



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1044 of 2001

MOSES NGENYE KAHINDOPLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....DEFENDANT

J U D G E M E N T

The Plaintiff Moses Ngenye Kahindo contracted with Victor Njoroge Kogie whereby the Plaintiff agreed to buy Mr. Kogie's property namely Naivasha Town Block 1/22. It is important to note that Mr. Kogie is not a party in this action. He was at the material time an employee of the Defendant. Indeed the plaintiff in his evidence stated that he was a senior officer that is a Senior Principal Loans Officer with the Defendant. At the time when the Plaintiff agreed to buy the aforesaid property the same was charged with the Defendant. In his evidence he said that Mr. Kogie informed him that he was in arrears in his loan repayments to the defendant. It was for that reason that Mr. Kogie desired to sell his property to clear those arrears. The plaintiff said that at first his response was that he was not in a financial position to be able to buy the property. Mr. Kogie was willing to arrange for him to obtain financial assistance from the defendant to buy the property. Mr. Kogie went to Headquarters of the defendant obtained loan application forms then collected the plaintiff from his house and this was on the 8th of October 1996. On collecting the plaintiff they both went to the Defendant's branch manager office in Nairobi where they met with Mr. Cyrus Kiplagat who was then the Defendant branch manager. Mr. Cyrus according to the plaintiff filled those forms from the information he obtained from Mr. Kogie. It was not disputed by the parties that the defendant gave the plaintiff a loan application form which is dated the 30th of October 1996 and which the plaintiff and the defendant executed. This indeed is the basis of the relationship between the plaintiff and the defendant. On that loan application term No. 2 provided that the loan that was to be granted to the plaintiff Namely kshs 6.7 million was to be credited into the vendors account No. 210952. This loan account belonged to the vendor in this case that is Mr. Kogie. The plaintiff in giving evidence stated that on entering into that loan agreement he discovered that there was a conspiracy between the vendor and the defendant by its managing director. The plaintiff drew the courts attention to Clause No. 7 of that agreement which provided that the first installment and that is the principal and interest was to be made on 31st of December 1997. In the plaintiff's evidence he said that the agreement rather provided that he was to be given the loan on or before the 31st January 1997. That if the loan payment was not made by that date that is 31st January 1997 the same would lapse. He further stated that on the 31st of January 1997 Mr Kogie the vendor herein filed **HCCC NO. 366 OF 1997** in the Nakuru High Court. That by that action the vendor was seeking that the said land be returned to him. The plaintiff said because of that action he knew that the defendant had not paid for the suit property as provided in the agreement for sale. He further added that he has never todate received the loan the subject of that loan agreement. In the plaintiffs further evidence he stated that Mr. Kogie in the action in the Nakuru High Court swore an affidavit stating that he had not been paid kshs 8.9 million by the plaintiff for the purchase of the suit property. The plaintiff produced in this court a Chamber Summons and the supporting affidavit sworn and filed by the vendor in the Nakuru High Court Case. It ought to

however be noted that the court in scrutinizing those documents as found that in some parts in the photocopying the writings have obliterated. It is not clear whether that was deliberately done so by the plaintiff or not. It is however important to note that the portions that have been obliterated are those that relate to the financial dealing between the plaintiff and the vendor which have a relationship to this action. The plaintiff further stated that because the vendor was not paid as provided in the loan agreement there was no contract between him and the defendant. Further the plaintiff stated because the loan agreement provided that the charge and even the transfer of the suit property was to be carried out by the defendant but in fact that the charge was eventually prepared by his advocate. In his advocate preparing the charge there was a breach by the defendant of the loan agreement. The plaintiff stated that he had paid the advocate to do the work and yet he had already paid for those charges directly to the defendant. Further the plaintiff stated that condition No. 5 of that loan agreement was not fulfilled because he did not receive authority to incur expenditure. In this regard he produced a blank form entitled L/241/A which relates to authority to incur expenditure he said that it ought to have been given to him. The plaintiff however confirmed that on the 17th March 1997 the suit property namely Naivasha Town block 1/22 was transferred into his name. In this regard he produced as exhibit in the court of the copy of the title deed. The plaintiff produced a letter written to him by the defendant and dated the 28th of April 1998. In that letter the defendant advised the plaintiff that the security document had been completed. He further was advised that the loan of kshs 6.7 million had been applied against the vendors account No. 251-952. The plaintiff was therefore requested in that letter to repay the loan in 10 equal annual installments of principal interest combined of kshs 1, 598, 102.40 the interest applicable was 20% per annum. The plaintiff was of the view that this letter was in contradiction to the normal workings with the defendant because the defendant had failed to supply the plaintiff with authority to incur expenditure. This he said was in contravention of Clause No. 6 of the Loan Agreement. The plaintiff said that the charge in favour of the defendant over the suit property was registered on the 12th of February 1998. He said that charge was registered at the time when the agreement between him and the defendant had lapsed. He stated that the clear indication that the defendant had breached the loan agreement was that the loan agreement provided that the 1st installment was due and payable on the 31st of December 1997. Even though that was the provision that the defendant later by its letter dated 25th February 1998 demanded from the plaintiff the first installment of the loan. The plaintiff further referred to a letter dated 10th July 1997 written by the defendant addressed to the plaintiff whereby the letter stated as follows: -

