



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 353 OF 2018

POSTAL CORPORATION OF KENYA.....PLAINTIFF

-VERSUS-

THE REGISTERED TRUSTEES OF

TELPOST PENSION SCHEME.....DEFENDANT

RULING

1. *Postal Corporation of Kenya, the Plaintiff*, filed its *Plaint* seeking permanent injunction to restrain *The Registered Trustee of Telpost Pension Scheme, the Defendant*, from interfering in any manner whatsoever with the Plaintiff's occupation and quite possession of the demised premises being the basement of Telpost Towers erected on **L.R. No. 209/16 954**. The Plaintiff further sought a declaration that the Defendant's invasion, disruption and interference with the Plaintiff's quite possession of that basement is unlawful and in breach of the terms of the lease.
2. The Plaintiff filed a *Notice of Motion* dated **30th August 2018** simultaneously with the *plaint*. The Plaintiff by that notice of motion sought *ex parte* injunction to restrain the Defendant from interfering with the plaintiff's quite possession of the basement. The Plaintiff also by that application sought *ex parte* mandatory injunction directing the Defendant to restore the Plaintiff's electricity connection within the basement.
3. The *Notice of Motion* was considered *ex parte* on **31st August 2018**. The Court granted the Plaintiff the restraining orders and mandatory injunction as sought.
4. In making that application the Plaintiff, through the Affidavit of its manager, *Joel Mageto*, deponed that it acquired a lease over the aforesaid premises on **24th November 2014** for a period of 6 years that the lease terminates on **31st December 2018**. That the Plaintiff had duly discharged its obligations throughout the lease term including paying the rent. That despite that the Defendant disconnected the electricity to the basement on **26th August 2018**. That as a consequence the Plaintiff had been prevented from discharging its statutory functions, of providing postal services to the public.
5. As noted above the Plaintiff was very categorical that it has met all its obligations in the lease and that despite that the Defendant had taken the action of disconnecting electricity.
6. When a party appears before a court *ex parte*, seeking injunctive orders, such a party is required to be candid to the court and to demonstrate *uberrimaefidei* (**utmost good faith**). In other words they are required to disclose all material facts and surrounding circumstances.
7. The Court of Appeal in the case; *Uhuru Highway Development Limited –vs- Central Bank of Kenya & Others Civil Application No. 140 of 1995*, the justices had this to say:-

“...Order 39 Rule 3 (1) of the Civil Procedure (revised) Rules (now Order 40 of the Civil procedure Rules, 2010) permits the granting of ex parte injunctions but it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant material, including even material which is against his interest. The basis for this requirement is obvious. It is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it.

...I would add my voice to that of my Learned brothers that there cannot be any legal authority for obtaining an ex parte

injunction on one basis, and when it comes to the inter partes hearing of the application, a totally different or even a more detailed basis is advanced to support the ex parte order. A party who has obtained an ex parte order must be able to support that order, at the inter partes hearing, on the very same grounds upon which he was able to obtain it in the first place. I would also agree that the granting of ex parte injunctions should be the exception rather than the rule. Ole Keiwua, J. found as a fact that the applicant obtained the ex parte order of injunction by concealing from Githinji J. relevant material which it could have been in a position to disclose to the later learned Judge.”

8. The requirement for a party at ex parte stage to show utmost good faith was discussed in the case; **The King –vs- General Commissioners for the Purpose of the Income Tax Acts for the District of Kensington KBD [1971]** where the Court stated:-

“That the rule of the Court requiring uberrima fides on the part of an application for an ex parte injunction applied equally to the case of an applicant for a rule nisi for a writ of prohibition ...that, there having been a suppression of material facts by the applicant in her affidavit, the Court would refuse a writ of prohibition without going into the merits of the case.”

9. Although the Plaintiff stated that it had met all its obligation in the lease it was revealed by the Defendant that it was in rent arrears of **Kshs 78,311, 126.56** as at **August 2018**. It had indeed, for many years, been in arrears of its rent with the Defendant.

10. The Plaintiff’s failure to show utmost good faith, at ex parte stage, and because it is indebted to the Defendant in rent arrears it does not deserve equitable relief that it seeks from this Court. Accordingly the ex parte injunction order will be discharged and the application will be dismissed with costs.

11. In the end the following are the orders of the Court:-

a) The Notice of Motion dated 30th August 2018 is dismissed with costs to the Defendant;

b) The ex parte injunction issued on 31st August 2018 is hereby discharged and set aside.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE