Port Florence Community Hospital Limited & another v Prime Bank Limited & another (Commercial Case E004 of 2021) [2022] KEHC 357 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 357 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

COMMERCIAL CASE E004 OF 2021

FA OCHIENG, J

APRIL 28, 2022

BETWEEN

PORT FLORENCE COMMUNITY HOSPITAL LIMITED ..... 1ST PLAINTIFF

JOSHUA ODONGO ORON ..... 2ND PLAINTIFF

AND

PRIME BANK LIMITED ..... 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS ..... 2ND DEFENDANT

RULING

The application dated 6th January 2022 sought a temporary injunction to restrain the Defendants from disposing of the following properties, by Advertisement, Public Auction or otherwise, until the suit is heard and determined;

(i) Kisumu/korando/2284;

(ii) Kisumu/korando/2286; and

(iii) Kisumu Municipality/block 4/135.

1. The Plaintiffs told the court that the Defendants had intended to publish an advertisement of the Notice of Sale, of the said properties, in the local daily newspapers and on public posters on the 10th of January 2022.

2. Obviously, that information was intended to bring to the court's attention, the sense of urgency prevailing.

3. The Plaintiffs made it clear that they wished to stop the Public Auction and "Specifically" the advertisement of the intended sale of their properties.

4. The grounds upon which the application was anchored, can be gleaned from the face thereof; and this is what the Plaintiffs said;

> " 3 That unless stopped from publishing the Advertisements of the intended Notice of sale by Public Auction of the Plaintiffs properties on the 10/1/2022 prior to the pending hearings of the applications herein and the suit, and further more any issues of negotiations between the Plaintiff, other parties and the parties herein, shall open the Plaintiffs to extreme prejudice and jeopardize any real attempt at redemption and or amicable settlement of the suit and or the outstanding issue."

5. Prior to the filing of the application dated 6th January 2022, the Plaintiffs had filed an application dated 15th December 2021.

6. By the earlier application, the Plaintiffs had sought a temporary injunction to restrain the Defendants from disposing of the same properties, whether by private sale, public auction or otherwise.

7. The Plaintiff's case, as stated in the Plaint was that;

> " 5. The Plaintiffs aver that sometimes on or about 23rd May 2015 the 1st Defendant granted to the Plaintiffs"Loan I" of Kshs 150,000,000/= and "Loan II" of Kshs 50,000,000/=.
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> 6. That the said "Loan I" of Kshs 150,000,000/= was secured by Land Parcel Number Kisumu/Municipality/ Block 4/135 and "Loan II" ofKshs 50,000,000/= was secured by LandParcel Number Kisumu/Korando/2284 and Kisumu/Korando/2286."

8. According to the Plaintiffs, Loan I was disbursed on 10th December 2015, whilst Loan II was never disbursed.

9. In the circumstances, the Plaintiffs position was that the charge which was to secure the loan of Kshs 50,000,000/= ought to be discharged.

10. Meanwhile, as regards the loan of Kshs 150,000,000/=, the Plaintiffs said that the 1st Plaintiff had already paid over Kshs 80,000,000/=.

11. From the pleadings I understand the Plaintiffs to be mounting distinct challenges in respect of the 2 loans.

12. On the one hand, the Plaintiffs believe that the 2 properties which were intended to secure the loan of Kshs 50,000,000/= ought to be discharged because the loan was never disbursed.

13. Meanwhile, in respect to the loan of Kshs 150,000,000/= the Plaintiffs' complaint was that the value of the security (Kisumu/Municipality/Block 4/135) had been seriously understated by the Defendants.

14. According to the 1st Defendant (hereinafter "the Bank"), the 3 properties which were offered as security by the Plaintiffs were intended to secure the repayment of the ultimate balance due and owing to the Bank, in respect of the credit facilities which the Bank had accorded to the 1st Plaintiff (hereinafter "the Hospital").

15. The Bank drew the attention of the Court to the Consolidation Clause in the legal charge registered over Titles Numbers Kisumu/korando/2284 and Kisumu/korando/2286.

16. The Bank also told the Court about the various requests which were made by the Hospital, for the restructuring of the credit facilities; and the fact that the Bank accommodated the said requests on 3 occasions.

17. Upon receiving each such request, the Bank provided the Plaintiffs with a new Letter of Offer, and the Plaintiffs duly signed the said letters.

18. The Bank asserted that it did issue all the requisite Statutory Notices, after the Plaintiffs had defaulted. The said Notices were exhibited by the Bank.

19. Initially, the Hospital asserted that the Bank had declined to disburse the loan of Kshs 50,000,000/=.

20. However, the Plaintiffs have now conceded that it is they who made a decision to withdraw their request for the said sum of Kshs 50,000,000/=, after they had realized their inability to meet the conditions agreed upon.

21. It is common ground that the Bank did not disburse the loan of Kshs 50,000,000/=.

22. Therefore, although the contracts between the Bank and the Plaintiffs expressly permitted the consolidation of the various facilities which the Bank provided to the Hospital. I find, on a prima facie basis that the Bank could not consolidate an account which had no loan facility, (and which therefore had no transactions), with the account for the loan of Kshs 150,000,000/=.

23. If the bank purported to have been seeking to recover the loan which had not been disbursed, the Court would have told it categorically, that that was improper.

24. As the Plaintiffs have submitted, a contract only comes into being when there has been an offer, acceptance and consideration.

25. The Plaintiffs have cited the following words of Lord Blackburn, in *Brodgen Vs Metropolitan Railway Company* (1876-77) L.R 2 AP 66;

> " I have always believed the law to be this, that when an offer is made to another party and in that offer there is a request, express or implied, that he must signify his acceptance by doing some particular thing, then as soon as he does that thing he is bound."

26. In effect, the Letter of Offer alone does not constitute a contract. It has to be accepted, unconditionally. Thereafter, there has to be consideration.

27. As was held by the Court of Appeal in *Nic Bank Limited vs Victor Ochieng Oloo* [2018] eKLR, if a letter of offer contains conditions, and;

> " The said conditions were not accepted by the Appellant, therefore no legal obligations or responsibility could result from the letter, save in so far as clearly accepted by the Respondent."

28. In this case, the Hospital asserts that the;

> " ..... terms and conditions qualifying the loans I and II were not met."

29. With due respect to the Plaintiffs, there is no specified term or condition, in respect to the loan for Kshs 150,000,000/= which were not met. I have no doubt that the Plaintiffs fully appreciate that position, hence their submission in the following words;

> " 21. We submit that in essence and specifically in respect of loan II that there are no rights thereof which can be enforced against the plaintiffs at all."

30. The parties were very clear in their understanding of the fact that the loans designated I and II, respectively were distinct and thus severable.

31. In my considered opinion, therefore, the fact that Loan II was not disbursed, does not affect the validity of Loan I.

32. I deem it to be a cheeky preposition by the Plaintiffs, that because the Hospital no longer wanted the loan for Kshs 50,000,000/=, the bank was obliged to seek a fresh charge in respect of the sum of Kshs 150,000,000/= which it had already disbursed. I describe that contention as cheeky because it would imply that if the Plaintiffs declined to execute a fresh charge, the Bank would be rendered an unsecured creditor notwithstanding the charge which the Plaintiffs had already executed.

33. It is common ground that when the Hospital had defaulted in the repayments of the loan, it approached the Bank severally, to negotiate the re-scheduling of the loan.

34. Each time when the Bank agreed to re-schedule the loan, the Plaintiffs acknowledged the balances that were outstanding. The parties then executed contracts which reflected the amounts that were outstanding at every such time.

35. In my considered opinion, the Plaintiffs have not demonstrated a prima facie case, upon which the court can find the express acknowledgements of the outstanding loan as well as the express re-affirmation of the securities, to be null and void.

36. Based on those documents, I find, on a prima facie basis, that the Plaintiffs cannot now assert that money being cited in the Notices issued by the Bank, were not those which were owed.

37. In any event, as appreciated by the Plaintiffs, in accordance with the decision of *Argos Furnishers Limited Vs Ecobank Kenya Limited & Another* (2014) eKLR, (which they cited);

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

38. Although the Plaintiffs have asserted that the amount being claimed by the Bank was excessive, I note that the Plaintiffs expressly and explicitly acknowledged the outstanding balances, whenever they negotiated the re-scheduling of the loan.

39. The last such letter embodying the Plaintiffs' acknowledgement of the debt, is dated 30th November 2020.

40. I therefore decline to declare the statutory notices as defective or null and void.

41. As regards the claim that the Plaintiffs would suffer irreparable harm, which would be incapable of compensation by an award of damages, I find the same to be hollow. I so hold because it was the Plaintiffs who voluntarily offered the properties as security, in the knowledge that if they failed to meet the terms and conditions for repayment of the loan, the bank would be entitled to realize the securities.

42. When the Plaintiffs submitted that the bank had under-valued the properties, that implies that the value of each such property was determinable through valuation. Therefore, if the Court should ultimately find that any of the properties was sold at an under-value, it will be possible to determine the quantum of the appropriate compensation.

43. My considered view is that;

    (a) The reputation of the Hospital, as a going concern, would suffer if the Bank sold the securities. However, provided that the sale was done in accordance with the law, the consequence thereof should be attributed to the Plaintiffs' failure. If the Hospital is truly a going concern, with a good public image, it should demonstrate that, by meeting the terms and conditions of the contract to which it is a party.

    (b) The probable panic that the innocent patients and the staff would suffer, if the security was sold, is something which the Plaintiffs ought to have taken into account before offering the property as security.

    (c) The issue about the possible impact on the various contractual arrangements which the plaintiffs have with other parties, cannot be the basis for the grant of an injunction to restrain the bank from exercising its statutory powers of sale.

    (d) The health and safety of the in-patients and the out-patients of the Hospital, is not a matter for consideration when determining whether or not to grant an injunction.

    (e) The fact that the plaintiffs wished to have more time to negotiate with the Bank, cannot be reason enough to warrant the grant of an injunction.

    (f) The Plaintiffs acknowledgement of the need to redeem the securities is indeed an affirmation by them, that they have an obligation to pay-off the loan.

    (g) The Plaintiffs have neither offered to pay into court or to the bank, the amount of money which they believe to be outstanding. An interlocutory injunction would lead to a situation where the loan continues to grow, which would then be prejudicial to all the parties.

44. In the result, the applications dated 15th December 2021 and 6th January 2022 are dismissed.

45. The Plaintiffs will pay the costs thereof to the Defendants.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL 2022

FRED A. OCHIENG

JUDGE