



Hasmo Agencies Limited v National Social Security Fund (Land Case E052 of 2023) [2025] KEELC 140 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEELC 140 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E052 OF 2023
OA ANGOTE, J
JANUARY 23, 2025

BETWEEN

HASMO AGENCIES LIMITED PLAINTIFF

AND

NATIONAL SOCIAL SECURITY FUND DEFENDANT

RULING

1. The Defendant has filed a Notice of Motion Application brought under Section 3 and 3A of the [Civil Procedure Act](#), Order 40 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and dated 19th August 2024. Through this application, the Defendant has sought the following orders:
 - a. That the orders of the court issued on 15/08/2023 and 23/09/2023 be vacated and or set aside.
 - b. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue orders of injunction restraining the Plaintiff by itself, its servants, agents, proxies and/or persons exercising its authority alienation, dealing, disposing, trespassing and/or in any other manner interfering with the defendant's quiet use, occupation and possession of the premises housing the carpark at Kenyatta Avenue Nairobi on L.R. No. 209/11412, L.R. No. 209/11331, L.R. No. 209/12220, L.R. No. 209/12219 and L.R. No. 209/12287 a parking bay along Kenyatta Avenue comprising 455 parking lots.
 - c. That the costs of the application be provided for.
2. The application is based on the grounds on the face of the application and the Supporting Affidavit sworn by David Koross, the Defendant's Managing Trustee, who deponed that the Plaintiff entered into two license agreements with the Defendant dated 21/12/2015 and 30/11/2018, through which the Defendant agreed to demise the suit property, being the premises housing the carpark at Kenyatta Avenue Nairobi on L.R. No. 209/11412, L.R. No. 209/11331, L.R. No. 209/12220, L.R. No.



209/12219 and L.R. No. 209/12287 a parking bay along Kenyatta Avenue comprising 455 parking lots.

3. He asserts that the performance of the agreements was however frustrated by orders in Nairobi BPRT Case No. 15 of 2016; that further orders were issued in Chief Magistrates Environment and Land Case No. 1447 of 2020, which were quashed by the High Court in HCJR Application No. E006 of 2020 and that the orders were served to the Defendant after it had commenced development of the suit property.
4. The Defendant's Director asserts that as the Plaintiff commenced this suit vide a Plaint dated 10/08/2023, it simultaneously filed an application seeking interim injunction orders against the Defendant from interfering with its possession of the suit property, which are the same prayers the Plaintiff had placed before the Business Premises Rent Tribunal in Nairobi BPRT No. E558 of 2023.
5. It was deposed that this court then issued orders on 15/08/2023 which were confirmed on 25/09/2023 and that the Plaintiff subsequently filed an application citing the Defendant's officials for contempt, which application is pending determination.
6. The Defendant's Director argues that the orders of this court were based on material non-disclosure of facts; that the Plaintiff deliberately concealed that subsequent to expiry of the lease permitting its possession and use of the suit property, it has never used or had possession of the same and that at the time the orders were made, it is the Defendant that had used and enjoyed quiet possession of the suit property albeit with interference by the Plaintiff.
7. According to the Defendant, the Plaintiff withheld information on the existence of an arbitral clause in the licence agreement it seeks to enforce, which provides for mandatory arbitration before approaching court and that this suit is for enforcement of the orders of the Chief Magistrates Court issued in Miscellaneous Case No. E358 of 2020, disguised as a fresh suit.
8. According to the Defendant, the implication of the injunctive orders in the Plaintiff's favor was to allow the suit at the interim stage and divest the defendant of proprietary rights over the suit property. They urge that the Defendant is in occupation of the suit property and that there is no dispute as to its proprietorship.
9. It is the Defendant's case that the Defendant should be allowed to use the property in keeping with protection of its proprietary rights and that unless the application is heard and orders sought herein granted, the Defendant's property rights will continue to be violated.
10. The Plaintiff did not file a response to the application within the requisite time. No submissions were filed in support of this application.

Analysis and Determination

11. Arising from this application, the following issues are for this court's determination:
 - a. Whether this court should vacate and set aside the orders it issued on 15/08/2023 and 23/09/2023.
 - b. Whether this court should grant injunction orders as prayed by the Defendant.
12. This suit was instituted by the Plaintiff through a Plaint dated 10th August 2023, in which the Plaintiff sought to enforce the licensing agreement between itself and the Defendant dated 21st December 2015. According to the Plaintiff, the Defendant is in breach of the licensing Agreement as the Defendant failed or neglected to deliver up vacant possession to the Plaintiff.



13. The Plaintiff asserts that in its judgment dated 29th May 2020, the Business Premises Rent Tribunal granted the Plaintiff full possession and occupation of the suit premises. They claim these orders were later adopted by the Chief Magistrates Court at Milimani through orders issued on 25th September 2020, in which the court ordered the Defendant to obey, abide and comply with the said Judgment.
14. The Plaintiff asserts that the Defendant has frustrated, refused and neglected to hand over possession of the suit premises by acting in bad faith, including through erecting a blockade at the entrances of the suit premises using several motor vehicles.
15. There is no dispute that the Defendant is the registered proprietor of the suit property. The matter before this court concerns the license agreement pending between the parties, in which the Plaintiff was granted a license to manage the car park for one year, renewable for a further one year, which period commenced on 1st January 2016.
16. The Defendant has sought that this court should vacate and set aside its orders issued on 15th August 2023 and confirmed on 23rd September 2023, on the grounds that there has been factual non-disclosure on the part of the Plaintiff. This application has been made under Order 40 Rule 7 of the Civil Procedure Rules, under which a court may discharge, vary or set aside orders of injunction. It states:

“ Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
17. The jurisdiction granted under this provision is discretionary, and must therefore be exercised judiciously. This was held by the court in *James Juma Muchemi & Partners Ltd vs Barclays Bank of Kenya & Another* (Nairobi HCCC No.339 of 2011 (2012) eKLR. In *Ragui vs Barclays Bank of Kenya* (2002) 1 KLR 647, Ringera J stated that:

“It is settled law that if an interlocutory injunction has been obtained by means of representation or concealment of material facts, the same will on the application of the party aggrieved be discharged.”
18. The ex parte orders of this dated issued on 14th August 2023 read as follows:

“That until 25th September 2023, an order of injunction is hereby issued prohibiting the Defendant from erecting a blockade and/or obstruction, being motor vehicles Registration Number KCP 699K, KDA 466P, KCK 598U, KCN 899C, KCE 970D, KBB 760G, KCT 717Y, KDE 831R and KDG 306J all belonging to/ the Defendant or any Motor Vehicle belonging to the Defendant, at the entrances of the premises housing the Carpark At Kenyatta Avenue Nairobi on L.R. No. 209/11412, L.R. No. 209/11331, L.R. No. 209/12220, L.R. No. 209/12219 and L.R. No 209/12287 as parking bay along Kenyatta Avenue comprising 455 parking lots.”
19. The orders issued by this court on 15th August 2023 and dated 16th August 2023 reads as follows:

“That until 25th September 2023, in addition to the orders issued on 14th August 2023, an order of injunction is hereby issued to restrain the Defendant whether by herself or through her agents, servants or employees or howsoever else from erecting a blockade, obstructing, entering upon, remaining upon, trespassing, damaging, wasting, removing, disposing of, selling, advertising, inviting tenders, receiving bids, evaluating bids, awarding and/or appointing managers, closing and/or shutting down, attaching, distressing, or in



other way whatsoever evicting, harassing, intimidating, threatening, interfering and/or interrupting the Plaintiff's quiet use, possession, occupation management and enjoyment of the property and the Plaintiff's business at the Carpark at Kenyatta Avenue Nairobi on L.R. No. 209/11412, L.R. No. 209/11331, L.R. No. 209/12220, L.R. No. 209/12219 and L.R. No 209/12287 as parking bay along Kenyatta Avenue comprising 455 parking lots."

20. These orders were extended on 25th September 2023. As at the time of this ruling, the Plaintiff's substantive application for injunctive orders dated 10th August 2023 is yet to be heard and determined.
21. According to the Defendant, the orders quoted above ought to be vacated and set aside, on the basis that the Plaintiff failed to disclose the following facts: that subsequent to expiry of the lease permitting its possession and use of the suit property, it has never used or had possession of the same and that at the time the orders were made, it is the Defendant that had used and enjoyed quiet possession of the suit property albeit with interference by the Plaintiff.
22. Further, it is the Defendant's case that the Plaintiff withheld information on the existence of an arbitral clause in the license agreement it seeks to enforce, which provides for mandatory arbitration before approaching the court and that this suit is for enforcement of the orders of the Chief Magistrates Court issued in Miscellaneous Case No. E358 of 2020, disguised as a fresh suit.
23. Several suits have been filed with respect to this dispute, which matters have been referenced above. In Nairobi BPRT Case No. 15 of 2016 Sokomania Limited(Tenant) vs Value Zone Ltd (Agent) and National Social Security Fund (Landlord), through its judgement dated 29th May 2020, the Tribunal dismissed the Tenant's application having found that it was not a tenant of the 1st Respondent, and there was no privity of contract between itself and NSSF.
24. The Tribunal also allowed the application by the Interested Party (the Plaintiff in this matter) dated 14th January 2016 for vacant possession of the suit property.
25. The Tribunal's judgement was adopted by the magistrate's court in Milimani Commercial Miscellaneous Case No. E358 of 2020 Hasmo Agencies Limited vs National Social Security Fund through an order dated 25th September 2020. The court ordered the Defendant to obey, abide and comply with the said judgement, and directed the OCPD and OCS Central Police Station to supervise the compliance with the said orders.
26. A further suit, Milimani MCELC No. 1447 of 2020 Sokomania Ltd vs Board of Trustees NSSF, was filed before the magistrates' court. These proceedings and all orders made therein were quashed by Hon. Justice Anne Omollo in Nairobi ELCJR Application No. E006 of 2020, Republic vs Sokomania Limited and Chief Magistrates Court Milimani on the grounds that the proceedings were an abuse of court processes, as the 1st Respondent was seeking the same redress as it had sought before the Tribunal and that the orders of the tribunal had not been set aside or stayed.
27. Lastly, although David Koross has referred to Nairobi BPRT No. E558 of 2023, in which he asserts that the Plaintiff has sought similar reliefs as in this matter, he has however failed to avail any pleadings or orders from the Tribunal in that matter. However, the Plaintiff has not denied the existence of the suit.
28. It is trite that a party who appears before a court has a duty to disclose all material facts. The principles governing non-disclosure of facts in ex parte applications are set out in the case of Brink's MAT Ltd



vs Elcombe & others [1988] 3 ALL ER 180, as quoted in Coast Apparel EPZ Limited vs Mtwapa Epz Limited & I & M Bank Limited [2017] KEHC 4025 (KLR) 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 to make a ‘full and fair disclosure of all 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 of 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 the 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. (viii) Finally ‘it is not for every omission that the injunction will be automatically discharged...The court has 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.”

29. Upon review of the Plaintiff’s application dated 10th August 2023, this court finds that although the Plaintiff claimed that it was in lawful possession and use of the suit property, it failed to disclose that it had never been in possession of the suit property. The Plaintiff instead averred that it had been prevented from taking full possession due to the deliberate actions of the Defendant, which have barred them from accessing the same. It is however apparent that the Plaintiff has never had possession and use of the suit property at all.
30. There was further non-disclosure on the Plaintiff’s part for failing to inform the court of an arbitral clause in the License Agreement, as is evident from the copy that the Defendant has annexed to the application herein.
31. This court finds that the Defendant’s grounds upon which it seeks to vary the orders of this court are meritorious. In fact, the court takes note of the fact that the Plaintiff did not oppose the current application either by filing a Replying Affidavit or Grounds of Opposition.
32. In a nutshell, the application dated 19th August 2024 was not opposed by the Plaintiff.
33. Consequently, the orders of this court issued on 15th August 2023 and extended on 23rd September 2023 are hereby set aside.



34. The Defendant has sought injunctive orders preventing the Plaintiff from dealing with the suit property, pending the determination of this suit. This court notes that similar orders have been sought by the Plaintiff through their application dated 10th August 2023, which application is yet to be heard and determined.
35. In my view, the prayers for injunctive orders in the two applications should be heard simultaneously, on a later date. However, considering that two applications are pending, the prevailing status quo should be maintained pending hearing and determination of the applications.
36. For those reasons, the application dated 19th August 2024 partially succeeds as follows:
 - a. The orders of this court issued on 15th August, 2023 and 23rd September, 2023 be and are hereby vacated and or set aside.
 - b. The prevailing status quo to be maintained pending the hearing and determination of the applications for injunction.
 - c. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF JANUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kimathi for Defendant

Mr. Shikanda for Osundwa of Plaintiff

Court Assistant - Tracy