Mr Moses Ng'eny Kahindo

P O Box 802

NAIVASHA

Dear Sir,

RE SALE OF L.R. NO. NAIVASHA TOWN BLOCK 1/22

As you are both aware, the above land was sold to Mr. Moses Kahindo by Mr Victor Kogie. One of the special conditions was that the sum of ksh 6, 7000/- being part of the sale proceeds be paid to Agricultural Finance Corporation to redeem the vendors account.

We have now finalized all the legal formalities related to this loan and would like to effect the transfers but are unable to do so because we don't have communication from you on the value date for this transactions to be effected.

We would like to request both of you to give us a letter signed by both of you indicating the value date which we can use to transfer the outstanding dues from the vendors account to the purchaser account. This information is necessary to avoid any later misunderstandings.

Please expedite.

Yours faithfully

E A OBADO (MRS)

FOR: MANAGING DIRECTOR

CC Branch Manager,

A.F.C.

NAIVASHA

The Plaintiff said that neither he nor the vendor executed this letter to give the defendant the value date. The plaintiff explained what is meant by the value date. He said that it is when the loan can start to accrue interest. The plaintiff also referred to the defendant's letter addressed to him and dated the 28th of October 1997. The letter stated as follows: -

Moses Ngenyi Kahindo,

P O Box 802,

NAIVASHA

Dear Sir,

RE: SALE OF L.R. NAIVASHA TOWN BLOCK 1/22

Further to our letter Ref. AFC/WR/21750/133 of 10th July 1997.

You did not address the issue raised in the 3rd Paragraph of our letter to you.

This issue is long outstanding and we would like to settle it out as fast as possible.

Please give us a value date which we can use to transfer the outstanding dues from the Vendors Account to your account. This information should reach us not later than 14 days from the date of this letter.

Yours faithfully,

E A OBADO (MRS)

FOR: MANAGING DIRECOTR

CC: Branch Manager,

A.F.C.,

NAIVASHA

He stated that this letter was written 2 months to when the first installment was due and because this was three months less than what is required by the authority to incur expenses that the loan should not have been given by the defendant that it should have cancelled. The plaintiff further stated that the vendor has never acknowledged the receipt of the loan agreement in his account. The plaintiff then proceeded going through the different Clauses of the loan agreement and he stated that the defendant had to fulfill those conditions. In particular the plaintiff referred to Clause No. 5 of the loan agreement and stated that the period of the loan that is 10 years the defendant was supposed to only charge 20 % interest. He said that

however the defendant in the demands that it has sent to the plaintiffs it seems to have compounded interest. The plaintiff thereafter referred to two letters which demanded two different amounts from him. The 1st is dated 31st of May 2000 which demanded a total amount of kshs 12, 251, 704. 20. The other letter is dated 2nd June 2000 and it demanded from the plaintiff kshs 11, 271, 494.31. He said referring to the two letters that he did not know which figure to pay to the defendant. He said that those letters had arrived at the wrong figure because of incorrect calculation of the interest. Plaintiff was of the view that if an injunction as sought by him is not granted he would suffer irreparable loss. That even now he has suffered loss because he has not been able to farm the land because of the pending case. He sought that the court will order the defendant to pay him damages. The plaintiff produced the defendant's statements which had two different stamp date.

