



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 400 OF 2015**

MAINA KARAH.....1<sup>ST</sup> PLAINTIFF/RESPONDENT  
BONIFACE NGUIRI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT  
MICHAEL MBURU.....3<sup>RD</sup> PLAINTIFF/RESPONDENT  
HERMAN KIGO.....4<sup>TH</sup> PLAINTIFF/RESPONDENT  
JOSEPH KARIUKI.....5<sup>TH</sup> PLAINTIFF/RESPONDENT  
EDWARD MWANGI.....6<sup>TH</sup> PLAINTIFF/RESPONDENT  
MORGAN MACHARIA.....7<sup>TH</sup> PLAINTIFF/RESPONDENT  
STEPHEN KARIUKI.....8<sup>TH</sup> PLAINTIFF/RESPONDENT  
JOHN WARUL.....9<sup>TH</sup> PLAINTIFF/RESPONDENT  
MOSES KAGO.....10<sup>TH</sup> PLAINTIFF/RESPONDENT  
GEORGE GITHINJI.....11<sup>TH</sup> PLAINTIFF/RESPONDENT  
MARTIN MWANGI.....12<sup>TH</sup> PLAINTIFF/RESPONDENT  
FREDRICK OCHOLA.....13<sup>TH</sup> PLAINTIFF/RESPONDENT  
EJIDIO MAINA.....14<sup>TH</sup> PLAINTIFF/RESPONDENT

**VERSUS**

**MATTHEW KIMITU**

**DENNIS KINOTI**

**ANTHONY ONYANGO**

**(Suing as officials of BARCLAYS SPORTS CLUB).....DEFENDANTS/APPLICANTS**

**RULING**

The defendants/applicants have brought the Notice of Motion dated 31<sup>st</sup> October, 2017 supported by the grounds set out on its face and the facts stated in the affidavit of the 3<sup>rd</sup> defendant/applicant, Anthony Onyango. The applicants sought for the substantive order that the interlocutory injunction granted by this court on 15<sup>th</sup> September, 2016 has lapsed, plus costs of the application.

To oppose the Motion, the 1<sup>st</sup> plaintiff/respondent put in a replying affidavit he swore on 16<sup>th</sup> January, 2018, to which the 3<sup>rd</sup> applicant

responded with a further affidavit sworn on 6<sup>th</sup> February, 2018

Following the directions of the court, the parties to put in written submissions on the instant Motion.

I have considered the grounds set out in the body of the Motion, the affidavits supporting and resisting the Motion, the rival submissions and authorities relied upon.

It is clear that the applicants have come under the provisions of **Order 40, Rule 6** of the **Civil Procedure Rules, 2010** which stipulate that:

***“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”***

The applicants are of the view that, since the granting of the interlocutory injunction by this court on 15<sup>th</sup> September, 2016 there has been laxity on the part of the respondents in setting the suit down for hearing, and that the delay is unjust and purely intended to prejudice the applicants.

The above position was echoed in the applicants’ submissions dated 13<sup>th</sup> February, 2018 with the addition that consequently, the respondents are undeserving of the injunctive orders currently in place.

The applicants are relying on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** in which the Court of Appeal stated that:

***“Without going into the details we, with respect, agree with the submissions of all learned counsel that the object of introducing rule 6 aforesaid in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various machinations to delay the disposal of the suit. Rule 6 of order 40 was therefore a necessary and reasonable safeguard against such machinations.”***

In reply, the respondents through the replying affidavit of the 1<sup>st</sup> respondent aver that it is the applicants who have not observed the injunctive orders and have therefore approached this court with unclean hands, thereby making them least deserving of the orders sought in the Motion.

The respondents also submit that, contrary to the averments being made by the applicants, the parties were at all material times engaged in negotiations and that the applicants have made it difficult for the respondents to effect the injunctive order in place due to their non-compliance.

The respondents further contend that they have since moved to file and serve the requisite documents to pave way for the trial in the suit and hence the instant Motion has been overtaken by events.

In closing, it is the contention of the respondents that should the order sought in the Motion be granted, they stand to suffer irreparable loss/damage.

In rejoinder, the 3<sup>rd</sup> applicant avers in his further affidavit that the applicants have been compliant and cooperative in respect to the injunctive orders issued, and that the respondents are simply trying to enjoy the orders at the expense of the applicants.

Upon my perusal of the record, I observed that prior to the granting of the interlocutory injunctive orders, the parties herein were engaged in out-of-court settlement negotiations.

Following the injunctive orders issued on 15<sup>th</sup> September, 2016 the matter was referred for court annexed mediation on 8<sup>th</sup> March, 2018 and that upon undertaking mediation, a report dated 3<sup>rd</sup> October, 2018 was issued by the mediator indicating that the mediation process was unsuccessful. However, as at 16<sup>th</sup> December, 2019 the parties had indicated their willingness to pursue mediation afresh.

Be that as it may, from the foregoing it is apparent that though the suit was initially inactive for about one (1) year following the injunctive orders, it became active for the next two (2) years albeit undergoing the mediation process.

It is equally apparent from the record that while the applicants had filed the instant Motion on 7<sup>th</sup> November, 2017 they did not raise the issue of inaction until now and which issue, in my view, has since been overtaken by events for all the foregoing reasons.

On the subject of prejudice, I find that the applicants have not demonstrated by way of any credible evidence the prejudice they have suffered since the interlocutory injunctive orders were issued, as they were at all material times represented by counsel in court and privy to the mediation process in the matter.

In the same light, upon my perusal of the material presented by the parties and of the record, there is nothing to demonstrate that the applicants have neglected to comply with the interlocutory injunction issued on 15<sup>th</sup> September, 2016 as claimed by the respondents.

Ultimately, I am not convinced that any credible evidence or sufficient reasons have been afforded to warrant a grant of the order sought. As earlier noted, the application has been overtaken by events.

The upshot is that the Motion is dismissed with no order on costs. However, I hereby make the following orders:

**a) Status quo shall be maintained.**

**b) The plaintiffs/respondents shall take a mention date from the registry to confirm compliance with pre-trial directions within 30 days from today.**

**c) The plaintiffs/respondents shall then prosecute their suit within 120 days from the date on which pre-trial directions are taken, failing which the suit shall be dismissed with costs.**

**Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of March, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Mr. Njugi ..... for the Plaintiffs/Respondents

Mr. Mwangi .... for the Defendants/Applicants