



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**Civil Suit 41 of 2009**

**FOUR FARMS LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**AGRICULTURAL FINANCE CORPORATION...DEFENDANT/RESPONDENT**

**RULING**

The plaintiff has moved the Court by Chamber Summons dated 17<sup>th</sup> February, 2009, and bearing one main prayer:

*that after the inter partes hearing of this application, the defendant by itself, its servants, agents or otherwise be restrained from selling, auctioning, repossessing, foreclosing, alienating or in any way whatsoever interfering with parcel of land known as L.R. No. 544 [Org. 482/3] Section III Mainland North until the final hearing and adjudication of this suit.*

The Primary grounds upon which the application is founded, are set out as follows:

- (i) *the plaintiff is the registered owner of the parcel of land known as L.R. No. 544 [Org. No. 482/3] Section III Mainland North;*
- (ii) *the plaintiff borrowed a sum of money from the defendant sometime in 1985 for the purpose of carrying out agricultural activities on the said land, and the defendant on that basis took a charge on the said land;*
- (iii) *for reasons beyond its control, the plaintiff fell into arrears with loan repayments;*
- (iv) *by an agreement dated 9<sup>th</sup> November, 1987 the parties agreed on sub-division and sale of the charged land, the proceeds of sale being used to settle the plaintiff's indebtedness; and the effect of this agreement was to vary the original loan agreement, such that the defendant could not exercise its statutory power of sale;*
- (v) *the defendant conducted auctions and sold various assets of the plaintiff, but no records at the sum realised was furnished to the plaintiff;*

- (vi) *the plaintiff does not know whether his account for loan repayment was credited with the sums realized from the auction of the various properties;*
- (vii) *the agreement regarding sale of the charged property made on 9<sup>th</sup> November, 1987 was later confirmed by a consent order between the plaintiff and the defendant, in HCCC No. 652 of 1988, on 24<sup>th</sup> November, 2000;*
- (viii) *the defendant failed to receive cheques emanating from the sale of the sub-divided parcels, and this caused fear in the prospective buyers, and frustrated further sales of the said sub-divided parcels of land;*
- (ix) *the defendant's intended auction is unlawful, as the defendant has not provided accounts for the monies being claimed from the plaintiff;*
- (x) *the defendant had unlawfully appointed a receiver who sold cattle and other assets without giving accounts to the plaintiff of the monies realized from such sale;*
- (xi) *it is contended that no sums are due from the plaintiff to the defendant, on account of the loan advanced in 1985;*
- (xii) *it is fair and just that the defendant be restrained from proceeding with unlawful auctions.*

Relevant matters of fact are set out in considerable detail, in the supporting affidavit of *Hussein Nurmohamed*, the applicant's managing director.

Learned counsel, *Mr. Rashid* came to defend the respondent's position, even though he was labouring under the disadvantage of having filed no replying papers; he lacked a document of evidence to rely on. This leaves the depositions made for the applicant to stand or fall by themselves; and counsel would largely have to depend on points of law.

It was clear that learned counsel was not keen to be constrained by the second agreement after the charge-agreement between the parties. Obviously the charge agreement of 1985 gave the chargee certain rights; but the very same parties found a preferred solution to the plaintiff's indebtedness: on 9<sup>th</sup> November, 1987 they agreed that sub-division and sale of the charges land would equally protect the lender's interests.

*Mr. Rashid* urged that "the loan is a secured one; and the defendant ought to be allowed to exercise its statutory power". Counsel submitted that the plaintiff had admitted its indebtedness; and so "the actions of the defendant are well within the statutory provisions". Counsel contended that the suit herein is "an attempt to frustrate recovery".

Learned counsel *Mr. Oguk* urged the intended exercise of chargee's powers, by the defendant, to be unjustified because there was no accounting basis to support it. Counsel recalled the content of the defendant's letter to the plaintiff, dated 8<sup>th</sup> September, 2005:

*"Kindly note that we have been unable to give you a substantive response to the proposal made by yourselves to us during our meeting on 21<sup>st</sup> April, 2005 as it is necessary for us to first establish the amount collected by our advocates....., the number of parcels of land sold, their acreages and the size of the land that was left unsold. The Corporation had diligently sought this information from these advocates and continues to do so to-date"*.

Learned counsel brought to the Court's attention an annexure to the supporting affidavit, a published (*The Standard*, 27<sup>th</sup> January, 2009) intended sale of the plaintiff's land; and he urged that restraint orders be made against such intended sale. The said advertised sale in part reads: "Under instruction received from our principals, the chargees, we shall sell the undermentioned property....."

It is clear to me that the defendants reserved for themselves two avenues leading towards a realization of their chargee's interest: the first was in the original charge agreement with the plaintiff herein; the second was in the agreement of 9<sup>th</sup> November, 1987. The defendant's entitlement, in law, was one, namely, to have its loan to the plaintiff repaid. That loan, obviously, would accrue interests over the years, from the time it was advanced in 1985. The critical basis for making a lawful demand for repayment of the said loan, would be a detailed, computed statement showing how the amounts now demanded have evolved.

Although the defendant now announces its intention to protect its chargee's interests by selling off the plaintiff's properties, there is no evidence of any attempt to provide rational statements showing the accrual of the sums being demanded.

A similar difficulty in the *bona fides* of the amounts now claimed by the defendant, arises from the fact that the defendant voluntarily consented to an alternative method of recovering the unpaid loan money – by the agreement of 9<sup>th</sup> November, 1987, whereunder the plaintiff's land would be sub-divided and sold. Not only was some progress made in the sale of such sub-divided parcels of land, but the defendant went further and effected sales of certain effects being on the plaintiff's land. Such are drastic steps, with the effect of creating an effective new, agreed mode of realizing the chargee's interest. Since some considerable action has already been taken by the defendant in realizing the terms of the agreement of 9<sup>th</sup> November, 1987, it ceases to be equitable for the defendant to return to the terms of the original charge agreement, before giving a full account of the monies realized from the actions taken under the agreement of 9<sup>th</sup> November, 1987. Only with such account faithfully given, can it become an issue whether or not to return to the terms of the original charge agreement.

I hold, therefore, that the defendant has not met the conditions which, alone, will provide the justification for proceeding under the original charge agreement. This ruling has set out in detail the essential accounting responsibilities which the defendant must perform, as the validating condition for it to proceed under the terms of the original charge agreement.

Consequently, I allow the plaintiff's application with costs, and order that the defendant by itself, its servants, agents or otherwise, shall be restrained from selling, auctioning, repossessing, foreclosing, alienating or in any way whatsoever interfering with the parcel of land known as L.R. No. 544 [Org. 482/3] Section III Mainland North, until the final hearing and determination of the main cause.

*Orders accordingly.*

DATED and DELIVERED at MOMBASA this 6<sup>th</sup> day of November, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: *Ibrahim*

For the Plaintiff/Applicant: Mr. Oguk

For the Defendant/Respondent: *Mr. Rashid*