One was stamped the 12th of June 1998 whilst the other was stamped 8th of April 1999. The plaintiff indeed invited the court to look at the different debits where he said that the court would note that the figures did not agree according to statements. That looking at the two statements there is a clear difference of kshs 4 million. The plaintiff said that this was one of the things which has confused him on what he ought to pay the defendant. The plaintiff as he concluded his evidence stated that he was seeking the prayers as drawn in the plaint and added that he did not dispute or deny the loan application nor did he deny the loan agreement. He however found fault in the defendants breach as he said of the loan agreement. He further sought a refund of the amount that he paid to the defendant in respect of the charges of charging the property namely kshs 75, 000. He said that this money should be refunded to him because he eventually had to get his own advocate to do the work. On being cross examined the plaintiff accepted that the vendor is not a party to this suit. He stated that he did consider it expedient to join the vendor in this action. He accepted that he had applied and obtained a loan from the defendant for the purpose of buying the land from the vendor. He confirmed that that property was eventually transferred into his name. He said that the full purchase price of that suit property was kshs 9 million. He accepted that kshs 6.7 million was to come from the defendant and to be credited into the vendors account and he accepted that he never did pay the vendor the balance of the purchase price. It was because of that that the vendor sued him in the Nakuru High Court Case NO. 366 of 1997 seeking damages for breach of contract. He also confirmed that he did take possession of the suit property before he paid the vendor the balance of the purchase price. In what was a turn around in his evidence he later stated that he was not sued by the Vendor for failure to pay the balance of the purchase price but rather the vendor desired to cancel the said agreement. He reiterated that the loan agreement between himself and the defendant had lapsed because the documentation was not completed by the 31st of January 1997. The plaintiff on being further cross examined accepted that he has never re-paid the defendants loan at all and that he was indeed in default. The court noted that a lot of the time during cross-examination the plaintiff refused or failed to answer questions or feigned ignorance on being asked certain questions particularly dealing with the crediting of the loan amount into the vendors account and dealing with the issue that the property was transferred into his name. The plaintiff did accept that he is aware that the defendant had since sold the suit property in the auction whereby the defendant as allowed by law purchased the same.

Defence evidence was given by Mr Wallance Okumu. he said that he was the bank branch manager of the Nakuru branch. He has worked for the defendant for 15 years. That he is qualified as ranch economist and a Financial Manager. He confirmed that the plaintiff in 1996 applied for a loan from the defendant to purchase a property in Naivasha. He looked at the Plaintiff's Exhibit 1 and confirmed that it is the loan application forms for the plaintiff. Looking at the particulars of that loan application the witness said that the plaintiff applied kshs 6.7 million to enable him to purchase land, that is Naivasha Town Block 1/22. On presenting the loan application the witness said that the Plaintiff was given a letter offer which he said acts as the agreement between the parties. He was referring to the plaintiff's Exhibit No. 2. He confirmed that the plaintiff accepted the offer and that the money the subject of the agreement was to be paid into the vendors account and he confirmed that the vendor was Mr. Kogie. The witness said that that suit property which was being purchased by the plaintiff was the security for the loan given to the plaintiff that is kshs 6.7 million. On crediting the vendors account with the loans proceeds the witness said that the plaintiff was expected to make repayment of that loan annually. He said that the plaintiff failed to make any payment and that indeed since the loan was granted he has never made any payments. As a consequence the plaintiff was issued with foreclosure notices. That it was when the property was advised for sale by public auction that the plaintiff filed this present suit. The witness confirmed that the

