



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI(NAIROBI LAW COURTS)**

**Misc Civ. Appli. 1170 of 2006**

**SAID MWANIKI HAMISI.....APPLICANT**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION .....RESPONDENT**

**RULING**

On the 30<sup>th</sup> January 2007, Kasango J delivered a ruling in this suit in which she directed the respondent release the title documents in respect of Parcels Nos. L.R. No. 7495 and L.R. 9430 together with the duly executed discharge of charge in respect of each property to the applicant. She further ordered the applicant – said Mwaniki Hamisi – to deposit in a joint interest earning account the sum of KShs.1,000,000/=. Pending further orders of the court. The said account was to be maintained in the joint names of the counsel of the parties to the suit.

By an application dated 24/8/2007, the respondent sought to have the said amount of KShs.1,000,000/= released to it on the grounds to that it had complied with the order of the court requiring it to release the title documents of the suit parcels of land to the applicant. The respondent further stated that it had issued discharge of charge in respect of the said suit properties. The

applicant is opposed to the said release of the monies deposited. Mr. Chege for the applicant argued that since the applicant insists that he had repaid in full the loan that was advanced to him by respondent, and further since the applicant was of the view that pending the hearing and determination of the suit the said amount should remain so deposited, it would be imprudent for the court to order the release of the said deposited sum.

I have carefully considered the rival arguments made by the parties to this application. It is not disputed that the applicant borrowed certain sums of money from the respondent. As security for the advance of the said loan, the applicant charged two of his properties to the respondent. The two properties are parcels of land Nos. L.R. No.7495 and LR No.9430. It is apparent from the pleadings filed by the parties that there is a dispute the applicant still owes any monies in respect of the said loan advanced to him by the respondent. Kasango J in her ruling observed that there was a dispute as to the actual amount, if any, owed by the applicant to the respondent. Due to the exigencies of the particular time (*i.e. since the applicant had intended to sell one of the suit properties that was charged to the respondent*), the Learned Judge ordered the respondent to release the duly discharged titles in respect of the suit properties to the applicant.

I think the respondent has raised a valid point when it argued that since the applicant now has in his possession the titles that had previously been charged to the respondent, it is only fair and just in the circumstances that the amount presently deposited in the joint interest earning account be released to it. I have however noted that the actual amount which was claimed by the respondent was at the time the suit was filed KShs.523,432/32 plus costs of KShs.70,967/=. The total amount thus claimed by the respondent is KShs.594,399/32. I have excluded interest in the computation of the amount claimed by the respondent.

Mr. Chege for the respondent submitted that the interest of the respondent is secured since the said amount remains deposited in the joint account out of the reach of the applicant pending the hearing and

determination of the suit. That could be the correct position if the respondent was an ordinary trading company. The respondent is a financial institution. Its business is dealing in money for the purposes of generating profit. As long as the said amount is not in the actual possession of the respondent, it cannot be argued that the respondent's position is secured by the interest earned in the joint interest earning account in another financial institution. The opportunity cost for such withholding of the said amount from the possession of the respondent cannot be easily quantified. This is more so when it is apparent that it is uncertain when this suit will be heard and determined since the parties herein appear not keen to fix the suit for substantive hearing.

It is my view that the respondent has made a case for the release of the said amount currently deposited in the joint account in the names of the counsel of the parties to this suit. The applicant will not be prejudiced by the order of release since, in the event that the court finds in his favour, the respondent shall be compelled to refund the sum so released to it. In the premises therefore, I will allow the application but on the following terms;

(i) The sum of KShs.1,000,000/= (plus interest) currently deposited in the joint interest earning account in the names of the counsels of the parties to this suit shall be withdrawn and allocated as hereunder;

(a) The sum of KShs.594,399/35 shall be paid forthwith to the firm of Kembi Gitura & Company Advocates for onward transmission to the respondent.

(b) The balance of the amount shall be released to the firm of Amolo & Gachoka Advocates on behalf of the applicant.

(ii) The parties are hereby ordered to conclude all the preliminaries in this suit, including seeking appropriate directions within thirty (30) days of today's date so that this suit may be fixed for hearing at the civil registry on priority basis.

(iii) Costs shall be in the cause.

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF SEPTEMBER, 2008.**

**L. KIMARU**

**JUDGE**