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Mediheal Group Limited & 2 others v Equity Bank Kenya Limited (Civil Suit E012 of 2024) [2024] KEHC 16373 (KLR) (23 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16373 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT E012 OF 2024

RN NYAKUNDI, J

DECEMBER 23, 2024

BETWEEN

MEDIHEAL GROUP LIMITED .... 1ST PLAINTIFF

SWARUP RANJAN MISHRA .... 2ND PLAINTIFF

PALLAVI MISHRA .... 3RD PLAINTIFF

AND

EQUITY BANK KENYA LIMITED .... DEFENDANT

RULING

1. What is pending before me for determination is a Notice of Motion Application dated 9th September 2024 premised upon the Civil Procedure and section 90 of the *Land Act* where the Applicant seeks the following orders:

    a. Spent

    b. Spent

    c. That a permanent injunction do issue to restrain and prevent the Respondents by themselves and/or their agents, servants, employees, assigns or otherwise howsoever from interfering with the Applicant's quiet possession of, Cheptiret/cheplaskei Block 2(chepkigen)/251 or offering the same for sale by auction or private treaty pending the hearing and determination of the main suit.

    d. That the costs be provided for.

        1. The Application is based on the grounds on the face of it among others:

            a. That the 1st Applicant is a renowned medical facility with its services rendered to the members of the public in major parts of the Republic of Kenya whereas

the 2nd and 3rd Applicants are the directors of the Applicant's companies and are the registered owners of the subject property.

b. That the Applicants do acknowledge that they had taken out facilities with the Respondent and have been servicing the loans only to find in their mail box on or about 8th September 2024, a letter dated 23rd August, 2024 being a statutory notice to sell culminating from an alleged default.

c. That the Respondent has not issued any prior notices according to section 90(1) of the *Land Act* hence are denying the Applicants the chance to know the extent of default and redeem the property.

d. That of concern to the Applicant is that no redemption notice was ever issued and/or served upon the Applicants to enable them correct the default if any. Actually according to the Applicant, their account is not in default and if it is then the extent is not as presented in the letter dated 23rd August, 2024 by the Applicants.

e. That unless the issues raised above are dealt with and the law followed, the Applicants shall be rendered destitute by a process par incarium the law.

f. That it is only fair that the Applicant is accorded the opportunity to face adversaries who want to sell the property illegally in court. If the auction proceeds, then the property shall change hands and this application and the entire suit shall be rendered nugatory.

g. That currently there are subsisting preservative court orders issued in other matters and unless the intended sale is stayed, then there shall be contradictory orders which can leave the court in a dilemma.

h. That it is therefore only fair that the sale process is halted until the legality of the same is determined. Secondly, the Respondents are acting per incarium the law because it is only after the issuance of a redemption notice and notification of sale that a party is allowed to sale the property.

i. That the notice to sell having been issued without issuance of the redemption notice and other notices contemplated under section 90 of the *Land Act* should be found null and void ab initio.

j. That the Applicant stands to suffer substantial loss and irreparable damage if the interim orders sought are issued.

2. The Application is supported by the annexed affidavit dated 9th September 2024 sworn by Maryline Chepkosgei Lang'at in which she avers as follows;

a. That indeed we acknowledge that there exists a financial relationship between the Applicants and the respondent. The Applicant indeed has taken a charge over the subject property and has been making periodic payments.

b. That to our surprise, having not received any prior correspondence from the respondent we reviewed on or about 8th September 2024 a notification of sale over the subject property.

c. That I am aware that bidding has commenced over the subject properties as per our insider information and at any time, the respondents shall prepare and publish publically an advert which shall affect our reputation negatively.

d. That I have been advised by my advocates on record whose information I believe to be true that first, the respondent ought to have prepared and served us with a redemption notice for 45 days and that it is only when the respondent would have the liberty to issue a notification of sale.

e. That we have tried to get into the Bank system to get updated loan accounts but are unable to hence shall be asking at the interparty hearing of the application to have the respondent compelled to produce the current statement of account.

f. That I have been advised by my advocate on record whose information I believe to be true that unless an injunction is issued to restrain illegal intended sale, we shall suffer irreparable losses. Our reputation shall be at stake in the first place and all this would have culminated from an illegal process.

g. That the Applicant stands to suffer substantial loss and irreparable damage if the interim orders sought are not granted.

h. That it is in the interest of justice that the orders sought be granted.

