



**Maisha Mabati Mills Limited v Farm Auto Spares Limited & 2 others; Gregory & another (Interested Parties) ((In their capacity as the Joint Receivers and Managers of Nalin Works Limited (In Receivers)) (Environment & Land Case E192 of 2023) [2024] KEELC 3553 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3553 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E192 OF 2023**

**EK WABWOTO, J  
APRIL 5, 2024**

**BETWEEN**

**MAISHA MABATI MILLS LIMITED ..... PLAINTIFF**

**AND**

**FARM AUTO SPARES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**ANDREW DOUGLAS GREGORY ..... INTERESTED PARTY**

**ABDUL ZAHIR SHIEKH ..... INTERESTED PARTY**

**(IN THEIR CAPACITY AS THE JOINT RECEIVERS AND MANAGERS OF  
NALIN WORKS LIMITED (IN RECEIVERS))**

**RULING**

1. The 1<sup>st</sup> Defendant moved this Court vide an application dated 8<sup>th</sup> January 2024 seeking for review and setting aside of the interim orders issued on 1<sup>st</sup> December 2023.
2. The application was premised on numerous grounds enumerated on the body of the application. The application was also supported by the affidavits sworn by Kiran Patel on 8<sup>th</sup> February 2024 and 2<sup>nd</sup> February 2024.
3. The 1<sup>st</sup> Defendant averred that the interim orders issued on 1<sup>st</sup> December 2023 were issued through material misrepresentation and concealment of facts by the Plaintiff. It was contended that the issue



- of ownership of the subject of the Plaintiff's application dated 28<sup>th</sup> November 2023 has been fully determined and judgment delivered on 25<sup>th</sup> January 2023 in ELC No. 762 of 2017 (OS) Maisha Mabati Mills Limited vs Farm Auto Spares Ltd. It was also averred that on 1<sup>st</sup> December 2023, the 1<sup>st</sup> Defendant was served with an erroneous Hearing Notice by the Plaintiff indicating that the application dated 28<sup>th</sup> November 2023 would be heard at 9.00am yet the same was scheduled for hearing at 8.00am and hence therefore the 1<sup>st</sup> Defendant missed out attending the proceedings and was condemned unheard. The 1<sup>st</sup> Defendant prayed that the application be allowed.
4. The application was opposed. The Plaintiff filed a Notice of Preliminary Objection dated 15<sup>th</sup> January 2024 and a Replying Affidavit sworn by Kaushik Pandit on 15<sup>th</sup> January 2024.
  5. The application was canvassed by way of written submissions pursuant to the directions issued by this Court. The 1<sup>st</sup> Defendant filed written submissions dated 26<sup>th</sup> February 2024 while the Plaintiff filed written submissions dated 20<sup>th</sup> March 2024.
  6. Counsel for the 1<sup>st</sup> Defendant submitted on the following two issues; whether the Plaintiff's Notice of Preliminary Objection is merited and whether this Court should review, vary and or set aside the orders issued on 1<sup>st</sup> December 2023.
  7. Relying on the case of *Karata Ernest & Others vs Attorney General (Civil Revision 10 of 2020) [2010] TZCA 30 (29 December 2010)* it was argued that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it and hence the preliminary objection ought to be dismissed.
  8. It was submitted that the Plaintiff obtained the orders through fundamental material non-disclosure. The 1<sup>st</sup> Defendant was served with an erroneous hearing notice indicating that the hearing would proceed at 9.00am instead of 8.00am and further there was no addendum cause list for the day. It was submitted that the said orders are prejudicial to the 1<sup>st</sup> Defendant since they have the net effect of dispossessing the 1<sup>st</sup> Defendant from a portion of its property. Reliance was made to the cases of *Bahadural Ebrahim Shamji vs Al Noor Jamal & 2 Others [1998] eKLR* and *Kenya Electricity Transmission Company Limited vs Kibotu Limited [2019] eKLR*.
  9. It was further submitted that the 1<sup>st</sup> Defendant has demonstrated sufficient cause why this Court ought to set aside the said orders.
  10. The Plaintiff in its submissions dated 20<sup>th</sup> March 2024 outlined the following issues for determination by the Court; whether this Court can grant the orders sought in the instant application in the absence of a duly filed Defence or a draft Defence on behalf of the 1<sup>st</sup> Defendant and whether this Court's interim orders of 1<sup>st</sup> December 2023 should be discharged, varied, reviewed and or set aside.
  11. It was argued that the application was a non-starter and ought to be dismissed for the reasons that the Defendants have not annexed a draft defence and further that they cannot prosecute an application prior to filling a defence. Reliance was placed on the cases of *Mutua Kihui vs Housing Finance Company of Kenya and Kennedy Onguny [2019] eKLR*, *George Waweru Njuguna vs Pauline Chesang Gitau Kamunyu vs Pauline Chesang Gitau Kamunyu [2017] eKLR*, *Moses Kimaiyo vs Geoffrey Kiprotich Kirui & 2 Others [2022] eKLR* and *Harun Rashid Khator suing as the Representative of Rashid Khator (Deceased) vs Suid Hamisi & 11 Others [2014] eKLR*.
  12. It was also submitted that the Court cannot be faulted for issuing the orders on 1<sup>st</sup> December 2023 owing to the absence of the Defendants who had been served but were not present. It was argued that no prejudice will be suffered by the 1<sup>st</sup> Defendant if the injunction is granted pending the hearing and



determination of the suit since the Plaintiff will be greatly prejudiced should the injunction orders be lifted. The Court was urged to dismiss the application.

13. The court has considered the application together with the Notice of Preliminary Objection, rival affidavits and written submissions filed. The following are the salient issues for determination herein:
  - i. Whether the Notice of Preliminary Objection dated 15<sup>th</sup> January 2024 is merited?
  - ii. Whether the threshold for setting aside, varying and or review of the Court's orders issued on 1<sup>st</sup> December 2023 has been met?
14. It is trite law that a Preliminary Objection must be raised on a point of law as reiterated in the case of *Mukhisa Biscuits Manufacturing Co. Ltd V. West-End Distributors Limited* (1969). E.A 696.
15. In *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR the Court of Appeal highlighted that:

“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
16. The circumstances under which a Preliminary objection can be raised and canvassed was discussed in the case of *Oraro v Mbaja* [2004]eKLR, where the court (per Justice Ojwang, Judge, as he then was);

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”[Emphasis mine]
17. A perusal of the Preliminary objection filed herein confirms that the objection was not raised on a pure point of law but on a factual basis of questioning the inaction of the applicant. In alignment with the sentiments of the precedent suits above, I find that the preliminary object must fail.
18. In respect to the second issue. The jurisdiction of the court to set aside an order of injunction is set outlined under Order 40 Rule 7 Civil Procedure Rules, 2010 which provides as follows:

“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.”
19. The Court has the discretionary powers to vary, review and or set aside its orders. In *Patriotic Guards Ltd v. James Kipchirchir Sambu* [2018]eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”



20. In the case of Shah v. Mbogo [1967] EA 116 the court stated that:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

21. This Court upon considering the Plaintiff’s application dated 28<sup>th</sup> November 2023 which had been filed under certificate of urgency issued the following directions;

“I have perused the application dated 28<sup>th</sup> November 2023 and UPON CONSIDERING the same, I direct that the said application be served for hearing on 1<sup>st</sup> December 2023 at 8.00am”

22. The 1<sup>st</sup> Defendant has adduced evidence demonstrating as to why it was not able to attend court on 1<sup>st</sup> December 2023 when the interim orders were issued. It is evident that the hearing notice that was served upon the 1<sup>st</sup> Defendant was misleading to the extent that it indicated that the Plaintiff’s application would proceed for hearing at 9.00am and not 8.00am. This was indeed misleading and the 1<sup>st</sup> Defendant cannot be faulted for the same. The Plaintiff did not comply with the same but instead proceeded to serve an erroneous hearing notice bearing a different time for commencement of the Court’s proceedings. In the circumstances there was no proper service to the Defendants. It is worth noting that a court may equally set aside and or vary its orders on the discovery of new and important issue or evidence which it did not have at the time of issuance of the said orders.

23. In view of the foregoing, this Court is persuaded that indeed the application does meet the threshold for setting aside of the interim orders issued herein on 1<sup>st</sup> December 2023.

24. In the foregoing, this Court hereby issues the following orders:

- i. The Notice of Preliminary Objection dated 15<sup>th</sup> January 2024 is unmerited and the same is hereby dismissed.
- ii. Orders issued on 1<sup>st</sup> December 2023 are hereby set aside.
- iii. The Plaintiff’s application dated 28<sup>th</sup> November 2023 shall be set down afresh for interpartes hearing.
- iv. Each party shall bear own costs of this application.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5<sup>TH</sup> DAY OF APRIL 2024.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

Mr. Otieno h/b for Mr. Karungo for the Plaintiff.

Ms. Njihia h/b for Elijah Mwangi for the 1<sup>st</sup> Defendant.

N/A for the other parties.

Court Assistant; Caroline Nafuna.

