



**REPUBLIC OF KENYA  
IN THE HIGH COURT  
AT MOMBASA**

Comm  
15 of 2

JOH  
N  
MAR  
O  
GAL  
GAL  
O

**t/a BRIGHTONS PRIMARY AND KINDERGATEN.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**K-REP BANK LIMITED .....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff came before the Court by Notice of Motion dated **8<sup>th</sup> December, 2010** brought under the earlier edition of the Civil Procedure Rules, Order XLIX, Rule 5. The application carries two substantive prayers, as follows:

*(i) THAT this Court be pleased to extend the time within which the plaintiff/applicant ought to have filed an undertaking as to damages, to **7<sup>th</sup> December, 2010** when the same was filed;*

*(ii) THAT the undertaking as to damages under oath filed herein on **7<sup>th</sup> December, 2010** be declared to have been duly and properly filed within the extended period herein.*

The application rests on specific grounds which may be set out in summary:

**(a)**this Court, on **25<sup>th</sup> November, 2010** delivered a Ruling dated **12<sup>th</sup> November, 2010** granting the Orders sought in the plaintiff's earlier application of **2<sup>nd</sup> April, 2009**;

(b)the Court required the plaintiff to file an undertaking as to damages on oath, within seven days from the date of delivery of the Ruling;

(c) due to inadvertence and/or oversight on the part of the Advocates for the plaintiff, the said undertaking was not filed within the period required by the Court; and by the time the same was filed, on **7<sup>th</sup> December, 2010**, the said period had expired;

(d)in the interest of justice, this Court be pleased to grant the Orders sought.

**John Maro Galgalo**, the plaintiff/applicant, swore an affidavit on **8<sup>th</sup> December, 2010** in support of the application, to which the defendant responded by filing grounds of opposition. The said grounds are two, as follows:

(i) *the application is an abuse of Court process by a loan defaulter who has benefited from three consecutive injunctions restraining the Bank from realizing the security; and*

(ii) *the guilty party should not benefit from the equitable discretion of the Court.*

Submissions were made by learned counsel, **Mr. Tindika**, for the plaintiff and **Mr. Sitonik** for the defendant, who appeared before the Court on **11<sup>th</sup> April, 2011**.

Learned counsel, **Mr. Tindika** submitted that in an earlier application by his client, **Mr. Justice Azangalala** had given a Ruling on **25<sup>th</sup> November, 2010** granting an injunction on condition that the plaintiff filed an undertaking as to damages, within seven days. Regarding the non-compliance with the stated deadline, counsel thus stated: *“unfortunately, filing took place five days late, but it is [now] on record. May the inadvertence of the Advocate be not visited upon the parties.”*

Of the defendant’s grounds of opposition, **Mr. Tindika** urged that they were filed belatedly and so were not properly on the record – apart from raising “no serious point.”

Learned counsel, **Mr. Sitonik**, though admitting that his client’s response had been filed belatedly, urged that since the applicant did not comply with the time-limit for filing an undertaking as to damages, the injunctive orders which attended the set of Orders made by **Azangalala, J** on **25<sup>th</sup> November, 2010** had expired on **2<sup>nd</sup> December, 2010** – particularly as there was no application to reinstate those injunctive Orders.

**Mr. Tindika’s** riposte was that “justice cuts both ways”, and so a respondent who had filed papers belatedly should not come to contest the continuance in force of the Orders of **2<sup>nd</sup> December, 2010**. More cogently, counsel invoked a general case-management direction given by the Resident Judge on **8<sup>th</sup> December, 2010** at the beginning of the December Court vacation that:

*“In exercise of the Court’s discretion and owing to pressure on Court-time, the Interim Orders shall continue without prejudice pending the inter partes hearing of the application dated **8<sup>th</sup> December, 2010**...in the new term...”*

On the facts as set out herein, and in the light of the submissions of counsel, it is apparent that there is no weighty matter of law that attends the plaintiff’s prayers in the Notice of Motion of **8<sup>th</sup> December, 2010**. The plaintiff has already filed the required undertaking as to costs, even though belatedly; and I find no compelling point in the defendant’s objections. Since, therefore, both the *status quo* and the balance of merits, are consistent with the plaintiff’s prayers, the practical and judicious course is to allow the application.

Consequently, I make Orders allowing the main prayers in the plaintiff’s Notice of Motion of **8<sup>th</sup> December, 2010**. The costs shall be in the cause.

**SIGNED at NAIROBI** .....

**J.B. OJWANG**  
**JUDGE**

**DATED and DELIVERED at MOMBASA** this 16<sup>th</sup> day of February, 2012.

**MAUREEN ODERO**  
**JUDGE**