



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 266 of 2010

RACCALTA, MOLNAR & GREINER LTD. :::::::::::::::::::::::::::::: PLAINTIFF

- VERSUS -

ROYAL TRADING COMPANY LTD. :::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

1. The **Notice of Motion** application before the court is a dated **3rd October 2012**. It seeks:-
 - That leave be granted to the Applicant to file verifying affidavit out of time.
 - That the draft verifying affidavit be deemed as duly filed.
 - That the costs of this application be provided for.
2. The application is based on grounds that:-
 - a) The Plaintiffs/Applicants only got the Ruling dated **30th May 2012** on **29th August 2012**.
 - b) That the Plaintiffs/Applicants directors reside in Vienna making communication and or movements of documents take time.
3. The application is supported by affidavit sworn by **MARY WANJOHI MUIGAI** dated **3rd October 2012** with annexure.
4. The application is opposed vide a Replying Affidavit dated **19th October 2012** by **SHABBIR TAHERAJI HASSANALI**.
5. Briefly, the history of this application is that by a Ruling of this court dated **30th May 2012** the court struck out the Plaintiff's verifying affidavit sworn by **RITA ROGERS** for non-compliant. The court at the same time gave the Plaintiff the leave to file and serve a more compliant verifying affidavit within **30 days**. The Plaintiff failed to comply with this deadline for the reasons given in the affidavit among them that when the said Ruling was delivered, the Plaintiff's advocates, who had just taken over this matter from the previous advocates, were not in court. They only came to learn about the Ruling on **23rd August 2012** when they obtained a copy from the registry. Upon getting the Ruling, it took the Plaintiff's advocates a long time to get instructions from the Plaintiff's directors who live in Vienna. By the time they secured those instructions and prepared another affidavit, they were already out of time.

6. In response, Mr. Khan for the Respondent submitted that the Plaintiff's counsel ought to have been in court to get the said Ruling. Their not being in court was an act of negligence and that this application is an abuse of the process of the court. Mr. Khan further submitted that even if this court were to indulge the Plaintiffs the intended verifying affidavit of **DR. GETRUDE EDER** is still fatally defective and in total disregard to the orders made by the court on **30th May 2012**. Having already been granted indulgence once, Mr. Khan submitted, the Plaintiff comes to court making the same fatal error. This shows that the Plaintiff is not serious in prosecuting the case and is causing embarrassment to this court.

7. I have carefully considered the merits of the opposing submissions. I have noted that since the matter was filed in **August 2010** the Plaintiff has changed advocates twice, meaning that the current advocates are the third in line. Since the matter has not moved since the date of filing, the Plaintiff appears not to be very serious in prosecuting the suit. I am, however, satisfied with the reasons given by the Plaintiff's counsel concerning the causes of delay and why they were not able to abide with the time limitation granted by the court.

8. This court, after careful consideration of the issue before it on **30th May 2012**, granted the Plaintiff the leave to file more compliant verifying affidavit. I am inclined to grant the Plaintiff more time to enable them comply with that order. Mr. Khan had submitted that in any event, the proposed affidavit is still defective. If that is so, the Plaintiff will have time to rectify it. In reaching this decision I am attentive to the constitutional provision under **Article 159 (2) (d)** which obligates this court to rely less on procedural technicalities and to instead promote substantive justice. If this application is rejected, the suit herein automatically collapses thereby denying both parties a chance to be heard on merit.

9. In the upshot I allow the **Notice of Motion** dated **3rd October 2012** in the following terms:-

- 1) Leave is hereby granted to the Applicant to file a verifying affidavit within **30 days** from the date hereof.
- 2) The costs of this application shall be for the Defendant/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 6TH DAY OF FEBRUARY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Mary Muigai for the Plaintiff

N/A for the Defendant

Teresia – Court Clerk