



**Pavicon Kenya Limited v Cheda Links Group Limited & 2 others; Jomo Kenyatta Foundation & 2 others (Interested Parties) (Commercial Case E439 of 2024) [2024] KEHC 12785 (KLR) (Commercial and Tax) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12785 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E439 OF 2024  
MN MWANGI, J  
OCTOBER 14, 2024**

**BETWEEN**

**PAVICON KENYA LIMITED ..... APPLICANT**

**AND**

**CHEDA LINKS GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**QONTA WORKS COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EVERSMART AGENCIES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JOMO KENYATTA FOUNDATION ..... INTERESTED PARTY**

**CREDIT BANK LIMITED ..... INTERESTED PARTY**

**JOHN WAMBURU ..... INTERESTED PARTY**

**RULING**

1. The application dated 6<sup>th</sup> August, 2024 has been brought by the plaintiff/applicant under the provisions of Section 3 of the *Civil Procedure Act*, Order 40 Rule 1, Order 51, Order 39 Rules 5 & 6 of the Civil Procedure Rules, 2010, Section 45 of the *Advocates Act*, Cap 16 Laws of Kenya, and all other provisions of the law. The plaintiff seeks the following orders: -
  - i. Spent;
  - ii. Spent;





8. She averred that there is a real risk that the funds held by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants at the 2<sup>nd</sup> interested party's various branches will be withdrawn or otherwise dissipated if an injunction is not granted, especially owing to the fact that the parties have made several attempts to discuss the matter including engaging a mediator so as to have the issues herein resolved amicably, without any success.
9. Ms Ngugi stated that it is in the interest of justice for this Court to intervene to stop further mischief from being committed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants by granting the orders sought so as to restrain the defendants from depriving the applicant of its rightful share of the proceeds.
10. She urged that unless freezing orders and orders for an injunction are granted, the plaintiff stands to lose its hard earned savings and investment made towards execution of the Tender between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the 1<sup>st</sup> interested party due to the current stalemate between the plaintiff and the defendants. She averred that it is in the best interest of justice that the application be certified urgent and orders granted as prayed to preserve any sums that have since been remitted in the said bank accounts that are being held by the 2<sup>nd</sup> interested party.
11. She expressed the view that no prejudice will be meted to the defendants as the monies in the said accounts will be preserved until the hearing and determination of the application and/or conclusive determination of the current dispute.
12. Upon being served with the Court orders and directions made on 8<sup>th</sup> August, 2024, the defendants filed a Notice of Motion dated 9<sup>th</sup> August, 2024.
13. The defendants' application is anchored on the provisions on Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rules 4 and 7, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling laws of Kenya. The defendants seek the following orders: -
  - i. Spent
  - ii. The Honourable Court be pleased to set aside, vary and/or discharge the exparte freezing orders made on 8<sup>th</sup> day of August, 2024.
  - iii. That this Honourable Court be pleased to give such further and other/or orders and directions as it may deem fit; and
  - iv. That the costs of the application be awarded to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
14. The said application is supported by an affidavit sworn on 9<sup>th</sup> August, 2024 by Kevin Ng'ang'a Muturi, a Director of the 1<sup>st</sup> defendant, who was duly authorized by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to swear the said affidavit on their behalf. He stated that he was aware that on 12<sup>th</sup> July, 2024, the firm of Emily Nyongesa Advocates through the plaintiff herein moved the Court vide Nairobi High Court and Commercial Division Civil Case No. E382 of 2024 in a suit filed between Pavicon Kenya Limited v Cheda Links Group Limited, Qonta works Kenya Limited Eversmart Agencies, Jomo Kenyatta Foundation Education Publishers and Housing Finance Bank Limited.
15. He stated that contemporaneous with the said suit, the plaintiff also took out a Notice of Motion application dated 12<sup>th</sup> July, 2024 seeking inter alia orders freezing the defendants' accounts at HFC Bank alleging breach of the terms of the Partnership Agreement. He stated that Hon. Lady Justice Josephine Mong'are upon hearing the said application on 12<sup>th</sup> July, 2024 granted interim exparte freezing orders of injunction on 16<sup>th</sup> July, 2024.
16. That on 22<sup>nd</sup> July, 2024 another Notice of Motion was filed seeking extension of the exparte freezing orders of 16<sup>th</sup> July, 2024 to the defendants' other accounts at Equity Bank Limited and Credit Bank



