



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO E129 OF 2021

GABRIEL KARIUKI GITONGA.....1ST PLAINTIFF/APPLICANT

EUNICE WAMBUI NDIRITU.....2ND PLAINTIFF/APPLICANT

PURITY WANGECHI MURINGI.....3RD PLAINTIFF/APPLICANT

VERSUS

REDKEN WELLS LTD.....1ST DEFENDANT/RESPONDENT

PETER MACHARIA MWANGI.....2ND DEFENDANT/RESPONDENT

SIMON MURIITHI NJAGI.....3RD DEFENDANT/RESPONDENT

MOSES WANJOHI KAIRONGE.....4TH DEFENDANT/RESPONDENT

TRACY EMILY N. NDUNG'U.....5TH DEFENDANT/RESPONDENT

MARY WANJIKU MBUGUA.....6TH DEFENDANT/RESPONDENT

TIMOTHY KANYONJI KARIUKI.....7TH DEFENDANT/RESPONDENT

EVALYNE WANJIKU KARIUKI.....8TH DEFENDANT/RESPONDENT

BERNICE GATAKAA BOORE.....9TH DEFENDANT/RESPONDENT

SIMON KANUHI NDUNGU.....10TH DEFENDANT/RESPONDENT

FREDRICK KIARIE NJONJO.....11TH DEFENDANT/RESPONDENT

SUSAN WANJIRU KANYONJI.....12TH DEFENDANT/RESPONDENT

RULING

1. This is a ruling on the defendants' Notice of Motion dated 31/03/2021. It was brought under **Order 40 Rule 7 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act CAP. 21 of the Laws of Kenya.**

2. The application sought orders for the discharge or setting aside of the temporary injunction made of 19/3/2021. That order had restrained the directors of the 1st defendant/applicant (hereinafter "the Company") from, *inter alia*, disposing off any assets of the 1st defendant or withdrawing any funds from its account number 01158537300300 held at Co-operative Bank pending the hearing and determination of the application dated 11/3/2021.

3. The application was supported by the Affidavit of **Peter Macharia Mwangi** sworn on 31/3/2021. It was averred that the impugned order was prejudicial to the company as it is a going concern with financial obligations to third parties who are not parties to the suit. That the

company was in need of funds to run its day-to-day affairs and did not hold any other account from the one frozen.

4. That the order of 19/3/2021 was never served as a result of which the 2nd, 3rd, 6th, 7th, 8th, 9th, 10th and 12th applicants held the Special General Meeting of 20/3/2021 whereby the respondents were removed from directorship of the company. That unless the orders sought were granted, the operations of the company will ground to a halt and breach 3rd party obligations leading to possible legal action against it.

5. The respondents opposed the application vide a replying affidavit of **Gabriel Gitonga** sworn on 16/4/2021. It was contended that the applicants had failed to demonstrate any grounds for discharge of the injunction. That no evidence was tendered of the title for the alleged land where the farming project was being undertaken.

6. The applicants filed a supplementary affidavit of **Peter Macharia Mwangi** reiterating the losses the company risked to suffer if the orders sought were not granted.

7. The parties filed their respective submissions dated 19/4/2021, respectively which the Court has carefully considered. The bone of contention is the freezing of the aforesaid bank account which the applicants contend has grounded the operations of the company. That the company needs to access the account to pay legal and accountants fees among other payments. However, the payment of Kshs. 12,000/- for the caretaker is not contested.

8. The issue for determination is whether the applicants are entitled to the discharge of the injunction. The applicants are entitled to have made the application as **Order 40 Rule 7 of the Civil Procedure Rules** allows the making of such applications. The rule provides: -

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

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

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

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

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

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

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

a) The applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge.

b) The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made sufficient inquiries.

c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.

d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the Judge in the application.

e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

f) Finally, it is not every omission that the injunction will be automatically discharged".

12. Material non-disclosure is a serious issue which, once the court is made aware of it, would lead to the setting aside and discharge of an ex-parte order forthwith. Good faith is so central in an ex-parte circumstances that a party who approaches the court in such circumstances must be absolutely truthful.

13. In the present case, there is no allegation that there was any material non-disclosure. The main ground for the application is that the company will face financial challenges as a result of the ex-parte orders of 19/3/2021. That the company risks legal action from 3rd parties to whom it is legally bound to make payments.

14. It was not demonstrated that the order was obtained either by non-disclosure of any material fact, fraud, irregularity or mistake. The applicants only mentioned, in their submissions of 19/4/2021 that the respondents were guilty of concealment of material facts. They did no more. The alleged material facts were not disclosed or particularized. Evidence of such facts is material to move a court to disentitle a party who has already convinced the court that he is entitled to an order.

15. The Court notes that the grounds put forth by the applicant are those that would be remediable by damages should the respondents' cause fail. In **Kenya Electricity Transmission Company Limited v Kibotu Limited (supra)**, the court opined: -

“Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit. The grant of interlocutory injunctions is not meant to occasion prejudice to any party. In this particular case the defendant would be able to be compensated by way of damages if the court finds that the plaintiff did not deserve the grant of the injunction. The damages can be quantified and I notice that the defendant has filed a counterclaim seeking for aggravated general damages for trespass to the land and damage to the crops, general and punitive damages for nuisance and disturbance. These are monetary in nature which can be granted if the defendant’s counterclaim succeeds.”

16. In **St Patricks Hill School Ltd v Bank of Africa Kenya Ltd [2018] Eklr**, the court referred to the principles laid down by DR SPRY in his book on **equitable remedies 6th edition LBC page 447** wherein it is stated: -

“Interlocutory injunctions concern with (a)The maintenance of a position that will more easily enable justice to be done when its final order is made and (b)an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances”.

17. It should be appreciated that the purpose of an interlocutory injunction is to enable the court to do justice after a determination of the merits of a case. In the present case, even the main application itself has not been heard. It is slated for hearing in a fort night. There are no grounds to interfere with the order of 19/3/2021.

18. Be that as it may, the Court notes that there was agreement between the parties that the caretaker should be paid Kshs. 12,000/= from the sequestered account. This was contained in a resolution of the company made on 12/10/2019 which approved the expense.

19. In this regard, I allow the variation of the order of 19/3/2021 and allow the signatories of the subject account to withdraw a sum of Kshs. 12,000/= every end month from 30/4/2021 (now past) until further orders of the Court. The said amount is to solely cater for the salary of the caretaker.

20. Accordingly, the application partly succeeds as follows: -

a) That the order dated 19/3/2021 is hereby varied only to the extent that the signatories of the 1st Defendant’s bank account No. 01158537300300 held at Co-operative Bank be allowed to withdraw a maximum of Kshs. 12,000/= (Kenya Shillings Twelve Thousand Shillings Only) per month, from 30/4/2021 (now past) for the sole purpose of paying the caretaker’s monthly salary until the application dated 11/03/2021 is determined and/or further orders issued.

b) Each party to bears its own costs.

It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2021.

A. MABEYA, FCI Arb

JUDGE