



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ENVIRONMENT & LAND CASE NO. 151 OF 2015**

**MARY JUSTER CHEPLETING.....PLAINTIFF**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....DEFENDANT**

**RULING**

**THE APPLICANTS CASE**

Mary Juster Chepleting (**hereinafter referred to as the Plaintiff**) has come to this Court against Agricultural Finance Corporation. (**Hereinafter referred to as the Defendant**). The Plaintiff avers that she took a loan advance of Kshs.10Million for the development of her farm Land Parcel No. Uasin Gishu L.R No.3209/1. The Plaintiff avers further that she has been able to repay substantial part of the loan. However, on or about the 3rd day of March, 2015, the 2nd Defendant served her with the 45 days redemption notice and avers that no statutory 90 days notice had been served on her or at all. The Plaintiff states that the Legacy Auctioneering Services had served her with the notification of sale and had advertised the land for sale on 3rd June, 2015 in fragrant disregard of the legal process. According to the plaintiff, the Defendant's claim of Kshs.339,275,195/= for a loan advancement of Kshs.10 Million is not only unconscionable but also illegal. The Plaintiff contends that the purported sale of her property by the Defendants infringes on her fundamental rights to ownership of property as enshrined in article 40 of the Constitution. The Plaintiff seeks protection of this Honourable Court against the apparent exploitation tendencies of the Defendant. There was suit being Kisumu High Court No.108 of 2006 between the parties which was dismissed for want of prosecution and therefore no issue was determined as between the parties. She prays for a Permanent injunction to issue restraining the Defendants, their agents, servants and all persons acting under their directions and/or authority from selling the Plaintiff's property UASIN GISHU L.R. NO.3209/1 and any other relief the honourable Court shall deem fit to grant and Costs of this suit.

**THE NOTICE OF MOTION**

The Plaintiff further filed a Notice of Motion praying for an order that the Defendants by themselves, their agents, servants and/or representatives be restraining by way of injunction from selling disposing of and/or alienating the Plaintiff's property L.R. No. UASIN GISHU 3209/1 pending the hearing of this application interpartes and thereafter pending the hearing and determination of this suit. The application is based on grounds that the Defendant had instructed Legacy Auctioneering Services to sell the Plaintiff's Land Parcel UASIN GISHU LR. NO.3209/1. The Defendant had not served the Plaintiff with the 90 days Statutory Notice. The Defendant had instructed the Legacy Auctioneering Services to recover a sum of Kshs.339,275,195/= which amount is highly unconscionable and illegal when an amount of Kshs.10 Million was advanced as loan some of which has been repaid. The parties were engaged in negotiations and the Plaintiff had offered to sell half of the 305 Acre land to settle the debt but the Defendant appears

to have disengaged without notice. The intended sell is aimed at coercing and intimidating the Plaintiff to allow the Defendant to sell the entire parcel and was also directed toward embarrassing her. The Defendant was acting maliciously in exaggerating the figures without observing the law. The application was brought in utmost good faith and was intended to make the ends of justice meet. Applicant had good case with high chances of success.

The application is supported by the Affidavit of **Mary Juster Chepleting** who states that she is the registered owner of Land Parcel UASIN GISHU L.R. NO.3209/1. The Plaintiff took a loan facility from the Defendant of Kshs.10M for development and farming on her said land measuring by acreage 305 acres .The Plaintiff serviced the loan to the extend of over 7 Million. The Plaintiff approached the Defendant with a proposal to sell part of the farm in order to offset the loan balance, a proposal which tended to resonate well with the Defendant. That she had been engaged in negotiations with the Defendant and her Advocates C.D. Nyamweya, now on record, had been corresponding on a without prejudice basis with the Defendant over proposals to settle the matter. That without any notice that the negotiation had broken down, the Legacy Auctioneering Services acting on instructions of the Defendant served the Plaintiff with a 45 days redemption notice. The Defendant did not serve the Plaintiff with any statutory 90 days notice as per law required. That the legacy auctioneering services had served the Plaintiff with notification of sale giving the 3rd of June, 2015 as the date for the sale. The Legacy Auctioneering Services had further advertised Plaintiff's said Land on the daily nation newspaper of 11th May, 2015. That the Defendant's actions were a violation of the land and an infringement to her right to own property under Article 40 of the Kenya Constitution 2010. That without any notice under S.90 of the Land Act, 2012, the purported 45 days redemption notice, the notice of sale of property and the advertisement in the newspaper are all a nullity and she prays that the Court do find as such. That the applicant has a good case to advance, and it is mete and just that she be allowed to ventilate the same. That there is no way, having taken a loan of Kshs.10 Million and having paid a substantial amount thereof the figure could have risen to 339,275,195/= which was not only unconscionable but also highly unlawful and unholy. That the creation of the Defendant which was a Government Corporation was to help the farmers to develop their farm and its apparent appetite for interest rates way beyond commercial banks was not within its mandate.