- Limited, respectively, and on 22<sup>nd</sup> July, 2024, further freezing orders were issued by Hon. Lady Justice Mong'are. Mr. Muturi stated that the *ex parte* orders were discharged on 31<sup>st</sup> July, 2024 after the Judge heard opposing arguments and found that the plaintiff therein had withheld material facts from the Court to the effect that the Partnership Agreement contains an arbitral clause. He stated that the Notice of Motion dated 12<sup>th</sup> July, 2024 was set down for hearing and determination.
17. Mr. Muturi deposed that on 6<sup>th</sup> August, 2024, the plaintiff engaged its 3<sup>rd</sup> set of Advocates Y. Jeruto & Co. Advocates who filed a Notice of Withdrawal of both the suit and the application before Lady Justice Mong'are, and then filed the suit and application dated 6<sup>th</sup> August, 2024 now before this Court.
  18. Mr. Muturi contended that at paragraph 26 of the plaint dated 6<sup>th</sup> August, 2024, the plaintiff deliberately failed to disclose the fact that there were previous proceedings between the same parties in the previous High Court proceedings.
  19. Mr. Muturi averred that on 1<sup>st</sup> August, 2024, one of the partners entitled to a share of the profits of the Partnership Agreement namely, John Wamburu filed a suit at the Chief Magistrate's Court being Civil Case No. E3892 of 2024 against Pavicon Kenya Limited, Cheda Links Group Ltd, Qonta Works Company Limited, Eversmart Agencies and Jomo Kenyatta Foundation Educational Publishers, Housing Finance Bank Kenya Ltd, Credit Bank Limited and Equity Bank Kenya Limited alleging inter alia breach of the Partnership Agreement. He stated that the plaintiff therein also filed a Notice of Motion seeking freezing of the defendants' accounts including the accounts held at Credit Bank Limited, the subject of the instant suit.
  20. He deposed that the *ex parte* orders freezing the defendants' accounts were granted on 2<sup>nd</sup> August, 2024 by Hon. C. A. Ogwen, Senior Resident Magistrate. He stated that on 5<sup>th</sup> August, 2024 the defendants filed a Notice of Motion application seeking to set aside the *ex parte* freezing orders of 2<sup>nd</sup> August, 2024 on the principal ground of the plaintiff's failure to disclose the existence of the first High Court proceedings. He stated that the firm of Y. Jeruto & Co. Advocates entered appearance on the plaintiff's behalf on 6<sup>th</sup> August, 2024 and fully participated in the Chief Magistrate's Court's proceedings.
  21. He averred that they filed a Notice of Preliminary Objection contending that the Chief Magistrate's Court lacked jurisdiction due to the Partnership Agreement. That the said Notice of Preliminary Objection was heard on 8<sup>th</sup> August, 2024, but the plaintiff failed to disclose in the Chief Magistrate's proceedings that it had on 6<sup>th</sup> August, 2024 at 2104 hours filed the present suit.
  22. Mr. Muturi contended that the plaintiff failed to disclose to this Court, not only the fact that the parties hereto were involved in active litigation in the Chief Magistrate's Court proceedings on the same subject matter, and that the *ex parte* freezing orders in respect of the bank accounts of the instant suit were in force.
  23. He stated that the institution of a multiplicity of actions against the same parties on the same subject matter is tantamount to forum shopping and is a gross abuse of the Court process. He expressed the view that the plaintiff herein obtained the *ex parte* order by failure to make full and frank disclosure to this Court of the facts disclosed in the defendants' affidavit. He deposed that justice dictates that this Court should remove any unjust advantage obtained by the plaintiff, by setting aside and discharging the *ex parte* order of 8<sup>th</sup> August, 2024.
  24. The defendants also filed a replying affidavit sworn by Kevin Ng'ang'a Muturi on 20<sup>th</sup> August, 2024, in opposition to the plaintiff's application dated 6<sup>th</sup> August, 2024. He reiterated the assertion that the application filed by the plaintiff is a gross abuse of the Court process, having been filed in violation of the directions of Hon. Lady Justice Mong'are issued on 31<sup>st</sup> July, 2024.



25. He contended that the suit and the application filed by the plaintiff are unmaintainable having been filed in clear breach of the dispute resolution clause contained in the Partnership Agreement, that forms the subject of this suit.
26. He claimed that in clear breach of the Partnership Agreement, the plaintiff failed to avail all the funds required for execution of the project and the defendants had to seek alternative funding, but now the plaintiff wants to obtain full benefits from the Partnership Agreement yet there is a clear failure to provide all the funding in breach of Clause 2 of the Agreement. The defendants' deponent averred that the plaintiff has so far been paid an amount of Ksh.185,381,100.00 out of the proceeds of the business, which figure far exceeds the plaintiff's total investment of Ksh.105,521,976.00 together with interest at 12% per month, and 47% profit under the Agreement.
27. Mr. Muturi contended that any further claims by the plaintiff pursuant to the Agreement amounts to unjust enrichment and is without legal contractual basis. He deposed that the plaintiff has failed to disclose the fact that at Clause 3 of the Agreement, decision making in the partnership is by a simple majority vote by the parties, and that the parties voted overwhelmingly to remove Josephine Njeri Ngugi as a signatory to the accounts.
28. He stated that the instant suit offends the clear terms of Clause 4 of the Agreement which contemplates sharing of profits only after payment of government taxes, as the plaintiff was adamant in previous suits that taxes were yet to be paid.
29. He averred that to the extent that the entire suit is predicated solely on LPO No. 022659 attributable to Cheda Links Group Limited, there was no basis for joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to these proceedings.
30. He contended that the entire suit and the application is unmaintainable to the extent that it fails to recognize the indemnity at Clause 8 of the Agreement, whereby parties had clearly bound themselves to indemnify each other from any losses or claims arising from the Agreement.
31. Mr. Muturi deposed that the plaintiff is seeking pre-emptive remedies in its application without any undertaking as to damages in clear violation of the applicable legal principles.
32. The application dated 9<sup>th</sup> August, 2024 filed by the defendants was opposed by the plaintiff, through Josephine Njeri Ngugi, the plaintiff's Director, vide a replying affidavit sworn on 15<sup>th</sup> August, 2024.
33. She deposed that the right to legal representation is sacrosanct under *the Constitution* of Kenya, and as such, the defendants cannot dictate the firm to represent the plaintiff company.
34. She also deposed that after appointing the firm of Y. Jeruto & Co. Advocates, the plaintiff company issued instructions for the withdrawal of the suit and attendant application in HCCOMM No. E382 of 2024, and a Notice of Withdrawal dated 6<sup>th</sup> August, 2024 was filed and served on the parties, including the defendants. It was averred that withdrawal of the said suit does not act as a bar, and it does not deter a party from instituting subsequent suits, as the same was done before the Notice of Motion application in the said suit was set down for hearing.
35. The plaintiff averred that at the time of filing the instant suit, there was no pending dispute between the same parties over the same subject matter as the other suit had been withdrawn and the Notice of Withdrawal was served on all the parties to the said suit.
36. She stated that the application before Lady Justice Mong'are in HCCOMM No. E382 of 2024 related to accounts for Cheda Link Groups Limited account No.97838XXXX at HFC Limited Westlands Branch, Qonta Works Company Limited account No.97838XXXX at HFC Bank Westlands Branch



