



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 106 OF 2013

EMPOWER INSTALLATIONS LIMITEDPLAINTIFF

Vesus

ESWARI ELECTRICALS PVT LIMITED DEFENDANT

AND

KENYA ELECTRICITY GENERATING COMPANY LIMITED.....INTERESTED PARTY

RULING

[1] I am called upon to determine the application dated 19th March, 2014 which seeks for an order of temporary injunction to restrain the interested party from making any further payments associated with the construction of the Ngong Hills Power Substation to the Defendant/Respondent pending the hearing and determination of the suit. It also seeks for an order to compel the defendant/respondent to deposit an acceptable security with the plaintiff/applicant and give an undertaking to pay the sum of Kshs.35,462,649.00/- less any credited sum as of the date of the said application and in accordance with the Quantity Surveyor's Report adopted by the court on 25th November, 2013 within 14 days of the hearing and determination of the said application. In the alternative; it seeks an order to compel the interested party, by way of written confirmation and/or a bank guarantee or collateral to pay the sum of Kshs. 35,462,649.00 less any sum credited as of the date of the said application, or undertake to pay the said sum to the plaintiff/applicant under the Quantity Surveyor's report as adopted on 25th November, 2013 within 14 days.

[2] The Plaintiff had initially applied for temporary orders of status quo which had been granted by Havelock J but were later on vacated and other orders were issued by consent of the parties allowing the Defendant to continue with the works at the site. Thereafter, the Quantity Surveyor's Report dated 26th August, 2013 on works done by the Plaintiff/Applicant on the construction site was filed in court by consent of the parties on 3rd September, 2013. The report assessed the works done by the plaintiff/applicant at kshs.35,462,649.00/-. On 25th November, 2013 the said Report was adopted by the parties. There was no specific order for payments of the balance as per the Report despite the request by counsel for the plaintiff/applicant for the same.

Instead, the court ordered the Plaintiff to serve the Defendant/Respondent with summons to enter appearance. After service, the Defendant/Respondent entered appearance on 23rd January, 2014 and filed its statement of defence and counterclaim on 6th February, 2014 and an amended statement of Defence and counterclaim on 19th February, 2014 praying for the plaintiff/applicant's suit be dismissed with costs and claim inter alia;

1. USD\$179,432.50/- plus Kshs.9,176,174.50/- to be forfeited by the plaintiff/applicant to the interested party as loss allegedly incurred due to the failure of the plaintiff/applicant to complete the project within the stipulated time in the subcontract.
2. Additional expenses/costs amounting to Kshs.25,392,768.44/- allegedly incurred by the defendant/respondent allegedly owing to the plaintiff/applicant's breach of contract.

[3] It is then on 26th March, 2014 the plaintiff/applicant filed an application dated 19th March, 2014, which is under consideration by the court. The application has been opposed by the Defendant/Respondent and the interested party through a replying affidavit of 7th April, 2014 and 8th April, 2014, respectively. The interested party stated that it has no obligation towards the plaintiff/applicant under the main contract between the interested party and the Defendant/Respondent and that it was not privy to the subcontract between the Defendant/Respondent and the Plaintiff/Applicant. On 16th April, 2014 the plaintiff/applicant filed further affidavits in response thereto.

Request for security

[4] The Plaintiff/Applicant is convinced that its application is well founded on fears that the defendant/respondent might leave the country at any time without informing the Plaintiff/applicant nor setting the sum of Kshs.35,462,649.00/- once it completes the construction. The project is nearing completion soon as demonstrated by photographs of the construction site taken by the plaintiff/applicant marked as annexures "SK-1" in the Plaintiff/Applicant's supporting affidavit dated 19th March, 2014. The Defendant/Respondent is a foreign based company and holds an account in India into which the interested party pays the contract sums. Further, the Defendant's amended counterclaim dated 19th February, 2014 is just an afterthought aimed at scuttling and/or defeating and or frustrating the plaintiff/applicant's case. For those reasons, the court should not let the negotiations and processes herein which culminated into the Report that was filed to be mere pious aspirations as they will become once the construction works are completed and the Defendant/Respondent has left the country without making good the plaintiff's/applicant's claim. The plaintiff/applicant has demonstrated goodwill in the suit which have not been reciprocated by the Defendant/Respondent. The Report established the worth of the works done at the sub-station to be Kshs. 35,462,649/- less any sums credited. In the premise, the Plaintiff has complied with the familiar maxim, "*he who comes into Equity must come with clean hands,*" and its application dated 19th March, 2014 should be allowed.

[5] The Plaintiff submitted that it has satisfied the principles in the case of **GIELLA v CASSMAN BROWN & CO. LTD 91973) EA 338** as well the opinion by Bosire, JA in **MRAO LTD v FIRST AMERICAN BANK OF KENYA LTD AND 2 OTHERS 2003 KLR 125**. The Plaintiff/Applicant carried out its works as a subcontractor of the Defendant/Respondent in accordance with the terms of the contract relating to the complete civil construction and other electrochemical works at Ngong Hills substation-to construct the 30MVA 11/66 kv. It was further agreed that all payments would be made within 30 days from the date of receipt of invoice. The invoice is raised on the basis of a Report on work measurement the Defendant/Respondent and a letter of authorization issued by the Interested Party herein. The plaintiff/applicant relying on the express terms of the subcontract commenced construction work as stipulated but could not immediately proceed on with the construction as the materials for construction had not been supplied by the Defendant/Respondent as stipulated under the contract. The project whose initial completion date was set to be within 12 months dragged on for over 2 years because the Defendant/Respondent was most of the time in total breach of the contract; was not making

payment on vouchers given after work was done and paid for by the interested party; and was not delivering essential materials in good time. Other than dragging the works, the delay forced the plaintiff/applicant to pay more taxes and incur extra overhead costs. When the Plaintiff complained of the delays, security guards were deployed to the construction site which was yet another ploy to deny the Plaintiff/applicant of its dues for works done as per the Quantity Surveyor's Report. The plaintiff/applicant has done substantial amount of work on the site which should be secured with an undertaking and/security by the Defendant/Respondent and/or the interested party.

[6] It was argued that the Plaintiff has established it has acquired an interest over payments advanced and/or to be advanced to the Defendant/Respondent by the interested party pertaining to the construction project. The only issue for trial is the Defendant/Respondent's counterclaim. There is, therefore a likelihood that the plaintiff/applicant will succeed in the main suit. It referred the Court to the case of **ROSEBELLA NDUMI MBITHI v JONATHAN MBITHI NTHUKA & 3 OTHERS [2012] eKLR**, where J.M Ngugi J, stated that:-

“I am aware that the court is not required, in order to grant a preliminary injunction, to virtually satisfy itself that the plaintiff will succeed on the merits. As aforesaid, an application for an injunction does not involve a final determination on the merits”.

The Plaintiff also referred the Court to decision by the United States Supreme Court in **UNIVERSITY OF TEXAS v CAMENISCH, 451, U.S 390, 395, [1981]** which stated that, the primary purpose for granting a preliminary injunction is ***“ to preserve the relative positions of the parties until a trial on the merits can be held.”*** See also **LIFICO TRUST REGISTERED v PATEL (1985) KLR 538** where the court of appeal held that the appropriate forum for deciding weighty issues of law raised is at the trial and not in the course of interlocutory proceedings.

[7] The Plaintiff also contended that it has shown it will suffer irreparable harm that cannot be adequately compensated. These following facts are relevant: The works are about to be completed by the Defendant which is a foreign based company; the interested party pays the Defendant by depositing money into the Defendant's account in India which portends a high likelihood that the Defendant might leave the country once the construction of the project is complete. That may happen before the Defendant has paid the Plaintiff's outstanding dues. The Plaintiff will as a result suffer financial loss to the extent of collapsing while the Defendant will have benefited from an illegality. That is tantamount to denying the plaintiff the opportunity to recoup back its investments in the project and is irreparable damage. The delays in payment have been occasioned by the Defendant. The plaintiff has no control over any payments to the Defendant.

