



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 15 OF 2014**

**CMA CGM KENYA LIMITED ..... PLAINTIFF**

**-VERSUS-**

**STOUT MINERA METALS LIMITED ..... DEFENDANT**

**RULING**

1. Plaintiff has sued Defendant seeking judgment for total USD of 188,594 being the demurrage for various containers for which the Defendant failed to pay; for 50 Containers Defendant did not ship as agreed; and for the accrued demurrage of those containers. Plaintiff also has sued for future demurrage that will accrue until those containers are released to it.
2. The Defendant although was served with the Complaint and Summons has to date not filed a Memorandum of Appearance or Defence.
3. Plaintiff filed and served on Defendant an interlocutory Notice of Motion dated 3<sup>rd</sup> July 2014. The application was unopposed by Defendant. By that Notice of Motion Plaintiff prays for mandatory order for release of 50 of its containers still held by Defendant. All those containers have been identified in the application by their numbers.
4. The application is based on the ground that the 50 containers belong to the Plaintiff; that the Defendant has made several unfulfilled promises to release them to Plaintiff and to pay for the accrued demurrage; and that the release of those containers will mitigate further loss.
5. As stated before Defendant was served with the Complaint on 22<sup>nd</sup> April 2014 and to date Defendant has not filed Memorandum of Appearance or Defence to Plaintiff's claim. Further Plaintiff served the Notice of Motion under consideration on the Defendant's Director Mr. Adiel Gitari on 21<sup>st</sup> July 2014. The service of the Notice of Motion was done by the Learned Counsel acting for Plaintiff Mr. William O. Wameyo. The said Counsel deposed in the affidavit of service as follows-
  - **THAT I introduced myself to Mr. Gitari and explained to him the purpose of my visit.**
  - **THAT I served him with copy of the Notice of Motion dated 3<sup>rd</sup> July 2014 bearing a hearing date of 24<sup>th</sup> September 2014.**
  - **THAT he accepted service but declined to sign on the reverse copy.**

- **THAT he however indicated that the Defendant did not oppose the application and would have the containers returned by Friday the following week.**
- **THAT he even gave me his mobile no. being 0721380965.**

The Defendant did not attend nor was he represented nor did he oppose Plaintiff's Notice of Motion.

6. Despite the Defendant's Director's undertaking to release the containers, Learned Counsel for the Plaintiff informed the Court from the Bar that the containers had not been released to the Plaintiff.
7. The law on mandatory injunction has been discussed in various Court. Those Court's decisions have been in tandem with the discussion by the principles propounded in Halsbury's Laws of England Vol. 24 viz-

**"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notices that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."**

8. Justice J. B. Havelock in the case-

**"Rafique Ebrahim v William Ochanda T/A Ochanda & Co. Advocates [2013]eKLR further discussed the above principle thus-**

**'Similar sentiments were reiterated by the Court of Appeal in Africa Safari Club Ltd v Commissioner of Police & 6 Others Civil Application No. 248 of 2011; (2013)eKLR, where the Court reiterated the ruling of Gicheru, JA (as he then was) in East African Fine Spinners Ltd (In Receivership) & 3 Others v Bedi Investments Ltd Civil Application NAI. 72 of 1994 (UR), who cited Megarry, J (as he then was) in Shepherd Homes Ltd v Sandahm (1971)1 Ch. 34 where the learned Judge stated:**

**'... it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the Plaintiff's attempts to stop him, then upon the Plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the Plaintiff's promptitude is a badge of the seriousness of this complaint.'**

9. The Defendant has not defended this suit nor the Notice of Motion. The Plaintiff's depositions therefore and its pleadings are unopposed. There being no such opposition, the Court then finds that the containers enumerated in the Notice of Motion belong to the Plaintiff. Their release to the Plaintiff as sought by the Notice of Motion will ensure that further demurrage charges are mitigated. The Plaintiff has met the conditions of granting the orders sought. This is indeed a fit and proper application for granting mandatory injunction.

10. The Court will however not grant prayer 3 of the Notice of Motion

seeking for costs of repair of the 50 containers held by Defendant. That prayer will have to await formal proof of this case.

11. Accordingly I grant the following orders-

- a. **The Defendant shall release the 50 containers enumerated in prayer No. 2 of Notice of Motion dated 3<sup>rd</sup> July 2014 to the Plaintiff forthwith. To that end Plaintiff is granted leave to get the assistance of an Auctioneer, if need be to obtain such release.**
- b. **The Officer-In-Charge of Police Station nearest to where the said 50 containers are stored shall give assistance to the Plaintiff to ensure that peace and order is maintained.**
- c. **The Plaintiff is awarded costs of the Notice of Motion dated 3<sup>rd</sup> July 2014.**

**DATED and DELIVERED at MOMBASA this 2<sup>ND</sup> day of OCTOBER, 2014.**

**MARY KASANGO**

**JUDGE**