



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 446 of 2009**

**BASIL CRITICOS (alias BASIL VASSILIS CRITICOS) ..... PLAINTIFF**

**VERSUS**

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

**RULING**

**1.** The plaintiff/applicant and Mama Ngina Kenyatta (not a party to this suit) obtained a loan of Ksh.14,185,000/- from Agriculture Finance Corporation in July 1990. The said loan was to be repaid with interest at the rate 12% per annum within a period of seven (7) by a 1<sup>st</sup> installment of a sum of **Ksh.3.108,185** per year with effect from 30<sup>th</sup> September 1991. The other installments were to be paid as per the schedule of payments which was attached to a charge registered on 20<sup>th</sup> July 1990. The plaintiff and Mama Ngina Kenyatta are also the registered proprietors of **LR NO. 6731 and 6732 in Taveta District** (hereinafter referred to as the suit premises). Subsequently the record shows a transfer was signed by which Mama Ngina Kenyatta exchanged her interests in the suit premises with the plaintiff and the plaintiff now claims to be the beneficial owner of the premises.

**2.** The plaintiff contends that due to unfavorable conditions brought about by a combination of factors in the farming industry, he was unable to service the loan and fell in arrears. In 1996 the defendant attempted to sell the property under the charge but the plaintiff filed **HCCC Misc 1497 OF 1997 (OS)** challenging the said sale. That suit was dismissed for want of prosecution. In 2006 the defendant tried to sell the property again and the plaintiff filed another suit being **Miscellaneous Civil suit No. 473 of 2006 (OS)**. That suit was withdrawn on agreed terms that both the plaintiff and the defendant would sell part of the suit premises and use the proceeds of the sale to clear the legitimate, lawful, contractual and statutory indebtedness to the defendant.

**3.** The plaintiff contends that since 1990 to 2007, there were various correspondences exchanged between him and the defendant regarding the outstanding loan. The plaintiff claims that he was never furnished with a statement of accounts bearing the particulars of the principal sum borrowed

and the interest rates charged. Sometimes in the year 2008, the parties agreed to sub divide and sell the suit land and the proceeds of the sale be applied to offset the true debt as a lasting solution to the outstanding loan. The defendant agreed to the subdivision so that the suit premises could easily be disposed of and they also agreed on the redemption figure of **Ksh.36,600,000/=** against an accumulated balance of over **120 million**. Those were some of the conditions agreed upon for withdrawing **Misc. Civil suit No. 473 of 2006**.

4. The Board of Directors of the defendant approved the settlement but the time frame imposed of 90 days was not viable and feasible to the plaintiff. The parties exchanged correspondence regarding the terms against which the defendant was to release the title documents. Several meetings were held about the subdivision. The consents to subdivide the land as well as the Land Control Board Consents to transfer the portions to the prospective purchasers were applied for. However there are several allegations in the supporting affidavit by the plaintiff to the effect that the process of obtaining necessary consents was frustrated by the local District Commissioner of Taveta District and the Local Member of Parliament. The property has also been invaded by unauthorized persons who destroyed the beacons established by the surveyor and the trespassers have been farming and using the land.

5. The plaintiff made several complaints to the local police and to the District Commissioner without any response. However the subdivision and the sale which included the defendant has been substantially implemented and a joint account was opened between the advocates for the plaintiff and defendant to receive the proceeds of some of the plots carved out of the suit premises. Amidst all these efforts, it is alleged that the defendant adopted a non committal disposition since early 2009. This is exacerbated by the defendant's procrastination and attempts to alter the terms of agreement. This culminated with the defendant issuing a letter to the plaintiff dated 29<sup>th</sup> May 2009 in which it is claiming **Ksh.263,102.911.65/-** as the outstanding loan and threatening that unless the entire loan is paid within thirty days, the defendant would enter upon, and take possession of the suit premises with the liberty to use it and dispose of the same.

6. This is what prompted the filing of this suit and the chamber summons dated 23<sup>rd</sup> June 2009 in which the plaintiff is seeking for an order to restrain the defendant its agents, servants or employees from interfering with the plaintiff's suit premises until the hearing and determination of this suit. This application is based on the grounds inter alia that the charge dated **20<sup>th</sup> July 1990** pursuant to which the defendant seeks to invoke the provisions of **Section 33 of the AFC Act** is invalid and **void ab initio** as it is in breach of **Section 26 of the AFC Act**. The charge was drawn by **Mrs. G.N Taraiya, Advocate** who did not hold a practicing certificate in 1990. Also the signature of the plaintiff was witnessed by **Mvati Advocate** who did not hold a practicing certificate and this was confirmed by a letter from the Law Society that the two Advocates did not have a practicing

certificate for the year 1990.