[8] The Plaintiff finally submitted that in the event the Court is in doubt, it should decide the application on a balance of convenience. In this case it is more reasonable to ask the Defendant and or the Interested Party to furnish security by way of guarantee or grant the temporary injunction against the Interested Party. The grant of orders sought by the Plaintiff, especially order 5, 6 and/or 7 will not prejudice the Defendant and/or interested party. The interested party should not now come and allege that it was not privy to the subcontract between the Plaintiff/Applicant and the Defendant as clauses 6.1 and 6.13 of the main contract between the interested party and the Defendant referred to an annexure “DKM-1” in the interested party's replying affidavit dated 7th April, 2014 also annexures “SK-1” in the Plaintiff's further affidavit dated 14th April, 2014 both of which contemplated and encouraged the Defendant to source for labour with the required qualifications and experience from sources within and outside Kenya in carrying out its obligations under the main contract. And Clause 1.0 of the subcontract between the defendant and the interested party annexure “SK-2” in the plaintiff/applicant's further affidavit dated 14th April, 2014 stipulates that all work orders from the plaintiff shall strictly comply to the drawings and specifications provided by the Defendant and approved by the interested party. Clause 12.0 of the subcontract further stipulates that the plaintiff shall be entitled to submit invoices for payment upon receipt of the letter of authorization issued by the interested party. How then can the interested party claim not to be privy to the subcontract between the plaintiff and the defendant?

The Plaintiff prayed for the application dated 19th march, 2014 to be allowed as prayed.

The Defendant opposed the application

[9] The Defendant opposed the application and relied entirely on the Replying Affidavit sworn on 4th April, 2014 by one Rathnaraj Joenathan Ebenezer, the Country manager of the defendant company. The defendant averred that, contrary to the submissions by the Plaintiff, construction works are far from being completed and even upon completion, the Defendant shall not under the contract between the Defendant and the interested party, cease operations until after the Defects Liability period of 1 year has lapsed. The photographs, annexure "SK-1" of the Plaintiff's supporting affidavit, are of no evidential value that matter.

[10] The Defendant defended its counter-claim which it stated, is legitimate and involves a sum much more than what the plaintiff is claiming from the defendant and it is proper, fair and in the interest of justice that the application herein be dismissed and the entire suit together with the counter-claim be determined on their merits at the main hearing of the suit as provided for in the Rules of Procedure. Pursuant to Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya (1) **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."** Section 109 of the same Act provides **"the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."** The specific or alternative orders as sought against the Defendant are premised on the assumption that the Interested Party deposited or deposits the Defendant/Respondent's dues in the Defendant/Respondent's Bank Account in India. It has not proved that allegation. The Defendant has demonstrated that it is lawfully authorized to carry on business in Kenya, has its offices in Kenya, operated Bank account in Kenya, is authorized to own assets in Kenya, has assets in Kenya and carries on business in Kenya as evidenced by copies of documents being annexure "EEL1" of the Defendant's Replying Affidavit. There is also no evidence that the Defendant intends to leave the jurisdiction of this court without any notice. Therefore, the requests for a guarantee and/or security from either the defendant or the interested party are ill placed, misadvised and without any merit at all.

[11] According to the Defendant, Order 40 Rule 11 of the Civil Procedure Rules, 2010 under which this application is purported to be brought envisages the money, which is the subject matter of the suit to be ascertained and any party must admit holding such money as a trustee for another party or that it belongs or it is due to another party before the court makes orders under this Rule. In this case, any money due to the Plaintiff, if any, has not been ascertained in view of the yet to be determined suit and the counterclaim and no party in the proceedings herein has admitted holding any such money as trustee for another, and in particular for the plaintiff. In the circumstances, even if the defendant were to be directed to provide security/guarantee/collateral as sought by the plaintiff, it is yet to be established the value of such guarantee/security/collateral. The Defendant relied on Order 7, rule 3 of the Civil Procedure Rules, 2010, which provides that:-

"A defendant in a suit may set-off by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit or ought not to be allowed, refuse permission to defendant to avail himself thereof."

And also Rule 14 of the same order which provides that:-

"Where in any suit a set-off or counterclaim is established as a defence against the Plaintiff's claim, the court may, if the balance is in favour of the defendant, give

judgment for the defendant for such balance, or may otherwise adjudge to the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon merit of the case”.

