REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO 302 OF 2013

GEOFFREY KINJA.....PLAINTIFF

VERSUS

GILBERT KABEERE M'MBIJIWE.....1ST DEFENDANT

BARNABAS MUTWIRI KINOTI.....2ND DEFENDANT

R U L I N G

This ruling relates to two applications. The first one filed by the Plaintiff is dated 18th November, 2013. The second one filed by the defendants is dated 2nd November, 2013.

The application dated 18th November, 2013 prays for orders:

a) that this application be certified urgent and the same be heard ex- parte in the 1st instance.

b) that the honourable court be pleased to issue an order of temporary injunction restraining the defendants, their agents, assigns and or persons claiming under them from in anyway interfering with the plaintiff's use and occupation of land parcel LR NKUENE /KATHERA /400 and or evicting the plaintiff and his family from the suit land pending the hearing and determination of this application.

(c) that the Hon. Court be pleased to issue such further and or better orders as may deem fit in the interest of justice.

(d) that costs of this application be provided for.

It is supported by the affidavit of Geoffrey Kinja and is based, inter alia, on the following grounds.

i. ***There is a subsisting lease between the plaintiff and the 1st defendant over the suit land.***

ii. ***the 1st defendant has sold and transferred the suit land to the 2nd defendant.***
iii. ***The 2nd defendant is threatening the plaintiff and his family with eviction.***
iv. ***There is a residue of five years to the lease.***
v. ***The plaintiff has effected a number of developments running into millions which are at risk of being wasted.***
vi. ***The plaintiff/applicant has been in use and occupation for 10 years.***
vii. ***The plaintiff has effected many developments on the suit land.***
viii. ***The plaintiff stands to suffer irreparable loss.***

The application dated 27th November, 2013 prays for orders:

1. <u>THAT</u> this application be certified most urgent and be heard ex- parte in the first instance.

2. <u>THAT</u> the honourable court be pleased to stay the orders given on the 21st day of November, 2013 pending interpartes hearing of this application.

3. <u>THAT</u> the Honourable Court be pleased to set-aside and/or discharge the orders given on 21st day of November, 2013.

4. <u>THAT</u> costs be provided for.

The application is supported by the affidavits of Gilbert Kabeere M'Mbijiwe and Barnabas Mutwiri Kinoti and has the following grounds;

a) The plaintiff/respondent when obtaining the orders afore cited materially misled the court and further failed to disclose vital facts.

b) There is no legally subsisting lease between the 1st defendant and the plaintiff.

c) The plaintiff/respondent failed to disclose the existence of NKUBU PMCC NO.85 OF 2013; GEOFFREY KINJA-versus-GILBERT KABEERE M'MBIJIWE whereby the same issues herein are still pending and yet to be determined.

d) The actions by the plaintiff to institute a multiplicity of suit is gross abuse of the court's process.

e) the aforesaid orders having been issued without material disclosure and through material misinterpretation of facts are unjust, unconstitutional and ought to be set aside and/or discharge.

f) This application has merit.

<u>THE PLAINTIFF'S SUBMISSIONS</u>

The plaintiff has explained that he filed this suit by way of a plaint dated 18.11.2013. He also filed a Notice of Motion dated the same day. He explains that he appeared before Court on 21.11.2013 and obtained a temporary order of injunction restraining the defendants from in anyway interfering with the plaintiff's user and occupation of **LR NKUENE/KATHERA/400** and or evicting the plaintiff and his family from the suit land.

He goes on to say that after serving the orders obtained on 21.11.2013, and before the application could be heard interpartes on 9.12.2013, the defendants hastily filed an application dated 27.11.2013 seeking, inter alia, orders for stay of orders granted on 21.11.2013 and the setting aside of the same.

The plaintiff says that his claim against the defendant is predicated upon a lease agreement dated 1st January, 2003 entered into between the plaintiff and the defendant whose term was for a period of 15 years and that it had a residue of 5 years when this suit was filed. The plaintiffs states that the defendant in violation of the stipulations and terms of the lease and without giving notice, unilaterally sought to terminate the lease and actually proceeded to do so by transferring the suit land to the 2nd defendant who in turn sought to evict the plaintiff. The plaintiff says that on the strength of the lease he had effected many developments on the suit land whose fruits he anticipated to reap at the expiry of the 15 years lease period. He argues that the would suffer irreparable damage and has annexed a valuation report (Anexture GK 3) showing that the developments he had undertaken on the suit land amounted to millions of shillings. He also claimed that the 1st defendant sold the suit land to the 2nd defendant together with

the developments he had made.