defendant has a charged registered under the property. In this regard he referred to the Plaintiffs Exhibit No. 19. The witness referred to the Plaintiffs Exhibit No. 10 that is the foreclosure notice dated 31st May 1999. He said that on receiving that foreclosure notice the plaintiff approached the defendant and offered some repayment proposal. In that letter where the plaintiff made a proposal for repayment dated 15th June 1999, the plaintiff thanked the defendant for their kindness purchasing the parcel of land for him and after complaints of what he said were interference by the vendor at the defendant's office and interference in his economical use of suit property, the plaintiff accepted that a method could be found whereby he could start to settle the loans repayment. The witness said that despite that letter the plaintiff did not make any payment therefore the defendant sent another foreclosure notice dated the 31st of May 2004. Following that foreclosure notice the plaintiff brought other letters through his Advocate specifically a letter dated 26th August 2000 and in that letter the plaintiff made proposals for repayment of the loan. The plaintiff wrote yet another letter through his advocate. In that letter their advocate on behalf of the plaintiff gave reason why the plaintiff was unable to make payment of his loan citing the El Nino rains which allegedly had destroyed the plaintiffs crops. In that letter the advocate requested for a further loan of kshs 4.5 million to enable the plaintiff to restart his farming. He further requested that the outstanding loan be rescheduled. The witness confirmed that all legal formalities relating to the transaction between the plaintiff and the defendant were complied with and that by the defendant's letter dated 10th July 1997 which was addressed to the plaintiff. The plaintiff was informed of this formalization of the legal requirement. It was thereafter that the Defendant wrote to the plaintiff requesting the plaintiff to give the value date of the transaction. The witness said that a value date is a date that the defendant effects transfer of money. He said that in the case of land purchase, the money can be transferred earlier than the value date. He therefore concluded that ideally, the value date should be done at the point of transfer. In this case the money was transferred after receipt of the plaintiff's letter dated the 1st of September 1997. On receipt of that letter the transfer was effected and the defendant gave the value date of 31st March 1997. He confirmed that that was the date that the suit property was transferred into the plaintiff's name. The witness said that it is essential for their client to agree the value date and this is usually where the same property is discharged being also the security for new loan. The value date he said was when the money was transferred into the vendors account. The witness said that after the transfer of the money into the vendors account the plaintiff's first installment was due and payable as at 31st December 1997. The witness said that the plaintiff never before this suit complained about the value date. In respect of interest the witness referred to Clause No. 5 of the Loan Agreement where he said that interest was stipulated to be at 20% with the Defendant being at liberty to vary the rate depending on the market situation. The witness said that the Plaintiff was charged 20% simple interest and that the variation that was that the Defendant charged compound interest only relating to the arrears outstanding. The witness confirmed that the charge or the security documents were prepared by the Plaintiff's Advocate. The witness finally stated that the defendant cannot agree to unconditionally discharge the suit property because the Defendant had already exercised its statutory rights of land. That it was sold on the 27th of August 2003. He stated that the defendant purchased the land for kshs 5.5 million which it was entitled to do, when the property failed to fetch the reserve price at the sale. The witness said that the Plaintiff was as at the 31st July of 2006 indebted to the Defendant to the tune of kshs 39, 536. 272/- The witness stated that the Nakuru High Court Case had nothing to do with the defendant that it was an action between the plaintiff and the vendor. On being cross examined by the plaintiff the witness said that in this particular transaction there was no need for a value date because the parties had agreed that the loan proceeds were to be credited into the vendors account. He denied that the defendant at all required the authority of the plaintiff to transfer the funds into the vendors account. That those funds could be transferred once the legal formalities of charging the property in favour of the defendant were completed.

The court wishes to state that if at all the evidence of the plaintiff does seem to be disjointed it is because the plaintiff in giving his evidence was very inconsistent. He would begin to give evidence on one particular issue and soon enough mix it up with another issue. That as it may be the plaintiff's claims against the defendant in this suit is for an injunction to stop the defendant or its agent from advertising or offering for sale by public auction or otherwise the plaintiffs parcel of land Naivasha Town Block 1/22. The plaintiff further prays for an unconditional discharge of that land.

