



**Kariuki v Kiarie & 2 others (Civil Case E014 of 2023)
[2023] KEHC 23990 (KLR) (10 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 23990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE E014 OF 2023
DO CHEPKWONY, J
AUGUST 10, 2023**

BETWEEN

JAMES GACHERU KARIUKI PLAINTIFF

AND

DAVID KIARIE 1ST DEFENDANT

THE OCS KIAMBU, POLICE STATION 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. This Ruling relate to three applications filed by the parties herein. The first one is an application dated 2nd June, 2023 and filed by the Plaintiff herein. The second one is dated 15th June, 2023 and filed by the 1st Defendant while the third one is dated 14th June, 2023 and filed by the 2nd and 3rd Defendants.

The Plaintiff’s Application dated 2nd June, 2023

2. This application seeks the following orders:
 - a. Spent;
 - b. That a temporary prohibitory Injunction do issue prohibiting the 1st Defendant/Respondent herein and/or his co- conspirators to commit a felony operating from the offices of the Kiambu County Government, their servants, agents and/or any other person claiming from them from gaining any forceful entry into the Plaintiff/Applicant’s business premises, confiscating therefrom and carting away the Plaintiff/Applicant’s property /goods/merchandise pending the hearing and determination of the application herein and/or suit herein and or until further orders of the Honourable court and the Kiambu County Police Commander to ensure compliance;



- c. That in the alternative and without prejudice to prayer (b) hereinabove, the Honourable Court be pleased to grant the Plaintiff/Applicant an order authorising him to use all reasonable force to protect his property from intrusion by the 1st Defendant/Respondent herein and his co-conspirators to commit a felony operating from the offices of the Kiambu County Government pending the hearing and determination of the application herein and/or suit herein and/or until further orders of the Honourable Court.
 - d. That a Mandatory Injunction do issue compelling the OCS Kiambu Police Station (2nd Defendant/Respondent herein) to forthwith cause the recording of the Plaintiff/Applicant's complaint against the 1st Defendant/Applicant herein and /or his co-conspirators to commit a felony operating from the offices of the Kiambu County Government in the Kiambu police station occurrence book and cause the commencement of investigations over an alleged offence under Section 101 (1) as read with Section 102A of the Penal Code Cap 63 Laws of Kenya and/or an alleged criminal offence under Section 10(2) of the Public Officers Ethics Act No 4 of 2003 as read with the provisions of Section 130 of the Penal Code Cap 63 Laws of Kenya.
 - e. That a Mandatory Injunction do issue compelling the 2nd Defendant/Respondent herein to immediately after the commencement of investigations herein above cause the photographing of the Plaintiff/Applicant's confiscated goods and merchandise for the photos to be used as exhibits and return the goods/merchandise to the Plaintiff /Applicant who is the lawful owner.
 - f. That the Honourable Court be pleased give such other or further order that it deems fit to grant to entrench the rule of law.
 - g. Costs of this application be provided for.
3. The application is supported by the grounds set out on its face and affidavit of James Gaheru Kariuki sworn on 2nd June, 2023. According to the Plaintiff, he operates barber shop together with his associate Josphat Muchamba Ngamau in Kiambu Municipality. He states that together with other traders, they petitioned or challenged the office of the Kiambu OCS, the 1st Defendant and that of County Attorney, over the continued demand of single business permit fees. It is the Plaintiff's contention that the 1st Defendant trespassed into his premises and confiscated two shaving machines and one UV Ray Sterilizer, converted them for his own use, a result of which their business has since been immobilized. The Plaintiff argues that the 1st Defendant's actions are in criminal in nature and states that the 2nd Defendant through his officers failed to register his complaint in the Kiambu Police Station Occurrence Book for investigations to be conducted. The Plaintiff then filed the present application and the suit against the Defendants seeking injunctive orders as enumerated in the Application.
 4. When the matter came up for Exparte hearing on 5th June, 2021, the court granted the following prayers in its Court Order issued on 7th June, 2021:-
 - a. That the application is certified as urgent.
 - b. That a temporary injunction prohibiting the 1st Defendant and/or his co-conspirators to commit a felony from the offices of Kiambu County Government, their servants, agents and/or any other person claiming from them from gaining any forceful entry into the Plaintiff /Applicant's business premises , confiscating therefrom and carting away the Plaintiff/ Applicant's property /goods/merchandise pending the hearing and determination of the application herein and/or suit herein and or until further orders of the Honourable court save for the order for the Kiambu County Police Commander to ensure compliance...



