



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 174 of 2003**

**SAM-CON LTD. .... PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.**

**ANDREW DOUGLAS GREGORY**

**ABDUL ZAHIL SHEIKH .....**

**.....DEFENDANTS**

**R U L I N G**

This Notice of Motion, dated 17/8/04, under Order 39 rules 4 and 9, Order 6 rules 13(b), (c), (d) and Order 41 rules 4(1) and 27 of the Civil Procedure Rules, Sections 2, 3A and 78 of Cap.21, Laws of Kenya, seeks the following orders:-

1. )
2. )
3. ) Already spent
5. )

4. Plaintiffs' Notice of Motion, dated 12/8/04 together with the Annexed affidavit by Gurburx Singh Bhogal, on 21/7/04, be struck out as it is:-

- (a) scandalous, frivolous and/or vexatious.

(b) It may prejudice, embarrass, or delay the fair trial of the suit and/or intended appeal to the Court of Appeal by the Defendant/Applicant herein.

(c) It is an abuse of the court process.

6. Any further and other orders which this court may deem just and necessary in the interest of justice.

7. Costs of this application. The application is supported by the affidavit of Damaris Wanjiku

Gitonga of even date, and is on the grounds, **inter alia**, that:-

(a) **at all material times, the defendants are in lawful receivership of the Plaintiff Company under a series of Debentures to the 1<sup>st</sup> Defendant. The interim injunctive orders of this court issued on 13/8/04 were framed by Plaintiff's directors and/or its advocates to conceal the said fact of receivership and thus by irregular and or unlawful means to oust the Defendant' lawful receivership aforesaid.**

(b) **At the time of the grant of Ex-parte orders on 13/8/04, the Plaintiff did not disclose to the Duty Judge – Justice L. Njagi - that the Plaintiff had previously filed a Chamber Summons dated 31/3/03 seeking similar injunctive orders which had been heard inter-partes and the ruling delivered on 14/5/03 by Mwera, J.**

(c) **The Plaintiff and its lawyers failed to disclose to the Duty Judge when they got the ex-parte orders on 13/8/04 that the Court of Appeal had given a ruling 4/7/04, which ruling was still in force thereby leading the Duty Judge to grant orders in conflict and contrary to the Ruling of the Court of Appeal of 4/7/03. Hence this court's orders, by virtue of the non-disclosure by the Plaintiff, are Ultra-Vires.**

(d) **The Plaintiff's Notice of Motion dated 12/8/04 seeks orders that are substantially similar to its Chamber Summons dated 31/3/03 and hence scandalous, frivolous and vexatious, and an abuse of the court process.**

(e) **The application dated 12/8/04 did not comply with the provisions of the Judicature Act (Cap.8) and Plaintiff should not have been heard during the Vacation in the 1<sup>st</sup> instance.**

(f) **The Plaintiffs' application of 12/8/04 is RES JUDICATA as the issues raised therein and the orders sought are substantially similar to those in the application dated 31/3/03 between the same parties, which was heard inter-partes and determined by this court on 14/5/03.**

(g) **In light of the conflict of interest between the Ruling of Court of Appeal, dated 4/7/03 and this court's ex-parte interim injunction dated 13/8/04, regarding the management of the Plaintiff Company which may lead to chaos, it is in the interest of justice that this court's interim order of 13/8/04 be discharged, set aside and/or varied to maintain the respective positions of the parties prior to the grant of the 13/8/04 – that is the Defendants' lawful receivership of the Plaintiff Company without interference by the Plaintiffs' directors, servants and/or agents.**

I have closely perused the massive pleadings – the affidavit of

Damaris Wanjiku Gitonga; and the annexures thereto, and have considered the submissions by the two learned counsels – Mr. Kibanya and Mr. Wanjohi for the applicant and the Respondent respectively; the authorities cited, both statutory and decided cases, and I have reached the following findings and conclusions.

The **ex parte** interim orders of this court, dated 13/8/04 by Njagi, J. were obtained by non-disclosure of material facts on the part of the Respondents in this application – that is the Plaintiff Company and its counsel and/or directors. The Plaintiff Company failed to disclose to the learned Duty Judge that there was, as a matter of fact, a Ruling by the Court of Appeal on the matter, which Ruling was delivered on 4/7/03, and which ruling was still in force. This non-disclosure, apart from creating an unnecessary conflict between this court and that of Appeal, is, and was, a professional misconduct by the counsel for the Plaintiff Company, the Respondent herein. Accordingly, this court's **ex-parte** interim order are **ultra vires** and of no legal consequence in light of the earlier Ruling by the Court of Appeal.

Further, my perusal, and actual comparison of the Plaintiff Company's (Respondents) application dated 12/8/04, and the application dated 31/3/03, which was ruled upon by Mwera, J. on 14/5/03, shows that the application of 12/8/04 violates the **RES JUDICATA** - doctrine as stated in Section 7 of the Civil Procedure Act, Cap.21, Laws of Kenya, in that the Orders and reliefs prayed for are substantially similar to those in the application of 31/3/03. The parties are the same in both applications.

To that end, the application dated 12/8/04 should not have been heard by this court, even on an **ex parte** basis. This is the other material non-disclosure by the Plaintiff/Respondent when they appeared before the Duty Judge on 13/8/04.

On the basis of the foregoing conclusions, it is imperative to reiterate that injunctive orders are the court's discretion as they are equitable in nature. Any party praying or obtaining such orders must come before the court with clean hands and disclose all the material facts.

In the current case, I have no doubt that had the Duty Judge been given the correct position, he would not have granted the **ex parte** interim orders on 13/8/04.

Accordingly, I hereby set aside those orders as irregularly granted through non-disclosure by the Plaintiff/Respondent Company. The orders are hereby discharged and the position as per the Court of Appeal – that is prior to the 13/8/04 restored.

This application, dated 17/8/04 is granted.

The Respondent – Plaintiff Company is ordered to pay the costs of this application to the applicants.

It is so ordered.

**DATED** and delivered at Nairobi, this 3<sup>rd</sup> day of June, 2005.

O.K. MUTUNGI

**JUDGE**