REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, AKIWUMI & TUNOI, JJ.A.)
CIVIL APPEAL NO. 210 OF 1997
BETWEEN

BAHADURALI EBRAHIM SHAMJI ..... APPELLANT

AND

AL NOOR JAMAL.....1ST RESPONDENT

SALIM JAMAL.....2ND RESPONDENT

OXYCO HOLDINGS LTD.....3RD RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Nairobi (Mr. Justice Mbito)
given on the 24th day of February, 1997
in
H.C.C.C. NO. 2386 OF 1995)
****

JUDGMENT OF THE COURT

This is an appeal from the ruling of the High Court of Kenya at Nairobi (Mbito, J.) delivered on 24th February, 1997.

Bahadurali Ebrahim Shamji, the appellant in this appeal, whom we shall hereinafter refer to as "the plaintiff', filed a suit on 29th July, 1995, against three defendants namely, Al Noor Jamal, Salim Jamal and Oxyco Holdings Limited, the first, second and third respondents in this appeal, whom we shall hereinafter refer to as Jamal, Salim and Oxyco, respectively. It was averred in the plaint that the plaintiff is the majority shareholder in Oxyco being holder of 55% of the issued shareholding whilst the remaining 45% is held by Jamal. There are three directors of

Oxyco, namely, the plaintiff, Jamal and his younger brother, Salim. It is complained that this set up has made Jamal and Salim to act oppressively in that despite the plaintiff's majority shareholding in Oxyco they are able to take decisions at meetings of the Board of Directors of Oxyco detrimental to the plaintiff's interests and favourable to their interests.

Oxyco is said to be the holding company of Uganda Oxygen Limited, a limited liability company incorporated in Uganda and whose business, inter alia, is the manufacturing of oxygen at its factory in Kampala. Oxyco holds all the issued shares of Uganda Oxygen Limited except one share which is held by Jamal in trust for Oxyco.

It is common knowledge that disputes and differences have arisen between the plaintiff on the one side

and Jamal and Salim on the other with respect to the control over Oxyco. Consequent upon these disputes and differences, the plaintiff has instituted suits being H.C.C.C. No. 5451 of 1993, in Nairobi and H.C.C.C. No. 282 of 1994 in Kampala. The former suit arose in the following manner. By notice dated 8th November, 1993, served on the plaintiff, Jamal called an emergency meeting of the Board of Directors of the Oxyco to pass, inter alia, the following resolutions:-

> ***1.To receive a report on litigation brought in the name of the Company in Uganda and to pass such resolutions in connection therewith as the Board shall think fit.***
>
> ***2.To receive a report on the purported issue of shares in the Company and pass such resolutions in connection therewith as the Board shall think fit.***

It is apparent that this notice triggered off a suit and multiple interlocutory applications. On 10th November, 1993, after filing suit against the respondents, the plaintiff obtained ex parte injunction preventing the holding of the said meeting. However, the plaintiff could not serve the injunctive order on the respondents in time and the meeting took place whereat certain resolutions, obviously not to the liking of the plaintiff, were passed. The plaintiff went back to court in the afternoon of the same day and obtained a second injunction restraining the respondents from implementing the resolutions passed at the aforesaid meeting. But, when the respondents were served with the order on 11th November, 1993, they maintained that they had already implemented the resolutions.

It is averred by the plaintiff that despite the second injunction order, the respondents held a meeting of the shareholders of Uganda Oxygen Limited on 23rd May, 1994, where they passed a unanimous resolution removing the plaintiff as a director of Uganda Oxygen Limited. He has thereafter issued requisitions for Extraordinary General Meetings of Oxyco under Section 132 of the Companies Act to discuss various issues and to pass resolutions on them but all have been frustrated by Jamal and Salim who constitute the majority at the Board. The plaintiff, in particular, lodged a requisition dated 21st June, 1995, for an Extraordinary General Meeting to consider and pass a resolution to appoint Rashid Sheikh and Badrudin Shamji as directors of Oxyco. But, to frustrate this move by the plaintiff to pack the Board with his nominees, Jamal by a notice dated 1st July, 1995, called a meeting of the directors of the said company to be held on 10th July, 1995, which meeting took place at the Boardroom of Messrs Kaplan & Stratton, Advocates, Nairobi.During the meeting chaired by Mr. Keith, Advocate, and also attended by the plaintiff, Jamal and Salim, it was resolved not to hold the requisitioned Extraordinary General Meeting earlier than 21st September, 1995. It is contended by the plaintiff that the resolution was passed despite his objection and by improper exercise of their majority at the Board by both Jamal and Salim. Immediately after this Mr. Keith and Jamal proceeded to deal with the affairs of Uganda Oxygen Limited and appointed Shabir Abji and Salim Jamal as its directors despite the plaintiff's protestations. The effect of this addition of directors, the plaintiff alleges, is to oust him, the majority shareholder, from participating in and having any say in the implementation of the above resolutions and to take over the management of the said company and vest it in the directors nominated and/or appointed by the minority shareholder. It is stated in the plaint that there has been no Annual General Meeting of Oxyco since 1992.

