



**Mohamed & another v Isaak & another (Commercial Case E028 of 2021)
[2022] KEHC 14197 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E028 OF 2021
A MABEYA, J
OCTOBER 21, 2022**

BETWEEN

**MOHAMEDIN MOHAMED 1ST PLAINTIFF
HISH COMPANY LTD 2ND PLAINTIFF**

AND

**IBRAHIM ISMAIL ISAAK 1ST DEFENDANT
YUSSUF ADAN HUSSEIN 2ND DEFENDANT**

RULING

1. This ruling is in respect of the application dated December 1, 2021 by the defendants seeking to vary, discharge or set aside the orders of this court dated May 6, 2021.
2. The application was brought under sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, order 10 rule 11, order 51 of the *Civil Procedure Rules 2010* articles 47,48,50 and 159(2) *Constitution* of Kenya.
3. The grounds thereof were set out on the face of the application and in the affidavit of Ibrahim Ismail Isak sworn on December 1, 2021. It was the applicant's case that this court had directed that the application dated December 30, 2020 be referred to the deputy registrar for compliance and have a date set for the hearing.
4. That the respondent filed a new application with the same prayers sought in the said application dated December 30, 2020 and the court *vides* a ruling dated May 6, 2021 issued orders thereon *ex-parte*. The applicant averred that the said orders were irregularly obtained through concealment of material facts and urged the court to vary or discharge them.



5. The respondent opposed the application by grounds of opposition dated December 29, 2021 stating that the application was misleading, a gross abuse of the court process and scandalous, frivolous and vexatious.
6. The respondent further opposed the application *vide* a replying affidavit sworn on December 29, 2021 by the 1st plaintiff Mohamedin Mohamed. He deposed that the applicant's recourse upon receipt of the orders dated May 6, 2021 was either to appeal against the ruling or apply for a review of the same. That the respondent did not open a skeleton file to obtain the ruling as alleged by the applicant and that the application for leave to file defence out of time had no nexus with the plaintiff's application dated December 30, 2021.
7. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the setting aside of the impugned orders.
8. It was submitted by the applicant that the plaintiff obtained the orders of May 6, 2021 by misleading the court as its affidavit in support of the application dated December 30, 2020 was full of falsehoods and misrepresentations. It was contended that the plaintiffs/respondents had taken advantage of the orders by limiting the defendants from carrying out their business. The applicants faulted the respondents from sitting on the orders and failing to prosecute the case further.
9. On the other hand, the plaintiffs submitted that the court had exercised its discretion fairly in granting the orders of May 6, 2021 in view of ensuring that the defendants managed the company in accordance with sections 145, 628 and 635 of the *Companies Act*. It was further submitted that the applicants had not advanced any genuine reasons to warrant interference with the said orders. Counsel for the applicant submitted that the allegations that the orders were obtained illegally were false and misleading. It was the plaintiffs' case that the defendants had not demonstrated sufficient cause as to why the orders ought to be varied.
10. The orders delivered on May 6, 2021, that are subject to this application, were as follows: -
 1. The applicant be and is hereby granted permission to continue the derivative claim seeking relief on behalf of the High Company Ltd in respect of the acts and omissions by the respondents, involving negligence default, breach of duty and breach of trust in their capacity as directors of Hish Company Ltd on such terms as the Honourable court considers fit.
 2. Pending the hearing and determination of the suit a temporary injunction does issue restraining the defendants, their servants, agents and/or employees from selling alienating, transferring, charging, disposing, removing or in any manner whatsoever dealing with the assets of the 2nd plaintiff company pending the determination of the suit
 3. Pending the hearing and determination of the derivative claim, the respondents are hereby compelled to produce the books of records, banking slips, audited financial accounts, bank statements of the 2nd plaintiff company in their custody from 2015 up to date.
 4. The honourable court does issue order restraining the board of directors from intimidating and threatening the 1st plaintiff/applicant.
 5. The cost of this application be provided for.
11. The record shows that, by an application dated December 30, 2020, the plaintiff moved this court seeking leave to continue the derivative claim and injunctive orders on the ground that, the 2nd plaintiff's properties were in danger of being wasted by the 1st and 2nd defendant. The defendants



- entered appearance on February 8, 2021 and participated in the proceedings. However, they failed to respond to the application despite the court issuing directions on the same.
12. Order 40 rule 7 of the *Civil Procedure Rules, 2010* though not invoked by the applicants allows a party who is affected by an injunction to apply to court for its discharge, variation or setting aside.
 13. In *Ragui v Barclays Bank of Kenya* (2002) 1 KLR 647, Ringera J stated: -

“It is settled law that if an interlocutory injunction has been obtained by means of representation or concealment of material facts, the same will on the application of the party aggrieved be discharged”.
 14. Further, in *Leah Nyambura Mburu v Barclays Bank Of Kenya Ltd* [2012] eKLR, it was held: -

“However, it is my view that an application under order 40 rule 7 may be based on the events subsequent to the grant of the injunction such as the conduct of the applicant which conduct make the sustenance of the injunctive orders unwarranted. This may occur where for example the applicant’s subsequent conduct is meant to frustrate the hearing and determination of the suit or where the applicant goes to sleep after the grant of the said injunctive orders. The court does recognize that injunction is an equitable remedy and the subsequent events may render the continued retention of the injunction unreasonable or unjustifiable.

Again the court may be justified where there is evidence that the orders of injunction were obtained without disclosure of material facts or by distortion or deliberate misrepresentation of the facts. To obtain equitable orders of injunction by misleading the court would justify the court in setting aside the orders. In *Devani v Bhadresa and another* [1972] EA 22 the East African Court of Appeal held that the learned judge was right in holding that he would never have granted the injunction had the appellant made a full and fair disclosure of the material facts at the time of granting the ex parte order of injunction and that the judge was entitled to set aside the injunction if satisfied that the status quo could be preserved without the injunction.”
 15. The defendant’s application to discharge, vary, or set aside the orders of May 6, 2021 is anchored on the ground that the orders were obtained irregularly by the 1st plaintiff by concealment of material facts of the existence of an ongoing suit.
 16. Firstly, the court notes that although the defendants had the opportunity to oppose the application that resulted in the impugned orders, they decided not to. That application was therefore dealt with as unopposed, although the court determined the same on merit.
 17. Secondly, the applicants ought to have demonstrated sufficient cause in order to invoke the discretionary power of the court to grant the orders sought. In the court’s view, it is not enough to allege that some facts were misrepresented, rather it was the applicant’s obligation to bring attention to the court the nature of the misrepresentation and the facts that were indeed concealed.
 18. This court is alive to the fact that the orders granted being equitable, were to the effect that the subject matter of the suit would be protected and as such the orders were granted against that backdrop. There is no prejudice that has been shown to have been suffered by the grant of the impugned orders.
 19. In the upshot, I do not see any material facts that were concealed and neither is there a change in the circumstances of the suit to warrant the change being sought for.



20. In the premises, I find no merit in the application and the same is dismissed with costs to the plaintiffs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

A. MABEYA, FCIArb

JUDGE

