REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

JUDICIAL REVIEW MISC. APPLICATION NO. E005 OF 2021

JOHNSON MWANIKI NYAGAH.....APPLICANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

RULING

1. The applicant herein moved this court by way of chamber summons dated 23.07.2021 brought under Article 47 of the Constitution of Kenya 2010, Order 53 Rule 1 of the Civil Procedure Rules 2010, Section 9 of the Law Reforms Act Cap 26 of the Laws of Kenya and Sections 7 and 11 of the Fair Administrative Actions Act.

2. Essentially, the applicant seeks (under prayer 2) leave to apply for an order of certiorari removing to this Honourable Court for purposes of being quashed the respondent's statutory notices dated 23.02.2021 and 7.06.2021 and issued under the provisions of the Land Act No. 6 of 2012; an order of mandamus compelling the respondent to grant the applicant an extension on the period for repayment of the loan facility and the accrued interest thereon in accordance with section 21 of the Agricultural Finance Corporation Act Cap 232 of the Laws of Kenya; an order of inhibition inhibiting the respondent whether by itself, servants, agents, assigns and/or any person whatsoever acting on its behalf, mandate and/or instructions from advertising for sale, offering for sale, disposing of, selling, alienating, taking possession of, transferring or otherwise in any manner whatsoever interfering with land parcel Number LR. No. Mbeti/Kiamuringa/2600.

3. The applicant further prayed that the grant of leave herein do operate as a stay of any proceedings in furtherance and/ or implementation of the statutory notices dated 23.02.2021 and 7.06.2021 or any further purported exercise of statutory power of sale in variation, substitution, subtraction, addition, akin to or identical thereto pending the hearing and determination of the substantive judicial review application.

4. The said application is premised on the grounds on the face of it and is supported by the verifying affidavit and the statement of facts by the applicant. In a nut shell, it is the applicant's case that the respondent is a state corporation established under section 3 of the Agricultural Finance Corporation Act with the mandate of assisting in the development of agriculture and agricultural industries by giving loans to farmers, co-operative societies, incorporated group representatives, private companies, public bodies, local authorities and other persons engaging in agriculture or agricultural industries.

5. That pursuant to Sections 3(2) and 14(1)(a) of the Act, the respondent advanced the applicant Kshs. 166,650.00 which loan was to be secured by a first ranking legal charge over the applicant's property being LR. No. Mbeti/Kiamuringa/2600 and which charge was created under section 20 of the Act. As such, the applicant contended that the recovery of the said loan can only be in accordance with the Act. That the applicant has paid Kshs. 1,347,542.15 out of the said loan amount but is unable to pay the total loan amount within the thirty six (36) months. Further that despite the applicant explaining to the respondent the circumstances which led to default in repayment of the said loan and further seeking extension of the loan repayment period for further 36 months which discretion the respondent has, under section 21 of the Act, the respondent has refused, ignored and/or failed to grant the request for the said extension in blatant abuse of its statutory discretion without any lawful reason and which is in blatant abuse of the said statutory discretion.

6. Further that the respondent has disregarded the express provisions of the law and ostensibly initiated statutory power of sale pursuant to the Land Act No. 6 of 2012 in absence of a charge created under the Land Act of 2012. As thus, the said loan was only subject to the provisions of the Land Act of 2012 and any recovery process can only be conducted in accordance with the Agricultural Finance Corporation Act but which the respondent has ignored and instead detoured to invoking the statutory power of sale under the Land Act and which is not applicable in the circumstances. Further that the respondent has power under Section 59 of the Interpretation and General Provisions Act to extend the time for repayment of the said loan facility even though the applicant's request was submitted to the respondent after the expiry of the initial loan repayment period.

7. As such, by the fact that the loan facility is only subject to the recovery procedure under the Agricultural Finance Act, the respondent acted in blatant abuse of statutory discretion, unreasonably, in breach of the applicant's legitimate expectations and committed errors of law by proceeding to issue statutory notices to the applicant under the Land Act No. 6 of 2012. The extent of the said blatant abuse of discretion,

unreasonableness, violation of the applicant's legitimate expectations and errors of law were itemized in paragraph 13 of the grounds in support of the application, paragraph 25 of the verifying affidavit and equally in paragraph 13 of the statutory statement.

8. At the hearing of the application, Mr. Ngigi, the Learned counsel for the ex-parte applicant relied on the affidavit and the statement of fact in canvassing the same.

