REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 433 of 0F 2015

IN THE MATTER OF AN APPLICATION BY CARRON CREATIONS LTD AND VEEPSONS INVESTMENTS LTD

AND

IN THE MATTER OF THE PROCEEDINGS, JUDGEMENT AND

THE =CLOSING ORDERS OF THE CHIEF MAGISTRATE, CITY

COURT, (T.W. MURIGI) IN CRIMINAL CASE NO. 635A OF 2015.

AND

IN THE MATTER BETWEEN:

THE REPUBLIC ……..…….…….....…APPLICANT

AND

THE CHIEF MAGISTRATE, CITY COURT

(T.W. MURIGI) …….....…...RESPONDENT

SAYANI INVESTMENTS LTD……..…….INTERESTED PARTY

EXPARTE: CARRON CREATIONS LTD

VEEPSONS INVESTMENTS LTD

RULING

Introduction

1. The applicants herein, **Carron Creations Ltd** and **Veepsons Investments Ltd**, commenced these judicial review proceedings by way of a Notice of Motion dated 9th December, 2015 seeking the following orders:

> **1. That an Order of Certiorari do issue to remove into this Court and to quash the Proceedings, Judgment and the Closing Orders of the Chief Magistrate, City Court, T.W. Murigi, made on 10th November 2015, and on 1st December 2015, in Criminal Case No. 635A**

of 2015, and or, any other subsequent Orders made by that Court.

2. That the Respondent to pay the costs of this Application.

Ex Parte Applicants' Case

2. According to the Applicants, **Carron Creations Ltd** has been in occupation of the Tenancy premises within Philadevia House, on L. R. No.209/675, Tom Mboya Street, Nairobi, since October 1992, where it has been operating its shop business on the Ground Floor. It was however averred that there is no written Tenancy Agreement between **Carron Creations Ltd** (hereinafter referred to as "the Landlord") and Landlord, **Sayani Investments Ltd,** the interested party herein (hereinafter referred to as "the Landlord").

3. Based on legal advice, the Applicant believed that in the absence of a written Tenancy Agreement, **Carron Creations Ltd** enjoys a *"Controlled Tenancy"* status in their shop premises, in terms of Section 2 of ***The Landlord and Tenant (Shops, Hotels, and Catering Establishment) Act, Cap. 301 of the Laws of Kenya*** (hereinafter referred to as "the Act").

4. It was averred that sometime in the month of August 2013, the Landlord served the Tenant with a Tenancy Termination Notice, dated 16th August 2013, pursuant to pursuant to the provisions of section 4(2) of the Act seeking to terminate the tenancy with effect from 1st November 2013. On 16th October 2013, the Tenant filed a Reference at the Business Premises Rent Tribunal, Nairobi, as required by section 6 of the Act being **BPRT Case No. 662 of 2013**, which case is still pending before the Tribunal.

5. It was averred that on 10th September 2015, the Tenant filed a Complaint against the Landlord, at the Business Premises Rent Tribunal, being **BPRT Case No. 653 of 2015**, after the Landlord threatened to disconnect electricity to the building and on the same day, the Tribunal issued orders against the Landlord, restraining it from disconnecting electricity or in any other manner interfering with the tenant's quiet and peaceful enjoyment of the tenancy premises, pending hearing and determination of the Complaint which complaint is equally pending. On 21st November 2015, the Tenant Carron was again forced to file a Complaint against the Landlord at the Business Premises Rent Tribunal, then sitting in Kisumu, after the Landlord, without any explanation threatened to throw out the Tenants goods and close down the shop. Once again, the Tribunal issued Orders against the Landlord in **BPRT Case No. 873 of 2015**, to restrain the Landlord from evicting the tenant or from obstructing the tenant's access to the tenancy premises.

6. The Tenant averred that in spite of the orders of the Business Premises Rent Tribunal, the Landlord, using a gang of people, broke into the shop and sealed off the shop using corrugated iron sheets such that, the Tenant was not able to access the premises. It was averred that it was only when the assistance of the **Officer Commanding Station (OCS), Kamukunji Police Station**, Nairobi, was sought to enforce the last Tribunal's order issued in Kisumu on 23rd November 2015, that, the Tenant learned of the Chief Magistrates Orders made on 10th November 2015 and on 1st December 2015.

