



REPUBLIC OF KENYA



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**Royals Palms Mustard Ltd v Troy Medicare Pharmacy Limited & 2
others; Muchai & 16 others (Interested Parties) (Environment & Land
Case E033 of 2023) [2023] KEELC 19312 (KLR) (8 August 2023) (Ruling)**

Neutral citation: [2023] KEELC 19312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E033 OF 2023**

EK WABWOTO, J

AUGUST 8, 2023

BETWEEN

ROYALS PALMS MUSTARD LTD PLAINTIFF

AND

TROY MEDICARE PHARMACY LIMITED 1ST RESPONDENT

FASHION PLAZA LTD 2ND RESPONDENT

NISHAPA INVESTMENT LTD 3RD RESPONDENT

AND

MOSES WANDERI MUCHAI INTERESTED PARTY

JECINTA NJERI WAIRIMU INTERESTED PARTY

JEDDIAH WAWIRI GATINDI INTERESTED PARTY

JECINTA MIRENJA ANGONDI INTERESTED PARTY

HELLEN WANJINKU MUKUHA INTERESTED PARTY

EMMAH WANJIRU KIBARA INTERESTED PARTY

LYDIA WAMBURA MUGURE INTERESTED PARTY

MOHAMED IBRAHIM GEED INTERESTED PARTY

ANN NJOKI KARIUKI INTERESTED PARTY

JUDY WAMARWA NYAMU INTERESTED PARTY

ABDIRIZAK SAHAL ABDULLAHI INTERESTED PARTY

ONESMUS MUIRU INTERESTED PARTY

FELIX MULI MUSYOKA INTERESTED PARTY



JOYCE WANJIKU GICHURU INTERESTED PARTY
JOSEPH WACHIRA GITHINJI INTERESTED PARTY
BENSON WAWERU INTERESTED PARTY
PEKEE DEVELOPERS LTD INTERESTED PARTY

RULING

1. This is a ruling in respect to two applications. The first application is dated 31st July 2023 brought by the 1st Defendant while the 2nd Application is dated 1st August 2023 brought by the 1st to 16th Interested Parties.
2. Before we proceed to examine and address the applications, it is necessary to outline the brief background of this matter. On 27th July 2023 the Plaintiff moved this Court with a Notice of Motion filed under Certificate of Urgency seeking for injunctive orders against the Defendants. In the said application dated 26th July 2023 the Plaintiff sought injunctive orders against the Defendants from eviction and also restraining the Defendants from taking possession of the suit premises and in any way interfering with the Plaintiff's quiet possession and or peaceful enjoyment of the property known as L. R. No. 209/1829. The Court upon considering the said application together with the supporting affidavit sworn by Anthony Maina Mutahi a director of the Plaintiff proceeded to grant an interim relief of the injunctive order sought and further granted a date of interparties hearing of the application.
3. Upon service of the said application to the Defendants, the 1st Defendant filed an application dated 31st July 2023 seeking to stay, discharge, vary and set aside the interim orders of this court issued on 27th July 2023. The said application was supported by an affidavit sworn by Rosemary Mutheu Muathe and premised on the grounds that:
 1. On 27th July 2023, this Honourable Court issued orders restraining the Respondent from evicting, taking possession or in any way whatsoever interfering with the Plaintiff's quiet possession and/or peaceful enjoyment of all that property known as Land Reference No. 209/1829. The court further directed that until 29th September 2023, to preserve the suit premises, the Ward Commander/Officer Commanding Station Kamukunji Police Station be and is hereby ordered to ensure immediate compliance with the above order and enforce the same in failure thereof the said order is hereby directed at the Regional Police Commander for purposes of ensuring compliance.
 2. The said orders were obtained through concealment of material facts, non-disclosure and misrepresentation of facts before court.
 3. The Applicant failed to disclose to the court that the 1st Respondent is in exclusive possession of the suit premises pursuant to the Lease Agreement dated 14th April 2021 between the 1st Respondent and the 2nd and 3rd Respondents over the suit premises and which lease is valid and existing.
 4. The Applicant herein failed to disclose to the court that the 1st Respondent has constructed stalls on the suit property and sub-leased the same to over 500 tenants who are in occupation of the same. The Applicant has not disclosed how and when he issued notices of termination of the sub-tenants' tenancy



agreements which in any event, were entered between themselves and the 1st Respondent hence any attempt to terminate the same would be ultra vires, illegal, null and void.

5. This matter is res sub judice ELC Suit No. E236/2023 Troy Medicare Pharmacy Limited vs Nishapa Investments Limited and Fashion Plaza Limited. The said matter was filed simultaneously with ELC E235/2023 Troy Medicare Pharmacy Limited vs Pekee Developers Limited. In the former, the subject matter is the suit property herein L.R. No. 209/1829 and in the latter the suit property is the adjoining property L.R. No. 209/1742.
6. On 21st July 2023, pursuant to the 1st Respondent's applications filed in the said respective suits, Justice M.D. Mwangi granted orders in the following terms.