9. The application was canvassed by way of written submissions and wherein the applicant generally submitted that the application meets the threshold for grant of leave to file for the judicial review orders sought as he had demonstrated an arguable case warranting the granting of leave. The applicant relied on the case **Republic –vs- County Council of Kwale & Another Ex Parte Kondo & 57 Others (1998) 1 KLR (E & L)** on the test for granting leave to commence judicial review proceedings.

10. It was further submitted that the court ought to order that the grant of leave do apply as a stay of the impugned statutory notices so as to prevent the implementation of the statutory notices which would culminate in the sale of the applicant's suit property. That, the said stay ought to be given pending the hearing of the substantive judicial review application. Reliance was made on Order 53 Rule 1(4) of the Civil Procedure Rules 2010 and the case of **Taib A. Taib –vs- The Minister for Local Government &3 Others [2006] eKLR**.

11. I have considered the application herein, and have perused the annexures thereto. I have further considered the applicant's written submissions.

12. As I have already noted, the gist of the application is leave by the applicant to commence judicial review proceedings. Under Order 53 Rule 1 of the Civil Procedure Rules 2010, it is mandatory that the applicant in such applications must seek leave before he/she can file the substantive application.

13. The reasons for leave were explained by Waki J. (as he then was) in **Republic –vs- County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** and the dictum in that decision is that basically, leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

14. The Learned Judge further held that leave may only be granted if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. Granting of leave to file for judicial review is an exercise of the court's discretion but as always it has to be exercised judiciously.

15. It is therefore clear from the above that in an application for leave such as the present one, this court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.

16. The applicant herein deposed and further averred that he took a loan facility with the respondent and that he has been unable to repay the whole of the said loan and attempts to seek extension of the repayment period has been fruitless. This is despite the law providing that the respondent has discretion to extend the repayment period. Further that the respondent has issued statutory notices under the Land Act of 2012 in relation to the sale of his land LR. Mbeti/Kiamuringa/2600 which was used as the security. His contention is that the said notices are issued in error as the specific loan facility is not governed by the Land Act but by the Agricultural Finance Corporation Act.

17. He annexed to the application the statutory notice dated 23.02.2021 and a Forty Days' Notice dated 7.06.2021 both issued by the respondent and which are indicated to have been issued under Section 90(1)(2)(3)E and Section 96(2) and (3) of the Land Act of 2012 respectively. He further annexed a letter dated 20.04.2021 addressed to the respondent seeking renegotiations of the loan terms. The applicant deposed that the above acts of the respondent amounted to abuse of discretion, unreasonableness violation of his legitimate expectation and error of law.

18. In the light of the above, and upon a cursory perusal of the material before court and without delving into the argument by the ex-parte applicant, and upon reading of the provisions of the Agricultural Finance Corporation Act, it is my view that the applicant's case is meritorious to justify leave. It cannot be said to be frivolous or vexatious or hopeless. The prayer for leave to file substantive application for judicial review as such is hereby granted.

19. On the question of whether the said leave can operate as a stay of any proceedings in furtherance and/or implementation of the statutory notices dated 23.02.2021 and 7.06.2021 or any further purported exercise of statutory power of sale by the respondent pending the hearing and determination of the substantive judicial review application, the applicable principle is that the grant of such leave is discretionary, but the Court should exercise such discretion judiciously. Order 53 Rule 1(4) of the Civil Procedure Rules provides as follows in this respect:

> ***"The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise."***

20. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127**, it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The main consideration is always whether or not the decision or action sought to be stayed has been fully implemented. In **Taib A. Taib –vs- The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** the court held that: -

> ***"… The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act…."***

21. In **R (H). vs Ashworth Special Hospital Authority (supra),** Dyson L.J. held as follows: -

> ***"As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being."]***

22. It is therefore clear that where the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature, then it is still possible to suspend the implementation.

23. In the present application, the applicant's case is that the respondent has issued two statutory notices. The applicant annexed a notice dated 7.06.2021 wherein the respondent gives the applicant a forty days' period within which to remedy his default. There is need therefore to prevent the execution of the same or the intended sale of the suit property until the issue which the applicant wishes to canvass in the substantive application (blatant abuse of discretion, unreasonableness, violation of the applicant's legitimate expectations and errors of law) has been established and determined by this court.

24. In the end, the application is hereby granted in terms of prayers (2) and (3).

25. The substantive application to be prosecuted within 90 days from the date of filing failing which, the stay order shall automatically lapse.

26. It is so ordered.

Delivered, dated and **signed** at **Embu** this **14th** day of **September, 2021.**

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent