REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

PETITION NO. 7 OF 2015 CONSOLIDATED WITH

PETITION NO 6 OF 2015

IN THE MATTER OF: ARTICLES 2,10,19,20,21,22,23 & 165 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL, RIGHTS AND FREEDOMS SECURED AND GUARANTEED UNDER ARTICLES 27,35,40,46,47,48 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF CLOSURE NOTICE ISSUED BY COUNTY GOVERNMENT OF UASIN GISHU

BETWEEN

SPREE CLUB LIMITED..PETITIONER/RESPONDENT

VS.

MEDICAL OFFICER OF HEALTH

UASIN GISHU GOVERNMENT..1ST APPLICANT

PUBLIC HEALTH OFFICER

UASIN GISHU COUNTY GOVERNMENT..2ND APPLICANT

UASIN GISHU COUNTY GOVERNMENT..3RD APPLICANT

RULING

Introduction

The application before the Honourable Court for determination is a Notice of Motion dated 1st Day of July 2015. It is seeking that that the interim orders granted herein restraining the County Government of Uasin Gishu, the 3rd Respondent from closing down the petitioners premises be varied, set aside and or vacated. The main ground relied upon by the Respondents/Applicants is that the said interim orders were obtained by non-disclosure of full facts by the Respondent. The foregoing application is supported by Affidavit sworn on 1st July 2015 by Peter Leley. The same is opposed by the Petitioner through Replying

Affidavit sworn on 7th July, 2015 by Charles Kamau Kariuki.

Respondents'/Applicants Case.

The Applicants *vide* Supporting Affidavit sworn by one Peter Leley, the County Secretary of Uasin Gishu on 1st July 2015, have deposed that the closure notice herein which is contested was as a result of blatant contravention of mandatory statutory requirements on part of the petitioner/ respondent. It is deposed that the Petitioners continued use of the basement premises without the express written permission as required by law is not only injurious and dangerous to the public but also an affront to the rule of law. It has been sworn that the Petitioner/respondent who has been operating unlawfully and illegally has approached this honourable court to endorse an illegality. It is deposed further that the petitioner/respondent is guilty of non-disclosure of full material facts within his knowledge and has been issued with interim orders which have been obtained out of deception.

It is further contended that the petitioner/respondent does not even have a valid permit for the year 2015 and is operating on an expired permit for the year 2014. it is deponed that the petitioner/respondent is carrying on business in clear contravention of sections 117, 118 and 151 of the Public Health Act, and is therefore operating illegally which illegality a court of law cannot countenance and especially in the manner sought by the Respondent. It is deponed that it is illegal and unlawful for one to operate on the basement of a building without the express written permission of the Medical Officer of Health. To this end the deponent attached a ruling of the court, being H.C at Eldoret Civil Case No. 13 of 2015.

It is further deponed that the the Respondent's interim orders in force were obtained by deceit as the Respondent has failed to disclose material facts to the court and also made untruthful statements and has therefore committed fraud upon the court and that having come to court with unclean hands is not entitled to the equitable remedies sought and that cannot seek the protection of the court in the manner attempted.

Petitioner's/Respondent's Case

The instant application is opposed vide the Replying Affidavit sworn on 7th of July 2015 by ***Charles Kamau Kariuki.*** It is contended in the foregoing affidavit that the instant application is occasioned by malice, lacks merits and does not meet the requirement of the law to warrant the setting aside of the interim orders in force. It is deposed that the issue as to whether the Petitioner/Respondent is operating in a basement of a building is a contested matter and can only be determined in the main application pending before the Honourable Court. It is deponed that at the time of obtaining the interim orders all the facts were disclosed to the court and the Applicant has failed to disclose any matters that were not disclosed to the court. It is deponed that it would be prudent for the court to hear the main application on merit and that in any case the issue as to whether the Petitioner/Respondent has a license for the year 2015 is not part of the reason why the Petitioner's/Respondent's premises were closed. It is deposed further that in any event the license for 2015 has been applied for and paid for the same. To this end the Petitioner/Respondent attached receipts and marked them CKK1.

It is sworn by the Petitioner/Respondent that the premises in question were inspected by the Applicants/Respondents and found to be fit for operation. To this end the Petitioner/Respondent attached a copy of the report and marked the same CKK2. It is deposed further that the the ruling relied upon by the Applicants/Respondents does not relate to this matter and that the circumstances are different and is not binding on this court as per the principles of law.

