

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 353 OF 2016

SAMMY KIPCHO CHOGE..... PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION..... DEFENDANT

RULING

The application before court is dated 25.3.2016 wherein the applicant seeks an order of temporary injunction do issue to restrain the defendant, its servants and or agents, in particular M/s Keysian Auctioneers and court brokers by themselves, or others or its nominees by themselves or others or whomsoever claiming to act for and on their behalf from selling, alienating, appropriating, transferring, charging, leasing and or trespassing upon all that piece of land known as **Nandi/Kapsengere/1063** comprising 1.55 Ha (3.83 Acres) or thereabouts pending the hearing and the final determination of the main suit.

The application is based on grounds that the Applicant/Plaintiff is the registered proprietor of all that piece of land known as NAND1/KAPSENGERE/1063 comprising 1.55 Ha (3.83 Acres) or thereabouts. That on the 7th day of November, 2016, M/S Keysian Auctioneers And Court Brokers acting as agents and or servants of the Respondent/Defendant advertised the Plaintiff's piece of land aforesaid for sale by public auction on the 30th day of November, 2016. That on the same day, the Applicant/Plaintiff wrote a protest letter to the Respondent/Defendant against the latter's move to sell his land without serving the Statutory Notice in terms of Section 90 of the Lands Act and for charging exorbitant, immoral and unlawful interest on the principal amount. That the Respondent/Defendant did not serve the Statutory Notice upon the Applicant/Plaintiff in terms of Section 90 of the Land Act.

The plaintiff claims that the Respondent/Defendant has not valued the property which is currently having dwelling houses thereon and people residing therein as required by law. The Respondent/Defendant has not explored the engagement of other alternative remedies before exercising its power of sale. The action of the Respondent/Defendant is unlawful, unconstitutional, oppressive, inequitable, fraudulent and in bad faith. The Applicant/Plaintiff who has a good and or reasonable cause of action with a probability of success will suffer irreparable, irredeemable, and irreversible loss if the suit property is unlawfully sold by M/S Keysian Auctioneers And Court Brokers on the 30th Day Of November, 2016 or at any other time thereafter. The plaintiff had serviced the loan facility but due to poor farming opportunities he lagged behind in the payment of the outstanding installments more so since the Respondent/Defendant delivered the 2 tractors purchased some 11 months late. The aforesaid piece of land comprises the matrimonial home of the Plaintiff and his family of more than 20 persons who live thereon on. That it is just and fair in the premises that pending the hearing and the final determination of this Application and the main suit, this Honourable Court be pleased to restrain the Respondent/Defendant, its servants and or agents in particular M/S Keysian Auctioneers And Court Brokers or others acting for and on their behalf from selling, alienating, appropriating, transferring, charging, leasing, and or trespassing upon all that piece of land known as Nand1/Kapsengere/1063 comprising 1.55 HA (3.83 Acres) or thereabouts. The supporting affidavit merely reiterates the grounds of the application.

In the replying affidavit, Mainga Evans, an advocate of the High Court of Kenya and a Legal Officer of Agricultural Finance Corporation states that he is familiar with the matters that are the subject of these proceedings and therefore competent and duly authorized by the Corporation to make this Affidavit. He states that the matters deponed to herein are based on his knowledge, such knowledge being derived from

his perusal of the Corporation's files and the court papers relating to the matters in dispute in this suit and from his position as a Legal Officer of the Defendant Corporation, to the extent that such knowledge is based on information, belief or advice he disclosed. He deposes that on or about 3rd July, 2007, the Plaintiff applied for and received a second loan of Kenya Shillings One Million Five Hundred (Kshs.1,500,000) for purchase of beef cattle which sum was to be repaid in full with interest and costs within a period 2 years. That on or about 17th February 2006, the Plaintiff applied for and received Kenya Shillings Eight Million Nine Hundred and Twenty Eight Thousand Three Hundred (Kshs.8,928,300) for purchase of farm machineries which sum was to be repaid in full with interest and costs within a period 3 years. That as a cardinal principal, the Defendant would only finance the Plaintiff after being furnished with collateral for the credit facility, which information was adequately conveyed to the Plaintiff who promptly produced the title deed in respect of all that parcel of land known as NANDI/KAPSENGERE/1063 upon which Notifications of Charge were lodged and registered in favour of the Defendant to secure the loan sums advanced to the Plaintiff together with interest and costs thereon. That immediately the loans became due and owing, the plaintiff breached the loan agreement by failing and/or refusing to repay the installments prompting the Defendant to serve upon him a demand notice to honour his contractual obligation and that as a result of the Plaintiff's continued default, the Defendant initiated recovery process in exercise of its statutory power of sale by issuing a statutory notice to the Plaintiff dated 21st May, 2009 recalling the outstanding sums in full together with interest thereon. The above statutory notice was served upon the Plaintiff vide registered post through his last known address. At the time of serving the statutory notice, the loan had fully matured to wit 2 and 3 years respectively within which the same was to be repaid, thus, it defeats logic and reason in the mind of any reasonable member of society for the Plaintiff to out rightly mislead the Court that the statutory notice was defective. That it is impenetrable and duplicitous for the Plaintiff to allege that he has never been informed about the outstanding sum whereas on every occasion he was served with notices the amount outstanding together with interests thereon was tabulated for his perusal. That he is advised by their Advocate on record the advice he verily believes to be true that there is no legal obligation and/provision to the effect that wherever there is a dispute about the outstanding loan amount, the Plaintiff should be exonerated and/or discharged from his contractual obligation. That as a result of the Plaintiff's continued default, the 1st Defendant instructed the firm of Messrs Keysian Auctioneers to execute against the Plaintiff by disposing of the suit property with a view to realizing the outstanding sums involved. That the said Messrs Viewline Auctioneers issued a 45 days redemption notice and a notification of sale over all that parcel of land known as NANDI/KAPSENGERE/1063 upon the Plaintiff giving him ample time to salvage and/or redeem his account but the same was still not complied with and that in total compliance with the law, the 2nd Defendant advertised the intended sale through print media.

At the time of issuing instruction to the auctioneer, the Defendant through Real Appraisal Limited did a valuation of the suit property and that when the suit property was offered as security for the loan advanced it was deemed to have become a commodity of sale and the only available remedy is for the Plaintiff to exercise his right of redemption to safeguard his sentimental attachment thereon. He is advised that the loan agreement is binding and the prayers being sought by the Plaintiff lack any existing and/or imaginary legal basis since the Court has no jurisdiction to rewrite the loan agreement between the Plaintiff and the Defendant. That it is only just and fair if the Plaintiff's application is dismissed with costs as it does not satisfy the requirements that tug along the principles of procuring and enjoying an injunctive order.

In the supplementary affidavit sworn on 23.12.2016, the applicant states that he paid the respondent the initial loan of Kshs.1.5 million and applied for discharge of charge but his title deed could not be traced. Thereafter, he applied for a new loan and therefore, he does not owe them Kshs.1.5 million and that the respondent has not at any time demanded for Kshs.1.5 million. He claims to have paid the final loan in full. Moreover, he claims that the property was not valued as at no time did the valuers enter the property.

I have considered the application, supporting affidavit, replying affidavit and the supplementary affidavit and do find that it is a fact that the plaintiff borrowed Kshs.1.5 million from the respondent to be repaid within 2 years. The plaintiff was to pay the Corporation Kshs.423,015 half yearly for 2 years. The certificate of acceptance was signed on 16.2.2006. Another loan offer of Kshs.8,928,300 was made on 3rd

July, 2007 and the same was accepted by the plaintiff.

The two loans were offered and the plaintiff's projects financed after the plaintiff furnished collateral for the credit facility being title deed for land reference No. Nandi/Kapsengere/1063. Notifications of charge were accordingly lodged and registered in favour of the defendant. There is no evidence that the loans have been repaid as agreed. I have looked at ME4 in the affidavit of Mainga Evans and the same is a sufficient demand notice.

I have also looked at ME5 being the foreclosure notice sent by registered post of the plaintiff. The question is, were these documents sent to the plaintiff? I doubt, as there is no receipt issued by the postal corporation of Kenya that the two documents were registered as items to be delivered to the plaintiff. In such matters, the respondent should demonstrate that notice was issued failure of which the process of realization of security should be stopped. Therefore, I do find that the plaintiff has demonstrated sufficiently that he was not notified. I do find that the plaintiff has demonstrated a prima facie case with a liability of success.

On irreparable harm that cannot be sufficiently compensated with damages, I do find that the property being a matrimonial, with a home if sold, the plaintiff will suffer irreparable damage and that damages will not compensate the plaintiff sufficiently if the property is sold and the family evicted. On balance of probabilities, I do find that it tilts towards maintaining status quo. Ultimately, I do issue an order of temporary injunction restraining the defendant, its servants and or agents, in particular M/s Keysian Auctioneers and court brokers by themselves, or others or its nominees by themselves or others or whomsoever claiming to act for and on their behalf from selling, alienating, appropriating, transferring, charging, leasing and or trespassing upon all that piece of land known as **Nandi/Kapsengere/1063** comprising 1.55 Ha (3.83 Acres) or thereabouts pending the hearing and the final determination of the main suit. Orders accordingly.

Dated and delivered at Eldoret this 2nd day of March, 2018.

A. OMBWAYO

JUDGE