7. The Applicant contended that the Chief Magistrate, City Court, **T.W. Murigi**, in making the Closing Orders acted without jurisdiction, in view of the unequivocal provisions of section 4(1) of the Act and the Judgments of this Court in the cases of **Republic –vs-Kisanga & Others 1990) KLR 97** and **Indo Company Lt & 4 Others –vs- The Senior Resident Magistrate, City Court - Misc. Civil Application No. 1091 of 2007** (unreported)**.**

8. It was the Applicants' case that section 120(9) of the ***Public Health Act***, pursuant to which the Chief Magistrate made the Closing Orders applies to dwelling houses only and not to commercial buildings, and that, the Chief Magistrate does not have the power and or jurisdiction to make a Closing Order in respect of a commercial building. **Accordingly,** the Chief Magistrate did not have the jurisdiction to make Orders interfering with the tenant's quiet possession and enjoyment of the tenancy premises, in total disregard of the tenant's rights as conferred by the Act.

9. The Applicants contended that the prosecution was a conspiracy between the Landlord and Officers from the Public Health Department of the Nairobi County, which was intended to result in the eviction of the tenants in the building, thus circumventing the mandatory requirements of the Act as appertains to the process of terminating "controlled tenancies".

10. It was reiterated that under section 120 (9) of the ***Public Health Act***, Chapter 242 of the laws of Kenya, the Chief Magistrate did not have the power and, or the jurisdiction to make the Closing Order, in view of the fact that, a Closing Order under that section can be made only in respect of human dwellings, as defined under section 2 of the Act.

11. In support of their case the applicants relied on the decision of **Nyamu, J** (as he then was) in **Indo Company Ltd & 4 Others vs. Senior Resident Magistrate City Court [2008] eKLR** where he expressed himself as follows:

> **"It is not in dispute that the premises in question or building was at the material time being used as trade premises. However it is crystal clear to the court that the power for the lower court to grant a closing order only relates to dwellings. Section 2 of the Public Health Act Cap 242 defines "dwelling" as any house, room, shed, hut, cave, tent, vehicle, vessel or boat or any other structure or portion whereof is used by any human being for sleeping or in which any human being dwells. Trade or Business premises are therefore outside the purview of a closing order and are regulated by other laws."**

Respondent's Case

12. In opposition to the application the Respondent filed the following grounds of opposition:

> **1. The Application is frivolous vexatious and an abuse of court process.**
>
> **2. The application is premature, without merit as the respondent is till seized of the matter.**
>
> **3. The issues of jurisdiction can be ventilated in the matter before the respondent.**
>
> **4. The respondent acted within its jurisdiction under the Public Health Act.**
>
> **5. The application is an affront to the laid down procedure as prescribed by the Fair Administrative Action Act more specifically Section 9(2) and is therefore an abuse of the court process.**

Interested Party's Case

13. In opposing the application, the Landlord averred that the Ex-parte Applicants are guilty of material in-disclosure and misrepresentation coupled with falsehoods and are not deserving of any orders of this Court.

14. It was averred that the Interested Party herein is a limited liability company and indeed the proprietor of the property known as L.R 209/675 Philadelphia House, Hakati Road opposite Afya Centre (hereinafter referred to as the premises) and that the ex-parte applicants have been tenants of the Landlord where they had let part of the premises on the ground floor which they in turn had entirely sub-let to other tenants. It was contended that the ex-parte Applicants do not run any actual business on the premises other than being brokers who without the consent of the Landlord sub-divided the part of the premises which they had rented from the Landlord without the necessary approvals from the County Government of Nairobi making the same illegal and consequently exposing the Landlord to prosecution for contravening the law.

15. According to the Landlord, the relationship between them was purely contractual and within the ambit of private law and is not subject to judicial review. It was therefore the Landlord's case that the Ex Parte

Applicants want to steal a match against it by using public law to impose a contractual obligation on the Landlord.

16. According to the Landlord, the ex Parte Applicants did not disclose to this Court that prior to this they had filed Judicial Review Miscellaneous Application Number 411 of 2015 where the issues raised therein are directly and substantially similar to the ones herein except that in the other case they admit being out of possession while in the instant case they have misrepresented to the court that they are in possession and it is only their access to the premises which is hindered by the sealing and hoarding of the premises. Further, the ex Parte Applicants did not disclose to this Court that the orders they sought to stay had already been executed hence stay of the orders had been overtaken by events.

17. The Landlord asserted that during the duration that the ex-parte applicants have been the main tenants in the building the same has fallen into a state of total disrepair and despite the Landlord's attempts to have the same repaired the Ex-parte Applicants have frustrated its efforts. Due to its state of disrepair and hazardous condition the Medical Officer of Health on 28th May, 2015 issued a compliance notice requiring the Landlord to comply with the following conditions within 21 days of the notice:

(i) To bring all the defective floors of the premises to a smooth finish .

(ii) To repair the cracked canopy and line the same with a damp proof membrane to avoid penetrating dampness.

(iii) Demolish all the partition therein in all the floors that do not meet public health standards or avail approved plans for the same.

(iv) Provide adequate sanitary facilities in all the floors for both male and female.

(v) Replace all the leaking drainpipes of the entire building.

(vi) Repair the leaking roof.

(vii) Repair the defective water closets.

(viii) Provide an alternative fire exit in all the shops.

(ix) Rectify all the signs of dampness.

(x) Repair all electrical and plumbing faults therein.

(xi) Repair all fire detectors.

18. It was averred that the said Compliance Notice was served upon all tenants but the Ex-parte Applicants refused to vacate and/or give way for the renovations to be done. However, Toprank Holdings Limited who were the main tenants occupying the whole of 1st , 2nd , 3rd and 4th Floor of the premises which they had sub-let to several tenants in turn gave a Notice to vacate to their sub-tenants who indeed vacated the premises paving way for renovations on the said floors. On their part, the ex-parte Applicants totally refused issue a similar notice to vacate to their sub-tenants despite the ongoing renovations and condition of the building which is hazardous to the general public as found by the Medical officer of Health, the Nairobi City County Structural Engineer and indeed the Court upon site visits.

19. According to the Landlord, due to lack of cooperation from the ex-parte Applicants it was unable to comply within the stipulated notice period and was consequently summoned to appear in Court on 27th July, 2015 on which day it was charged under Case number 635A of 2015, in the Chief Magistrate's Court at City Court with failing to comply with a notice issued contrary to section 115 as read with section 118 and 119 punishable under sections 120 and 121 of the ***Public Health Act*** CAP 242 Laws of Kenya and as contained in the ***Statute Law (Miscellaneous Amendments) Act*** no. 2 of 2002 in respect of

Public Health Act 242 Penalties and was released on a cash bail of Kshs. 50,000/-.

20. It was averred that the said Court made a site visit and actually conducted a hearing at the site prior to issuing the closing order yet the Ex-parte Applicants who claim to be running shop businesses at the premises still claim not to be aware of the proceedings before the Chief Magistrate at City Court. Further, a Structural Engineer from County Government of Nairobi visited the premises and gave a report stating that it was totally unsafe for the type of renovations that were going on to take place while the building was occupied, hence the closing order by the court.

21. It was the Landlord's position that the Respondent acted within the law as she was exercising jurisdiction under the ***Public Health Act***. The Landlord however contended that the tenants who were in actual occupation until 20th November, 2015 peacefully and voluntarily vacated the premises in accordance to the court order issued by Chief Magistrate at City Court sitting as the Public Health Court on 10th November, 2015.

22. It was contended that the Notice of the proceedings in the Chief Magistrate's Court were served on all parties at the commencement of the same and the same were subsequently re-served upon the directions of the court. In any event the Ex-parte Applicants have always been aware that at some pint they have to pave way for renovations and that the place will be hoarded and cannot therefore play victim. It was disclosed that the Landlord lawfully sought the assistance of the Enforcement Unit from the County Government of Nairobi and the O.C.S Kamukunji to ensure that the vacation of the actual tenants from the premises was peaceful and secure.

23. The Landlord's case was that contrary to the Ex-parte Applicants' allegations the entire building is closed down and hoarded in accordance to the court orders issued by the Chief Magistrate's Court at City Court and that the Ex-parte Applicants have since the peaceful vacation of the actual tenants from the premises maliciously and without any colour of right or backing of the law attempted to forcefully re-enter the premises and in the process have illegal removed the hoarding around the premises which action has exposed the Landlord to imminent prosecution by the Nairobi City County for contravening the law. Over and above that the removal of the hoarding by the Ex-parte Applicants is causing unnecessary astronomical losses to the Landlord since for every day that the Landlord has not fully abated the nuisance as directed by the Medical Officer of Health it is liable to a daily fine of Kshs. 1500/- which currently stands at Kshs. 300,000/- the notice having been issued on 28th May, 2015 and if the renovations are delayed further that figure will continue growing to an astronomical amount to the Interested Party's financial detriment as well as loss of rental income which is in the tune of millions per month as a result of delayed completion of the renovations.

24. It was the Landlord's position that the Ex-parte Applicants have not demonstrated that their case is one fit for the grant of the orders of Judicial Review, *to wit*; Certiorari as they have not in any way demonstrated that the Respondent acted in excess of the powers conferred to her in exercise of her jurisdiction. To the Landlord, the Application herein is actuated by the Ex-parte Applicant's parochial commercial interests in blatant disregard of the greater public interest which is to protect the actual tenants who were in occupation of the premises and the thousands of Kenyans who come to shop there from its hazardous nature in its current state and condition as the building was majorly a shopping arcade.

25. It was averred that the Ex-parte Applicants have in the past attempted to use purported mandatory injunctive orders of the Business Premises Rent Tribunal to force their way back into the premises which is currently uninhabitable. Further, the Ex-parte Applicants have since obtaining the stay orders granted herein once again attempted to force their way back into the premises.

26. It was averred that if anyone suffers injury while in the premises it is the Landlord who will be solely liable for the consequential criminal prosecution and compensation and not the ex-parte Applicants who are determined to further their commercial interests even if it means exposing the general public to injury.

27. It was therefore averred that this Application herein is not merited and is only a bid by the Ex-parte Applicants to stifle the Respondent from carrying on her mandate so as to achieve their parochial

commercial interests. It was therefore contended that it is in bad faith and contrary to the rules of natural justice for the ex-parte Applicant to allege a collusion between the Medical Officer of Health and Interested Party, which allegations are in any event denied by the Interested Party and fail to enjoin Medical Officer of Health as a necessary party so that he can defend himself and as such the said allegations should be treated with the contempt they deserve and consequently be expunged from the record and the application be dismissed with costs.

28. In support of their submissions the Landlord relied on **Mohamed Saeed Khan v City Commission of Nairobi [1994] eKLR** in which **Oguk, J** expressed himself as follows:

> ***"I think, with respect, that the point which learned counsel for the applicant sought to introduce between "dwellings" and "premises", may at best be termed as a distinction without a difference. I do not think that it was the intention of the Legislature to restrict the powers of the courts to issue closing orders where a nuisance exists which renders a building inhabitable to only those premises which were being used as dwellings. Public health matters are so fundamental to the lives of the people in general that it could not have been the intention of the Act only to protect those human beings who were dwelling or sleeping in certain rooms in one building and not those in the same building who were carrying out business. It would be disastrous, so I believe, to accept the reasoning of Mr Shehmi, that once a business cum-residential building as was the case here is found to constitute a nuisance, then only those parts that are being used for sleeping or dwelling could be ordered closed. Once a building is condemned as unfit for habitation, it matters not that it is a residential or a business premises or both…*** **I may add that it is the health of those who occupy such premises either for purposes of dwelling or carrying out business that the Act aims to protect. If it becomes necessary to close any premises on health grounds, then a magistrate to whom such a complaint is lodged and who is satisfied that a nuisance exists that renders such premises inhabitable, may proceed in addition to any other penalties prescribed, issue a closing order.**
>
> **I am not prepared to give any narrower interpretation as was suggested by learned counsel for the applicant to s 120(9) of the Public Health Act so as to restrict its scope and operation to dwelling houses only. In my ruling, it applies to all premises whether used for dwelling or business. Given the prevailing shortage of decent housing in major urban centres in this country where rooms which were meant strictly for business are also used by occupiers thereof as dwellings, the Courts cannot afford to give section 120(9) of the Public Health Act any more restrictive application. It is common knowledge that many people in several towns in this country do live behind their business premises or *kiosks*, where such premises have no toilet facilities or running water such that the health of those working there or occupying such premises is endangered. In these circumstances the Courts in suitable cases could perfectly issue closing orders."**

29. It also relied on **Republic vs. Kisanga & 8 others[1989]eKLR** where it was held that:

> ***"Where the nuisance proved to exist is such as to render a dwelling unfit, in the judgment of the court, for human habitation, the court may issue a closing order prohibiting the use thereof as a dwelling until in its judgment the dwelling is fit for that purpose; and may further order that no rent shall be due or payable by or on behalf of the occupier of that dwelling in respect of the period in which the closing order exists; and on the court being satisfied that it has been rendered fit for use as a dwelling the court may terminate the closing order and by a further order declare the dwelling habitable, and from the date thereof such dwelling may be let or inhabited."***

Determination

30. I have considered the foregoing.

31. The first issue to be determined is whether the Applicants are guilty of material non-disclosure. The

law on this issue is clear that where a party, at the ex parte stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. This was appreciated in **Ibrahim, J** (as he then was) in **Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya [2005] 1 KLR 242** where the court held that:

> **"It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant. This is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure; failure to do so will result, in appropriate cases, in the discretion of the Court being exercised against (a claimant) in relation to the grant of (a remedy)."**

32. I also associate myself with the position adopted in **Hussein Ali & 4 Others vs. Commissioner of Lands, Lands Registrar & 7 Others (2013) eKLR** that:

"It is well settled that a person who makes an ex-parte Application to 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 by him. That is perfectly plain and requires no authority to justify it."

33. However, what is material and what is not must depend on the particular circumstances of the case. The issue was deliberated upon at length in **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated:

> **"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 the 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 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 there 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 include; (i) The duty of the applicant is to make 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 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 sufficient 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 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. (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 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 in 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 every omission that the injunction will be automatically discharged. A *locus pentitentiae* (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…In the instant case the so-called material facts repeatedly alleged to have been either suppressed, concealed or not disclosed by the respondents are only two pending applications which were never heard nor determined by the superior court. It is submitted that the court was consequently misled but the court cannot understand how this could be so…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 no 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 in any sense misleading. Granted that the respondents did not inform the learned Judge of the pending applications, the issue 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 the suit had not been heard on merit. He was also concerned that 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".

34. In my view, an advocate as an officer of the court owes the Court a duty to prod his client as to the existence of any proceedings which the advocate ought to have reasonably been put on notice from the nature of the documents availed to him as to whether there is a possibility of existence of similar prior proceedings and their relevance to the present proceedings in order to disclose to the Court all relevant material. When on the face of the instructions given to the advocate it would appear that the said instructions form the basis of existing court proceedings, the failure by the advocate to pursue such course may well amount to a failure to disclose material facts if it turns out the existence of those other proceedings were material to the determination of the matter especially at an *ex parte* stage. In any case, the non-disclosure of material fact is not to be pegged on the facts known to an advocate but the facts as known to the party instructing an advocate. Where a party fails to disclose material facts to his counsel such non-disclosure cannot be excused on the ground that counsel was not appraised of the existence of the said facts. This was the position adopted in **Brink's MAT Ltd vs. Elcombe [1988] 3 All ER CA 188** where it was held that:

"…The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers…"

35. This position as appreciated by **Ibrahim, J** (as he then was) in **Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya [2005] 1 KLR 242** where he held:

"The requirement of full and frank disclosures by applicants in judicial review is the same as in injunction applications. There is no criteria for lowering of standards in the said

statements. It does not matter the type of case or matter, once a matter is before the Court in the absence of another or other parties (*ex parte)* the duty of full and frank disclosures are imposed on applicants and the standard must always be fairly high considering the authorities. The rule of the court requiring *uberima fides* on the part of an applicant for an *ex parte* injunction applies equally to the case of an application for the rule *nisi* for a writ of prohibition and if there is suppression of material facts by the applicant, the Court would refuse a writ of prohibition without going into the merits of the case. It is the duty of a party asking for an injunction to bring under the notice of the court all the facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts, which he has omitted to bring forward. Every fact must be stated, or even if there is evidence enough to sustain the injunction, it will be dissolved. If the applicant does not act with *uberima fides* and put every material fact before the court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application. Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant and once that confidence is undermined, he is lost. The court must insist on strict compliance with the rules pertaining to non-disclosure to afford protection to the absent parties at the *ex parte* stage… An applicant and its counsel are required to carry out a diligent inquiry on all the facts including the applicable law before making an *ex parte* application and it is the duty of an applicant to inquire as to whether there exists an alternative remedy… It is of fundamental importance that applications for judicial review should be made with full disclosure of all material available to the claimant. This is a case which I can properly use in order to send a message to those who are making applications to this court reminding them of their duty to make full disclosure; failure to do so will result, in appropriate cases, in the discretion of the Court being exercised against (a claimant) in relation to the grant of (a remedy).”

36. Where the Court finds that its process is being abused, it has the inherent power to terminate the proceedings without going to the merits of the case. This position was appreciated by **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** where he expressed himself as follows:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

37. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005** held:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil

and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

38. It must however be emphasised that mere non-disclosure however does not automatically deprive an applicant of the benefit of the ex parte orders. As appreciated hereinabove, 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.

39. What then should the Court do when at *inter partes* hearing it turns out that the applicant did not disclose material facts? It is trite that where a party, at the *ex parte* stage of an application fails to disclose relevant material to court and thus obtains an order from the court by disguise or camouflage the court will set aside the ex parte orders so obtained. This was the position adopted in **Hussein Ali & 4 Others vs. Commissioner of Lands, Lands Registrar & 7 Others (2013) eKLR** where it was held that:

"It is well settled that a person who makes an ex-parte Application to 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 by him. That is perfectly plain and requires no authority to justify it."

40. See also **R vs. Kensington Income Tax Commissioners, ex p. Princess Edmond de Polignac [1917] 1 KB 486** and **The Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited C.A. No. 50 of 1989** .

41. In **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others Civil Application No. Nai. 140 of 1995,** it was held that if the Court finds at the time of *inter-partes* hearing that there was lack of disclosure at the time of *ex-parte* application it should strike out the application. In **Margaret Nduati & Another vs. Housing Finance Company of Kenya Nairobi (Milimani) HCCC No. 307 of 2001** it was held that a person who makes an *ex parte* application to the Court is under an obligation to the Court to make the fullest possible disclosure of material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceeding and he will be deprived of any advantage he may have already obtained by means of the order, which has thus wrongly been obtained by him.

42. In **Johnson Kimeli vs. Barclays Bank of Kenya Ltd. Kisumu HCCC No. 171 of 2003**, it was held that:

"Where the plaintiff is seeking an equitable remedy he must show a good account of himself for the Court would be reluctant to extend its hand to a person with dirty and unclean hands for he would soil the hands of justice. Secondly a Court would not allow a person to benefit from his own wrong for that would amount to judicial treason...The failure to make a candid

disclosure of all material and essential facts would militate against the person concealing that evidence or facts from the Court...There is an obligation upon a person seeking an equitable remedy of injunction to make full disclosure and to show expression of good faith... The courts would be strict on non-disclosure of material facts by a party seeking an *ex parte* order more so when he has obtained the orders by concealing important material from the Court at the first instance."

43. For a party to fail to disclose material facts or to disclose them in such a way as to mislead the court as to the true facts, amounts to abuse of the Court process and the court ought, for its own protection and to prevent an abuse of the process, to refuse to proceed any further with the examination of the merits.

44. In this case it was contended that the applicants failed to disclose the existence of Judicial Review Miscellaneous Application No. 411 of 2015 instituted on 23rd November, 2015 which raised issues directly a substantially similar to the issues raised herein. Copies of the said proceedings were exhibited to these proceedings and it is clear that the parties are the same. The said proceedings were commenced on 23rd November, 2015. The closing order which is the subject of these proceedings was issued on 10th November, 2015. From the said earlier proceedings it is clear that the applicants were put on notice that a closing order had been issued by the time they commenced the said earlier proceedings.

45. No reason has been given why the orders now being sought in these proceedings were not sought in the earlier proceedings. It is not explained to the Court why, if it was necessary to institute these proceedings, the said earlier proceedings were not deemed fit to be withdrawn before these proceedings were instituted. In fact the applicants have maintained a "deafening silence" both in their pleadings and in the submissions about the existence of those earlier proceedings as if those proceedings do not exist.

46. In my view the failure by the applicant to disclose the existence of the said earlier proceedings not only amounts to non-disclosure of material facts but is also an abuse of the process of the Court which cannot be countenanced.

47. In the premises, these proceedings cannot be entertained by this Court and are accordingly struck out with costs to the Respondent and interested party.

48. It is so ordered.

Dated at Nairobi this 14th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kenyatta for the applicant

Mr Kinyanjui for Mr Mongeri for the Interested Party

Mr Munene for the Respondent

Cc Mwangi