The plaintiff went to court in the light of these averments and sought a multiplicity of reliefs which included an order to compel Oxyco to hold an Extraordinary General Meeting of its members to consider and pass the following resolutions:

> ***(i)To appoint four more named directors;***
>
> ***(ii)To revoke all resolutions passed on 10th July, 1995;***
>
> ***(iii)To declare null and void the meeting whether general, extraordinary or annual general meeting of Uganda Oxygen Limited held on or after 10th July, 1993, and all resolutions passed thereat;***
>
> ***(iv)That the Board of Directors of Uganda Oxygen Limited do remain constituted as it was immediately prior to the meeting of 10th July, 1993***.

The plaintiff also sought two prohibitory injunction orders, first, to restrain the Directors of Oxyco from holding any meeting of the Board of Directors between the filing of this suit and the holding of Extraordinary General Meeting prayed for in the suit, and; secondly, to restrain Jamal and Salim from attending and/or voting at any meeting of the Board of Uganda Oxygen Limited until the holding of the Extraordinary General Meeting of Oxyco.

Simultaneously with the plaint, the plaintiff applied ex parte by Chamber Summons under section 3A of the Civil Procedure Act and Order XXXIX of the Civil Procedure Rules for the orders which he had sought and enumerated in the plaint. The application was supported by the affidavit sworn by the plaintiff by which he attempted to justify the granting of the proposed orders. The application came before Hayanga, J. on 28th July, 1995. The learned Judge granted the prohibitory injunction orders as sought and set down the inter partes hearing for 8th August, 1995. This did not occur until 14th September, 1995, when Mr. Nagpal with Mr. Rayani appeared before Mwera, J. to argue the Chamber Summons dated 6th September, 1995, and filed on behalf of the plaintiff. The main prayer sought was as follows:-

> ***"2.That the EGM of the 3rd defendant (Oxyco) scheduled for 21st September, 1995 be proceeded with and be exempted from the orders of this Honourable Court made on 8th and 11th August, 1995 which orders otherwise remain in full force and effect."***

In his ruling made on 20th September, 1995, the learned Judge granted the application as prayed. He observed that the said meeting had for so long been desired by the plaintiff and that no party was likely to be prejudiced by it; and, moreover, notices of the meeting had been duly despatched to all the parties. It is worthy of note that this was a variation of the original order of 28th July, 1995, and the subsequent orders that extended it.

On 6th November, 1995, Salim and his counsel, Mr. Ngatia, appeared before Hayanga, J. and made an oral application for an injunction to issue to restrain the plaintiff from holding Oxyco's Board of Directors meeting on the same day until he had lodged a formal application. Salim gave evidence on oath in support of his application which was granted by the learned Judge. However, it appears that the plaintiff paid no heed to the order of the learned Judge and proceeded to hold the meeting during which he singularly appointed his own nominees to the Board of Directors of Oxyco a deed which made him acquire a numerical strength in the company than the respondents combined.His explanation for holding the meeting despite the existence of the Court order barring it is that the court order was belatedly made some twenty minutes after the event.

When the application came for **inter partes** hearing on 9th November, 1995, Mr. Nagpal for the plaintiff, submitted that the ex parte order granted on 6th and 7th November, 1995, be set aside without going into the merits of the application on the ground that the respondents had failed to make a full and candid disclosure of all material facts to the Court when applying for the injunction. The omission and the non-disclosure alleged being the fact that the injunction order of 28th July, 1995, was varied by Mwera, J. to the extent that Oxyco's Board of Directors was free to hold meetings. The learned Judge, Hayanga, J. in his ruling given on 23rd January, 1996, found for the Plaintiff and vacated the orders given on 6th and 7th November, 1995.

A few days after the delivery of the said ruling, i.e. on 5th February, 1996, the respondents once again took out a notice of motion seeking orders to review, vary or set aside the order made on 3rd November, 1995, on the ground that there was no formal application for the variation of the order made on 28th July, 1995, and it was not by consent. An injunction was also sought to restrain the plaintiff from implementing the resolutions so passed on 6th November, 1995, at the Oxyco's Board of Directors' meeting. This application, like many others in the file of this suit, was never heard.

On 23rd August, 1996, the respondents, yet once again, sought similar orders by another application expressly brought by way of notice of motion under Section 3A of the Civil Procedure Act, Order XXXIX rules 1, 2, 3 and 7, Order 44 rule 1 and Order L rule 1 of the Civil Procedure Rules. Simultaneously, the respondents filed a notice of discontinuance of the two pending applications dated

7th November, 1995, and 5th February, 1996. On the same day Mbito, J. in an **ex parte** hearing granted all the injunctive orders sought in the application and set down the inter partes hearing for 6th September, 1996. On the material day it was by consent adjourned to 6th October, 1996, and the interim orders extended till then. However, the hearing did not take place on the even date and on two other subsequent occasions. Finally, the hearing took off on 13th November, 1996. Again, Mr. Nagpal was permitted to raise a preliminary objection of which notice had been given, that the **ex parte** injunction orders obtained by the respondents on 23rd August, 1996, be discharged without the court descending to the merits of the application as the said orders were obtained by suppression, non disclosure and misrepresentation of material facts.

Mr. Nagpal submitted that the withdrawal of the two pending applications of the respondents was irregular and ineffective since the current application in effect sought substantially the same relief sought in the applications that had been withdrawn. Consequently, he contended, the respondents were precluded from proceeding with the current application since they had abused the process of the court generally and in particular the procedure specially designed for obtaining **ex parte** relief on the basis of urgency. The respondents had also misled the court in to granting the said orders.He averred that the discontinuation was totally wrong as it was not with the plaintiff's consent. He submitted that the respondents had failed to disclose that the application of 7th November, 1995, had in fact been heard and ruled upon by Hayanga, J. on 23rd January, 1996, and, further, that the respondents had not been candid enough as they had not disclosed but had concealed that they had an unserved application on record dated 11th October, 1995, and; that if those orders had been granted, the need for the ex parte orders would not have arisen nor would it have been granted.

The learned Judge condensed the issues before him to this.

> ***(i) Was the existence of the earlier undetermined applications material to the issues in the current application?***
>
> ***(ii) Did the respondents wilfully conceal and suppress these issues from Court?***

In his considered ruling Mbito, J. held that as far as considerations for injunctions are concerned, especially in this case where parties were excelling in obtaining on regular bases **ex parte** injunctions, the fact that any party to the suit had filed an undetermined application would not appear to him to be so material as to bar him from granting an order intended to maintain the status quo and to render justice. The position, he observed, would be different if the applications had been heard and refused on merits and not merely struck out for reasons which could have been remedied in subsequent applications.He distinguished the case of ***The King v. The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington: Ex parte Princess Edmond De Polignac*** [1917] All E. R. 486 from the one before him and saw no relevance in the authority as the respondents had not been found to be not entitled to the orders on merit. He held that no question of wilful concealment and non-disclosure could have arisen in the circumstances.

The learned Judge finally said:

> ***"I find that the existence and/or withdrawal of undetermined applications could not have denied the defendants (respondents) grant of the prayers sought in the instant application. The facts complained of were not therefore necessary for the determination of the application now before the court. I therefore overrule the preliminary objection with costs."***

From this ruling and the resulting order the plaintiff has appealed in a memorandum of appeal containing 20 grounds of appeal. Mr. Nagpal's first limb of submissions on this ruling is that the learned Judge erred in failing to appreciate that the respondents concealed and failed to disclose material facts which if brought to his notice would have resulted in his refusing to hear the application ex parte and would not have made the orders that he did. According to Mr. Nagpal, the respondents' failure to disclose the existence of the previous pending application amounted to concealment and had deprived the

respondents of the right to be heard on merit on their application of 23rd August, 1996, regardless of whether the said application was or was not tenable in law.He submitted that the withdrawals of the pending applications were irregular and ineffective, since they had actually been disposed of, and; that had the learned Judge known or been made aware of this fact, he would not have granted the reliefs sought since the same reliefs had been prayed for twice before and not proceeded with. Mr. Nagpal further submitted that the learned Judge fell into error in considering himself under some obligation to protect the respondents when in law they were never entitled to the reliefs sought. He placed much reliance in the well-known authority of **Princess Edmond de Polgnac: Ex part**e (Supra).

In that case the princess, an American lady, was assessed to pay income tax on her overseas income, on the ground that she was resident in the United Kingdom because she had a house at 213, King's Road, Chelsea. In her application for prohibition, she stated that she had never resided there for six months or more in any one year and that the property belonged to her brother. Unfortunately for her, a disgruntled clerk who had been sacked from the office of her solicitors leaked certain information from which the respondents were able to conclude that she had not only provided the purchase money for the house, but had provided the furniture and had paid every expense thereon. Warrington L. J. at page 509, said:

> ***"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 a sked 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***."

Scrutton L. J. at pages 513 - 514 said:

> ***"Now that 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 f air 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 pena lty 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."***

Mr. Nagpal also cited to us the local authority of ***The Lilian S, (Owners of the Motor Vessel Lilian S) v Caltex Oil (Kenya) Ltd ;*** Civil Appeal No. 50 of 1989 (Unreported). An application had been lodged to arrest the ship in pursuance of the admiralty jurisdiction of the High Court in rem. In order to found the jurisdiction in rem the applicants had to show to the court that they had, prima facie at best a valid action in personam against the owners of the ship. The action in question was for the recovery of Shs.6,000,000/= as the price of gas oil and fuel supplied to the ship for her operation and maintenance within the meaning of section 20 (1) 2 (m) of the (UK) Supreme Court Act 1981, for which the owner would be liable by virtue of section 21 (4) (b) of the same act, for without the necessary link being established between the action in rem and the action in personam, the court would have lacked jurisdiction to arrest the ship.However, the ship was arrested on an application grounded on the affidavit which deponed that a large quantity of oil and fuel had been supplied by Caltex to the Lilian S. The affidavit failed to refer to the highly material telex messages which, had they been shown to the Court, would have almost certainly resulted in the motion of arrest being denied, for they showed that the fuel and oil in question had been supplied to a wholly different company, so that the owners of the ship could not have been liable for it in personam, or consequently, in rem.

It is not in doubt that the applicants for the warrant of arrest of the ship had failed in their duty of candour to the court. They did not reveal the true facts to the judge, for if they had done so, they would

never have been given the relief sought.

Princess Polignac also well knew that her tax liability turned on whether she was resident in the UK, and; no doubt by concealing it, she was intentionally misleading the court. These two cases (supra) are distinguishable from the one before us and have no relevance to this appeal. We were also referred to the case of Brink's - MAT Ltd v Elcombe [1988] 3 All E.R. 188. The speech of Ralph Gibson, L.J. is as follows:

> ***"In considering whether 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 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 maki ng 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 (c) 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 injunctio n without full disclosure is deprived of any advantage he may have derived by that breach of duty.... see Bank Mellat v Nikpour at (91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case . (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 whethe r 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 poenitentiae (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 continue the order, or to make a new order on terms: "***
>
> ***... when the whole of the facts, including that of the origi nal 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."***

We agree with these well settled principles of law. But, 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 consequently was misled. We do not understand how this could be so.

We agree with the forceful submissions of Mr. Nagpal that in all cases of **ex parte** proceedings there must be full and frank disclosure to the court of all material facts known to the applicant. But, we look on the case before us quite differently. What learned counsel's submission overlooks, however, is that there is a vitally important difference between those cases and the present. In the authorities cited to us there

was outright attempt to mislead the Court. The attempts were intentional. In the matter before us, everything was in the Court record and was available to the learned Judge for perusal.

We are unable to find that there was any deliberate concealment on the part of the respondents. The applications dated 7th November, 1995, and 5th February, 1996, as we have said, were in the court file and the notice of discontinuance accompanying the application of 23rd August, 1996, clearly showed what applications were being discontinued. 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 Mbito, J. to know in dealing with the application as made? The answer to this must be in the negative. 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 by damages could be occasioned by a delay. This mode of approach to the matter before him cannot be faulted.