The Defendant duly filed its counter claim seeking losses occasioned to the Defendant by the breach of contract by the plaintiff. Both the plaintiff's as well as the Defendant's claims are yet to be determined and pursuant to the provisions of order 7 rules 3 and 14, both claims ought to be determined together in a full hearing to establish which party owes the other how much. At this stage therefore the plaintiff does not warrant the orders it seeks.

The quantity Surveyor's report herein is neither an order of the court nor an Arbitral Award. It is an estimate of the value of works done by the plaintiff to guide the Honourable Court in resolving the dispute between the parties. The Plaintiff itself is not certain of the value of the security/guarantee/collateral it is seeking. The Defendant has not shown unwillingness to pay the plaintiff any dues found that the Court, if at all, finds to it owes the Plaintiff. Indeed, the Defendant has previously made payments to the plaintiff for all works done as per the copy of the statement of payments so far made to the plaintiff. See annexure "EEL3" of the Replying Affidavit.

[12] The Defendant advanced a rather technical argument that for the court to order the furnishing of security, the Plaintiff, should plead Section 63 of the Civil Procedure Act and the specific order and Rule of the Civil procedure Rules under which the application is brought. Failure to so plead, ideally deprives the party against whom such order is sought the lawful opportunity to respond adequately to the application. The Defendant herein has been deprived of such opportunity and it will be unfair and unjust to grant the said orders against the Defendant; that is tantamount to being condemned unheard. However, for the court to order the giving of such security, the applicant must satisfy the court that:

- i. The Defendant is about to dispose the whole or any part of his property
- ii. The defendant is about to remove the whole or any part of his property from local limits of the jurisdiction of the court.
- iii. The defendant has absconded or left or is about to leave the local limited of the jurisdiction of the court.
- iv. The plaintiff has a cause of action which is prima facie unimpeachable.

It is the Defendant's submission that the plaintiff has failed to place material before the court to satisfy these requirements for the grant of order of security. Further, the Plaintiff's claim is impeachable in view of the Defendant's Counter-claim which is not disputed by the plaintiff and as such I urge the Honourable Court to decline the application herein. Order 40 Rule 1 of the Civil Procedure Rules under which the injunctive prayers are premised, the plaintiff must prove by Affidavit or otherwise:-

- a. That the property in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree.
- b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

And further order 40 Rule 2 of the Civil procedure Rules, demands the Plaintiff to show that the defendant is committing a breach of contract or other injury of any kind, for the court to issue a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of. None of the above requirements has been satisfied by the Plaintiff.

[13] The Defendant took the view that there is no privity of contract between the plaintiff and the interested party to warrant the orders sought by the plaintiff against the said interested party. Indeed it is the plaintiff who is in breach of contract between the plaintiff and the Defendant and

in the circumstances the plaintiff having not come to court with clean hands, should be refused the orders sought lest the Plaintiff will be benefitting from its own breach of contract. The thresholds for the grant of injunction in **CSSMAN v BROWN** have not been met. In any case, any damage that the plaintiff may suffer is compensable by an award of damages. The Defendant relied on the following decided authorities:

1. **NAIROBI HCCC NO. 635 OF 2005 GEMSECURITIES (E.A) LIMITED VS UZIMA PRESS LIMITED (ALNASHIR VISRAM, J, 22ND FEBRUARY, 2006) [2006] E KLR**
2. **MILIMANI HCCC NO. 387 OF 2009 JORUTH ENTERPRISES LIMITED VS GROFIN KENYA LIMITED & 2 OTHERS (M.K KOOME , J, 5TH FEBRUARY, 2010) [2010] EKLR**
3. **COURT OF APPEAL AT NAIROBI – CIVIL APPEAL NO. 42 & 45 OF 2008 (CONSOLIDATED) KIRKDALE LIMITED VS MOUNT AGENCIES LIMITED & 3 OTHERS (P.K. TUNOI, E.M GIHTINJI & D.K.S AGANYANYA, JJA, 8TH MAY, 2009) [2009] EKLR**

The interested party also opposed the application

[14] The Interested Party started by stating that from Order 40 Rules 1, 2, 4(1), 8 and 11 of the Civil Procedure Rules, an injunction can only be issued against a defendant in a suit. The interested party was enjoined in this suit purely to protect its interest and ensure that the project at Ngong Hills continued according to the timelines set out in the contract between itself. Although the interested party was not a party, this dispute between the plaintiff and the defendant had brought the project to a complete halt, thereby, directly affecting the interested party. Although the quantity surveyor's report was adopted, it never became a judgment against the defendant or the interested party. There was also no order as to when the assessed value of the work was payable. Of importance, however, is that here is no privity of contract between the plaintiff and the interested party which places any obligations on it towards the plaintiff at all. And the citing by the Plaintiff of clause 6.1 and 6.13 which authorized the defendant to source qualified labour from third parties is extending the doctrine of privity of contract too far. The interested party was not involved in the appointment of the plaintiff. See the case of **PROVINCIAL CONSTRUCTION COMPANY LIMITED & ANOTHER v ATTORNEY GENERAL, CIVIL CASE NO.165 of 1991**, where the court said that a third party cannot benefit from a contract unless such a contract is for his benefit or was made for his on his behalf by his agent. Further that construction documents/contracts must be construed in accordance with clear expression of the documents in question. The contract between the defendant and the interested party obligates the interested party to pay the defendant when relevant payment certificates are issued. Failure to do so would expose the interested party to litigation and payment of damages.

[15] The plaintiff allegations that the defendant is likely to leave jurisdiction is not based on any evidence and that is unlikely given the fact that the defendant has a huge counterclaim to prove against the plaintiff. The prayers sought against the interested party are also not legally founded to the extent that they are not anchored in the plaint filed by the plaintiff. There are no orders prayed against the interested party in the plaint and there is no dispute between them. As such the plaintiff cannot obtain orders against the interested party where the two do not have a claim as against each other. For the above reasons, the interested party prayed for the application in so far as it relates/affects the interested party to be dismissed with costs.

COURT'S RENDITION

[16] After considering all the rival arguments herein, I do not hesitate to state that the Court will not for now issue any order of injunction against the interested party. The Interested party is bound to satisfy the terms and conditions of their agreement with the Defendant and the Court may not alter those terms. The Plaintiff has not also established that there is money owing from the Interested Party to the Defendant as yet. And therefore, there is no prima facie case which has been established by the Plaintiff to warrant an injunction to restrain the Interested Party from paying the Defendant in accordance with the contract between them.

[17] The only prayer that will need an elaborate discussion is the one calling for security or guarantee from the Defendant.

[18] I should start by saying that in this case, the Plaintiff has argued that the Defendant has breached the contract between them and as a result of the said breach it has suffered losses which have been assessed and are documented in the quantity surveyor's report that was adopted by all the parties. The Defendant on the other hand accuses the Plaintiff of breach of the same contract and claims to have suffered losses constituting the counter-claim herein which it contended involves a much higher sum than the Plaintiff's claim. These counter-accusations brings the Court to the point where I should ask whether this is a case falling within the doctrine of *in pari delicto* whereat the court will not ordinarily involve itself in resolving one side's claim over the other; and will be guided by the practice that, law leaves them where it finds them, in accordance with the maxim, *in pari delicto potior est conditio defendentis et possidendis*. Or, should the Court take this case to be an appropriate case where I should take the view that whoever possesses whatever is in dispute may continue to do so in the absence of a superior claim. Judicial decisions on this subject are legion and I do not wish to multiply them except I am content to adopt a work of this court in **NBI HCCC NO 516 2013 C-HEAR KENYA LIMITED v LIQUID TELECOMMUNICATION KENYA LIMITED [2014] eKLR** on the said doctrine.

[17] That aside, both parties claim to have legitimate claims and have offered elaborate submissions thereto. But this is a case where I should determine whether there exists any claim that weighs preponderantly over the other. I think there are aspects of this case which may provide indents in resolving the application before the Court in the best interest of justice. It is quite startling for the Defendant to submit casually that it is lawfully authorized to carry on business in Kenya; it has its offices in Kenya; owns properties in Kenya; and operates an account within Kenya; without considering the purport of those submissions in law. Undoubtedly, the Defendant is a foreign company whose address and registered offices are disclosed in the contract thus:-

“...whose registered office is situated at Plot No. 64 Industrial area Estate, Perungudi, Chennai-600 096, India...”

