

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 56 OF 2019

HASSAN KIPTOO KOSGEY.....PLAINTIFF

VERSUS

SPRING WEST KENYA LIMITED.....DEFENDANT

RULING

Spring West Kenya Limited (*hereinafter referred to as the defendant/applicant*) has come to court against Hassan Kiptoo Kosgey (*hereinafter referred to as the plaintiff/respondent*) vide application dated 17th May, 2019 praying for orders that the order of status quo granted on the 29th April, 2019 *ex parte* be set aside and the entire suit against the defendant be struck out.

The application is based on grounds that the defendant is registered owner of the suit property and that the plaintiff has never been registered as the proprietor. The defendant bought the suit property from Elite Ventures Limited who bought it in a public auction. The plaintiff did not disclose material facts.

The plaintiff in reply states that the status quo order was issued after the hearing of the application. The plaintiff claims to be the owner of the property in dispute. He claims to have purchased the property from Joseph Wamang'oli in the year 2001.

In the case of **The King Vs 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.”

At pages 513 to 514, Scruton 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)

Later, in the case of **Brinks-MAT Ltd Vs Elcombe (1988) 3 All ER 188**, the Court set out what the court has to consider to be material non-disclosure 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 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 (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 injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.... see Bank Mellat v Nikipour 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 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 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 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.”

I have considered the application and do find that the extract of register does not show that the said Joseph Wamang'oli was ever the proprietor of the suit property and therefore transferred the property to the plaintiff. The sale against between Soy County Club 1987 Ltd and the plaintiff is not sufficient to sustain the order of status quo issued by this court. Had the court been aware of register extract, it could not have issued the order of status quo. I do find that the plaintiff did not disclose to court that the property was not registered in his names. I do find that the order of status quo was issued with material non-disclosure and the same is hereby discharged. The prayer that the suit be struck out is dismissed as the suit raises reasonable cause of action. Costs in the cause.

Dated and delivered at Eldoret this 25th day of July, 2019.

A. OMBWAYO

JUDGE