



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 124 OF 2019**

**DORSE EPZ LIMITED (K).....PLAINTIFF/RESPONDENT**

**VERSUS**

**EXPORT PROCESSING ZONES AUTHORITY.....DEFENDANT/APPLICANT**

**RULING**

**Introduction:**

1. In the Notice of Motion dated 29<sup>th</sup> January, 2020, the Defendant has sought for the following orders:

- a) That this Honourable Court be pleased to review and or set aside the ex parte orders issued on 28<sup>th</sup> January, 2020 allowing the Plaintiff's/Respondent's Application dated 15<sup>th</sup> November, 2019 and any other subsequent proceedings or consequential orders issued or made in default of filing a Replying Affidavit and court attendance by the Defendant/Applicant;*
- b) That this Honourable Court be pleased to issue an order granting the Defendant/Applicant leave to admit out of time and or regularize the filed Replying Affidavit sworn by Winnie Sang and filed on 28<sup>th</sup> January, 2020;*
- c) That this Honourable Court be pleased to issue an order that the Plaintiff's/Respondent's Application dated 15<sup>th</sup> November, 2019 be heard inter partes on another date mutually convenient to the parties herein while taking into account averments contained in the filed Replying Affidavit sworn by Winnie Sang and filed on 28<sup>th</sup> January, 2020;*
- d) That this Honourable Court be pleased to make such further and or other orders as it may deem just, fair, reasonable and appropriate in the circumstances in order for the ends of justice to be met;*
- e) That the costs of this Application be in the cause.*

**The Defendant's/Applicant's case:**

2. The Application is supported by the Affidavit of the Defendant's Head of Legal Department who has deponed that *ex parte* orders were issued on 28<sup>th</sup> January, 2020 allowing the Plaintiff's/Respondent's Application dated 15<sup>th</sup> November, 2019 and that although served, the Plaintiff's/Respondent's Application dated 15<sup>th</sup> November, 2019 was misplaced and thus could not be acted upon in good time owing to the fact that the Defendant/Applicant handles legal matters through different offices -the Chief Executive Offices and the Legal Department.
3. It was deponed by the Head of Legal Services that at the time of service of the Plaintiff's/Respondent's Application dated 15<sup>th</sup> November, 2019 upon either of the aforesaid offices, the holders were out of the office and that the then Acting Chief Executive Officer, George Makateto was on his way out of the organization and herself, as the Acting Principal Legal Officer, was away on leave.
4. It was deponed that the Plaintiff's/Respondent's Application dated 15<sup>th</sup> November, 2019 was only discovered on 27<sup>th</sup> January, 2020 and immediately acted upon through preparation of a suitable Replying Affidavit that was filed on the morning of 28<sup>th</sup> January, 2020.
5. It was the deposition of the Defendant's Head of Legal Services that after preparation of the Replying Affidavit, she instructed Leah Wamaitha, who is an intern attached in the Defendant's/Applicant's Legal Department, to attend court on 28<sup>th</sup> January, 2020, and file the Replying Affidavit, and request a counsel to hold her brief and seek the court's leave to admit the Replying Affidavit out of time and or regularize the same.
6. It was the deposition of the Defendant's Head of Legal Services that owing to the congestion in the registry, as well as the finance section,

she took longer than anticipated to pay for and file the Replying Affidavit; that the said intern encountered transport difficulties – mechanical challenges affecting the vehicle she was using to travel to Court and that as a result of the aforesaid unforeseen circumstances, by the time the intern arrived in court, the matter had already been called out and dealt with.

7. The Defendant's counsel deponed that the misplacement of the Plaintiff's/Respondent's Application dated 15<sup>th</sup> November, 2019 and failure to file a Replying Affidavit in good time as well as attend court on 28<sup>th</sup> January, 2020 on the part of the Defendant/Applicant are *bona fide* human mistakes and in the disclosed circumstances, they were not deliberate, premeditated and hence excusable.

