REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
Civil Miscellaneous Application 1170 of 2006

SAID MWANIKI HAMISI……..…….APPLICANT
VERSUS

AGRICULTURAL FINANCE
CORPORATION ……...……..RESPONDENT

JUDGMENT

The applicant filed suit by originating motion pursuant to the provisions of **Order XXXVI Rule 3(A – F)** of the **Civil Procedure Rules** seeking orders of the court to compel the respondent to discharge the charge in respect of LR. Nos. 7495 & 9340 *(hereinafter referred to as the suit properties)*. The applicant alleged that he had paid in full the debt owed to the respondent and was therefore entitled to the discharge of charge and the release of the title documents. The suit was filed way back in 1996 at the Nairobi central registry before it was transferred to this court for hearing and final disposal. The originating summon is supported by the annexed affidavit of the applicant. The suit was opposed by the respondent. Richard K. Malel, the then credit controller of the respondent, swore a replying affidavit in opposition to the suit. In the said affidavit, he deponed that, contrary to the applicant's assertion that he had completed paying off the debt owed to the respondent, applicant then still owed the respondent a substantial sum of money.

Subsequent to the filing of the suit, the applicant and the respondent engaged in out of court negotiations with a view to amicably settling the matter out of court. The negotiations were prompted by the respondent's decision to write off a substantial part of the debt that was then owed by the applicant. According to the applicant, he made an offer to pay to the respondent the sum of Kshs.350,000/= in full and final settlement of the debt then owing. The applicant made this offer on 28th January 1998. It is the applicant's case that on 25th March 2003, the respondent notified him that it had written off the entire debt that he owed to the respondent. The only amount that the respondent required the applicant to pay was the respondent's advocate's fees. The applicant complained that despite agreeing to pay the respondent's advocate's fees which was ascertained at Kshs.70,967/=, the respondent failed to discharge the charge and release the title documents in respect of the suit properties.

The respondent countered the argument advanced by the applicant by denying the applicant's allegation that it had agreed to write off the entire debt owed to it by the applicant. To the contrary, the respondent asserted that it had only written off the sum of Kshs.4,829,639.49 from the debt owed by the applicant. There was an outstanding balance of Kshs.523,423.23 which was then yet to be paid. The respondent communicated the decision to the applicant vide its letter of 31st May 2004. The applicant was not agreeable to paying the said sum of Kshs.523,423.23 because in his considered view, the respondent had earlier communicated to him that it had waived the entire amount owing in respect of the said loan account. Having evaluated affidavit evidence adduced by the applicant and the respondent in that regard, I hold that the applicant was unable to establish that indeed the respondent had written off the entire debt. The applicant placed reliance on *"without prejudice"* communication between his advocate and the advocate for the respondent. No evidence was adduced to suggest that the respondent had waived its rights in regard to the admission of the said letter into evidence.

"*Without prejudice"* communications are not admissible in evidence unless the party who wrote the communication waives his right. There are instances in which *"without prejudice"* communications may be admitted in evidence. For example, a *"without prejudice"* communication may be admitted into evidence where it is established that the *"without prejudice"* communication subsequently led to the settlement of the matter in dispute. In the present suit, there is no evidence that the parties reached a settlement subsequent to the said

"without prejudice" communication. I am prepared to accept as a fact that the respondent wrote off a substantial sum that was then owed by the applicant but left a balance of Kshs.523,423.23.

There are two interlocutory applications that the applicant filed which have a bearing to the decision that this court will subsequently render. In the first application filed on 27th October 2005, the applicant sough to be allowed to deposit in an interest earning account the sum of Kshs.523,423.23 which it alleged was a disputed amount. The applicant further sought an order of the court to compel the defendant to release the title document in respect of the suit properties. Although the respondent opposed the application, the same was allowed by Kasango J who directed the applicant to deposit the sum of Kshs.1 million in an interest earning account. The learned judge further directed the respondent to release to the applicant the title documents in respect of the suit properties together with the duly executed discharge of charge in respect of each property. The applicant did comply with the said order of the court. He deposited the said sum of Kshs.1 million in a joint interest earning account. The respondent also complied with the order of the court. It has released the title documents together with the duly discharged documents to the applicant.

In a subsequent application filed on 24th August 2007, the respondent sough to have the entire sum of kshs.1 million released to it on the ground that it had complied with the order of the court by releasing the title document of the suit properties to the applicant. The applicant opposed the application. After considering the opposing arguments of the parties, this court directed that the sum of Kshs.594,399.32 (Kshs.523,423.23 + 70,967/=) be paid to the respondent. The balance of the amount was to be released to the applicant. According to the respondent, after the court had issued directions that the said sum be paid to it, it is of the opinion that the applicant has paid in full the amount owed to it. The respondent however insists that the applicant be compelled to pay it costs of the suit. The applicant on his part, is of the view that the court should reach a finding that the respondent waived the entire loan that he was alleged to owe and therefore he should be refunded the sum of Kshs.594,399.32 that was ordered to be paid to the respondent. The applicant further prays that the respondent be ordered to pay the cost of the suit.

Having carefully evaluated the facts of this case, I formed the firm view that by paying the said sum of Kshs.594,399.32, the applicant settled its financial obligations to the respondent. As stated earlier in this judgment, there was no evidence to suggest that the respondent had waived the entire amount in the applicant's loan account. The respondent informed the court that it is demanding nothing from the applicant in regard to the said loan agreement save for costs. The respondent conveniently forgot that part of the said sum of Kshs.594,399.32 that was it was paid as directed by the court was its advocate's costs. The title documents in respect of the suit properties are now in possession of the applicant. The respondent has duly discharged the charges that had been registered as encumbrances in respect of the titles of the suit properties.

The order that commends itself to this court with a view to finalizing this suit is that I hold that the applicant's and the respondent's respective claims in this suit have been satisfied. The applicant's claim was satisfied when the title documents were released to him. The respondent's claim was satisfied when the sum of Kshs.594,399.32 was paid to it. None of the parties herein are entitled to costs. Each party shall bear his/its own costs. The suit is concluded. I direct that the suit herein be marked as settled.

DATED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2009

L. KIMARU
JUDGE