



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MILIMANI LAW COURTS, NAIROBI**  
**ELC NO. 496 OF 2017**

**AGRAFIN MANAGEMENT SERVICES LIMITED.....**  
**PLAINTIFF**

**-VERSUS-**

**AGRICULTURAL FINANCE CORPORATION .....1<sup>ST</sup>**  
**DEFENDANT**

**NTIKYA ENTERPRISES LIMITED.....2<sup>ND</sup>**  
**DEFENDANT**

**EQUITY BUILDING SOCIETY BANK LTD.....3<sup>RD</sup>**  
**DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup>**  
**DEFENDANT**

**THE COMMISSIONER OF LANDS.....5<sup>TH</sup>**  
**DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. This is a dispute concerning the ownership and alleged unlawful disposition of Land Reference No. 8480/2 (I.R. 43657) situate in Kasarani, Nairobi, measuring approximately 40.48 hectares (hereinafter “the suit property”). The Plaintiff, AGRAFIN MANAGEMENT SERVICES LIMITED, instituted these proceedings against the AGRICULTURAL FINANCE CORPORATION (1<sup>st</sup>Defendant), NTIKYA ENTERPRISES LIMITED (2<sup>nd</sup>

Defendant), the HONOURABLE ATTORNEY GENERAL (4<sup>th</sup> Defendant) and the COMMISSIONER OF LANDS (5<sup>th</sup> Defendant) challenging the creation of a charge dated 26<sup>th</sup> April 1989 and the subsequent sale and transfer of the suit property to the 2<sup>nd</sup> Defendant through a purported exercise of statutory power of sale.

2. The Plaintiff contends that the charge registered in favour of the 1<sup>st</sup> Defendant was illegal, unlawful and fraudulent, and that the subsequent sale to the 2<sup>nd</sup> Defendant was equally tainted with fraud, conspiracy and misrepresentation. The Defendants, on their part, maintain that the charge was lawfully created pursuant to the provisions of the Agricultural Finance Corporation Act, that the statutory power of sale was properly exercised following default, and that the 2<sup>nd</sup> Defendant acquired a good and indefeasible title as a bona fide purchaser for value at a public auction.
3. The Court is therefore called upon to determine the legality of the charge, the propriety of the sale, and the validity of the 2<sup>nd</sup> Defendant's title.

#### THE PLAINTIFF'S CASE

4. The Plaintiff's case is that it is and has always been the lawful and registered proprietor of L.R. No. 8480/2 (I.R. 43657) situated in Kasarani, Nairobi. Through its Managing Director, PW1, the Plaintiff testified that it purchased approximately 100 acres of land with the intention of undertaking residential development. It was the Plaintiff's evidence that although the original title was availed to the 1<sup>st</sup> Defendant for purposes of verification, no loan agreement, charge instrument, resolution of the Board of Directors, or any contractual document was ever executed between the Plaintiff and the 1<sup>st</sup> Defendant to create any borrowing relationship or to secure a facility of Kshs. 17,000,000/= . The Plaintiff maintained that it never borrowed any monies from the 1<sup>st</sup> Defendant and did not guarantee any loan in favour of Agrarian (or Agrafin) Building

Society.

5. The Plaintiff further distinguished itself from Agrarian Building Society, stating that Agrafin Management Services Limited was incorporated under the Companies Act, whereas Agrarian Building Society was incorporated under the Building Societies Act and placed under receivership in 1986. The Plaintiff asserted that the two entities were separate legal persons, notwithstanding alleged common directorship. It was its evidence that any debt allegedly owed to the 1<sup>st</sup> Defendant was owed by Agrarian Building Society and not the Plaintiff Company, and therefore the purported charge over its property was created without privity of contract and without lawful authority. The Plaintiff emphasized that under its Articles of Association, any borrowing required proper board authorization and affixing of the company seal, none of which was demonstrated by the 1<sup>st</sup> Defendant.
6. In addition, the Plaintiff contended that it was never served with any valid statutory notice prior to the purported exercise of the statutory power of sale. It challenged the legality of the alleged auction, questioned the absence of evidence of payment of the balance of the purchase price by the 2<sup>nd</sup> Defendant, and denied the validity of the transfer. Through PW2, a registered valuer, the Plaintiff produced a valuation report placing the current market value of the suit property at **Kshs. 2,200,000,000/=**, and prayed for declarations nullifying the charge and transfer, restoration of title, or in the alternative, damages equivalent to the market value.

### **THE 1<sup>ST</sup> DEFENDANT'S CASE**

7. The 1<sup>st</sup> Defendant, AGRICULTURAL FINANCE CORPORATION, contends that on diverse dates in 1988 and 1989 it deposited sums amounting to approximately Kshs. 17,000,000/= with Agrarian Building Society Limited as investments on call, which deposits accrued agreed interest. It is its case that Agrarian Building Society, which shared common directorship

and management with the Plaintiff, voluntarily deposited several titles, including L.R. No. 8480/2, as security to guarantee repayment of the said sums. The 1<sup>st</sup> Defendant maintains that a charge was lawfully registered on 26<sup>th</sup> April 1989 pursuant to the provisions of the Agricultural Finance Corporation Act, and that the Plaintiff, through its Managing Director who was common to both entities, was fully aware of the transaction and engaged in correspondence proposing settlement of the outstanding amounts.

8. The 1<sup>st</sup> Defendant further states that following default and the subsequent liquidation of Agrarian Building Society, a vesting order was issued placing the assets under the Official Receiver. As a secured creditor holding a first ranking charge, the 1<sup>st</sup> Defendant asserts that it was entitled to realize the security independent of the liquidation process. It maintains that the statutory power of sale was properly exercised after advertisement, culminating in a public auction at which the 2<sup>nd</sup> Defendant emerged as the highest bidder. The 1<sup>st</sup> Defendant therefore denies any fraud or illegality and contends that the sale and transfer of the suit property were lawful, regular, and within its statutory mandate.

### **THE 2<sup>ND</sup> DEFENDANT'S CASE**

9. The 2<sup>nd</sup> Defendant, NTIKYA ENTERPRISES LIMITED, asserts that it lawfully acquired the suit property as a bona fide purchaser for value without notice. Its Director testified that the Company was attracted by a newspaper advertisement placed in the *Daily Nation* announcing a public auction scheduled for 19<sup>th</sup> August 2003 in respect of L.R. No. 8480/2. The 2<sup>nd</sup> Defendant participated in the said auction, emerged as the highest bidder at Kshs. 70,000,000/=, paid the requisite deposit, and was subsequently issued with a Certificate of Sale. Upon completion of payment, the property was transferred and registered in its name. The 2<sup>nd</sup> Defendant maintains that it relied on the apparent validity of the title and

the authority of the 1<sup>st</sup> Defendant as chargee exercising its statutory power of sale.

10. The 2<sup>nd</sup> Defendant denies all allegations of fraud, conspiracy, misrepresentation or negligence. It contends that it conducted itself in good faith, had no knowledge of any defect in the charge or in the exercise of the statutory power of sale, and cannot be faulted for any dispute between the Plaintiff and the 1<sup>st</sup> Defendant. It further argues that once property is sold at a public auction pursuant to a chargee's statutory power of sale, the charger's remedy, if any, lies in damages and not in cancellation of title. The 2<sup>nd</sup> Defendant therefore prays that the suit against it be dismissed with costs.

#### **THE 4<sup>TH</sup> AND 5<sup>TH</sup> DEFENDANTS' CASE**

11. The 4<sup>th</sup> and 5<sup>th</sup> Defendants produced certified records relating to the suit property. The Land Registrar placed before the Court a certified copy of the Certificate of Title I.R. 43657, together with the Notification of Charge dated 26<sup>th</sup> April 1989, registered on 28<sup>th</sup> April 1989 as an encumbrance in favour of the 1<sup>st</sup> Defendant for Kshs. 17,000,000/= at an interest rate of 15% per annum. The notification indicated that the charge was subject to the provisions of the Agricultural Finance Corporation Act and referenced a loan agreement dated 25<sup>th</sup> April 1989.
12. The 4<sup>th</sup> and 5<sup>th</sup> Defendants maintained that the registration of the charge and the subsequent entries in the land register were effected in accordance with the documents presented to the Lands Registry and in compliance with the law as it then stood under the Registration of Titles Act. They denied any negligence, illegality or impropriety on their part, contending that the Registrar's role was purely administrative and procedural upon presentation of duly executed instruments. They therefore prayed that the claims against them be dismissed.