8. It was deponed that the Defendant/Applicant has a very good Replying Affidavit to the Plaintiff's/Respondent's Application, which should be admitted out of time/regularized and the Plaintiff's/Respondent's Application dated 15<sup>th</sup> November, 2019 be heard *inter partes* and that among the orders issued is a mandatory injunction that is very drastic in nature and ordinarily ought to be issued only in the clearest of circumstances which do not obtain in this case.

9. The Defendant's Head of Legal Services deponed that the Plaintiff/Respondent did not do equity by coming before this Honourable Court with very dirty hands through failure to disclose material facts about the genesis and nature of its claim and that in the disclosed circumstances, it is most undeserving of the remedies granted.

10. It was deponed that the Application has been brought for hearing and determination without any undue or any unreasonable delay soon after learning about the subject Application as well as the *ex parte* orders issued on 28<sup>th</sup> January, 2020 and that no prejudice will be occasioned to the Plaintiff/Respondent if this Application is allowed as it will still have an opportunity to prosecute the Application dated 15<sup>th</sup> November, 2019 fully during the *inter partes* hearing thereof.

11. The Defendant's Head of Legal Services finally deponed that if the court is inclined not to allow the Application, the Defendant/Applicant will be condemned to honour among other things a very drastic mandatory injunction order to a party who has been in breach of contractual obligations without ever having had an opportunity to be heard and hence will suffer great prejudice, harm and substantial loss.

#### **The Plaintiff's/Respondent's case:**

12. In response, the Plaintiff's advocate deponed that she attended court on 28<sup>th</sup> January, 2020 for the hearing of the Plaintiff's Application dated 15<sup>th</sup> November, 2019 and that the court upon being satisfied that the Defendant/Applicant had been served with the Plaintiff's Application together with its order issued on 20<sup>th</sup> November, 2019, and owing to the Defendant's/Applicant's absence in court, the court allowed the Plaintiff's Application dated 15<sup>th</sup> November, 2019.

13. The Plaintiff's advocate deponed that the Application dated 15<sup>th</sup> November, 2019 together with the order issued on 20<sup>th</sup> November, 2019 were served upon the Defendant/Applicant on 26<sup>th</sup> November, 2019, more than two(2) months to the hearing date of the said Application; that the Defendant/Applicant had two(2) months to put in their response to the Application dated 15<sup>th</sup> November, 2019 which they did not and that the Plaintiff's Application was brought to court under a Certificate of Urgency and it was expedient that the same be heard without undue delay.

14. It was deponed that the Defendant/Applicant was not diligent in the way it took conduct of this matter hence it will be unfair to compromise the position of the Plaintiff because of the Defendant's lack of seriousness in defending the matter; that the Defendant/Applicant's Application is meant to delay the Plaintiff from enjoying the fruits of the orders issued by the court on 28<sup>th</sup> January, 2020 and generally delay the cause of justice and that the Defendant/Applicant will not suffer any prejudice as they still have the opportunity to advance their case during the hearing of the main suit herein.

15. The Plaintiff's counsel finally deponed that the mistake of the Defendant/Applicant not to attend court on 28<sup>th</sup> January, 2020 ought not to be visited upon the Plaintiff/Respondent and that if the Defendant's/Applicant's Application is allowed, the same will unjustly delay the Plaintiff from commencing construction of the proposed go-down as the initial delay had been caused by the Defendant who has intentionally failed to issue the Plaintiff/Respondent with the Lease Agreement.

16. The Defendant's Head of Legal Services swore a Further Affidavit which I have considered. The Application proceeded by way of written submissions.

#### **Submissions:**

17. In his submissions, the Defendant's advocate submitted that the court should accept the Defendant's/Applicant's explanation and exercise a positive discretion aimed at accommodating, as opposed to locking out it out of this case without considering their meritorious Replying Affidavit.

18. Counsel invited the court to consider the decision in the Court of Appeal case of *Patriotic Guards Limited vs. James Kipchirchir Sambu [2018] eKLR* where it was held that:

*"...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit. Chief Justice, John Marshall.*

the 4<sup>th</sup> Chief Justice of the United States, delivered himself in *Osborn V. Bank of the United States, 22 U. S. 738 [1824]* on the issue as follows;

*“Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law...”*

19. The Defendant’s counsel submitted that this is one clear case where discretion should be exercised in the Defendant’s/Applicant’s favour because a plausible explanation has been given for the failure to attend court in good time; that it is a well-established principle that a party should never be condemned unheard and that the right to be heard falls under the rules of natural justice and in specific the ‘*audi alteram partem*’ rule which dictates that no person should be condemned unheard.

20. It was submitted that the Defendant/Applicant has a very good Defence/Replying Affidavit to the Plaintiff’s/Respondent’s Application dated 15<sup>th</sup> November, 2029 which ought to be considered by this Honourable Court and that the Replying Affidavit shows that the Plaintiff is the one in breach of the Agreement entered into with the Defendant.

21. The Defendant’s advocate submitted that a mandatory injunction order is very drastic in nature and ordinarily ought to be issued only in the clearest of circumstances which do not obtain in this case. Counsel relied on the case of *Kenya Breweries Limited & another vs. Washington O. Okeyo [2002] eKLR* where the Court of Appeal held as follows:

*“...The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury’s Laws of England 4<sup>th</sup> Edn. para 948 which reads:*

*“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 it 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 attempted to steal a march on the Plaintiff.....a mandatory injunction will be granted on an interlocutory application.”*

*Also in Locabail International Finance Ltd. vs. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the Plaintiff...”*

22. It was submitted that courts should be very hesitant to grant mandatory injunction orders *ex parte*, on an interlocutory Application and even after full hearing and that this is not one of the cases where the drastic *ex parte* orders should be allowed to exist.

23. The Plaintiff’s advocate submitted that the Defendant’s non- attendance is not excusable; that the Application dated 15<sup>th</sup> November, 2019 was brought to court under a Certificate of Urgency; that it was only right that the same be heard without undue delay; that by allowing this Application, the same will defeat the purpose of the urgency as the Plaintiff is still ready and willing to construct the Go-downs and that the construction of the go-down was not undertaken due to the Defendant’s failure to issue to the Plaintiff with a Lease Agreement.

24. It was submitted that the Defendant has not in its Replying Affidavit to the Application dated 15<sup>th</sup> November, 2019 shown that it has a good Defence and that the Defendant has not demonstrated that it would suffer peril if the orders sought in the present Application are not allowed.

25. Counsel submitted that one of the orders allowed in the Application dated 15<sup>th</sup> November, 2019 was that a mandatory injunction be issued compelling the Defendant to issue the Plaintiff with a Lease Agreement over L.R. No. 18474/56; that the Defendant has failed to offer an explanation why the said Lease Agreement cannot be issued to the Plaintiff and that the Defendant is out to delay this matter.

26. It was submitted that the mistake of the Defendant should not be visited upon the Plaintiff. Counsel relied on the case of *Edney Adaka Ismail vs. Equity Bank Limited [2014] eKLR* where the Court quoted with approval the case of *Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002* in which the court expressed itself as follows:

*“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff’s determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.”*

27. The Plaintiff’s advocate submitted that the Defendant is the litigant and the Head of Legal Department acts on behalf of the Defendant herein; that the Defendant ought to have received the order served upon it, diarize the same and ensure that the Replying Affidavit was filed

on time and that the Defendant was indolent in defending itself and the court cannot exercise its discretion in favour of the Defendant.

**Analysis and findings:**

28. This suit was commenced by the Plaintiff by way of a Plaint dated 15<sup>th</sup> November, 2019. Filed alongside the Plaint was an Application of even date seeking for both a prohibitory and mandatory injunction in respect of land known as 18474/56 (*the suit property*). When the Application came up for hearing on 28<sup>th</sup> January, 2020, the Defendant's advocate was not in court. The court allowed the Application as prayed.