**7.** The defendant is a statutory body created under the Agriculture Finance Corporation Act and pursuant to the provisions of **Section 26(2)** the mortgage should be created under the prescribed written law or in such form as the Board may prescribe. According to Mr. Wanyonyi Learned counsel for the plaintiff, this charge was drawn by unqualified person. It was held in the case of **Wilson Ndoro Ayah vs National Bank of Kenya HCCC NO. 1723 OF 1997** that a document drawn and attested by unqualified person is ***null and void***. This was also held in the case of ***Omulo vs Small Enterprises - Finance Co. Ltd & Another [2005] 1KLR. Warsame J*** held that a document prepared by unqualified persons acting as an advocate who are not qualified under **Sections 31, 33 and 34 of the Advocates Act are null and void.**

**8.** Accordingly, the plaintiff has a prima facie case with a probability of success and damages would not be adequate remedies because the defendants' actions are illegal. These anomalies were brought to the attention of the defendant through various correspondences exchanged between the parties. However the defendant has proceeded to issue foreclosure notices on the suit premises. The plaintiff's claim is based on the validity of the charge. Counsel for the plaintiff further submitted that the issue of ***res judicata*** did not arise in this case because the previous suits were never heard on merit and the same issue of the validity of the charge was not before the court. Counsel for the plaintiff also relied on very extensive written submissions and authorities.

**9.** This application was opposed; the respondent relied on the replying affidavit of **Rose Akinyi Ochanda** sworn on 30<sup>th</sup> October 2009. Mr. Nyanchiro learned counsel for the defendant also relied on his written submissions. It was argued that the plaintiff admitted the indebtedness. There was an elaborate arrangement to settle the matter out of court. Pursuant to those negotiations, **Misc HCCC NO 473 OF 2006** was withdrawn. That suit which was seeking for orders of injunction was compromised by the parties so that the suit premises could be sold to raise the amount required to pay the debt. In consideration of the settlement, the defendant bent backward and gave a concession. It was thus submitted that the plaintiff, is estopped from seeking to have the charge declared a nullity and to stop the subdivision which was agreed in that compromise.

**10.** It was further submitted that if the orders sought were to be granted, this will create a multiplicity of suits because there are third parties who are already involved as purchasers of the suit premises pursuant to the agreements. The plaintiff has not given an undertaking for damages. It was argued that the charge was drawn by **Mrs. Taraiya** who was an employee of the AFC. She was not at the time practicing as an advocate for gain and the charge document was drawn pursuant to the AFC Act. Moreover the agreement which was entered into as the documents annexed to this application will demonstrate. It is now a pattern that the plaintiff has perfected of filling cases to

frustrate the defendants' efforts to realize the security.

**11.** This application by the plaintiff seeks for an interim order of injunction pending the hearing and determination of the suit. The plaintiff's sole complaint is that the charge against which he was advanced a loan of **Ksh.14,185,000/-** in July 1990 was drawn by G.N. Taraiya Advocate who did not possess a practicing certificate. The plaintiff's own signature was witnessed by Mr. Mvati Advocate who also did not possess a practicing certificate. The plaintiff admits having borrowed the money and having fallen into arrears. Documents are attached especially communication by the plaintiff in which he requested or proposed to pay a sum of **Ksh.28,370,000/-** in full and final settlement of the principal loan and the interest. This letter was written on 2<sup>nd</sup> April 2008. It was followed by intense negotiations and the plaintiff agreed to a settlement of 36 million but to be paid as per the set out conditions.

