Port Florence Community Hospital v Crown Health Care Limited (Civil Appeal E053 of 2021) [2024] KEHC 7021 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEHC 7021 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E053 OF 2021

MS SHARIFF, J

APRIL 30, 2024

BETWEEN

PORT FLORENCE COMMUNITY HOSPITAL ..... APPELLANT

AND

CROWN HEALTH CARE LIMITED ..... RESPONDENT

(Being an appeal from the Ruling of Hon P. Gesora delivered on 21/4/2021 in KISUMU CMCC NO 108 Of 2020)

JUDGMENT

A. Background and Facts

1. On the 12th of April 2019 the Appellant and the Respondent entered into an agreement for supply of assorted medical equipment and chemicals. According to the agreement, Crown Healthcare (Respondent) was to supply Port Florence Community Hospital (the Appellant) with the said goods at a cost of Kshs.32,648,110/=.

2. As stipulated by the agreement, a sum of Kshs.19,320,021/= was paid at the signing thereof while the balance was to be settled in monthly instalments on or before 31st of March 2020.

3. As per the Appellant it was dutifully servicing the outstanding amount when on the 10th March 2020 Auctioneers on instructions of the Respondent inexplicably descended on their premises and attached property, ostensibly in recovery of amounts due from the agreement.

4. This attachment, the Appellant averred was unwarranted and a breach of the agreement.

5. The cascading effect of this attachment was the filing of a suit in the magistrate's court by the Appellant on 12th March 2020 alleging breach of contract among other things. Contemporaneously the Appellant filed an application on even date under certificate of urgency seeking injunctive orders restraining the Respondent from attaching or interfering with their property.

B. Appeal

6. In a ruling dated 22nd April 2021 the learned magistrate found the application unmerited and dismissed it. The Appellant was aggrieved by this decision and lodged this appeal via a memorandum of appeal dated 21st May 2021 contending that: -

    1. The Learned Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence in arriving at his decision.

    2. The Learned Magistrate erred in law and in fact in holding that the Appellant did not demonstrate a *prima facie case* with a probability of success in the circumstances of the case.

    3. The Learned Magistrate erred in law and in fact in finding that the Appellant would not suffer irreparable harm and in failing to grant an interim temporary injunction in that behalf to the Appellant.

C. Submissions

7. On 19th July 2023 directions on the appeal were taken to the effect that the it be canvassed by way of written submissions.

8. On 30th January 2024 both parties indicated that they had filed written submissions.

C.1. Appellant's Submissions

9. On the first ground the Appellant submits that the Magistrate was wrong in construing execution to mean attachment and execution without following legal procedure. It states that according to them execution meant taking legal action to recover the outstanding balance.

10. Additionally, the Appellant faults the Magistrate for making conclusive orders at the interlocutory stage. It states that the finding that proclamation had been done despite the obvious reservations amounted to conclusively dealing with matters in issue in the main suit. Equally, the Appellant submits that the finding that it would amount to miscarriage of justice if a permanent injunction is issued at the end of the case, was beyond the scope of an interlocutory application.

11. In support of this the Appellant relies on the Court of Appeal case of *Esso Kenya limited vs Mark Makwata Okiya* Civil Appeal No. 69 of 1991 as cited in *JM vs SMK & 4 others* [2022] eKLR where it was stated that: -

> "the court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing."

12. On the second ground of appeal it is submitted that the Magistrate was wrong in finding that there was no *prima facie case* established by the Appellant. The Appellant submits that it had met the principles for grant of injunction orders as stipulated in the *Giella vs Cassman Brown, Mrao vs First American Bank ltd & 2 others* [2003] eKLR and *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR. It avers that the Magistrate disregarded evidence of payment of the outstanding amount and the fact that the proclamation was unlawful.

13. On the third ground the Appellant submits that the Magistrate was wrong in finding that no irreparable damage would be suffered. It avers that it is a hospital and thus the attachment could lead to fatalities, opening it up to lawsuits. It submits that the Magistrate failed to appreciate the extent and the nature of harm likely to be suffered as the equipment such as Ambulances, X-ray machines were vital.

14. Moreover, it contends that the balance of convenience should shift in its favour. The Appellant urges this court to consider the case of *Bryan Chebii Kipkoech vs Barnabas Tuitoek Bargoria & another* [2019] eKLR to the effect that the Appellant only needs to show that it will suffer more inconvenience than the Respondent if the orders are not granted. It asserts that if this appeal is not allowed the suit will be rendered moot, the subject matter of the suit will be wasted and they would lose vital equipment that may cause fatalities making them susceptible to law suits resulting in unimaginable losses. On the flipside it argues that the Respondent would not suffer any loss incapable of compensation by way of costs. To buttress this position, it relies on the case of *Esso Kenya Limited vs Mark Makwata Okiya* where it was stated as follows: -

> " The principle underlying injunctions is that the *status quo* should be maintained so that if at the hearing the applicant obtains judgment in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgment nugatory."

15. On the strength of this the court is urged to allow the appeal.

C.2. Respondent's Submissions

16. On its part the Respondent outlined the following issues for determination:-

    1. Whether the suit is an abuse of the court process;
    2. Whether the Appellant breached the express terms of the contract;
    3. Whether the Magistrate appreciated the proper effect and purport of the evidence adduced and hence arrived at a just decision;
    4. Whether any cause of action has accrued to the Appellant.

17. On the first issue the Respondent answers in the affirmative. It submits that the Appellant breached the agreement and is now looking to court to delay the inevitable outcome. It relies on the case of *James Mwashori Mwakio vs Kenya Commercial Bank Ltd* Civil Appeal No. 147 of 1986 where it was held that:-

> " The plain truth is that the appellant who has been unable to pay his just debt has used the machinery of the court to postpone what to him must be the day of reckoning. That day has now come and the court has the duty to tell him so in plain terms."

18. The Respondent argues that litigation is not a game of chess where parties seek to outsmart each other. It stresses that the magistrate was right in finding that the conditions in Giella vs Cassman Brown had not been met.

19. On the second issue the Respondent asserts that the Appellant was in default from November 2019 to March 2020, despite incessant pleas to pay up. It restates that the Appellant was well aware that the repercussions of non-compliance would be execution.

20. On the third issue the Respondent stresses that the Magistrate's decision could not be impugned in the absence of evidence that there was coercion, fraud, misrepresentation or illegality in the making of the contract. It contends that the proclamation was proof enough that the attachment was legal.

21. On the fourth issue the Respondent asserts that having breached the contract there was no cause of action accruing to the Appellant. It urges the court not to punish it just because it adhered to the terms of the agreement.

D. Analysis and Determination

22. Being a first appeal it's important to restate this court's duty. On this I am guided by the case of *Okeno v Republic* [1972] EA, 32 where the then East African Court of Appeal stated: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*, [1957] EA 336) and for the appellate court to make its own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424."

23. With the foregoing in mind, and after a careful analysis of the record and the rival submissions the issue that arises for determination is whether the magistrate erred in dismissing the application.

Whether the Learned Magistrate Erred in Dismissing the Application Dated 12th March 2020

24. The Appellant contends that the Magistrate was wrong in dismissing its prayer for injunction. It avers that the magistrate was wrong in finding that the prerequisites for grant of injunctive orders had not been met. The Respondent on its part is of the contrary opinion.

25. A temporary/interlocutory injunction is a court order made in the early stages of a lawsuit or petition which prohibits the parties from doing an act in order to preserve the status quo until a pending ruling or outcome. The purpose of a temporary/ interlocutory injunction is to keep the parties, while the suit is pending, as much as possible in the respective positions they occupied when the suit began and to preserve the court's ability to render a meaningful decision after a trial on the merits.

26. The locus classicus case on granting of interlocutory injunctions, is that of *Giella vs Cassman Brown* [1973] EA 358, where it was stated as follows;-

> " The conditions for grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 be 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."

27. The question that arises therefore is whether the Appellant has met the threshold for grant of injunctive orders sought.

Prima Facie Case

28. A *prima facie case* was discussed in the case of *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR in the following manner:

> "I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. ... But as I earlier endeavoured to show, and I cited ample authority for it, a *prima facie case* is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

29. In support of a *prima facie case* the Appellant avers that there is a danger they will lose their property to an illegal process. It equally avers that the Magistrate disregarded the cheques showing it had made the payments. Moreover, the Appellant stated that the Magistrate was wrong in delving into issues that should have been canvassed at the main hearing. The Respondent on its part submitted that the Appellant was in persistent default and breached the contract thereby necessitating attachment.

30. In dealing with the issue the Magistrate stated that there was a proclamation form on instruction from the Respondent's Counsel. Additionally, he stated that the Appellant had acknowledged the debt and knew that the Respondent may want to execute.

31. I have analysed the rival submissions and major point of contention was the propriety of the attachment process, which has a bearing on whether the Appellant has a *prima facie case*.

32. The agreement entered into stipulates that the Appellant was supposed to pay the outstanding amount in monthly instalments till payment in full on 31st March 2020. It also stipulates that if the Appellant defaults on any instalment the Respondent would be at liberty to execute for the balance.

33. I have taken a look at the bundle of cheques produced by the Appellant. The three cheques provided are as from March 2020, contrary to the agreement that deposits should be made from April 2019. Up to this point the Respondent was well within its right to enforce the agreement.

34. Turning to the issue of propriety of the execution process, Rule 12 of the *Auctioneer Rules* is instructive. It states as follows: -

> "(1) Upon receipt of a court warrant or letter of instruction the auctioneer shall in case of movables other than goods of a perishable nature and livestock-
>
> (a) record the court warrant or letter of instruction in the register;
>
> (b) prepare a proclamation in Sale Form 2 of the Schedule indicating the value of specific items and the condition of each item, such inventory to be signed by the owner of the goods or an adult person residing or working at the premises where the goods are attached or repossessed, and where any person refuses to sign such inventory the auctioneer shall sign a certificate to that effect;
>
> (c) in writing, give to the owner of the goods seven days notice in Sale Form 3 of the Schedule within which the owner may redeem the

goods by payment of the amount set forth in the court warrant or letter of instruction;

(d) on expiry of the period of notice without payment and if the goods are not to be sold *in situ*, remove the goods to safe premises for auction;

(e) ensure safe storage of the goods pending their auction;

(f) arrange advertisement within seven days from the date of removal of the goods and arrange sale not earlier than seven days after the first newspaper advertisement and not later than fourteen days thereafter;

(g) not remove any goods under the proclamation until the expiry of the grace period".

35. The above provision shows that execution does not have to be strictly court initiated. It can be commenced by an advocate or even the principal party via an instruction letter. The contention that execution has to go through the court therefore has no basis. Section 12 (1) provides for the whole process of execution. Section 12(1)(b) provides for a proclamation giving an inventory of the specific goods and their condition.

36. In view of the foregoing there is no doubt that the process of execution can not be impugned. In as much as the Appellant talks of the *Debt Recovery Act* the agreement was specific on the route to be taken in case of default which is execution.

37. The upshot of the foregoing is that the Appellant does not have a *prima facie case* with a high probability of success. There is no reason to interfere with the Learned Magistrate's decision.

38. The Appeal is accordingly dismissed with costs to the Respondent. This court is guided by the Court of Appeal case of *Nguruman Limited vs Jan Bonde Nielson & 2 Others* [2014] eKLR where it was held that if *prima facie case* is not established, then irreparable injury and balance of convenience need no consideration.

DELIVERED, DATED, SIGNED AT KISUMU THIS 30TH DAY APRIL, OF 2024.

M. S. SHARIFF

JUDGE