



REPUBLIC OF KENYA



KENYA LAW

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**Naado & 7 others v Shaban & 5 others (Civil Appeal E744 of 2023)
[2023] KEHC 21899 (KLR) (Civ) (11 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E744 OF 2023

AN ONGERI, J

AUGUST 11, 2023

BETWEEN

HASSAN OLE NAADO 1ST APPELLANT
MUHNDHAR SHARIFF 2ND APPELLANT
ABDULLAHI SALAT 3RD APPELLANT
JUMA MUSA 4TH APPELLANT
DEGHO IMANI 5TH APPELLANT
KHAMIS MWAGUZO 6TH APPELLANT
KHAMIS OMAR 7TH APPELLANT
SUPREME COUNCIL OF KENYA MUSLIMS (SUPKEM) 8TH APPELLANT

AND

LATIFF NGIRATI SHABAN 1ST RESPONDENT
YUSUF NGOTHO ALI 2ND RESPONDENT
GULF AFRICAN BANK (KENYATTA AVENUE) 3RD RESPONDENT
KENYA COMMERCIAL BANK (BIASHARA) 4TH RESPONDENT
FIRST COMMUNITY BANK (WABERA STREET) 5TH RESPONDENT
REGISTRAR OF SOCIETIES 6TH RESPONDENT



RULING

1. The application coming for consideration in this ruling is the one dated August 7, 2023 brought under Section 1, 1A, 3, 3A, 63(e) of the Civil Procedure Act Order 42 Rule 6 and Order 45 (1) (1) (b); 3(1); (2) and Oder 5 Rule 1 seeking the following prayers;
 - i. This application be certified as urgent and be heard ex parte in the first instance owing to the extreme urgency demonstrated, and service thereof on the respondents herein be dispensed with in the first instance.
 - ii. Pending the hearing and determination of this motion, the order issued by the Hon BM Cheloti, (PM) in the Nairobi Chief Magistrates Court CMCC No. E3488 of 2023 on the August 2, 2023 freezing the 8th appellant's (supreme Council Of Kenya Muslims – Supkem) Bank account numbers: Gulf African Bank, USD account no 08xxxxx204, Kenyatta Avenue branch, Kenya Commercial Bank account no 13xxxxx238, Biashara street branch, First Community Bank Account no 00xxxxx501, Wabera Street branch and any other bank account held in the name of Supreme Council Of Kenya Muslims, the 8th appellant herein, be forthwith suspended, stayed, and the enforcement of which Order dated August 2, 2023 in CMCC No E3488 of 2023 be immediately place in abeyance.
 - iii. Pending the hearing and determination of this motion, there be a stay of further proceedings in Nairobi Chief Magistrate's Court CMCC No E3488 of 2023 between the parties herein.
 - iv. Pending the hearing and determination of the appeal herein, there be a stay of proceedings in Nairobi Chef Magistrates Court CMCC NO E3488 of 2023 between the parties herein.
 - v. Pending the hearing and determination of the appeal herein, the order herein issued on the August 2, 2023 freezing the 8th defendant's (Supeme Council Of Kenya Muslims – Supkem) Bank account numbers: Gulf African Bank USD account no 08xxxxx204, Kenyatta avenue branch, Kenya Commercial Bank Account no. 13xxxxx238, Biashara Street branch, First Community Bank Account no 001xxxxx01m Wabera street branch and any other bank account held in the name of Supreme Council Of Kenya Muslims, the 8th respondent herein be forthwith suspended, stayed and the enforcement of which order dated August 2, 2023 in CMCC no E3488 of 2023 be immediately placed in abeyance.
 - vi. The costs of this application be awarded to the appellants/ applicants.
2. The application is based on the following grounds;
 - (a) That the appellant/applicants were served with exparte mandatory injunction orders dated August 2, 2023 issued by Hon Cheloti (PM) freezing all the bank accounts of the 8th respondent (SUPKEM).
 - (b) That the applicant/appellants immediately lodged an appeal dated August 3, 2023 to review and set aside the said exparte orders but the court directed on August 4, 2023 that the application will be heard on August 24, 2023.
 - (c) That the 8th appellant/applicant had issued cheques to 3rd parties that were being dishonored by the freezing of their accounts.



