



**Fahrenheit Energy Limited v Boit & another (Environment & Land  
Case E068 of 2024) [2025] KEELC 3711 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3711 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E068 OF 2024**

**CK YANO, J  
MAY 8, 2025**

**BETWEEN**

**FAHRENHEIT ENERGY LIMITED ..... PLAINTIFF**

**AND**

**PAMELA BOIT ..... 1<sup>ST</sup> DEFENDANT**

**MARAGRET BOIT ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendants/Applicants in this matter through a Notice of Motion dated 29<sup>th</sup> January, 2025 seek the following orders:-
  - a. Spent
  - b. That the Honourable Court be pleased to set aside/discharge the orders issued on 16<sup>th</sup> December, 2024.
  - c. That the costs of this application be in the cause.
2. The application is supported by the 1<sup>st</sup> Applicant's Affidavit sworn with the 2<sup>nd</sup> Applicant's authority on 29<sup>th</sup> January, 2025. She deponed that she is the Administratrix of the Estate of Richard Kipchumba Boit (Deceased), which owns half of Land Parcel No. Choronok Farm (Sergoit) L.R. No. 9128 (the suit property). That the land was initially owned by Choronok Farmers Ltd whose shareholders were the late Geoffrey Sila Kibet Boit (50 shares) and Parmod Chandra Kalidas Patel (50 shares).
3. She deponed that the late Geoffrey Sila Kibet bequeathed his share of the land to his two sons, Richard Kipchumba Boit (deceased) and Geoffrey Kirwa Boit. That Geoffrey Kirwa Boit obtained a Grant of Probate over his father's estate and was substituted as shareholder, and using that position caused his father's share to be transferred to him. That together with the other shareholder, they caused the company to be wound up through Eldoret Winding Up Cause No. 1 of 1996 handing over ownership



- of the land to the two of them. That Geoffrey Kirwa Boit then incorporated Fahrenheit Energy Limited (the Plaintiff herein) and caused Land Reference No. 21792/2 originally delineated as Land Survey Plan 204917, Title No. I.R. 69725 to be registered in its name. The company then subdivided the land into various portions which were also registered in its name.
4. The 1<sup>st</sup> Applicant deponed that as a co-administrator and co-beneficiary of his father's share with the late Richard Kipchumba Boit, Geoffrey Kirwa was in a position of trust for himself and the rest of the beneficiaries of the estate. That he abused that trust and disinherited his co-beneficiaries and all their efforts by the siblings and beneficiaries of Richard Boit's to have Geoffrey Kirwa Boit transfer his share to them bore no fruit. Consequently, the 1<sup>st</sup> Applicant petitioned the Eldoret High Court through Succession Cause No. E026/2022, In the Estate of Richard Kipchumba Boit.
  5. She deponed that a grant was issued and later confirmed that the half share of L.R. No. 9128 held by Geoffrey Kibet Boit was to devolve to Margaret Chepchirchir Boit, James Raymond Boit and Pamela Boit in equal share. She deponed that Geoffrey Kirwa Boit admitted in the Succession proceedings that he acquired the land from his late father pursuant to Succession Cause No. 156 of 1992, and that he never purchased the land. She deponed that the registration and subsequent transfer of the suit property to Geoffrey Kirwa Boit and the Plaintiff was fraudulent, inconsequential, null and void owing to the trust created on the land pursuant to Section 28(b) of the [Land Registration Act](#).
  6. The 1<sup>st</sup> Applicant averred that the beneficiaries of the Estate of Richard Kipchumba Boit are in the process of subdividing and transferring the land to their names per the grant in Succession Cause No. E026 of 2022. That the instant suit is an attempt by Geoffrey Kibet Boit, through the Plaintiff Company, where he is the majority shareholder, to frustrate their efforts of realising their entitlements. She alleged that the orders issued by this Court were obtained without full and frank disclosure to the court, and are in direct conflict with those obtained in Succession No. E026 of 2022.
  7. She contended that the Plaintiff ought to have ventilated its claim in the Succession Cause instead of filing this separate suit. She expressed belief that had this court been given the full benefit of the facts and background, it would not have made the orders it issued on 16<sup>th</sup> December, 2024. She termed the instant suit an abuse of the court process and prayed that the orders of 16<sup>th</sup> December, 2024 be set aside.
  8. The Application was opposed by the Plaintiff through a Replying Affidavit sworn by its Director, Geoffrey Kirwa Boit. He deponed that the Plaintiff is the legal and registered owner of 17 parcels of land known as Title Nos. IR. 145476 - 145492 having acquired them in 2013 and has been in peaceful, exclusive possession and use. He deponed that the Defendants trespassed into the said parcels and have refused to comply with the Plaintiff's demands to cease the alleged trespass, necessitating this suit.
  9. Mr. Geoffrey Boit deponed that the Applicants herein were duly served with the pleadings and the Application dated 29<sup>th</sup> November, 2024 as indicated in the Affidavit of Service by Pella Amugune Tsisaga, a licensed process server, filed in court on 16<sup>th</sup> December, 2024. He averred that the orders were granted by the court upon full hearing of the application and a determination of the evidence on record, and to set them aside negates the interests of justice.
  10. He averred that Article 40 of [the Constitution](#) guarantees the Plaintiff as registered owner the right to own property, which is recognised under Section 24, 25 and 26 of the [Land Registration Act](#). He denied that the late Richard Kipchumba Boit had any interest in the suit land, and averred that the Estate of the late Geoffrey Sila Kibet was distributed under the rules of intestacy, as no will was considered in Succession Cause No. 156 of 1992.
  11. He further deponed that the 1<sup>st</sup> Applicant fraudulently obtained a grant in the estate of Richard Kipchumba Boit (Deceased), and that the succession matter is still pending in the Court of Appeal.



He also deponed that the instant application is res judicata Eldoret ELC Case No. E035 of 2023. He deponed that the Defendants admitted to participating in Succession Cause No. 156 of 1992 and had no objection to the mode of distribution. He averred that the transmission and registration complied with the law, and no evidence was exhibited to show that it was fraudulent.

12. In addition, he denied any trust in favour of the Defendants, or that the alleged trust could form a legitimate basis to deprive the Plaintiff's rights over its property. That no draft response to the Application dated 29<sup>th</sup> November, 2024 has been annexed to demonstrate that they raised triable issues or lay a basis for the court's intervention. He further deponed that no valid grounds for setting aside the orders herein. Further, the Defendants have not demonstrated that he concealed or misrepresented facts.
13. He also averred that the Plaintiff is not a beneficiary to any estate and is thus not covered by succession proceedings. That no sufficient reason has been advanced for the failure by the Defendants to enter appearance and file a response. He averred that the Plaintiff will suffer great prejudice and irreparable loss if the orders are set aside. He urged that the Applicants are not entitled to the orders sought and asked that the same be dismissed with costs.
14. In further support of the Application, the Applicants filed a Further Affidavit sworn by Pamela Boit on 16<sup>th</sup> April, 2025. She deponed that she was never served with Summons to Enter Appearance. That from the two Affidavits of Service on record sworn by Pella Amugune Tsisaga, it is not clear when exactly she was served as one indicates she was served on 6<sup>th</sup> December, 2024 while the another indicates the date of service as 11<sup>th</sup> December, 2024.
15. The 1<sup>st</sup> Applicant explained that she could not have been served on 6<sup>th</sup> December, 2024 as she was bereaved and was not home for service as alleged. That she equally could not have been served on 11<sup>th</sup> December, 2024 as she had a prior scheduled trip to Uganda at 7.45 a.m. and was at the JKIA at 5.30 a.m. on the said date for check in. That she landed at Entebbe International Airport at 9.00a.m on that date and returned to Kenya on 26<sup>th</sup> December, 2024. She contended that the 2 Affidavits of Service were forgeries and do not conform to Order 5 Rule 15. She asked the court to not only set aside the orders, but also punish the said Process Server pursuant to Order 5 Rule 15(2).

### **Analysis and Determination;**

16. On 26<sup>th</sup> March, 2025 the court directed that the Application be canvassed by way of written submissions. The parties complied with the Applicants filing their submissions dated 16<sup>th</sup> April, 2025 and the Respondent filing its submissions dated 22<sup>nd</sup> April, 2025.
17. I have carefully considered the Application and the Affidavits sworn in support thereof. I have also considered the Replying Affidavit as well as the submissions of learned Counsel for the respective parties and the authorities cited thereunder. It is my considered opinion that the two main issues for determination are:-
  - i. Whether there was non-disclosure of material facts in the Application dated 29<sup>th</sup> November, 2024;
  - ii. Whether the Application dated 29<sup>th</sup> November, 2024 was duly served on the Defendants/ Applicants herein;
  - iii. Whether the orders sought herein should be granted or not.



**Whether there was non-disclosure of material facts in the Application dated 29th November, 2024;**

18. The Plaintiff/Respondent herein filed this suit and along with it, a Notice of Motion Application dated 29<sup>th</sup> November, 2024. In that Application, he sought a temporary injunction restraining the Defendants from any dealings with the suit property pending hearing and determination of the suit. The matter came up for inter- partes hearing on 16<sup>th</sup> December, 2024 when Counsel for the Plaintiff informed the court that the Defendants had been served with the Application but there was no response. In the absence of the Defendants/Applicants herein, he asked the court to allow the Application. Consequently, the court allowed the Application.

19. This is an application by the Defendants/Applicants herein for the setting aside and/or discharge of the orders made on 16<sup>th</sup> December, 2024. The Applicants made this application under Order 40 Rule 7 and sections 1A, 1B and 3A of the Civil Procedure Act. Order 40 Rules 7 provides that:-

“ Any Order for injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order.”

20. From the foregoing, it is clear that the law allows for the setting aside/discharge of both injunctions and ex-parte orders where the circumstances of the case allow. The court has unfettered discretion to discharge or vary an injunction if the ends of justice demand so. The court in the case of Atlas Copco Customer Finance AB vs Polarize Enterprises (2016) eKLR set out the factors that may be considered in an application for discharge of an injunction as follows:-

“ It is now trite that some of the factors that guide the exercise of the courts' discretion in this area of law are, but not limited to:

- a. Proof that the injunction was obtained by concealment of facts which if presented would have worked against the granting of the injunction;
- b. A radical change in the circumstances of the suit, such that it is no longer necessary to have the injunction;
- c. Proof that the general conduct of the holder of injunction is such that the court is impelled to discharge the injunction, for instance, where the injunction is being used to intimidate the Defendant or achieve an ulterior purpose;
- d. Proof that the sustenance of the injunction would cause an injustice.”

21. On the ground of non-disclosure, the party seeking to have an order set aside and/or discharged bears the burden of proving that the beneficiary thereof concealed or misrepresented some material facts which would have influenced the decision of the court. In Kenya Electricity Transmission Company Limited vs Kibotu Limited [2019] eKLR, M. A Odeny J further espoused that:-

“ The other issue that is relevant to this case is whether the plaintiff obtained the interlocutory orders of injunction by non-disclosure of material facts and misrepresentation of facts. 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.”

22. That being said, it behoves this court to interrogate whether the facts allegedly not to have been disclosed are of sufficient materiality to justify or require immediate discharge of the orders without examination of the merits.

23. I have looked at the Plaintiff’s Notice of Motion dated 29<sup>th</sup> November, 2024 and the Supporting Affidavit thereto. It is evident that the Plaintiff through its Director Mr. Geoffrey Kirwa Boit, who swore that Affidavit never disclosed the existence of the Eldoret High Court Succession Cause No. E026 of 2022 to the court. The orders made by the High Court in the said Succession cause were also never brought to the attention of this court. Instead, the Plaintiff only alleged that the Defendants trespassed into his property, the exact words at paragraph 3(c) of the Supporting Affidavit dated 29<sup>th</sup> November, 2024 as filed in the CTS e-filing platform being: -

“On 28<sup>th</sup> November, 2024 the Defendants/Respondents without any colour of right and/or lawful excuse and without the Plaintiff’s consent, authority or permission accompanied by surveyors and police officers from Chepkanga police station have intentionally, knowingly and/or voluntarily and without lawful justification invaded/trespassed into the said parcels of land with the intention of illegally depriving the Plaintiff of its rights to quiet possession thereof as the rightful owner of the parcels with indefeasible title causing permanent and irreparable damage.”

24. It is worth to note that the hard copy of the supporting affidavit of even date and which is in the court file contains the same averments at paragraph *para\_ 6 6*, save that the date is omitted.

25. The Respondent painted a picture to this court that the Applicants were trespassers, intruders even, with no colour of right or justification to set foot on the suit land. This could not however be further from the truth. The truth of the matter is that the Applicants are on the land by virtue of the orders



obtained from the succession dispute as determined by the High Court in succession cause No. E026 of 2022. Those orders justify their presence on the land and they cannot thus be referred as trespassers or intruders.

26. By the Respondent's own averment, the Applicants herein were in the company of Surveyors and Police Officers. I therefore believe the Applicants when they say they are in the process of subdividing the suit land to realise their entitlements determined by the High Court. However, the Respondent concealed this fact, making it look like they were misusing state machinery to deprive it of its rights to the suit property.
27. Litigants have a duty to be honest and truthful in their pleadings, especially in an Affidavit where one makes an oath as to the veracity of their statements. In that regard, the Plaintiff herein failed and/or neglected to fulfil that duty. The Plaintiff instead clings to the principle that companies are separate from their directors, and that the fact that its director was aware of the succession cause and the orders issued thereunder did not translate to knowledge on its part.
28. While it is indeed true that a Company is at law distinct from its shareholders, it is an undeniable fact that a company, being an artificial person, has no hand and mind of its own. The Board of Directors is the mind of the company for purposes of executing the company's objects, as these are the people who have the ultimate authority to manage the company's affairs. In the case of *Michael Kyambati vs Principal Magistrate Milimani Commercial Courts Nairobi & Another* (2016) eKLR, the court observed as follows:-

“The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents, usually the Board of Directors. A company may in many ways be likened to a human body; it also has hands which hold tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents... [and] others are directors and managers who represent the directing mind and will of the company, control what it does... ultimate responsibility rests with the directors.”
29. It is for this reason that the Plaintiff company did not swear the affidavit as a person, instead, it was sworn on its behalf by its director who confirmed that its contents were true to the best of his knowledge, information and belief. The said Director Geoffrey Kirwa Boit, who is also the majority shareholder holding 999 out of a possible 1000 shares, knew of and participated in the succession cause. Yet in an act that borders on perjury, he failed and/or neglected to inform the court of this vital information.
30. That aside, as the registered owner of the land, the Plaintiff company as well as its Directors ought to have been aware of the history of the land by conducting due diligence prior to acquiring the same. It cannot therefore claim ignorance of the facts herein or of the background of the suit properties. I am afraid that in this case, the Plaintiff cannot claim ignorance by virtue of the principle of separate legal persona.
31. The Plaintiff can also not deny that it is guilty of material non-disclosure of facts, which resulted in issuance of the impugned orders. The consequence of such non-disclosure is explained in *Harrishchandra Bhovanbhai Jobanputra & another vs Paramount Universal Bank Limited & 3 others*



(2014) eKLR, where the court relying on the words of Munyao Sila J in *Filista Chamaiyo Sosten vs Samson Mutai* (2012) eKLR, stated that:-

“... However, if the injunction was obtained by concealing facts which if put to the judge in the first instance would have affected his judgment on whether or not to give the injunction, then the Court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it's no longer necessary to have the injunction...”

32. Consequently, therefore, the Applicants have demonstrated that the information the Respondent withheld from this court is so crucial that had the court been made aware at the time of hearing of the Application, it would not in good conscience have issued the injunction.
33. The Respondent seems to operate under the belief that the order can only be set aside if the Applicants had annexed a draft response raising triable issues. That belief is however mistaken. Orders can be set aside whether or not the Application under which they were issued was opposed or even where they were made after a full hearing of the Application. In any event, the main ground advanced for the discharge of the injunction herein is that of non-disclosure of material facts, which this court finds has been established.

**Whether the Application dated 29<sup>th</sup> November, 2024 was duly served on the Defendants/Applicants herein;**

34. It goes without saying that service is confirmation that the right of hearing was accorded to the Applicants herein before the orders were made against them. In the instant application, the Applicants have argued that the ex-parte orders should be set aside as they were not duly served with the application dated 29<sup>th</sup> November, 2024. The Respondent however insist that the Applicants were served with the Application and presented the Affidavit of Service sworn by Pella Amugune Tsisaga on 13<sup>th</sup> December, 2024.
35. Initially, there were 2 Affidavits of Service sworn by Pella Amugune Tsisaga, a licensed Court Process Server both dated 13<sup>th</sup> December, 2024. He indicated in both that he travelled to Nakuru and was directed to the Defendant's residence by one Geoffrey Kirwa Boit, who pointed the 1<sup>st</sup> Applicant out to him. That he served her and she accepted the 2<sup>nd</sup> Defendant's copies. The only difference is that one alleges that service was done on 6<sup>th</sup> December, 2024 while the other 11<sup>th</sup> December, 2024.
36. Later, the Respondent vide its Notice of Withdrawal dated 22<sup>nd</sup> April, 2025 withdrew the Affidavit of Service showing that service was done on 11<sup>th</sup> December, 2024 for reason that it is erroneous. The error was explained to be the date of service. However, it has not escaped me that the Affidavit was only withdrawn after the 1<sup>st</sup> Applicant herein tabled evidence to show that she was not in the country on 11<sup>th</sup> December, 2024 and thus could not have been personally served as deponed therein.
37. The Respondent has had since 16<sup>th</sup> December, 2024 when the two Affidavits of Service were filed to regularise by withdrawing the alleged erroneous document, but they did not do so. Not until the 1<sup>st</sup> Applicant herein filed the instant Motion and presented evidence that she was not in the country at the alleged time of service did they withdraw the impugned Affidavit. This issue was also not brought to the attention of the court at the date of the issuance of the orders, or on any other date thereafter.
38. That aside, Order 5 Rule 5 gives the information that needs to be set forth in an Affidavit of Service as follows:-



