



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 86 OF 2010

SAMSON NGUGI ICHUNG'WA T/A GRENAIR PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LTD. 1ST DEFENDANT

RAJU DHANANI 2ND DEFENDANT

JOSEPH GIKONYO T/A GARAM INVESTMENTS ... 3RD DEFENDANT

R U L I N G

1. Before the Court is an application by the Plaintiff brought pursuant to the provisions of **Order 7 Rule 17** and **Order 1 Rule 1(6)** of the *Civil Procedure Rules* and **Section 3A** of the *Civil Procedure Act*. The Applicant seeks the following prayers inter alia;

“1. THIS Honourable Court be pleased to set aside the interlocutory judgment entered in favour of the Second Defendant, extend time for filing a Reply to the Second Defendant’s Amended Defence and Counterclaim filed in Court on 2nd December, 2013 and deem the Plaintiff’s Reply to Amended Defence and Defence to Counterclaim filed on 18th March, 2014 as being properly on record.

2. Costs of this application be in the cause”.

2. The application is predicated upon the grounds that the pleadings were filed out of time due to the Plaintiff’s advocate being away on leave until 8th January, 2014 and that the entry of the interlocutory judgment was illegal in light of the provisions of **Order 8 Rule 1(6)** of the *Civil Procedure Rules*.
3. The application is further supported by the Affidavit of **Samson Ngugi Ichugwa** sworn on 10th April, 2014. The deponent contends that the delay was neither deliberate nor inordinate, and that no prejudice would be suffered by any of the Respondents should the sought prayer be granted. It is further averred that the interlocutory judgment is in breach of the provisions of **Order 8 Rule 1(6)** of the *Civil Procedure Rules*.
4. The application is opposed. The 1st and 3rd Defendants filed their Grounds of Opposition dated 22nd May, 2014. They contended that the application is frivolous, misconceived and bad in law. They further contended that no justifiable reason has been given by the Applicant for the filing of the pleadings out of time and thus they were fatally defective for being filed without leave of the

Court.

5. The 2nd Defendant also filed his Grounds of Opposition dated 20th May, 2014. In reiterating the contentions raised by the 1st and 3rd Defendants, the 2nd Defendant averred that the application is meant to delay and deny him the enjoyment of the bona fide purchased property and that no tangible reason had been adduced for the delay in filing the pleadings. It is also contended that the application is bad in law and an abuse of the process of the Court.
6. The delay as enunciated by the Defendants is with regard to the filing of the Reply to Amended Defence and Defence to Counterclaim. Those pleadings were filed on 18th March, 2014 and served upon the Defendants on 21st March, 2014. This was in response to the Amended Defence by the 1st and 3rd Defendants filed on 29th November, 2013 and the 2nd Defendants Further Amended Defence and Counterclaim on 2nd December, 2013.
7. The provisions of **Order 7 Rule 17(1)** provide that:

“A plaintiff shall be entitled to file a reply within fourteen days after the defence or the last of the defences has been served on to him, unless the time is extended”. (Emphasis mine).

The Plaintiff was served with the amended pleadings by the Defendants on 3rd December, 2013. The provisions of **Order 7 Rule 17(1)** provide for a period of fourteen (14) days within which the Plaintiff would have to file the response. It is further provided that these timelines were to be adhered to and would only be extended by leave of the Court. No such leave was granted by the Court as no application for such leave was made. The reasons perpended by the Plaintiff are that the delay was neither inordinate nor deliberate and, that in any event, no prejudice has been suffered by any of the Defendants.

8. The Applicant admits that the delay was occasioned by the advocate not being able to file the pleadings as stipulated under **Order 7 Rule 17(1)**. In arguing the application in Court, it was stated that the matter came to the attention of the advocates sometime in February, when he realized that judgment had already been entered on 14th February, 2014. He pleaded that there was an oversight on their part and that the same should not be visited upon the parties.
9. To the mind of the Court this does not constitute a valid reason as to why there was a delay by the Plaintiff in filing his pleadings in response within the stipulated time lines. By addressing the provisions of **Order 8 Rule 6** with regard to breach thereof, the Applicant contends that the Court therein erred in granting the interlocutory judgment. The aforesaid provision reads:

“Where a party has pleaded to a pleading which is subsequently amended and served on him under subrule (1), then, if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading, and Order 2 rule 12(2) shall have effect at the expiry of the period within which the pleading could have been amended”. (Emphasis mine).

The Applicant not having filed his Reply to Amended Defence and Defence to Counterclaim within the stipulated period of fourteen (14) days as provided under **Order 7 Rule 17(1)**, could not then countermand and regard the interlocutory judgment as having been entered in contravention of **Order 8 Rule 6**. The provision as above stipulates, in context, that if no amendments are made to his pleadings, then it shall be deemed that the provisions of **Order 2 rule 12(2)** shall take effect. The effect that the said rule in the circumstances are that the Defendants made application to amend after the close of pleadings, and the same was allowed enabling them to file their respective pleadings on 29th November, 2013 and 2nd December, 2013.

10. The upshot is that the Applicant has not adduced any cogent or reasonable grounds to warrant the Court to award the Orders as sought in the application. The onus is upon the Applicant to provide sufficient reasons as to the delay in filing his pleadings within the time provided under the law. The Court's inherent powers cannot be invoked to aid the Applicant if no reasonable basis has been presented before it upon which to issue such reliefs. The prejudice occasioned upon the Defendants is that there has been delay in executing their case. It therefore follows that the

application is without merit, and is hereby dismissed with costs to the Respondents.

DATED and delivered at Nairobi this 26th day of June, 2014.

J. B. HAVELOCK

JUDGE