REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO 11 OF 2019

KAMAU MUHIA.....APPELLANT

VS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

JUDGMENT

1. This is an Appeal arising from the judgement and decision of Hon J Wekesa SRM in CMCC NO 46 of 2011 delivered on the 19/7/2011.

2. By way of Appeal the Appellant filed 7 grounds of Appeal interalia that the Hon Magistrate erred in law and fact in; not allowing the prayers of the Appellant; not considering that the Appellant will suffer irreparable loss if the suit is sold by public auction; not giving weight to a letter dated the 22/10/13 authored by the Minister for Finance; not relying on the affidavit sworn on the 24/1/2012; in not finding that the title should be stopped from being sold; in not deciding the case in his favour.

3. The parties elected to canvass the Appeal through oral arguments which I heard on the 24/9/19. In his oral submissions the Appellant relied on his Memorandum of Appeal and the entire record of Appeal in advancing his Appeal. He gave reasons why he is aggrieved by the judgement of the Hon Learned Magistrate; that he was not given the opportunity to be heard; the auctioneer advertised his property for sale by public auction without following the law; that his case was heard before the Hon Learned Magistrate Kaniaru but the judgement was delivered by Hon Wekesa; that there has been delay in hearing his case.

4. In response the Respondent through its Counsel on record Mr Mutuma acknowledged that the matter is old. He stated that the Appellant testified before the Hon Wekesa in the lower Court and the case was determined in 2013. That notwithstanding that the Respondent is yet to sell the land by public auction the Respondent has given the Appellant time to repay the loan since then but he has failed to take advantage of the opportunity. That the Respondent is willing to afford the Appellant time to repay the loan if he approaches them with a repayment proposal which he stated would be considered favorably.

5. Being the first Appellate Court, I must caution myself in the words of the Honorable Judges in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** regarding the duty of first Appellate Court:-

> "This being a first Appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

6. It is not in dispute that the Appellant obtained a loan facility of Kshs 165000/- from the Respondent in 2006. A letter of offer dated the 20/2/06 showed the purpose of the loan was for setting up a dairy unit, buying grade cows and development of nappier grass etc. The said facility letter was duly accepted by the Appellant on the 22/2/06. On the 23/2/06 a charge was registered on the suit land to secure the said sum of Kshs 165,000/-. The Appellant has acknowledged and admitted the facility and that he repaid Kshs 60,000/- which was acknowledged by the Respondent.

7. The Defendant produced the letters for demand and the foreclosure notice .The amount claimed stood at Ksh 66,350/= as at 30/5/07 when the first set of demand letters were issued .The Foreclosure notice dated 22/2/2008 gave him 3 Months to clear Ksh 244,193 /= as the principle and accrued interest, failure which the chargor would sell the land .

8. The advertisement for sale was issued on 3/1/11, which was 3 months after the 90 days statutory notice had been issued. There was no evidence of payment as at the time the notice had issued and the Appellant rushed to Court to stop the sale .The Appellant does not dispute the address of service and the debt.

9. The charge was executed under the repealed Act .Section 74 of the Registered Land Act set out the statutory provisions to be satisfied before sale of land under the Act.

10. Section 74 of the Registered Land Act (CAP 300) Laws of Kenya (now repealed) which provided as follows :-

> "(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.
>
> (2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -
>
> (a) appoint a receiver of the income of the charged property; or
>
> (b) sell the charged property:
>
> Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

11. The foreclosure notice is akin to the provisions of the statutory notice .It set out the precise amount that was due, the action to be taken and the consequences of the default .The period for payment was 90 days .The Respondent also produced a 45 day redemption notice. The notices and advertisement for sale are bound by the provisions of Rule 15 and 16 of the Auctioneers Act.

12. In the case of **Kiran Ramji Kotedia -Vs- Trust Bank Ltd, HCCC No. 1319 of 1999** (UR) Mulwa J found that:

> "non-compliance with the provisions of Rule 15 of the Auctioneers Rules would not invalidate a sale and would not by itself entitle the Applicant to an injunction."

The Appellant does not dispute the address of service in the statutory notice and the redemption notice.

13. It would appear that the Appellant started defaulting on the loan as at 12/2/2007 when a letter was written to him to repay the scheduled loan repayments. Similar letters followed culminating to the issuance of the 90-day statutory period by the Respondent on the 22/12/08. The auctioneers 45 days redemption notice followed on the 3/1/2011. It is on record that the property was advertised on the 1/3/2011.

14. Section of the 74 and 77 of the Registered Land Act (now repealed) aforementioned made provisions to be followed before a lender exercised his statutory power of sale. Having reviewed the record and the documents adduced in the lower Court I am satisfied that the Respondent followed the law in exercise of its statutory power of sale.

15. The Appellant's contention that the Respondent should have served him with a Court order or execution decree is not founded in law. On admission of default and that he was served with the notices he cannot hide behind his own imagined notice which is not legally binding.

16. When the matter came for hearing the Appellant was heard and he tendered evidence as seen on the record. It is therefore not true that he was not give the opportunity to be heard.

17. The record speaks for itself. This matter was heard by the Hon Kaniaru when the Appellant testified and later concluded by Hon Wekesa who delivered the judgement. I have not seen any protestation or objection raised by the Appellant. indeed it is on record that the Appellant requested the Court presided by Hon Wekesa to hear the matter as he did not want it to go to another Court meaning that he properly submitted to the jurisdiction of the said Court which had jurisdiction to hear and determine the matter. And determine it did.

18. The law is that the Court cannot interfere with the judgment of the trial Court unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. **See Coffee Board of Kenya -Vs- Thika Coffee Mills Limited & 2 Others [2014] eKLR**.

19. I have thoroughly and carefully reviewed the record, the pleadings the evidence adduced in Court and the submissions of the parties in the lower bench and judgement pronounced in this case and I find no grounds to fault the learned Magistrate. It is not in dispute that the loan is outstanding. The Appellant is in default. The Respondent followed the law in exercising its statutory power of sale. The charge is lawful.

20. I have seen the letter addressed to the Respondent by the then Minister for Finance Hon. Robinson Njeru. My view of the letter is that it did not waive the interest. The matter of interest rate is comprised in the contract between the parties and this Court cannot rewrite terms of contract for the parties. It can at best interpret the rights of the parties as contained in the contract.

21. It is not lost on the Court that the Respondent has not sold the suit property and that it is willing to accommodate the Appellant to have the loan renegotiated. In my view I think the Appellant should take advantage of this gesture and approach the Respondent with a view to renegotiating the loan.

22. In the end the Appeal has no merit and it is dismissed with costs to the Respondent both in the lower Court and on Appeal.

23. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 5TH DAY OF DECEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Appellant: Present in person

Respondent: Absent

Irene and Njeri, Court Assistants