



**Nakuru War Memorial Hospital Limited v County Government of Nakuru & 2 others (Land Case 3 of 2024) [2024] KEELC 5715 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5715 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
LAND CASE 3 OF 2024  
YM ANGIMA, J  
JULY 25, 2024  
(FORMERLY NAKURU ELC 36 OF 2023)**

**BETWEEN**

**NAKURU WAR MEMORIAL HOSPITAL LIMITED ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF NAKURU ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, NAKURU ..... 2<sup>ND</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**A. 1<sup>st</sup> Defendant's Application**

1. The 1<sup>st</sup> Defendant filed 3 similar applications in this matter. The first was a notice of motion dated 02.11.2023 brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* (Cap.21), and Order 51 rule 1 of the *Civil Procedure Rules, 2010*, seeking that the interim orders made on 31.10.2013 in favour of the Plaintiff be vacated, discharged or set aside. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn on 02.11.2023 by Dr. Samuel Mwangi Mwaura and the annexures thereto.
2. The second application was dated 06.11.2023 also filed pursuant to the same provisions of law in which the 1<sup>st</sup> Defendant was seeking, inter alia, the setting aside of the interim injunction granted on 31.10.2023 and a permanent injunction to restrain the Plaintiff from interfering with the “peaceful” takeover, running, operations and the activities of Nakuru War Memorial Hospital (the hospital) on the suit property which was said to be public land. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Dr. Samuel Mwangi Mwaura.



3. The third application was dated 19.02.2024 brought pursuant to the same provisions of the law seeking a review and setting aside of the orders granted on 31.10.2023 and a temporary injunction to restrain the Plaintiff from interfering with the 'peaceful' takeover, running, operations and activities of the hospital on the suit property which was said to be public land. The application was supported by an affidavit sworn by the same deponent, Dr. Samuel Mwangi Mwaura on 19.02.2024. However, the record shows that the notice of motion dated 02.11.2023 was withdrawn by the 1<sup>st</sup> Defendant on 20.02.2024.
4. The 1<sup>st</sup> Defendant pleaded that the orders of 31.10.2023 were obtained by the Plaintiff through deceit, misrepresentation and non-disclosure of material facts. It was pleaded that the 99-year lease for the hospital was initially granted to Nakuru War Memorial Hospital in 1922 and that the same expired in 2021 hence the purported renewal of the lease in favour of the Plaintiff which was a limited company was unlawful and an attempt to privatize public land.
5. The 1<sup>st</sup> Defendant stated that there existed a public PGH Annex facility and a helipad used by state house on part of the suit property and that the hospital initially had 9 directors 2 of whom were public officers. It was contended that the directorship had since been reduced to 5 with the directorships of the public officers being left out. The 1<sup>st</sup> Defendant further pleaded that in any event the Plaintiff's certificate of lease has since been cancelled by the land registrar.
6. It was also the 1<sup>st</sup> Defendant's contention that owing to the unlawful and fraudulent conduct on the part of the Plaintiff, its directors had been charged in a pending criminal case with forgery in Nakuru MCCCCR E153/2024 (the criminal case). It was thus the 1<sup>st</sup> Defendant's case that the Plaintiff was guilty of fraudulent acquisition of public property hence it ought not to enjoy the benefit of an interim injunction.

## **B. Plaintiff's Response**

7. The record shows that the Plaintiff filed a replying affidavit sworn by Dr. Simon Mwangi on 18.01.2024 in opposition to the applications dated 02.11.2023 and 06.11.2023 which were on record at the material time. The Plaintiff denied that it was guilty of any form of deception, misrepresentation or non-disclosure of material facts as alleged by the 1<sup>st</sup> Defendant or at all. It was denied that the suit property was public land or that it had been reserved for a public purpose. It was contended that the applications had been filed in bad faith solely for the purpose of evading compliance with the interim orders granted on 31.10.2023.
8. The Plaintiff contended that since it was in possession of the suit property then any injunction issued against it would amount to its eviction before the hearing and determination of the main suit. It was contended that, in any event, the 1<sup>st</sup> Defendant had failed to satisfy the principles for the grant of a temporary injunction as set out in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In particular, it was stated that the 1<sup>st</sup> Defendant had failed to demonstrate that it shall suffer any irreparable injury or loss which cannot be compensated by an award of damages. The Plaintiff also contended that since it had been in possession of the suit property for nearly a century then the balance of convenience favoured it and not the 1<sup>st</sup> Defendant.

## **C. Directions on Submissions**

9. When the said applications came up for mention it was directed that they shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the 1<sup>st</sup> Defendant filed its submissions



dated 27.03.2024 whereas the submissions of the rest of the parties were not on record by the time of preparation of the ruling.

#### **D. Issues for Determination**

10. The court has considered the applications filed by the 1<sup>st</sup> Defendant and the Plaintiff's replying affidavit in response thereto. The court is of the view that the following are the key issues which arise for determination herein:
  - a. Whether the 1<sup>st</sup> Defendant has made out a case for review or setting aside of the interim orders granted on 31.10.2023.
  - b. Whether the 1<sup>st</sup> Defendant has satisfied the requirements for the grant of a temporary injunction against the Plaintiff.
  - c. Who shall bear costs of the applications.

#### **E. Analysis and Determination**

##### **a. Whether the 1<sup>st</sup> Defendant has made out a case for review or setting aside of the interim orders granted on 31.10.2023**

11. The court has considered the material and submissions on record on this issue. The gist of 1<sup>st</sup> Defendant's applications was that the Plaintiff had obtained the interim orders dated 31.10.2023 through deception, misrepresentation and non-disclosure of material facts. The court agrees that as a matter of law, a party who approaches a court of law and obtains ex parte interim orders is obligated to act with utmost good faith and to make a full and faithful disclose of all material facts so far as they fall within his knowledge.
12. As was held in the case of the *Owners of Motor Vessel Lillian 'S' v Caltex Oil (Kenya) Ltd* [1989]eKLR a party who unfairly obtains ex parte orders through concealment or non-disclosure of all material facts ought to be deprived of such benefit by having such orders set aside. While making reference to the English case of *The Andriano (Vasso)* [1984] QB 477 it was held, *inter alia*, that:

“... The Court of Appeal in its judgment which was read by Robert Goff LJ said at page 491 G:

‘It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the Court of facts known to the Applicant, and that failure to make such disclosure may result in the discharge of any order made upon the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified; see *Reg v Kensington Income Tax Commisioners, Ex parte Princess Edmond de Polignac* (1971) 1 KB 486. Examples of this principle are to be found in the case of ex parte unjunctions, ex parte orders made for service of proceedings out of the jurisdiction under Order 11 of the Rules of the Supreme Court. In our judgment, exactly the same applies in the case of an ex parte application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the Court.’



‘The same principle was dealt with in the case of *Brink’s Mat Ltd v Elcombe* [1988] 3 All ER 188. It is not necessary to set the relevant facts here but I would like to refer to an important passage in the judgment of Ralph Gibson LJ, at page 192 (f) where he said:

“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 as 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 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.
- (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..”

13. The court is also aware that an interim order may be varied, reviewed or set aside where there has been discovery of new or important evidence or where there has been a material change of circumstances since the time it was granted; or when it has become impossible or impracticable to enforce it; or when it is being used for improper or oppressive purposes. For instance, in the case of *Mobile Kitale Service Station v Mobil Oil Kenya Ltd & another* [2004] eKLR it was held, inter alia, that:

“... an interlocutory injunction is given on the court’s understanding that the Defendant is trampling on the rights of the Plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person’s conduct with respect to matters pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter. The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose- to shield a party against violation of the legal rights a person is seeking.”

14. In the case of *Filista Chemaiyo Sosten v Samson Mutai* [2012] eKLR it was held that:

“...I think the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction...”

15. So, what was the evidence before court to demonstrate that the interim orders of 31.10.2023 were obtained through deceit and non-disclosure of material facts? The 1<sup>st</sup> Defendant contended that the suit property was public land which had been reserved for a public purpose and that the Plaintiff had acted improperly by attempting to privatize it without following due process. The court is of the view that the question of whether or not the suit property was public property and whether or not it was reserved for a public purpose goes into the root of the dispute among the parties. It appears to be one of the key issues for determination in the main suit. It cannot, therefore, be determined at the interlocutory stage without the benefit of a full hearing. The same applies to the legality of the extension or renewal of the lease by another 50 years and the composition of the board of directors of the Plaintiff.
16. The court is further of the opinion that the mere fact that the directors of the Plaintiff have been charged with some criminal offences including forgery of the certificate of lease is not necessarily of evidence of fraud. The accused persons in the criminal case have not yet been convicted since the



proceedings are still pending. The court is thus of the view that the criminal case can only have a bearing on the instant civil suit upon conviction of the directors of the Plaintiff.

17. The court is thus not satisfied that there is prima facie evidence of misrepresentation or non-disclosure of material facts on the part of the Plaintiff. The court is also not satisfied that there has been a material change in circumstances between 31.10.2023 and to date such as to make the interim orders of 31.10.2023 untenable. In the premises, the court is not inclined to review, vacate, or set aside the interim injunction granted on 31.10.2023.

**b. Whether the 1<sup>st</sup> Defendant has satisfied the requirements for the grant of a temporary injunction against the Plaintiff**

18. By the interim injunction dated 31.10.2023 the Environment and Land Court at Nakuru restrained the 1<sup>st</sup> Defendant from, inter alia, entering, remaining and undertaking any unauthorized activities on the suit property and from interfering with the running, operations and activities of the hospital. By its applications dated 06.11.2023 and 19.02.2024 the 1<sup>st</sup> Defendant is seeking an injunction to restrain the Plaintiff from, inter alia, from interfering with the takeover, running, operations and activities of the hospital. It is quite evident that the interim injunction sought by the 1<sup>st</sup> Defendant is the anti-thesis of the earlier injunction of 31.10.2023. Whereas the earlier order allowed the Plaintiff to remain in possession and to run and operate the hospital the orders sought by the 1<sup>st</sup> Defendant are intended to allow it to take or retain possession of the suit property and to run and operate the hospital.
19. The court is of the view that having declined to review and set aside the interim injunction of 31.10.2023 it would be untenable to grant the 1<sup>st</sup> Defendant an interim injunction running contrary to the earlier one. It would result in two contradictory orders in the same matter. The only option the 1<sup>st</sup> Defendant may have is to wait for inter partes hearing of the original application for interim orders and persuade the court that the ex parte orders should not be confirmed. As a result, the court finds and holds that the 1<sup>st</sup> Defendant has not made out a case for the grant of the interim injunction sought.

**c. Who shall bear costs of the application**

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a consequence, the Plaintiff shall be awarded costs of the 2 applications.

**F. Conclusion and Disposal Order**

21. The upshot of the foregoing is that the court finds no merit in the 1<sup>st</sup> Defendant's applications for review and setting aside of the interim injunction orders of 31.10.2023 and for a counter-injunction against the Plaintiff. As a consequence, the 1<sup>st</sup> Defendant's notices of motion dated 06.11.2023 and 19.02.2024 are hereby dismissed with costs to the Plaintiff.

Orders accordingly.

**RULING DATED AND SIGNED AT NYANDARUA THIS 25<sup>TH</sup> DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Kamau Chomba for the Plaintiff



Mr. Okore holding brief for Prof. Ojienda for the 1<sup>st</sup> Defendant

Ms. Adomeyon for the Attorney General for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

