Prodigy Healthcare Limited & 2 others v Grofin SGB Kenya Limited (Civil Case 1 of 2022) [2023] KEHC 21589 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21589 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL CASE 1 OF 2022

SN MUTUKU, J

JULY 19, 2023

BETWEEN

PRODIGY HEALTHCARE LIMITED ..... 1ST PLAINTIFF

CATHERINE NJERI OTIENO ..... 2ND PLAINTIFF

GERALD OTIENO NYAKWAKA OYUGI ..... 3RD PLAINTIFF

AND

GROFIN SGB KENYA LIMITED ..... RESPONDENT

RULING

1. Prodigy Healthcare Limited and two others, herein the Applicants, have brought two applications against Grofin SGB Kenya Limited, the Respondent. The first application is the Notice of Motion dated 15th September 2021 and the second application is the Notice of Motion dated 5th October 2021. The Notice of Motion dated 15th September 2021 mainly seeks temporary injunction against the Respondent, whether by themselves or through any other person or entity, from advertising for sale, leasing, sub-leasing, offering for sale or selling by public auction or otherwise interfering with, alienating, disposing or in any way dealing with the Applicant's parcels of land title numbers Ngong/ Ngong/58743, 52920, 46267 and 46268 pending the hearing and determination of this application and secondly, pending the hearing and determination of the suit. It also seeks further orders as the court may deem fit to grant and costs of the application.

2. The grounds in support of this application are that the Applicants are the registered owners of the properties named herein; that on 30th October 2015 they entered into a loan facility agreement with the Respondent and were advanced Kenya Shillings Fifty Million (Kshs 50,000,000) with the named properties as the collateral to secure the said loan and that a charge dated 30th November 2015 was registered in respect of the properties.

3. The Applicants claim to have paid Kenya Shillings Fifty-Four Million (Kshs 54,000,000). They claim that the Respondent is claiming from them Kenya Shillings Fifty-Seven Million, Three Hundred and Forty-Nine Thousand, Eight Hundred and Seventy (Kshs 57,349,870) which is over and above the amount already paid. They state that the Respondent is bound by the in duplum rule and cannot legally charge or recover interest that is more than the principal amount. They state that the Respondent has instructed auctioneers to sell by public auction the charged properties in total disregard of the payments made to the detriment of the Applicants.

4. The Notice of Motion dated 5th October 2021 seeks similar orders as the one dated 15th September 2021. This latter application was brought under certificate of urgency following the advertising for sale by public auction of the properties. At the time the application was filed together with the Certificate of Urgency, it was stated that the public auction was slated for 6th October 2021. The latter Notice of Motion was meant to stop the said auction.

5. The matter was initially handled in Nairobi on 7th October 2021 when the judge (Lady Justice Okwany) was informed that auction had taken place the previous day, 6th October 2021. She declined to grant interim orders to stop the auction because of a lack of clarity as to whether the property had been auctioned or not. To date no interim orders were granted to the Applicants.

6. The Applications are opposed by the Respondent through their Replying Affidavits and a Preliminary Objection to the Notice of Motion dated 5th October 2021. The gist of the Respondent's opposition is that the properties were sold and the circumstances leading to that sale being that the Applicants defaulted in repayment of the loan, had knowledge of the sale and that the Respondent complied with the law as to the procedures and processes laid down.

7. Through the Respondent's Further Affidavit by Rita Odero, the Investment Executive of the Respondent sworn on the 29th June 2022, filed with leave of the court, the Respondent attached documents to demonstrate that the auction took place and the bids were realized save for one property Ngong/Ngong/46267 where the bidder failed to pay the requisite deposit prompting the re-advertising of the property for another auction which took place on 8th December, 2021.

8. The Respondent has stated that the applications have been overtaken by events as the properties have since been surrendered to third parties who legally acquired rights to them. The Respondent seeks dismissal of the applications.

9. The 2nd Applicant swore a Further Supplementary Affidavit on 25th October 2021 in response to the Respondent's Further Affidavit sworn on the 29th June 2021 deposing that the purported auction allegedly held on 8th December 2021 was illegal, premature and void as it was conducted whilst the matter was still pending in court; that no bids were obtained by the auctioneers; that there is no evidence that the suit properties were disposed off and hence the applications have not been overtaken by events.

10. Directions were given that both applications be canvassed simultaneously by way of written submissions. Both parties have filed their submissions. The Applicants' submissions are dated 28th January 2021 while those by the Respondent are dated 28th February 2022.

Applicants' Submissions

11. The Applicants, through their written submissions have argued one issue: whether the applicants' applications dated 15th September 2021 and 5th October 2021 have met the legal threshold for grant of an interlocutory injunction as laid down in Giella v. Cassman Brown [1979] E.A 358 that the applicant

must demonstrate a prima facie case with a probability of success; that damages will not be an adequate remedy and that if the court is in doubt on the two principles above, it should determine the matter on a balance of convenience.

12. On prima facie case, they have argued that they have met the legal threshold. It is their submissions that they have demonstrated a prima facie case as defined in Mrao Ltd v, First American Bank of Kenya Ltd & 2 others [2003] KLR, 125 and 132. They have argued that they were advanced a loan of Kshs 50,000,000 by the Respondent for which they repaid a total of Kshs 66,589,229.80 but the Respondent demanded Kshs 63,705,386.22, as deposed in their Replying Affidavit sworn on 20th December 2021, over and above the amount already paid. The Applicants term this as excessive and illegal interest and an additional illegal 10% annual escalation on instalments payable during the tenor of the loan. They argue that there is no legal basis to charge excessive interest and additional annual escalation on instalments at 10%.

13. The Applicants cited Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited (2014) eKLR where the court stated that:

> "……courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case."

14. The Applicants further cited John G. Kamunyu & Another v Safari 'M' Park Motors (2013) eKLR to emphasize the point that in in duplum rule interest stops running when the unpaid interest equals the outstanding capital amount, and Ajay Indravadan Shah v. Guilders International Bank Ltd [2002] 1 EA 269 to point out that courts can interfere even where parties have agreed on a rate of interest as long as it is shown that the rate is illegal, unconscionable and fraudulent.

15. On the argument by the Respondent in its Replying Affidavit sworn on 22nd September 2021 that it is not a bank or financial institution within the *Banking Act*, is not engaged in the banking business and hence the provisions relating to interest capping do not apply to it, the Applicants submitted that this allegation cannot stand against the law. They have submitted that the orders sought have not been overtaken by events because they have stated in their supplementary affidavit sworn on the 20thDecember 2021 that the purported auction held on 6th October 2021 did not attract any bids.

16. They further submitted that the annual escalation clause as provided in the agreement dated 30th October 2015 is illegal as it is meant to indirectly increase the interest recoverable by the respondent and that they have demonstrated a prima facie case with a probability of success.

17. On whether damages will be an adequate remedy, the Applicants have argued that they will suffer irreparable damage is the suit property is sold in the absence of valuation being conducted in accordance with section 97 (2) of the *Land Act*. They submitted that the valuation produced by the Respondent was neither commissioned nor conducted prior to the premature attempted auction held on 6th October 2021 and subsequently on the 28th October 2021.

18. They submitted that the 90 days' notice indicated in the Respondent's bundle indicates that the amount owing as at 31st December 2020 was Kshs 57,349,870 whereas at paragraph 14 of the Respondent's Replying Affidavit sworn on 22nd September 2021, it was alleged that the amount owing had increased to Kshs 63,705,386 in a period of 8 months. They submitted that this was erratic and

oppressive increment and is a real threat to the Applicants' right to redeem their properties and that the properties risk unlawful sale leading to irreparable damage to the Applicants.

19. They have submitted that the balance of convenience tilts in their favour as the sale of one's property is a serious matter that deprives one of his rights. They submitted that the balance of convenience lies in favour of granting the orders sought as the Applicants stands to suffer irreparable loss.

20. The Applicants filed further submissions dated 28th October 2022. I have read and considered the same. They lay emphasis on the issue of lack of proof that the property has been sold and transferred and therefore the application has not been overtaken by events.

21. The Applicants urged that they have met the threshold for grant of the orders they seek in the two applications and therefore this court should allow them.

Respondent's Submissions

22. It is the Respondent's submissions that the Applicants have acknowledged that they were financed by the Respondent and admitted that the suit properties were offered as security to the said facility; that the Applicants alleged that they had paid the loan in full, however the statement they produced clearly contradicts their averments as the statement clearly demonstrate that the facility is outstanding; that they seek to challenge the auction sale because they claim that the Respondent charged excessive interest and the suit property was sold without a current valuation report.

23. The Respondent submitted that for the court to grant an applicant an injunction, the applicant must satisfy three requirements as held in Giella v Cassman Brown & Co. Limited that:

> " .....firstly, the 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 and, thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

24. Citing Mrao case, above, on what constitutes a prima facie case, the Respondent submitted that the question is whether the Applicants have demonstrated a prima facie case that would warrant this court's interference with the Respondent's statutory right of sale and subsequent purchase of the suit properties. It was submitted that the Respondent's Replying Affidavit by their Investment Executive dated 22nd September 2021 demonstrates that the Applicants were duly served, through Registered Post, with the statutory notices under sections 90 and 96(2) of the *Land Act* as evidenced by the annexed postage receipts; that the Notification of Sale and Redemption Notice were also served on the Applicants as required under Rule 15 of the Auctioneers Rules and that the Applicants have not denied receipt of the notices and therefore it is submitted that the Applicants were properly served with the requisite notices.

25. It is submitted that the Applicants, in their Application dated 15th September 2021, did not raise the issue of want of valuation; that this issue was raised in the application dated 5th October 2021; that the Respondent conducted valuation before the sale as deposed in the Respondent's Replying Affidavit sworn on 6th October 2021; that valuation reports all dated 5th August 2021 (RO-9, RO-10 and RO-11) by Danco Limited were attached to that Replying Affidavit and that the Respondent has demonstrated that before the public auction was conducted, the Respondent had discharged the duty of care under section 97(2) of the *Land Act*.

26. It was submitted that the purpose of valuation as envisaged under section 97(2) if the *Land Act* is to, inter alia, obtain the best price reasonably obtainable at the time of the sale thus protecting the right of the chargor to the property and to ensure the best reasonable price. It was submitted that the Respondent has satisfied the requirements of section 97(2) of the *Land Act* and complied with the statutory procedures in exercising the power of sale.

27. It was submitted that the Applicants claim to have paid Kshs 16,589,229.80 over and above the loaned amount of Kshs 50,000,000. However, the Respondent in its Replying Affidavit dated 22nd September 2021 as paragraph 14 has stated that the Applicants have only paid Kshs 43,541,713.80 out of the disbursed sum which means that there is unpaid amount in terms of the principal sum without considering the interest.

28. It was submitted that the Respondent is not a bank and/or financial institution within the meaning of the *Banking Act* and is not engaged in banking business and hence the provisions relating to interest capping do not apply to it and that the engagement between the parties was purely contractual and the Applicants signed voluntarily, received the credit and commenced repaying it as per the contractual obligation. It is submitted that the Applicant's action of challenging the interests is an afterthought meant to defeat the loan and amounts to inviting this court to re-write the contract between the parties and that having partly performed their obligation under the contract they cannot turn back and cite in duplum rule.

29. It was submitted that having admitted defaulting in loan repayment, the Applicants cannot maintain an action without repaying the loan among as "those who come to equity must do equity and failure to service the loan or to pay the lender or to pay into court what had been admitted takes the Applicants outside the realm of exercise of the court's jurisdiction" (see Maithya v Housing Finance Company of Kenya & another [2003] 1 EA 133 as cited with approval in Simon Njoroge Mburu v. Consolidated Bank of Kenya Ltd [2014] eKLR).

30. It is submitted that the Applicants have failed to demonstrate a prima facie case and therefore the court need not consider the other pillars for granting an injunction, that is whether the Applicant will suffer irreparable injury that cannot be adequately compensated by an award of damages (see Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR).

31. It was submitted that the Applicant cannot claim irreparable injury that cannot be remedied by damages; that the Respondent is a stable and financially sound lending institution with business presence all over the world and therefore it would not face any challenges in compensating the Applicants for the value of the suit property in the event that it emerges that the suit property was sold irregularly or at a lower than market price. The Respondent cited Nahashon K. Mbatia v. Finance Company Limited (2006) eKLR where the court stated as follows:

> "What about irreparable loss? Neither in the plaint nor in the application has the Plaintiff pleaded any special or unique attachment to the suit property. In any event, having charged the property, the Plaintiff converted it to a commercial commodity with a monetary value that can easily be ascertained. Its loss can always be made good by an appropriate award of monetary compensation. There is no allegation that the Defendant will not be in a position to meet such award. I hold, therefore, that the Plaintiff may not suffer irreparable loss."

32. It was submitted that the balance of convenience tilts in favour of the denying the injunction given that the suit properties have been sold to third party.

33. It was submitted, in respect to the Notice of Motion dated 5th October 2021, that the same offends the subjudice doctrine. This is the gist of the Preliminary Objection raised by the Respondent. To support their argument that the latter application offends this doctrine, the Respondent cited section 6 of the *Civil Procedure Act*, Republic v. Registrar of Societies – Kenya & 2 others Ex Parte Moses Kirima & 2 others [2017] eKLR and DSV Silo v The Owners of Sennar [1985] 2 All ER 104 as cited in Mugi Ndegwa v James Nderitu Githae & 2 others [2010] eKLR and in Henderson v Henderson [1843] 67 ER 313.

