



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC LAND CIVIL SUIT NO. E038 OF 2024

MITCHELL COTTS EPZ LIMITED.....

.....PLAINTIFF

VERSUS

EXPORT PROCESSING ZONES AUTHORITY.....

DEFENDANT

RULING

1. This ruling considers the notice of motion dated 21st May 2024, which is presented as being moved under the provisions of **Sections IA, 1B, and 3A** of the **Civil Procedure Act, Orders 40, Rules 1 and 2, and 51 Rule 1** of the **Civil Procedure Rules, 2010**, along with all other enabling legal provisions. The plaintiff seeks the following reliefs from this court: -

a. Spent.

b. Spent.

c. THAT pending the hearing of the suit, a temporary injunction be issued restraining the defendant herein, whether by itself, its agents, employees, assigns, servants or otherwise howsoever and any persons claiming under or through it whatsoever from selling, disposing, charging, pledging, dealing, leasing, transferring, interfering with and/or intermeddling in any manner whatsoever with the suit parcels namely Land Reference No. 18474/129-138 (inclusive) and 214, Athi River.

d. THAT pending the hearing and determination of the suit, the honourable court does issue an order compelling the defendant herein to furnish the plaintiff herein with the detailed technical drawings of the railway siding designs as requested in the plaintiff's letter of 19th April 2023.

e. THAT the defendant bears the costs of the motion.

2. The motion is supported by the grounds outlined in the body thereof and the supporting affidavit of Daniel K. Tanui, sworn on the same date. In summary, he succinctly states that on 21st December 2017, the plaintiff applied for a service license for a logistics operating center at Athi River EPZ, seeking 50 acres of land. Conditional approval was granted by the defendant on 24th January 2018, requiring the plaintiff to incorporate a

company, obtain an Environmental Impact Assessment (EIA) license, pay an annual fee of USD 1,000, and obtain a letter of offer from the defendant herein for the lease of land for the logistics facility.

3. Thus, the plaintiff was incorporated in June 2018 and paid the required fees, but could not obtain the EIA license without completing the necessary documentation. On 17th August 2018, the defendant provided six letters of offer for land, which the plaintiff found unsuitable for its logistics needs. Therefore, the plaintiff requested different parcels of land, leading to fresh letters of offer on 12th March 2019 for eleven parcels, which the plaintiff accepted and paid additional fees totalling USD 148,452.20.
4. However, the plaintiff noted that the parcels lacked railway access, crucial for compliance with regulations, and engaged the defendant for infrastructure improvements. A meeting on 1st October 2019 resulted in an agreement to develop a railway siding. On 10th March 2021, the plaintiff requested an extension for construction due to pending infrastructure. In response, the defendant confirmed it was working on the railway siding, and the plaintiff assumed the construction timeline was extended. Despite the 24 months expiring in April 2021, the defendant did not terminate the letters of offer. In consequence, the plaintiff continued making payments based on the expectation that the defendant would complete the required infrastructure.

5. On 19th April 2023, the plaintiff sought detailed technical drawings of the railway siding for clarity. However, the defendant responded by terminating the plaintiff's leases, citing alleged failure to start construction within 24 months, despite prior assurances from the defendant about completing supporting infrastructure first. The plaintiff claims this constitutes a breach of contract, as it has fulfilled its obligations and continues to make payments for the parcels. The defendant's actions have led to the plaintiff being excluded from its land, which could result in significant damages and irreparable harm, thus the relief sought. In support of the assertions, the plaintiff availed this court with a bundle of documents.
6. The defendant vehemently opposes the motion by the affidavit of Andrew Njuru, deposed on 14th June 2024, where he concisely avers that on 21st December, 2017, the plaintiff applied for an EPZ Enterprise Service License to provide value-added services for agricultural products, specifically focusing on tea and coffee exports. The initial application did not request land allocation of 50 acres to operate a logistics centre. On 24 January 2018, the application was conditionally approved.
7. Nevertheless, as of now, the plaintiff has complied with two out of four conditions, including company incorporation and securing a lease offer for land. The defendant issued letters offering specific parcels of land, though the plaintiff later

requested relocation to parcels with railway access. In consequence, fresh offers were made on 12th March, 2019, for land parcels no. **LR. Nos. 18474/129-138** and **214 (“suit properties”)**, without a precondition for railway siding construction or government approvals.

8. The letters of offer over the suit properties required development within 24 months and stipulated conditions to avoid repossession of the land. The plaintiff was also required to pay the relevant fees for the land pending execution of a standard lease. The defendant issued invoices for these charges and engaged in consultations regarding the railway siding, though it stressed there was no obligation on the defendant’s part to construct this infrastructure. The defendant’s silence did not imply consent for extensions regarding development timelines. The conditions for approval had to be met before operations could begin, and a reminder was issued to the plaintiff regarding compliance. The plaintiff had not fully complied with all conditions before attempting construction on the site. Finally, the defendant was not in breach of any contract; instead, it was the plaintiff who necessitated the defendant issuing a notice of termination of leases for the suit properties.

9. In a supplementary affidavit sworn on 7th March 2025, Daniel K. Tanui reiterated his earlier averments. Further, he states that although the letter of offer initially required development within 24 months, the plaintiff requested an extension in a

letter dated 10th March 2021. The defendant responded on 22nd March 2021 without declining the request and even forwarded the leases to the plaintiff for execution on 21st January 2022, long after the 24-month construction deadline had passed.

10. The motions are canvassed by written submissions. This court is highly appreciative of the submissions filed by the law firms of Mss **TRIPLEOKLAW LLP** for the plaintiff, dated 7th March 2025, and those by **C&O ADVOCATES LLP** for the defendant, dated 20th March 2025. Therefore, after identifying and considering the issues for determination, this ruling will, later in its analysis and decision, review the arguments presented in the rival submissions regarding the specific issue and also consider the relevant law and judicial precedents.

11. Accordingly, having reviewed the motion, its grounds, affidavits, annexures, as well as the opposing submissions, the ensuing issues, which will be addressed concurrently, that emerge for resolution are:

a) Whether the defendant should be compelled to release the document sought by the plaintiff.

b) Whether orders of injunction can be issued against a government entity.

c) Whether the plaintiff has met the legal threshold to warrant the grant of injunctive relief.

And they shall soon be addressed in this court's analysis and determination. However, as some of the issues are related, the court proposes to deal with **issue (a)** separately and thereafter handle the last two together.

a) Whether the defendant should be compelled to release the document sought by the plaintiff.

12. Unfortunately, the parties' submissions did not address the issue, and it is necessary to articulate the pertinent law and prevailing jurisprudence on the issue. Therefore, regarding the relevant legal provisions, **Section 22 (a)** of the **Civil Procedure Act**, grounded in **Article 35(1) (b)** of the **Constitution of Kenya**, confers upon this court the authority to order discovery, inspect documents, and require the production of documents, among other functions. These provisions provide as follows:

Article 35(1) (b)

(1) Every citizen has the right of access to—

(a).....

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

Section 22 of the Civil Procedure Act: -

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

(a)make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b)issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c)order any fact to be proved by affidavit.

13. As read together, these provisions of the law grant this court broad discretionary powers in an application for discovery, which must be exercised judiciously. The core purpose of discovery is to ensure the availability of relevant documentary evidence to support a party's case and to facilitate access to justice and the fair resolution of the matter. In this context, this court concurs with the persuasive decision of **Oracle Productions Limited v Decapture Limited & 3 others [2014] KEHC 8658 (KLR)**, which held: -

“The true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial.”

14. Further, **Halsbury’s Laws of England Vol 13, paragraph 1** states as follows on the importance of the discovery of evidence: -

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”

15. Given the circumstances of this case and upon review of the various affidavits, the defendant has not objected to the discovery process. Nevertheless, the court encountered

significant difficulty in tracing the purported letter dated 19th April 2023 from the plaintiff to the defendant, as the annexures were combined as one annexure without specific referencing to specific page nos, yet the annexure was nearly 300 pages. It would have been advisable for counsel to mark each annexure as a separate exhibit. Be that as it may, the letter demonstrates that the plaintiff requested a clear copy of the drawings concerning the Railway Siding Designs, to which the defendant, upon receipt on 20th April 2023, did not respond. Therefore, this court concludes that the plaintiff has established sufficient grounds for the discovery of documents. This court finds this relief is merited.

b) Whether orders of injunction can be issued against a government entity and whether the plaintiff has met the threshold to warrant the grant of injunctive relief.

16. The first aspect of this issue was not addressed in the submissions of the parties. However, as is evident from **paragraph 2** of the plaint, the defendant is sued as a State Corporation established pursuant to **Section 3** of the **Export Processing Zones Act**. In other words, it is a government entity; accordingly, **Section 16 (1) (i)** of the **Government Proceedings Act, Cap 40**, prohibits the granting of injunctive relief against it. This statutory provision specifically states that: -

“(1)In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that—

(i)where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(ii).....”

17. Breathing life into this provision of law, **Order 29 Rule 2(2)** of the **Civil Procedure Rules** further provides: -

“(2)No order against the Government may be made under—

(a)Order 14, rule 4 (Impounding of documents);

(b)Order 22 (Execution of decrees and orders);

(c)Order 23 (Attachment of debts);

**(d)Order 40 (Injunctions); and
(e)Order 41 (Appointment of receiver).”**

18. This provision of law has been the subject of interpretation by our courts, and this court associates itself with the decision of **Gakundu Farmers Co-operative Society v Board of Trustees Commodities Fund & 3 others [2025] KEHC 3791 (KLR)**, where the court stated: -

“The facts pleaded seek an injunction against the respondents who are Government organs. A reading of the above cited provision of statute expressly forbids issuance of an injunction against the Government.”

19. Following this, this court concludes that the relief sought of an injunction against the state is vexatious, as it cannot be issued in accordance with the specific provisions outlined under the **Government Proceedings Act**. It also finds that this relief is untenable. A determination of the second limb of this issue is deemed unnecessary. Costs shall abide by the outcome of the main suit. In the end, this court grants the following final orders: -

a. The defendant shall and subject to being in possession thereof, within 60 days hereof and at the plaintiff’s cost, furnish the plaintiff herein with the detailed technical drawings of

the railway siding designs as requested in the plaintiff's letter of 19th April 2023.

b. Costs of the motion shall abide by the outcome of the main suit.

c. A mention date shall be given for purposes of pretrial directions.

Orders accordingly.

Delivered and Dated at Machakos this 20th day of January, 2026.

**HON. A. Y. KOROSS
JUDGE
20.01.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant

Mr. Benson Oduor holding brief for Mr. Henry Ouma for Plaintiff/
Applicant

Mr. Edeyo holding brief for Mr. Anyichi for Defendant/ Respondent

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