



REPUBLIC OF KENYA



**Gitonga & 2 others v Redken Wells Ltd & 12 others (Civil Case E129 of 2021)  
[2023] KEHC 18534 (KLR) (Commercial and Tax) (6 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18534 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E129 OF 2021  
FG MUGAMBI, J  
JUNE 6, 2023**

**BETWEEN**

**GABRIEL KARIUKI GITONGA ..... 1<sup>ST</sup> PLAINTIFF  
EUNICE WAMBUI NDIRITU ..... 2<sup>ND</sup> PLAINTIFF  
PURITY WANGECHI MURING ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**REDKEN WELLS LTD ..... 1<sup>ST</sup> DEFENDANT  
PETER MACHARIA MWANGI ..... 2<sup>ND</sup> DEFENDANT  
SIMON MURIITHI NJAGI ..... 3<sup>RD</sup> DEFENDANT  
MOSES WANJOHI KAIRONGE ..... 4<sup>TH</sup> DEFENDANT  
TRACY EMILY NDUATA NDUNG'U ..... 5<sup>TH</sup> DEFENDANT  
MARY WANJIKU MBUGUA ..... 6<sup>TH</sup> DEFENDANT  
TIMOTHY KANYONJI KARIUKI ..... 7<sup>TH</sup> DEFENDANT  
EVALYNE WANJIKU KARIUKI ..... 8<sup>TH</sup> DEFENDANT  
BERNICE GATAKAA BOORE ..... 9<sup>TH</sup> DEFENDANT  
SIMON KANUHI NDUNGU ..... 10<sup>TH</sup> DEFENDANT  
FREDRICK KIARIE NJONJO ..... 11<sup>TH</sup> DEFENDANT  
SUSAN WANJIRU KANYONJ ..... 12<sup>TH</sup> DEFENDANT  
BENARD NJOROGE GITHIRE ..... 13<sup>TH</sup> DEFENDANT**



## RULING

1. Before the court is the defendants' application dated January 30, 2023 brought under Order 40 rule 6 &7, Order 51 Rule 1&15 of the *Civil Procedure Rules* 2010, Section 1A, 1B and 3A of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya and any other enabling provisions of the Law.
2. The application seeks the following orders;
  - i. Spent
  - ii. That this Honourable Court be pleased to discharge, vary and/or set aside the orders of temporary injunction issued on January 14, 2022 restraining the defendants/respondents, their agents, servants and/or employees from disposing off any assets of the Company and from withdrawing any funds from the company's bank account no xxxx held at Co-operative Bank or from the Company's pending the hearing and determination of the main suit since the same has lapsed by operation of the Law;
  - iii. Costs of this Application be provided for.
3. The application was supported by the affidavit and further affidavit both sworn by Peter Macharia Mwangi. The applicant also filed written submissions dated March 6, 2023.
4. The applicants' case was that the respondents had instituted a derivative suit against the applicants vide a plaint dated March 11, 2023. The court had meanwhile issued interim injunctive orders against the applicants, vide a ruling dated January 14, 2022. The result of the said injunctive orders was that the 1<sup>st</sup> defendant had been unable to operate as a going concern due to financial constraints that it had faced arising from the freezing of its bank accounts. The applicant stated that it needed funds from the frozen bank account to pay for legal services, professional services in respect to preparation of financial reports and for filing annual KRA returns.
5. The applicant's contention was that in any case, the injunctive orders granted on January 14, 2022 had lapsed on January 14, 2023 by operation of the law since the respondents had failed to extend the same. Counsel took issue with the position that the injunctive orders were to last until the hearing and determination of the suit terming it as erroneous. It was further stated that the applicants stood to suffer great prejudice if the orders sought were not granted.
6. Although the applicants admitted that the application before the court was similar to an earlier application dated March 31, 2021, they nonetheless stated that the grounds in the applications are substantially different. The previous application was based on the grounds that the applicants had not been served. The application before the court in this instance is based on the fact that the temporary injunction issued by the court had lapsed by operation of law as provided for in Order 40 rules 6 and 7 of the Civil Procedure Rules. It is therefore submitted that since the grounds are substantively different, the application was not sub judice.
7. In further support of the application it was stated that ever since the injunctive orders were granted, the company had been unable to carry out any business since it required the funds from members' contributions. Further, that nothing stopped the court from ordering supervised withdrawals and/or accounts during the pendency of the suit. If this was not done, the applicants stated that the company would come to a grinding halt.



8. The respondent opposed the application through a replying affidavit dated February 21, 2023 sworn by Gabriel Kariuki Gitonga. The respondent also filed written submissions dated March 21, 2023.
9. The respondents pointed out that the application was defective and incompetent for not setting out the grounds upon which it was based. It was submitted that the language of Order 51 rule 4 was couched in mandatory terms and therefore a Notice of Motion was required to set out the grounds on which it was based.
10. The respondents further submitted that the application was res judicata. Counsel for the respondents noted that the application before Court sought the same orders as those in the application dated March 31, 2021. This is an application that had been filed by the applicants seeking to vary the interim orders of injunction issued on January 14, 2022. The court had delivered its ruling on the said application on May 13, 2021, dismissing that application, after consideration of the facts and issues raised by both parties to the suit.
11. The respondents further averred that the applicants had not shown that there was any new material or that there was a mistake, error or fraud to warrant setting aside of the court's earlier decision. It was also averred that no evidence had been provided by the applicants for the day to day activities of the Company that would warrant the discharge of the orders. This was especially considering that there had been no new projects voted for since March 2021. Counsel submitted that there had been no company meetings or resolutions where funds were needed. As such, the applicants had failed to prove the alleged expenses that would require the varying of the injunctive orders.
12. The respondents contended that the application was only a scheme to maneuver around the court orders in order to swindle and mismanage the company assets and resources. Further it averred that the orders were made pending the hearing and determination of the main suit and therefore they did not lapse by operation of the law.
13. The respondent points out that while Order 40 rule 6 contemplates the expiry of a temporary injunction within twelve months where there is a suit and the same is not determined within twelve months, there are exceptions where the court may for sufficient reasons order otherwise. The court's powers to extend this period were by dint of section 3A of the CPA and Order 50 rule 5 of the CPR. This provision would normally be applied in instances where applicants have been indolent and only sought to enjoy interim orders.
14. The respondents stated that this matter was alive in court after the grant of the interlocutory orders and therefore the respondent was diligent in having the matter disposed of expeditiously. Further counsel submitted that the application failed to meet the threshold for discharging, setting aside the injunction orders under Order 40 rule 7 of the Civil Procedure rules.

## **Analysis**

15. I have considered the rival pleadings, submissions and authorities relied on by the parties. There are three issues for determination. First is whether the application is fatally defective, second is whether the application before the court is res judicata and finally whether the injunctive orders granted on January 14, 2022 had lapsed.
16. Beginning with the point on whether the Motion herein is fatally defective, Counsel for the respondent is right in his submission that Order 51 rule 4 provides that every notice of motion shall state in general terms the grounds of the application. I have perused the Notice of Motion application dated January 30, 2023 and note that the same is bereft of the grounds on which the application is brought. The purpose of the generalized grounds on the face of the Notice of Motion is to inform the respondent of



the case that he has to answer to. It is not enough for the grounds to be given only in the supporting affidavit.

17. While I certainly agree that a Notice of Motion which does not set out the grounds on which it is based is defective, I am also alive to the edict under article 159(2)(d) of the *Constitution* that requires this Court to dispense justice without undue regard to technicality. The grounds found on the face of a Notice of Motion are required to be in general terms to be further elaborated in the supporting affidavit to the Motion.
18. For this reason, the respondents would not be prejudiced by the omission of the grounds, grave though it is. The mistake is that of form. This notwithstanding, and for the reasons stated, this Court is disinclined to strike out the application for failure to comply with the requirements of Order 51 rule 4. I shall therefore proceed to deal with the substantive issues arising from the application.
19. The second issue that falls for determination is whether the application before the Court is res judicata. Section 7 of the *Civil Procedure Act*, 2010 is relevant. It provides that:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

20. The parameters for a party to successfully rely on the doctrine of res judicata have been subject of judicial interpretation in many decisions. The Court of Appeal has particularly guided that: -

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

(See also *Abok James Odera vs John Patrick Machira Civil Application No Nai 49 of 2001* amongst others).