Submissions By Counsels

Miss Koech, Learned Counsel for the applicant forcefully submits that the notice of closure was issued pursuant to the Public Health Act and that the petitioners are operating in the basement of a building without the prerequisite permit as required by section 151 of the Public Health Act. She further submits that the respondent does not have a valid Single Business Permit for the year 2015. The gravamen of her submission is that this facts were not disclosed to the court when the petitioner sought interim orders. She cites the decision of Hon ***F. AZANGALALA in Julius W . Mwangi Njunu V H.F.C.K and another.***

Milimani High Court Civil Case NO 504 of 2005 where the learned judge found evidence of material non disclosure.

Mr Kitiwa learned counsel for the petitioner/ respondent argues that the petitioner made full disclosure of material facts of this matter and that the issues raised in the application can be raised at the main hearing of the substantive Notice of Motion. Moreover that the applicants were served but never appeared in court and therefore the application was heard on merit.

Determination.

I have considered the submissions of both counsel, the authorities cited and do find that on the 27th April 2015 when the ***petition no 6 of 2015*** was brought before Hon justice Githua who certified the matter urgent and ordered the respondents to serve the applicants with the application for an inter parte hearing and slated the matter for 4/5/2015. The application was ultimately heard on 5th April 2015 and interim orders granted. While granting the orders the court observed that the petitioner/ respondent did not have the licence for the year 2015 but had applied for the same and was waiting for the response from the Respondent/ Applicant. Similar orders were granted in ***petition no 7 of 2015*** . The two petitions have been consolidated.

In view of the foregoing interim orders, the Applicants in the instant application who are the Respondents in both the Petitions herein and the Notice of Motion dated 27th April 2015 are aggrieved by the said orders and are seeking the same to be set aside. The main reasons being that the said orders were obtained by deceit and that the Petitioner/Respondent failed to disclose material facts to the court and made untruthful statements. **It is trite law that this court has a discretion to set aside interim orders granted exparte, however the discretion ought to be exercised judiciously**

> **"...even where the court has discretion to extend *ex parte* orders, the discretion must be exercised judiciously. What is judicious is as held by the Court of Appeal in *CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173* where it was held as follows:**
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> > ***In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously…... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error.***
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> **12. The court in this case dully considered the nature of orders granted and granted the extensions herein that were reasonable. The interim orders were not to be issued in futility."**

The learned judge in the foregoing case further delivered himself as follows;

> **"In the case of Ruaha Concrete Co. Ltd et al versus Paramount universal Bank Ltd et al, HCCC No. 430 of 2002, the Court outlined in that case the principles of non-disclosure and the consequences which will follow as a result of such non-disclosure.**
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> > ***The duty is not to make full and fair disclosure of all material facts, the material facts are those which 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 assessment of the applicant, and the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to any additional facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. 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 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 or the Plaintiff.

(c) The degree of the legitimate urgency and the time available for the making of the inquiries."

And 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 b 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".

In the instant case, as much as the Respondents/Applicants have emphasized that the Petitioner/Respondent obtained the interim orders herein on failure to disclose material facts, the Applicant/Respondents have not categorically stated what was to be disclosed and the Petitioner failed to disclose to the court.

The Applicants/Respondents seem to fault the petitioner for having failed to disclose to the honourable court that his business is operating in basement contrary to the law. The foregoing is the main issue for determination in this petition. What I understand the Petitioner's main complain to be is that his business was closed up by the Applicants/Respondents for allegedly offending the provisions of the Public Health Act Cap 242, Laws of Kenya without giving him a fair hearing and more so it is the same Applicants/Respondents who cleared him to operate the said business pursuant to a report marked CKK 1.

The foregoing are the main issues that have been raised in the instant petition and are pending to be deliberated upon. It is my finding that the Applicants/Respondents have failed to demonstrate any material fact that was not disclosed to the honourable court by the Petitioner/Respondent that would warrant the setting aside of the interim orders that were granted herein as the petitioner disclosed to court that the licence for the year 2015 had been applied for but not issued. The application is therefore dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF SEPTEMBER, 2015.

ANTONY OMBWAYO

JUDGE