



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 6 OF 2015

**IN THE MATTER OF: AN APPLICATION BY SAID TAHIR, STEVEN
OGWAPIT AND HUBERT SEIFERT AS OFFICIALS OF NEW NYALI
RESIDENTS ASSOCIATION UNDER ARTICLE 22 OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF: FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 19, 20, 21, 22, 23, 27, 42, 69 AND 70 OF THE CONSTITUTION OF
KENYA**

BETWEEN

1. SAID TAHIR

2. STEVEN OGWAPIT

3. HUBERT SEIFERT AS OFFICIALS OF NEW NYALI

RESIDENTS ASSOCIATION.....PETITIONERS

VERSUS

1. COUNTY GOVERNMENT OF MOMBASA

**2. FRANCIS THOYA, CHIEF EXECUTIVE, LAND PLANNING &
HOUSING, COUNTY GOVERNMENT OF MOMBASA**

**3. DIRECTOR OF TOWN PLANNING & ARCHITECTURE,
COUNTY GOVERNMENT OF MOMBASA**

4. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY

5. FUAD MAHMOUD MOHAMED

6. HYDRO LUXURIOUS APARTMENT LTD.....RESPONDENTS

RULING

1. The issue raised in this matter at this stage is whether *ex parte* orders granted herein on 9th April, 2014 should be extended.
2. Counsel for the 5th Respondent has urged the court to set aside the *ex parte* order on the ground that there was no disclosure of matters material to the Petition, that is to say that there was and there is in existence HCCC No. 250 of 2014 between the same parties raising the same issues. In that suit the Petitioners as Plaintiffs applied for an order of injunction to stop the Respondents from continuing with their construction. The court however declined to grant the orders for injunction. His submissions were supported by Mr. Kinyanjui, Counsel for the 1st – 3rd Respondents, as well as Ms. Wanbi counsel for the 6th Respondent, for failure to serve the Respondents on time.
3. As I have informed counsel in open court, I granted conservatory orders on the sole grounds of alleged illegality of the construction by the Respondents. It was not disclosed to me either in the application or in oral argument that there existed HCCC No. 250 of 2014 between the same parties, and raising substantially the same issues, or that the question of injunction had been raised and denied.
4. This is not the stage to discuss the difference between a conservatory order and an injunctive order. All I can say is that for a party to be granted any of these orders at an *ex parte* stage, the duty of candour to the court cannot be over emphasized.
5. In the English case of **THE ANDRIA (Vasso) [1984] QB477**, Robert Goff LJ said:-

“It is axiomatic that in *ex parte* proceedings there should be full and frank disclosure to the Court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the *ex parte* application, even though the facts were such that, with full disclosure, an order would have been justified.”

This case was adopted and upheld in the case of the **OWNERS OF MOTOR VESSEL “Lilian S” vs. CALTEX OIL (K) LTD [1989] 1KLR**.

6. In **BRINK’S MAT LTD. VS. ELCOMBE [1988] 13 All ER 188**, Ralph Gibson LJ at page 192 (f) said:-

“In considering whether 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 me to include the following: (i) The duty of the applicant is to make a 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 as made; materiality is to be decided by the Court and not by 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 such 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 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 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 he may have derived 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 on 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 for every omission that the injunction will be automatically discharged. A *locus poenitentiae* (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 continue the order, or 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.”

7. Counsel for the Petitioners argued that this application is brought under Article 23 of the Constitution which has given the court expansive discretion to grant Judicial Review Orders.

8. There is no doubt that the court has been granted wide discretion to grant Judicial Review orders, this has not however displaced the requirement of full candour on the part of the *ex parte* applicant. The court process must not be used as a game of Russian Roulette. At no stage should the court embarrass itself by issuing contradictory and competing orders from two parallel processes.

9. For those reasons the *ex parte* orders made on 9th April, 2015 are hereby set aside with a direction that each party bears its own costs.

10. It is so ordered.

Dated, Delivered and Signed in Mombasa this 13th day of April, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Wameyo for Petitioners

Mr. Kinyanjui for 1st to 3rd Respondents

No appearance for 4th Respondent

Mr. Ngibuini for 5th Respondent

Ms. Wambi for 6th Respondent