



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.530 OF 2001**

KENYA SUGAR AUTHORITY PLAINTIFF

VERSUS

SONY OUTGROWERS CO. LTD. DEFENDANT

RULING

This application dated 19/3/04 under Order 50 rules 1 and 17 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks:-

- (a) discharge of the Orders of this court, by Emukule, J., dated 10/3/04.**
- (b) That the Respondent's application dated 9/3/04 be heard inter partes.**

The application is supported by an affidavit by Lilian Renee Awuor Omondi, Advocate, and on the following grounds:-

- 1. that the 10/3/04 orders are final orders granted without the applicants being afforded opportunity to be heard in opposition to the said application.**
- 2. the Respondents participated in the taxation argued before the Deputy Registrar on 5/3/04 and not on 27/2/04 as alleged, and have misled the court in granting the orders.**
- 3. the orders of 10/3/04 were made contrary to the rule and natural justice and geared toward denying the applicants their rightfully awarded costs.**

In their Replying Affidavit by Francis Olalo, dated 13/4/04, the Respondents aver that they came on record on 19/9/03; they were not ready to proceed when the matter came up on 29/9/03; the Defendants commenced taxation of the party to party costs contrary to the agreement between the parties that the defendants would not seek to pursue costs in this matter; the suit was dismissed for want of prosecution while the parties were seeking to amicably settle the matter and negotiating; it is in the interest of justice for the case to be re-instated.

I have carefully gone through the pleadings herein, and paid special attention to the alleged negotiations between the parties, and have arrived at the following findings and conclusions. The provisions under which this application is brought – Order 50 rule 17 simply states: **“the court may set aside an order made ex parte.”** Thus, setting aside an ex parte order is a discretion of the court, and this will only be exercised if the court is satisfied with the grounds upon which such an application to set aside, is founded.

From the pleadings there is lots of reference to the parties having agreed to negotiate. This is advanced by the applicant herein, and is based on alleged correspondence on the subject matter. My reading through the annexed bundle of the said correspondence – **JOA-1**- does not show anything in support of such assertions.

It is true there is correspondence between the Plaintiff/applicant and their counsel , and probably the Government of Kenya. But communication between the plaintiff and any party other than the Defendant herein is not communication between the parties.

In my view, such communication by the Plaintiff was with third parties to the dispute.

From the tone and contents of the above correspondence between the Plaintiff/applicant and its lawyers, two key matters are noted. First, the letters are not addressed to the Defendant; nor are they copied to the Defendant. Secondly, there seems to exist, from those letters, an unspoken implication that the parties in the case take their instructions from the Government of Kenya. That is not my understanding, nor is it the law. Both parties are legal entities with power to sue and be sued in their legal capacities. That is the way the matter came to this court, and the Government of Kenya does not feature anywhere and it is naïve for the Plaintiff/applicant to have relied on such a misconception.

The only correspondence – letter - that comes anywhere near the alleged negotiations is dated 30/3/04, from the Defendant/Respondent which clearly shows that the parties were not negotiating but being directed by the Government. In my view, if there were any negotiations, and there is no evidence on record to support that, then such process was not free from the standpoint of any of the parties.

But of greater importance is the date of the letter – 30/3/04. By the time the letter touching on the so-called negotiations was written, the Order sought to be set aside herein had long been issued by this court. Hence, any negotiations had been locked out by the court order.

I now turn to the component of this application which heavily dwells on **natural justice and the unfairness**, if any, in the **ex parte** order.

From the pleadings and the submissions by counsel for both sides, the counsel for the Plaintiff/applicant came on record on 19/9/03 and the so-called ex parte hearing was on 29/9/03. Counsel for the Plaintiff – Mr. J. Okome Arwa – was present in court on 29/9/03 when the hearing for Notice to show cause why the case should not be dismissed for want of prosecution came up with Ms Omondi appearing for the Defendant. Mr. Arwa applied for adjournment that day, and the court did not grant such an application and the matter went on.

To turn around and term the proceedings that followed the rejection of the adjournment application ex parte simply because Mr. Arwa was not ready to proceed is a misnomer and an unwarranted accusation against both the court and Ms. Omondi. I find Mr. Arwa's allegation in paragraph 6 of the Plaintiff/applicants Further Affidavit, that **he had talked to Ms. Omondi on the adjournment and discovered nothing averse to the adjournment from her**, most interesting and chicky. Adjournments are granted by the court, not by the parties.

Finally, setting aside of any **ex parte** order is at the discretion of the court unless the court was misled in the dismissal order. I find no evidence where this court was misled in its grant of the dismissal order.

All in all therefore, this application to set aside the order of 10/3/04 fails and I dismiss the same with costs in favour to the Defendant/respondent and against the Plaintiff/applicant.

It is so ordered.

DATED and delivered in Nairobi this 6th day of May, 2005.

O.K. MUTUNGI

JUDGE