



**African Academy of Sciences v Science for Africa Foundation & another (Commercial Cause E200 of 2024) [2024] KEHC 11850 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11850 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CAUSE E200 OF 2024  
A MABEYA, J  
OCTOBER 4, 2024**

**BETWEEN**

**AFRICAN ACADEMY OF SCIENCES ..... PLAINTIFF**

**AND**

**SCIENCE FOR AFRICA FOUNDATION ..... 1<sup>ST</sup> DEFENDANT**

**DR. THOMAS MAINA KARIUKI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before Court is the defendants’ application dated 6/8/2024. It is brought under section 3A of the *Civil Procedure Act* CAP 21 Laws of Kenya and order 26(1) and (5) of the Civil Procedure rules 2010. It seeks the setting aside the orders made by Mwangi J on 27/5/2024 plus costs.
2. The basis thereof is the grounds stated in the Motion and the supporting affidavit of Raynold Mduduzi Zondo sworn on 6/8/2024. The defendant contended that the plaintiff filed an application on 20/5/2024 seeking, among other things, injunctive orders to prevent the defendants from using the brand name Deltas in any of their promotional activities, platforms or websites pending the hearing of the main suit.
3. They claimed that that application was not served on them and that they only became aware of it through the cause list of the day. That when the matter came up for mention, the Court issued interim injunctive orders before even reviewing the defendants’ responses. The defendants were granted leave to file a replying affidavit while the plaintiff was allowed to submit a supplementary affidavit. The defendants filed their submissions and the matter was rescheduled for 11/11/2024.
4. The defendants maintained that the injunction application was unfavorable because the plaintiff was neither the proprietor nor a registered user of the Deltas mark. They contended that Deltas was a



charitable initiative owned by Wellcome Trust and was created, developed, and launched by Wellcome Trust in collaboration with the UK Department for International Development.

5. That the plaintiff's residual trust program had been terminated and that the defendants entrusted by Wellcome Trust with grants to implement Deltas Africa II. They argued that the plaintiff was attempting to benefit from contradictory claims, asserting that the defendants were engaging in passing off while simultaneously seeking an injunction for a trademark at an interlocutory stage. Moreover, the defendants noted that the plaintiff had failed to demonstrate any prejudice that would result from not granting the injunctive orders.
6. They further contended that the interim orders resulted from the plaintiff's material non-disclosure, which hindered the court from obtaining the necessary information to make an informed decision. That as a consequence of those orders, the defendants had suffered irreparable harm and continued to face damage since the Deltas program operated in 35 countries. That restraining the Deltas program, a charitable initiative, would adversely affect its creators.
7. The plaintiff opposed the application through a replying affidavit sworn by Dr. Oti Boteng on 19/8/2024. He averred that during the directions hearing, the defendants' advocates informed the Court that they had filed grounds of opposition and none of the lawyers mentioned that they had not been served with the application.
8. That the order of 27/5/2024 was not granted ex-parte but rather the defendants were given the opportunity to address the Court on the merits of the case. The plaintiff asserted that the defendants failed to reveal how they obtained their alleged rights to DELTAS, which underscored the reason for the injunction being issued.
9. According to the plaintiff, Deltas was conceptualized, created, and owned by him, while the 2nd defendant was employed to carry out Deltas programs. The plaintiff stated that he had implemented Deltas for ten years, developing knowledge, reputation, prestige, brand, goodwill and awareness. That he had invited donors, including Wellcome Trust and DFID, to launch the first cohort of 11 successful Deltas applicants. That this invitation did not grant the ownership of Deltas to the donors. He emphasized that Wellcome Trust made no claim to have created, developed, or owned Deltas.
10. The plaintiff contended that the defendants' assertion that the interim orders of 27/5/2024 hinder their charitable activities is false and lacks merit. On the contrary, he argued that the defendants intended to misrepresent the Deltas brand to solicit funding which would be harmful to the plaintiff.
11. In a rejoinder, the defendants filed a supplementary affidavit dated 21/8/2024 sworn by Raynold Mduduzi Zondo. It was averred that the plaintiff did not serve the defendants with the application dated 20/5/2024 and the documents indicate that the application was forwarded to a wrong email. That the plaintiff negligently and or willfully refused to serve the defendants with the documents.
12. That no substantive orders should have been issued when the matter was only listed for mention. That the Court did not understand the morphing claim tendered against the defendants.
13. The application was canvassed by way of written submissions which I have considered. The plaintiff submitted that it had demonstrated the ownership and long term as well as continuing implementation of the Deltas program as its distinguishing mark, indicum and exclusive franchise. Counsel submitted that in doing so, it had established a prima facie case that the defendants are infringing on its Deltas program.



