

REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 545 of 2001

KENYA BREWERIES LIMITED PLAINTIFF

VERSUS

KENYA BUS SERVICES LIMITED..... 1ST DEFENDANT

HOUSING FINANCE COMPANY OF KENYA LIMITED 2ND DEFENDANT

R U L I N G

1. Upon the Plaintiff closing its case and the 2nd Defendant indicating that it did not wish to call any evidence on 30th November, 2011, the court gave directions and time frame for filing written submissions as requested by the parties. The court directed that hi-lighting thereof be on 5th March, 2012.

2. Come 5th March, 2012 no submissions had been filed and the parties requested for more time within which to file those submissions. The parties indicated that they would file the submissions and be ready for hi-lighting the same on 14th May, 2012. The court acceded to the request and fixed the matter for hi-lighting on 14th May, 2012 at 11.00 a.m. Come the said 14th May, 2012, still no submissions had been filed by either of the parties, prompting the court to give final directions and a timeline for the filing of the said submissions. One of the directions made was that:-

“5. The timelines set above to be strictly adhered to, in default judgment shall be made on the basis of the evidence on record and without considering any of the submissions that may have been filed in contravention of this order.”

3. Under the directions of 14th May, 2012, the Plaintiff was supposed to file and serve its submissions by the 14th of June, 2012. The Plaintiff did not do so until 26th June, 2012. When the matter came up for hi-lighting of the submissions on 25th July, 2012, the 2nd Defendant had not filed its submissions for two (2) reasons. One was that since the Plaintiff had not strictly complied with the order of 14th May, 2012, and that its submissions on record could not be considered and secondly that Mr. Inamdar who had the conduct of the matter had been unwell and had been undergoing treatment outside the country. Mr. Inamdar had returned to the country on 14th July, 2012 and was contemplating applying for the suit to be terminated for the Plaintiff’s continuous non-compliance with court orders. Mr. Ojiambo, for the Plaintiff, submitted that the issue before court was only procedural and that the court should rather be concerned with substantive justice under **Article 159 (2)** of the Constitution of Kenya, 2010. He cited the case of **Trust Bank Ltd –vs- Amalo Co. Ltd (2003) I EA 300** wherein the Court of Appeal held that a party has a right to be heard on documents it has placed before the court.

4. I have considered this matter carefully. I note that the Counsels appearing for the parties herein are some of the senior most and polished counsels in this country. What is most disturbing is that whilst the court has tried to bend backwards to accommodate the parties, the learned counsels are not advancing the cause of justice. None of the counsels applied to set aside the order of 14th May, 2012 or have it varied. This notwithstanding, the filing of the submissions by the Plaintiff on 26th June, 2012 and the failure by

the 2nd Defendant to file any submissions at all, was in total disregard and utter contempt of the court's orders. This is the very least that can be expected by Counsels of the standing of the Counsel appearing for the parties in this matter. To say the least, this does not augur well for their respective clients.

5. Since however, the cases do not belong to the Advocates, and that the persons to be prejudiced by Counsels' said action are the parties, this court will close its eyes to the Counsels' said conduct, invoke its inherent jurisdiction under **Article 159 (2)** of the Constitution and **Section 3A** of the Civil Procedure Act and vary the orders of 14th May, 2012 accordingly. The submissions filed by the Plaintiff on 26th June, 2012 are hereby deemed as filed with leave of Court. The 2nd Defendant is directed to file and serve its written submissions within 30 days from the date hereof. The Plaintiff is at liberty to respond thereto within 14 days of service. It is so ordered. Dates for hi-lighting be taken in the registry

DATED and delivered at Nairobi this 31st July, 2012.

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A. MABEYA

JUDGE