

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE NO. 26 OF 2003

MAPENZI RESORTS LTD.....PLAINTIFF

V E R S U S

SABAKI BUILDERS.....DEFENDANT

R U L I N G

The Applicant entered into a contract for construction of certain premises. The contract was scheduled to be completed by certain date namely 30/4/2003. By 7/10/03 the works had not been completed. The Respondent came to court seeking mandatory injunction ordering the Applicant to move out of cite to enable the Respondent to take over the possession of the cite and to complete the outstanding works on the ground that the Applicant had failed to complete the works in time and consequently the Respondents International Investment would collapse if project is not completed by 31/10/03 and he is likely to suffer irreparable loss due to negative International publicity unless the Respondent is allowed to take over the cite so as to complete construction by deadline to enable the opening of the holiday resort. The application is supported by affidavit of Max Leffring, Director of the company. The deponent swears that the substantial amount of works had not been completed as argued in the contract and that the Respondent would suffer substantial loss if the project is not completed soonest.

The matter was brought to court under Certificate of Urgency but the court directed the application to be served for hearing inter-partes. There is an affidavit of service on the file. However, on the date appointed for hearing inter-partes, the Applicant had not filed any Opposition Grounds or Replying Affidavit and there was no representation in court.

The Respondent proceeded to argue his case and the mandatory order was issued by this court on the material then before the court.

The Applicant by this application seeks to discharge, vary or set aside that mandatory injunction on the grounds set out in the application that he was not given sufficient time to come to court, was given only one working day, the other days being week-end. That there was no full disclosure, that the suit has been determined by court without by the Defendant, that the Plaintiff has stolen a match against the Applicant that there was no exception consistence justifying granting of mandatory order, that the Plaintiff/Respondent has supported his application by issuing false statements and the court should not have disturbed status quo. The affidavit in support shows that the application was served but the deponent failed to turn up in court for some reasons given in his affidavit. The building contract is admitted. However, he pleads that there was provision under paragraph 7 to extend in case of delay after 15/12/02. Otherwise the deponent testifies to non payment of money due by Respondent and to the fact that even before order was issued the Respondent had kept the Defendant workers from the premises.

I have perused the application and the authorities submitted by both parties. This is a dispute over a building contract. In the case of **Dharamshi –vs Karsam**, 1974 E.A. 41 the Court of Appeal dealt with the issue of damages where there was breach of building contract. It is evident therefore that such a breach can be calculated and the remedy is in damages. In this case the Respondent claimed that the damages he would suffer would be so colossal that he would be compensated by Applicant if the order was not granted. He cited the case of **Despina Pontikos**, 1975 E.A. 38 where it was held that where there is no assurance that an award of damages would be recovered an interlocutory mandatory injunction may be granted. It was said in that judgment that it would be quite unrealistic to refuse a mandatory injunction on the grounds that damages would afford a sufficient remedy, if that remedy is to prove illusory.

In his affidavit the Applicant stated that even before the court order his employees had ceased to enter the site.

The Respondent had also argued that the mandatory injunction would be in the course of mitigating his damages that would be caused by the Applicant's non-completion of the project and for this proposal he cited the case of **Moore & Anor. Vs D.E.R. Ltd**, [1971] 3 All E.R. 512 where it was held that:- although a Plaintiff who had suffered damage for which Defendant was liable, was in mitigating his loss bound to act with the Defendant's interest in mind as well as his own, the only requirement is that should act reasonably.

Also case of **African Highland Produce Ltd vs Kisorio E.A. Law Reports**, [2001] 1 (CAK). It was held that it was Plaintiff's duty to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he has sued.

Upon considering the Plaintiff's position, I am convinced that it was lawful to grant a mandatory injunction at interlocutory stage.

Suit should proceed for the money claims the parties seem to be making against each other.

The application is therefore dismissed with costs.

Dated at Mombasa this 27th February, day of 2004.

JOYCE KHAMINWA

J U D G E