REFERENCE No. 3/2000

IN THE COMESA COURT OF JUSTICE, LUSAKA, ZAMBIA.

Coram: **Nyankiye, Kalaile, Sakala, Ogoola and Mutsinzi, LJJ.**
Delivered in Open Court, Friday 19th October, 2001.

Registrar: **S.H. Zwane, Esq.**

THE REPUBLIC OF KENYA AND
THE COMMISSIONER OF LANDS.....APPLICANTS

Versus

COSTAL AQUACULTURE LIMITED.....RESPONDENTS

For the Applicants: **Ambassador Esther Mshai Tolle – Agent**

For the Respondents: **Collins Namachanja, Esq.; assisted by Christopher Akiwumi, Esq.**

JUDGMENT OF THE COURT

Lord Justice James Ogoola delivered the Judgment of the Court.

The Applicants are represented in Court this morning by their Agent: The High Commissioner of the Republic of Kenya to Zambia (Ambassador Esther Mshai Tolle). The Application is for an adjournment of the hearing of the Applicants' own preliminary Application (dated 20th August, 2000), on the grounds that the Applicants' lawyers are not available today to prosecute their case. The reasons for the lawyers unavailability were stated by the Ambassador to be: (a) the change by the Court in the hearing dates of this case (from 30th October to 19th and 20th October, 2001); and (b) the prior engagements of the lawyers in other courts in Mombasa, Kenya.

In light of the above, Applicants prayed Court to adjourn the matter in order to afford their lawyers the opportunity to argue the preliminary Application – given, especially, the importance that the Kenyan Government attaches to this litigation.

For their part, Respondents firmly and vigorously objected to the Application for adjournment on the grounds that:

(a) Applicants have had full and prompt official notices of the dates of hearing of this matter – as regularly communicated to the Parties (through their Agents) starting from 27th September and ending with 3rd October, 2001; not to mention newspaper stories on the hearing dates of this case that have been carried in the local Kenyan media- (see **The Nation** of 13/10/01);

(b) Applicants have a preliminary Application (on the issue of jurisdiction) – which they need to prosecute today;

(c) The Court's timetable is too tight to allow laxities in hearing cases. This Court should, as it has in its previous judgments, send a strong signal for its intolerance to adjournments; and

(d) Respondents' prior conduct in this case (in Kenyan courts), has been held to be "mischievous". That conduct must be nipped in the bud by this Court.

Accordingly, Respondents pray that Court rejects the present Application; strikes out the Applicants' preliminary Application on jurisdiction; and awards substantial costs to the Respondents (including the cost of air tickets, accommodation, subsistence, lawyers' hourly fees, etc).

Court has listened very carefully to the submissions of the Parties' Agents. The applicable law for the analysis of this Application is Rule 48, subrule 3(a) of this Court's Rules of Procedure, which provides as follows:

"3. (a) The President may in special circumstances, after hearing the parties, either on his own initiative or at the request of one of the parties, defer a case to be dealt with at a later date."

It is evident that an Application for adjournment under subrule 3 (a) of Rule 48, must be supported by "special circumstances". The Applicants have adduced basically two grounds for their prayer – namely; (i) untimely notification of the change in the hearing dates, and (ii) prior engagements of their advocates. This Court does not agree that either one of these grounds constitutes "special circumstances". This is so because of the following considerations.

The Applicants' Agent concedes to having received the Registrar's letter of 3rd October, 2001, in which the definitive change in the hearing dates was officially communicated by the Registrar to both Parties. She received that letter on 4th October, and forwarded it to the Attorney General of Kenya "promptly". The Attorney General presumably received that letter around 6th or 7th October, which afforded a notice of approximately two weeks prior to the new hearing dates of 19th and 20th October. Therefore, Court finds that the Applicants were not only duly notified of the change in the hearing dates; but that they were so notified in sufficient time. If, for any reason, they were confronted with any difficulties in meeting the new dates, they were free to communicate with both the Court and the Respondents in a bid to set matters right. They did not. That failure or indifference on their part can only redound to their disadvantage in this Application – in as much as it has directly and totally wasted the whole of today and tomorrow, with severe financial repercussions for the other Party.

