



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 198 OF 2014

JACKSON KING'ORI KAMWERU.....PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION.....DEFENDANT

JUDGMENT

Jackson King'ori Kamweru, hereinafter referred to as the plaintiff is the registered owner of the land parcel known as **Kakamega/Mautuma/517** which measures approximately 7.9 hectares. **Agricultural Finance Corporation** is the defendant herein. The plaintiff avers that he charged his land to the defendant to secure a facility of Kshs. 286,000. The plaintiff avers that he has dutifully made efforts to repay the loan however, the defendant has commenced an irregular exercise of the chargee's statutory power of sale which is unlawful for the reasons the suit land is registered and its proprietorship is governed by the Land Act, 2012 which by section 90 obligates a chargee to serve a valid statutory notice prior to commencing to exercise the statutory power of sale but none has been issued and served.

The plaintiff claims that the amount demanded in the notification of sale and the redemption notices are unlawful as it flouts the *induplum* principle to demand kshs.1,336,081 when the principal advanced was Kshs. 286,000 and that the loan and interest to be recovered by the sale is illegal as it claims amounts that are over the 10% maximum interest rate that the defendant is allowed to charge under the Agricultural Finance Corporation Act, Cap. 323.

The intended sale seeks to enforce the recovery of amounts of interest that the Senate by its resolution has since outlawed by seeking to have the defendant to charge interest at 3% p.a. instead of 10% p.a.

The requirements of notice under the Agricultural Finance Corporation Act, 323 have not been duly complied with and no valid advertisement of the property has been carried out as required by section 33 of the Agricultural Finance Corporation Act, Cap. 323 and the Auctioneers Rules, 1997. According to the plaintiff, no proper valuation of the property has been done as required by the law.

The plaintiff laments that the County Commissioner of the area where the land is located has not been served with the notice of the intended sale and that the sale shall affect a number of tenants and a nursery school that are in occupation of the suit land but not duly served with notice as required by law.

The intended sale as scheduled and the process of the exercise of the chargee's statutory power of sale as initiated militates against security of land rights as provided for in section 4(2)(b) of the Land Act, 2012.

The decision to recover interest which is way above the legal limit militates against the principle of inclusiveness as provided by section 4(2) (m) of the Land Act, 2012 as the defendant unilaterally altered the interest due on the loan without involving the plaintiff.

The plaintiff states that there is no previous pending suit of proceedings parted hereto in respect of the cause of action herein before court and that the cause of action arose within the jurisdiction of this Court.

The plaintiff thus seeks a declaration that the intended sale is void and unlawful coupled with a perpetual injunction restraining the defendant whether by itself, its servants and/or agents from selling, transferring the land parcel known as KAKAMEGA/MAUTUMA 22/517 plus Costs and interest.

In her defence, Agricultural Finance Corporation denies the contents of the defence and states that the Plaintiff obtained a loan of Kshs. 286,000/- sometime in 2006 which he failed to repay and he was refinanced again sometime in 2009 with a sum of Kshs. 286,000/- which is also due and owing.

That the Defendant denies that the Plaintiff has been repaying his loan dutifully as captured in paragraph 5 (a-k) of the plaint and further states as follows that on or about 3rd February 2006, the Plaintiff applied for and received Kshs. 286,000/- to grow 26 acres of maize which sum was to be repaid in full with interest within a period of one (1) year. A notification of charge was duly registered on the plaintiff's land

known as KAKAMEGA/MAUTUMA/517 on the 10th February, 2006 in favour of the Defendant to secure the loan sums. The plaintiff defaulted in the repayment of the loan and the Defendant requested for refinancing;

On or about 9th April 2009, the Plaintiff was refinanced with a sum of Kshs. 286,000/- to grow 26 acres of maize which sum was to be repaid in full with interest within a period of one (1) year;

When the loan became due and owing, the Plaintiff failed to honor his contractual obligation again. The Plaintiff applied for rescheduling of the said loans which he was granted when an addendum was prepared but he refused to execute the addendum;

The Plaintiff was served with notices indicating clearly that he was in default and that the Defendant was now charging compound interest in accordance with paragraph 20 of the loan agreement.

Due to the continued default on the part of the plaintiff, the defendant served the plaintiff with a statutory notice which was served upon his wife, Jackline Wanjiku.

The Plaintiff still failed and neglected and/or refused to honour his debt repayment obligation thus constraining the defendant to instruct Messrs Joni Consult Auctioneers to dispose of the security parcel by way of public auction.

