



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION No 80 OF 2016**

**IN THE MATTER OF THE MENTAL HEALTH ACT**

**AND**

**IN THE MATTER OF K W**

S W.....PETITIONER/RESPONDENT

**VERSUS**

S M S.....1<sup>ST</sup> INTERESTED PARTY/ APPLICANT

T N S.....2<sup>ND</sup> INTERESTED PARTY/ APPLICANT

W P (E. A) LIMITED.....3<sup>RD</sup> INTERESTED PARTY/ APPLICANT

**RULING**

1. The matter before this court is the Notice of Motion dated filed on 7<sup>th</sup> October 2016 by the interested party/applicant seeking the following orders,

- i. Spent
- ii. Spent
- iii. That this Honourable Court be pleased to review and set aside the ex-parte orders issued on the 19<sup>th</sup> day of August 2016 by the Honourable Lady Justice R.E. Ougo.
- iv. That the applicant be granted leave to respond to the Chamber Summons application and petition, both dated 12<sup>th</sup> July 2016 and filed on the 13<sup>th</sup> day of July 2016.
- v. That the cost of this application be provided for.

2. The application is hinged on grounds that the 3<sup>rd</sup> applicant, on 14<sup>th</sup> September 2016 filed a suit Nairobi Chief Magistrate Civil Suit case No. CMCC 6281 of 2016, seeking to evict the petitioner from the premises. The applicant’s advocate was served with a ruling in this matter delivered by this Honourable court on 19<sup>th</sup> August 2016, which ruling allowed the petitioner to oversee the affairs of K W. The said ruling has an effect of defeating the suit in the lower court by the 3<sup>rd</sup> applicant seeking to evict the petitioner from its premises. That on perusing the court file that his advocate found out that the petitioner

had stated that K W was the only director in the 3<sup>rd</sup> Applicant company, which is a misleading statement as the said K W had transferred all his shares to his ex-wife the 2<sup>nd</sup> applicant thus making the 1<sup>st</sup> and 2<sup>nd</sup> applicants the only two directors in the company.

3. The 1<sup>st</sup> applicant S M S swore an affidavit dated 7<sup>th</sup> October 2016 stating that he is competed and duly authorized to make and swear the affidavit by a board resolution made on 4<sup>th</sup> October 2016. He states that on 20<sup>th</sup> September 2016, he was informed by his advocates that they were served with a ruling delivered on 19<sup>th</sup> August 2016 in respect to an application filled by S W seeking to manage the estate of K W. The said ruling gave the petitioner powers to oversee the carrying of business at W P Limited on behalf of K W. He further states that in the said application, the petitioner went ahead and informed the court that K W was the sole director to the 3<sup>rd</sup> applicant. He also misdirected the court that the 1<sup>st</sup> applicant had transferred all his shares to the company on the 29<sup>th</sup> day of February 2012, and attached an affidavit allegedly deposed by the 1<sup>st</sup> applicant. The annual returns of December 2014 show that the 1<sup>st</sup> applicant is still a director of the company. He states further that W P, the 3<sup>rd</sup> applicant had two directors, himself and K W. However, K W transferred his shares to his ex-wife, the 2<sup>nd</sup> applicant, via an agreement made on 21<sup>st</sup> January 2015 following the division of matrimonial property and maintenance of the children.

4. The petitioner filed a replying affidavit filed on 25<sup>th</sup> October 2016 wherein he denies having concealed any material information from the court stating that the 3<sup>rd</sup> applicant was incorporated on 7<sup>th</sup> October 2007 with K W holding 950 shares and S M S, the 1<sup>st</sup> applicant, holding 50 shares. That on 29<sup>th</sup> February 2012, the 1<sup>st</sup> applicant surrendered his 50 share to the company and resigned as a director via an affidavit dated 29<sup>th</sup> February 2012 and deposited with I & M bank. That after his resignation, the 1<sup>st</sup> applicant/Interested party has never participated in the directorship and active management of the 3<sup>rd</sup> interested party/applicant. That to date K W holds his 950 shares in 3<sup>rd</sup> interested party/applicant and has never transferred any shares to 2<sup>nd</sup> interested party/applicant. That K W has been ill since and in rehabilitation since the year 2013. The petitioner further states that the agreement to transfer K W shares to the 2<sup>nd</sup> applicant is fraudulently before the court as K W was already admitted at Jorgs Ark Centre for treatment and rehabilitation. The purported transfer executed by the said K W cannot be said to have been valid as he was still admitted at the said centre for treatment and rehabilitation. That the agreement the 2<sup>nd</sup> interested party/Applicant seeks to rely allegedly signed by his brother K W on 21<sup>st</sup> of January 2015 in respect of division of matrimonial property and maintenance of children of the marriage is fraudulent. That on the said date, when he is said to have purportedly resigned as director of the 3<sup>rd</sup> interested party/applicant, transferred his shares to 2<sup>nd</sup> interested party/applicant and signed an agreement in respect of division of matrimonial property and maintenance of children of the marriage, K W was ill and in rehabilitation at Jorgs Ark Centre. That K W was in an advanced state of disorganized schizophrenia and undergoing psychiatric treatment and counseling therapy and as such was incapable of legally executing any transfers or any legally binding agreement's as he lacked the mental capacity. That the court via Miscellaneous Application No. 5 of 2015, the court appointed him as manager of K W, via an order dated 13<sup>th</sup> March 2015 for the purposes of managing and operating his bank account held at I& M Bank. Following the resignation of the 1<sup>st</sup> applicant and the admission of K W, the 3<sup>rd</sup> applicant was left unmanaged making it vital for the petitioner to take over and generate revenue that would aid in the payment of K W medical bills. That in February 2016 he was informed that there had been attempts to fraudulently transfer K W 950 shares in the company and a notification of change of directors dated 21<sup>st</sup> January 2015 was fraudulently filed at the companies registry. That his advocates to the Registrar General of the Companies Registry seeking clarification on the fraudulent transfer of shares that there has been no response. That from the date of his resignation in 2013, the 3<sup>rd</sup> interested party/applicant has never engaged in the running of 3<sup>rd</sup> interested party/applicant and has as such never objected to his running of the company until now. That he still manage the 3<sup>rd</sup> Interested party/Applicant Company situate on L.R. no. 209/10648 on behalf of his brothers who is still ill and in rehabilitation at Eden Village. That in order to protect his brother's interest in the 3<sup>rd</sup> interested party/applicant company, he instituted miscellaneous application no. 80 of 2016 dated 12<sup>th</sup> July 2016 seeking orders to manage his brother's shares and

directorship in the 3<sup>rd</sup> interested party/applicant company. That the High Court of Kenya, Vide the Ruling dated 19<sup>th</sup> August 2016 appointed him as the manager of K W for purposes of overseeing the running of business for K W and specifically the 3<sup>rd</sup> interested party/applicant company. That as a result of the vacuum in directorship in the 3<sup>rd</sup> interested party/ applicant, he saw it necessary to file miscellaneous application no. 80 of 2016 in order for him to legally and effectively manage his brother's interests in the company. That he is therefore legally on the plaintiff/applicant's business premises situate on L. R. No. 209/10648 and that the application dated 7<sup>th</sup> October should be dismissed with costs.

5. The respondent filed a further affidavit in response to the petitioner's replying affidavit. He reiterates the contents of his supporting affidavit and adds that he never resigned from the directorship of the 3<sup>rd</sup> applicant or transferred any shares since its incorporation. That the Companies Act in force in 2012 did not provide for a sole directorship of a limited company. That he is still a director of the company and the petitioner is misleading the court by stating that the agreement signed by the parties in respect of the matrimonial and maintenance of the minor is fraudulently obtained. That the respondent knew that his brother was married to the 2<sup>nd</sup> applicant they were divorced and a matter was filed in the Children's Court Cause number 1247 of 2011. That the respondent rushed to court to fraudulently obtain orders after he received several demand letters from his advocate to vacate the premises of the 3<sup>rd</sup> applicant. That if the petitioner has approached this court with good intent he would have informed him of the same knowing very well that he was a director of the 3<sup>rd</sup> applicant. That at no point has there been a vacuum in the directorship of the 3<sup>rd</sup> applicant nor has it been left unmanaged as he has been overseeing the company's day to day operations. That the operations were good until March 2015 when the petitioner/respondent came in and began interfering with the operations after he had obtained an order to manage the ward's bank account.

