



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL CASE NO. 4 OF 2017**

**SIGNATURE TOURS & TRAVEL LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

1. Before this court is the plaintiff's notice of motion dated 16<sup>th</sup> February, 2017. It has been brought under order 40 rule 1 (a), 2(1), Order 51 rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The plaintiff essentially seeks:

a. An injunction restraining the respondent by themselves, agents and assignees from interfering with the plaintiff's assets and business activities in Mavoko LR No. 12715/1651 and 1652.

2. The motion is based on the grounds on the body of the motion and the supporting affidavit of Koome Munene who is the Director of the plaintiff. He stated that the defendant sent strangers to the plaintiff's business premises situate on Mavoko LR No. 12715/1651 and 1652 (hereinafter referred to as '**the premises**') who attempted to take forceful possession of the assets and business of the plaintiff. That the disruption and the forceful taking over of the plaintiff's business and assets by the defendant's agents will be a loss that cannot be compensated in damages.

3. In response thereto, the defendant filed a replying affidavit sworn by Nancy Naswa on 3<sup>rd</sup> March, 2017. She contended that the plaintiff applied to the defendant for an asset financing facility on 23<sup>rd</sup> May, 2013. The defendant considered and granted the facility by a letter of offer dated 21<sup>st</sup> June, 2013. That the offer was later superseded by the defendant's subsequent letter of offer dated 24<sup>th</sup> June, 2013. That the defendant duly met the terms of its financing offer as per the letter of offer. That the nature of financing granted being a takeover of asset financing and insurance premiums from Standard Chartered Bank, invoice discounting line to finance invoices from third parties, guarantees and letters of credit was such that payments or guarantees were all to third parties and not the plaintiff. That the issue of crediting the plaintiff's account is therefore not only unfounded but spurious. That subsequently, the plaintiff defaulted in repayment despite the several opportunities accorded to the plaintiff to remedy its default. That the plaintiff further failed to honour the terms of the facility offered by the defendant thus prompting the defendant to exercise its statutory power of sale over several securities it held. That on 5<sup>th</sup> April, 2016, the plaintiff together with its directors filed a suit seeking to challenge the exercise of the defendant's statutory power of sale over three (3) properties held as security in Nairobi High Court Civil Case No. 101 of 2016 Signature Tours and Travels & 2 Others v. National Bank of Kenya Limited and another. A consent was entered in that case by the defendant and plaintiff on 12<sup>th</sup> April, 2016. The said consent was made an order of court and has never been vacated and remains binding to the plaintiff. That the court order provided among others that the defendant's auction of the suit properties was postponed for a period

of 45 days as long as the plaintiff met the conditions enumerated under the said order among which were that the plaintiff procures the sale of the suit properties and have the purchase moneys deposited with the defendant. That it was a term of the consent that in default of any of the conditions enumerated therein by the plaintiff, the defendant was at liberty to proceed to sell the suit properties without further reference to the plaintiff and subject only to advertising the said properties. That despite the order, the plaintiff failed to sell the suit properties pursuant to the terms and timelines of the order. Subsequently, the defendant through its advocates wrote to the plaintiff by a letter dated 14<sup>th</sup> June, 2016 informing it of the default and that the defendant would proceed to exercise its right over the properties. That the defendant rightly on 30<sup>th</sup> August, 2016 proceeded to sell by public auction the properties Land Reference No. 12715/1651 and 12715/1652 in Machakos County together with the property bearing Land Reference No. 12672/128 Kigwaru Estate Nairobi County. That in a bid to circumvent the terms of the consent entered into in Nairobi HCCC No. 101 of 2016, the plaintiff filed a notice of withdrawal of the suit on 22<sup>nd</sup> September, 2016 and the same was adopted by the court. That following the withdrawal of the said suit, the directors of the plaintiff filed Machakos ELC No.124 of 2016 Alfetta Waruiru Mungai and Koome Munene v. National Bank of Kenya Limited on 23<sup>rd</sup> September, 2016. The court in ELC No. 124 of 2016 granted an ex parte interim order which orders lapsed as it was never served and the court declined to extend it to 30<sup>th</sup> September, 2016. That after the court declined to extend the orders, the advocate acting for the plaintiff's directors purported to serve the order which had been vacated on 30<sup>th</sup> September, 2016 vide a letter dated 19<sup>th</sup> October, 2016. That further, one of the Directors has filed Nairobi ELC Miscellaneous Application No. 19 of 2017, Koome Munene v. National Bank of Kenya. That in view of the foregoing, the plaintiff is guilty of material non-disclosure of the existence of suits other than this and is merely forum shopping. It was further contended that the contentions in this suit is therefore sub judice.

4. Mr. Koome swore a further affidavit filed on 27<sup>th</sup> March, 2017. He contended that the letter of offer of 24<sup>th</sup> June, 2013 does not exist since it was revised by way of a letter of offer dated 5<sup>th</sup> September, 2013 which was finally amended by a facility letter dated 24<sup>th</sup> November, 2014. That for a number of years the plaintiff had sought the intervention of the defendant's senior officers to sort out the myriad of problems and illegal manner of handling of the plaintiff's business and accounts but no assistance was forthcoming. That the plaintiff's dealings with the defendant are tainted with fraud and illegalities that has been perpetuated by the defendant. Among the particulars are said to be that at no point did the defendant ever credit any amounts in respect of any facility letter into the plaintiff's bank accounts and that any amounts lent to the plaintiff were used by the defendant to directly purchase various vehicles in its name and the defendant detained the logbooks.

5. In response thereto, Nancy Naswa swore a supplementary affidavit filed on 5<sup>th</sup> April, 2017. She contended that the defendant is a stranger to the allegations of fraud levied against it and that no evidence had been adduced in support of the allegations in the further affidavit.

6. In its submissions, the plaintiff cited Judge Mabeya in **Jan Bolden Nielsen v. Herman Philipus Steyn & 2 others (2012) eKLR** where the judge held inter alia:

**“44. I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set in the Giella v. Cassman Brown Case. The court may look at the circumstances of the case generally and the overriding objective of the law...”**

7. That the rights of the plaintiff not to be deprived of its rights over the suit property without full compensation is provided for in Article 40 of the Constitution. That the overall handling of the matter by the defendant is so adverse to the plaintiff as to be inequitable in breach of section 13 (2) (f) of the Consumer Protection Act.

8. For the defendant it was submitted that the plaintiff has not satisfied the conditions for granting an application for injunction. That the plaintiff has no right to the property since the defendant has, on the strength of the plaintiff's default on payment, has a statutory right of action over the property thereby the

plaintiff has not established a prima facie case. In support thereof, the defendant relied on **Godfrey Ngumo Nyaga v. H.F.C.K. Civil Appeal No. 134 of 1987** cited in **Henry Wanyama Khaemba v. Standard Chartered Bank Ltd & 3 others (2005) e KLR**. It was further argued that the plaintiff has not established that it will suffer irreparable injury which cannot be compensated by an award of damages if the orders prayed for are not granted. It was amplified that the establishment of irreparable injuries is an important factor considered in granting such orders. The court of Appeal sitting on Judge Mabeya's ruling in **Jan Blonde** (supra) in **Nguruman Ltd v. Jan Blonde Nielsen & 2 others (2014) e KLR**, stated that the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction. It was particularly held that speculative injury does not suffice. The defendant further cited **Al Jalal Enterprises Limited v. Gulf African Bank Limited (2014) eKLR** where the court was of the opinion that once a property is given to a bank as security, the same becomes a commodity that can be sold and further **Apollo Onyango Njago & another v. Savings & Loan Kenya Limited (2012) eKLR** where the court was of the opinion that a person who charges his property to secure a loan does so knowing that upon default, the property could be sold to recover the loan. That having not established the first two ingredients for grant of an injunction that balance of convenience favours the defendant. That the plaintiff having not come to court with clean hands is not entitled to any relief.

9. I have carefully considered the application herein. It is not in contention that there are several cases in court relating on the subject matter herein an issue that was not disclosed by the plaintiff at the ex parte stage. This is what the Court of Appeal said concerning material non-disclosure while making an application for injunction. The court in **Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** 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 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 give careful consideration to the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A locus penitentiae (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...In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so...It is accepted that in cases of ex parte proceedings there must be full and frank disclosure to the court of all material facts known to the applicant but in the instant case everything was in the court record and was available to the learned judge for perusal. There was no deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue is: were the material facts those, which it was material for the learned judge to know in dealing with the application as, made" The answer to this must be in the negative since the learned Judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and the suit had not been heard on merit. He was also concerned that injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted".

10. Applying the test, I am of the view that the plaintiff misled the court by not disclosing the existence of the other suits as it would have had a bearing on the outcome of the court's orders. In view of the foregoing and in view of the fact that the Plaintiff has not established the essential ingredients for a grant of an order of injunction, I come to the finding that the Plaintiff's Application dated 16/2/2017 lacks merit. The same is ordered dismissed with costs to the Defendant/Respondent.

**Dated and delivered at Machakos this 24<sup>th</sup> day of November, 2017.**

**D.K. KEMEI**

**JUDGE**

**In the presence of:**

**Muumbi for Githi for the Plaintiff**

**Watta for Kinara for the Defendant**

**Kituva - Court Assistant**