



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ELC CAUSE NO. 181 OF 2017**

**MAU RESORT LIMITED.....PLAINTIFF**

**VERSUS**

**NAROK COUNTY GOVERNMENT.....DEFENDANT**

**RULING**

1. Before this is a Notice of Motion Application dated 15<sup>th</sup> June, 2021 brought under **Order 45 Rules 1,2 (2), Order 51 Rule 1** of the **Civil Procedure Rules, 2010, Sections 1A,1B,3A** of the **Civil Procedure Act** and **Order 22 Rule 52** by the Defendant/Applicant herein seeking the following Orders: -

**a) That the Honourable Court be pleased to set aside the Order issued on 8<sup>th</sup> April, 2021.**

**b) That the Honourable Court be pleased to issue appropriate directions with respect to filing and service of written submissions by all parties with respect to the Plaintiff's/Applicant's Notice of Motion Application dated 19<sup>th</sup> April, 2020.**

**c) That the costs of this Application be in the cause.**

2. The Application is premised on the grounds on the face of it and more particularly surrounding the circumstances relating to the Respondent's conduct on effect of service and the timelines granted by the court on filing and service of written submissions. The Application is supported by the supporting affidavit of Elizabeth Sanangoi Lolchoki, the County Secretary of the Applicant herein sworn on 15<sup>th</sup> June, 2021 in which she avers that the Respondent filed a Notice of Motion Application dated 19<sup>th</sup> April, 2020 seeking injunctive order in which the Applicant filed a replying affidavit dated 30<sup>th</sup> November, 2020 and served the same upon the Respondent's counsel through their official email address on 1<sup>st</sup> December, 2020.

3. That both parties appeared in court on 10<sup>th</sup> December, 2020 upon which the Respondent's counsel disputed service. Once again, the Applicant served the replying affidavit on the said 10<sup>th</sup> December, 2020. That on the 10<sup>th</sup> December, 2020 the court gave further directions that the Respondent to file a further affidavit within 7 days, the Applicant was granted 14 days upon receipt to file and serve written submissions and that the matter be mentioned on 3<sup>rd</sup> February, 2021 to confirm compliance and take a date for the ruling. That come 3<sup>rd</sup> February, 2021, the Respondent had not complied with the court's directions and sought a further 14 days to do so. The matter was given another mention date on 11<sup>th</sup> March, 2021.

4. On 11<sup>th</sup> March, 2021 the counsel for the Respondent informed the court that whereas he had filed the Respondent's written submissions, the same had not been served on the Applicant's counsel upon which the court directed the Respondent to serve the written submissions within 3 days and thereafter, the Applicant to have 14 days within which to file its written submissions and a ruling to be delivered on 8<sup>th</sup> April, 2021 at 2.30pm.

5. The Applicant avers that it was never served with the written submissions and that when the matter came up for ruling on 8<sup>th</sup> April, 2021, the counsel for the Applicant raised the issue of non-service but despite the same the court went ahead and delivered its ruling. The court also granted the Applicant leave to file this instant Application.

6. It is the Applicant's contention that the Respondent's non-compliance on service of the written submissions was a deliberate action to handicap the court and the Applicant so that its Application would prevail and that the Respondent's action further amounts to sharp practice which infringed on the rights of the Defendant to a fair hearing as it was denied an opportunity to counter each and every position taken by the Respondent in its submissions.

7. Finally, that the Respondent should not benefit from orders it obtained through deceit, ignorance of court order and directions which actions denied the Applicant the right to be heard.

8. When this matter came before me on 26<sup>th</sup> October, 2021, I noted that the Respondent had not complied with the directions issued on 22<sup>nd</sup> September, 2021 directing them to file a replying affidavit within 14 days. As such, the Respondent was deemed to have forfeited leave granted to it to file and serve a replying affidavit.

9. This matter was further mentioned on 11<sup>th</sup> November, 2021 during which the Respondent was granted 7 days to file its replying affidavit and written submissions. The counsel for the Applicant opted to rely on the Application entirely as he considered the same as unopposed.

10. I note that in granting the Respondent 7 days within which to file and serve its replying affidavit and written submissions, the same lapsed on 19<sup>th</sup> November, 2021.

11. I have carefully analysed the Notice of Motion Application, the supporting affidavit thereof, the court proceedings, the ruling dated and delivered on 8<sup>th</sup> April, 2021, in my view the issue for determination is whether this court can set aside the orders issued on 8<sup>th</sup> April, 2021.

12. The Applicant's main contention is that its right to a fair hearing was infringed upon owing to non-inclusion of their written submissions and therefore the reason as to why the orders issued on 8<sup>th</sup> April, 2021 should be set aside. A cursory look at the proceedings of the Application dated 19<sup>th</sup> April, 2020, indicate that the Application be disposed off by way of written submissions. In my view, this directive formed part of the case and it would only be fair and reasonable that it be included. I have also observed that the counsel for the Respondent not only admitted to have filed their written submissions but also failed to serve the same upon the Applicant. I cannot tell whether or not this omission was intentional.

13. In ***Republic v Ahmad Abolfathi Mohammed & another [2019] eKLR*** the Supreme Court observed as follows:- '**For most practical purposes, this Supreme Court functions as the ultimate appellate Court. Before this Court, as before any Court bearing appellate jurisdiction, the submissions of learned counsel, whether written or oral, have a crucial significance**' (emphasis mine).

14. I also refer to the case of ***Joseph Mwangi Njoroge v Republic [2017] eKLR*** where the court also observed as follows: - '**It is now a settled practice under the new constitutional dispensation that filing of written submissions has become the norm. With the provision in the Constitution at Article 159 that courts should not dwell on technicalities but focus on doing substantive justice, written submissions serve the purpose of expedience. Therefore, submissions can now be oral or written**'.

15. In the case of ***Ali Ngumbao Baya & 2 others v Director of Public Prosecution [2016] eKLR*** '**Reliance has been placed on the Court of Appeal decision in the case of ROBERT FANALI AKHUYA case. That case was decided on 12th July, 2012. It no longer stand as good law. Article 159 of the Constitution is against technicalities. Submissions can either be oral or written. Submissions simply put means an evaluation of the evidence by each party and analysis of the law. This can be done either orally or in writing. At times parties make oral submissions in furtherance or addition to their written submissions. The idea of filing written submissions is intended to save on judicial time and also to enable the parties or their advocates to condense their thoughts on the matter at their own and in good time. This gives the parties enough time to evaluate the case and put down their view in writing. Written submissions gives parties latitude to explain their respective cases with ease as opposed to oral submissions which can be limited inform of time**'.

16. From the foregoing, my finding is that the Notice of Motion Application dated 15<sup>th</sup> June, 2021 has merit and in the circumstances, I hereby proceed to allow it in terms of prayers 1, 2 and 3. I set aside the order issued on 8<sup>th</sup> April, 2021 and direct that the Respondent do serve the written submissions of the Notice of Motion Application dated 19<sup>th</sup> April, 2020 upon the Applicant within 3 days, the Applicant is granted 7 days within which to file and serve its written submissions. The matter to be mentioned on 23<sup>rd</sup> day of February, 2022 to confirm compliance and for further directions. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 16TH DAY OF DECEMBER, 2021**

**MBOGO C. G.**

**JUDGE**

**16/12/2021**

In the presence of:

CA: T.Chuma