29. The Defendant is seeking to set aside the order of this court that was granted in favour of the Plaintiff on 28<sup>th</sup> January, 2020 on the ground that although served, the Plaintiff's/Respondent's Application dated 15<sup>th</sup> November, 2019 was misplaced and thus could not be acted upon in good time owing to the fact that the Defendant handles legal matters through different offices - Chief Executive Officer's Offices and the Legal Department.

30. According to the Defendant's Head of Legal Services, at the time of service of the Plaintiff's Application dated 15<sup>th</sup> November, 2019 upon either of the aforesaid offices, the holders were out of the office and that it was only on 27<sup>th</sup> January, 2020 that they stumbled on the Application and immediately acted upon it by preparing a suitable Replying Affidavit that was filed on the morning of 28<sup>th</sup> January, 2020.

31. It was the deposition of the Defendant's Head of Legal Services that owing to the congestion in the registry, as well as the finance section, the intern who was sent to file the Replying Affidavit took longer than anticipated to pay for and file the Replying Affidavit; that the said intern encountered transport difficulties - mechanical challenges affecting the vehicle she was using to travel to court and that as a result of the aforesaid unforeseen circumstances, by the time the intern arrived in court, the matter had already been called out and dealt with.

32. I have perused the Replying Affidavit that was filed in this court on 28<sup>th</sup> January, 2020, the same day the Plaintiff's Application came up for hearing. Indeed, the official receipt shows that the Replying Affidavit was paid for on the said date at 9:25 am, which was a few minutes after the matter had been called out.

33. The filed Replying Affidavit is in tandem with the Defendant's Head of Legal Services deposition that the failure to file a Replying Affidavit in good time as well as attend court on 28<sup>th</sup> January, 2020 on the part of the Defendant/Applicant are *bona fide* human mistakes and in the disclosed circumstances, they were not deliberate, premeditated and hence excusable.

34. Indeed, the orders granted to the Plaintiff are mandatory in nature. As stated in *Halsbury's Laws of England, Vol. 24, 4<sup>th</sup> Edn. para 948*:

*"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 it 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 attempted to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application."*

35. The dispute herein is in respect of the Lease Agreement in respect of the suit property, which the Plaintiff has alleged that the Defendant has refused to sign, despite having paid for, and obtained building plans for the proposed go-down. According to the Plaintiff, the Defendant had threatened to terminate the Lease issued to it and acquire back the suit property.

36. In its Replying Affidavit which is on record, the Defendant deposed that although it entered into a formal Letter of Offer with the Plaintiff in respect of the suit property, the said Letter of Offer provided that the Plaintiff was to develop the suit property within twenty four (24) months, which condition the Plaintiff has breached.

37. The issues raised by both parties can only be resolved conclusively upon hearing both parties. Indeed, this is a case where discretion should be exercised in the Defendant's/Applicant's favour because a plausible explanation has been given for the failure to attend court in good time, and the fact that the Replying Affidavit was filed on the same day the matter came up for hearing, albeit late. Indeed, this Application was filed one day after the dismissal order was made, which was prompt.

38. In view of the well-established principle that a party should never be condemned unheard, and the Defendant's advocate's failure to attend court having been explained to the satisfaction of the court, and the Application to set aside the ex parte orders having been filed promptly, I shall allow the Application dated 29<sup>th</sup> January, 2020 as follows:

***a) The orders issued on 28<sup>th</sup> January, 2020 allowing the Plaintiff's Application dated 15<sup>th</sup> November, 2019 and any other subsequent proceedings or consequential orders issued or made in default of filing a Replying Affidavit and court attendance by the Defendant/Applicant be and are hereby set aside.***

***b) Each party to bear its own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2020.**

**O.A. ANGOTE**

**JUDGE**