14. That the actions of the defendants will cause the goodwill it has built for years to be vilified and stands to suffer irreparable loss that cannot be compensated by an award of damages. Further, it was submitted that the defendants had failed to demonstrate sufficient grounds for setting aside the interim orders.
15. The defendants submitted that the Court acted on matters on which it should not have acted. Counsel submitted that parties appeared before Court for a mention and therefore substantive orders cannot be issued on a date when a matter is coming up only for mention. That the plaintiff had failed to demonstrate that it has a proprietary right over DELTAS as a brand, mark or program and therefore it is not entitled to the injunctive orders sought.
16. On passing off, it was submitted that the plaintiff should establish misrepresentation, made by a trader in the course of trade and calculated to injure the business or goodwill of another trade. That any goodwill attached to the deltas is not exclusive to any party rather it is inclusive of any institution granted the implementation of the deltas. Counsel submitted that it would be unfair to seek an injunction over a property they have no proprietary rights over or usage rights. Analysis
17. I have considered the averments by the parties and their respective submissions. The main issue for determination is whether the defendants have made out a case for setting aside the orders of the Court made on 27/5/2024.
18. The Counsels who appeared before me seem to have gotten it wrong. The application before Court is not one for injunction, such that the Court has to consider its merits and de-merits, but rather one for setting aside an interim order of injunction. In this regard, I will not deal with the many submissions which go to the merit of the injunction application, but rather the setting aside. I will limit myself to the known ground for setting aside an interlocutory injunction.
  19. Order 40 Rule 7 of the Civil Procedure Rules 2010 provides that: -  
"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."
20. This provision permits any party impacted by an order of injunction to approach the court to set it aside or modify it. In this context, the defendants have approached the court seeking to have the orders issued on 27/5/2024 to be set aside or altered. They challenged them orders on the grounds that they were substantive and should not have been granted during a mention. Additionally, that they were obtained on material non-disclosure.
21. Conversely, the plaintiff argued that prior to the issuance of the interim injunction orders, the defendants were given a chance to present their case to the Court regarding the request for the injunction. They further contended that the plaintiff conceptualized and created DELTAS and that donors like Wellcome Trust and DFID were only invited to launch the initiative
22. On 20/5/2024, the plaintiff filed an application seeking five different orders, including a temporary injunction to restrain the defendants from specific actions pending the resolution of the main injunction application. This application came up for mention before Mwangi J who stepped for me in my absence. The Court gave directions on the filing of responses and then issued the orders. The Court did not have the opportunity to hear substantive submissions from the parties. The orders were therefore made on very limited material then on record.



23. In *St Patricks Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR, it was held: -

“Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction.”

24. The purpose of an interim order of injunction is basically to maintain the status quo or state of affairs before the outcome of the main application. Order 40 of the Civil Procedure Rules provides for applications for temporary injunction and interlocutory orders. The setting aside of those orders under sub rule 7 thereof is in the discretion of the court. However, like all other discretions, the same must be exercised judiciously.

25. As held in the *St. Patricks Hill School Case*(supra), one of the considerations is what will serve the ends of justice, maintaining the interim orders or setting them aside. What will cause lesser injustice. This is in addition to the well-known principle that an order obtained for material non-disclosure is a sure candidate for setting aside

26. In the present case, there is an allegation that the plaintiff was guilty of material non-disclosure. That it had failed to disclose that its engagement with the donors who allegedly own the program Deltas had been terminated in 2021. The plaintiff has however strenuously contended that, it is the one who owned the program and not the donors. That it had only invited the donors to launch the program.

27. I note that the issue of who owns the program is hotly disputed. I also note that in its initial filings, the plaintiff did not explain that its engagement with those supporting the program Deltashad been terminated and that the program DeltasII had been given to the defendants. The Court must have dealt with the matter as a straight forward issue of infringement of a mark. To that extent, there was material non-disclosure.

28. In any event, I have considered the larger picture of this matter. It has been stated and not denied that the DeltaII program is a charitable initiative that is being implemented in 35 countries. That the impugned order has had wide ramifications and inquiries being made as from as far as Cape Town, Addis Abbaba, Abidjan, Dakar and Kemri. That the order has caused chaos far and wide. That the DeltasII program is meant to reach the less fortunate in the countries its being implemented.

29. In view of the foregoing, the question that this Court has to consider is, where does the justice of the case lie, protecting the narrow interests of the parties before it or consider the wider public interest of the hundreds, thousands or even millions who will be negatively affected by the orders. It is alleged that the orders are causing chaos in the implementation of the program.

30. The view the Court takes is that, with or without the alleged material non-disclosure, the interests of justice demand that the Court takes the route where there would be lesser injury. Where there will be good to a larger group than individual interest.

31. I am mindful that the plaintiff has quantified its claim. It has pegged it on Kshs.12b. The amount may be staggering but it is quantified. On the other hand, the negative effect of the orders that are in force on the people who are supposed to be benefiting from the implementation of the program cannot be quantified. The justice of the case lies in exercising the discretion and set aside the orders.

32. Accordingly, I find merit in the application and allow the same. The orders of 27/5/2024 are hereby discharged and set aside. Let the parties take steps to prosecute the main application on merit.



It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

