



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 26 OF 2006

CORAM: D.S. MAJANJA J.

BETWEEN

MUNICIPAL COUNCIL OF KISUMU.....PLAINTIFF

AND

NATIONAL HOUSING CORPORATION.....DEFENDANT

JUDGMENT

Background

1. At all times material to this suit, the plaintiff was a local government authority established under the now repealed ***Local Government Act (Chapter 265 of the Laws of Kenya)***. Following the promulgation of the Constitution and enactment of the ***County Governments Act***, the functions of the plaintiff were taken over by the County Government of Kisumu. The defendant is a body corporate established under the ***Housing Act (Chapter 117 of the Laws of Kenya)***.

2. In its plaint dated 8th June 2005, the plaintiff seeks the following reliefs:

- a) *a declaration that the plaintiff paid in full to the defendant what was lawfully and contractually due to it in respect of the suit properties in the respective accounts*
- b) *a declaration that the defendant has no right to sell or manage the suit properties*
- c) *an order directing the defendant to forthwith surrender the management of the suit properties back to the plaintiff*
- d) *a declaration that the defendant has overpaid itself and an order that whatever amount found to be over and above what is lawfully to the defendant should be refunded to the plaintiff*
- e) *a permanent injunction restraining the defendant whether by itself, its agents or servants from selling or otherwise disposing of the suit properties or any of tm from interfering with the plaintiff's use, possession or management.*
- f) *a declaration that there is no valid security held by the defendant over the suit properties*
- g) *an order for full accounts*

h) interest on (d) and (e) at court rates from the date of the suit until full settlement

The Plaintiff's Case

3. The plaintiff claims ownership of the following housing estates ("the suit properties) within Kisumu Town (a) Arina comprising 525 units of various types and sizes; (b) Ondiek comprising 165 units of various types and sizes and 3 commercial units; (c) Mosque comprising 88 units of various types and sizes and 3 commercial units (d) Argwings Kodhek comprising 98 residential units and (e) Makasembo comprising 125 units of various types and sizes and 3 commercial units.

4. According to the plaintiff, an arrangement was made with the defendant for construction of housing units with funds provided by the defendant. Under this arrangement, proceeds from rental income would be channeled towards repayment of loans and grants advanced for construction of suit properties. The dispute arose when, in 1991, the defendant claimed that the plaintiff owed it Kshs. 112,000,000.00. Consequently, the defendant proceeded to take over the management of the suit properties to recover the outstanding debt.

5. The plaintiff contended that since the original loans which had facilitated the construction of the suit properties had been written off, the defendant did not owe any money to the original donors and was as such not entitled to collect any money from the plaintiff. The plaintiff further averred that after the defendant took over management of the suit properties, it failed to manage the houses prudently, professionally and transparently causing the original alleged debt of Kshs. 112,000,000.00 to increase to Kshs. 416,920,748.57 as at 30th November 2004. The plaintiff alleged that the defendant failed to collect rent, it failed to invoke its powers to increase rent to reasonable levels and loaded onto it loan account, salaries and expenses incurred in the management of the suit properties in the absence of an agreement to that effect.

6. The plaintiff stated that on 8th December 2004, the parties convened a meeting where the parties agreed to consider selling the 525 units at Arina Estate which could generate over Kshs. 700,000,000.00 to clear the outstanding debt. To execute this proposal, it was agreed that the plaintiff's council would make an appropriate resolution authorizing the sale following which the estate would be subdivided and the housing units numbered to pave way for the sale. The plaintiff pleaded that the defendant acted contrary to this agreement when it proceeded to advertise the units to tenants in other estates other than Arina Estate for sale. The plaintiff complains that the defendant unilaterally and arbitrarily valued the houses and accepted deposits for the purchase of the houses.