5. These Courts orders then precipitated the filing of the 1st Defendant's Application and the application of the 2nd and 3rd Defendants.

The 1st Defendant's Application dated 15th June, 2023

6. The Defendant's Notice of Motion application dated 15th June, 2023 seeks for:-
- a. Spent;
 - b. That there be a stay of proceedings conducted on the 5th June, 2023 and all consequential orders issued therein pending the hearing and determination of this application.
 - c. That the ex parte hearing and all consequential orders delivered on 5th June 2023 be set aside and the matter be heard a fresh on merit.
 - d. That in the alternative and without prejudice to prayers No 2 and 3 hereinabove, this Honourable Court be pleased to issue a prohibitory injunction against the Plaintiff/ Respondent, their servants, agents and /or any other person claiming from them preventing the 1st Defendant /Applicant to execute their mandate in as far as revenue collection in the County of Kiambu is concerned pending the hearing and determination of this application.
 - e. That costs be in the cause.
7. It is supported by the Affidavit of David Mararo the 1st Defendant's legal Counsel sworn on 15th June, 2023.

The 2nd and 3rd Defendants' Application dated 14th June, 2023

8. The 2nd and 3rd Defendants' Application dated 14th June, 2023 seeks for the following orders:
- a. Spent;
 - b. That this Honourable Court be pleased to set aside the orders made on 7th June, 2023.
 - c. That the costs of this application be borne by the Plaintiff/ Respondent.
9. This is supported by the grounds on its face and the Supporting Affidavit of Ogange Zowade sworn on 14th June, 2023.

The Responses filed

10. The 1st Defendant, David Kiarie filed Replying Affidavit opposing the Plaintiff's application dated 2nd June, 2023 and in support of the 2nd and 3rd Defendants' Application and aver that the order issued on 7th June, 2023 was specific to the effect that it was to apply to the Plaintiff's business premise only but on instructions of the Plaintiff one John Muigai, proceeded to various business premises within Kiambu Township and incited the business owners against making the requisite payments due and owing to the County Government of Kiambu. It is also averred that this actions by the Plaintiff and or his proxy are likely to have a spillover effect to the rest of the Sub-counties in Kiambu which will deny the County Government its lawful dues in revenue. Further, it has been deposed that apart from the Revenue Enhancement Exercise Levy hampered, the lives of the staff from the County Government tasked with spearheading the said exercise is endangered. The law governing the exercise is cited in support thereof.



11. The 2nd and 3rd Defendants filed their Grounds of Opposition dated 26th June, 2023 on the Plaintiff's application on the basis that the application for injunction against the government and/or public officers is in contravention of Section 16 (2) of the [Government Proceedings Act](#) and that the Applicant has not demonstrated any special or clear circumstances to warrant the grant of a mandatory injunction.
12. On 20th June, 2023, the court directed parties to canvass all the three (3) applications by way of written submissions and they duly complied and the same will be considered in the determination of the issues herein.