6. The applicant filed submissions on the 6<sup>th</sup> December 2016. According to the applicant the issue for determination is whether the court can review and set aside the ex parte orders and grant leave to the applicant to respond to the chamber summons. It is submitted that Order 51 rule 15 of the Civil Procedure provides that the court may set aside an ex-parte order. That the order they seek to set aside was issued in the absence of the party that it seeks to affect that if a party fails to or discloses any information it misleads the court, in a bid to obtain the ex-parte orders, then the orders should be vacated. The applicant relied on the three cases to support this submissions namely **Hussein Ali & 4 others Vs. Commissioner of Lands, Lands Registrar & 7 others (2013) eKLR, Republic V. Principal Registrar of Government Lands & 3 others Ex-parte John Ngugi Gathumbi (2014) eKLR and Republic V Business Premises Rent Tribunal Interested Party John Mwangi Muturi & 3 others (2016) eKLR**. It was submitted that the courts have held that the law is clear that where a party at the ex parte stage of an application fails to disclose material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. The applicant reiterated what is deposed in their affidavits adding that what the respondent did by failing to disclose material facts before obtaining the ex parte order is an abuse of court process.

7. The Petitioner/Respondent filed his written submissions on 23<sup>rd</sup> February 2017 highlighting the issues for determination as;

- a. Whether S M is still a director in the 3<sup>rd</sup> applicant/interested party.
- b. Whether the agreement dated 21<sup>st</sup> January 2015 is valid.
- c. Whether this Honourable court should review and set aside the ex-parte orders issued on the 19<sup>th</sup> Day of August 2016

With regard to the first issue, the petitioner submitted that the 1<sup>st</sup> interested party surrendered his shares to the company and resigned leaving the ward as the only director of the company. He further submitted that since the resignation of the 1<sup>st</sup> interested party, he has never participated in the day to day running of

the company and that the said affidavit surrendering the 1<sup>st</sup> applicant's shares was held in an account at I&M bank, which account is the sole account of the company. On the second issue the petitioner submitted that the agreement relied upon by the 1<sup>st</sup> interested party/applicant is undated but signed on 21<sup>st</sup> January 2015 is fraudulent as the same cannot be valid since the ward was diagnosed with advanced disorganized schizophrenia and admitted for treatment in the year 2013. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> interested parties/ applicants have not adduced any evidence to show that there was indeed a resolution passed to effect the said transfer of shares and change directorship. On the third issue, the petitioner submitted that Order 51 of the Civil Procedure Rules makes provisions for a court to set aside an ex-parte judgment. The said order does not provide for grounds upon which such an order can be set aside. The petitioner urges the court to dismiss the application since no valid evidence has been adduced to support the allegations made by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties/applicants.

8. I have considered the application, affidavits, submissions and the law. The issue for determination is whether the court can review and set aside the ex-parte orders issued on the 19<sup>th</sup> of August 2016 by this court. Under Order 10 Rule 11 of the Civil Procedure Rules it is provided that *where judgment has been entered the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just*. Under order 45 (1) of the Civil Procedure Rules it is provided that, *a person who is aggrieved can seek a review of the court order upon 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 on 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 of judgment to the court which passed the decree or made the order without unreasonable delay*. The applicant has raised the issue that the respondent did not disclose to the court the interest of the applicants in the company that he sought to run its activities. There are allegations of forgery on the process of transfers of shares and whether the 1<sup>st</sup> and 2<sup>nd</sup> applicants are directors of the 3<sup>rd</sup> applicant and who should control the affairs of the 3<sup>rd</sup> applicant. These issues need to be sorted out and therefore it is only in order that the court reviews its order, part of it, to enable the applicants respond to the application that gave rise to the said orders. I find that the applicants have raised sufficient reasons in their affidavit to enable this court set aside the order granting the respondent powers as it did. I therefore set aside the order giving the applicant powers to oversee the carrying on of business in W P E. A Limited. The applicant is granted leave to respond to the Chamber Summons application and Petition both dated 12<sup>th</sup> July 2016 and filed on the 13<sup>th</sup> of July 2016. The response shall be filed as directed by the court on the date this ruling is read in open court. Costs shall be in the cause. It is so ordered.

Dated, signed and delivered this 4<sup>th</sup> day of **August 2017**

**R. E. OUGO**

**JUDGE**

**In the Presence of:**

**Mrs Kiguatha holding brief for Mr. Sang For the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties/Applicants**

**Miss Opondo holding brief for Miss Misere For the Petitioner/Respondent**

**Juma Court Clerk**