“ That an ex-parte order be and is hereby issued restraining the Defendants/ Respondents by themselves, agents or employees or any one sent by them from interfering/blocking/interrupting, causing disturbance of any from on the Plaintiff/Applicant's business premises known as L.R. No. 209/1742 pending inter-partes hearing of the Plaintiff's application on 28th July 2023.”
7. Similar orders were issued in respect to ELC E236 of 2023.
8. When the said matters came up for hearing/directions on 28th July 2023 before Justice Mwangi, the Judge directed that the two matters be heard together with file number ELC E236/2023 being the lead file. The Defendant's Counsel one Mr. Gisemba indicated to the court of a purported lease agreement of 13th July 2023 between the applicant and the 2nd 3rd Respondents herein and intimated to the court that a Third Party was in possession of the premises. Consequently, the court granted the said counsel leave of ten (10) days to serve the Applicant herein with the pleadings. Upon service, the Applicant was granted leave to apply for joinder in the said proceedings.
9. These directions were necessitated by the fact that Mr. Gisemba disclosed to the court of existence of the purported lease agreement of 13th July 2023 which the Applicant herein has reproduced in her documents, a copy whereof was produced before Judge court pursuant to an application dated 25th July 2023.
10. The orders earlier issued on 21st July 2023 were extended in both files, ELC E236 of 2023 in respect of L.R. No. E1829 and ELC E235 of 2023 in respect to L.R. No. 209/1742. Further in order to ascertain the question of possession, the Honourable Judge directed the Deputy Registrar to conduct a site visit on the suit properties within 10 days of the date of the order and a return date was set for 21st August 2023.
11. The substratum of the dispute herein is therefore directly in issue in ELC E236 of 2023, wherein there exists injunctive orders and which orders predate the orders of this court of 27th July 2023.
12. Notably the application herein is dated the 26th July 2023 while the application filed by Mr. Gisemba in ELC E236 of 2023 where he produced the Lease Agreement of 13th July 2023 relied on by the Applicant herein was filed on 25th



July 2023 hence the Applicant must have been aware of the proceedings that had earlier been instituted in respect of the suit property which in any event at the time of filing, ELC E236 of 2023 was scheduled for hearing on 28th July 2023.

13. The instant application was filed in collusion of the 2nd and 3rd Defendants who are represented in the proceedings before Justice Mwangi hence the same was meant to defeat the orders issued on 21st July 2023 and cause confusion. As such the Applicant has approached this court with unclean hands and is undeserving of any orders issued in its favour.
 14. The failure to disclose the existence of orders in respect of the suit property resulting in issuance of contra orders herein in respect of the same premises have put the interests of the 1st Respondent as well as all the sub-tenants currently in the suit premises in jeopardy as the 1st Respondent's and the sub-tenants use of the suit property has greatly been compromised.
4. The court upon considering the 1st Defendant's application dated 31st July 2023 directed that the same be served for inter parties hearing on 7th August 2023.
 5. The sixteen (16) Interested Parties herein also filed an application dated 1st August 2023 which sought inter alia the joinder of the 17 Interested Parties to these proceedings and an order that the court do declare that the subtenants herein are in a controlled tenancy. They also sought an order that this court directs the 1st Defendant to surrender the rent deposits and goodwill paid by subtenants to the Landlord's or the Plaintiff/Tenant or the subtenants for onward transmission to the Landlord's or Plaintiff/Tenant or as the court be pleased to order that the sub-tenants be issued with written tenancy agreements as is provided in law. The said application was supported by an affidavit sworn by Moses Wanderi Muchai and Jecinta Njeri Wairimu. The Court upon considering their application allowed the joinder of the 17 interested parties to the proceedings and directed the application to be served for inter parties hearing on 7th August 2023 in respect to the other orders sought.
 6. On 7th August 2023 during the plenary hearing of the applications dated 31st July 2023 and 1st August 2023, Learned Counsel Mr. Mutunga appeared for the 1st Defendant, Learned Counsel Mr. Waigwa appeared for the Plaintiff and Learned Counsel Mr. Gisemba appeared for the 2nd and 3rd Defendant. There was no representation from the 17 interested parties.
 7. The 1st Defendant in prosecuting the application argued that the orders issued by this court on 27th July 2023 were prejudicial to the 1st Defendant for the reasons that this suit was filed after Justice D. M. Mwangi had granted interim orders in respect to ELC Suit No. E236/2023 Troy Medicare Pharmacy Limited Investments Limited and Fashion Plaza Limited and ELC E235/2023 Troy Medicare Pharmacy Limited –vs- Pekee Developers Limited.
 8. It was argued that the said orders were also extended up to 21st August 2023 by Justice D. M. Mwangi and he had also directed that the Deputy Registrar of this court to conduct a site visit of the suit properties within 10 days. Counsel for the 1st Defendant also submitted that the substratum of the dispute herein is therefore directly in issue with ELC NO. E236 of 2023.
 9. Learned Counsel Mr. Gisemba in opposing the application argued that the interim orders issued by this court should be maintained since the Plaintiff was not a party to the ELC NO. E235 and ELC NO. 236 of 2023 that were currently pending before Justice D. M. Mwangi. He also submitted that to avoid duplicity and having conflicting orders over the same subject matter being heard by two courts,



this suit should be placed and be mentioned before Justice D. M. Mwangi together with ELC NO. 236 of 2023 and ELC NO. 235 of 2023.

10. Learned Counsel Mr. Gisemba also supported the position taken by Learned Counsel Mr. Waigwa for the Plaintiff and urged this court not to set aside its orders and further to have this suit placed before Justice Mwangi for further directions.

11. I have considered the applications filed and the oral submissions made by Counsel for the parties. The two main issue for determination by this Court at this stage are as follows;

- i. Whether the court should proceed to vary, discharge and or set aside its interim orders issued on 27th July 2023.
- ii. Whether the Application dated 1st August 2023 is merited.

12. The jurisdiction of the court to set aside an order of injunction is outlined under order 40 rule 7 Civil Procedure Rules, 2010 which provides as follows:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

13. It is trite law that a court may set aside and or vary its orders on discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders. Order 45 rule 1 (1) of the Civil Procedure Rules provides;

“Any person considering himself aggrieved,

By a decree or order from which an appeal is allowed, but from which no appeal has been preferred or

By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or no account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review.....”

14. In the instant application, the 1st Defendant stated that the Plaintiff failed to disclose to this court that the 1st Defendant is in exclusive possession of the suit premises pursuant to the lease agreement dated 14th April 2021 between the 1st Defendant and 2nd and 3rd Defendants. It was also stated that this matter is subjudice ELC NO. E236 of 2023 and ELC NO. E235 of 2023 and further that similar orders were issued in respect to ELC NO. E236 of 2023 by Justice M. D. Mwangi on 21st July 2023. The 1st defendant argued that those were material facts that the plaintiff failed to disclose to this court.

15. Non-disclosure of material facts was discussed in Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997 where the Court of Appeal stated as follows: -

“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 the 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. It has been for many years the rule of court, and one which it is



of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement...In considering whether or not there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to include; (i) The duty of the applicant is to make full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries. (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage by that breach of duty. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge in the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to consider the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A locus penitential (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the court may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed...”

16. In the instant case, it is not disputed that there exists similar matters ELC NO. E235 of 2023 and ELC NO. E236 of 2023 that are currently pending for determination before Justice M.D. Mwangi. It is also not disputed that in the said matters there already exists injunctive orders which were issued by my brother Judge. No disclosures were made in respect to these facts in the current suit. I have painstakingly perused the entire application and affidavit sworn in support of the 1st Defendant’s application dated 31st July 2023 and have noted that the 1st Defendant has repetitively stated that the 2nd and 3rd Defendants herein who are also present before the proceedings pending before ELC NO. E236 and ELC NO. E235 of 2023 were aware of the existence of that matter at the time of filing this suit. However, the 1st Defendant in his entire Application and Supporting Affidavit filed herein has not demonstrated whether the Plaintiff was in any way aware of the existence of the proceedings in ELC NO. E235 of 2023 and ELC NO. E236 of 2023. The interim injunctive orders were issued on



27th July 2023 based on the material facts that were placed before Court at that time. Be that as it may, I agree that had this Court had sight of the current position as stated by the 1st Defendant at the time of issuance of its orders on 27th July 2023, this Court would not have arrived at the same decision.

18. I wish to state that considering the fact that all parties herein have indeed confirmed the existence of similar injunctive orders issued earlier by my brother Justice M.D. Mwangi in respect to ELC NO. E235 of 2023 and ELC NO. E236 of 2023, I will proceed to set aside the orders issued by this Court on 27th July 2023. Courts will generally refrain from pronouncing themselves and or issuing orders in matters which have already been dealt with by another Court of same jurisdiction.
19. In respect to the Application by the 1st to 16th Interested parties dated August 1, 2023, the 16 Interested parties were not present to prosecute the same despite being aware of its hearing date and in their absence this court has no option but to dismiss the said application.
20. In view of the foregoing and further considering that the suit property involves subleases of several tenants and while doing substantive justice to all the parties at this stage, I will hereby proceed to issue the following orders;
 - i. That the orders issued on July 27, 2023 are hereby set aside.
 - ii. This matter shall be mentioned together with ELC No. E235 of 2023 and ELC No. E236 of 2023 on 21st August 2023 before Justice M.D. Mwangi.
 - iii. That until August 21, 2023 there shall be no eviction of any party and or entity irrespective of the manner of his or her occupation to the premises.
 - iv. The Application dated 1st August 2023 is dismissed.
 - v. There shall be no orders as to costs.
- 21 It is so ordered.

DATED, SIGNED AND DELIVERED BY EMAIL AT NAIROBI THIS 8TH AUGUST 2023.

E.K. WABWOTO

JUDGE

