



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 416 of 2012

BENSON KABUGI MURIUKI.....PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....DEFENDANT

RULING

1. The application before me is the one dated 26th June, 2012 brought under the provisions of Section 63(c) & (e), Order 40 Rules 1, 2, 4 & 10, Order 51 Rule 1 of the Civil Procedure Rules by the Plaintiff seeking for orders, *inter alia* that pending the hearing and determination of the main suit, a temporary injunction be issued restraining the Respondent, its agents, employees auctioneers, or advocates 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 No. Nyeri/Warazo/124** (hereinafter “the suit property”). The application is premised on the grounds that the Applicant has repaid the loan advanced to him in full but the Respondent has continued to demand payments which are not due and owing, that the Respondent has purported to instruct auctioneers to dispose off the suit property and that the Applicant stands to suffer irreparable loss and being rendered destitute should the suit property be sold.

2. The application is supported by the Affidavit of Benson Kabugi Muriuki sworn on 26th June, 2012. The deponent averred *inter alia* that at all material times he made repayments to the loan which had been advanced to him by the Defendant on or about 9th January, 2004, that the Respondent has purported to sell his land **L.R No. Nyeri/Warazo/124**, that the Notices of Sale issued by the Respondent’s auctioneers dated 9th November, 2006 and 5th June, 2012, respectively are null and void and that the Respondent deviated from the terms of the letter of offer. In the Plaintiff’s submissions dated 14th September, 2012, it was submitted that the Plaintiff would suffer irreparable loss should the suit property be sold as he would be rendered destitute, that the matter was not res judicata as the matter had not been directly and substantially in issue in C.M.C.C No. 755 of 2005 and C.M.C.C No. 124 of 2010, that the matter had not been determined in the aforementioned suits and that the balance of probability tilts in favour of the Plaintiff. Counsel for the Plaintiff relied on the authorities of **Ngige –vs- Chomba & 3 Others [2004] 1 KLR 597**, **Bulhan & Another –vs- Eastern & Southern African Trade and Development [2004] 1 KLR 147**, **Manjit Singh Sethi & Others –vs- Paramount Universal Bank & 2 Others [2005] eKLR**, **Giella –vs- Cassman Brown (1963) E.A 358**, **Muriithi M’mbui & Another –vs- Housing Finance H.C.C.C No. 247 of 2006**, **Joseph Muli Kiilu –vs- Housing Finance of Kenya Limited & Another H.C.C.C No. 2003 of 2000**, **Givan Okallo Ingaro –vs- Housing Finance Ltd H.C.C.C No. 79 of 2007** and **Raj Kumari Gadhi v Barclays Bank of Kenya & Another [2005] eKLR**.

3. The Respondent in opposing the Application, filed Grounds of Opposition dated 28th June, 2012 and a Replying Affidavit sworn on 18th July, 2012. The Respondent contended that the matter is *res judicata*, that the application is without merit and does not meet the grounds for the grant of the orders sought, that the Plaintiff had filed previous suits in which the matter was determined, that the Respondent had satisfied all the requirements in exercise of its statutory power of sale and that the Plaintiff had failed to satisfy the principles for issuance of an injunction and had not come to court with clean hands.

4. In the submissions dated 16th October, 2012, the Respondent submitted that the Plaintiff had filed previous suits that were directly and substantially similar to the present suit, that the suits were filed to frustrate the Respondent's statutory power of sale, that the Plaintiff had offered his property i.e. L.R No. Nyeri/Waroza/124 as security for a loan advanced to him, that the sums advanced have not been repaid and that the Plaintiff is guilty of non-disclosure of material facts. The Respondent relied on the authorities of **Moses Ngeny Kahindo –vs- Agricultural Finance Corporation Milimani High Court No. 1044 of 2001**, **Joseph Okoth Waudi –vs- National Bank of Kenya Civil Appeal No. 77 of 2004** and **Giro Commercial Bank Ltd –vs- Halid Hamad Mutesi Civil Appeal No. 342 of 2000**.

5. I have considered the Affidavits on record, written submissions and the authorities relied on. Two issues arise for determination. These are whether the matter is *res judicata* and whether an injunction can issue in the circumstances of this case. On the issue of *res judicata*, the Respondent has relied on the facts that the Plaintiff had filed two previous suits i.e. C.M.C.C No. 755 of 2005 and C.M.C.C No. 124 of 2010. The Respondent has contended that the Plaintiff is guilty of material non-disclosure in that he had failed to disclose the existence of these previous suits. I think that submission is not correct. The Plaintiff did disclose in paragraphs 15 and 18 of the Supporting Affidavit the existence and the fate of the said two (2) suits. Accordingly, I reject that contention.

6. As to whether the matter is *res-judicata*. Firstly, no ruling or order in CMCC No. 755 of 2005 was produced by the Respondent. As regards CMCC No. 124 of 2006, the same was struck out for want of jurisdiction. This was because the value of the suit seems to have been more than Kshs.500,000/-. The suit property was registered under the Registered Act, Chapter 300 of the Laws of Kenya (now repealed). Under Section 159 of that Act, all suits touching on any property whose value was in excess of Kshs .500,000/- were to be filed in the High Court. The suits having been filed in Chief Magistrate's court, that court did not have any jurisdiction (as was held in CMCC No. 124 of 2006) to determine any issue regarding the dispute at hand. Accordingly, any determination made therein was but a nullity and the plea of *Res-Judicata* does not therefore arise.

7. This is an injunction application. The principles applicable are well known as enunciated in the case of **Giella –vs- Cassman Brown**. These are that the Applicants should establish a *prima facie* case with a probability of success, that damages are not an adequate remedy and that if the court has any doubt, it will decide the matter on a balance of convenience. *Prima facie* case had been defined by the Court of Appeal in the case of **Mrao –vs- First American Bank of Kenya Ltd 2003** to be a case where on the material presented, a tribunal directing itself properly will find that there is a right of the Applicant that has been breached by a Defendant requiring a rebuttal by the latter. The question is, is there any right of the Plaintiff in this case that has been breach requiring a rebuttal by the Defendant?

8. It is not disputed that the Plaintiff did take a loan from the Defendant of Kshs.592,500/- in or about January, 2004 at the interest rate of 10% per annum. The amount was repayable by monthly instalments of Kshs.14,850/-. The total amount was repayable within a period of two (2) to five (5) years on the different disbursements depending on the five items for which the loan was disbursed. The Plaintiff has stated that he has over paid the Defendant, that the Defendant charged him amounts that were not agreed upon. He produced a report by an entity known as IRAC (Interest Rates Advisory Centre) which showed that he amount overpaid was kshs.624,138/03. The Respondent 's contention is that the amount due was Kshs.756,652/71 as at 31st October, 2012 and produced a statement of account signed by three (3) Bank officials on 12/7/12, 16/7/12 and 17/7/12, respectively.

9. I have critically examined the said statement and the following are the results:-

- a) The Amount borrowed - Kshs.592,500/-
- b) Total amount paid to date - Kshs.1,695,537.11
- c) Instalment interest - Kshs.177,337.59
- d) Installments - Kshs.769,837.59
- e) The amount outstanding
as at 31/10/12 - Kshs.756,652/71.

From the foregoing, the items debited to the account are (a), (c) and (d). Other debits included Auctioneers fees, late fees of Kshs.768,800/61, Account maintenance fees, F/Notice, Farm Inspection and mileage fees.

10. I have carefully examined the letter of offer dated 9th January, 2004. Whilst the charging of interest at 10% p.a variable was agreed on, I do not see any authority of provision to charge late fees, a charge called Installment or any of the other charges. While the item called Installment debited to the account is completely alien to the court and was not explained by the Defendant, I wish to refer to Clause 19 of the letter of offer dated 9th January, 2004. The same provides:-

“19. If the borrower shall default in the full and punctual payment of any installment of interest or principal, or if the borrower shall default in the observance and performance of any covenant or condition contained in this agreement or implied in the security, or if the loan or any part thereof shall not be applied for the purpose(s) for which it was made and within the time specified..... the corporation shall be at liberty to:-

a) Refuse to pay any remaining balance of the loan not disbursed, and/or

b) At once proceed to call in and recover the money already disbursed together with interest accrued thereon.”

Nowhere does it state that the Defendant will charge late fees. In my view, the **late fees** and the item referred to as installments 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.

11. Accordingly, in my view, the Plaintiff has established a strong prima facie case with a probability of success.

12. Are damages an adequate remedy. I do not think so. The Plaintiff has sworn that the suit property is his matrimonial home. It may well be where he and his family reside. Whilst I appreciate that once a borrower gives his property as a security the same becomes a commodity for sale, it cannot be so in this case where the Plaintiff's rights may have been breached. One cannot be left to lose his matrimonial home in the circumstances where there is prima facie evidence that there may be no monies due.

13. In my view, the balance of convenience tilts in favour of the Plaintiff. Let him continue occupying his matrimonial home until the case is determined.

14. Accordingly, I do allow the application in terms of Prayer Nos. 3 and 4 of the Notice of Motion dated 26th June, 2012.

DATED and DELIVERED at NAIROBI this 3rd day of December 2012.

A. MABEYA
JUDGE