When one considers the two prayers the plaintiff in giving evidence did accept that as at the time of

hearing of this case the suit property had been sold at an auction and he did confirm in an affidavit filed in this court on the 14th of June 2006 that he had carried out a search of the suit property which search revealed that entry No. 9 dated 6th December 2005 the property was registered in the defendant's name. The defendant witness did also give evidence that the suit property was purchased by the defendant which they are entitled to do when the property fails to fetch the reserve price at a public auction. That being the case the court will not be able to grant the two prayers that the plaintiff seeks, that is an injunction and the unconditional discharge of the suit property. Those two prayers will certainly fail. The plaintiff did seek compensation for the loss occasioned by the illegal charge to his property. There was no evidence that was given by the plaintiff to show the illegality of the charge and further to show the loss that was occasioned by him. The plaintiff did accept that it was him who through his lawyer prepared the charged documents. On being cross examined the plaintiff did confirm that a loan was given to him by the defendant to purchase the suit property and he did confirm that a title document was issued in his favour once the loan was effected. With this in mind court finds that there was no illegality in the charged documents that further the court finds that the plaintiff has failed on a balance on probability to show loss if any that was occasioned by him as a result of that charge. Again it ought to be noted that it was him through his advocate who prepared the legal charge over the suit property. The plaintiff's final prayer was that the court would order specific prayers requiring the defendant to honor its terms of letter of offer by applying simple interest to his loan account rather than the compound interest. In this regard reference is made to Clause No. 5 of the loan agreement Plaintiffs agreement. That clause provided that the rate of interest that was applicable was 20% per annum for a period of 10 years. That clause also provided that the defendant reserve right to vary the aforesaid rate of interest in accordance to the prevailing market lending rates without prior notice to the Plaintiff. The witness for the defendant stated that the defendant continues to apply simple interest to the principal amount but in respect of the arrears that have accrued on the plaintiffs account the defendant has applied compound interest. There is no illegality that the court finds in Clause No. 5 of the Loan Agreement the rate of interest could be varied. It was agreed between the parties that the defendant would have the right to change the rate of interest. Accordingly that prayer too is defeated. The parties have written down the issues in this matter dated the 3rd of March 2002.

In response to issue No. 1 the court finds that the defendant did meet the conditions that were set out in the loan agreement. There was no contrary evidence that was brought before the court to show otherwise. The issue about the authority to use the funds as claimed by the plaintiff was not applicable here because the parties did agree that the loan agreement would be credited into the Vendors account.

In respect of the issue No. 2 in examining the circumstances around the transaction the court finds that on a balance of probability the defendant did disburse the loan to the plaintiff through crediting the vendors account. There was no evidence that was introduced to the contrary. Indeed to prove that that was done the title document was eventually transferred into the plaintiffs name.

In respect of Issue No. 3 the Clause Agreement No. 5 stated the rate of interest to be 20% per annum and there was a proviso whereby the defendant was entitled to vary that rate.

In respect of issue No. 4 the court finds that there was no need for the plaintiff to confirm to the defendant that it may disburse the loan to the vendor. That was already provided for in the loan agreement.

On issue No. 5 the charged documents were prepared by the plaintiffs advocate and that seems to have been acceptable to the parties. Therefore nothing turns on this issue.

On issue No. 6 the court finds that that case had no relevance to this party.

On issue No. 7 the court finds that the defendant has made demand on payments from the plaintiff and initially the plaintiff was willing by its correspondence to settle the loan and it does seem that after the suit was filed that the plaintiff seems to have raised the objection to the repayment of that loan.

In respect of issue No. 8 the defendant has not acted in breach of the contract between himself and the plaintiff.

In respect of the statutory power of sale indeed that arose and the defendant exercised that power by purchasing the suit property which is now registered in their name.

In respect of issue No. 9 the plaintiff did not prove to this court what irreparable loss or damage she has suffered in respect of the sale of suit property. The plaintiff therefore is not entitled to any compensation in this regard.

In respect of issue No. 10 nothing really turns on this issue now as stated herein before the suit property was sold.

In respect of 11 there as has been found herein before the plaintiff is not entitled to the prayers that it seeks and indeed the court does find that the plaintiff has stated in correspondence in evidence that he was advanced the loan by the defendant.

The end of the matter is that this court finds and is indeed the judgment of this court that the plaintiff's suit fails. The plaintiff has failed to proof on a balance of probability his case. Accordingly the judgment of this court is that this case is dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 1st day of February 2007

MARY KASANGO

JUDGE