**12.** This loan as with all loans with the defendant is governed by the **AFC Act Cap 323 of the Laws of Kenya**. The charge that was registered in respect of the suit premises provides that if the principal and the interest advanced to the plaintiff was not paid as provided in the charge the whole amount shall become due and payable and the charge is subject to **AFC Act Cap. 323 of the Laws of Kenya**. This charge was created pursuant to Section of the AFC Act which provides:-

*“(1) A loan shall bear such rate of interest as the Board with the approval of the Minister for the time being responsible for finance given after consultation with the Minister, may prescribe either generally or for any particular class of loan.*

*(2) A mortgage given under this act shall be in such form as is prescribed under any written law relating to that mortgage or, where no such form is prescribed, in such form as the Board may determine.”*

**13.** Accordingly, the charge should be drawn according to the provisions of section 46 of the Registration of Titles Act. It is admitted that **Mrs. Tayaiya** did not have a practicing certificate for year 1990 but it is contended that she drew the documents as an employee of the defendant which is statutory body. She was not practicing as an advocate. This suit is wholly predicated on the validity of the charge, and a further argument that although the loan taken is payable as a contract inter parties it is time barred under the Limitation of Actions Act.

**14.** The elements to bring to bear on whether or not to grant an application for injunction are well settled; firstly, the applicant has to establish that they have a prima facie case with a probability of success. Secondly, irreparable harm which may not be compensated for in damages would arise, and if the court is in doubt the matter should be determined on a balance of convenience. See the oft' cited case of **Giella vs. Cassman Brown and Company Limited 1973 EA 358**. The Court of Appeal has explained in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others**

**[2003] KLR 125** what constitutes a prima facie case in the following terms:

***“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

**15.** The facts of this matter will require to be taken through all the tests. There are provisions under the AFC Act, which give leeway to the defendant to deal with their own loans differently from normal Commercial loans. This is understandable because the objects of the defendant is to assist the farmers and in particular to develop agricultural industries. This charge was however drawn under the Registration of Tittles Act. The other issue which has caused this court considerable anxiety is the fact that the charge was witnessed by the plaintiff’s own advocate. It is the plaintiff who appeared before his advocate and the issue of why he appeared before unqualified person will also be an issue. Alongside the issue of the suit which was withdrawn on the understanding that the parties could sell the suit land, and the non payment of the outstanding loan since 1990. In other words I find the defendant has issues to explain the trial court regarding the charge which was signed by unqualified person and the plaintiff too has issues; why he signed the document before unqualified person, and whether he is estopped from filling this fresh suit and his failure to pay the loan which was advanced to him in 1990.

**16.** Regarding the second element, that the plaintiff will suffer irreparable loss, it is not clear to this court, because the suit property was turned into collateral. On the other hand if the injunction is granted the defendant who utilized public funds meant for farmers which loan has not been paid for over 20 years will suffer some harm. On the balance of convenience, I find the parties had covered considerable ground to realize the agreements entered into after the suit was compromised and the parties agreed on the settlement sum and the property be sub divided and sold jointly to offset the loan.

**17.** It is contended that pursuant to that agreement, the land was subdivided and money has been received from some third parties. This leads me to the dilemma I face in this matter on what will happen to the innocent parties who deposited their money pursuant to the joint sales. The sales were being undertaken jointly by the plaintiff and the defendant. The plaintiff has also been filing a multiplicity of the suits regarding the subject matter every time the defendant tried to realize the security created under the charge.

**18.** A solution to this matter must be found, in my humble opinion the solution the plaintiff and the defendant had identified whereby the defendant gave a concession on the outstanding loan and the parties embarked on the subdivision and the sale of the property charged is reasonable. If that process is stopped by an order of injunction until the suit is heard and determined, will that be in

furtherance of substantive justice? In this case there are Undisputed Facts that the loan does exist only the charge is challenged and it would appear this challenge was pointed out when the exercise of the sale started facing some challenges in the last one year. For that reason even if the charge were to be found null and void there is a contract that is enforceable inter- parties. I have already pointed out that the issue of Limitation in view of the various agreements in my view does not hold much.

**19.** On the balance of convenience, considering that the plaintiff admits having borrowed the loan, this is public money meant to develop farmers and farming industry, the plaintiff has not made any payments since 1990, it will not be in the interest of justice to grant an injunction without conditions. The condition to be imposed is that the plaintiff should deposit the sum of **Ksh.14,185,000/=** being the principle loan. That sum should be deposited in an interest earning account to be held by the plaintiff's Advocates and the defendant within thirty (30) days of this order. Failure to make the deposit this injunction shall lapse. The parties are also directed to complete discovery and set down the matter for hearing which should be given a priority date.

**RULING READ AND SIGNED ON 16<sup>TH</sup> JULY 2010 AT NAIROBI.**

**M. K. KOOME**  
**JUDGE**