### **THE DEFENDANTS REPLY**

The Defendant filed a replying affidavit stating that on or about 5th June, 1996 the Plaintiff applied for and received an Agricultural Loan in the sum of Kenya Shillings Ten Million One Hundred Thousand 10,100,000/=) for land purchase and development broken down as follows:-

<b>(a) Land purchase over LR. No.3209/1</b>	<b>-</b>	<b>Kshs.7,800,000/=</b>
<b>(b) Purchase of Ford Tractor Mode 5640 4WD</b>	<b>-</b>	<b>Kshs.1,720,000/=</b>
<b>(c) Farm Implements</b>	<b>-</b>	<b>Kshs. 580,000/=</b>
<b><u>TOTAL</u></b>	<b>-</b>	<b><u>Kshs.10,100,000/=</u></b>

which sum was to be repaid in full with interest at the rate of 20% per annum within a cumulative period of 10 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 L.R. No.3209/1 upon which a mortgage was lodged and registered in favour of the Defendant to secure the loan such advanced together with interest. That on or about 14th March, 1997, the Plaintiff applied for and received a further agricultural loan of Kenya Shillings Five Million Eight Hundred and Ninety Three Thousand Six Hundred and Fifty (5,893,950/=) broken down as follows:-

<b>a) Purchase of New Holland 7840 Tractor</b>	<b>-</b>	<b>Kshs.1,750,000/=</b>
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b) *Purchase of 5 Nardi disc ploughs and 24 disc harrows* - Kshs. 280,000/=

c) *Purchase of New Holland 6640 Tractor* - Kshs.1,610,000/=

d) *Purchase of baler 565T* - Kshs.  
700,000/=

e) *Purchase of Canter Truck* ----- Kshs.1,553,650/=

**TOTAL** -----  
**Kshs.5,893,650/=**

which sum was to be repaid with interest until payment in full at the rate of 20% per annum within a cumulative period of 3 years. That a further mortgage was created and registered in favour of the Defendant to secure the subsequent loan advanced to the Plaintiff. That the Plaintiff defaulted by failing, refusing and/or neglecting to repay the debt, thereby breaching her contractual obligations toward the defendant.

That the defendant reminded the Plaintiff of her indebtedness and the outstanding amount that continued to accrue interest on her loan account but she failed, refused and or neglected to regularize her account. That sometime on or about 29th September, 2000 the Defendant issued a statutory notice demanding the outstanding sum of Kshs.32,683,023.55, which sum continued to accrue interest until payment in full. That sometime on or about 17th October, 2000, the Plaintiff indicated that she was keen to liquidate the account fully by transferring the mortgages through a loan to be guaranteed by an "International Bank. That sometime on or about 18th October, 2000 the Plaintiff drew a postdated cheque in favour of the defendant in the sum of Kshs.200,000/= purporting to repay the loan only for it to be dishonored upon presentation. That having perused the record relating to the Plaintiff's account, there has been no single payment made towards settlement of the loan account since inception.

That as a result of the foregoing, the Defendant was constrained to initiate recovery in exercise of its statutory power of sale by instructing Jomuki Enterprises who went ahead to serve the Plaintiff with a 45 days redemption notice together with a notification of sale. That upon receipt of the said notices, the plaintiff pleaded with the Defendant not to dispose of the security parcel by way of Public Auction since she had a suitable buyer to purchase the suit parcel for purposes of clearing the outstanding loan. Indeed the Defendant suspended the action and issued consent to the Plaintiff to proceed to dispose of the security parcel within 90 days with a view to redeeming the entire loan account.

The defendant claims that the plaintiff has continually engaged the Defendant in negotiations and has made void promises thereby hampering recovery of the loan which is due and owing. The defendant has annexed and marked RAO 10 a bundle of proposals made by the Plaintiff over the years which she has always reneged on.

That as a result of the Plaintiff's failure to honour her contractual obligations, the Defendant re-initiated recovery proceedings in exercise of its statutory power of sale and issued a statutory notice to the plaintiff recalling the outstanding sums together with interest thereon. **The defendant annexed and marked RAO 11 copies of the statutory notices.** The defendant denies the allegation that Plaintiff has never been served with statutory notices as she has been responding to them by way of proposals which she has never honored and states that in compliance with the law, the Defendant instructed the firm of Legacy Auctioneering Services who issued a 45 days redemption notice and a notification of sale over all that parcel of land known as LR. No.3209/1 upon the Plaintiff giving her ample time to salvage and/or redeem her account.

The defendant verily believes that the present suit has been brought in bad faith and without clean hands with a view to defeating the defendant's statutory power of sale and obstruct the recovery of what is due and owing. That the Plaintiff has previously filed similar suits against the Defendant over the same subject matter in:-

- I. KISUMU HCCC NO.108 OF 2006 *Mary Juster Chepleting -VS-Agricultural Finance Corporation*
- II. ELDORET HCCC NO.50 OF 2006 *Mary Juster Chepleting -VS-Agricultural Finance Corporation*

That the Defendant advised by their Advocate on record which advice the Defendant verily believed to be true that the conduct of the Plaintiff amounts to abuse of the process of this Honourable Court and as such the Plaintiff's application for injunction ought to fail. The Defendant was further advised by their Advocates on record which advice the Defendant verily believed to be true that the actions of the Defendant are well within the purview of the law and that its unfettered statutory power of sale has crystallized.

The Plaintiff filed a supplementary affidavit stating that though she had complained that the amount being claimed from her being Kshs.339,275,195/= was completely unholy and unreasonable for a loan of Kshs.15,895,650/= taken, the Defendant have not made any effort nor had they demonstrated or at all how that figure was arrived at. The plaintiff believes that the Defendants were guilty of material non disclosure, that whereas they had annexed evidence to show that she had made payment and even of bankers cheques and that they had her cattle attached and auctioned, they continued claiming that nothing had ever been paid.

**Mr. Nyamweya learned counsel for the applicant** submitted that the Statutory power of sale by the Defendant has not arisen because there was no Notice given for 90 days. What was given was a redemption Notice. The Statutory Notice was dated 29/9/2000 which gave his client 20 days from 29/9/2000 to pay Kshs.32,683,023/=. He submits that if the statutory notice of 90 days is not given, the statutory power of sale cannot arise. He refers to Ochieng -vs- Ochieng and Another. Mr. Nyamweya further submits that the loan was for Kshs.15,000,000/= but the defendant is seeking a sum of Kshs.32,000,000/= which the Auctioneers notice is seeking Kshs.339 + Million, the three documents do not reflect the same message.

Mr. Ngaira learned counsel for the respondent on his part submits that the Plaintiff borrowed Kshs.10,500,000/= on the 5/6/1996. 10 months later she borrowed Kshs.5,893,000/= on 14/3/1997. The Plaintiff has not paid a single cent since she borrowed the money and yet the money in dispute is Public money allocated to a State Corporation. Notice was issued according to the agreement and Agricultural Finance Corporation Act. According to the Counsel for the Respondent, Section 3 Subsection 4 gives exclusion to the other act of Parliament such as the Banking Act and the Corporation Act and therefore the *induplum* rule does not apply. According to the Counsel the Statutory Notice sought Kshs.32,000,000/= and that the Plaintiff has issued bouncing cheques. She acknowledged receipt of notice and issued a bouncing cheque that was returned as unpaid. In 2001, the cheque was still alive. He argues that there are 3 Principles to be applied in grant of injunction thus the plaintiff should demonstrate the existence of a prima facie case with a probability of success. Secondly, the element of irreparable loss that cannot be compensated in damages by the Defendant and Thirdly balance of convenience.

### **HOLDINGS AND FINDINGS**

I have considered the application supporting affidavit, replying affidavit and supplementary affidavit and do find two pertinent issues raised by the plaintiff being that ***no statutory Notice of Sale was issued*** by the Defendant and that the claim offends the ***induplum rule***. It is not in dispute that the loan was obtained on the basis of Agricultural Finance Corporation Act Cap 323 Laws of Kenya which is an Act of Parliament to establish the corporation and to prosecute its powers and duties. Section 3 of the Act establishes the Corporation which is not subject to the Companies Act Cap 486 and the Banking Act Cap 488. Section 19 A provides that the repayment of loans made under subsections 14 (1) and 19(1) of the Act shall be made to the Corporation or to any branch thereof in accordance with rules made under the Act.

The procedure for recovery in default is also set out in Section 33 of the Act. The procedure is distinct and independent from the procedure of sale under the Land Act however I do find that notice of 90 days

was issued on the 23rd day of July 2002 and another notice issued on the 18th of May 2005. However before this notice had been issued an earlier notice had been issued on the 29th September 2000 requiring the plaintiff to pay by 19th October 2000 which appears insufficient but was followed by the aforesaid notices. The plaintiff wrote back to the defendant vide the letter dated 17/10/2000 asking for more time to pay and indeed made payments by depositing post dated cheques that were to be encashed on 3/11/2000 and 2/12/2000 unfortunately the cheques were dishonored and therefore the court finds that the plaintiff was issued with sufficient notice as contemplated by section 33 of the Agricultural Finance Corporation Act Cap 323 Laws of Kenya.

On the issue of the *induplum* rule it is clear that the Banking Act in Section 44A places limit on interest recovered on defaulted loans as follows:

“(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

(2) The maximum amount referred to in subsection (1) is the sum of the following-

(a) the principal owing when the loan becomes nonperforming;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

(c) expenses incurred in the recovery of any amounts owed by the debtor.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.

(4) This section shall not apply to limit any interest under a court order accruing after the order is made.”

This section provides a statutory application of the *induplum rule* to the banking sector, which rule basically provides that interest stops running when the unpaid interest equals the outstanding capital amount. I find that this rule is not applicable in the present case as Section 3 of the Act establishes the Corporation which is not subject to the companies Act Cap 486 and the Banking Act Cap 488. It is clear that Section 44A of the Banking Act does not apply to a loan provided under Agricultural Finance Corporation Act by virtue of the provisions of section 3 subsection 4 of the said act.

The upshot of the above is that the plaintiff' has not demonstrated a prima facie case with the probability of success.

On irreparable loss, the Court finds that the plaintiff has not demonstrated that the Defendant is not capable of refunding any monies that would be lost by the Plaintiff if she succeeds in the main suit. It also appears that the Plaintiff purchased the charged land using the loan hence she does not suffer any irreparable loss as the charged property was purchased using the loan advanced by the defendant which she has not demonstrated that she has paid any single cent.

On Balance of Probabilities, the Plaintiff has not satisfied the court that she has repaid even a single cent to the Defendant hence the outstanding loan balance has already outstripped the borrowed money. The act of issuing cheques that bounced was in bad faith and not acceptable for a person who requires the court to exercise its discretion to his favor. It is a trite principle of equity that he who comes to equity should do equity and therefore the plaintiff' should have demonstrated that she has been paying the loan. Moreover, the amount loaned was drawn from the treasury 20 years ago and therefore failure to repay the said amount is a great loss of public funds. Ultimately the application is dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF AUGUST, 2016.**

**ANTONY OMBWAYO**

**JUDGE**