



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 733 of 2009

ESSAR TELECOM (K) LIMITED PLAINTIFF
VERSUS
AMBER AFRICA LIMITED DEFENDANT
R U L I N G

By this application, the Plaintiff seeks enlargement of time within which to file its reply to defence, and that the reply to defence annexed to the application be deemed as having been duly filed and served.

The application is brought by a notice of motion dated 8th February, 2010 and made under **Sections 3, 3A** and **95** of the **Civil Procedure Act, Order XLIX Rule 5** of the **Civil Procedure Rules** and all other enabling provisions of the law. It is supported by the annexed affidavit of Caroline Thuo, and is based on the grounds that the Plaintiff has a good and sound reply to the Defendant's defence which will enable the court to determine all the issues in dispute effectively and on their merits; that the delay in filing the reply to defence was not intentional; and that no prejudice will be occasioned to the Defendant if the orders sought are granted.

Opposing the application, the Defendants filed grounds of opposition contending that the delay in filing the reply to the defence was inordinate and that no good or sufficient reason had been advanced to entitle the court to exercise its discretion in favour of the applicant; that the application is an abuse of the process; and that the interests of justice would best be served if the orders sought by the Applicant are rejected.

Arguing the application for the Applicant, Ms. Thuo referred to paragraphs 7, 8 and 9 of her supporting affidavit in which she explained on oath that the Defendant's statement of defence was lengthy and raised several issues as to what exactly the parties had agreed in the agreement which is the subject matter of this suit. These issues prompted the Plaintiff's advocates to seek further instructions from their client. Secondly, the process of receiving the further instructions took time, and the time within which to file and serve the reply to defence expired. Thirdly, upon realizing that time had run out, she communicated with Counsel for the Defendants on several occasions seeking their indulgence to file the reply to defence out of time, and it was not until January this year that they said they had no instructions to consent – hence this application.

Ms. Mati for the Respondent opposed the application and in so doing relied on their grounds of opposition. The main thrust of their argument was that there had been inordinate delay on the part of the Applicant. The last day for filing the reply to defence was 13th November, 2009 and the application was only filed on 12th February, 2010. Secondly, she submitted that at the time of filing suit, the Plaintiff's Counsel had full instructions on the matter, and therefore the argument that delay was brought about by lack of timely instructions was untenable. Finally, she submitted that there was no evidence of the alleged attempts by the Plaintiff to obtain indulgence from the Defendant's Counsel which would enable the court to exercise its discretion in favour of the Plaintiff. She referred to **WILLIAM K. TOO v. SIMION K. LANGAT [2007] eKLR** and **HOUSING FINANCE COMPANY OF KENYA LTD. v. WAMALWA [2002] LLR 470**

(CCK) and prayed that the application be dismissed with costs.

In her reply, Ms. Thuo said that the rules allow parties to enter into consents and that was the route the Plaintiff first took. Secondly, the reason why there was no documentary evidence of the Plaintiff's attempts to obtain indulgence from the Defendant's advocates was that the communication between the advocates was by telephone.

I have considered the pleadings and the submissions of Counsel. Having done so, I find that the main issues for determination are whether there was delay in filing this application; if so whether it was inordinate; and finally whether the plaintiff is entitled to the orders sought.

Order VIII Rule 17 (1) of the **Civil Procedure Rules** entitles a Plaintiff to file a reply to a defence within 7 days after the defence or the last of the defences has been delivered to him, unless the time is extended. In the instant suit, the defence was filed on 5th November, 2009, and this gave the Plaintiff up to 12th November, 2009 within which to file its reply. Having failed to do so by that date, the Plaintiff filed this application on 12th February, 2010, which was exactly 3 months after the expiration of the time allowed by the rules. On the face of the record, I find that a delay of 3 months was an inordinate delay in filing this application. Can that delay be excused?

According to the Applicant's Counsel, the reason for the delay was that the defence raised some issues in respect of which the Plaintiff's Counsel required further instructions from the Plaintiff. It was that process which caused the delay in the filing of the reply to the defence. Even though it is generally true, as contended by the Respondent's Counsel, that an advocate is normally given full instructions before the filing of a suit, it is possible for the defence to raise some issues requiring further consultations between the Plaintiff's Counsel and his client. That is what the Plaintiff's Counsel avers to have happened in this matter.

Perusing the pleadings to date, the plaint comprises some 21 paragraphs over 4 ½ pages. The defence is much longer with a span of 38 paragraphs over 7 pages. The defence raises some pertinent issues which, if unanswered, could easily prejudice the plaintiff. On the other hand, allowing the filing of the reply would certainly enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. In spite of the delay, I am therefore satisfied with the Plaintiff's excuse for the delay, and that justice can still be done to the parties. In the circumstances, I find that the interests of justice in this case will best be served by allowing the plaintiff to file the reply to defence out of time. Each case should be considered on its own facts and circumstances, and the facts in the authorities cited are not in tandem with those of this case. I accordingly make the following orders-

1. *That the time within which the Plaintiff should file its reply to defence in this matter be and is hereby extended.*
2. *The reply to defence annexed to the application dated 8th February, 2010 shall be deemed as having been duly filed and served.*
3. *The costs of this application to be borne by the Plaintiff in any event.*

DATED and **DELIVERED** at **NAIROBI** this 22nd day of April, 2010.

L. NJAGI
JUDGE