



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC APPLN. NO. 1275 OF 2020 (O.S)**

**BROOKSHILL CRESCENT INVESTMENTS**

**LIMITED .....APPLICANT/RESPONDENT**

**VERSUS**

**PRIDE INN HOTELS & INVESTMENTS**

**LIMITED .....RESPONDENT/APPLICANT**

**RULING**

1. Before me is the applicant's Motion on Notice dated 12/01/2021 which is brought under **section 7 and 10 of the Arbitration Act, Section 6 of the Civil Procedure Act and Article 40 & 50 of the Constitution.**
2. In the Motion, the applicant seeks the setting aside of the status quo order made on 7/12/2020 and extended on 16/12/2020. It also seeks the immediate release of the furniture and goods that were seized on 6<sup>th</sup> and 7<sup>th</sup> August, 2020 by the DCIO Gigiri. There was also a prayer that the Chamber Summons and Originating Summons dated 4/12/2020 be struck out and the suit dismissed with costs.
3. The grounds upon which the application is predicated upon are set out in the body of the Motion and the supporting affidavit of **Hasnain Shabbir Noorani**, sworn on 12/01/2021. These are that, the parties entered into a sub-lease agreement for the premises erected on **LR. No. 1870/IV/109 ("the suit premises")** from 1/11/2009 to 1/02/2015. The same was subsequently renewed for a further 5 years 3 months from 1/02/2015.
4. On 10/1/2015, during the term of the second sub-lease, the parties entered into an agreement whereby the respondent agreed to renovate the demised premises and in consideration, the applicant was to pay increased rent. It was contended that the respondent paid for the renovations that were duly undertaken whilst the applicant purchased the furniture and fittings on its own. That in the premises, the furniture and fittings could not be considered as part of the renovated premises.
5. It was further contended that the parties executed a Deed of Variation of the sublease by which the rent payable for the premises was enhanced. That upon expiry of the term of the sub – lease on 30/4/2020, the parties properly executed a handover agreement on 01/07/2020 whereby the applicant handed over the premises to the respondent. That the respondent had concealed all these facts from the Court when it applied for and obtained the status quo orders.
6. Subsequently however, after the applicant had vacated the premises and having removed its' furniture and fixtures as agreed, the respondent made a report at Gigiri Police Station as a result of which, the DCI Gigiri applied and obtained orders of seizure from the Kiambu Magistrate's Court. As a result of the said order, the applicants furniture and fittings were seized by the police and dumped at Gigiri Police Station.
7. However, after the matter was reviewed by the Director of Public Prosecution (DPP), the DPP advised that there was no criminal element revealed as the matter was purely a civil dispute. The parties were directed to sort out the matter before the civil courts. The applicant accused the respondent of withholding these facts from the court.
8. The applicant therefore urged that unless the order of status quo was set aside and the goods held at Gigiri Police Station released, they will continue to waste away in containers and will be unfit for use in a hotel establishment.
9. The respondent opposed the application vide the replying affidavit of **Imran Abdulsalman Noorani** sworn on 8/02/2021. He denied that the respondent had obtained the *ex parte* order of *status quo* on the basis of false depositions and material misrepresentation.

10. He deposed that during the pendency of the sub lease, the applicant approached the respondent for money to facilitate renovation of the premises. The renovations costed the respondent Kshs. 210,254,083/- which included the purchase of new fittings, fixtures, furniture and general improvement of the premises.

11. That at the time of handover of the premises, the same was in a state of disrepair and damage. That it could not be rented out until restoration which would cost about Kshs. 36,668,880/=. That the state of disrepair was caused by the applicant's act of stripping the premises of its valuable fixtures and fittings which had been acquired by the respondent's funds. That the said fixtures and fittings are part of the premises by virtue of the sub - lease agreement, the agreement for renovation and the deed of variation.

12. According to him, the applicant's actions were criminal which made him to lodge a complaint at the Gigiri Police Station which led the police to seize some of the fixtures and fittings now being held at Gigiri Police Station.

13. The deponent further deposed that the applicant owed the respondent the said sum of Kshs. 210,254,083/- which was advanced for renovation and the purchase of furniture and fittings, Kshs. 4,278,898/- in rent arrears for the month of June, 2020, Kshs. 36,668,880/= for repairs and Kshs. 105,811,200/- for lost opportunity.

14. That the matter should be referred to arbitration in terms of the sublease agreements. That if the *status quo* orders are vacated, the respondent would suffer irreparable harm as it is the owner of the items in question.

15. The Court has carefully considered the depositions and submissions on record. This is an application to set aside an order of status quo that was made ex-parte and the striking out of the Chamber Summons and Originating Summons dated 4/12/2020.

16. The dispute revolves around the sub - lease agreements and the renovation agreement by which the ownership of some furniture and fittings are disputed. The application by the applicant is that the *ex-parte order of status quo* was obtained on material non - disclosure.

17. The applicant submitted that the respondent intentionally concealed from court pertinent material facts which disentitles it of the orders it obtained. These are; misrepresentation that the furniture and fixtures in contention were acquired through funds advanced by the respondent, the offer by the respondent to buy the furniture and fixtures from the applicant, failure to disclose that there was a deed of variation to the sub lease agreement which only provided for enhanced rent and not the furniture and fittings purchased by the applicant.

18. Further that there was failure to disclose that there was an application pending before the Chief Magistrate's Court, Kiambu for the release of the goods since that was the court that had issued the seizure orders and that the respondents complaint of theft of the said goods against the applicant had been found to be unfounded by the DPP.

19. The Court has carefully considered both the Originating Summons, the Chamber Summons dated 4/12/2020 and the supporting affidavits thereto. In the aforesaid pleadings, nowhere did the respondent disclose most of the matters set out in paragraphs 17 and 18 above. The said matters, in the view of this Court, were so material as to whether the Court was to order the status quo or not. Indeed, the respondent failed to disclose that there was a matter pending before the Kiambu Chief Magistrate's Court which had issued the seizure orders. In respect of the release of the said goods.

20. This is an interlocutory application. The main suit is yet to be heard. The Court is therefore careful not to make any firm findings on matters of fact. However, on the material before Court, the applicant has provided prima facie proof of the purchase of the disputed items in annexure 'HSN-4'. Further, the Deed of Variation 'HSN', which the respondent had withheld from Court when it appeared ex-parte, provided that the applicant would pay enhanced rent for the renovations undertaken by the respondent. There was no reference that the renovation funds would be used to purchase the furniture and fittings being fought over.

21. In **Kenya Planters Cooperative Union Ltd v Kenya Commercial Bank Limited & 4 others [2016] Eklr**, the court cited the case of **R vs. Kensington Income Tax Commissioners, ex parte. Princess Edmond de Polignac [1917] 1 KB 486** and held: -

*“It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.”*

22. What constitutes material facts? In the case of **Brink's MAT Ltd vs. Elcombe [1988] 3 All ER 188**, it was held: -

*“The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers...”*

23. In **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others Civil Application No. Nai. 140 of 1995**, it was held that if the Court finds at the time of inter-partes hearing that there was lack of disclosure at the time of ex-parte application, it should strike out the application.

24. In **Margaret Nduati & Another vs. Housing Finance Company of Kenya Nairobi (Milimani) HCCC No. 307 of 2001** it was held that a person who makes an ex parte application to Court is under an obligation to make the fullest possible disclosure of material facts within his knowledge. If he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceeding and he will be deprived of any advantage he may have already obtained by means of the order, which may have been wrongly obtained by him.

25. In the present case, the Court finds that there was grave material non-disclosure by the respondent that the ex-parte order of 7/12/2020 which was extended on 16/12/2020 cannot be allowed to stand.

26. Additionally, the court finds the respondent guilty of abusing the court process by not adhering to the *res sub judice* rule. There is evidence on record that the respondent was fully aware that there was pending before the Chief Magistrates Court, Kiambu an application on the same subject matter between the same parties. That notwithstanding, the respondent proceeded to make its application dated 4/12/2020 without even disclosing that fact.

27. The foregoing notwithstanding, there several issues that have troubled this court. Firstly, the Court wonders why the report of alleged theft and/or malicious damage to property was made at Gigiri Police Station. It was not shown that the suit premises was under the jurisdiction of that Police Station. There are Police Stations near the premises but the respondent chose to go to Gigiri.

28. Secondly, from the record, the suit premises is situated within Westlands Nairobi. It is unclear why the Courts of Nairobi were side-stepped in favour of the Kiambu Court. The premises fell within the jurisdiction of the Nairobi Courts and not Kiambu.

29. Thirdly, none than the DPP himself has determined that the respondent was out to abuse the Police powers. That is why he terminated the investigations and referred the parties to the civil courts. With such blatant abuse of Court process, the respondent is undeserving of any favour by the Court. The Chamber Summons dated 4/12/2020 is so spurious that it should not be spared.

30. There was a prayer for the striking out of the Originating Summons. However, the jurisdiction of this Court for such an order was not properly invoked and neither were any grounds proffered for the said order. In this regard, the Court declines to grant that order.

31. Accordingly, the application is allowed in terms of prayer nos. 2 and 3 of the Motion dated 12/01/2020. Prayer no. 4 of that Motion is allowed only to the extent of the Chamber Summons dated 4/12/2020. The applicant will have the costs of the application.

It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 18<sup>th</sup> day of March, 2021.

**A. MABEYA, FCI Arb**

**JUDGE**