



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 228 OF 2019**

**PHILIP MUTINDA MUMO.....PETITIONER**

**V**

**GOVERNOR, COUNTY OF KITUI.....1<sup>ST</sup> RESPONDENT**

**SPEAKER, COUNTY ASSEMBLY, KITUI.....2<sup>ND</sup> RESPONDENT**

**COUNTY ASSEMBLY KITUI.....3<sup>RD</sup> RESPONDENT**

**DAVID THUVI.....4<sup>TH</sup> RESPONDENT**

**ALEX N. MUSILI.....5<sup>TH</sup> RESPONDENT**

**JACOB M. KAVOLONZA.....6<sup>TH</sup> RESPONDENT**

**ANNE M. MUMO.....7<sup>TH</sup> RESPONDENT**

**BONIFACE K. KATUMO.....8<sup>TH</sup> RESPONDENT**

**PETER M. KILONZO.....9<sup>TH</sup> RESPONDENT**

**RULING**

1. Philip Mutinda Mumo (Petitioner) is the County Executive Committee member for Trade, Co-Operatives and Investments, County Government of Kitui.
2. On 29 November 2019, the Petitioner moved this Court under a certificate of urgency seeking a conservatory order restraining the Governor, County of Kitui from dismissing him from the position of County Executive Committee member.
3. When the application was placed before the Duty Court, the Court issued the conservatory order pending *inter partes* hearing of the application on 10 December 2019.
4. When served with the motion, the 2<sup>nd</sup> to 9<sup>th</sup> Respondents raised a preliminary issue contending that the Petitioner had failed to make a material disclosure, that is, that he had earlier filed Kitui High Court Petition No. 15 of 2019, *Philip Mutinda Mumo v County Assembly of Kitui & Ar.*
5. The Court directed that the parties file and exchange affidavits in relation to the question of material non-disclosure ahead of making oral submissions today.
6. The Court took the submissions today and has considered the material placed before it including the authorities even if no reference is made to them in this Ruling.
7. In his further affidavit, the Petitioner admitted that indeed he had instituted proceedings before the High Court, Kitui without making that disclosure to this Court. He contended that the failure to make the disclosure was innocent and that in any case the dispute and issues that

were placed before the High Court, Kitui had substantially changed rendering the proceedings moot, hence he filed a *Notice of Withdrawal* which was adopted by the High Court on 5 December 2019.

8. For the 2<sup>nd</sup> to 9<sup>th</sup> Respondents who raised the objection to the competency of the *ex-parte* orders issued on 29 November 2019, it was urged that the material non-disclosure rendered the *ex-parte* orders apt for vacation and/or setting aside.

9. In addressing material non-disclosure it was stated in *Brinks-MAT Ltd Vs Elcombe (1988) 3 All ER 188*

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 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 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.

10. The disclosure of the pending proceedings before the High Court in Kitui, in the view of this Court, was relevant and material whether the proceedings had been withdrawn or terminated.

11. The Court, in the circumstances, has come to the conclusion that the *ex-parte* orders issued on 29 November 2019 be discharged.

12. No order on costs.

**Delivered, dated and signed in Nairobi on this 19<sup>th</sup> day of December 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner Mr. Mwinzi instructed by Mwendwa Mwinzi & Associates

For 1<sup>st</sup> Respondent Mr. Oloo instructed by Oloo & Oloo Advocates

For 2<sup>nd</sup> to 9<sup>th</sup> Respondents Mr. Oginga/Ms. Namulala instructed by Apollo Muinde & Partners Advocates

Court Assistant Muturi