#### **SUBMISSIONS**

## **PLAINTIFF'S SUBMISSIONS**

13. In its written submissions, the Plaintiff framed the dispute around the central issues of whether the charge dated 26<sup>th</sup> April 1989 was lawfully created, whether there existed any privity of contract between the Plaintiff and the 1<sup>st</sup> Defendant, whether the statutory power of sale was properly exercised, and whether the 2<sup>nd</sup> Defendant qualifies as a bona fide purchaser for value without notice.
14. The Plaintiff relied on statutory provisions including **Sections 19, 20 and 33 of the Agricultural Finance Corporation Act, Section 3(3) of the Law of Contract Act, and Section 99(4) of the Land Act, 2012**, arguing that no written loan agreement executed by the Plaintiff existed and therefore the charge was void.
15. The Plaintiff cited, inter alia, ***Agricultural Finance Corporation v Lengetia Ltd & Another (Civil Appeal No. 104 of 1984)*** on privity of contract; ***Salim v Co-operative Bank of Kenya Ltd & 2 Others (ELC No. 193 of 2021)*** on unlawful charging of property; ***Basil Criticos v National Bank of Kenya & Another (Civil Appeal No. 80 of 2017)*** and ***Lalji Karsan Rabadia & 2 Others v Commercial Bank of Africa (2015 eKLR)*** on the nature of guarantees; ***Dina Management Ltd v County Government of Mombasa & 5 Others (2023) KESC 30 (KLR)*** and ***Torino Enterprises Ltd v Attorney General (2023) KESC 79 (KLR)*** on the doctrine of bona fide purchaser; and ***Munyua Maina v Hiram Gathiha Maina (Civil Appeal No. 239 of 2009)*** on the burden of proving legality of title. The Plaintiff therefore urged the Court to nullify the charge and transfer and to grant the reliefs sought in the amended plaint.

## **1<sup>st</sup> DEFENDANT'S SUBMISSIONS**

16. The 1<sup>st</sup> Defendant submitted that the key issues for determination were whether the Plaintiff and Agrarian Building Society were interconnected entities with common management; whether monies amounting to Kshs. 17,000,000/= were advanced and secured; whether the suit property was validly offered as collateral; whether the 1<sup>st</sup> Defendant lawfully exercised its statutory power of sale; and whether this Court has jurisdiction to entertain what it termed a commercial dispute arising from liquidation.
17. The 1<sup>st</sup> Defendant relied on authorities including ***Diamond Hasham Lalji & Another v Jatcom*** on the liability of a guarantor upon default; ***First Choice Mega Store Ltd v Ecobank Kenya Ltd (2017 eKLR)*** and ***Paul Muhoro Kihara v Barclays Bank (K) Ltd (HCCC No. 33 of 2002)*** on the principle that charged property becomes a commodity for sale upon default; ***Fina Bank Ltd v Spares & Industries Ltd & Another (2000 eKLR)*** and ***Official Receiver v Freight Forwarders Kenya Ltd (2000 eKLR)*** on the rights of secured creditors during liquidation; and ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989 KLR 1)*** and ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (2012 eKLR)*** on jurisdiction. It urged the Court to find that the charge and sale were lawful and that the Plaintiff's claim be dismissed with costs.

## **2<sup>nd</sup> DEFENDANT'S SUBMISSIONS**

18. The 2<sup>nd</sup> Defendant submitted that the principal issue for determination was whether it lawfully acquired **L.R. No. 8480/2 (I.R. 43657)** as a **bona fide purchaser for value at a public auction**, and whether any defect in the charge or in the relationship between the Plaintiff and the 1<sup>st</sup> Defendant could invalidate its title. It argued that once a property is sold pursuant to a chargee's statutory power of sale and a certificate of sale is issued, the chargor's remedy, if any, lies in damages and not cancellation of title.

19. In support of this position, the 2nd Defendant relied on ***Kirima v Taramba & Others (Environment and Land Appeal No. E007 of 2022)*** where the Court held that after a public auction, reversal of title is not the proper remedy. The 2<sup>nd</sup> Defendant therefore urged the Court to find that it acquired good title free from any fraud, conspiracy or misrepresentation and to dismiss the Plaintiff's claim against it with costs.

### **ISSUES FOR DETERMINATION**

20. Having considered the pleadings, the evidence on record, and the submissions of Counsel, the Court is of the view that the dispute before it raises the following issues for determination:

- a) Whether this Court has jurisdiction to determine a dispute whose foundation, substratum, and consequential reliefs are entirely pegged on the existence, validity, and enforcement of a charge.
- b) If the answer to (a) is in the negative, whether this Court can nonetheless interrogate the sale, transfer, or title to the suit property without first determining issues relating to the charge.
- c) What orders ought to issue in the circumstances.