Analysis and Determination

3. I have read through the application, the affidavit in support, the parties' submissions and the response thereto. The only issue I find for determination is whether the applicant has met the conditions necessary to grant a permanent injunction pending the hearing and determination of the main suit.

4. On the issue as to whether the plaintiff has established for grant of a permanent injunction, I wish to highlight the following;

5. The court defined a perpetual injunction in the case of Kenya Power & Lighting Co. Ltd -vs- Sheriff Molana Habib (2018) eKLR as follows;

> "A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected."

6. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others, *CA No. 77 of 2012*; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows;

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to; (a) establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that

all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."

7. In the case of Giella vs. Cassman Brown & Company Limited (1973) EA 358 the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction;

> " First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

8. The Applicants averred and acknowledged that there exists a financial relationship between the Applicants and the Respondent and that the Applicants indeed have taken a charge over the subject property and have been making periodic payments. Moreover, the Applicants acknowledged that they had taken out facilities with the Respondent and have been servicing the loans only to find in their mail box on or about 8th September 2024, a letter dated 23rd August, 2024 being a statutory notice to sell culminating from an alleged default.

9. I take note that section 90 of the *Land Act* provides for the Remedies of a chargee and it provides that, "(1)If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."

10. From the Application, it is clear that Respondent has not issued any prior notices according to section 90(1) of the *Land Act* hence are denying the Applicants the chance to know the extent of default and redeem the property. Moreover, of concern to the Applicant is that no redemption notice was ever issued and/or served upon the Applicants to enable them correct the default if any. Actually according to the Applicant, their account is not in default and if it is then the extent is not as presented in the letter dated 23rd August, 2024 by the Applicants.

11. The Applicants further averred that to their surprise, having not received any prior correspondence from the respondent they reviewed on or about 8th September 2024 a notification of sale over the subject property. Moreover, the Applicant averred that she is aware that bidding has commenced over the subject properties as per their insider information and at any time, the Respondent shall prepare and publish publically an advert which shall affect their reputation negatively.

12. Furthermore, I find that the Applicant has demonstrated that he has clean hands, while coming to this court to seek equity. The Plaintiff is seeking the assistance of the Court to avoid the intended sale or auction of the property in question Cheptiret/cheplaskei Block 2(chepkigen)/251. In the case of *Francis J. K. Ichatha vs. Holding Finance Co. Ltd. Kenya HCCC No. 414 of 2004* the court held that;

> " A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make payments to the defendant/ respondent a debt which he expressly undertook to pay"

13. Similarly, in the case of Showind Industries vs. Guardian Bank Limited & Another [2002] 1 EA 284 the learned judge stated as follows;

> " An injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant's conduct does not meet the approval of court of equity or his equity has been defeated by laches"

14. From the above information, I find that the Applicant has not defaulted in servicing the facility. He is therefore entitled to the grant of an injunction. Moreover, I find that the Applicant has made out a prima facie case with probability of success to warrant the grant of an order of injunction from this Honourable court.

15. The upshot is that the Application is merited. The following orders shall abide:

    a. That a temporary injunction do issue to restrain and prevent the Respondents by themselves and/or their agents, servants, employees, assigns or otherwise howsoever from interfering with the Applicant's quiet possession of, Cheptiret/cheplaskei Block 2(chepkigen)/251 or offering the same for sale by auction or private treaty pending the hearing and determination of the main suit.

    b. The pre-trial conference be held on 17th January, 2024.

    c. The Costs shall be in cause.

    d. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 23RD DECEMBER, 2024

……………………………………….

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mahinda, Advocate for the defendant.