



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELCC NO 149 OF 2017

(Formerly Kisii Elc No. 198 of 2014)

WALTER OTIENO OBALA.....PLAINTIFF

VERSUS

LEGACY AUCTIONEER SERVICES.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....2ND DEFENDANT

JUDGMENT

1. In a plaint dated 20th May 2014, the Plaintiff, WALTER OTIENO OBALA who is represented by NYAUKE ADVOCATE has sued the Defendants LEGACY AUCTIONEERS SERVICES and AGRICULTURAL CORPORATION for;

a. Order of declaration that the Plaintiff owes no money on account of the loan granted to the plaintiff by the 2nd defendant whereof the intended sale by way of public auction of land parcel number SUNA EAST/WASWETA I/11964 is unlawful.

b. Costs of the suit and interest thereon at the rate of 14% p.a as from the date of judgment until payment in full.

2. The Plaintiff claims that before the year 2000, he charged his land parcel known as **L.R Suna East/Wasweta 1/11964** to the 2nd Defendant for a sum of Ksh. 200,000 for the development of his agricultural activities. He then ran into difficulties in servicing the loan.

3. The 2nd Defendant made demand for the loan repayment and instructed the 1st Defendant to advertise by public auction the charged property. Later, the Plaintiff discharged of his security for the loan upon making payment of Ksh. 190,000 to the 2nd Defendant.

4. The Defendants who are represented by ROSE A OCHANDA ADVOCATE denied the Plaintiff's claim in their statement of defence dated 12th June 2014. They claim that the Plaintiff breached the loan agreement hence his loan account went into heavy arrears together with the cost of contracting an independent auctioneer. The arrears also attracted interest.

5. Counsel for the Plaintiff served the Defendant's counsel with a hearing notice dated 13th March, 2017 for hearing of this suit fixed for 3rd April, 2017. The service of the notice was by registered post RD 113891516KE as shown on affidavit of service sworn on 21st March, 2017. The Defendant's counsel

failed to appear at the hearing hence I heard the case the absence of the Defendant and their counsel notwithstanding.

6. This court allowed the Plaintiff's counsel to file written submissions pursuant to **Order 51 rule 6 of the Civil Procedure Rules, 2010**. He filed submissions dated 21st April, 2017. He submitted on the factual background of the case, issues for determination namely the plaintiff's claim against the Defendant and compliance with Section 96 (2) of the Land Act 2016 (2012). He urged the court to decide the matter in favour of the plaintiff. He cited the following case law;

a. **David Gitome Kuhiguka-vs-Equity Bank Ltd (2013) eKLR** where a temporary injunction was granted regarding advertisement made contrary to Section 96 (2) above.

b. **Musa Angira Angira-vs-Industrial and Commercial Development Corporation (2015)eKLR FAST Security Ltd-Vs- Equity Bank (2014) eKLR Rand Albert Maribo Cordeiro & Anor -vs- Vishram(2015) eKLR Palmy Company Limited Consolidated Bank of Kenya Ltd (2014)eK.LR, on duration of notices under Section 96 (2) (supra)**

7. At the hearing of the suit, Mr Nyakwamba counsel holding brief for Nyauke counsel for the Plaintiff called one (1) witness namely the Plaintiff/PW1 who stated that he took a loan of Ksh. 200,000/= from the 2nd Defendant and offered his land parcel number Suna East/Wasweta 1/11964 as security for the loan. He further stated that he failed to repay it, but later he settled the loan balance of Ksh. 190,000/= as per P Exhibit 3. He referred to and produced the following documents:

a. Demand letter dated 21/3/2014 for Ksh. 189, 627/= (P Exhibit 1)

b. Notification of sale dated 21/3/2014 (P Exhibit 2)

c. Customer transaction receipt for Ksh. 190,000/= (P Exhibit 3)

d. Receipt dated 24/4/2014 for Ksh. 190,000/= (P Exhibit 4)

e. Letter dated 12/5/2014 addressed to the 2nd Defendant (P Exhibit 5)

f. Discharge and release of title (P Exhibit 5)

g. Daily Nation advertisement of 5/5/2014 (P Exhibit 6)

8. I have studied the entire plaint, statement of defence, evidence of the Plaintiff/PW1 and submissions by the Plaintiff's counsel. The points that emerge therefrom for determination are whether;

a. ***The Plaintiff owes the Defendant money on account of the loan granted.***

b. ***Intended sale by way of public auction of suit land is unlawful.***

c. ***Costs and interest payable and the party to bear the same.***

9. The Plaintiff/PW1 testified in part as hereunder;

“On 17th April, 2014, I deposited Kshs.190,000/= into account number 01004083639200 of the 2nd Defendant with National Bank of Kenya St. Paul's branch. This is a customer transaction receipt-P Exhibit 3.”

10. This witness further stated thus

“I requested for discharge and release of title deed-P Exhibit 5. The title deed was discharged to

me, I have it with me.”

11. I am aware of the right to property under **Article 40 (2) Constitution of Kenya, 2010**. I have considered Section 96 (2) Land Act cited and the case law relied upon by the Plaintiff's counsel.

12. It is the statutory right of the bank to realize the security upon giving a notice which complied with the law: see **National Bank of Kenya Limited vs-Shimmers Plaza Limited (2009) KLR 278 at 283**. Any other purported procedure thereof is unlawful.

The Plaintiff has demonstrated by way of PExh 3 and 4 that he owes no money to the 2nd Defendant because he fully repaid the loan. By PExh 5, he was discharged of accordingly. The intended sale of the suit land to be unlawful in the circumstances. I find his evidence to be cogent and uncontroverted. He has proved his case against the Defendant on a balance of probability.

14. I accordingly enter judgment for the Plaintiff against the Defendant for an order of declaration as sought in paragraph (a) of the plaint.

15. The award of costs is governed by the proviso to **Section 27 (1) of the Civil Procedure Act (Cap 21 Laws of Kenya)**. I am guided by the said proviso and the case of **Rai-vs-Rai (2014)eKLR**. The Defendant shall bear the costs of this suit together with interest at court rates as envisaged under **Section 26 of the Civil Procedure Act Cap 21 Laws of Kenya**

Delivered, signed and Dated in Migori this 31st day of May, 2017.

G.M. A.ONGONDO

JUDGE

In the presence of :

Tom Maurice Otieno, court assistant

Plaintiff and his counsel are absent, but aware of this date