



**Ngong Matonyok Wholesalers Ltd & another v Kenya Breweries Limited & another;
Bia Tosha Distributors Limited (Interested Party) (Civil Suit E127 of 2023)
[2023] KEHC 4050 (KLR) (Commercial and Tax) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E127 OF 2023**

A MABEYA, J

MAY 5, 2023

BETWEEN

NGONG MATONYOK WHOLESALERS LTD 1ST PLAINTIFF

MANARA LIMITED 2ND PLAINTIFF

AND

KENYA BREWERIES LIMITED 1ST DEFENDANT

IDV KENYA LIMITED 2ND DEFENDANT

AND

BIA TOSHA DISTRIBUTORS LIMITED INTERESTED PARTY

RULING

1. In *The King v The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington: Exparte Princess Edmond De Pligac* [1917] 1 KB 486, Warrington LJ stated at page 509 that: -

“It is perfectly well settled that a person who makes an ex-parte application to the Court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it.”



2. At pages 513 to 514, Scrutton L. J emphasized that;

“Now the rule giving a day to the Commissioners to show cause was obtained upon an ex parte application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex-parte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement.” (Emphasis added)

3. In *Kenya Electricity Transmission Company Limited v Kibotu Limited* [2019] eKLR, the court observed: -

“The fundamental principles of non-disclosure of material facts that an applicant must adhere to are as follows: -

- a. The applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge.
- b. 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 sufficient inquiries.
- c. 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 the 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 the inquiries.
- d. 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 issues which were to be decided by the Judge in the application.
- e. 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.
- f. Finally, it is not every omission that the injunction will be automatically discharged”.

4. On 21/2/2023, the plaintiffs came to Court *vide* a Motion on Notice dated the same day under a certificate of urgency. They told the Court that the defendants were on the verge of terminating or suspending their distribution agreements dated 30/4/2019 and 1/6/2022, respectively. They were clear in their averments that were that to happen, it would have the domino effect of triggering breaches of countless contracts between the plaintiffs and other 3rd parties.



5. Being satisfied with the urgency of the application and the financial implication the alleged termination would cause in the prevailing hard economic times, the Court granted an injunction to restrain the alleged termination. That order was made *ex-parte* and the plaintiffs were directed to serve the application for directions on 6/3/2023.
6. On 1/3/2023, the interested party applied to be joined in these proceedings and prayed that the said *ex-parte* order be set aside. That is the Motion that is the subject of this ruling. The Motion was brought under Order 1 rule 10(2), Order 40 rule 7 of the [Civil Procedure rules](#).
7. The application was supported by the grounds on the face of it and by the supporting affidavit of even date sworn by Anne-marie Burugu, the managing Director of the Interested Party.
8. It was the applicant's case that *vide* a decision dated 17/2/2023, the Supreme Court allowed the appeal by the interested party and upheld the Orders of Onguto J made on 29/06/2016. That the said judgment had found the defendants guilty of contempt of court. That the deponent had stumbled upon a newspaper report which suggested that the plaintiffs had been allowed to continue distributing the defendants' products in areas which the Supreme Court had already directed immediately revert to the interested party.
9. That the interested party procured the court documents and noted that in the application, the plaintiffs had not mentioned the supreme court judgment. According to the applicant, the plaintiffs were guilty of concealment of material facts. That by placing the judgment of the Supreme Court in the very bottom of voluminous documents, the plaintiffs intended to shield the Court from discovering the truth.
10. The Plaintiffs opposed the application *vide* a replying affidavit of William Nduva Muli sworn on 8/3/2023. He stated that the interested party had admitted in its motion that the plaintiffs had disclosed to the court the existence of the Supreme Court ruling. That the plaintiffs had not been parties to the cases previously filed in the High Court, Court of Appeal and the Supreme Court.
11. It was contended that the interested party did not join the plaintiffs to the case at the Constitutional division without considering how the said cases would in turn impact on the plaintiffs. It was averred that the court had jurisdiction to issue the orders it made on 21/2/2023 as the issue therein was in relation to breach of contract. The plaintiff termed the interested party as the author of the problem since it refused to enjoin the plaintiffs to the previously decided cases.
12. In answer to the application, the 2nd defendant filed a replying affidavit by Karen Mate Gitonga sworn on 14/3/2023. She stated that on 21/2/2023, the Court allowed the plaintiffs application whereby it restrained the defendants from terminating the plaintiff's rights to distribute the defendant's products.
13. That the Supreme Court had reinstated the High court Conservatory orders issued on 29/6/2016. That in the said orders, the court had preserved the interested party's territory in view of the Operation agreement dated 2/2/2006. That the 2nd defendant had since moved the Constitutional court in Constitutional Petition no 249 of 2016 seeking to get a confirmation on the terms upon which the orders dated 29/06/2016 could be implemented. That the said application was pending before the Constitutional Court.
14. I have considered the dispositions of the respective parties. I have also considered the oral submissions by Learned Counsel. This is an application for discharging the orders of the Court delivered made on 21/2/2023.



15. The applicant invoked Order 40 Rule 7 which provides that: -
- “Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.”
16. The main thrust of the interested party’s complaint is that the plaintiffs were guilty of material non-disclosure. That they did not disclose to the Court the existence of the Supreme Court’s judgment. The plaintiffs deny that accusation and state that, the said judgment formed part of its exhibits.
17. In the supporting affidavit of Joseph William Nduva Muli sworn on 21/2/2023, it was deposed that the 1st plaintiff had been a distributor of the defendants for 55 years while the 2nd plaintiff had been such distributor for 7 years. In paragraph 14 thereof, it was specifically deposed that: -
- “On 18th February, 2023 and 20th February, 2023, during the currency of the latest versions of the Agreements, the Defendants/Respondents sent correspondence evincing an imminent plan to repudiate the Agreements by granting a third party exclusive distributorship rights over the territories covered by the Agreements.”
18. The foregoing is the disclosure that the plaintiffs made. It was not contended and it is indeed not in dispute that the plaintiffs were not parties to the suit that culminated in the Supreme Court in the judgment. It is also not in dispute that the plaintiffs produced the said judgment in their exhibit. All they are being accused of is that they placed the same at a position where the Court could not see it.
19. I think that cannot be correct. It is expected that notwithstanding the urgency of a matter and the voluminous nature of documents that may be thrown on a court, it is imperative and expected that the Court is to look at each document before deciding on a matter.
20. In my view, all that the interested party would have done is to join the proceedings and oppose the application on the basis of the existence on the subject judgment of the Supreme Court. It is at the hearing of the main application whereby the effect and tenor of that judgment can be gone to.
21. In the present application, the interested party seeks to have the orders discharged on the allegation that the plaintiffs are guilty of material non-disclosure. I have found that that is not the case. The plaintiffs placed the subject judgment before the Court. Let the interested party, now that is a party to these proceedings oppose the main application on the basis of that judgment.
22. The ex-parte order was made to maintain the status quo. The Court was satisfied that on the material before it, it called for the *status quo* to be maintained pending the parties being heard on their respective cases.
23. Since I have found that there was no material non-disclosure, the application to discharge the orders on that basis fails. Let the interested party respond to the main application by the plaintiffs for injunction.
24. In the premises, I find no merit in the application and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