21. I have considered both applications and the orders sought in the previous application dated March 31, 2021 and the application currently before the court. On the face of it, the two applications seek the same orders. This fact is not controverted by the applicants save for the fact that the application currently before the Court is premised on the fact that the injunctive orders granted on January 22, 2022 have since lapsed.
22. I take the position that this fact alone substantially alters the present application. As such, even though the parties and the suit are similar, the issue of the injunctive order introduces a new dimension to the



- application. The lapsing of the injunctive order was not previously before the Court and has not been heard and determined.
23. I say so completely aware of the Court's finding in *Nancy Mwangi T/A Worthlin Marketers vs Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR* where the Court quoted the case of *ET vs Attorney General & Another (2012) eKLR* in warning Courts to remain vigilant to litigants who in a bid to evade the doctrine of res judicata do so by introducing new causes of action so as to seek the same remedy before the Court. Having found that this matter is not barred from litigation by the sub judice doctrine, I shall proceed to the final question for determination, and that is on the status of the injunctive relief.
24. Order 40 Rule 6 and 7 of the Civil Procedure Rules 2010, provides as follows;
- (6). Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.
- (7). Any order for injunction may be discharged, or varied, or set aside by court on application made thereto by any party dissatisfied with such order.
25. The applicants herein argue that the injunctive orders granted on January 22, 2022 automatically lapsed after twelve months by operation of law. The respondents are opposed to this view and argue that the injunction granted covered the respondents until the hearing and determination of the suit. The interpretation of Order 40 rule 6 of the Civil Procedure Rules has been a subject of wide judicial discourse.
26. In *Barclays Bank of Kenya Limited Vs Henry Ndungu Kinuthia & Another (2018) eKLR*, the Court of Appeal stated thus: -
- ' A plain reading of Order 40 Rule 6 shows that the rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not lapse.'
27. Likewise, in *Erick Kimingichi Wapang'ana & Another vs Equity Bank Limited & Another (2015) eKLR*, the Court of Appeal elaborated on the purport of Order 40 rule 6 by stating that:-
- ' Order 40 Rule 6 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months 'unless', as the Rule provides, for any sufficient reason the court orders otherwise... In this case, there was no subsequent order extending the injunction.'
28. It is trite that the orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party or defeat the ends of justice. Being an equitable remedy therefore, injunctive orders would be discharged if the beneficiary's conduct with respect to the matter does not meet the approval of the court which granted the orders. This is particularly where a party upon getting the injunction orders sits on the matter and uses the orders to the prejudice of the opponent. It is this mischief that was intended to be fought by introducing Rule 6 in the 2010 amendment to the Civil Procedure Rules. (See *Nguruman Ltd Vs Ian Bonde Nielsen & 2 Others (2014) eKLR*).



29. I also associate myself with the finding of Gikonyo J. in the case of *David Wambua Ngii Vs Abed Alembi & 6 Others (2014) eKLR*, where he stated that:-

'...The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure.'

30. I have perused the record and I confirm that the injunctive orders in question relate to prayer 4 of the ruling delivered by this Honorable Court on January 14, 2022. Prayer 4 of the application dated March 11, 2021 had sought injunctive relief pending the hearing and determination of the main suit. This is the basis for the claim by the respondents that the injunctive orders are still in place.

31. The Court of Appeal dealt with the purport of the words “pending the hearing and determination of this suit” and particularly whether these words created a sufficient reason within the Rule so that the interlocutory injunction does not automatically lapse after twelve months. The Court had this to say:

The order made by the court on February 22, 2011 remained subject to Order 40 Rule 6 that required that such an interlocutory order remain in force for a period of 12 months only, but subject to the court having the power to extend the interlocutory order beyond the 12 months, if there is sufficient reason for it to do so. In our view, such an extension cannot be done by way of a blanket order at the time the interlocutory order is issued. The need for the extension must be addressed by the court and justified at the opportune time.

#### **Determination and final orders**

32. In conclusion therefore, I find that the injunctive relief herein having been granted on January 14, 2022 automatically lapsed on January 14, 2023 by operation of law. Since there has been no application for extension of the same, the order is not available to discharge, vary and/or set aside and effectively the application has been overtaken by events. For this reason each party shall bear its own costs of the application.

**DATED, SIGNED AND DELIVERED IN NAIROBI**

**THIS 6th DAY OF JUNE 2023.**

**F. MUGAMBI**

**JUDGE**

**Court Assistant: Ms. Lucy Wandiri**

