Mediheal Diagnostic & Fertility Centre & 2 others v Services & another (Civil Case E005 of 2024) [2024] KEHC 2469 (KLR) (11 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2469 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE E005 OF 2024

RN NYAKUNDI, J

MARCH 11, 2024

BETWEEN

MEDIHEAL DIAGNOSTIC & FERTILITY CENTRE ..... 1ST PLAINTIFF

SWARUP RANJAN MISHRA ..... 2ND PLAINTIFF

PALLAVI JODHIPUR RAJSTHAN ..... 3RD PLAINTIFF

AND

IGARE AUCTIONEERING SERVICES ..... 1ST DEFENDANT

CIB KENYA LIMITED ..... 2ND DEFENDANT

RULING

1. Before me is a notice of motion application dated 6th March, 2024 wherein the application seeks the following orders:

   i. Spent

   ii. That this honorable court do issue a temporary injunction to restrain and prevent the 1st and 2nd defendants/Respondents by themselves and/or their agents, servants, employees, assigns or otherwise howsoever from selling, auctioning or disposing of the 1st Plaintiff's goods contained in the Proclamation notice dated 14th February, 2024 pending the hearing and determination inter-parties of this application.

   iii. That this honorable court do issue a temporary injunction to restrain and prevent the 1st and 2nd defendants/Respondents by themselves and/or their agents, servants, employees, assigns or otherwise howsoever from selling, auctioning or disposing of the 1st Plaintiff's goods contained in the Proclamation notice dated 14th February, 2024 pending the hearing and determination of the main suit herein.

iv. That the 1st and 2nd defendants/Respondents by itself, agents, servants or anybody acting on its behalf be and is hereby ordered to release the Plaintiff's vital equipment contained in the proclamation notice dated 14th February, 2024.

v. That the costs of this application be borne by the Respondents.

2. The application is supported by the 2nd Plaintiff/applicant's affidavit and is premised on the grounds that: -

a. The 1st Plaintiff/Applicant is a renown medical facility with its services rendered to members of the public in major parts of the Republic of Kenya.

b. The 2nd defendant/Respondent provided a loan facility to the 1st Plaintiff for the amount of Kshs. 165,415,234/= and the 2nd and 3rd Plaintiffs acted as guarantors.

c. The 1st Plaintiff/Applicant serviced the loan facility by religiously remitting monies to the 2nd Defendant/Respondent as stipulated under the loan agreement.

d. That vide letter dated 16th January, 2024, the 2nd defendant without any lawful or legitimate cause instructed the 1st defendant to break-in and repossess the Plaintiff's Assets in an attempt to recover the disputed loan amount/arrears of USD 289,174.38. This is despite the Plaintiffs never being informed that they had fallen into arrears by the 2nd defendant as of the aforesaid date.

e. The 1st defendant illegally broke into the 1st Plaintiff's facilities in Eldoret and Nakuru and carted away assorted vital hospital equipment necessary for the maintenance of life and well-being of innocent patients within the care of the 1st Plaintiff/Applicant.

f. That the 1st defendant purports to have conducted a proclamation exercise dated 14th February, 2024 for USD 971,047.15 as opposed to the 2nd Defendant's disputed amount of USD 289,174.38.

g. That the 1st Defendant has advertised the 1st Plaintiff's vital Hospital equipment illegally attached in satisfaction of a disputed amount for public auction on 11th March, 2024.

h. That unless the application is heard urgently and orders sought thereof granted, the Plaintiffs/Applicants are doomed to suffer substantial loss and irreparable damage and the entire application together with the main suit herein rendered nugatory.

3. The 2nd defendant/Respondent opposed the application through a replying affidavit and a Preliminary objection all dated 8th March, 2024.

The Preliminary Objection is based on the following grounds: -

i. That the intended application is fatally flawed, premised on the legal presumption that the Applicants' as of right, are entitled to injunct the 2nd defendant from realizing its securities.

ii. That the Applicants' have failed to execute/attest to the supporting affidavit to the said application rendering it fatally defective as provided for in Civil Application No. 26 of 2018 Gideon Sitelu Konchellah v. Julius Lekakenv Ole Sunkuli & 2 others (2018) eKLR.

iii. That the substratum upon which the instant application is premised is incompetent, fatally and hopelessly defective thus the application should be struck out in limine and be dismissed with costs.

4. Turning to the Replying affidavit dated 8th March, 2024, the 2nd Respondent opposed the application and averred that upon the 1st Plaintiff's application, the 2nd defendant advanced certain banking facilities aggregating to USD 842,637 and Kshs. 65,321,156.00/= to the 1st Plaintiff and the 2nd & 3rd Plaintiffs being directors acted as guarantors of the Plaintiff's facilities.

5. The 2nd defendant further avers that pursuant to the terms of engagement vide letters of offer dated 2.3.2021, 18.3.2011 and 27.6.2022 to the 1st Plaintiffs, it was mutually agreed that the banking facilities were to be secured by inter-alia a specific Debenture over certain medical equipment, viz, Artis Zee Floor Mounted Cath Lab and Somatom Emotion 16 Eco, New Cardiac, Oncology and Cathlab equipment and Anestia Workstation Flow C, Surgical OT, OT Table, Surgical Pendant, Heart Lung Machine, Heater Cooler Unit, IABP Machines and Ventilator, registered in favour of the Bank for Kshs. 150,615,234/=.

6. That the 1st Plaintiff defaulted in payment of its loan necessitating action being taken by the 2nd defendant towards recovery of the said loan.

7. On diverse dates, being 24th March, 2022, 7th December, 2022 and 7th March, 2023c, the 2nd defendant wrote several letters to the Plaintiffs' demanding regularization of the outstanding arrears that continued to accrue owing to their failure to repay the contractual instalments.

8. The 2nd defendant, whilst exercising its rights under the Debenture instrument, issued the relevant notification and demand under section 67 of the *Movable Property Security Rights Act*, 2017.

9. That the 1st Plaintiff failed to heed to the Demand and the 2nd defendant proceeded to commission its service providers, the 1st defendant to proceed to recover its security.

10. According to the 2nd defendant, the 1st defendant proceeded to effect service of the requisite proclamation notice on the 1st Plaintiff through its premises at Parklands Medi Plaza in Nairobi, where the 2nd defendant's security was installed at the point of disbursement of the loan.

11. That the 1st Plaintiff's premises has been subsequently shut down and the Bank's security rendered inaccessible, necessitating the 2nd defendant to seek court's intervention in accessing the said securities.

12. The 2nd defendant through the OCS, Parklands Police Station and the 1st Plaintiff's Landlord delivered access to the 1st Plaintiff's premises in Parklands Medi Plaza in Nairobi, Parklands area, solely for the purpose of valuation and taking stock of the security.

13. The 1st defendant though the 2nd defendant proceeded to advertise the security for a sale scheduled for 11th March, 2024.

    That as at 11th January, 2024, the borrower owed the 2nd defendant a sum of USD 971,047.15 being the outstanding loan facility and which continues to accrue interest and penalties until payment in full.

14. That the 2nd defendant has granted both the Plaintiffs more than sufficient time to redeem the loan account, with numerous unfulfilled promises, occasioning immense financial loss to the defendant.

Analysis and Determination

15. Before I delve into the merits of the application, I find it prudent to briefly deal with the Preliminary Objection raised by the 2nd defendant. The Preliminary objection is majorly based on one ground; The applicants failed to attest the affidavit in support of the application dated 6th March, 2024 thus rendering it fatally defective.

16. I have perused through the record and from the onset, I take note of a few discrepancies. The 2nd defendant made reference to an undated application in their response. According to the court's record, the application is dated 6th March, 2024. Secondly, the objection has been raised on grounds that the affidavit in support of the application has not been executed. The record speaks otherwise. The application before me is dated and has been duly executed by the 2nd Applicant.

17. Tuning to the merits of the application, the law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the Civil Procedure Rules 2010 which provides that: -

> " Where in any suit it is proved by affidavit or otherwise—
>
> (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
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> (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

18. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court restated the law as follows:

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> (a) establish his case only at a prima facie level,
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> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
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> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favor.

19. 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in

damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."

20. While reiterating the said principles, Ringera, J (as he then was) in Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002 stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR) where it was stated:

> "....I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein..."

21. Additionally, the test for granting of an interlocutory injunction was considered in the American Cyanamid Co. v Ethicom Limited (1975) A AER 504 where three elements were noted to be of great importance namely: -

i. There must be a serious/fair issue to be tried,

ii. Damages are not an adequate remedy,

iv. The balance of convenience lies in favour of granting or refusing the application.

22. In my humble view the key consideration before granting a temporary injunction under order 40 Rule 1 of the Civil Procedure Rules is the proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the court is in such a situation enjoined to grant a temporary injunction to restrain such acts.

23. In the instant case, there is no doubt that the medical equipment offered as security is in danger of being sold out as the 2nd defendant has already set in motion the process of realizing the security offered by the 1st plaintiff for the debt. The 2nd defendant however contends that it should be allowed to proceed to dispose of its security for purposed of recovering the outstanding loan, whereas the Plaintiff/Applicant challenges such a right while contending that the 1st defendant illegally broke into the 1st Plaintiff's facilities in Eldoret and Nakuru and carted away assorted vital hospital equipment necessary for the maintenance of life and well-being of innocent patients within the care of the 1st Plaintiff.

24. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In Mrao Ltd v First American Bank of Kenya and 2 others, (2003) KLR 125 which was cited with approval in Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, the Court of Appeal defined a prima facie case as: -

> " A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing

itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".

25. While adopting the same position the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR added that:

> " The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

26. In the instant case, I have taken note that the applicants dispute the amount alleged to be owed to the 2nd defendant. The parties have not attached any documents evidencing the payments made by the 1st Applicant in satisfaction of the loan amount. In such circumstances, I expect to see a financial statement wherein one can keep track of the payments made by the 1st Applicant. Such are questions I believe that can be answered in a full trial.

27. Having considered the issues raised by the Applicants, I find that they have established a prima facie case for the purposes of the grant of an injunction pending the hearing and determination of the suit. That does not necessarily mean that the Plaintiffs will succeed. What it means is that there is a basis upon which this Court can restrain the Defendants from disposing of the said equipment.

28. As regards the second condition, whether the Plaintiff stands to suffer irreparable loss, it was held in Nguruman Limited case (supra) expressed itself as hereunder:

> " On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

29. It is the Plaintiffs' case that the equipment carted away by the defendants are necessary for the maintenance of life and well-being of patients within the care of the 1st Plaintiff. It is clear that in the event that the 1st Plaintiff does not get access to the equipment, the lives dependent on them will be lost. Accordingly, I agree that the Plaintiffs have surmounted the second condition.

30. As regards the issue of balance of convenience, I agree with the decision in Pius Kipchirchir Kogo vs. Frank Kimeli Tenai [2018] eKLR where it was held as follows:

> " The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

31. Be that at it may be, the constitutional imperatives of Arts.10, 27, 48 & 50 of *the Constitution* are the touchstone of any decision making process of one independent tribunal or court established under Art.50 (1) of *the Constitution*. The right of access to court in Art.48 of *the Constitution* is generally guaranteed through a right of safeguarding equal protection of the law in Art.27 which ensures no person shall be deprived of a right to due process of law in canvasing his or her dispute on the merit. This requires the session judge to have the veracity of the canons of evidence as enshrined in the *Evidence Act* tested and proven to establish a fact in issue as outlined in Section 107 (1) of the *Evidence Act*. The summary nature of proceedings are only permissible where the facts in issue to the dispute are not challenged or contested. The rival affidavit evidence in this case is not one such protocol that answers to the question of summary judgment proceedings. There is also the question of the right to a fair hearing in Art. 50 in civil cases as it is in criminal administration. An equally elementary principle of justice is that no party ought to have its case decided at the interlocutory stage unless it is a sham, vexatious, hopeless and raises no triable issues. For justice to be done in any particular case every litigant to a dispute should be given an opportunity to challenge evidence adduced by an adverse party unless the substratum of the subject matter is admitted in its entirety. The right of access to court in Art.48, the right to a fair hearing in Art.50, the equality before the law are guarantees embedded in the judicial conscience and as read with Art.10 that a civil dispute must be given a substantive meaning rather than a formal one. It is necessary to look beyond the appearance and the language used in the affidavits at the interlocutory stage of the proceedings and concentrate on the realities of the disputes according to the circumstances of each case.

32. This discussion would be incomplete without saying something preliminary objection as stated by the defendant counsel to have the affidavits for the plaintiff struck out for being offensive and against the laid down jurisprudential questions. The court has considered that question and argument by counsel in my view it looks like a genuine concern but from the record the instruments had been procedurally procured to competently capable of forming part of the record of this court:

> " a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as preliminary point may dispose of the suit...it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."
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> From this the preliminary objection is lost.

33. In light of my findings above, I am satisfied that the Plaintiffs have satisfied the conditions necessary for the grant of the Injunctive orders sought.

In the upshot, I grant the following orders:

i. A temporary injunction do and is hereby issued restraining the 1st and 2nd defendants/ Respondents by themselves and/or their agents, servants, employees, assigns or otherwise howsoever from selling, auctioning or disposing of the 1st Plaintiff's goods contained in the Proclamation notice dated 14th February, 2024 pending the hearing and determination of the main suit herein.

ii. That the 1st and 2nd defendants/Respondents by itself, agents, servants or anybody acting on its behalf be and is hereby ordered to release the Plaintiff's vital equipment contained in the proclamation notice dated 14th February, 2024.

iii. The auctioneer's costs and other incidental of advertisement of the property shall be borne by the Applicants and payable within 14 days from today's days.

iv. This temporary injunction has a lifetime of 60 day's time which all parties shall comply with order 11 of the Civil Procedure Rules to have the suit heard and determined.

34. It is so ordered.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 11TH DAY OF MARCH 2024.

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R. NYAKUNDI

JUDGE