REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 12 OF 2021

(FORMERLY HCCC E262 OF 2021)

HALIMA HAJI SARAH .....PLAINTIFF

=VERSUS=

MULTIPLE HAURLIERS (E.A) LIMITED .....1ST DEFENDANT

AJMAN COMPANY LIMITED .....2ND DEFENDANT

RULING

Introduction

1. This Ruling is in respect to two applications. The Plaintiff's application dated 20th December 2021 and the 2nd Defendant's application dated 14th January 2022.

2. **Halima Haji Sarah** the Plaintiff herein commenced this suit vide a plaint dated 22nd October 2021 seeking for various reliefs. Contemporaneously to the filing of the plaint she also filed a Notice of Motion application where she sought for status quo to be maintained pending the determination of the suit to the effect that she remains on the suit property **L.R No. 209/4194/38**. The Court considered the application and initially granted status quo orders to remain in force until 15th November 2021 during inter partes hearing of the said application. On 15th November 2021, the Defendants despite being served were not present and neither had they filed any response. The Court upon being moved by the Plaintiff proceeded to disposed of the application and directed that the status quo orders to remain in force until the determination of the suit.

3. The Plaintiff subsequently moved this court vide another application dated **20th December 2021** where she sought for the following orders: -

> ***i) The O.C.P.D Pangani Police Division and O.C.S Pangani Police Station do oversee the court's orders issued on 16th November 2021 against the defendants to the effect that the defendants do not evict the plaintiff from the suit property L.R No. 209/4194/38 pending the determination of the suit.***
>
> ***ii) Costs of this application be in the cause.***

4. The Application is supported by grounds stated on its face as well as the supporting Affidavit of the Plaintiff**,** sworn on **20th December 2021,** where she deposed inter alia that she had been informed that the Defendants are plaining to evict her from the suit property contrary to the existing orders herein. The application is opposed. The 2nd Defendant filed a replying affidavit sworn on **2nd February 2022** by **Bashir Abdi Mohamed** its director. He deposed that the 2nd Defendant is the registered owner of the suit property which was transferred to it from the 1st Defendant on 10th September 2021 a upon payment of Ksh 77,000,000. They averred that they have never harassed the Plaintiff. According to them, the Plaintiff had only been requested to peacefully vacate and hand over vacant possession of the property to its new owner who was the 2nd Defendant.

5. The second application for determination is an application dated 14th January 2022 filed by the 2nd Defendant seeking for the following orders:-

> *a) Spent.*

b) That pending the hearing and determination of this application, the plaintiff be directed to pay rent to the 2nd Defendant as and when it falls due.

c) That pending the hearing and determination of this application, the court be pleased to set aside and or vary the orders issued to the Plaintiff on the 16th November 2021.

d) That the plaint filed in this suit be struck out based on the fact that it is an abuse of the court process.

e) That the Plaintiff's suit be dismissed with costs as the orders sought have already been overtaken by events.

f) That in the alternative, the court gives directions that the 2nd Defendant's counterclaim be heard expeditiously.

g) That the costs of this application be provided for.

h) Any other orders that this Court deems just and proper to grant.

6. The application is supported by the affidavit sworn on **14th January 2022** sworn by **Bashir Abdi Mohamed** a director of the 2nd Defendant company.

The Plaintiff's case

7. In support of her application dated 20th December 2021, the Plaintiff relied on her own supporting affidavit sworn on the same date and also filed a replying affidavit and grounds of opposition dated 1st January 2022. The grounds of opposition pointed out that the 2nd Defendant's application was an abuse of the court process and meant to defeat the scales of justice.

8. The Plaintiff averred that the status quo orders were issued after the Defendants who had been served failed to attend court for the hearing of her application on 15th November 2021.

9. The Plaintiff further averred that she had been in the suit property for over 30 years and she has no tenancy agreement with the 2nd Defendant. In reference to the case that had been filed at the Rent Tribunal, the Plaintiff stated that the same had been overtaken by events and hence the reason for her filing the current suit which she was disputing the purported sale to the 2nd Defendant.

10. She prayed that her application dated 20th December 2021 be allowed and the 2nd Defendant's application dated 14th January 2022 be dismissed so that the matter can proceed for full hearing as earlier directed.

1st Defendant's case

11. The 1st Defendant never filed any response to the applications save for stating that they supported the 2nd Defendant's application dated 14th January 2022.

The 2nd Defendant's case

12. The 2nd Defendant filed a replying affidavit sworn on **2nd February 2022** by **Bashir Abdi Mohamed** its director. He deposed that the 2nd Defendant is the registered owner of the suit property which was transferred to it from the 1st Defendant on 10th September 2021 upon payment of Ksh 77,000,000. They averred that they have never harassed the Plaintiff. According to them, the Plaintiff had only been requested to peacefully vacate and hand over vacant possession of the property to its new owner who was the 2nd Defendant.

13. The 2nd Defendant also filed an application dated 14th January 2022 which sought several orders as listed at paragraph 5 of this Ruling.

14. It was averred that the Plaintiff failed to disclose to this court at the time of filing her suit, that the suit property had already been transferred to the 2nd Defendant from the 1st Defendant and the transaction was completed on 10th September 2021.

15. It was the 2nd Defendant's case that pursuant to the said transaction, the 2nd Defendant was now the registered proprietor of the suit property and that the Plaintiff had no claim whatsoever and the payers sought by the Plaintiff cannot be granted since the same has been overtaken by events.

16. The 2nd Defendant accused the Plaintiff of failing to disclose to the court that prior to the filing of this suit, she had already filed another case vide **RENT TRIBUNAL CASE NO. E633 OF 2021** which she had obtained protection orders from the Tribunal and hence she was guilty of forum shopping.

17. The 2nd Defendant thus urged the court to dismiss the Plaintiff's application dated 20th December 2021 and grant the prayers sought in their application.

Analysis and determination

18. I have considered both Applications and the responses filed thereto. The issues which in my opinion arise for determination and can dispose of both applications are summarized are as follows: -

i. Whether there was non-disclosure of material facts by the Plaintiff?

ii. What are the appropriate orders/remedies that can be issued herein?

Issue No. 1

Whether there was non disclosure of material facts by the Plaintiff?

19. The 2nd Defendant averred that the Plaintiff had failed to disclose to the court that the suit property had already been transferred to the 2nd Defendant from the 1st Defendant pursuant to a sale transaction that was concluded on 10th September 2021 which was before the commencement of the current suit.

20. It was also stated that the Plaintiff had also failed to disclose to this court at the time of filing suit that she had previously filed **RENT TRIBUNAL CASE NO. E633 OF 2021 HALIMA HAJI SARAH v MULTIPLE HAULIERS (EA) LIMITED & OTHERS**. According to the 2nd Defendant, the action of the Plaintiff amounted to forum shopping and an abuse of the Court process.

21. Non-disclosure of material facts was discussed in **Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated as follows: -

> ***"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 consider the case being presented. (vii) Finally, it is not every omission that the injunction will be automatically discharged. A locus pentitentiae (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".***

22. I note that the Plaintiff has not directly controverted the allegations made against her. The Plaintiff filed the suit at the Rent Restriction Tribunal on 7th October 2021 suing the same parties who are Defendants herein. At the Tribunal the Plaintiff sought inter alia orders restraining the Defendants from evicting her from the suit property. In the current suit she sought status quo orders against her eviction which in essence are similar orders sought in the current suit. No disclosure was made in respect to this fact. In fact, at **paragraph 15 of her plaint**, the plaintiff stated: -

"There is no pending suit over the property between the parties in any other court."

23. The Plaintiff also filed the current suit on 25th October 2021, equally seeking status quo orders against any transaction relating to the suit property. Similarly, it was not disclosed that at the time of filing suit, the property had already been transferred to the 2nd Defendant pursuant to a transaction that was concluded on 10th September 2021.

24. Thus, when a party comes to Court on an application supported by an Affidavit under oath and fails to outline and disclose matters that are material to the granting of orders, such a party is acting in a manner suggesting that they are peddling falsehood while under oath. The consequences of such conduct are well settled in law. Any advantage gained by such non-disclosure, the grant of *ex-parte* orders will be taken away from the offending party. In the case of ***Ruaha Concrete Co. Ltd et al versus Paramount universal Bank Ltd et al, HCCC No. 430 of 2002***, the Court outlined in that case the principles of non-disclosure and the consequences which will follow as a result of such non-disclosure.

> ***The duty is not to make full and fair disclosure of all material facts, the material facts are those which 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 assessment of the applicant, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. 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: -***
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> ***a) The nature of the case 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 or the Plaintiff.***
>
> ***c) The degree of the legitimate urgency and the time available for the making of the inquiries.***

25. It is now settled that any party seeking an equitable relief must disclose all the necessary facts that may aid the court in rendering justice to the parties. In the instant case, it is the finding of this court that indeed the Plaintiff is guilty of material disclosure for obtaining the status quo orders without disclosing all material facts to the court.

Issue No. 2

What are the appropriate orders/remedies that can be issued herein?

26. In the 2nd Defendant's application dated 14th January 2022, they sought several orders. Among the orders sought was that the plaint be struck out since the suit was an abuse of the court process.

27. In ***The Co-operative Merchant Bank Ltd. v George Fredrick Wekesa*** **(Civil Appeal No. 54 of 1999)** the Court of Appeal stated:

> ***"Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court".***

28. In ***Yaya Towers Limited v Trade Bank Limited (In Liquidation)*** **(Civil Appeal No. 35 of 2000)** the same court expressed itself thus:

> ***"A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved".***

29. *Similarly, in* ***D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another*** [1980] eKLR, **Madan JA,** stated:

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it".***

30. Being guided by the above authorities, striking out the Plaint without hearing the parties at trial would be draconian at this stage and the court will be reluctant to do so.

Disposition

31. In the end, the Plaintiff's application dated 20th December 2021 and the 2nd Defendant's application dated 14th January 2022 are

disposed in the following terms;

i. The Plaintiff's application dated 20th October 2021 is dismissed in its entirety.

ii. The status quo orders issued on 16th November 2021 are varied to the extent that pending the hearing and determination of this suit the Plaintiff is directed to pay the monthly rent of the suit property to the 2nd Defendant as and when it falls due.

iii. Costs shall abide the suit.

32. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2022.

E. K. WABWOTO

JUDGE

In the Virtual Presence of:-

Mr. Nyakundi for the Plaintiff.

Mr. Mwihuri for the 1st Defendant

Ms. Lusweti h/b for Mr. Saad for the 2nd Defendant

Court Assistant: Caroline Nafuna.