



**Mwara v Agricultural Finance Corporation (Commercial Case E043 of 2024) [2024] KEHC 12654 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12654 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E043 OF 2024  
JK NG'ARNG'AR, J  
OCTOBER 23, 2024**

**BETWEEN**

**NANCY NYAMBURA MWARA ..... PLAINTIFF**

**AND**

**AGRICULTURAL FINANCE CORPORATION ..... DEFENDANT**

**RULING**

1. The Plaintiff/Applicant filed a Notice of Motion application dated 12<sup>th</sup> August 2024 under Certificate of Urgency pursuant to the High Court (Practice & Procedures) Vacation Rules, Sections 1A, 1B & 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 40 Rules (1) & (2), Order 51 Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law.
2. The Plaintiff/Applicant seeks for orders that pending the hearing and determination of this suit, an injunction do issue against the Defendant/ Respondent restraining them whether by themselves, their servants and/or assigns from interfering with the Plaintiff/Applicant's quiet possession, alienating, selling, offering for sale, transferring, disposing, using, charging, mortgaging, developing or in any way disposing all that property known as LR No 18378/25 Mtwapa. The Plaintiff/Applicant also prayed that costs of this application be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit of the Plaintiff/Applicant that she is the registered owner of LR No 18378/25 Mtwapa charged to the Defendant/ Respondent for the advancement of loan facilities. That the Plaintiff/Applicant entered into a loan rescheduling Agreement on 20<sup>th</sup> May 2024 to which she has repaid the loan to the extent of Kshs 4,681,000 out of the outstanding Kshs 10,745,085.90 projected to 30<sup>th</sup> July 2024 and is well on course to making full payment without default as per the rescheduling agreement.
4. The Plaintiff/Applicant averred that contrary to the Loan Rescheduling Agreement, the Defendant/ Respondent despite the Applicant fulfilling the terms of the agreement sought to purportedly exercise



its statutory power of sale over the charged property and instructed an auctioneer who served the notifications, advertised the charged property and slated an auction for 20<sup>th</sup> August 2024. That the Plaintiff/Applicant contends that the intended sale of the charged property is wrongful, illegal, unlawful, and is a breach of contract and fiduciary duty. That the Defendant/Respondent is estopped from trashing the Loan Rescheduling Agreement and representations made upon which the Plaintiff/Applicant has relied and made substantial repayments and the intended action on the part of the Defendant/Respondent in the circumstances is manifestly unjust and unconscionable.

5. The Defendant/Respondent in their Replying Affidavit sworn on 15<sup>th</sup> August 2024 by Evans E. Mainga, the Legal Officer of the Defendant/Respondent, stated that on or about 21<sup>st</sup> September 2017, the Plaintiff applied for and was granted an agricultural development loan in the sum of Kshs 10,000,000 which was to be repaid in full together with interest within a cumulative period of 3 years. That it was an express term of the loan that the Plaintiff was to execute a banker's order in favour of the Defendant for Kshs 217,000 per month on acceptance of the offer. That as collateral for the credit facilities, the Plaintiff produced the title deed of the land known as LR No 18378/25 (CR No 36464) as security.
6. The Defendant/Respondent stated that on or about 17<sup>th</sup> November 2021, a first ranking charge was lodged and registered in favour of the Defendant to secure the loan sum advanced together with interests and costs thereon. That the Plaintiff breached her contractual obligations in line with the loan agreement which prompted the Defendant to issue multiple reminders and demand notices asking the Plaintiff to rectify the default. That the Plaintiff requested the Defendant to for rescheduling of the loan which in return the Defendant was lenient and allowed it.
7. The Defendant/Respondent maintained that the Plaintiff still defaulted in making her payments and made proposals that were never honoured. That as a result, the Defendant initiated recovery process in exercise of its statutory power of sale by issuing statutory notices to the Plaintiff dated 10<sup>th</sup> July 2023 recalling the outstanding sums in full. That upon expiry of the statutory notice, the Defendant issued a 40 days' notice upon the Plaintiff dated 11<sup>th</sup> October 2023 and upon expiry of the same, the Defendant instructed Pay Day Auctioneers to execute against the Plaintiff by disposing of all that parcel of land known as LR No 18378/25 (CR No 36464) in exercise of its statutory power of sale.
8. That on or about 30<sup>th</sup> May 2024, the Auctioneer prepared a 45 days redemption notice and notification of sale by way of public auction upon which the Plaintiff was served via WhatsApp and through registered post but the same was still not complied with. That upon expiry of the 45 days redemption notice, Pay Day Auctioneers duly advertised the security parcels in the Daily Nation Newspaper in exercise of its statutory power of sale. That the Defendant ensured a proper land valuation was done and Cambrian Valuers Limited were instructed to conduct valuation of the suit parcel and the forced sale value of the suit parcel was determined to be Kshs 12,000,000. That the application herein has been brought in bad faith as the Defendant adhered to all the requisite legal processes in exercise of its statutory power of sale.
9. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed written submissions dated 26<sup>th</sup> August 2024 while the Defendant/Respondent filed written submissions dated 16<sup>th</sup> September 2024 which have been considered by this court.
10. I have considered the Notice of Motion application dated 12<sup>th</sup> August 2024, Replying Affidavits sworn on 15<sup>th</sup> August 2024 and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.