34. The subjudice rule is well captured in DSV case cited above that:

> "....where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of matter which might have been brought forward only because they have, from negligence, inadvertence or even accident, omitted part of their case. The pleas of resjudicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

35. It was submitted that the Notice of Motion dated 5th October 2021 is similar to the one dated 15th September 2021 and the orders sought are the same save for the inclusion of the valuation report which could have been brought forward in the earlier application. The Respondent invited this court to adopt the reasoning in East Africa Development Bank v Hyundai Motors Kenya Limited [2006] eKLR where the court stated that:

> " In view of the foregoing, we are satisfied that since the learned judge made very clear findings as regards the conditions for granting an interlocutory injunction which were to the effect that the respondent had failed to meet these conditions then there were no other avenues open to the learned judge to grant the interlocutory injunction."

36. The Respondent urged the court to decline to grant the orders sought by the Applicants as holding otherwise would be an academic exercise given that the Respondent has already parted with ownership of the properties.

Analysis and Determination

37. I have considered all the material placed before me in respect of the two applications under consideration. It is clear to me that the Applicants were the registered owners of the four parcels of land subject of this litigation. They borrowed money amounting to Kshs 50,000,000 from the Respondents on the strength of those properties for which a charge was registered. They claim to have repaid the loan, but the interest charged by the Respondent is exorbitant, is over and above the principal amount resulting in the breach of the in duplum rule. The Applicants accuse the Respondent of selling the properties through public auction without conducting valuation of the property.

38. The Respondent asserts that the loan is in arrears; that they followed the law in selling the property by public auction in serving all the requisite notices and conduction valuation of the property and that their relationship with the Applicants is contractual and each party is bound by the terms of that contract.

39. I have read all the authorities cited by both parties. The principles governing the grant of injunctions are clear to me. They have been well articulated in Giella v. Cassman Brown case with both parties have cited in support of their arguments. The major issue before me is whether the Applicants have met the threshold for a grant of an injunction. They have admitted borrowing money from the Respondent and falling in arrears; they do not challenge service of requisite notices, their only main issue being that the Respondent has not conducted valuation before placing the properties for auction. They claim to have repaid a substantial amount of the loan, but my reading of the evidence placed before me shows lack of clarity as to the amount paid and what is outstanding.

40. My view, after subjecting all the evidence to due consideration, is that the Applicants cannot claim to have demonstrated a prima facie case when evidence points to default in repaying the loan or its interest. From the evidence presented before this court it is not clear how much the Applicants have paid and what is pending. It is clear to me therefore that the Applicants have failed to show a prima facie case with a probability of success. Having failed to do so, this court need not proceed further to consider the other two pillars for granting injunctions, whether they stand to suffer irreparable injury and the balance of convenience (see Nguruman case).

41. Even if this court were to proceed and consider these principles, it is my view that the Respondent is able to pay damages to compensate the Applicants should it be found that the suit property was sold irregularly or at a lower than market price. Further, the balance of convenience, in my view, tilts in favour of the Respondent.

42. Irrespective of my pronouncements above, there is evidence to show that the properties have been sold to third parties. By their Further Affidavit sworn by Rita Odera on 29th June 2022, the Respondent has demonstrated through several annexures RO1, RO2, RO3, RO4 RO6, RO6. RO10, RO11, RO17 and RO18, that the four parcels of land were sold by public auction to the persons named in those documents. It is clear therefore that the Application dated 15th September 2021 has been overtaken by events. There is nothing to prevent by issuing the sought orders for an injunction.

43. It would appear to me that this court would be acting in vain, an academic exercise, if it were to grant an injunction against the Respondent as the property has already been auctioned.

44. As regards the application dated 5th October 2021, I agree with the Respondent that it offends section 6 of the *Civil Procedure Act* because it brings up a matter in issue directly and substantially in issue in the earlier application. This Notice of Motion cannot therefore stand and must fail.

45. The Applicants have failed to persuade this court that they deserve the orders they are seeking in the Notice of Motion dated 15th September 2021. It has been overtaken by events and that application must also fail.

46. Consequently, the Notice of Motion dated 15th September, 2021 and the Notice of Motion dated 5th October, 2021 stand dismissed with costs to the Respondent.

47. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JULY 2023.

S. N. MUTUKU

JUDGE