Healthlink Matcare Limited t/a Nairobi Women's Hospital v Lusaka & another (Civil Suit E011 of 2024) [2024] KEHC 16655 (KLR) (14 October 2024) (Ruling)

Neutral citation: [2024] KEHC 16655 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL SUIT E011 OF 2024

JL TAMAR, J

OCTOBER 14, 2024

BETWEEN

HEALTHLINK MATCARE LIMITED T/A NAIROBI WOMEN'S HOSPITAL ..... PLAINTIFF

AND

KENNETH MAKELO LUSAKA ..... 1ST DEFENDANT

MARGARET NAFULA MAKELO ..... 2ND DEFENDANT

RULING

1. By notice of motion application dated 14th May 2024, the plaintiff/applicant moved this court seeking the following orders;

   i. ... Spent

   ii. A stay of execution of the warrant of attachment pending the hearing and determination of this application and the substantive suit

   iii. A temporary injunction against the defendant/respondent from carrying away from the premises, disposing by auction and/or any other means the plaintiff/applicant assets contained within all that space measuring approximately Twenty-two Thousand, Nine Hundred and Fifty -four square feet (22,954sq ft) on the Ground floor, the First second floor, the Second floor and the Third floor of the building being part of the development known as 'MK' Archade erected on title number Kajiado/Kaputei-North/19624 and Kajiado/Kaputei-North/19625 pending the hearing and determination of this application.

   iv. A temporary injunction against the defendant/respondent from carrying away from the premises, disposing by auction and/or any other means the plaintiff/applicant assets contained within all that space measuring approximately Twenty-two Thousand, Nine Hundred and

Fifty -four square feet (22,954sq ft) on the Ground floor, the First second floor, the Second floor and the Third floor of the building being part of the development known as 'MK' Archade erected on title number Kajiado/Kaputei-North/19624 and Kajiado/Kaputei-North/19625 pending the hearing and determination of this suit.

v. That at inter-parte hearing, the warrants of attachment issued in this matter be declared immature and hence unenforceable for the lease agreement in place between the parties first requires that the parties herein subject dispute to arbitration at the first instance

vi. That the parties refer the dispute to arbitration for determination

vii. That the cost of this application be provided for

9. The application is based on the grounds on the face of the application and the affidavit of Wycliffe Moindi sworn on the 14th May 2024.

Plaintiff/ applicant case

10. The plaintiff a limited liability company and registered with Kenya Medical practitioners and Dentist Council entered and executed a lease agreement with the defendants lessors of all that space measuring approximately Twenty-two Thousand, Nine Hundred and Fifty -four square feet (22,954sq ft) on the Ground floor, the First floor, the Second floor and the Third floor of the building being part of the development known as 'MK' Archade erected on title number Kajiado/Kaputei-North/19624 and Kajiado/Kaputei-North/19625.

11. The plaintiff averred that it faithfully paid all rental sums required as and when the same fell due until sometimes in the year 2022 when it began delaying in disbursing the rent payment due to difficult economic situation in the country which negatively impacted on its cashflow. Further, that the plaintiff/applicant has a huge portfolio of NHIF paying clients and the current transition from National Health Insurance Fund to Social Health Insurance Fund (SHIF) has caused extreme delays in settlement of payment due and owing to the plaintiff thus causing serious financial hardship to the applicant.

12. As a result, there is now a dispute over the amount owed to the defendant and despite negotiations, the parties have not reached an agreement. Consequently, the defendant proceeded to serve upon the applicant a demand letter in which it claimed immediate payment of rental arrears of ksh.26,379,823.20 and a further 1,103,898 as stamp duty and rental arrears.

13. It is for the reason of default in rent payment that the defendant sent agents to issue proclamation notice with the intention of disposing the plaintiff property by way of public auction should the applicant fail to pay the amount due.

14. The applicant contends that the lease agreement in place between the parties specifically provides that any dispute in place between the parties where there is a failure to agree on terms should first be subjected to arbitration. That neither of the parties have invoked the arbitration clause as per the lease agreement executed by the parties

15. The plaintiff/applicant averred that it is a provider of essential services and any adverse action taken against it might cause harm to the many patients under its care. Hence the orders sought.

Respondent case

16. The application is strenuously opposed by the defendant/respondent who filed grounds of opposition and a supporting affidavit deponed by Duncan Aura on 31st may 2024 and a further replying affidavit

of even date. Firstly, the respondent contends that there is no dispute between the parties to the lease and the plaintiff has failed to specify the dispute and the nature of such dispute if any. Secondly, that the plaintiff failure to serve the defendants with a 'Notification of Dispute and Appointment of Arbitrator' under clause 5.20, 5.21 of the *Arbitration Act* of 1995, prior to institution of the suit confirms the position that there is no dispute between the parties. That the court can only be moved through a formal application under section 6 of the *Arbitration Act* of 1995 where the court would then conduct an inquiry under section 6 (1) (b) of the Act to ascertain whether there exists a dispute between the parties.

17. The defendant avers that applicant had significantly fallen behind in rent payments and had accrued huge rent arrears over a period of time as a result, the respondent instructed their advocate to formally demand payment. The applicant on receipt of the demand letter, acknowledged through its advocates the debt due and made a proposal to settle the outstanding amount. Subsequently a consensus was arrived at between the parties herein on the settlement of the rent arrears with the defendant accepting the terms of applicants proposal.

18. It is stated that despite the consensus on the settlement of the rent arrears, the applicant persisted in default save for underpayments made severally. Duncan Auras affidavit sets out in details the instances where the applicant failed to make any payments towards the accumulated rent arrears or rent due despite being served with the invoices and their commitment in writing to regularize the rent payment.

