



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 478 OF 2013

TECHNO –PLAST LIMITED.....PLAINTIFF

VERSUS

TYL LIMITED.....DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated 25th January 2018 by which **TYL LIMITED** (the Defendant/ Applicant) seeks the following Orders:-

“1. SPENT

2. THAT the proceedings for 4th December 2018 before Lady Justice Odera where the Defendant’s case was closed for non-attendance be set aside.

3. THAT the Defendant be granted leave to prosecute its case by calling the Defence witness and an early date for Defence by allocated

4. THAT costs of the application be in the cause.”

(2) The application which was premised upon **Article 50(1)** of the **Constitution, Order 51 Rule 15** of the **Civil Procedure Rules, Section 1A & 1B and 3A** of the **Civil Procedure Act 2010**, was supported by the Affidavit of even date sworn by **SHARON CHEPKURUI LIPWOP** an Advocate of the High court of Kenya.

(3) **TECHNO-PLAST LIMITED** the Plaintiff/Respondent opposed the application through the Replying Affidavit dated **6th February 2019**, sworn by **KAMINZA CHARLES ZAKAYO**, also an Advocate of the High Court of Kenya.

(4) Pursuant to directions given by the court the application was canvassed by way of written submissions. The Defendant/ Applicant filed their written submissions on **20th February 2019**, whilst the Plaintiff/Respondent filed their submissions on **19th February 2019**.

BACKGROUND

(5) This suit was initially heard by **Hon Lady Justice Olga Sewe**. The Plaintiff closed its case on **18-9-2017**. On that same date Defence counsel sought an adjournment before **Justice Sewe** to enable them file a substituted witness statement. The application was allowed. On **1st November 2017** when the matter came up for defence hearing counsel for the Defendant once again sought an adjournment on the basis that they had not yet secured a replacement witness. This too was allowed. Thereafter **Hon. Justice Sewe** was transferred to Eldoret High Court, and this Court took over the matter. On **24th July 2018** in the present of both counsel, the court directed that the trial would proceed from where it had stopped and directed that the matter would proceed to defence hearing. On that day Counsel for the Defendant/Applicant once again sought an adjournment to enable them substitute a defence witness. This application was allowed and in present of both counsel the court directed that the hearing would proceed on **4th December 2012**.

(6) On **4th December 2018**, **Mr KAMINZA** Advocate was present in Court holding brief for **Mr ATONGA** for the Plaintiff but there was no appearance for the Defendant. The matter was called out twice, once at **9.30 A.M** during the morning call over and again at **11.00 A.M** but still no Advocate was in Court for the Defendant/Applicant.

(7) Given that the hearing date of **4th December 2018** had been taken by consent, with both counsel present and there being no reason or explanation why there was no appearance by counsel for the Defence the court proceeded to close the Defendant's case and directed that parties file their final written submissions. The Defendant/Applicant then filed this present application.

(8) Counsel for the Defendant/Applicant submits that on **4th December 2018**, the matter was called out in their absence. Upon enquiring from the court clerk, counsel was informed that the hearing would proceed before **Justice Sewe** who would be in Nairobi to handle her part-heard cases between **28th January 2019** to **4th February 2019**, Counsel accordingly advised his client so vide the letter dated **4th December 2018** (Annexure "SCL – I" to the Supporting Affidavit dated **25th January 2018**). That there was clearly an inadvertent mix-up on **4th December 2018**, and that the Defendant is desirous of presenting his defence therefore in the interests of justice the orders sought should be granted. It was further submitted that a reasonable explanation has been given for the failure of Defence Counsel to be in court. Finally it was submitted that the Defendant/Applicant would be prejudiced as he would be condemned unheard contrary to **Article 50** of the **Constitution of Kenya 2010**.

(9) The Plaintiff/Respondent strongly opposed the present application. They submit that the hearing date of **4th December 2018** was given in the presence of both Counsel and aver that no convincing reason has been advanced for failure of Defence Counsel to be in Court on that day. It is submitted that the Affidavit sworn in support of the Application contains several untruths. That this is an old 2013 matter and the Defendants constant prayers for adjournments have delayed the determination of the suit to the great prejudice of the Plaintiff.

(10) I have considered the submissions filed by both counsel. It is not in any doubt that the hearing date of **4th December 2018** was given in presence of both counsel and therefore bound them both. It is also not in dispute that counsel for the Defendant/Applicant failed/declined to attend court on the hearing day. No explanation has been advanced for their failure to attend court. The court called out the matter twice at **9.30A.M** and again at **11.30 A.M** and there no appearance for the Defendant/Applicant.

(11) The claim that counsel was informed by the Court clerk that the matter would proceed before **Justice Sewe** in January 2019 is a blatant untruth. Firstly there is no such indication on the record. If indeed the court had given such directions this would have been clearly recorded in the Court file. Secondly the court had made it clear on **24th July 2018** that the matter would be proceeding before **Justice Maureen Odero**, therefore the question of **Justice Sewe** returning to conclude the hearing did not arise. Finally if indeed counsel for the Defendant had attended Court on **4th December 2018**, she would have perused the file and noted on that very day that the Court had closed their defence. A diligent lawyer would have filed this application the very next day. The fact that this application was not filed until **25th January 2019** after the date scheduled by the Court to receive written submissions convinces me that counsel for the Defendant not only failed to attend court on **4th December 2018** but also did not bother to peruse the court file thereafter to find out exactly what had transpired in Court on that date. This was gross negligence on the part of counsel and was a dereliction of the duty owed to their client. Accordingly I find that no valid reason has been advanced for failure of counsel to be in court on the hearing date.

(12) Having said that, I am mindful that the Defendant has all along participated in the trial indicating their desire to defend the suit. The omissions or faults of counsel ought not be visited upon the client. I am also mindful of the duty imposed upon courts to do justice to all parties vide **Article 50** of the Constitution of Kenya. The Defendant ought not be locked out due to the mistakes of his lawyer. Therefore in order not to prejudice the Defendant I do reluctantly set aside my orders of **4th November 2018** and grant to the Defendant a last opportunity to present its defence. Any witness statement to be filed and served within 7 days hereof. The Defendants Advocates shall pay to the Plaintiffs getting up costs assessed at **Kshs.30,000/=** before the next hearing date.

Costs of this application to be met by the Defendant/ Applicant.

Dated in **Nairobi** this **22nd** .day of **July 2019**.

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Justice Maureen A. Odero