



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 62 OF 2016

KENYA MEDICAL ENGINEERING LTD.....PLAINTIFF

VERSUS

THE MATER HOSPITAL1ST DEFENDANT

THE SHAPA CONSULTING LTD.....2ND DEFENDANT

RULING

1. For ruling is a Preliminary Objection dated 22.3.2016 lodged by the firm of CHIURU KIPKURUI & RUGO ADVOCATES on 24.3.2016. The same Preliminary Objection is based on the grounds;
 1. The 1st Respondent is neither a Legal person nor a juristic person.
 2. The Plaintiff/applicant has abused the process of the court by failing to serve on an order of court obtained ex parte.
2. The Preliminary Objection was canvassed orally on 8.4.2016. Mr. Chiuri Ngugi for the 1st Defendant/respondent submitted that the ex parte Injunction Order obtained by Applicant on 4.3.2016 was neither extracted nor served until 5.4.2016.
3. The foregoing omission by the Applicant violates the provisions of Order 40 Rule 4(3) CPR which stipulates that an ex parte Order ought to be served within 3 days.
4. On 8.3.2016 when the matter came to court for directions, the said Order had not been served upon the 1st Respondent. After extraction of the same Order, the same was not served within 3 days.
5. On 23.3.2016, the Orders were not extended thus Respondents seek court declaration that there was an abuse of the court process. The advocate relies on the case of **B.O.G MOI HIGH SCHOOL KABARAK & ANOTHER VS. MALCOLM BELL 2013 EKLR**, where the court defined abuse of court process as “*The concept of abuse of the process of the court bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the court’s jurisdiction in a manner incompatible with the goals of justice*”
6. In the instant case, the Applicant obtained Orders exparte, failed to serve, got extension of the same Orders and failed to serve again and thus seeks a court’s pronouncement over the same.
7. Mr. Jomo for the 2nd Respondent adopted Mr. Chiuri Ngugi’s submissions and added that; ‘*The extracted Order was served upon their side on 5.4.2016. The same was against the rules. The 1st*

Respondent was not a Legal person by the time of obtaining Order. On 8.3.2016 Order was extended but on 23.3.2016 the Order was not extended'. The failure to extend the Orders rendered the same orders to lapse.

8. In any event the amendment and re-amendment of the suit added new party who replaced the original first Defendant thus changed the nature and form of the parties and thus the Order could not be tenable in such circumstances.
9. Mr. Nduati for the Plaintiff/applicant opposed the Preliminary Objection on behalf of the Plaintiff/applicant. Mr. Nduati submits that once the party admits that it has no capacity to sue or be sued, then it has no capacity to appear in court. He submits that Mater Hospital is not supposed to be in court. It has no capacity even to be represented by an advocate, thus he prays for the striking out of the Preliminary Objection.
10. The omission to extract Orders as stated above is explained by Mr. Nduati to have been occasioned by the scarcity of time as the duration was very short to do the same. The Orders were obtained on 5.4.2016 and the matter came to court on 8.3.2016 when Orders were extended by consent. The issue of non-service of Orders was not raised until 23.3.2016.
11. The Order was later extracted and served. However the matter is spent. The court had granted status quo. The current state of affairs ought to be sustained for substantial justice to be done to the parties. The court ought not set aside the orders. Applicant seeks substantial justice.
12. In a quick rejoinder from Mr. Chiuri Ngugi, he did submit that the 1st Defendant came to court because it was sued. It had a right to appear in court to complain of its incapacity to be sued. As we stand now there is no order in force. Order 40 Rule CPR states that;

"...where the court grants an ex parte injunction the applicant shall within 3 days from the date of issue of the order serve the order, the application and the pleadings on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse".

13. The failure or omission of service for a period beyond 3 days as stipulated above is admitted. The consequences are stipulated by the rule that the Order lapses automatically. The Applicant/Plaintiff never sought extension of time or reissue of the same order. The order thus lapsed as prescribed by the rule.
14. The extension of 8.3.2016 whether consented or otherwise was of no legal consequence as there was no order to be extended. Court could only have either reissued the order or order status quo. In absence of the aforesaid happenings, there was no order as from the 4th day of the issuance of the order due to lapse as a result of non-service as prescribed by the rule. The acts of the Plaintiff were definitely abuse of court process. See case cited.
15. On the issue of suing the original first Defendant who has since been replaced via amendment and re-amendment of the Plaintiff, the court is of the view that it was incumbent upon the original 1st Defendant to come and tell the court either in person or via its advocate that it has no capacity to be sued. That it is not a juristic person. Who else would have told court? To say that it ought not appear in court, is not logical at all. The Plaintiff would have proceeded as it has happened in the past and get warrants and thereafter execute with catastrophic effect. By the time the Applicant realizes it sued the wrong party, it will have suffered loss and damage.
16. The court thus declares that the suing of the 1st Defendant which has no legal capacity to be sued, was erroneous and thus proceedings against it void ab initio.
17. There is no way a non diligence party who sued the original 1st Defendant an avoid payment of costs as an advocate had to be instructed. The court therefore makes the following pronouncement /orders;

1. The Orders of 5.4.2016 lapsed after 3 days after the Plaintiff/Applicant failed to serve the same.
2. The suing of the original 1st Defendant was illegal and thus null and void ab initio.
3. Costs assessed at Kshs.20,000/= to be paid to the Mater Hospital within 14 days and in default execution to issue.
4. Parties to take dates for further directions.

Dated, Signed and Delivered in Court at Nairobi this 22nd day of April, 2016.

.....

C. KARIUKI

JUDGE