



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 120 OF 2019**

**(Being an appeal from the original judgment and decree of Hon. MI Shimenga, Resident Magistrate, of 21<sup>st</sup> November 2019, in Butere SRMCCC No. 101 of 2018)**

**HARRISON MANYASA LUBANGA.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

1. The suit at the primary court, in Butere SRMCCC No. 101 of 2018, was initiated by the appellant herein against the respondent, for provision of accounts, a discharge of charge and an injunction to restrain sale of charged property. The appellant averred that the advertised sale of his property, which he had given to the respondent as security for a loan, was premature, as he had not been given the requisite statutory notice, and to ascertain the loan status he required to be furnished with proper accounts.

2. The respondent filed a defence, in which it acknowledged the loan arrangements between it and the appellant, and averred that the appellant had breached his loan obligations. It was averred that a statutory notice was issued, and default after that necessitated that auctioneers be instructed to recover the amount.

3. At the oral hearing only the appellant testified. He explained how he had applied for and was granted loan facilities by the respondent. He detailed how he repaid the loan, concluding that he had in fact overpaid the same, by 13<sup>th</sup> July 2016. He described how he had difficulties which made him sometimes not to make payments as and when they were due, such as when he was attacked by thieves, or when his child fell ill and required surgery, among others. He said that he had paid a total of Kshs. 321, 647.00, and produced receipts showing payment of Kshs. 169, 100.00, and a loan statement dated 31<sup>st</sup> August 2018. The respondent did not attend the hearing, and offered no evidence.

4. After reviewing the evidence adduced at the trial, and other material on record, the trial court found and held that the appellant had not come to court with clean hands, and that he had not been genuine in trying to clear the sums that had been advanced. The court did not find any merit in the claim. However, the respondent was directed to halt its exercise of statutory power of sale, to give the appellant a second chance, to clear the debts owed.

5. The appellant was aggrieved by the decision, and lodged this appeal. His case, as articulated in his memorandum of appeal, dated 5<sup>th</sup> December 2019, is that the trial court made an order that was not prayed for, did not rely on the evidence adduced but formulated its own evidence, ignored the evidence adduced by the appellant which was unchallenged, failed to find that the appellant had paid a total of Kshs. 325, 157.00, denied him costs, failed to exercise judicial discretion properly, and failed to appreciate that the defence comprised of mere denials.

6. Although directions were given for filing of written submissions, only the appellant complied. I have read through written submissions, and noted the arguments made. The appellant is in person, and, therefore, his written submissions do not raise any legal arguments.

7. A party is bound by its pleadings. In his pleadings, the appellant principally addressed the sale of the security that he had offered. He averred, at paragraph 5 of the pleadings, that he had not been served with the statutory notice, and that he only became aware of the proposed sale when he stumbled on the notice at some public space in Kakamega town. At paragraph 6, he pleaded that the sale was premature. At paragraph 7, he pleaded for accounts, to enable him establish the status of the loan. His principal prayer, going by the pleadings, in the body of the pleadings, was for taking of accounts, to determine the outstanding loan.

8. The case that the appellant presented at the oral hearing of the suit did not seek to meet the averments in the pleadings. It did not address the allegation that he had not been served with the statutory notice, nor that the sale was premature, nor about the accounts. He presented a case that he had cleared the loan, in fact he had even overpaid it. The case presented was not aligned to the case set out in the pleadings. I have scoured the record of the trial court, and I have not found any evidence that the pleadings filed in there, on 23<sup>rd</sup> August 2018, dated 20<sup>th</sup> August 2018, was ever amended to state a case other than that in the pleadings dated 20<sup>th</sup> August 2018.

9. Faced with what I have stated above, at paragraph 8 of this judgment, the trial court cannot be said to have been off the mark, when it found that there was no merit in the appellant's case. The case he presented orally was not the case presented in his pleadings. The trial court should have dismissed the pleadings, and awarded costs to the respondent, now that it had filed a defence, even though there was no attendance at the oral hearing. However, the court was magnanimous. It did not dismiss the suit, nor impose costs. It directed, instead, that the respondent should not exercise its accrued right to realize its security, in order to afford the appellant time to repay the loan. I do not know what more the appellant wanted. I do not understand why he is complaining. If anything, it should be the respondent protesting.

10. There is absolutely no merit in the appeal herein. The same is for dismissal, and I hereby dismiss the same. I shall make no order on costs, as the respondent, once again, did not actively participate in the appeal proceedings. It did not file written submissions, even when time was extended for it to do so. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17<sup>th</sup> DAY OF September, 2021**

**W. MUSYOKA**

**JUDGE**