



REPUBLIC OF KENYA



**KENYA LAW**  
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**Laiser Communications Ltd v Tanad Transporters Limited & 2 others;  
City Council of Nairobi & another (Third party) (Environment & Land  
Case 64 of 2009) [2022] KEELC 2804 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2804 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 64 OF 2009**

**EK WABWOTO, J**

**MAY 27, 2022**

**BETWEEN**

**LAISER COMMUNICATIONS LTD ..... PLAINTIFF**

**AND**

**TANAD TRANSPORTERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GEORGE GICHANA MOMANYI ..... 2<sup>ND</sup> DEFENDANT**

**ABDULAHMAN M. SAID ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**CITY COUNCIL OF NAIROBI ..... THIRD PARTY**

**CHIEF LAND REGISTRAR ..... THIRD PARTY**

**RULING**

1. This ruling is in respect to the application dated May 5, 2022 wherein in the 1<sup>st</sup> and 3<sup>rd</sup> defendants seeks to set aside the orders made on April 8, 2022. The application is supported by the grounds on the face thereof and further by the affidavit of Musa Said Hassan, a director of the 1<sup>st</sup> defendant herein.
2. The application is opposed by the plaintiff. In opposition to the same, the plaintiff filed a notice preliminary objection dated May 9, 2022 and a replying affidavit sworn by Mohammed Mohammed Mohamud a Director of the plaintiff on May 11, 2022.
3. The application was heard by oral submissions from the counsel of the parties. Mr. Havi learned counsel submitted on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> defendants while Mr Chege learned counsel submitted on behalf of the plaintiff. During the hearing of the application. Mr Havi relied on the affidavits sworn by Musa Said Hassan on May 5, 2022 and May 12, 2022. Counsel submitted that in their affidavits,



they had outlined and given a chronology detailing how the case moved from the court of Appeal to the Supreme Court. They also referred to the directions that had been made by the Supreme Court on 12<sup>th</sup> and April 26, 2022.

4. It was submitted that it was not in dispute that there is no order of stay at the Supreme Court however the issue was whether a party can move this court when a matter is pending before the Supreme Court while deliberately concealing the fact that there was a pending appeal before the Supreme Court.
5. Conversely, it was stated that this was not an application for stay but an application to set aside the expert orders and court was being urged to act ex debito justitiae since there was no material non-disclosure with a view of protecting the dignity of the court.
6. Counsel concluded his oral submissions by requesting the court to set aside the ex-parte orders since the 1<sup>st</sup> and 3<sup>rd</sup> defendants had made out a case warranting the grant of such orders.
7. Opposing the application, learned counsel, Mr. Chege for the plaintiff relied on the notice of preliminary objection dated May 9, 2022 that was filed in objection to the application and the replying affidavit sworn by Mohamed Mohammed Mohamud on May 11, 2022.
8. Counsel submitted that the main issue for the court to determine was whether there was a stay of execution of the Judgement of the court delivered herein. Counsel argued that there was no stay of execution of the judgement either from the Court of Appeal or the Supreme Court.
9. It was contended that in the absence of stay orders, nothing stops the plaintiff from executing the decree. Counsel stated that if there were stay orders, the auctioneer would not have moved this court. It was further argued that in the circumstances nothing stops the plaintiff from executing the decree.
10. In respect to the appeal that had been filed at the Supreme Court counsel submitted that section 15 of the Supreme Court Act No 7 of 2011 required leave to be granted before an appeal could be filed. In the instant case, no leave had been granted by the Supreme Court and as such that was no appeal.
11. It was further submitted that the auctioneer had moved the court after he was instructed by the plaintiff who was seeking to enforce its decree and on this basis the court was requested to dismiss the application.
12. On the issue of material non-disclosure, counsel submitted that the same was not relevant to this matter since the only issue was whether or not there was a stay and having established that there was none, the orders issued by this court on April 8, 2022 remain valid and should not be set aside.
13. The court has carefully considered the application as well as the parties' affidavits, notice of preliminary objection and oral submission that were made in support and those made in opposition to the application. In my view the main issue for determination is whether this court should proceed to set aside its orders made on April 8, 2022 directing the OCS, California Police Station to accompany Zachariah Baraza t/a Siama Auctioneers or his agents during the execution of the decree issued herein on November 12, 2018.
14. The applicants have premised the application on the fact that that the orders made on April 8, 2022 were issued after the Auctioneer had concealed material facts from the court and specifically the fact that there was the pendency of Petition No E009 of 2022, Tanad Transporters Limited & 2 others & Laiser Communications Ltd before the Supreme Court, and that the attempt by the plaintiff to execute the decree issued herein on November 12, 2018 in total disregard of the pendency of their case before the Supreme Court violated the legal principle set out in Law Society of Kenya Vs



Attorney General & another (2019) eKLR that courts subordinate to the Supreme Court should not take proceedings parallel to the former.

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

“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”.

16. In the instant case, the plaintiff submitted that the issue of the pending suit at the Supreme Court was not relevant to this matter and according to them what was of crucial significance was whether there was any order of stay that would affect the execution of the decree issued on November 18, 2018 and since there was none, the orders made on April 8, 2022 should not be set aside.
17. I have perused the directions that were issued by the Supreme Court and it is evident that while there was indeed the existence of the Supreme Court case, no stay of any proceedings was issued by the said court. To be specific, the Supreme Court gave the following directions on April 14, 2022; “Decline to certify the application as urgent”. Hence therefore the non-disclosure of the existence of the Petition filed at the Supreme Court and the lack of any stay orders from the said court is not of sufficient materiality that warrants the setting aside of the order issued on April 8, 2022 since there is no evidence of any stay orders in existence. However, it is worth noting that should there have been any stay orders from the Supreme Court then I would have proceeded to set aside the orders issued herein on April 8, 2022.
18. In the application under consideration, it is worth noting that Judgment herein was delivered on November 12, 2018. An appeal was filed to the Court of Appeal by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants which was heard and Judgment delivered on April 1, 2022 wherein the Appeal was dismissed. Later a Petition was filed at the Supreme Court on April 7, 2022 and the Supreme Court having considered



the Application that was filed accompanying the petition declined to certify the matter as urgent. In the circumstances, no court of law abiding by the law of the land and acting conscientiously would deny a successful party the right to enforce its decree.

19. Given the circumstances, of this case, I am not satisfied that the Applicants have met the threshold for setting aside the orders made on April 8, 2022. Consequently, the application dated May 5, 2022 is not merited and the same is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY 2022.**

**E.K WABWOTO**

**JUDGE**

In the Virtual Presence of:-

Mr. Havi for the 1<sup>st</sup> and 3<sup>rd</sup> Defendant/Applicants.

Mr. Chege for the Plaintiff/Respondent

Court Assistant: Caroline Nafuna