15. Affidavit of service [Order 5, rule 15]
- (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.
39. The prescribed form for an Affidavit of Service under the Civil Procedure Rules requires the process server to indicate not just the name and place of service, but also the time of service and whether the party served signed the documents or refused to sign. The two Affidavits by Pella Amugune Tsisaga do not contain this information.
40. But even if this court were to assume that the Process Server managed to effect service on the 1<sup>st</sup> Defendant on 6<sup>th</sup> December, 2024, there was no explanation as to why the 2<sup>nd</sup> Defendant could not be served personally.
41. Order 5 Rule 7 and 8 of the Civil Procedure Rules are clear on how service is to be effected and provide that:-
7. Service on several defendants [Order 5, rule 7]
- Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.
8. Service to be on defendant in person or on his agent [Order 5, rule 8]
- (1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
- (2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.
42. The Process Server deponed that the 1<sup>st</sup> Applicant accepted service by retaining copies of the documents for the 2<sup>nd</sup> Applicant. He does not explain his reason for not effecting service on the 2<sup>nd</sup> Applicant in person as required by the law, or why he opted to serve the 1<sup>st</sup> Applicant on her behalf. As at the time of service of the Application, there was no indication that the 1<sup>st</sup> Applicant herein was an authorised agent of the 2<sup>nd</sup> Applicant or that she is her advocate with instructions to accept service on her behalf.
43. Even assuming he did so by virtue of the fact that they are related, with regards to service on family members Order 5 Rule 12 provides that:-
12. Service on agent or adult [Order 5, rule 12]
- Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.



44. It is clear therefore that service on adult family members is only done as a measure of last resort, where all other efforts have failed. This court has not been informed of any prior unsuccessful attempts to locate the 2<sup>nd</sup> Applicant for service necessitating the service on the 1<sup>st</sup> Applicant on her behalf. The Plaintiff therefore did not put any effort in ensuring that the 2<sup>nd</sup> Applicant was properly served with the Application herein, and for that reason it cannot argue that service was regular.
45. A perusal of the record will reveal that the orders were not granted upon full hearing of the application as alleged by the Respondent. They were in fact issued in default since the Applicants herein had not filed a response to the Application dated 29<sup>th</sup> November, 2024. Counsel for the Plaintiff informed the court that the application was unopposed and prayed that it be allowed as prayed. Seeing that the Court allowed the Application dated 29<sup>th</sup> November, 2024 for reason that the Defendants were served and failed to appear, due to the fact that the alleged service has been successfully challenged, the orders cannot stand.
46. I should address the Respondent's submission that the Applicants raised new issues in the Further Affidavit and thus it ought to be disregarded and/or expunged. That is not true in this case as the issue of service was raised by the Respondent in its Replying Affidavit, where it alleged that the Applicants had been duly served. The Applicants only responded to those allegations through their Further Affidavit indicating that they could not have been served on the alleged dates.

**Orders:**

47. Consequently, I find merit in the Notice of Motion application dated 29<sup>th</sup> January, 2025. The same is allowed. The orders issued on 16<sup>th</sup> December, 2024 are hereby set aside and/or discharged. Cost of the application are awarded to the Defendants/Applicants.
48. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 8<sup>TH</sup> DAY OF MAY, 2025 VIDE MICROSOFT TEAMS.**

**HON. C. K. YANO**

**ELC, JUDGE**

In the virtual presence of:-

Mr. Akango for Defendants/Applicants.

Ms. Kesei holding brief for Mr. Mwinamo for the Plaintiff/Respondents.

Court Assistant - Laban.