- (d) That the *ex parte* mandatory injunction given by the trial court freezing the accounts of the 8th appellant/applicant were given at *ex parte* stage without demonstration of any exceptional circumstances.
 - (e) That the entire activities of the 8th appellant/applicant have been paralyzed and the said order would visit on the 8th appellant/applicant society hardship and incapacitate the entire SUPKEN affairs across Kenya.
 - (f) That not a single act of embezzlement, siphoning off of funds or mismanagement of the SUPKEM funds held in any of the frozen accounts was pleaded. The appellants filed a supporting affidavit by the 1st appellant sworn on August 7, 2023.
3. The Application is supported by the affidavit of Al Hajj Assan Kirua Ole Naado sworn on August 7, 2023 in which he reiterates the grounds stated above.
 4. The 1st and 2nd respondents filed a replying affidavit sworn by the 1st respondent on the August 10, 2023 denying the appellant/applicant claims.
 5. The parties filed written submissions and they also submitted orally in court as follows on August 11, 2023;
 6. The appellants submitted that the *ex parte* mandatory orders given by the trial court were oppressive to the appellants that that the same was granted without giving the appellant a chance to be heard.
 7. The appellants also submitted there were no exceptional circumstances to warrant such an order as no abuse or misappropriation of funds or otherwise has been pleaded or proved.
 8. The appellants submitted that Justice Chegiti gave orders in JR no E104/2023 suspending a letter issued by the Registrar of Societies that was the basis of the Appellants' suspension.
 9. Further that it had not been demonstrated what prejudice the respondents would suffer if the order of mandatory injunction is lifted but on SUPKEM would not undertake their obligation of the order is not lifted.
 10. The respondents opposed the application and submitted orally that the gravamen of the appellants' application was whether the trial court exercised its discretion judicially and whether the exceptional circumstances existed for grant of the *ex parte* mandatory injunction.
 11. The respondents relied on the case of *Kenya Breweries Ltd (KBL) vs Wangisho (Civil Appeal no 322 of 2000)* to buttress their submissions that a mandatory injunction can be granted at interlocutory stage.
 12. The respondent also submitted that the respondents ascended to office illegally by tampering with records at the office of the Registrar of Societies who expunged their names in a letter dated June 23, 2023.
 13. Further that the legality or otherwise of said action is subject of the JR case.
 14. The respondents also submitted that while the letter suspending them was still in force, the appellants were still transacting the business of the 8th appellant and the right thing for the trial court was to give the mandatory injunction.
 15. The respondents submitted that the letter convening the AGM on August 12, 2023 was done while the suspension was in force and so was the cheques at page 200 of their bundle issued on July 31, 2023 when the Registrar's letter dated July 20, 2023 was still in force.



16. The respondents submitted that the AGM was illegally convened as notification is supposed to be sent to every member and not only to the delegates.
17. Further that the said meeting was to be held virtually and no funds were required for the same.
18. On the issue of dishonoring the cheques, it was submitted that the cheques were issued illegally.
19. The respondents submitted that the signature of the treasurer who was in a coma had been forged and further that the A & B bank account had not been frozen.
20. The respondents submitted that Justice Warsame froze all accounts in a similar case and directed that elections be held.
21. The respondents stated that the appellants had tampered with the registrar's records and fraudulently changed the officials of SUPKEM elected on in November 2017.
22. Further, that the respondents had established exceptional circumstances necessitating the grant of the *ex parte* orders freezing the 8th appellants accounts.
23. The issue for determination in this application are as follows;
 - i. Whether the respondents established the grounds for grant of an interlocutory mandatory injunction.
 - ii. Whether the *ex parte* interlocutory mandatory injunction should be discharged.
24. On the issue as to whether the respondents established grounds for the grant of an interlocutory injunction, the guiding principles for the grant of orders of temporary injunctions are well settled and are set out in the judicial decision of *Giella Versus Cassman Brown (1973) EA 358*.
25. The position in the *Giella* case (*supra*) has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of [*Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No 77 of 2012 \(2014\) eKLR*](#) where the Court of Appeal held as follows;

' In an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially'.
26. In the case of [*Joseph Kaloki t/a Royal Family Assembly Vs Nancy Atieno Ouma \[2020\] eKLR*](#) the court of appeal reaffirmed its decision in [*Kenya Breweries Limited & another Vs Washington O Okeyo \[2002\] eKLR*](#) and stated as follows;

' A mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application'.



27. In the case of *Shariff Abdi Hassan Vs Nadbif Jama Adan [2006] eKLR* the court stated as follows;

' The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.'

28. I find that is not in dispute that the trial court granted the mandatory injunction at exparte stage without according the Appellants a hearing.

29. The cases referred to above are dealing with a situation where the parties have been given a chance to be heard and the Trial court has established that there are special circumstances to warrant grant of the orders and further that there is a clear case.

30. Article 159 of the *Constitution* of Kenya requires courts to render substantive justice and the right to be heard is a basic right under the Bill of Rights.

31. In the case of *Amir Suleiman Vs Amboseli Resort Limited [2004] eKLR* the court stated as follows;

' The court in responding to prayers for interlocutory injunctive reliefs should always opt for the lower rather than the higher risk of injustice.'

32. I find that the leadership wrangle at SUPKEM is still pending is JR No E104 /2023 before Hon Justice Chigiti and there is no dispute that the letter upon which the suspensions of the Appellants were premised has been stayed.

33. The 8th Respondent, Supkem is a gigantic organization with millions of members whose operations have been grounded by the said orders.

34. I find that the Appellants deserve to heard before the court can determine whether the respondents established the grounds for grant of an interlocutory mandatory injunction.

35. I accordingly set aside the exparte mandatory orders in terms of prayers 3 and 5 of the Application dated August 7, 2023 and I direct that both parties be heard by the Trial court and a determination be reached on merit.

36. The application dated August 7, 2023 is accordingly allowed with costs to the Applicants.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 11th day of August, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent

