REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.103 OF 2012

ISMAEL AHMED ..... APPLICANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.. RESPONDENT

RULING

By a notice of motion dated 27/03/2012 made pursuant to provisions of **Order 40 Rule 1** and **4, Order 51 Rule 1**, **Section 1A, 1B, 3A** and **63(e) Civil Procedure Act**. The applicant seeks for temporary restraining orders to issue against the respondent by itself, agents, employees and/or servants from disposing by way of public auction, alienating, transferring, interest and/or dealing in any way with the applicant's property known as **Title Samburu/Suguta Marmara "A"/66** pending the hearing and determination of this suit.

This application is based on grounds that:-

1. The applicant is licenced to buy and sell or barter stock by way of trade to the Stock Traders Licencing Act, where the Respondent is a Government Corporation put in place to assist in the development of agriculture and agricultural industries by making loans to farmers, co-operative societies, incorporated group representative, private companies, public bodies, local authorities and other persons engaging in agriculture or agricultural industries.

In the year 2009, the applicant took an off loan from the respondent for purposes of purchasing cattle for sale after fattening. The applicant deposited his title to land known as Title No.Samburu/Suguta Marmara A/66 with the corporation (suit property).

Immediately after purchasing the cattle, there was a quarantine of 3 (three) months imposed by the Veterinary Department, Ministry of Livestock following the outbreak of Foot and Mouth disease in Hababwein District and the applicant could not move the livestock. In addition, there was a prolonged drought and as a result, most of the stock perished. The President of Kenya is said to be on record as having declared the drought and famine in the country, a national disaster.

The respondent has, through Viewline Auctioneer, advertised the sale of the applicant's suit property.

The notice of sale was published in the gazette on 12th/03/2012 which is less than the mandatory period of twenty one (21) days required by the law. **Section 33(4)** of the **Agricultural Corporation Act (Cap 323 of the Laws** of Kenya stipulates that a sale shall not be held until a notice of the same has been published in the Gazette, or inn a newspaper circulating in the area in which the land is situated, stating

the date, time and place of sale, and the terms and conditions of the sale. The 21 days have elapsed since the date of publication of the notice.

Further, that the corporation has no powers to sell the property since the applicant did not execute any charge in favour of the corporation. It is only a duly registered charge that can grant the applicant powers to sell the property. The intended sale on 30/03/2012 is thus illegal since the respondent has not complied with the statutory provisions. The short notice is said to deny the applicant his right of redemption of the property. The applicant is ready and willing to settle any outstanding dues to the respondent if he is rendered an accurate account and if the respondent complies with the law. On 13th February 2012, the applicant wrote a letter to the respondent proposing to sell a portion of the property to pay the loan, but respondent refused to even acknowledge the letter. The applicant is apprehensive that unless the orders sought are granted, the respondent will proceed to dispose off the suit property by way of public auction.

In the supporting affidavit sworn by the applicant he deposes that after purchasing 74 head of cattle, they perished as a result of a prolonged drought and an outbreak of disease. He wrote to the respondent on 08/06/2011, explaining his predicament and requesting for an additional loan to enable him sustain the project as this would enable him repay the loan – but he got no response.

The application is opposed and in a replying affidavit sworn by **ROSE OCHANDA**, the Corporation Secretary of the Agricultural Corporation (AFC) she states that by a loan agreement dated 18/11/2009, the applicant obtained a loan from the Department of Kshs.1,000,000/= which was to be paid with interest at a variable rate of Kshs.7.5% within a period of two years. The suit property was offered as security to secure the loan. According to the respondent, the applicant refused to honour his contractual obligation to repay the loan and reminders were sent to him vide two letters, one dated 21/05/2010 and the other 09/06/2011. The applicant admitted his indebtedness and due to his default the respondent issued a statutory notice dated 18/11/2010 recalling the then outstanding balances consisting of the principal amount, interest and arrears. Consequently the respondent instructed auctioneers to execute against the applicant by disposing of the suit property.

On 20/02/2012, the auctioneers issued 45 days redemption notice and a notification of sale over the suit property upon the applicant, thus giving him time to salvage and/or redeem his account but there was no compliance.

Therefore upon the expiry of 45 days redemption notice, the auctioneer duly advertised the suit property for sale by way of public auction.

It is contended that the respondent's statutory power of sale crystallized having complied with all the legal provisions and this application is brought in bad faith and should be dismissed.

The court directed that the matter be disposed off by way of written submissions. Ruling in this matter was scheduled for 1st February 2012, however the parties did not file written submissions by the date and since the matter was never argued orally, it became difficult for me to write ruling based purely on the pleadings. This has led to the delay in disposing the matter, I eventually received written submissions which had been filed by the applicant but had been left in the registry. I sincerely apologise for the delay.

