



**Pavicon Kenya Limited v Cheda Links Group Limited & 4 others (Civil Case E382 of 2024) [2024] KEHC 9932 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9932 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E382 OF 2024  
JWW MONG'ARE, J  
JULY 31, 2024**

**BETWEEN**

**PAVICON KENYA LIMITED ..... PLAINTIFF**

**AND**

**CHEDA LINKS GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**QONTA WORKS COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EVERSMART AGENCIES ..... 3<sup>RD</sup> DEFENDANT**

**JOMO KENYATTA FOUNDATION EDUCATIONAL PUBLISHERS .... 4<sup>TH</sup> DEFENDANT**

**HOUSING FINANCE BANK KENYA LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. On 16<sup>th</sup> July 2024, this court issued *ex parte* orders allowing ‘prayer 2’ of the Plaintiff’s application dated 12<sup>th</sup> July 2024 by freezing and restraining the Defendants from accessing, withdrawing, transacting or interfering in any way whatsoever with the accounts: Cheda Links Groups Limited, Account Number: 978xxxx705, Bank Name: HFC limited, Branch: Westlands,; Qontaworks Company Limited, Account Number: 978xxxx995, Bank Name HFC Limited, Branch; Westlands and: EverSmart Agencies Limited, Account Number: 978xxxx516, Bank Name: HFC Limited, Branch: Westlands pending the hearing and determination of the application inter-partes. Subsequently, on 22<sup>nd</sup> July 2024, the court extended the ex-parte orders to the following accounts; Eversmart Agencies Limited Account Number:978xxxx489, Bank Name: HFC Limited, Branch: Westlands; Eversmart Agencies Limited Account Number: 01210xxxx0142, Bank Name: Credit Bank Limited, Branch: Thika and



Eversmart Agencies Limited Account Number: 19802xxxx0787, Bank Name: Equity Bank Limited, Branch: Kimathi street (“the ex-parte orders”)

2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (“the Defendants”) have now filed the Notice of Motion dated 22<sup>nd</sup> July 2024 made, inter alia, under Section 1A, 1B and 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 51 Rule 1 of the *Civil Procedure Rules* (“the Rules”) principally seeking to set aside, vary and/or discharge the ex-parte orders made on the 16<sup>th</sup> July 2024 and 22<sup>nd</sup> July 2024.
3. The application is supported by the grounds set out on its face and the supporting affidavit of Kevin Ng’ang’a Muturi, the 1<sup>st</sup> Defendant’s director, sworn on 22<sup>nd</sup> July 2024. It is opposed by the Plaintiff through the replying affidavit of its director, Josephine Njeri Ngugi, sworn on 26<sup>th</sup> July 2024. Counsel of the parties argued out their positions through oral submissions that I have taken into consideration together with the pleadings as I turn to determine the application below.

### **Analysis and Determination**

4. As per Order 40 Rule 7 of the *Civil Procedure Rules*, this court has unfettered discretion to discharge, or vary, or set aside any order of injunction on application made thereto by any party dissatisfied with such order. This provision is amplified by Order 51 Rule 15 which provides that the court may set aside an order made *ex-parte*. The Court of Appeal in, *Kenya Commercial Bank Ltd v Kipsang Sawe Sisei NRB* CA Civil Appeal No. 53 of 2002 [2005] eKLR stated that an “order of injunction is an equitable remedy and that the court can only exercise its equitable jurisdiction judicially, if all the parties have been fully heard and if all the material facts are before the court.”
5. It is the Defendants submissions that the Plaintiff willfully and deliberately suppressed material facts and matters, in obtaining the ex-parte Orders including the fact that the Plaintiff is not an account holder with HFC Bank Limited, Credit Bank Limited and Equity Bank Limited and as such has no privity of contract with the said Banks. Besides, that Credit Bank Limited and Equity Bank Limited have not been enjoined in these proceedings and that contrary to the Plaintiff’s suggestion, the twin transfers of the sum of Kshs.10,000,000.00/= to the 3<sup>rd</sup> Defendant’s account No. 01210\*\*\*\*1242 at Credit Bank Limited, Thika Branch and the sum of Kshs.15,950,000.00/= to Account No. 1980284960787 at Equity Bank Limited were carried out on or about the June 2024, with the full knowledge and authority of Josephine Njeri Ngugi, a director of the Plaintiff, in settlement of the invoice for supply and delivery of school uniforms
6. The Defendants further submit that pursuant to clause 4.5 of the Partnership Agreement the subject matter of the dispute, the parties agreed that any disputes arising from the Agreement shall be resolved by arbitration or mediation. Therefore, recourse to this Court as has been done, was clearly excluded by the parties.
7. The Defendants contend that besides, Kenya Revenue Authority has not issued a statutory agency notices or demands against the Plaintiff or any other party on account of non-payment of taxes and that “no grain of solid evidence” has been tendered by the Plaintiff to establish sufficiently or otherwise a real risk of dissipation of the monies in the bank accounts.
8. The Defendants aver that under clause 4 of the Agreement, the Plaintiff failed to disclose that it has thus far been paid way in excess of its entitlement and that one Emily Nyongesa, the Advocate retained by the Plaintiff against the Defendants is the same advocate who acted for all the parties in the Partnership Agreement and by dint of clear conflict of interest, the said advocate is precluded from acting for one party against the other. The Defendants depone that the omission to include several pages of the Agreement was deliberate and calculated to enable the Plaintiff to obtain undue advantage against the Defendants.



9. On its part, the Plaintiff submits that they have approached the court with clean hands disclosing all material facts within its knowledge and therefore are deserving of the ex-parte orders. That if at all there were any omissions or missing pages of the Partnership Agreement, then the same was an error and not a deliberate commission or conceal fundamental materials to court. On the dispute resolution by way of arbitration, the Plaintiff deponed that the said Clause provides for mediation before arbitration but that attempts by the Plaintiff to privately resolve the dispute through mediation have been thwarted by the Defendants' mischief.
10. Going through the parties' submissions, pleadings and annexures, it is quite clear to me that the Plaintiff omitted to disclose to the court some facts that were material to this case and that might have led the court to rule differently even at the *ex-parte* stage. The Plaintiff have admitted to not have included all the pages of the Partnership Agreement and in as much as they attribute the same to an inadvertent error. I agree with the Defendants that the omitted clauses therein are salient and material to this case. Even if the Plaintiff felt that the said clauses were not important, the duty of determining the importance and relevance of material and facts is with the court and not the Applicant (see the Australian case of *Thomas A Edison Ltd v Bullock* 15 ELR 679 and [Adopt - A - Light Limited v Municipal Council Of Mombasa & Another NRB](#) HC Misc. Appli. No. 997 of 2007 [2008] eKLR).
11. In addition, I note that the Plaintiff did not also disclose that there was an arbitration clause in the Partnership Agreement or that the same had been frustrated by the Defendants. Had the Plaintiff disclosed this, the court could maybe have screened the matter and determine whether the parties can exploit the court-annexed mediation process or arbitration as indicated in the Agreement. In my view, had the Court known of all these facts and omissions,
12. It is highly unlikely that it would have granted the ex-parte orders as it did and could have invited the Defendants to respond to the application before granting any injunctive orders. It is trite that any orders obtained as a consequence of non-disclosure of material facts are liable to be set aside (see [Total Kenya Ltd v The Permanent Secretary, Ministry of Energy & Others](#) (*supra*) and [Re Kenya National Federation of Co-Operatives Ltd & Others](#) [2004] EA 128.
13. In the instant case though the Plaintiff has denied that it is guilty of non-disclosure of material facts, I do find that from the pleadings and from the affidavits sworn by the parties, there are facts which were material to the application for the ex-parte injunction which were or ought to have been within the knowledge of the Plaintiff which it failed to disclose to the court handling the application *ex-parte*.

### **Conclusion and Disposition**

14. Consequently, I find that the Defendants' Notice of Motion dated 22<sup>nd</sup> July 2024 is merited and I hereby set aside and discharge the ex-parte orders granted by this court on 16<sup>th</sup> July 2024 and 22<sup>nd</sup> July 2024. The Plaintiff's Notice of Motion dated 12<sup>th</sup> July 2024 ought to be set down for hearing and determination. Costs of this Application are awarded to the Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Ogola for the Plaintiff/Respondent.



Mr. Odera for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Applicant.

N/A for the 5<sup>th</sup> Respondent.

Amos - Court Assistant

