



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
HCCC CASE NO. 430 OF 2011
GLOBAL PETROLEUM PRODUCTS KENYA LIMITED.....PLAINTIFF/APPLICANT
VERSUS
SONAL HOLDINGS (K) LIMITED.....1ST DEFENDANT
PARESH KUMAR DODHIA.....2ND DEFENDANT

RULING

1. The Plaintiff/Applicant moved the court pursuant to the provisions of **Sections 3A and 95 of the Civil Procedure Act, Section 59 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya**, as well as **Order 50 Rule 6 and Order 8 Rule 6 of the Civil Procedure Rules** vide the application dated **24 September 2013** for orders that:

- a) Spent
- b) Spent
- c) That the court do extend the time within which the Plaintiff can file and serve its Amended Plaintiff;
- d) That costs of the application be provided for.

The application is supported by the affidavit annexed thereto sworn by **James Singh Gitau** on 24 September 2013.

2. The brief background thereto is that, having filed this suit in September 2011 for recovery of a sum of **Kshs. 30,000,000** from the Defendants, the Plaintiff sought leave of the court vide its Chamber application dated **24 August 2012** to amend that Plaintiff. That application was granted on **28 February 2013** with an order that the Amended Plaintiff be filed within 14 days from the date thereof.

3. The Plaintiff now contends that after its application for amendment of Plaintiff was argued *inter partes* on **13 December 2012**, the Ruling was set for the **31 January 2013**, but was not delivered as the Court did not sit on that day. Thereafter, on **28 February 2013**, the Plaintiff's advocates wrote to the Court seeking to know the alternative Ruling date, and that, unknown to them, the court had delivered its Ruling on that

very date of **28 February 2013**. It is thus the Plaintiff's case that since it was unaware of the delivery of the Ruling, it was unable to file an Amended Plaintiff within the 14 day period stipulated by the Court.

4. In the Supporting Affidavit Counsel for the Plaintiff, **Mr. Singh Gitau** deponed to several other factors as having contributed to the delay in filing the Plaintiff as well as the instant application for extension of time, including the following:

a) That the court file could not be traced in the Registry between **15 March 2013** and **20 April 2013**;

b) That the application was prepared (per annexure **JGS-5**) and given to an Advocate in their firm, **Mr. Thomas Obel** for processing and prosecution, but this was not to be as **Mr. Obel** resigned around the same time without bringing the issue of the pending application to his knowledge.

For the foregoing reasons the Plaintiff pitched a case for the granting of the orders prayed for in the Notice of Motion dated 24 September 2013 as aforesaid.

5. In response to the application, the Defendants relied on the affidavit sworn on **20 December 2013** by the 2nd Defendant, **Paresh Kumar Dodhia**. While Mr. Dodhia conceded in his affidavit that the Ruling that was slated for **31 December 2013** was not delivered as scheduled, he averred that notice of the new date was duly given, and that in any event, it behooved Counsel to establish why the Ruling was not delivered and when it would be delivered. It was further deponed by **Mr. Dodhia** that had he exercised due diligence, Counsel for the Plaintiff would have been informed in good time that the Ruling had been delivered on **28 February 2013**. It was thus the contention of the Defendants that there being no justifiable explanation that had been tendered to explain the seven months' delay, it would be prejudicial to the Defence for the orders sought to be granted, considering that it had already lodged an application for stay of execution under **Rule 5(2)(b) of the Court of Appeal Rules**.

6. The record does confirm that after the filing of the Replying Affidavit aforementioned, the Defendants proceeded to file an application for stay of proceedings pending a proposed appeal against the Court's Ruling dated **28 February 2013**. That application was heard and found to be lacking in merit and was accordingly dismissed on **31 March 2014**. There is thus no indication herein that the Ruling of **28 February 2013** was appealed as intended.

7. Be that as it may, the parties are in agreement, and the court record does confirm, that the Ruling of **28 February 2013** was delivered in the absence of the Plaintiff. Counsel for the Plaintiff, in his affidavit filed in support of the application, endeavoured to explain that it is for this very reason that they did not file the Amended Plaintiff within the 14 days granted by the court. Additionally, Counsel explained why there was delay in the filing of the instant application, namely, the resignation of **Mr. Thomas Obel** from their firm. There is nothing in the Replying Affidavit to controvert these assertions, apart from a general deprecation of the Plaintiff's Counsel's negligence that is apparent in their conduct of this case.

8. Both **Section 95 of the Civil Procedure Act** and **Order 50 Rule 6 of the Civil Procedure Rules** empower the Court to enlarge time, for good cause, even where the application is brought after the expiry of the period originally fixed by the Court. In particular, **Order 51 Rule 6** provides thus:

"where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by Order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and any order made thereon shall be borne by the parties making such application unless, the Court orders otherwise."

9. The rationale for amendment of pleadings need not be belaboured. The principle laid down in the case

of Eastern Bakery vs. Castelino [1958] EA 461 still holds true that:

"...amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs..."

And in Cropper vs. Smith [1884] 26 Ch.D 700 Bowen LJ had this to say:

"I think it is a well established principle that the object of the courts is to decide the rights of the parties, and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance to their rights."

It was on the basis of the foregoing principles that the Court was convinced that the Plaintiff had made a good case for amendment of the Plaintiff and was accordingly granted leave so to do as per the Court's Ruling of 28 February 2013. The Plaintiff has further shown that as soon as the said Ruling came to its attention, it took immediate steps with a view of compliance therewith, including filing the instant application. The Court is therefore satisfied that the reasons given for the delay, which reasons are uncontroverted, are plausible and far from being just a stratagem to delay the expeditious disposal of this suit.

10. At paragraphs 11 to 13 of the Replying Affidavit, the Defence raised the issue of negligence on the part of Counsel for the Plaintiff in the prosecution of this matter and posited that the Plaintiff is unworthy of the discretion of the court on account thereof. However, it is evident from the documents annexed to the Supporting Affidavit that Counsel was unaware of the delivery of the Ruling of 28 February 2013 by which their application was allowed. It has not been disputed that Mr. Obel left the firm now on record for the Plaintiff, and whereas Mr. Obel could be said to have acted in a dilatory manner with particular regard to his handling of this matter before his exit, there appears to be no reason to conclude that he was acting *mala fide*.

11. Accordingly I would endorse the view taken by **Kuloba J** in Kassam vs. Bank of Baroda (kenya) Ltd [2002] 1 KLR 294, thus:

" ...Applications for leave to amend, even if necessitated by negligence or carelessness, will be granted so as to enable the right question to go to trial unless the party applying was acting *mala fide* or by his blunder he has done some injury to his opponent which cannot be compensated by costs or otherwise..."

It is on the basis of the foregoing, namely, lack of *mala fide*, that I would excuse the conduct of Mr. Obel, since, in my view the same principles apply to the exercise of discretion in the instant application for extension of time to file an Amended Plaintiff.

12. With regard to the question of prejudice, it is noteworthy that one of the grounds relied on by the Defendants was that they had already lodged an Application for stay pending appeal under **Rule 5(2)(b) of the Court of Appeal Rules**, which was still pending, and which, in their view, ranked in priority to the instant application. The said application has since been disposed of with the result that the same was dismissed on **31 March 2014**. Hence, the prejudice alleged in paragraph 10 of the Replying Affidavit of **Mr. Dodhia** has since ceased to exist. Moreover, upon the Amended Plaintiff being filed, the Defendants would be entitled to corresponding leave to respond to the Amended Plaintiff. Clearly, therefore, there is no prejudice that is likely to befall the Defendant that cannot be remedied by an award of costs.

13. It is to be borne in mind that the duty of the Court as spelt out in **Article 159(1)(d) of the Constitution of Kenya** as well as **Sections 1A and 1B of the Civil Procedure Rules**, is to administer justice without undue regard to procedural technicalities. Accordingly, infractions that do not occasion prejudice or cause a miscarriage of justice to the opposite party should be minimized in favour of substantive justice. In the case of Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR, the Court of Appeal made this point thus:

"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice...It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness..."

14. In the premises, I would allow the application dated **24 September 2013** and accordingly extend the time within which the Plaintiff can file and serve its Amended Plaintiff with the following result:

a) The leave that was granted to the Plaintiff on 28 February 2013 to amend its Plaintiff is hereby extended as prayed. The Amended Plaintiff to be filed within 14 days from the date hereof;

b)The Defendant to have corresponding leave to amend and file an Amended Defence within 14 days of service of Amended Plaintiff;

c) Costs of the application to be borne by the Plaintiff in any event.

Orders accordingly

OLGA SEWE

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL, 2016

CHARLES KARIUKI

JUDGE