The applicant's counsel submitted that the notice advertising the suit property for sale offends the mandatory provisions of **Section 33(4**) and **(b)** of the **AFC Act (Cap 323)** which obligates the respondent to carry out sale at the lapse of 21 days from the date of publication of the notice.

The provisions are said to be couched in mandatory terms and respondent is accused of failing to comply with the law.

It is also argued that the respondent has not exhibited a charge document or agreement executed by the applicant, allowing the respondent to dispose off the land in the event of default. It is argued that the letter of offer dated 18/11/2009 was just an offer which needed to be followed with an agreement after acceptance and it cannot be relied on as a contract authorizing the respondent to sell the property. To that

extent, counsel submits that the purported charge is null and void. The notification of charge is also faulted as not being in compliance with **Section 20** of the **Act** which provides that the same shall be executed by a General Manager appointed under **Section 9** of the **Act.**

It is submitted that the applicant upon realizing that he would not be able to meet his obligations invoked the provisions of **Section 21** and wrote the letter dated 08/6/2011 requested the respondent to postpone repayment or the time for the repayment without any success.

The section provides:-

> **"The Board may in its discretion postpone the repayment or extend the time for the repayment of a loan or for the payment of any interest payable thereon, but so that the maximum period for repayment in respect of any loan shall not exceed thirty years."**

It is argued that the circumstances of this case required the respondent to exercise discretion in favour of the applicant. Further that the respondent is not a financial institution like commercial banks whose purpose is to make money and the move it proposes is harsh and against the spirit of the Act to empower farmers in the country. Counsel contends that Parliament contemplated the circumstances facing applicant in enacting Section 21 and the statutory mandate of the respondent cannot be achieved if in every case of default even due to factors beyond the borrower's control, the borrower's property is sold to the highest bidder.

It is pointed out that the applicant has not refused to pay the loan but seeks that the respondent renders time and proper accounts. It is further submitted that the question as to whether a lender can exercise statutory power of sale without a charge document duly executed by the borrower and the implications properly explained to the borrower at the time of taking the loan is a matter which needs to be considered.

At the main hearing, and in this way offer protection of the applicant's rights under **Article 40** of the **Constitution of Kenya**, and will not cause any prejudice to the respondent.

I did not receive written submissions from the respondent's counsel.

The issues being contested and which are addressed by the applicant's counsel are:-

a. Whether the letter of offer did not amount to an agreement, and so there is no basis upon which the respondent can purport to enforce a contract.

b. The period within which the notice of sale was published was less than the mandatory statutory period provided under the law. This short notice thus hampered the applicant's right of redemption. Reference is made to Section 33(4) (b) of the AFC Act (Cap 323).

c. There was no duly registered charge executed by the applicant to warrant the respondent exercising its powers of sale.
d. The notification of charge is faulted for not complying with the provisions of Section 20 of the AFC Act.

e. There are sufficient ground to warrant forcing the respondent to exercise its discretion in favour of the applicant under Section 21 of the AFC Act.

f. The applicant is willing to pay the sum owing so long as the respondent renders an accurate account.

g. At the lapse of 45 days on the redemption notice, the bell is set to ring at the public auction, so the applicant's anxiety is not without a basis.

The uncontested facts are that:-

a. The applicant borrowed money from AFC, which sum was to draw an interest.

b. The applicant has not repaid the sum as they fell due.

c. The respondent has notified the applicant that it intends to exercise its statutory power of sale at the lapse of the period of notice.

What the applicant is required to demonstrate so as to obtain grant of injunction is:-

a. Whether there is established a prima facie case with probable success.

b. Whether damages would not adequately compensate the applicant in the event that the feared event takes place.

c. If (a) and (b) above fail then where does the balance of convenience tilt.

The AFC Act Section 20

"(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 repayment of the loan and the interest thereon subject to any prior registered charge.**

3. **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 assigning and transferring to the corporation, by way of mortgage to secure the loan and interest on it. . . ."**

The applicant's argument is that no such steps as provided in this section have been taken by the respondent.

In this regard the respondent has referred to a notification of charge which was lodged and registered against it to secure its interest and a copy of the notification has been annexed and marked RAO3.

The applicant cannot now begin to split horns saying there was an agreement, yet there is a copy of the loan agreement executed between himself and the respondent (annexed as RAO1). It is a letter of offer which has with it a certificate of acceptance duly executed by the applicant.

In any event if there was no such agreement, then how does the applicant explain the contents of his affidavit where he admits to obtaining a loan, depositing his title as security and his willingness to settle the outstanding loan?

That limb of his argument cannot stand whatsoever.