[18] Being a juristic person and a foreign company, a query on its office in Kenya becomes a challenge on its status and operations within the Companies Act. And, in that context, evidential burden based on the statutory obligations to prove its office and operations in Kenya is raised on such foreign company. In answer to the allegations thereto, the Defendant provided uncertified copies of a PIN Certificate, Registration Certificate for a Motor Vehicle registration number KBV 207N and a statement of Account on Account Number 0032022275017801 held at Bank of India-Kenya. The PIN Certificate is not proof of registered office in the context of the Companies Act. It will not, therefore, be speaking to the query by the Plaintiff about its office in Kenya. Similarly, the statement which the Defendant has annexed does not answer the Plaintiff's contention that the interested party pays the Defendant through an account in India. The impression from the statement annexed shows no entries for deposits except withdrawals. Also, and it is on record, the Defendant made a powerful statement that it has assets and would be able to pay any award of damages that this court may make in favour of the Plaintiff in this case; but looking at statement provided and the only asset of M/V registration number KBV 207N, is not in consonance with the said powerful statement made by the Defendant. In such an application for security, the general status of the company is an important factor to consider and where there is an indication of financial limitation on the part of the company, the law places evidential burden on the company to prove financial means. That should not be mistaken for shifting the legal burden of proof to the Defendant. See the case of **TARBO TRANSPORTERS LTD v ABSALOM DOVA LUMBASI [2013] eKLR** where the Court held that:

“The burden of proving that the Respondent will not be able to refund to the Applicant any sums paid to the Respondent lies on the Applicant. But where the records show some financial limitations on the part of the Respondent, it may as well raise evidential burden on the Respondent to file an affidavit of means. In this case

the Respondent's income is such that it may not be sufficient to constitute ability to pay...''

[19] Moreover, although the project is on-going, there is no precise indication as to when it will be completed. There is also no concrete evidence on which this court can lay its hands and say that the contract sum is paid through the account provided as the said account does not show any deposit by the Interested Party. Both the Interested Party and the Defendant were careful and did not provide any evidence that the contract sum were paid through the account provided or any other account in Kenya. All parties in a suit are under a statutory obligation under the overriding objective to assist the court come to a just resolution of disputes by making full disclosures especially in applications of this nature where disclosure of material information is necessary. These facts render support to the Plaintiff's claim that the Defendant has no intention of settling any decree which may be issued against it. I also find from the evidence before me that a possibility of flight by the Defendant after completion of the project without notice is not remote in the circumstances of this case. One little thing: I do not think mere presence of a counter-claim would in itself defeat an application for security because the consideration by the Court should be whether there are circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, such as possibility of flight by the Defendant from the local limits of the jurisdiction of the Court, or likelihood to dispose or remove its assets from the reach of the Court. Therefore, whether there is a counter-claim or not, what matters is that proof has been provided to show that the plaintiff will not be able to have the judgment satisfied by the Defendant if successful in the proceedings. All the pointers in this case suggest a need to call upon the Defendant to provide security by way of bank guarantee which is sufficient to cover the amount claimed by the Plaintiff, i.e. Kshs. 35,462,649. The security should be provided within 30 days of today. In making these orders, the Court has considered the fact that the security will be held by the Court as security for satisfaction of judgment which may be entered against the Defendant. Of course if no judgment is entered or if the counter-claim succeeds, the natural course would be that the security is returned to the Defendant. I, therefore, do not see any prejudice that the Defendant will suffer in the circumstances. On that basis, and on the guiding legal principles above, the Court was inclined to exercise its discretion in favour of the Plaintiff. The application dated 19th March, 2014 succeeds in part.

Dated and signed at Nairobi this 12th day of August 2014

F. GIKONYO

JUDGE

Dated, signed and delivered at Nairobi this 14th day of August 2014

J. KAMAU

JUDGE