### **ANALYSIS AND DETERMINATION**

**Issue No. 1: Whether this Court has jurisdiction to determine a dispute whose foundation, substratum, and consequential reliefs are entirely pegged on the existence, validity, and enforcement of a charge.**

21. The first and overriding issue for determination is whether this Court has jurisdiction to entertain the dispute as framed. Jurisdiction is fundamental, and a court must determine it at the earliest opportunity. Where a court finds that it lacks jurisdiction, it must down its tools without proceeding to

determine the merits of the dispute.

22. From the pleadings, evidence and submissions on record, it is clear that the parties placed before this Court extensive and conflicting factual material touching on whether a loan agreement existed, whether a charge was created, and whether such charge was lawfully enforced. The Plaintiff asserted that no charge ever existed, while the Defendants maintained that a charge existed and was enforced pursuant to law. The Court is therefore alive to the fact that the existence of the charge itself is a contested factual issue.
23. However, the Court must emphasize that ascertaining whether a charge existed, whether it was validly created, or whether it was enforceable is not a neutral or preliminary exercise. It is a substantive determination that goes to the heart of contractual and commercial relations between the parties. The Court cannot inquire into the existence of the charge without interrogating the underlying loan transaction, the security instrument, and the statutory framework governing its enforcement.
24. The sale, transfer and subsequent registration of Land Reference No. 8480/2 (I.R. 43657) are pleaded by all parties to have occurred pursuant to an alleged exercise of statutory power of sale. Whether that power existed at all, and whether it crystallized, are questions that are entirely dependent on the existence and enforceability of the charge. The dispute before this Court is therefore wholly pegged on the charge, not merely incidental to it.
25. The jurisdictional boundary between the High Court and the Environment and Land Court in disputes of this nature was conclusively settled by the Court of Appeal in ***Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others [2017] eKLR***. The Court of Appeal held

that the determining factor is the dominant issue in dispute, and that disputes relating to mortgages, charges, banking securities, and their enforcement fall within the civil jurisdiction of the High Court, notwithstanding that such instruments relate to land.

26. The Court of Appeal expressly rejected the argument that the Environment and Land Court acquires jurisdiction merely because a charge is an instrument granting an interest in land. It held that while a charge affects land, disputes relating to its existence, validity, enforcement, or the accounting arising therefrom are commercial and contractual disputes, not disputes relating to the use, occupation of, or title to land as contemplated under **Article 162(2)(b) of the Constitution** and **Section 13 of the Environment and Land Court Act**.
27. In the present case, the Court is satisfied that the dominant issue is not land use, occupation, or title per se, but whether a charge existed and was enforceable, and whether the sale and transfer flowed lawfully from that charge. The Court cannot determine the reliefs sought without first resolving those questions. To do so would require this Court to ascertain the existence and legality of the charge, an inquiry that lies outside its constitutional and statutory mandate.
28. The Court therefore finds that although facts were placed before it touching on the alleged charge, this Court lacks jurisdiction to ascertain whether the charge existed or not, and equally lacks jurisdiction to determine any dispute whose resolution is dependent upon that ascertainment.
29. Having so found, this Court must, in accordance with settled law, down its tools and refrain from making any findings on the merits of the dispute.

## **FINAL ORDERS**

In the result, the Court makes the following orders:

- a) In light of the finding that this Court lacks jurisdiction to entertain and determine the dispute before it, the Court hereby downs its tools.
- b) Accordingly, the Complaint dated 8<sup>th</sup> February 2000 and the Further Amended Complaint dated 18<sup>th</sup> March 2024 are hereby struck out in their entirety for want of jurisdiction.
- c) Each party shall bear its own costs.

**It is so ordered!**

**DATED, SIGNED and DELIVERED** virtually at **NAIROBI** on this **18<sup>TH</sup>** day of **FEBRUARY, 2026.**

**MOHAMMED N. KULLOW**

**JUDGE**

**Judgment delivered in the presence of: -**

**Mr. Mwaniki**..... for the Plaintiff

**N/A**..... for 1<sup>st</sup> Defendant

**Ms. Okondo for Gaserwa**..... for 2<sup>nd</sup> Defendant

**N/A**..... for 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Defendants

**Philomena W.**..... Court Assistant