The respondent in its replying affidavit has not provided any information to challenging this allegation, and it will be necessary that such a demonstration be made.

The applicant has contested the existence of a registered charge and whether the letter of offer amounted to an agreement. I suppose the question here is whether there was acceptance so as to justify referring to

the relationship as a contract.

The other aspect which appears at this interlocutory stage to have a sustainable argument is the issue regarding the right of redemption *vis a vis* the provisions of Section 33(4) of the Act which provides that:-

> **"A sale under subsection (1) should not be held until:**
>
> b. **Twenty one days have elapsed since the date of publication of the notice.**

To my mind, without going into the detailed merits of the claim prematurely, the only arguable point, having considered both the applicant's affidavit and the replying affidavit, is whether the respondent complied with **Section 33(4) (b)** – when was the notice published and did not then give the applicant the required 21 days?

The statutory notice was issued on 18th November 2010, it gave the applicant 3 months before the sale. The publication is required under **Section 33(4) (a)** to be in the Gazette OR in a newspaper circulating in the area where the land is situated. The notice of sale was published in the gazette on 12/03/2012. This notification must not be confused with the 45 days Redemption notice which is required to be given by the auctioneer pursuant to **Rule 15(d)** of the **Auctioneers Rules 1997** or the Notification of sale by the Auctioneer under the same provision. It is clear to me that the respondent complied with the statutory notice and gave 3 months. The notification of sale referred to by the applicant was issued by Viewline Auctioneers and published in the Daily Nation Newspaper of 12th March, 2012 indicating the sale would take place on 30th March 2012. In terms of computing time, the date the notice was published would not be counted but the last day is inclusive. I confirm that by 3oth March 2012, the 21 days would not have elapsed and that sale would be contravening the provisions of the Act.

In my view this is the only arguable point in the entire process, that prima facie, the applicant has demonstrated that the respondent notification of sale did not honour the statutory provisions and the sale must not take place unless such compliance has been met.

I think issues such as facing the respondent to exercise its discretion under Section 21 of the Act to extend time for repayment is self-defeating – by virtue of the wording of the Act, such a decision is purely at the Corporation's discretion.

As I have pointed out, it is evident that the applicant is not just in arrears of repayments – he has never made any repayment. He has explained his difficulties, including the effects of drought and disease but that does not change the fact that the respondent may and has failed to make repayments as they fell due. The only fault demonstrated is the time within which the applicant should exercise its right under Section 33(b) of the Act.

Of course if the land is sold the applicant will suffer irreparable loss, knowing the value Kenyans attach to land, and the current economic trends when it comes to purchase of land. He may probably never be able to raise money to buy another parcel of land of equal size at a similar price that he obtained the current one (if he did not inherit it). However that is the more sentimental and sympathetic view, which by the way, he has not canvassed or advanced.

The realistic practical view is that which was expressed by A.G. Ringera (J) as he then was, in the case of **MOSES NGENYE KAHINDI V AGRICULTURAL FINANCE CORPORATION HCCC NO.1044 of 2001 (Milimani Commercial)** where he stated:-

> **"a person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. He does not therefore lie in the mouth of such a person to state that he would suffer an injury which cannot adequately be compensated in damages, if the lender realizes the security in question."**

That summaries the exact position here, made worse by lack of any attempt to repay the loan, with the

applicant indulging in a lot of shadowboxing, blowing hot and cold, by first claiming there is no contract, then offering to repay if proper accounts are taken, then urging the court to force its hand upon the respondent to exercise its discretion. Just as Ringera J, stated in the **MOSES NGENYE** (supra) case, the respondent is a lender of reprite and the applicant's loss if any, can adequately be compensated in damages where such an award to be made. This means that the 2nd principle in granting injunction as set in the infamous case of **Giella V Cassman Brown 1973 EA pg 358** has not been met.

The third option in the **Giella Principle** is the **"doubt option"** meaning if the court doubts that the applicant has demonstrated that he will suffer loss which cannot be adequately compensated by way of damages, then the court should consider where the balance of convenience tilts. In this case the balance would only tilt if the applicant has demonstrated what steps he has undertaken towards honouring his obligations to the respondent. Unfortunately there is none. He cannot be demanding accurate record of accounts when he knows so well he has not paid a penny to the respondent. It would appear to me that these are just simply ways of buying time and delaying the recovery of what the applicant owes. I do not think that under the circumstances it would be just to issue orders of injunction to persist until hearing and determination of the suit. My own view is that the sale must be **stopped** until the proper notice is given in compliance with **Section 33 (4) (b)** of the **AFC Act**. Each party shall bear its own costs.

Delivered and dated this 26th day of July, 2013 at Nakuru.

H.A. OMONDI

JUDGE