and Eversmart Agencies Limited account No.9783886XXXX at HFC Limited Westlands Branch. She asserted that the instant suit relates to completely different accounts being Cheda Links Group Limited account No. 002100100XXXX held at the 2<sup>nd</sup> interested party Bank at Koinange Street Branch, and account No.0121019XXXX held in the 2<sup>nd</sup> defendant's name at the 2<sup>nd</sup> interested party Bank at Thika Branch.

37. Ms Ngugi stated that the plaintiff herein was the 1<sup>st</sup> defendant in CMCC No. E3892 of 2024, a case which was filed by John Wamburu, where the plaintiff herein had been sued with the defendants herein for recovery of the plaintiff's monies in that case, following a breach of Agreement by the parties therein. She averred that the said matter is not related to this matter in any way. She further stated that CMCC No. E3892 of 2024 was struck out by a Ruling of Hon. C.A. Ogwenso delivered on 13<sup>th</sup> August, 2024.
38. She deposed that in the plaint filed in the instant suit, the plaintiff disclosed in paragraph 26 of the existence of CMCC No. E3892 of 2024 filed by a different party. She stated that the plaintiff herein has made full disclosure of the material facts related to this matter.
39. She contended that the application by the defendants dated 9<sup>th</sup> August, 2024 does not meet the threshold for setting aside of an ex parte injunctive order and is unmeritorious and should be dismissed. She contended that it is quite clear that the defendants are keen in pursuing all avenues possible so as to fulfil their selfish and fraudulent schemes aimed at denying the plaintiff company its hard earned savings in the transaction that forms the subject of the instant suit, by misleading the Court in varying the orders issued in the interim, which orders are only aimed at preserving the subject matter herein, in the interest of justice and fairness to all parties.
40. Upon being served with the replying affidavit by the plaintiff, the defendants filed a supplementary affidavit sworn on 20<sup>th</sup> August, 2024 whose contents largely reverberate with the earlier averments in the affidavit sworn on 9<sup>th</sup> August, 2024 by Kevin Ng'ang'a Muturi.
41. The defendants also swore a further affidavit on 28<sup>th</sup> August, 2024 to the effect that the accounts in issue herein had been frozen by a Court order in Milimani CMCC No. 2850 of 2024.
42. The plaintiff filed a supplementary affidavit sworn on 26<sup>th</sup> August 2024 by Josephine Njeri Ngugi, the plaintiff's Director. She denied that the plaintiff violated any directions issued by Lady Justice Mong'are on 31<sup>st</sup> July, 2024, and stated that the parties herein attempted mediation as provided for in Agreement, but the same failed.
43. Ms Ngugi averred that Clause 3.2(b) of the Partnership Agreement demands that decisions in regard to financials of the partnership be made by the unanimous consent of all parties. She also averred that it was on account of the indemnity in the Agreement that the plaintiff seeks this indulgence to cure the mischief that is being perpetrated by the defendants by removing her as a signatory to the accounts under the Partnership Agreement, and transferring the funds from the agreed accounts pursuant to the Partnership Agreement.
44. The plaintiff filed its submissions dated 26<sup>th</sup> August, 2024, whereas the defendants filed their submissions on 28<sup>th</sup> August, 2024.
45. In highlighting the written submissions, Mr. Kimaiti, learned Counsel for the plaintiff stated that there is a Partnership Agreement dated 20<sup>th</sup> January, 2024 between the parties herein, wherein the plaintiff was to offer funds to facilitate the project by the defendants in favour of the 1<sup>st</sup> interested party. He also stated that prior to executing the said Agreement, parties agreed to open joint accounts at HFC



- Bank, and a resolution was made on 15<sup>th</sup> January, 2024 to make Josephine Njeri Ngugi, a Director of the plaintiff company, a mandatory signatory to the bank accounts.
46. The plaintiff's Counsel submitted that however through three (3) resolutions, the defendants removed Josephine Njeri Ngugi as a mandatory bank signatory without the plaintiff being represented in the meetings.
  47. Counsel stated that funds were then moved from HFC Bank to Credit Bank, which funds had been provided by the plaintiff to facilitate the project. He stated that the application before this Court is for injunctive orders.
  48. Mr. Kimaiti relied on the decisions made in the case of *Giella v CassmanBrown & Co. Ltd* [1973] EA 360, *American Cynamid v Ethicon Ltd* [1975] 1 ALL ER, to that effect that an applicant who seeks injunctive orders has to prove a prima facie case, irreparable harm, and a balance of convenience.
  49. He also relied on the case of *Maeri v Onduso and another* [2023] KEHC 21492 KLR, where the Court stated that the principles of injunction apply to mareva injunctions as well. He cited the case of *Mrao v First American Bank & 2 others* [2003] KLR 125, where the Court defined what a prima facie case is Counsel also cited the case of the *Registered Trustees of Jamie Masjid Akil - Sunnait Wal-Jamait Nairobi v Nairobi City County & 2 others* [2015] eKLR, where a description was given of whom an aggrieved party is.
  50. Mr. Kimaiti referred to Clause 3.2(b) of the Partnership Agreement, which is to the effect that anything affecting the finances of the parties would be unanimously agreed on, but the plaintiff's Director was removed from being a signatory to the bank accounts. He stated that as a result, the plaintiff is not in control of the funds advanced to the defendants.
  51. He submitted that the substratum of the suit between the parties herein will be protected only if an order of injunction is extended until the hearing and determination of the suit.
  52. In responding to the defendants' application to set aside ex parte orders, on the issue of non-disclosure of material facts, he stated that CMCC No. E3892 of 2024 (Milimani) was filed by John Wamburu, as the plaintiff, whereas the plaintiff herein was the 1<sup>st</sup> defendant in that suit, but the jurisdiction of the Court did not allow the suit to proceed in that Court.
  53. He stated that HCCOMM No. E382 of 2024 was withdrawn before it was heard, with the sole purpose of terminating the matter. He contended that there was no need for the plaintiff to disclose about the case that was withdrawn.
  54. He stated that Clause 4.5 of the Agreement provides for disputes to be dealt with by arbitration, but the plaintiff invoked Clause 12 of the Partnership Agreement that binds parties to the jurisdiction of this Court.
  55. On the issue of setting aside the ex parte orders granted on 8<sup>th</sup> August, 2024, Mr. Kimaiti relied on the case of *Elias Nyamu Njagi v Nelly Wanja Mugambi* [2022] KEHC 405 KLR and stated that the Court held that setting aside of Court orders should not be for purposes of obstructing justice.
  56. He contended that the removal of the plaintiff's Director was done clandestinely to obstruct justice hence the defendants' hands are not clean. He submitted that the actions of the defendants are to the detriment of the plaintiff, without whom their project would not come to fruition.
  57. Mr. Kimaiti prayed for the application dated 6<sup>th</sup> August, 2024 to be allowed and for the one dated 9<sup>th</sup> August, 2024 to be dismissed with costs. He prayed for freezing orders to be granted pending the hearing and determination of the case between the parties herein.



58. On his part, Mr. Odera stated that in addressing the Court about CMCC No. E3892 of 2024 in Milimani Law Courts, the plaintiffs' Advocate was economical with the truth, which put the legal profession into disrepute.
59. He stated that the freezing orders given by the Chief Magistrate's Court were in respect of the same bank account as in this case, with the bank in the two cases being Credit Bank, where Credit Bank was the 3<sup>rd</sup> interested party and in this case, it is the 2<sup>nd</sup> interested party. He added that the bank account in issue in the two cases is the same.
60. In relying on the provisions of Order 4 Rule 1(1)(f) of the Civil Procedure Rules, 2010, Mr. Odera stated that the plaintiff did not disclose about the existence of the former suit, namely HCCC No. E382 of 2024. He submitted that the provisions he had cited are couched in mandatory terms but there was material non-disclosure on the part of the plaintiff about the previous suit. He cited the case of *Uhuru Highway Development Ltd v Central Bank of Kenya*, Civil Appeal No. 126 of 1995, which discussed the consequences of non-disclosure. He also cited the case of *Okiya Omtatab Okoiti & 2 others v Joseph Kinyua & 2 others Petition No. 51 of 2018* on the same issue.
61. Counsel submitted that in the case of *Alexander Tugushev v Vitaly Orlov, Magnus Roth & Andrey Petrik* [2019] EWHC 2031(comm), the Court set out the guiding principles for granting an ex parte freezing order, and the duty to disclose all material facts, as well as the consequences of failure to disclose.
62. Mr. Odera stated that the plaintiff failed to disclose that Lady Justice Mong'are had sat in HCCC No. E382 of 2024 and handled a similar application and had discharged similar ex parte orders obtained by concealment of material facts. He added that the Court also addressed the propriety of filing a suit when there was a clear dispute resolution mechanism. He submitted that the Judge was categorical that one is deprived of the benefit of ex parte orders for non-disclosure of material facts. Mr. Odera submitted that it is not the duty of the Advocate or his client to determine what is material, as the said duty rests with the Court. He also submitted that it is not the business of the plaintiff's Counsel to say that the plaintiff did not disclose because the said suit was withdrawn.
63. In addressing the propriety of the present suit, the defendants' Counsel contended that the suit and application herein were filed in misapprehension of the applicable legal principles which were set out in the case of *International Air Association and another v Akarim Agencies Co. Ltd & 2 others* Civil Case No. 15 of 2014, where Court stated that the principles guiding a freezing order are quite distinct from an ordinary injunction.
64. He submitted that the defendants have a good and arguable case in that there is a dispute resolution clause in the Agreement, but there has been no arbitration.
65. He stated that Clause 12 of the said Agreement which has been cited by the plaintiff is applicable in an Arbitral Tribunal. He contended that the sharing of profits would only come in after settling of Government Taxes. He contended that there is no proper claim as no payment has been made to the Government and that only one annexure of LPO No. 022659 in favour of 1<sup>st</sup> defendant has been relied on, thus making it unnecessary to join the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
66. Mr. Odera contended that the plaintiff's Counsel misapprehended the provisions of clause 3.2(a) of the Agreement which provides for the day to day running of the business. He further contended that the defendants are distinct decision makers who made a decision to remove Josephine, and that the plaintiff is fully indemnified under Clause 8 of the Agreement from any loss.



67. He concluded that there is no risk of dissipation of funds, and added that such risk should not be inferred lightly. He submitted that mere reliance on the alleged dishonesty of the defendants is not a real risk.
68. On the third principle of balance of convenience, the defendant's Counsel submitted that it lies in favour of discharging the *exparte* orders.
69. He submitted that the defendants are the true contracting parties in a World Bank funded project for supply of school uniform and school equipment, which project has come to a halt. He contended that the defendants are now facing several suits by suppliers yet the defendants are Kenyan companies that are not likely to leave the jurisdiction of this Court.
70. He contended that there is no crystalized right due or owing to the plaintiff hence its claim is speculative.
71. He stated that the plaintiff invested Kshs.105,000,000/= and has so far been paid Kshs.185,000,000/=, which is far in excess of the Profit Sharing Agreement.
72. Counsel stated the *exparte* orders were made without any undertaking as to damages. He stated that the defendants are willing to offer an undertaking in lieu of the freezing orders.
73. He further stated that when the plaintiff came to Court, it did not disclose that there were freezing orders in CMCC No. E3892 of 2024 from 8<sup>th</sup> August, 2024 that were discharged on 13<sup>th</sup> August, 2024 when the suit in the lower Court was struck out.
74. He prayed for the defendant's application dated 9<sup>th</sup> August, 2024 to be allowed with costs and for the *exparte* orders to be discharged.
75. In a rejoinder, Mr. Kimaiti reiterated that in CMCC No. E3892 of 2024, the plaintiff herein was sued as the 1<sup>st</sup> defendant. He submitted that Order 25 Rule 1 of the Civil Procedure Rules applies, and as per the holding in the case of *Saul Kipkeny Rutto v Kipserem Arusei Maritim (2023) KEELC 15958 KLR*, the plaintiff is not bound to disclose the former suit.
76. Counsel further submitted that Section 6 of the *Arbitration Act* kicked in when the defendant failed to file an application for stay of proceedings. He contended that the presence of an arbitration clause in the Agreement does not bar parties from pursuing a case in Court.
77. He reiterated that the principles in *Giella vs Cassman Brown (supra)* apply to *mareva* injunctions. He submitted that the three (3) defendants are parties to the Agreement and that is the reason why they have been sued, and that they were in cahoots in the removal of the plaintiff's Director. He also stated that the plaintiff has moved to this Court to enforce the indemnity clause.
78. He indicated that the plaintiff funded the project and the defendants have been paid but something fishy is happening as the Agreement specified the accounts where the monies were to be channeled to, vide a resolution of the plaintiff and the defendants, but in meetings of the defendants, Josephine was removed as a mandatory signatory and monies were moved to Credit Bank Limited.

## **ANALYSIS AND DETERMINATION**

79. I have considered the 2 applications filed by the parties herein. I have also considered the depositions made in the affidavits filed in support of and in opposition to the said applications, as well as the further and supplementary affidavits relied on by the parties. I have also considered the submissions made by Counsel for the parties, as well as the authorities cited. The issues that arise for determination are-



- i. If there was non-disclosure of material facts by the plaintiff;
  - ii. If this Court is seized of the jurisdiction to hear the application herein in light of the arbitral clause in the Agreement between the parties; and
  - iii. If the ex parte injunction and the freezing orders should be confirmed or set aside.
80. In determination of the issue of non-disclosure of material facts, it is of utmost importance to look at what case law states on the consequences of failure to disclose. The said issue was discussed at length in the case of *Bahadurali Ebrahim Shanji vs Al Noor Jamal & 2 others – Civil Appeal No. 210 of 1997*, where the Court of Appeal stated as follows –

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. 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.

In considering whether or not time has been relevant non -disclosure and what consequence the Court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following -

- i. The duty of the applicant is to make a full and fair disclosure of the material facts.
- ii. The material facts are those which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.
- iii. The applicant must make proper inquiries before making the application. 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 such inquiries.
- iv. 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 application is made and the probable effect of the order on the defendant, and the degree of legitimate urgency and the time available for the making of inquiries



- v. If material non-disclosure is established the Court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.
- vi. 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 on the application. The answer to 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.
- vii. Finally, it is not for every omission that the injunction will be automatically discharged. A locus penitentiae (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to make a new order on terms: when the whole of the facts, including that of the original non-disclosure, are before it, the Court may well grant such a second injunction if the original non-disclosure, was innocent and if an injunction could properly be granted even had the facts been disclosed."
 

.....
- viii. In the instant case the so – called material facts repeatedly alleged to have been either suppressed, concealed and or not disclosed by the respondents are only two pending applications which were never heard and determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so..... (Emphasis added).

- 81. In the present case, the defendants contend that there was non-disclosure of material facts in that the plaintiff concealed about the existence of a freezing order made in Milimani CMCC No. E3892 of 2024 as at the time the plaintiff's application herein was filed. The plaintiff however stated that it had disclosed about the existence of the said case in the plaint. It further stated that in the case in the Magistrate's Court, it was sued as the 1<sup>st</sup> defendant in the said case and it was not the plaintiff. The said assertion was not contested or controverted by the defendant herein. I have perused the application filed in the said case and established that the plaintiff therein was John Wamburu. In the said case, he sought an injunction against the plaintiff and the defendants herein and other parties to protect the monies that were in bank accounts at HFC Bank Westlands Branch and Credit Bank Limited, which were in the names of the defendants herein.
- 82. Based on the said facts, it is my finding that since the order in the said suit was in favour of another party which was seeking to enforce its rights and not the rights of the plaintiff herein, and noting that the plaintiff in the application herein seeks to protect its rights having funded the projects in issue, its failure to disclose that there was a freezing order granted to another party in CMCC No. E3892 of 2024 does not amount to concealment of material facts.
- 83. Both the plaintiff in CMCC No. E3892 of 2024 and the plaintiff herein were seeking freezing orders in different Courts to protect different interests, and had filed the said suits in different capacities on the basis of alleged breach of the Partnership Agreement. I therefore find the arguments raised by the defendants on issue of non-disclosure of material facts in regard to the said case to be without merits.



Further, in paragraph 26 of the plaint in the suit between the parties herein, the plaintiff disclosed of the existence of the suit in the lower Court.

84. The 2<sup>nd</sup> ground raised on non-disclosure of material facts is that in the plaint filed in this suit, the plaintiff did not disclose about the existence of another suit namely HCCOMM No. E382 of 2024 in which Lady Justice Mong'are had given ex parte freezing orders but later discharged the same when she realized that the plaintiff therein had failed to disclose material facts. On the said issue, Mr. Kimaiti submitted that the plaintiff withdrew the said suit and therefore there was no suit subsisting in the High Court for disclosure to this Court.

85. Mr. Odera on his part asserted that the plaintiff was under an obligation to disclose about the existence of the said suit even if it had been withdrawn. He relied on Order 4 Rule 1(1)(f) of the Civil Procedure Rules, 2010, to support his assertion. The said provisions state as follows-

The plaint shall contain the following particulars -

- a. the name of the Court in which the suit is brought;
- b. the name, description and place of residence of the plaintiff, and an address for service;
- c. the name, description and place of residence of the defendant, so far as they can be ascertained;
- d. the place where the cause of action arose;
- e. where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and
- f. an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint. (Emphasis added).

86. In the plaint filed contemporaneously with the present application, the plaintiff did not disclose about the previous suit namely HCCOMM No. E382 of 2024. On that score the defendant's Counsel is correct that even where a suit has been withdrawn between the same parties on the same subject matter, it should be disclosed. This Court therefore has to consider the materiality of the said non-disclosure. In that regard, I am guided by the Court of Appeal decision in Bahadurali Ebrahim Shamji vs Al Noor Jamal & 2 others (supra) where the said Court went on to state as follows:

It is accepted that in cases of ex parte proceedings, there must be full and frank disclosure to the court of all material facts known to the applicant . . . but in the instant case everything was in the court record and was available to the learned judge for perusal. There was not deliberate concealment on the part of the respondents. Both the applications were on record and the notice of discontinuance accompanying the latest application clearly showed what applications were being discontinued and they were not misleading. Granted that the respondent did not inform the learned judge of the pending applications, the question is, were the material facts those, which it was material for the learned judge to know in dealing with the application as made? The answer to this must be in the negative since the learned judge was satisfied that the pending applications did not preclude him from doing justice to the parties especially in that the applications and suit had not been heard on merit. He was also concerned that the injury to the respondents, which could not be compensated for damages, could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted. (Emphasis added).



87. The circumstances of this case are somewhat different in that there was a previous suit and an application filed namely, HCCOMM No. E382 of 2024, which was at the interim stage dealt with by Lady Justice Mong'are. The said suit was however withdrawn before the application therein seeking freezing orders was heard and determined on merits. The issue then that arises is if failure to disclose about the existence of the said suit and application amounts to non-disclosure of material facts. As per the provisions of Order 4 Rule 1(1)(f) of the Civil Procedure Rules, 2010, the plaintiff had a duty to disclose in its plaint of the existence of the previous suit.
88. The question then is, does the failure to disclose materially affect the application before me. I think not, because HCCOMM No. E382 of 2024 was withdrawn, and therefore nothing about the said suit will affect the outcome of the present suit and application. In any event, the freezing orders in the said suit had been discharged and the application therein was never heard and determined on its merits as the suit was withdrawn. In addition, the application dated 22<sup>nd</sup> July, 2024 roped in Credit Bank Limited, account No. 0121001000XXXX at Thika Branch, but account No. 0021001XXXX in the same Bank at Koinange Street Branch was not part and parcel of the said application, and as such, no freezing orders had been given for the latter bank account in the case that was later withdrawn. I therefore see no prejudice that will be occasioned or that has been occasioned by the plaintiff's failure to disclose the withdrawn suit, namely, HCCOM No. E382 of 2024.
89. On the issue of whether the suit herein should have been referred to arbitration as per the arbitral clause in the Partnership Agreement as submitted by the defendant's Counsel, the applicable law is Section 6 of the *Arbitration Act* which states the following –
- (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-
    - (a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or
    - (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
  2. Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
90. As to whether the dispute herein should have been referred to arbitration as per the Partnership Agreement, see the decision in *Niazons (K) Ltd v China Road & Bridge [2001] eKLR*, where the Court held as follows-
- All that an applicant for a stay of proceedings under section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold things -
- a. Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;
  - b. Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and



- c. Whether the suit intended concerned a matter agreed to be referred to arbitration.

91. In *Charles Njogu Lefty v Bedouin Enterprises Ltd.* [2005] eKLR, the Court of Appeal in discussing the import of Section 6 (1) of the *Arbitration Act* held that -

We respectfully agree with these views so that even if the conditions set out in paragraphs (a) and (b) of section 6 (1) are satisfied the court would still be entitled to reject an application for stay of proceedings and referral thereof to arbitration if the application to do so is not made at the time of entering an appearance, or if no appearance is entered, at the time of filing any pleading or at the time of taking any step in the proceedings. The dispute between Charles Njogu Lefty, the appellant herein, and Bedouin Enterprises Ltd, the respondent herein, basically concerns the interpretation given by G.B.M. Kariuki, J. to section 6 (1) of the 1995 Act, “the Act” hereinafter, in light of the circumstances surrounding the dispute. (Emphasis added).

92. In this case, the defendants did not file an application to stay the proceedings filed by the plaintiff herein so that the parties could pursue arbitration. Instead, the defendants fully responded to the application dated 6<sup>th</sup> August 2024 and filed an application to set aside the *ex parte* freezing orders after the firm of Odera Obar & Co. Advocates filed its Notice of Appointment of Advocates on 9<sup>th</sup> August, 2024. That being the case, this Court is properly seized of the jurisdiction to hear the suit filed by the plaintiff and the applications filed by both the plaintiff and the defendants.

93. As to whether an injunction and a freezing order should be granted pending the hearing and determination of the suit, it is not disputed that there is a Partnership Agreement between the plaintiff and the defendants. The defendants secured tenders from the 1<sup>st</sup> interested party and the plaintiff was to finance the project. The plaintiff contended that it financed the projects in three (3) tenders for which the defendants were paid but upon receipt of the cash, the 1<sup>st</sup> and 2<sup>nd</sup> defendants directed the money to the 2<sup>nd</sup> interested party, Credit Bank Limited, after opening bank accounts in the said Bank.

94. The defendants on the other hand contended that they were not fully financed by the plaintiff, and if anything, the plaintiff has recouped the money it put in financing the project and has derived profits therefrom. The defendants stated that in meetings held by them, resolutions were made that the plaintiff’s Director, Josephine Njeri Ngugi, should be removed as a mandatory bank signatory to the bank accounts that had been opened by the defendant companies.

95. The plaintiff herein prays for an injunction and freezing order. In the case of *Giella vs Cassman Brown & Co. Ltd* (supra) and *American Cynamid vs Ethicon Co. Ltd*, (supra), the Court stated that in order for an injunction to be granted three conditions must be met, that is, a *prima facie* case must be established by the party seeking the said order, it must show that it stands to suffer irreparable injury and when in doubt, the Court has the obligation to decide the application on a balance of convenience.

96. In the application herein, it is evident that there is a Partnership Agreement in place which set out the terms and conditions of the partnership. In a meeting held by the Directors of the defendants and the plaintiff, it was resolved that the plaintiff’s Director, Josephine Njeri Ngugi, would be a mandatory signatory of the three (3) bank accounts that were to be opened. The Partnership Agreement also set out where the accounts were to be domiciled, the bank account numbers were also captured in said the Agreement. That is evident from both the Partnership Agreement and the three (3) letters written to HFC Bank, Westlands Branch by the defendants. In the said letters, it was stated that Josephine Njeri Ngugi would be a mandatory signatory with full access to all banking services through the



accounts, and that she could only be removed through a similar resolution with her written mandate. She accepted and signed the nomination on 15<sup>th</sup> January, 2024. The mandate in the three (3) letters was for “ALL TO SIGN”.

97. In a change of events, the defendants’ Directors in meetings held for each of the defendant companies resolved to remove Josephine Njeri Ngugi as a mandatory bank signatory. They then transferred funds from the two banks accounts held in the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ names from HFC Westlands Branch, to Credit Bank Kenya Ltd, the 2<sup>nd</sup> interested party herein, without the approval of the plaintiff’s Director.
98. In my assessment of the above circumstances, I find that they fall within the definition of what a prima facie case is as was defined in the case of *Mrao v First American Bank Kenya Ltd.* (supra). It is therefore satisfied that the plaintiff has established a prima facie case with a probability of success based on the evidence placed before me.
99. As to whether the plaintiffs stand to suffer irreparable injury that cannot be compensated by an award of damages, it is my finding that if I decline to grant the prayers sought by the plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> defendants will withdraw all the money they transferred to the accounts they opened in 2<sup>nd</sup> interested party, and it will be difficult for the plaintiff to recover any outstanding payments due to it, without resorting to a Court of law to recover the same. I therefore find that in the circumstances of this case, damages will not be an adequate remedy if this Court at this stage vacates the freezing orders granted on 8<sup>th</sup> August, 2024.
100. Since I am not in doubt that the plaintiff is entitled to the prayers sought, the balance of convenience tilts in favour of the plaintiff. I therefore confirm the orders for an injunction granted to the plaintiff at the *ex parte* stage.
101. As to the freezing order sought by the plaintiff, in *UBA - Kenya Bank Limited v Sylvia Mututi Magotsi* [2015] eKLR, the Court outlined the threshold for granting of freezing orders, otherwise known as a *mareva* injunctions, whose principles are different from those set down in *Giella v Cassman Brown & Co. Ltd* (supra). The Court held as follows-

The grant of freezing injunction is governed by the principles quite distinct from those laid down for ordinary interim injunctions. Before granting a freezing injunction, Court will usually require to be satisfied that-

- a. The claimant has a good arguable case based on a pre-existing cause of action;
- b. The claim is one over which the Court has jurisdiction;
- c. The defendant appears to have assets within the jurisdiction;
- d. That there is real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted
- e. The balance of convenience is in favour of granting the injunction;
- f. The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendants assets. (Emphasis added).



102. Similarly, in *Central Bank of Kenya v Giro commercial Bank Limited & another* [2007] 2 EA 93, the Court stated thus –

However, the power of a court to grant a Mareva injunction is a discretionary one and is only used in limited circumstances.

103. Earlier in this ruling, when I considered if an injunction should be granted pending the hearing and determination of the case filed by the plaintiff, I found that the defendants transferred funds that were initially held in bank accounts held by them, to the 2<sup>nd</sup> interested party Bank, after removal of the plaintiff's Director from being a mandatory signatory to the said Bank accounts. I am satisfied that was not an act of good faith and there is a real risk of the funds now held in the 2<sup>nd</sup> interested party Bank being dissipated by the defendants herein. I therefore exercise my discretion in granting the prayers sought in paragraph 3 of the Notice of Motion dated 6<sup>th</sup> August, 2024. In essence, that means that the prayers for setting aside the *ex parte* freezing orders as prayed in the application dated 9<sup>th</sup> August, 2024 are not granted for lack of merits.

104. In the result I make the following orders –

- i. That pending the hearing and determination of this suit, a freezing order and a temporary injunction do issue restraining the defendants/respondents either by themselves, employees, servants and/or agents, from accessing, withdrawing, transacting, interfering or dealing in any manner whatsoever with Cheda Links Groups Limited - Account No. 0021001XXXX held at the 2<sup>nd</sup> Interested Party Bank, Credit Bank Limited, Koinange Street Branch, Account Number 0121019XXXX held in the 2<sup>nd</sup> defendant's names (Qonta Works Company Limited) at the 2<sup>nd</sup> Interested Party Bank, Credit Bank Limited, Thika Branch;
- ii. Costs of the application dated 6<sup>th</sup> August, 2024 are granted to the plaintiff;
- iii. The application dated 9<sup>th</sup> August, 2024 is dismissed for lack of merits with costs being granted to the plaintiff; and
- iv. The plaintiff shall give an undertaking as to damages within fourteen (14) days from today.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF OCTOBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Kimaiti for the plaintiff

Mr. Odera for the defendants

Ms B. Wokabi – Court Assistant.

