



REPUBLIC OF KENYA



Munga v African Banking Corporation Ltd & another (Commercial Suit E006 of 2025) [2025] KEHC 4668 (KLR) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL SUIT E006 OF 2025
DO CHEPKWONY, J
APRIL 10, 2025**

BETWEEN

PETER KAHARA MUNGA PLAINTIFF

AND

AFRICAN BANKING CORPORATION LTD 1ST DEFENDANT

ABC CAPITAL LIMITED 2ND DEFENDANT

RULING

1. This matter came up for mention before the court on 9th April, 2025 for parties to confirm compliance of directions issued herein in respect of the two pending applications filed by the Plaintiff and Defendants respectively, the said applications are:-
 - a. The first one is filed by the Plaintiff and it is a Notice of Motion application dated 2nd February, 2025 seeking injunctive orders restraining the Defendants, their servants, agents and/ or representatives from proceeding to sell, auction, transfer or in any other way deal with the 75,000,000 shares in Britam Kenya, which was pledged as security for the loan advanced to Equitorial Nuts Processors Limited, or from taking any action against the Plaintiff in relation to the loan repayment pending the hearing and determination of the application and suit.
 - b. The second one is filed by the Defendants and is a Notice of Motion application dated 12th February, 2025 seeking to set aside and or discharge the ex parte orders issued on 3rd February, 2025 for having been obtained on the basis of non-disclosure of material facts.
2. When counsel for the parties appeared before court, Mr. Eric Theuri counsel for the parties pointed out that there were two applications filed in court by the parties respectively and proposed that both be heard so that if the court allows either application then it would not be necessary to consider the other. He then sought for leave of fourteen (14) days to file a Supplementary Affidavit in response to



the application dated 12th February, 2025. He also sought for extension of the interim orders issued on 3rd February, 2025.

3. Mr. Kiplang'at, counsel appearing for the Defendants, on the other hand, was of the view that the Notice of Motion application dated 13th February, 2025 is in limine and they are challenging the competence of the suit in its entirety and the jurisdiction of the court on the ground that the *ex parte* orders issued herein were obtained by concealing material facts, more specifically, the existence of Milimani HCCC. No.E602 of 2024, a suit filed on 4th October, 2024, and in which the Plaintiff sought similar reliefs aimed at restraining the Defendants from proceeding with the sale of 75,000,000 Shares held by the Plaintiff's in Britam – Kenya.
4. According to the Defendants' counsel, the Plaintiffs' conduct amounts to forum shopping exercise and is an attempt to appeal a ruling issued by the court in Milimani HCCC. No.E602 of 2024. The Defendants' counsel then sought for their application to take priority since there were interim orders which had been in force for sixty (60) days, which is extremely prejudicial on the part of the Respondent/Defendant. On the reasons cited, the Defendants' counsel is opposed to the extension of interim orders issued on 3rd February, 2025 and seek that the same be discharged.
5. In response, Mr. Theuri pointed out that the matter had only come up for mention and that the two applications were yet to be heard and dispensed with. He urged that even if the Defendants' application is challenging this Court's jurisdiction and seeking to set aside the orders they were granted in their application dated 2nd February, 2025, the Respondent cannot take the position that the said orders be set aside without hearing the parties on both application.
6. On the question of extension of interim order, the Plaintiffs' counsel pointed out that the purpose of interim orders is to preserve the subject matter in a suit pending the hearing and determination of the application. And that by the Defendants' counsel urging the court to extend the said interim orders, it is in essence asking the court to allow their application without the benefit of a full hearing at this *ex parte* stage. That, furthermore, the prayer to set aside the interim orders issued on 3rd February, 2025, is a substantive prayer in the Defendants' application, which has not been heard and it would be improper to grant the same. Counsel urged that he be granted leave to file a Supplementary Affidavit and submissions in support of their application, upon which the court can make a substantive determination.
7. To this, Mr. Kiplang'at stated that Order 40 Rules 4, 5, 6 and 7 of the [Civil Procedure Rules](#) are instructive that *ex parte* orders cannot remain in force for more than fourteen (14) days but can only be extended by consent of the parties, which in this case, is lacking. He contends that they have given good reasons being that the orders were obtained through concealment of material facts and considering the suit in Milimani is still active.
8. Having listened to both counsel in their respective oral arguments on whether or not to set aside or discharge the interim orders issued on 3rd February, 2025, I have carefully perused the pleadings and affidavits filed in the matter. I find it undisputed that the Plaintiff did not disclose the existence of Milimani HCCC No.E602 of 2024 when seeking interim reliefs from this Court vide an application dated 2nd February, 2025. A reading of the application dated 2nd February, 2025, which culminated in the issuance of the impugned *ex parte* interim orders herein, reveals that this Court was not informed of the prior and parallel proceedings in Milimani.
9. Even more telling in the Plaintiff's response to the Defendants' application dated 12th February, 2025, the Plaintiff admits the existence of the Milimani suit but attempts to downplay its significance while averring that it is different in substance and reliefs sought. However, a reading of the Milimani



- pleadings discloses that the reliefs pursued in both forums are substantially identical whereby the Plaintiff seeks to prevent the Defendants from disposing of his 75,000,000 Shares in Britam, Kenya.
10. The record also shows that the Plaintiff has since filed a Supplementary Affidavit sworn on 12th March, 2025, annexing a Notice of Withdrawal dated 11th March, 2025 for the Milimani suit. However, it is worth noting that this withdrawal only came after the Defendants exposed the material non-disclosure and the alleged forum shopping. In the Court's view, such post-facto action cannot cleanse or sanitize the initial fraud on the court through the concealment of material facts.
 11. Having established that there is in existence of Milimani HCCC No.E602 of 2024 wherein the Plaintiff had filed a similar application which was dismissed and then proceeded to file the instant suit, the court finds that as a rule of the thumb, a litigant should not multiply applications before the same or different courts in the hope that eventually one court will grant the relief he seeks. It is an abuse of court process for a party to re-litigating the same subject matter in multiple fora without disclosing prior or concurrent proceedings. Such actions not only amount to oppressive litigating tactics, but also downgrade judicial integrity, and pose the risk of conflicting decisions issuing on the same subject. In this Court's view, a party cannot be allowed to go around the country filing similar cases in different courts, with the hope that maybe one of the courts will give him the orders he wants. This conduct amounts to forum shopping, which is a discredited and impressible litigation strategy, whereby a party deliberately initiates the proceedings in different judicial forms hoping to secure favourable outcome or avoid adverse decisions.
 12. That being said, the law is settled that ex parte interim orders obtained through material non-disclosure are liable to be set aside ex debito justitiae (as of right). This is so because a party seeking ex-parte orders has a legal obligation and responsibility to make full and frank disclosure of all material facts of the case and within his/her/its knowledge. Failure to do so, disentitles the party from the equitable relief that may have been obtained. This principle is also reaffirmed in the case of *Bahadurali Ebrahim Shamji – vs- Al Noor Jamal & 2 Others* [1998] eKLR, where the Court held that: -

“A litigant who obtains ex parte relief must not withhold material facts which might influence the Court's decision. If he does, the Court is entitled to discharge the order even if the omitted facts would not have led to a different result.”
 13. Having confirmed that the Plaintiff approached this Court without disclosing that he had filed a similar suit seeking the same core reliefs before another court, this conduct constitutes an abuse of court process warranting immediate intervention by the court, which is to set aside the exparte interim orders issued on 3rd February, 2025.
 14. As for the subsequent withdrawal of the Milimani matter, which was done only after the material non-disclosure was brought forth by the Defendants, this is not a cure of the initial concealment. This Court is therefore duty-bound to protect the sanctity of its process by declining to endorse conduct that undermines the fair administration of justice.
 15. For these reasons, the court declines the invitation by the Plaintiffs' counsel to extend the interim orders issued on 3rd February, 2025 and proceeds to order that:-
 - a. The interim orders issued on 3rd February, 2025 be and are hereby set aside and/or discharged forthwith.
 - b. Be that as it may, parties be at liberty to canvass the pending prayers in the applications by way of written submissions as per the directions issued on 3rd February, 2025 and 17th February, 2025.



- c. Mention on 7th May, 2025 for parties to confirm compliance and take further directions on either highlighting or ruling.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 10TH DAY OF APRIL, 2025.

D. O. CHEPKWONY

JUDGE