Concerning the Applicants' second ground, namely non-availability of their advocates, allegedly on prior engagements in other courts elsewhere, this Court simply cannot accept or condone any such nonchalant behaviour on the part of counsel. Ever since the Registrar's communication of 3rd October, 2001, counsel were on strict and unambiguous notice to appear in this Court on 19th and 20th October. That timeframe was more than sufficient for them to set their house in order, and to make all necessary arrangements for

their own appearance in Court, or for the appearance of some other appropriate alternative counsel. We have not been told the courts in Mombasa in which the advocates are now engaged, nor whether those courts take precedence over this Court. We have not been told how many of Applicants' advocates are so engaged, or why alternate advocates could not be instructed. In any event, this Court wishes to firmly and forcefully reiterate its previous admonition in the case of **PTA Bank & Gondwe v Martin Ogang (Reference No. 1B/2000),** in which we stated that:

"It is for counsel to wait on the Court and not the Court to wait on counsel".

A supplementary ground was canvassed by the Applicants' Agent to the effect that as Agent, she sometimes found herself absent from her station in Lusaka to attend to her diplomatic assignments and duties; for instance in Malawi; and that this interrupted the promptness of transmission of some documents to Nairobi concerning this case. While Court appreciates the potential predicament of the Ambassador in this, the situation is not entirely without remedy. The function of an Agent is a crucial link in the efficiency and integrity of communications between the Court and the Parties, and *vice versa.* Indeed, in the scheme of this Court's operations, the Agent is a fundamental and critical link in the communications corridor between the Court and the Parties. The significance and paramountcy of that function need to be understood and underlined by all who dare to shoulder the burden of that responsibility. Court cannot believe that an Agent who finds himself/herself in the Ambassador's precarious situation cannot make appropriate, effective and practical arrangements to cover occasional absence(s) from station. In the present case, there was no explanation as to why such arrangements could not be made during the Agent's one single sortie to Malawi. In any event, there was direct communication on the matter by the Registrar to the Attorney General in Kenya, as was pointed out by the Applicants' Agent in her submission; and as is evidenced by the Registrar's letter of 3rd October, 2001, which was duly copied to the Attorney General.

Given all the above reasons, Court would have had no hesitation at all to find that the Applicants have not adduced any special circumstances to warrant an adjournment.

However, in this particular case, Court is also aware of the fact that the Court's own Cause-List has been changed many times over owing to unavoidable circumstances. The frequency and rapidity of these changes has no doubt contributed to some confusion in the minds of the Parties, and in the alignment of their calendars. In the premises, Court is willing to give the benefit of the doubt to the Applicants this time, and to grant the adjournment prayed for. Nonetheless, Court at the same time awards costs to the Respondents who, unlike the Applicants, have responded to the many changes in the Cause-List faultlessly and with full alacrity. Having regard to subrule 4 of Rule 62 of the Court's Rules of Procedure, Court does not accept the quantum of the costs canvassed by the Respondents' counsel. For the avoidance of doubts, therefore, apart from the Respondents' cost of air tickets for two counsel (direct travel: Nairobi-Lusaka-Nairobi), the other costs awarded to the Respondents are limited to the expenses that flow directly from the failure to conduct the two-day hearings of this case as cause-listed for 19th and 20th October, 2001. The above costs, as ascertained by the Registrar, are to be paid by the Applicants not later than 15th December, 2001.

Counsel for the Respondents also prayed Court to dismiss the Applicants' preliminary Application (dated 20th August, 2001), concerning the jurisdiction of this Court over this case. However, Court finds that having allowed this instant adjournment, it is obviously impossible to hear the jurisdictional Application, until the adjourned date. In any case, since learned counsel's Application is itself dependent on the hearing of the jurisdictional Application, Court cannot possibly grant his particular prayer at this point in time. Therefore, the Applicants will proceed with their preliminary Application on jurisdiction at the next sitting of Court.

Given the very tight constraints of this Court's operations, the hearing of this case is adjourned to the next Session of Court: the exact dates of which will be communicated to all the Parties by the Registrar of Court.

It is so ordered.

Dated and delivered at Lusaka this 19th day of October, 2001.

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A.J. Nyankiye

Lord Justice

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J.B. Kalaile

Lord Justice

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E.L. Sakala

Lord Justice

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James Ogoola

Lord Justice

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J. Mutsinzi

Lord Justice

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of the original

Sipho H. Zwane
Registrar
Comesa Court of Justice