Analysis and Determination

13. Having considered the prayers sought in the application alongside the respective responses hereof, this court finds the main issues for consideration being:-
 - a. Whether the court orders issued on 7th June, 2023 ought to be set aside.
 - b. Whether the Plaintiff's application has merits to warrant the orders sought.
14. The law on setting aside of *ex parte* orders is found under Order 12, Rule 7 of the [Civil Procedure Rules, 2010](#) which provides thus:-

“Where under this Order Judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the Judgment or order upon such terms as may be just.”
15. From the wording of Order 12 Rule 7, it is trite law that court has discretion to set aside injunction orders that it has issued upon being satisfied that the same are prejudicial or unjustified. In the case of [St Patricks Hill School Ltd v Bank of Africa Kenya Ltd](#) [2018]eKLR, it was held: -

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”
16. In this case, the 1st Defendant holds that the interlocutory injunctive orders that were issued by the court on 7th March, 2023 led to the Plaintiff and/or his proxy to incite other traders not to pay the requisite revenues owing and due to the County Government of Kiambu and as such instead of preserving the subject matter it has prejudiced Kiambu County Government which then defeats the purpose of the orders.

a. Whether the court orders issued on 7th June, 2023 ought to be set aside

17. According to the 1st Defendant, he states that the *ex parte* orders issued by the court were only applicable to the Plaintiff's business premises but instead the Plaintiff's proxy one Mr. John Ngugi Mungai went to various business premises and incited the traders against making the requisite payments due and owing to the Kiambu County Government which had an effect of denying it the lawful revenues which has in turn caused the Kiambu County Government substantial financial loss and endangered the lives of its staff tasked in collecting revenues. The 1st Defendant holds that the *ex parte* orders ought to be set aside.



18. On the other hand, the 2nd and 3rd Defendants hold that the ex parte orders issued temporary prohibitory injunction against the 1st Respondent which contravenes the provisions of Section 16 (2) of the *Government Proceedings Act* which states that”

“the court shall not in any civil proceedings issue injunction or make an order against an officer of the government if the effect of granting the injunction or making the order would be to give relief against the government which could not have obtained in proceedings against the Government”.

They therefore urge the court to set aside the ex parte orders issued on 7th June, 2023.

19. For a court to discharge an interlocutory injunction order, it must be established that such orders have prejudiced the other party or that they have been used to defeat the ends of justice. This was the court’s decision in the case of *Ocbola Kamili Holdings Ltd v Guardian Bank Ltd* [2018]eKLR, where it was held thus: -

“The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person’s conduct with respect to the matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are meant to preserve the subject matter Not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was obtained. No court would allow its orders to be used to defeat the ends of justice”.

20. In this case, although the 1st Defendant states that it has a clip of a video showing the Plaintiff and/or his proxy inciting the other traders not to pay revenue, the 1st Defendant has not called any of the traders if at all to confirm the same incitement or even evidence of the non-payment of the revenue as alleged. It is worth-noting that it is not enough for the 1st Defendant to state that it has suffered financial loss due to the injunction in place, 1st Defendant ought to have produced either a list of traders who were incited and have defied payment of revenues to the County Government as proof of the said loss (es).

21. Be that as it may, the court is also alive to the provisions of the *Government Proceedings Act* which prohibits the issuance of the injunctive orders against the government or an officer of the government. Section 16 (2) of the *Government Proceedings Act* states:-

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

22. From the provisions of the *Government Proceedings Act*, it is clear that injunctive orders shall not issue against an office of the Government if the effect of granting the same would be to give relief against the Government. In this case, the County Government just like the National Government relies on the procedures provided for under the National Legislation to settle disputes. Therefore the provisions under the *Government Proceedings Act* apply to the County Government. It then follows



that, pursuant to the provisions of Section 16(2) of the *Government Proceedings Act*, the exparte orders issued on 7th June, 2023 to be set aside.

23. Consequently, the following orders issue:-

- a. The 1st Defendant's Notice of Motion application dated 15th June, 2023 be and is hereby allowed in terms of prayers No (1) and (2).
- b. The Plaintiff's Notice of Motion application dated 2nd June, 2023 and the 1st Defendant's Notice of Motion application dated 15th June, 2023 to proceed for hearing on merit.
- c. Mention on for parties to take directions on hearing of the said application.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 10TH DAY OF AUGUST , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Oganda holding brief for Mr. Marara counsel for 1st Defendant

M/S Ogange counsel for 2nd and 3rd Defendants