7. In the alternative, the plaintiff contended that the agreement to sell Arina Estate was void for misrepresentation by the defendant. It claimed that the defendant allowed it to enter into the agreement under the false impression that there was outstanding amount owing on the account of the estate while in fact nothing was due. It alleged that the amount alleged to be due had nothing to do with the estate sought to be sold. The plaintiff also claimed that since taking over management of the suit properties, the defendant misled it about the outstanding aggregate loan by alleging that the loan due in 1991 was Kshs. 112,000,000.00 when the actual outstanding amount was Kshs. 96,156,208.00 and that the defendant alleged at the meeting when the agreement was made that its total claim was Kshs. 400,000,000.00 when the outstanding amount was much less.

8. The plaintiff further claimed that the intended sale of the suit properties was illegal, oppressive and irregular for the reason that the defendant was claiming a loan on the account of suit properties yet the loans in question were granted in respect of other properties from which it was receiving monies directly from the property allottees. The defendant also continued to levy unconscionable, irregular and illegal interest on the alleged loans.

9. The plaintiff faulted the defendant for falsely portraying it as a defaulter by loading the outstanding loans of other accounts onto the plaintiff's properties yet the plaintiff had redeemed or substantially redeemed the loan account of the suit properties. It further alleged that the defendant had failed to manage the housing units diligently, prudently, professionally and with due regard to the plaintiff's interests on

the grounds that the defendant failed to collect rent when it was due or initiate action against rent defaulters or otherwise recover outstanding debt including refusing to accept offers from the plaintiff intended to reduce the cost of the management process. Further, it contended that instead of managing the properties, the defendant was seeking to sell them and had failed to furnish the plaintiff with accounts or comply with the ***Housing Act (Chapter 117 of the Laws of Kenya)***.

10. The plaintiff maintained that the defendant did not have any right to sell the suit properties to recover any outstanding debt which ought to be recovered by way of a civil debt. In the alternative, the plaintiff pleaded that the defendant did not have any valid mortgage or other security over the suit properties entitling to manage or sell them. It also faulted the defendant's move to evict tenants who failed to meet the deadline for expressing interest to buy the suit properties, as well as for its failure to furnish the plaintiff with full accounts.

The Defence

11. The defendant denied the plaintiff's claim through its Defence and Counterclaim dated 14th November 2017. The defendant claimed ownership over the suit properties since March 1992 having assumed proprietorship by operation of the ***Housing Act***. It also denied the plaintiff's assertion of existence of a partnership for development of housing units from international lending organizations. Instead, it maintained that it directly provided funds loaned to the plaintiff to use for the development of the properties thus, the proceeds of the rental income from the suit properties were to be paid to the defendant in repayment of the loans, charges and interest.

12. It is the defendant's case that all properties developed through its financing automatically became secured, by virtue of the ***Housing Act***, as first mortgages or charges securing the repayment of the loans advanced. The defendant denied the plaintiff's claim that the loans advanced to it had been written off.

13. The defendant stated that Kshs. 112,000,000.00 demanded from the plaintiff was a round-off figure of loan repayment arrears of Kshs. 111,570,000.60 outstanding as at 31st December 1991. It further added that the actual outstanding loan as at 31st December 1991 was Kshs. 324,517,438.50 and not Kshs. 112,000,000.00 as alleged by the plaintiff. It denied the plaintiff's claim that it failed to manage the housing units professionally and efficiently since there was agreement to that effect. While admitting that there was a resolution for the sale of one of the suit properties, the defendant denied that it breached the agreement in proceeding to advertise for the sale of other estates beyond what was agreed upon and imposing arbitrary valuations and accepting deposits on the properties. It averred that it was the plaintiff breached the understanding by failing to secure the Council's resolution causing the defendant to take alternative steps to secure its interest. The defendant further denied that it had sought to sell residential and commercial units in Ondiek, Makasembo and Argwings Kodhek but had only asked for expressions of interest from Arina, Argwings Kodhek and Ondiek Estates and that no subdivision and numbering of the houses could proceed while the values placed on the houses were only provisional and were subject to actual valuation.

14. The defendant admitted that it took over management of the suit properties in March 1992, but denied that it entered into an agreement with the plaintiff in which it was required to take care of the plaintiff's interests. The defendant further denied misrepresentation alleged by the plaintiff contending that the loan advanced to the plaintiff was still due, and that as at 31st March 2005, the total outstanding loan was Kshs. 426,304,139.30 made up of Kshs. 326,342,381.60 in arrears and Kshs. 99,961,757.70 on the principal balance. The defendant further averred that any intention to sell the properties was neither illegal nor irregular. It added that the loans advanced to the plaintiff was for development of various estates under one loan portfolio just as the repayment of the loan was done under one repayment portfolio. It maintained that the plaintiff failed to service the loans as scheduled thus causing the outstanding balance to increase. The defendant stated that it had not charged interest on arrears over the years of default and only did so from 1st January 2005. The defendant maintained that it was entitled to charge interest despite taking over managing the suit properties since that loans were still outstanding.

15. In the Counterclaim, the defendant stated that it disbursed loans to the plaintiff between 1967 and 1987 totaling Kshs. 252,432,200.57 through loan agreements executed between 24th January 1968 and 21st April 1963 for the construction of housing units. The defendant contended that by virtue of **section 8** of the **Housing Act**, the loans were secured against the projects developed and were payable at an agreed interest of between 4.5% and 9.5% and the sum payable from rent collected from the units and loan repayment from individual beneficiaries. It maintained that as at 31st March 2017, the outstanding total debt was arrears at Kshs. 831,148,025.51 less total collections of Kshs. 43,766,396.04, totaling Kshs. 874,914,421.55. The defendant maintained that the plaintiff had been in arrears all through as evidenced by loan certificates dated 28th February 1974, 9th July 1975, and 2nd September 1978 and the joint understanding of indebtedness between the plaintiff and the defendant that was signed on 29th October 2009. The defendant therefore made a counterclaim of Kshs. 874,914,421.55 and interest as well as costs of the counterclaim.

Defence to Counterclaim

16. In its Defence to Counterclaim dated and filed on 16th November 2017, the plaintiff denied the defendant's allegations that 54 loans were disbursed to it. It also denied that any loan agreements were executed as alleged. It added that if any such loans were advanced, they were secured against the projects that were developed using the loans in accordance with **section 8** of the **Housing Act**. While denying that there was an agreement on the interest rate and that repayment would be done through rental collection, the plaintiff admitted that the loans were to be repaid from individual beneficiaries. It further maintained that it had always questioned the basis and quantum of the debt alleged and had demanded accounts which had not been forthcoming, adding that any such admission had been based on lack of information on management of the subject accounts. It further denied the alleged outstanding debt of Kshs. 874,914,421.55 or any alleged arrears cited in the alleged loan certificates and joint understanding of indebtedness.

17. The plaintiff instead contended that the defendant took over management of 251 residential houses and 9 commercial units in March 1992 and had for nearly 26 years been collecting rent without accounting for it, thus if any debt had been outstanding, it had been fully paid from the rent collected. It further contended that any admission on the debt was based on lack of information and the defendant's refusal to furnish accounts or furnishing false accounts; thus, such admission does not bind the plaintiff and that part of the alleged outstanding debt were monies that the defendant was required to collect from individual beneficiaries and not from the plaintiff.

18. According to the plaintiff, taking over the management of the properties, the plaintiff had invoked a statutory remedy under **section 8** of the **Housing Act**, which it is still employing to date thus, a suit for monies being recovered is contrary to the law, misconceived and exposes the plaintiff to double jeopardy. It reiterated that the defendant had breached conditions agreed by parties on settlement of the debt by initiating a process for sale of the properties.

The Hearing

19. The matter proceeded for hearing with each side calling one witness, James Goro Oronge (PW 1), a Principal Administrative Officer with the Kisumu County Government testified on behalf of the plaintiff. Simion Kirui (DW 1) testified on the respondent's behalf. The testimony of the witnesses reflected what was in their reflective pleadings. They also produced documents which were largely common ground. For reasons that shall become apparent I shall not outline the totality of their evidence as the case largely depends on the interpretation of their relationship based on the documents they submitted.

Submissions

20. Parties filed their respective written submissions. The plaintiff submitted that the defendant did not deny the fact that it breached the terms of the agreement and did not support its claim of the loan advanced by producing documentary evidence. The plaintiff also faulted the defendant for making claims

against the individual defaulters as well as plaintiff and at the same time not setting out what had been repaid. In addition, it submitted that there was no justification for taking over and holding on to the suit properties since the loans had been fully paid.

21. The plaintiff submitted that the counterclaim was based on falsified accounts and without statements for the period between 1967 to 2010. It faulted the defendant for claiming that the opening balance in its account was Kshs. 575,433,879.47 when it had collected Kshs. 115.9 million as at November 2004 and continued to collect an annual average of Kshs. 13.2 million from 2005. The plaintiff further faulted the defendant's action of appropriation of monies collected to management expenses instead of loan repayment. The plaintiff also submitted that its concession on indebtedness should not be used against it as this was based on misrepresentation on the part of the defendant's failure to furnish accounts

22. On the issue of interest, the plaintiff submitted that each loan was advanced at a fixed interest rate of 6.6% p.a. and bearing in mind that there is a restriction on raising the rate unless notice is served on the local authority and which cannot be raised beyond one-half percent by virtue of **section 17** of the **Housing Act**. The plaintiff faulted the defendant for retaining the houses and at the same time demanding payment of the loans yet the counterclaim is not pleaded in the alternative. The plaintiff urged the court to allow its suit with costs against the defendant, dismiss the counterclaim with costs and direct the defendant, once accounts have been taken, to turn over to the plaintiff, monies it has irregularly taken with interests at commercial rates.

23. On the question of loans advanced, the defendant submitted that the plaintiff had admitted in the plaint and witness affidavit to the fact that various loan agreements were entered into between the parties for loans for construction the suit properties. The defendant maintained that the plaintiff failed to pay the loans within the stipulated time, leading to it taking over management of the suit properties. Furthermore, the debt owed was admitted by the plaintiff.

24. The defendant dismissed the plaintiff's claim that the charging of management fees by the defendant in its obligation to recover debts owed by the plaintiff amounted to an estate agent stating that those actions are exempted under **section 3** of the **Estate Agents Act**. Furthermore, the issue of management fees had been agreed upon by the parties, thus the plaintiff could not disown what it had admitted.

25. On whether the defendant was entitled to charge interest, and if so, the applicable percentage, the defendant submitted that the interest was charged as agreed by parties at rate of 4.5% to 9.5 % as evidenced and the joint understanding of indebtedness. Furthermore, the capitalization of interest had been communicated to the plaintiff though a circular issued by the defendant on 3rd December 2004 and the plaintiff did not question the interest charged and is therefore estopped from challenging the interest charged. The defendant further submitted that its counterclaim should be allowed relying on a loan debtor statement which provides a comprehensive statement of monies received from the suit properties and expenses and absence of evidence to disprove the counterclaim.

Analysis and determination

26. After considering the testimony of the parties, the respective submissions and the reliefs sought by the parties, I consider the following to be the issues for determination:

- a) Whether the defendant disbursed loans to the plaintiff and whether the plaintiff is indebted to the defendant and, if so, how much?
- b) Whether the defendant was entitled to manage and sell the suit properties.
- c) Whether the plaintiff is entitled to the reliefs prayed in the plaint?

Whether the defendant disbursed loans to the plaintiff as funding for construction of housing estates

27. There is no dispute that some loans were disbursed by the defendant to the plaintiff towards the

construction of housing units, both residential and commercial. The defendant in its Defence and Counterclaim indicated that it had advanced 54 loans to the plaintiff between 1967 and 1987 totaling Kshs. 252,432,200.57 through loan agreements executed between 24th January 1968 and 21st April 1963. The plaintiff case was that only 11 loans were extended to it and that the defendant did not furnish full documents and accounts for the 54 loans allegedly advanced to it thus it was not entitled to judgment on the counterclaim.

28. Having considered the evidence and submissions, I find and hold that the question of the loans and outstanding debts was settled by the parties in the ***Joint Understanding of Indebtedness between the Municipal Council of Kisumu and National Housing Corporation*** (“the Understanding”) entered into on 20th May 2010.

29. The Understanding was a culmination of a consultative committee meeting between the Municipal Council of Kisumu and the National Housing Corporation held on 10th March 2010 and a full Council meeting held on 17th March 2010. The minutes of consultative meeting signed by the defendant’s Managing Director, the plaintiff’s mayor and town clerk on 11th March 2010 show that the issue of the number of loans was raised and discussed and the general indebtedness which was agreed at Kshs. 525,126,414.47 comprising Kshs. 24,768,633.75 as the principal balance, Kshs. 473,727,923.84 as arrear and expenses and management fees (March 1992 – December 2009), Kshs. 26,629,856.88. According to the record of the meeting, “*The Mayor said that since a settlement figure had been reached, the Council was going to put in place the necessary logistics that would culminate in actual settlement by June 2010 or there about.*” The report of the consultative meeting was then adopted at a full council meeting held on 17th March 2010.

30. The Understanding, which shows that a joint reconciliation of accounts was done, provided as follows:

JOINT UNDERSTANDING OF INDEBTEDNESS BETWEEN THE MUNICIPAL COUNCIL OF KISUMU AND NATIONAL HOUSING CORPORATION

Arising from a joint reconciliation of loan accounts between National Housing Corporation and the Municipal Council of Kisumu that was finalized on 28th October 2009 at NHC offices, the two parties hereby agree as follows:

- 1. That the Council owed National Housing Corporation a total of Ksh. 565,071,199.78 as at 31st December 2009, comprising arrears of Ksh. 473,727,923.84, office running expenses and management fees of Ksh. 66,574,642.19 and a principal balance of Ksh. 24,768,633.75*
- 2. In the joint consultative committee meeting held between the two institutions at NHC boardroom on 10th March 2010, NHC agreed to offset 60% of the total expenses loaded onto the Council’s account amounting to Ksh. 39,944,785.31*
- 3. That after deducting the expenses offset by NHC, the Council as at 31st December 2009 owed NHC a total of Ksh. 525,126,414.47 comprising arrears of Ksh. 473,727,923.84, office running expenses & management fees of Ksh. 26,629,856.88 and a principal balance of Ksh. 24,768,633.75*
- 4. That this amount will remain constant up to 30th June 2010 on condition that the Council undertakes to clear its debt by the said date.*
- 5. That if the Council does not clear the debt by 30th June 2010 NHC will reinstate the debt with all the expenses and management fees that had been earlier offset and any other incurred from 31st December 2009. In addition, NHC will reinstate all the interests on the principal balance and outstanding arrears from December 2009*

6. That the National Housing Corporation will continue managing the schemes within Kisumu Municipal Council until the debt is cleared.

As a sign of agreement with the figures and matters stated above, the two hereby append their signatures and common seals this 20th May 2010

SEALED with the common seal of the Municipal of Kisumu in the presence of

*HIS WORSHIP THE MAYOR SAMUEL OKELLOID NO. *****

*TOWN CLERK DANIEL OLE N'KERE ID NO. *****

SEALED with the common seal of NHC in the presence of

*MANAGING DIRECTOR JAMES WAGEMBA RUIITHA ID NO. *****

*CHAIRMAN BOSIRE OGERO ID NO. *****

31. My evaluation of the evidence shows that the Understanding was entered into with full knowledge of the facts. It confirmed that the defendant was entitled to charge management fees and expenses for the managing the suit properties and also charge interest. I therefore reject any allegations that the defendant misrepresented the facts upon which the Understanding was grounded. In summary, I find and hold that neither party can depart from it as it was consummated after a joint assessment of indebtedness.

Whether there is an outstanding debt to the defendant arising from loan disbursed

32. The Understanding I have set out above shows the amount owed by the plaintiff at the date of signing the agreement which is that as at 30th June 2010, the plaintiff owed the defendant Kshs. 525,126,414,47. The issue that requires reconciliation is the outstanding debt from 30th June 2010 when the plaintiff was supposed to clear the debt as agreed.

33. In an effort settle the debt, the plaintiff resolved in the meeting of 17th March 2010, *“That valuation of five Council Estates namely Arina, Mosque, Makasembo, Ondiek and Argwings be done urgently with the aim of determining which estate to be liquidated to offset the National Housing Corporation Debt ..”*

34. Following this resolution, the plaintiff wrote to the defendant a letter dated 22nd December 2010 offering Arina Estate for settlement of the entire debt of Kshs. 525,126,414,00. The letter stated that, *“The Council have now done valuation of the estate and have forwarded the offer to the Ministry of Local Government for approval.”* The issue did not progress but on 18th May 2012, the plaintiff wrote to the defendant stating that, *“The Council is unable to find any other property to top up the value for Arina Estate earlier valued at 485,000,000 against the reconciled debt of 525,000,000 Consequently, the Council hereby request that full debts owed to the Corporation be settled by swapping/handing over to you the said Arina Estate.”*

35. It is apparent the sale and/or swap was not effected as planned and therefore, the plaintiff did not comply with the agreement to offset the debt by 30th June 2010. The effect of this non-compliance, was that the plaintiff would cease to enjoy the waivers offered by the defendant in terms of the interest and arrears on expenses. In line with the Understanding, the total debt owing was Ksh. 565,071,199.78 as at 31st December 2009. To arrive at the debt owing, this remains the reference point, that is, the outstanding arrears, which as at 31st December 2009 was not in dispute and interest thereon as well as expenses and management fees.

36. To arrive at the actual payable amount requires a calculation on the outstanding principal balance of the loan, arrears to date, and expenses incurred inclusive of chargeable interest, less any monies that the defendant has continued to receive as rental income from the suit properties.

37. The plaintiff challenged the defendant charging interest on the loans as well as management expenses charged from the rental income. However, I note that even from the sample of agreements exhibited in court, the defendant charged an interest rate on the loans advanced. Furthermore, the plaintiff did not object to the issue of interest and management expenses in the Understanding and subsequent meetings with the defendant.

38. As of to date, there is no evidence before the court that the debt is fully settled. The plaintiff did not exhibit any evidence to show how much monies it remitted to the defendant towards settling its indebtedness. All the plaintiff did was to ask this court to declare that the plaintiff had paid in full the amount contractually due to the defendant. This was not supported by the plaintiff with a statement showing full settlement of the debt.

39. The defendant in its counterclaim and submissions demanded Kshs. 874,914,421.55 comprising Kshs. 831,142,025.51 being loan arrears and Kshs. 43,766,396.04 being the outstanding principal amount. In the counterclaim, and as rightly observed by the plaintiff, the defendant indicated the figure as arising from interest on loan arrears less total collections and went ahead to add them up as opposed to deducting. The defendant did not indicate how this figure was arrived at, the specific period applicable, the interest charged, the outstanding balance on which the interest was charged among others. Furthermore, by its own calculation, the plaintiff does not show the amount of money it remitted to the defendant before the defendant took over the suit properties. The defendant took over management of the housing units since March 1992 and following the Understanding, it was required to give a detailed account of rental income collected and how that has been credited to the plaintiff's loan account.

40. For the reasons I have stated, I am unable to enter judgment for the defendant as prayed in the counterclaim. However, from the Understanding, the sum what is clearly admitted is that the plaintiff owes the defendant **Kshs. 565,071,199.78** as at 31st December 2009. This sum was admitted in the subsequent letters to the defendant in which the plaintiff offered to sell or swap Arina Estate in order to clear its indebtedness

Whether the defendant was entitled to manage and or sell the suit properties

41. Prayers (b), (c), (d) and (f) of the plaint are the subject for consideration under this issue and they deal with the consequence of the plaintiff's indebtedness. The powers of the defendant in respect management and sale of the suit properties is provided for in **sections 8 and 9** of the **Housing Act** which provide as follows:

8(1) All loans made to a local authority by the Corporation shall be secured against the development financed by the loan advanced or against or in addition to any other specific immovable property owned by the local authority.

(2) The Corporation shall be a party to any contract or agreement between any person and the local authority advanced such loans with power to assume all the rights and remedies of such local authority in respect of developments financed by funds advanced by the corporation.

9(1) Where a local authority defaults in the repayment of debt charges due to the Corporation, the Corporation shall take over the management of the property developed by the local authority using funds borrowed from the Corporation and assume collection of any monies payable to the local authority by the beneficiary or any other person as provided in section 8(2) until the outstanding debt is recovered substantially or in full.

(2) Upon taking over the management of the property under subsection (1), the Corporation shall have the same rights and obligations as the local authority has in respect of the developments financed with funds provided by the Corporation.

(3) Any shortfall experienced as a result of the Corporation exercising its powers under this section shall be recovered from any other securities provided by the local authority or as civil debt

recoverable summarily.

(4) Notwithstanding any other provisions of this Act or of any other written law, the Corporation may take over the management, control and title to any property developed by a local authority which is in default using funds provided, secured or guaranteed by the Corporation upon the expiry of a ninety days' notice given by the Corporation to the local authority:

Provided that the Corporation shall compensate for the undeveloped site value of such property upon the vesting of title in the Corporation under this subsection.

42. In this case, the power to take over and manage the properties of a debtor under **section 9(1)** of the **Act** is not disputed by the plaintiff. In fact, it was implicit in the Understanding, at Clause 6, that the defendant was entitled to take over and manage the properties until the debt was repaid in full. Thus as long as the debt is not repaid, the defendant is entitled to continue managing the properties both under the **Act** and the Understanding.

43. The issue of sale was triggered by the what the plaintiff alleged was an attempt to offer for sale certain units in Arina Estate following the Understanding under circumstances I have alluded to elsewhere in the judgment. The plaintiff pleaded, at paragraph 23 of the plaint, that the defendant had published or caused to be published in the print and or electronic media it notice to evict the tenants who had failed to express their intention to purchase the units. The defendant denied that it had sought to sell residential and commercial units in Ondiek, Makasembo and Argwings Kodhek but it had only asked for expressions of interest from Arina, Argwings Kodhek and Ondiek Estates only and that no subdivision and numbering of the houses could proceed as a result of the frustration. It added that the values placed on the houses were only provisional and were subject to actual valuation.

44. At its meeting of 17th March 2010, the plaintiff resolved to offer some of its properties for sale to resolve the matter of its indebtedness. The matter of sale of local authority assets to liquidate settle loans due to the defendant had been dealt with in a letter dated 3rd March 2009 from the Permanent Secretary, Ministry of Housing authorised the defendant to commence the process of sale of local authority houses in order to redeem the defendant's debts. They authorised the defendant, *"In consultation and jointly with the Local Authorities ... convene the sale process."* He added that, *"The sale will be overseen by a high level committee to be constituted of nominees of relevant Ministries, Local Authorities and [the defendant]."*

45. In light of the approval given by the Minister, it is my understanding that the process of sale of the plaintiff's assets whether Arina Estate or any other properties was to be done in a co-operative and consultative process as directed by the Permanent Secretary in the letter dated 3rd March 2009 authorizing sale of council houses at various local authorities to redeem respective councils' indebtedness to the defendant. The authority given by the Permanent Secretary did not give the defendant authority to unilaterally sell the suit properties for this purpose. In any event, the parties had already agreed on the modalities of sale. I therefore find and hold that the defendant was not entitled to exercise any sale or intention to sell any of the suit properties in the manner it did.

What orders should this court grant?

46. I have found as a fact that the plaintiff is indebted to the defendant and the debt was indeed admitted in the Understanding as such prayers (a) and (d) of the plaint cannot stand. Despite admitting the debt, the plaintiff did not demonstrate any measures taken to clear the debt by 30th June 2010 or thereafter. I also reject the plaintiff's argument that since third part donors had written off their loans to the defendant, it was absolved from paying the loans. I hold that the plaintiff cannot interpose its indebtedness to the defendant with third party agreements between the defendant and its donors as it not privy to such agreements.

47. I also reject prayers (b), (c) and (d) of the plaint as the defendant has the power under **section 9(1)** of the **Act** to manage the suit properties to recover its debts, a fact admitted in Clause 6 of the Agreement.

Since indebtedness is admitted, there is no reason to interfere with the management of the properties. As regards the sale of the suit properties, I would only point out that the sale of the properties should proceed in line with the framework set out by the Minister of Housing in the letter dated 3rd March 2009.

48. Turning to the Counterclaim, I find and hold that the Understanding was a clear and unequivocal admission that the plaintiff owes the defendant **Kshs. 565,071,199.78** as at 31st December 2009. I therefore enter judgment for that sum only. In entering judgment against the plaintiff, I am fortified by the provisions of **section 9(1)** of the **Act** which entitles the defendant to recover any shortfall of any amounts due to its summarily as a civil debt.

49. Whether the plaintiff is further indebted to the plaintiff is in my view, a matter for taking accounts in terms of prayer (g). From the point of reference which is the Understanding, the amount owed continues to accumulate and accrue interest. In the meantime, the defendant continues to collect rent from the suit properties towards settlement of the outstanding loan. In order to resolve the matter, I order full accounts be taken to determine the actual amount owing to the defendant, with a clear indication of the principal balance, arrears, management expenses, accruing interest and amounts collected from the rental income as well as any sums paid under the tenant purchase scheme in respect of each loan account from the date of the Understanding.

Costs of the suit

50. Costs normally follow the event. Both parties have claimed costs of the suit. Considering the nature of prayers sought and conclusions of the court on the same, it is appropriate that each party bears its own costs particularly given that both parties are public institutions. It is my hope and expectation that the two parties being entities of the County and National government find a way to resolve this long outstanding dispute amicably.

Disposition

51. The final orders of the court are therefore as follows:

- a) Prayers (a), (b), (c), (d), (e) and (f) of the plaint be and are hereby dismissed.
- b) Judgment be and is hereby entered for the defendant against the plaintiff for the sum of **Kshs. 565,071,199.78** due to the defendant as at 31st December 2009.
- c) The plaintiff's order for full accounts is allowed. The defendant shall render a full account on the status of the plaintiff loans from 31st December 2009, including chargeable interests in accordance with each loan agreements as well as monies received from the suit properties and the amount charged for fees and expenses. This order shall be complied within 6 months from the date of this judgment and either party shall be at liberty to seek further and other orders in this regard.
- d) Each party shall bear their respective costs.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED at KISUMU on this 17th day of September, 2018.

F. A. OCHIENG'

JUDGE

Mr Otieno instructed by Otieno, Ragot and Company Advocated for the plaintiff.

Ms Ngania instructed by Ngatia and Associates Advocates for the defendant.