He claimed that after learning of the 1st defendants intention to dispose of the suit land he filed suit No. Nkubu PMCC 85 of 2013 against the 1st Defendant. He submits in his own words:

"***When the parties appeared before the Nkubu Court, the Honourable Court mischievously discharged the orders without assigning proper reasons known in law."***

He states that upon conducting a valuation, it was realized that the Magistrate's Court lacked requisite jurisdiction as the subject land had a valuation beyond the Court's pecuniary jurisdiction.

The plaintiff submits that there was no legal bar to the plaintiff seeking audience in a higher court of jurisdiction since the Nkubu suit had not been determined. He also, without giving details, says that the issues at the Nkubu Court and those in this suit are at variance.

He has told the court that the application at Nkubu was heard interpartes on 13.11.2013 and on the same day the court discharged the order of inhibition. He claims that on 14.11.2013 the suit land was transferred to the 2nd defendant. He opines that it would have been worthless to have the suit heard as the same had been rendered nugatory.

In response to the defendants' application dated 27.11.2013, he submits that it is without merit as this court, upon the presentation of the application, had decided that it had merit and proceeded to grant the exparte orders. He says that he had not misled the court by not owning up that the 1st defendant and the plaintiff had been involved in suit No. Nkubu PMCC 85/2013 as the Nkubu Court lacked jurisdiction.

The plaintiff concludes his submissions by saying that he does not seek to unreasonably stay on the suit land but only seeks to remain thereon until the expiry of the lease the plaintiff and the 1st defendant had signed.

1ST AND 2ND DEFENDNATS' SUBMISSIONS

The defendants have said that they rely on the grounds on the face of their application dated 27th November, 2013 as well as the supporting affidavits of the 1st and 2nd defendants, both sworn on 27th November, 2013. They also rely on the 1st and 2nd defendants' replying affidavits both sworn on 27th November, 2013, in response and in opposition to the plaintiff's application dated 18th November, 2013. They argue that as the replying affidavits had not been responded to, the Court should find that the defendants' facts raised therein are uncontroverted.

They say that paragraph 7 of the lease which the plaintiff predicates his case upon provided that the lease was terminable at the instance of either party by a one year's notice. They say that proper notice was given and the lease was terminated. They say that even before the termination of the lease the plaintiff had dishonoured the terms of the lease by not paying the 1st defendant 40% of the annual coffee crop yield which was the consideration of the lease.

They state that instead of vacating the 1st defendant's property, the plaintiff sought for extension of time to vacate the land. They state that instead of vacating the 1st defendants property, the plaintiff sought for extension of time to vacate the land. They claim that the plaintiff's former advocates letter dated 17.7.2013 asking for extension stated that the plaintiff respected the Lessors wish to terminate the lease and stated that this statement should be deemed as an acknowledgment by the plaintiff that the lease had indeed been terminated. They say that the request to have the date of vacating the suit land extended was promptly rejected.

They say that in Nkubu PMCC No. 85 of 2013 between the plaintiff and the 1st defendant, the plaintiff had obtained exparte orders by proffering misleading facts to the court which orders were set aside after the Nkubu Court had heard the parties interparties. They say that the Nkubu Court case was not withdrawn, is extant and unfortunately, there is a multiplicity of suits since the Nkubu suit raises the

same issues as the issues raised in this suit. They say that the plaintiff should have withdrawn the Nkubu case or enjoined the 2nd defendant in that case. The defendants have urged this court to be persuaded that the plaintiff has abused the court process and should, therefore, not be granted equitable remedies.

The defendants submit that the plaintiffs' application lacks any substantive prayers beyond the hearing of his application as it just seeks ***"restraining orders against the defendants for the period pending the hearing and determination of the plaintiff's application."*** They contend that a court can not grant injunctive orders for the period pending the hearing and determination of this suit because the plaintiff has not sought the same in his application.

The defendants also submit that the plaintiff lacks a *prima facie* case as the lease between the parties allowed either party to give one years notice to terminate the lease.

The defendants submit that the plaintiff is guilty of material non-disclosure for firstly, failing to disclose that the lease agreement had been terminated, secondly by failing to disclose that he and the first defendant had a case pending at Nkubu and thirdly by failing to admit that in his plaint at Nkubu he had admitted the jurisdiction of that Court. They, therefore, urge the Court to dismiss the plaintiff's application for want of material non-disclosure. They proffer the case of **BAHADURALI EBRAHIM SHAMJI - VERSUS - AL NOOR JAMAR & 2 OTHERS, CIVIL APPLICATION NO. 210 OF 1997, COURT OF APPEAL, NAIROBI.**

DETERMINATION

The plaintiff argues that his application has merit and should be allowed. He says that he moved to this Court after realization that the suit property (Developments) exceeded the pecuniary jurisdiction of the Lower Court at Nkubu. According to him, because the Court lacked jurisdiction, he did not find it necessary to disclose the existence of a prior suit between him and any of the defendants.

The defendants say that the plaintiff's application lacks any substantive prayer beyond the interpartes hearing of the application. Prayer (b) of the application reads:

"***That the Honourable Court be pleased to issue an order of temporary injunction restraining the defendants, their agents, assigns and or persons claiming under them from in any way interfering with the plaintiff's use and occupation of land parcel LR NKUENE/KATHERA/400 and or evicting the plaintiff and his family from the suit land pending the hearing and determination of this application."***

This is the only substantive prayer in the plaintiff's application. I agree with the defendants that there is no substantive prayer directed at the defendants beyond interpartes hearing of this application In my view, the granting of this prayer will be rather otiose as it will have no effect pending the hearing and determination of this suit. There are no shortcuts.Parties are bound by their pleadings. Courts should not contrive to read the minds of litigants or even contemplate arrogating unto themselves clairvoyant inclinations. I opine that this failure to frame prayers properly is not a technical infraction. It is a legal deficit.

The defendant's submission regarding the issue of lack of *prima facie* case is predicated on the claim that the lease entered into between the plaintiff and the 1st defendant allowed either party to give one year's notice to terminate the lease. Paragraph 7 of the lease reads: ***"Lease is terminable at the instance of either party by one (1) year notice."*** It is, therefore, totally misleading for the plaintiff to claim in paragraph 7 of his plaint that;

"The lease agreement referred to in paragraph (5) herein specifically stipulated that a party not wishing to renew the lease after its expiry would give the other one (1) year notice to vacate and or terminate the lease."

Correspondence between the advocates representing the parties show that proper notice had been

given to the plaintiff by the 1st defendant. I find that failure to disclose issues concerning the lease to the Court before the exparte orders were granted was material non-disclosure.

Regarding the non-disclosure of the existence of Civil Suit **NKUBU PMCC 85 OF 2013,** I note that the plaintiff in his plaint at paragraph 13 of his plaint averred as follows:

"***That there is no other suit pending and that there have been no other previous proceedings in any Court between the parties herein over the same subject matter and that the cause of action relates to the plaintiff named herein."***

The plaintiff veritably evinces his intention not to disclose the suit pitting himself against the 1st defendant at Nkubu where exparte orders originally granted in his favour had been set aside after the parties were heard interpartes. I do not agree with the plaintiff's explanation in his submissions, which to me is an afterthought, that since he had discovered that the value of his developments on the suit land exceeded the jurisdiction of the Nkubu Court, it was not necessary to disclose the existence of the case at Nkubu.

I find that the case of Bahadurali Ebrahim – Versus – Alnoor Jamal & 2 others (op.cit) relevant in the area of non-disclosure of material facts. In the case, the Court of Appeal quoted with Approval, Warringtong L. J. at Page 509 as opining:

"It is perfectly well settled that a person who makes an exparte application to the Court – that is to say, in the absence of the person to 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 that 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. That is perfectly plain and requires no authority to justify it."

Scranton L. J. at page 513 opined:

"**Now that rule giving a day to the Commissioners to show cause was obtained upon an exparte application; and it has been for many years the rule of the Court and one which is of the greatest importance to maintain that when an applicant comes to Court to obtain relieve on an exparte statement he should make a full and fair disclosure of all material facts – facts not of law. He must not mistake 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."**

The Court of Appeal also quoted with approval the case of **BRINKS – MAT Ltd – Versus - ELCOMBE [1988], 3 ALLER 188** where the opinion of Ralph Gibson L. J. eruditely enunciated the principles relevant to material non-disclosure as follows:

"***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 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 of inquiries. (v) if material non-disclosure is established the Court will be astute to ensure that a plaintiff who obtains an exparte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.....See Bank Mellat v Nikpour at (91) per Donaldson L J, citing Warrington LJ in the Kensingon Income tax cmrs case. (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 of 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. Alocus 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 exparte order, nevertheless to continue the order, or to make a new order on terms:

I find that the plaintiff is guilty of non-innocent disclosure in his application. I also find that the application does not contain any substantive prayer beyond the hearing of the application interpartes.

In the circumstances, I dismiss the plaintiff's application dated 18th November, 2013. I grant prayer 3 of the defendants' application dated 27th November, 2013 and accordingly set aside and discharge this court's orders granted to the plaintiff on 21st November, 2013.

Costs are awarded to the defendants.

Delivered in Open Court at Meru this 30th day of October, 2014 in the presence of:

Cc Daniel/Lilian

Mokua for the plaitiff

Mutunga h/b Mwanzia for defendant

P. M. NJOROGE

JUDGE