11. In *Giella v Cassman Brown* [1973] EA 358, the principles for grant of temporary injunction have been set out as follows: -
- (a) The applicant must first establish a *prima facie* case with a probability of success.
  - (b) The applicant must then demonstrate that he, she or it stands to suffer irreparable loss that cannot be adequately compensated through damages.
  - (c) Where there is doubt on the above, then the balance of convenience should tilt in favor of the applicant.
12. On whether the Plaintiff/Applicant has established a *prima facie* case with probability of success, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 held as follows: -
- “So what is a *prima facie* case ... In civil cases it is a case which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter.”
13. It is not in dispute that the Plaintiff/Applicant applied for and was granted an agricultural development loan in the sum of Kshs 10,000,000 by the Defendant/Respondent. The loan was to be repaid in full together with interest within a cumulative period of 3 years. The Plaintiff was to execute a banker’s order in favour of the Defendant for Kshs 217,000 per month on acceptance of the offer and as collateral for the credit facilities, the Plaintiff produced the title deed of the land known as LR No 18378/25 (CR No 36464) as security. It is also not in dispute that the Plaintiff breached her contractual obligations in line with the loan agreement and the Defendant/Respondent followed the requisite procedure in exercising its statutory power of sale.
14. However, it is evident on record that the Plaintiff/Applicant reached out to the Defendant/Respondent with a view of regularizing the facility. On 21<sup>st</sup> May 2024 the Plaintiff/Applicant deposited Kshs 3,000,000 in the account and this is a sign that the Plaintiff/Applicant is keen on settling the loan advanced to her. The Plaintiff/Applicant has therefore established a *prima facie* case with probability of success for grant of temporary injunction against sale of the property attached as security. It is clear to this court that the Plaintiff/Applicant will suffer irreparable loss that cannot be adequately compensated if the orders sought are not granted.
15. In the upshot, I allow the Notice of Motion application dated 12<sup>th</sup> August 2024 in terms of prayer 4. A temporary injunction is hereby issued restraining the Defendant/Respondent whether by themselves, their servants and/or assigns from interfering with the Plaintiff/Applicant’s quiet possession, alienating, selling, offering for sale, transferring, disposing, using, charging, mortgaging, developing or in any way disposing all that property known as LR No 18378/25 Mtwapa pending the hearing and determination of this suit. Costs be in the cause.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OCTOBER, 2024.**

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**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

No appearance Advocate for the Plaintiff/Applicant



Muturia Advocate for the Defendant/Respondent  
Court Assistant – Mr. Samuel Shitemi

