

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL SUIT NO. 1265 OF 2001

JUMA MUCHEMI PLAINTIFF

VERSUS

AGRICULTURAL FINANCE

CORPORATIONDEFENDANT

R U L I N G

This application dated 14th August 2001 is seeking temporary injunction to restrain the Respondent by itself, its servants and/or agents from selling, alienating advertising and/or disposing of Parcel L.R. No. 20091, 1168/7 and 11681/8 Ridgeways, Nairobi until this case is heard and determined. The grounds are that the Respondent has not served the Applicant under Section 33 of the Agricultural Finance Corporation Act Chapter 323 Laws of Kenya; that the Applicant has already paid over K.shs 5,000,000 and is still willing to pay monthly instalments of K.shs 200,000/- until payment in full; that the Applicant relies on the same properties for a living and so he will suffer irreparable damage if the same properties are sold; that the Applicant could not meet the yearly obligations to the farmers because of the Elnino rains that were followed by severe drought. The Supporting Affidavit merely gives details of the same grounds.

The Respondent opposed the same Application and has filed Replying Affidavit sworn by Augustine K. Psinen. It says in brief in that Affidavit that the Applicant was granted a loan of K.shs 24,000,000 repayable within 15 years at a yearly instalment of K.shs 5,133,120 and another loan of K.shs 8,000,000/- repayable at a yearly instalment of K.shs 3,797,840/-. The Applicant failed to honour the same agreement and never made the payments as agreed but instead he issued 12 cheques amounting in total to K.shs 3,400,000 which were all dishonoured and despite several indulgences granted to the Applicant, he failed to honour his obligations and at times he made false promises to the detriment of the Respondent. According to the Respondent the Applicant has not paid more than K.shs 3,000,000 in five years and he is not telling the truth when he says he has paid K.shs. 5,000,000/- as most of the payments he refers to were made by cheques which bounced. The Respondent maintains that the Applicant had been served with the Requisite notice and his (Applicant's) advocate acknowledged receipt of the same in his letter dated 18th July 2000 and lastly that the debt due is now over K.shs 72,000,000/- and payment by K.shs 200,000 per month would not be fair and appropriate.

I have carefully considered this application. The main ground worth considering in the application is the ground that the Applicant was not served with appropriate notice under the Agricultural Finance Corporation Act. I have seen annexure CCO4 exhibited by the Respondent. They are both Foreclosure Notices issued pursuant to Section 33 of the Agricultural Finance Corporation Act (Chapter 323 Laws of Kenya). In the letter dated 10th July 2001 from the Applicants advocates to the Respondent, the Applicant's advocate states at paragraphs 2 & 3 as follows:

“Our client acknowledge being indebted to you. Our client has previously made attempt to pay this debt but due to harsh economic conditions he has not cleared the same.

He has since the issuance of notice to redeem made a spirited effort to get a buyer for the property. He has been unable to get one buyer for the whole piece of land”.
(underlining supplied).

Thus much as he has obtained interim ex parte orders on the allegation that he has not been served with the appropriate notice under the Agricultural Finance Corporation Act, he knew only too well that that was not true and he had been served with the same and had indeed made that fact known to his advocates who wrote the above letter. One can only accept that he came to court with unclean hands and clearly told the court untruth. He was served with the appropriate notice.

On the other matter about the effects of Elnino on the repayment of the loan, his plea to have interest waived and to have interest paid on reducing balances; his having been sick for sometime and the effect of the same on the loan and whether the court should order the Respondent to accept repayment by monthly instalments of K.shs 200,000/- my answer to the same in that much as the court may sympathise with those conditions, the court cannot rewrite the contract for the parties. The court's duty is to declare the law. As the Applicant has in any case not come to court with clean hands, he does not deserve any discretionary remedies and in law no remedies are open to him as he has plainly not paid the debt. As to the question of irreparable loss, I note that the Applicant, going by the letter to his advocates, I have partly quoted above, is anxious to sell the property. He cannot therefore be right when he says that he heavily relies on the said securities for a living. Further, the Respondent is a reputable financial institution, the property can be evaluated and its value made known. If the property is sold and later the Applicant succeeds in this case, the Respondent will be able to compensate him for any loss and since he also wants to sell it, no irreparable loss will result.

The sum total of the above is that this application cannot succeed. It is dismissed with costs to the Respondent. Orders accordingly.

Dated at Nairobi this 20th day of September 2001.

ONYANGO OTIENO

JUDGE