The Extraordinary General Meeting permitted by Mwera, J. did not empower the plaintiff to exercise all manner of injustice against the respondents. The plaintiif sitting as a director unilaterally appointed four more directors of Oxyco out of the maximum seven directors permitted by the Articles of the Company. This is despite the admission by the plaintiff that he is a holder of 55% of the issued shareholding of Oxyco. The consequence of this, it is averred by the respondents, has been to exclude them from the operations of Oxyco. This is the mischief Mbito, J. was out to prevent.

It should be made manifestly clear that the main dispute is the ownership of Oxyco and Uganda Oxygen Limited. The plaintiff avers in the plaint that he is 55% shareholder of Oxyco. The respondents traverse. The issue is not yet tried and the plaintiff should not, in the meanwhile, be permitted to steal a march on the respondents by use of myriad ex parte applications. The only sure way of bringing the dispute between the parties to an end is by trial.Having said so, it suffices to say, with due respect to Mr. Nagpal, that it is our opinion, that this appeal is unmeritorious and ought not to have surfaced in this Court.

There was a reasonable apprehension, as opined by Mr. Oraro, that there was a real fear of the whole substratum of Oxyco and Uganda Oxygen Limited being dissipated by the unilateral actions of the plaintiff and that was what was of main concern to the learned Judge. The course he chose by hearing and granting the orders sought by the respondents was proper in the circumstances appertaining before him.

Mbito, J. having rejected the preliminary objection, it was to be expected that Mr. Nagpal would canvass his submissions during the hearing of the main application. Had he done so, he would have saved costs and time. The learned Judge would have been bound in any case to discharge or vary his ex parte orders which are by their nature provisional. ***See WEA Records Ltd v Visions Channel 4 Lt d & Others 2 All ER p 589.***

The second limb of Mr. Nagpal's submissions is that the **ex parte** injunction orders granted by the learned Judge were a nullity for failure by him to record reasons for hearing the application. Order 39 r 3 of the Civil Procedure Rules provides that where the Court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte . The granting of ex parte injunction is the exercise of a very extraordinary jurisdiction, and therefore the time at which the plaintiff first had notice of the act complained of will be looked at very carefully in order to prevent an improper order being made against a party in his absence. See the 4th Edition of **Halsbury's Laws of England** Vol. 24 at page 961.With regard to Mr. Nagpal's complaint, we are unable to accede to his submission on this point for two reasons. First, the learned judge had been told by Mr. Ojiambo that if the application was not granted irreparable injury would be occasioned to the respondents. The learned Judge stated that he agreed with him. Further, the learned Judge recorded that he had read the facts deponed to in the application and was satisfied that the application was merited. We really do not think he could have been expected to do any more in the matter. The complaint is misplaced. Secondly, even assuming for the purposes of argument only, that the granting of the ex parte orders was wrong, a matter over which we do not agree nor subscribe to, the plaintiff who was represented by an experienced counsel

did not at the first opportunity challenge those orders, but instead, consented on them being extended on more than two occasions. We have no doubt whatsoever that the learned Judge was right in the manner he entertained the ex parte application that was presented before him.

We agree with Mr. Oraro, for the respondents, that the plaintiff had an option under Order 39 r 3 to seek to vacate the injunctive orders by letting the application to set aside the ex parte orders be argued in the normal manner but instead, raised preliminary objections which consequently confused issues and prolonged the trial. This practice is to be discouraged. See the speech of Newbold, P in ***Mukisa Bis cuit Manufacturing Co. Ltd. vs. West End Distributors*** Ltd. [1969] E. A. p. 696. The determination of the inter partes application, one way or the other would have enabled the Court at the earliest opportunity to decide the issues right away on the material before it.

Looking at the case as a whole, it is manifestly clear that the learned Judge was correct in granting the orders sought by the respondents. By doing so, he was not protecting them as alleged by the plaintiff, but was only doing justice to all the litigants. Had the learned Judge not done so, the unilateral acts of the plaintiff would have adversely affected the respondents' interests in Oxyco and Uganda Oxygen Limited, if any. In the result we are of the opinion that the learned Judge came to the correct decision and cannot be faulted. Accordingly, the appeal is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 31st day of July, 1998.

J. E. GICHERU

.....

JUDGE OF APPEAL

A. A. AKIWUMI

.....

JUDGE OF APPEAL

P. K. TUNOI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR