



**Greenline Images Limited & 2 others v Kabarak University Teaching, Research and Referral Hospital & 2 others (Commercial Civil Case E021 of 2022) [2024] KEHC 11941 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11941 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE E021 OF 2022  
JWW MONG'ARE, J  
OCTOBER 4, 2024**

**BETWEEN**

**GREENLINE IMAGES LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
RACHAKY CONSTRUCTION LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
VICHA ENTERPRISES LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KABARAK UNIVERSITY TEACHING, RESEARCH AND REFERRAL  
HOSPITAL ..... 1<sup>ST</sup> DEFENDANT  
SWAHILI HILL DEVELOPMENT LIMITED ..... 2<sup>ND</sup> DEFENDANT  
EASTGATE INTERNATIONAL LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 26<sup>th</sup> January 2022, the Plaintiffs filed suit against the Defendants seeking inter alia an order of specific performance compelling them to honour the terms of the construction agreements entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by paying the Plaintiffs their dues, that is; Kshs. 11, 862,090.00 to the 1<sup>st</sup> Plaintiff and Kshs. 35,208,852.00/= to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.
2. On 29<sup>th</sup> March 2022, the Plaintiffs and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered into a consent that was adopted as an order of the court as follows(“the Consent”):
  1. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants do pay the Plaintiffs Kshs. 34,860,942/= in full as final settlement of this matter.
  2. That the amount of Kshs. 34,860,942 be paid in instalments as follows:



- a. Kshs. 4,500,000/= on or before 1/4/2022.
  - b. The balance of Kshs. 30,360,942/= be paid on or before 30/4/2022.
3. That costs of the suit to the Plaintiff to be agreed or taxed.
3. The 1<sup>st</sup> Defendant has now approached the court with the Notice of Motion dated 25<sup>th</sup> January 2024 under section 1A, 1B & 3A of the *Civil Procedure Act* (Chapter 21 Laws of Kenya), Order 40 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rules 2010*, seeking the following orders:
    1. Spent
    2. Spent
    3. Spent
    4. Spent
    5. The Honourable court be pleased to issue an injunction to permanently restrain the Decree Holders, their agents and or servants from further attempts to execute against Kabarak University or the Applicant;
    6. The Honourable Court be pleased to issue an injunction to permanently restrain Beta Base Auctioneers, its servants or agents from purporting to attach and /or sell by public auction or otherwise of Kabarak University or the Applicant's property; and
    7. Costs of this suit be provided for.
  4. The application is grounded by the facts set out on its face and the supporting affidavit of the 1<sup>st</sup> Defendant's director, PHilemon Kimutai Kaino, sworn on 25<sup>th</sup> January 2024. It is opposed by the Plaintiffs through the Grounds of Opposition dated 23<sup>rd</sup> February 2024. The parties were directed to file written submissions but only the 1<sup>st</sup> Defendant has filed the same.
  5. The 1<sup>st</sup> Defendant's case is that on 18<sup>th</sup> January 2024, the Plaintiffs, as the decree holders, through Beta Base Auctioneers brought a standstill to learning in Kabarak University by causing commotion in the main campus and harassing the various staff members including the Vice Chancellor in the name of satisfying a decretal sum of Kshs. 30,863,942.00/= pursuant to a Warrant of Attachment dated 19<sup>th</sup> December 2023. That the turn of events on the material day caused embarrassment to the Vice Chancellor of the institution with mixed reactions from the students creating concerns on their security and even credibility of their institution judging from the manner that the Vice Chancellor was handled.
  6. The 1<sup>st</sup> Defendant contends that the purported execution is targeted against Kabarak University, a learning institution that is not party to the contract that led to the Consent nor these execution proceedings and is distinct and separate from the 1<sup>st</sup> Defendant herein. That the Plaintiffs' actions were against the Consent which was between the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the Plaintiffs and the 1<sup>st</sup> Defendant claims that the Plaintiffs instructed the Auctioneers to cause havoc in the University despite their knowledge that the University is not a party to the suit. That their previous attempt to include the University into these proceedings by instituting garnishee proceedings targeting the University's Bank accounts was quashed by the Court.
  7. The 1<sup>st</sup> Defendant reiterates that the Consent Order did not include Kabarak University or even the 1<sup>st</sup> Defendant as parties responsible for the settlement of the decretal sum and that there exists no basis whatsoever for targeting Kabarak University other than "malice, witch-hunt, bravado and



intimidation tactics that are devoid of legal, factual or even logical backing”. It further avers that the Plaintiffs have also misled Court on the Decretal amount that is due and owing since the current balance is Kshs. 15,777,000.00/= as acknowledged by the Plaintiffs’ advocate and not the fictitious Kshs. 30,863,942.00/= and that the Judgment Debtors have consistently paid the Decree Holders in honouring their payment plan.