Accordingly, the said Joni Consult served the plaintiff with a 45 days' redemption notice and notification of sale by public auction. Upon expiry of the 45 days' redemption notice, the said Cash Crop Auctioneers duly advertised the entire suit parcel in the star Newspaper of 22nd May, 2014 floating the suit parcel for sale by way public auction. The Defendant did a proper valuation of the suit property before advertising the same for sale. The Defendant's statutory power of sale had crystallized considering that it complied with all the legal requirement it is within its rights to exercise the same

The Defendant denies the contents contained in paragraph 6 of the Plaint and strongly avers that the orders being asked for by the plaintiff are not capable of being granted since it appears as if he is gambling with justice having made several proposals.

When the matter came for hearing, the plaintiff stated that he took a loan of Kshs.286,000, he did not pay the loan because there was violence in 2007. When he called security, he was overwhelmed. He stayed in Turbo Police for 7 months. He was given 3 months' notice that his land was going to be sold. He received notice 3 months before 9.5.2014. He resides on the land. His wife was not given notice of the sale.

He was told to take another loan and indeed he took a loan of Kshs.286,000 but he could not do anything with the loan due to drought and school fees. The interest was too high. He is not refusing to pay and he is ready to negotiate. He had sugarcane that will mature after 5 months.

On cross examination by Mr. Mabonga learned counsel for the defendant, he states that the loan was taken on 3.2.2006. The money was Kshs. 286,000 for maize farming the same was to be repaid on 3.1.2007. He took a second loan in 2009 but did not pay. He admits that he was given notice.

The defence called James Kariuki Ngunjiri, the Branch Manager Agricultural Finance Corporation., Turbo branch. He states that the plaintiff applied for a loan of Kshs.286,000 in February, 2006 to grow maize and the loan was to be repaid on 3.2.2007. This was the peak maize harvesting period. The defendant is not aware of the problems that the plaintiff faced during 2007 election. In April 2009, in the month of April he was given a refinance loan of Kshs.286,000. He was to pay the money in April, 2010. The loan was never paid. He was served with the 45 days' notice by the Auctioneer.

The court has considered the pleadings, evidence and the submissions on record and does find that it is a fact that the plaintiff took a loan of Kshs. 286,000 on the 3.2.2006 and it was a term of the agreement that Kakamega/Mautuma/517 would be used as a collateral to secure the loan advanced. The plaintiff was given a refinance of Kshs. 286,000 and a further charge was made on the same parcel of land to secure the defendant's interest. The loan was to be repaid within 12 months. The first loan was to be repaid on or before 3.2.2007 whilst the 2nd loan was to be repaid on 8.4.2009. However, the plaintiff defaulted.

This court finds that the plaintiff received the loan advanced on 3.2.2006 of Kshs.286,000. He failed to repay the loan even after notice. He was given 2 demand notices on 10.9.2008 and on 24.6.2010. I do find that the plaintiff was given 90 days' statutory notice of sale by the defendant and failed to rectify the default. The notice was given on 23.9.2011. He was given 45 days Redemption Notice on 24.3.2014 together with the notification of sale. There is a certificate of service on record. The plaintiff admitted having been served by the defendant but requested for more time to pay the loan. I do find that the defendant has caused a valuation of the property as required by section 97(2) of the Land Act.

The plaintiff has not proved any irregularity in the intended sale and having admitted that the loan has not been fully repaid, he is not entitled to the orders sought.

The ***induplum principle*** relied upon by the plaintiff does not apply to the Agricultural Finance Corporation of Kenya by virtue of the Agricultural Finance Corporation Act Chapter 323 which provides in section 3 for the Establishment of Corporation thus:-

(1) -There is hereby established a Corporation, to be known as the Agricultural Finance Corporation.

(2) -The functions of the Corporation shall be to assist in the development of agriculture and agricultural industries by making loans to farmers, co-operative societies, incorporated group representatives, private companies, public bodies.

local authorities and other persons engaging in agriculture or agricultural industries.

(3) -The Corporation shall be a body corporate with perpetual succession and a common seal, and shall have power to acquire, own, possess and dispose of property, and to contract, and to sue and be sued in its own name.

(4) -The Corporation is not subject to the Companies Act (Cap. 486) or the Banking Act (Cap. 488).

The suit is therefore, dismissed with costs to the defendant. Orders accordingly.

Dated and delivered at Eldoret this 17th day of December, 2018.

A. OMBWAYO

JUDGE