



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 40 of 2006**

AUSTIN SALMON KITOLOLO .....PLAINTIFF

VERSUS

MIDDLE EAST BANK KENYA LIMITED .....1<sup>ST</sup> DEFENDANT

ROSEMARY NJERU WAWERU t/a

THAARA AUCTIONEERS .....2<sup>ND</sup> DEFENDANT

SULEIMAN MASUD .....3<sup>RD</sup> DEFENDANT

SHAHCO INVESTMENT LIMITED .....4<sup>TH</sup> DEFENDANT

**R U L I N G**

This is an application dated 20<sup>th</sup> July 2010 by the plaintiffs under the provisions of inter alia, Order XII, Rule 2(1) and (2) and Order XLIX Rule 5 of the Civil Procedure Rules. It seeks the following orders:-

- (a) *That the time limited for filing of Non-Admission of documents to the Notice to Admit dated 7<sup>th</sup> May 2008 and filed on 12<sup>th</sup> May 2008 be and is hereby extended.*
- (b) *That the Notice of Notion of non-admission of documents attached hereto be deemed as duly filed and served within such extended time.*
- (c) *That the costs of this application be in the cause.*

The grounds for the application are:-

1. **That failure by the plaintiff to file the Notice of non-admission of documents within the stipulated time was unpremeditated, inadvertent and excusable.**
2. **That the application has been brought with reasonable promptitude.**
3. **That an innocent litigant ought not to be punished for counsels indiscretions.**
4. **That it's only fair and just to grant the orders sought.**
5. **That no prejudice that cannot be remedied by an appropriate order for costs will visit the defendants if the order sought are granted while tremendous prejudice will be suffered by the plaintiff if the orders given are refused.**
6. **That the Honourable court enjoys the jurisdiction to grant the orders sought.**

The application is supported by an affidavit sworn by the plaintiff on 17<sup>th</sup> July 2009. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which filed Grounds of Objection and dated 15-09-2009. At the hearing Counsel agreed to dispose of the application by written submissions.

I have considered the application, the supporting affidavit, the grounds of objection and the submissions by Counsel. The 1<sup>st</sup> Defendant's Notice to Admit documents was filed on 8<sup>th</sup> May, 2006 and served on the plaintiff. It was in respect of Documents 1 – 89 in the plaintiff's List of Documents filed in court on 4<sup>th</sup> April 2008.

The said documents are in the possession of the plaintiffs. The plaintiff did not file any Notice of non-admission within 14 days as required by the Rules. The plaintiff claims that the Notice of non-admission was not filed due to mistake by his previous advocate and the same was inadvertent, unpremeditated and excusable. However, there is no affidavit from the previous firm of advocates to support this

statement of fact. It is only the Advocate on record at the time who could make a positive averment or statement in this regard. The previous Advocates on record who are a long established and reputed law firm, Kilonzo & Co. Advocates acted for the plaintiff until the present advocate took over more recently. There is no reason why the plaintiff did not obtain any affidavit to support this allegation. In the absence of such affidavit then the alleged mistake or inadvertence is a mere allegation or presumption. It is a serious allegation which touches on the reputation and competence of an advocate and the same cannot be accepted without some proof.

The question of non-admission of documents is one election and/or discretion upon the part of an advocate advising a client and is based on considered legal deliberations and decision making. If there is an allegation of mistake, then the advocate must confirm it. It is not like an omission to file a defence or plead limitation etc which are serious and can only be explained by an act of mistake or even negligence. Notice of non-admission is based on an election as to the correct course to follow by an Advocate. It may as well be possible that the firm of Kilonzo & Co. decided and was of the opinion that there was no basis for non-admission.

It is noted that many of the documents which are on the list comprise of title deeds, for the plaintiff's own properties, loan security documents and correspondence on the basis of which he obtained the interim injunction herein.

I hold that in the absence of an affidavit from the previous advocates to confirm the alleged mistake or inadvertence, the foundation of his application is weak and eroded. The ends of justice will not be served if the extension sought herein is granted. Also I do hold that there was delay in the filing of this application. Application was filed on 30.4.2009 while the Notice to Admit the Documents was filed on 8<sup>th</sup> May 2008 and duly served. A delay of one year is inordinate and unreasonable. If it was a mistake an inadvertence or indiscretion as alleged, the previous advocates had the opportunity to make amends and file an application to extend time earlier. It is for this reason that the need for an affidavit from the previous advocates is crucial. The court will not accept allegations which may adversely affect an advocate's professionalism and competence without substantiation or proof.

I therefore do hereby dismiss the application with costs.

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of June 2010.**

**M. K. IBRAHIM**  
**J U D G E**

Coram:

Ibrahim, J

Court clerk – Kazungu

Mrs. Juma h/b for Mr. Mereka for the plaintiff

Mr. Okongo for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Ruling delivered.

IBRAHIM, J