8. The 1<sup>st</sup> Defendant states that if the Court does not act in stopping this illegality, the learning and peaceful existence characteristic of any learning institution will be greatly compromised and diminished by these provocative acts of the Plaintiffs. That unless the Court issues an injunction, the Plaintiffs through their Auctioneers present a constant threat to learning at Kabarak University and potentially wrongfully attaching the institution’s property on a suit that the institution is not a party. As such, it contends that it is in the interest of justice and fairness that the Plaintiffs be restrained from further harassing staff and officers in the University in a veiled attempt to execute against improper parties and that it is of utmost importance that the orders sought in the application be granted to meet the ends of justice and that the Plaintiffs do not stand to suffer any damage.
9. In response, the Plaintiffs state that the application as drawn and filed is fatally defective, that the 1<sup>st</sup> Defendant has not demonstrated or shown evidence of the said Kabarak University being proclaimed and or attached and that the warrants annexed to the application are for the judgment debtors in the suit. That the 1<sup>st</sup> Defendant’s deponent has misled the court by indicating that he is its director as the 1<sup>st</sup> Defendant is a society and not a limited company and that the alleged grounds set out in the application are otherwise an abuse of the court process and the same are not bona fide. They state that the application has no chances of success at all.

#### **Analysis and Determination**

10. I have carefully considered the application and the response thereto together with the 1<sup>st</sup> Defendant’s submissions. To my mind, the main issue that arises for the court’s determination is “whether the court should issue the injunctive orders sought by the 1<sup>st</sup> Defendant.” As submitted by the Plaintiffs, the principles upon which the court is required to apply in determining whether to grant an injunction were fortified in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, where the Court of Appeal reiterated the settled principles in *Giella v Cassman Brown* [1973] EA 358 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,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

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”.

11. As to what constituted a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that 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 to call for an explanation or rebuttal from the latter.” Therefore, in the case before this court, the 1<sup>st</sup> Defendant must demonstrate that it has a right to the alleged proclaimed property and that this right is likely to be violated by the Plaintiffs’ actions.

12. As stated, the Consent was between the Plaintiffs and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and therefore, execution could only be against the said parties and not the 1<sup>st</sup> Defendant. However, the warrants of attachment annexed by the 1<sup>st</sup> Defendant indicate that the same is also against it which, in my view, is not supposed to be the case as there is no judgment against the 1<sup>st</sup> Defendant. I am satisfied that the 1<sup>st</sup> Defendant has established a prima facie case that its property is about to be attached and yet there is no judgment against it, which is a violation of its property rights.
13. In respect of Kabarak University, I note that the 1<sup>st</sup> Defendant has deponed that itself and the University are separate and distinct entities. As such, the University has capacity of filing its own suits or claims. The 1<sup>st</sup> Defendant has not explained why it is seeking an injunction on behalf of an entity that can file the claim itself and if anything, the said University is not listed in the warrants of attachment. I therefore find that the 1<sup>st</sup> Defendant has no locus standi to bring these proceedings on behalf of Kabarak University and as such, no injunction can be available to the University.
14. Having found that the 1<sup>st</sup> Defendant has demonstrated a prima facie case, I now move to determine whether the irreparable damage would be caused against the 1<sup>st</sup> Defendant and whether the balance of inconvenience tilts in favour of granting the injunction in line with the dicta in *Nguruman Limited*(supra). I find in the affirmative on both issues as I agree with the 1<sup>st</sup> Defendant that the reputational and credibility damage that can be caused to it from the intended execution would be irreversible and difficult to quantify even in damages. I also find that the balance of convenience tilts in favour of granting the injunction as the 1<sup>st</sup> Defendant is not a judgment debtor to the Consent and that it has a good defence against Plaintiffs which is likely to be ventilated at trial. Thus, it would only be convenient that the injunction be issued until the dispute between the Plaintiffs and the 1<sup>st</sup> Defendant is determined.

### **Conclusion and Disposition**

15. For these reasons, I find that the Plaintiff’s application dated 25<sup>th</sup> January 2024 is merited and the same is hereby allowed with the court issuing the following orders:
  1. An order of an injunction be and is hereby issued restraining the Decree Holders, their agents and or servants from further attempts to execute against the 1<sup>st</sup> Defendant, Kabarak University Teaching, Research And Referral Hospital
  2. An order of an injunction be and is hereby issued permanently restraining Beta Base Auctioneers, its servants or agents from purporting to attach and /or sell by public auction or otherwise of Kabarak University Teaching, Research And Referral Hospital and;
  3. The 1<sup>st</sup> Defendant, Kabarak University Teaching, Research And Referral Hospital is awarded costs of this application which shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4<sup>TH</sup> DAY OF OCTOBER 2024**

.....

**J.W.W. MONG’ARE**

**JUDGE**



In the Presence of:-

Mr. Okore Jayalo for the Applicant.

Ms. Muranguri holding brief for Ms. Mutua for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents.

N/A for the Decree Holder.

Amos - Court Assistant

