsed on the grant or certificate of title, and thereupon the charge created in respect of the loan shall be extinguished, and a written notification delivered under this subsection shall for all the purposes of this Act be deemed to be a mortgage of the land comprised therein executed by the borrower to secure the loan.

45. Muriuki asserts as follows in paragraph 7 of the Plaintiff;

“[7] The Defendant demanded that the Plaintiff delivers his title document in respect of his property known as Land Reference Number Nyeri/Warazo/124 in accordance with the terms of the letter which the Defendant purported to charge the property by issuing a notification of charge under the Chattels Transfer Act which charge is null and void and of no legal effect due to the following issues:-

i. The instrument was not properly or validly executed in accordance with Section 15 of the Chattels Transfer Act.

ii. The notification of charge was not properly registered”.

46. I am not too sure I understand the point made by Muriuki here because under Section 20(2) of the Act the Notification of Charge on the land was to be delivered to the Land Registrar for registration. There was no need for it to be registered under the Chattels Transfer Act (now repealed) which is for movable property. As regards the provisions of Section 20(2) it required the Notification to be executed by the General Manager of AFC. The Notification in question was executed by the Managing Director of AFC. Although the Act provides for execution by the General Manager this Court is not told that the Managing Director is not the head of that institution and that execution by him would be irregular.

47. As for the moveable assets, the relevant provision of the law was Section 20(3) of the AFC which read:-

“In addition to the action prescribed by subsection (2), the General Manager shall:-

a) deliver a written notification of the loan in the prescribed form to the Registrar General, who shall register it as an instrument under the Chattels Transfer Act, and it shall be deemed to be an instrument within the meaning of that Act as signing and transferring to the corporation, by way of mortgage to secure the loan and the interest on it, all the movable property for the time being of the borrower (other than his household and personal effects; and

b) upon repayment of the loan and all interest due on it, give written notice of the repayment to the Registrar General, who shall register it as a memorandum of satisfaction under the Chattels Transfer Act, and it shall be deemed to be a memorandum of satisfaction within the meaning of the Act in respect of the whole of the loan”.

48. Muriuki assails the Notification of Charge on Chattels register on 29<sup>th</sup> January 2004 as being faulty because:-

i. The Notice does not contain a schedule/inventory of the moveable properties for the time being of the Plaintiff.

ii. It was not properly or registered at all.

49. As regards the first criticism, the law was that that mortgage would be over all moveable property for the time being of the borrower (other than household and personal effects). The mortgage under review covers the exact breadth of moveable assets contemplated by the law. The law did not require a schedule or inventory of the assets to be provided. That could, in my view, delimit the assets to be covered yet the law expected all assets for the time being of the borrower (save for household and personal effects) to provide security.

50. As regards registration, the Notification on the Chattels was registered with the Registrar – General, an office then existing. The exact deficiency of that registration has not been specified by Muriuki and I find it to be properly registered.

51. In the end, I must decline to grant prayers (a), (c), (d) of the Plaintiff dated 26<sup>th</sup> June 2012. As to prayer (e), that can only be considered upon the taking of accounts. This Court has anxiously considered the order to make in respect of the taking of accounts. In the end I resolved not to grant more than what was sought. Prayer (b) is worded thus;

[b] An order that the Defendant do render true and proper, complete and accurate accounts of the payments made and an order that any amount paid in excess of the lawful indebtedness be refunded to the Plaintiff.

I grant the prayer. Accounts to be taken within 60 days hereof. The Defendant must pay heed to all observations made by this Court which includes, but are not be limited to;

a) That the first instalment was due on 28<sup>th</sup> February 2005.

b) That the Defendant was at liberty to charge compound interest at 10% per annum on any sum that was outstanding after an instalment was due.

The Court shall thereafter make final orders.

**Dated, Signed and Delivered in Court at Nairobi this 28<sup>th</sup> Day of February 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Kariuki for Plaintiff

Njuguna for Ngaira for Defendant

Court Assistant: Nixon