19. I have read the submissions filed by the plaintiff/applicant as well those filed by the Defendant/ respondent.

20. The Notice of Motion application dated 14th May 2024 seeks in the main a stay of execution of the warrants of attachments and a temporary injunction against the defendant

21. 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;
>
> (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 favour.

22. The Court of Appeal in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR had this to say:

> "...these are the three pillars on which rest 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... 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 are 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."

23. The Court at this stage is not seized of the main suit and cannot make a final determination based on the materials provided at the interlocutory stage.

24. As held by Ringera, J (as he then was) in Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001:

> " The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

25. The plaintiff/applicant contend that there has arisen a dispute as contemplated by the lease agreement and that the same should be referred to Arbitration as provided for in clause 5.21of the agreement. Its further contended by the applicant, that it is the responsibility of the defendant once a suit has been filed, to invoke the provisions of the *Arbitration Act*. In East African Cables ltd vs Mt Kenya Cables (2012) EKLR the court observed that;

> " The onus of proving the matters in dispute fell within a valid and subsisting arbitration clause is on the party applying to the court for stay of proceedings, once the burden has been discharged then the burden shift to the opposing party to show the cause why effect should not be given to the arbitration clause. The defendant who is the applicant in his application has failed to specifically state the nature of the dispute and that it fell within a valid and subsisting arbitration clause'

It is further stated that the words used in section 6(1) are of assistance in locating the bearer of the burden. Flowing from the language of the provisions it would seem that the applicant bears the task of persuading the court that the matter before it is the subject of arbitration agreement. Once this is done, the burden shifts to the party resisting to satisfy the court that the circumstances under section 6(1)(b) exists that make the referral untenable.

26. In the instant suit it is therefore the plaintiff/applicant and not the defendant/respondent who bears the burden of persuading the court that there has arisen a dispute between the parties which should be referred to arbitration as per the lease agreement. From the court filings it is clear the applicant was well aware of the arbitration route but never made any step to properly invoke the arbitration process but now wants the respondent to initiate the arbitration clause in lease agreement.

27. The defendant/Respondent submitted citing Niazons (k) ltd vs China Road & Bridges Corp (2001) eKLR that there is no dispute in existence between the parties regarding the amount of rent due and that in any event, if a debtor agrees that money is due, but simply fails to pay it, there is obviously no dispute, the creditor can and must proceed by action, rather than by arbitration. In the case of UAP

Provincial Insurance Company Limited vs Michael John Becket (2013) eKLR referred to by counsel for the Respondent, the court stated that "……I decline to stay the proceedings herein as there is nothing to be referred to arbitration. There is no dispute between the parties. All there is, is the plaintiff right to be paid as per the agreement, and that has nothing to do with the policy document"

Section 6(1) of the *Arbitration Act* states that:

> A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds;
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> (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

28. I agree with the defendant respondent that there is no dispute worth submitting to arbitration. The applicant has simply failed or been unable to consistently pay rent as and when they fall due and cites economic challenges as well as difficulties in transition from National Health Insurance Fund to Social Health Insurance Authority as the reason for delay in making timely rent payments.

29. If the rent is in dispute the onus is on the applicant to show that it is disputed on substantial and bona fide ground and demonstrate a prima facie case so as to deserve an order of injunction. Indeed, the applicant chief Accountant avers that the defendant has not refused to pay any arrears due and owing to the defendant. He stated in paragraph 15 of the supporting affidavit, that they have made a proposal and intend to agree with the defendant on a payment plan. A day before the applicant moved the court and obtained stay orders, it wrote a letter dated 13th may 2024, stating as follows;" our clients state that it has no intention of walking away from its obligations and will pay each and every cent due to your client. As such, it proposes to pay a monthly sum of ksh. 4,032,882 to your clients which will be inclusive of the ordinary monthly rent payable to your clients and payments to settle the outstanding rental arrears. kindly let us know if this is acceptable to yours to enable us advise ours accordingly"

30. It is patently clear that there is absolutely no dispute between the parties herein regarding the amount of rent payable under the lease agreement as the same is set out in clear and unambiguous terms in Third Schedule of the lease which runs from 1st April 2012 to 31st march 2027. What there is, is that the applicant has had difficulty meeting his rental obligations under the lease agreement and variously expressed itself and sought for indulgence from the defendant/respondent. This is not a reason in law to stop the defendant/Respondent from exercising its right under the agreement and levy distress.

31. In the circumstances therefore, I find that the plaintiff/applicant has not established a prima facies case with any prospects of success. As I am persuaded that the first hurdle has not be surmounted, then invitation to consider the other two pillars on the adequacy of damages and the balance of convenience is declined.

32. The plaintiff/ applicant avers that it is an essential service provider, helping dispense essential medical services and that auctioning of its attached equipment will subject it to significant irreparable damages, as it would be placed in a position whereby it cannot provide lifesaving care to its many patients under its care. In paragraph 14 of the plaint, the plaintiff/applicant avers that it will at an opportune time invoke order 21 Rule 12 of the Civil procedure Rules 2010 which allows for settlement by instalment.

In the circumstances, I make the following orders;

i. That the application dated 14th may 2024 is hereby Dismissed.

ii. That in the interest of Justice, the Order of stay of execution issued by this court on 17th May 2024 is Hereby Extended on Conditions;

iii. That the plaintiff/Applicant do within 14 days of the date herein come up with a concrete proposal on how to settle the rent and arrears due.

iv. That the plaintiff/Applicant do Continue to pay rent as ordered by the court on 2nd July 2024 and as per the lease agreement.

DATED AND DELIVERED AT KAJIADO THIS 14TH OCTOBER 2024.

JOHN. T. LOLWATAN

JUDGE