



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

**Civil Case 97 of 2008**

**KILIMANJARO CARVING EXPORTS LTD.....PLAINTIFF**

**VERSUS**

**BANK OF INDIA.....DEFENDANT**

**RULING**

This application by way of Notice of Motion has been brought by the plaintiff under Order XLIX Rule 5 of the Civil Procedure Rules, Section 3A and 63 of the Civil Procedure Act and all other enabling provisions of the Law. It seeks one primary order namely enlargement of time by one day so that the payment made by the plaintiff in the sum of Kshs. 13,456,164.00 on the 22<sup>nd</sup> October 2008 be deemed as having been made within the time granted by the court and the injunction granted on 23<sup>rd</sup> July 2008 be deemed not to have lapsed but still in force. The main reason for the application is that the delay of one day in complying with the order of the court was not intentional but arose solely out of an error of the plaintiff's advocates that the 90 day period given in the order of the court expired on 22<sup>nd</sup> October 2008 when in fact both months of July and August have 31 days each, a fact that was inadvertently overlooked. The plaintiff contends that the order sought will not occasion the defendant any prejudice and as the delay was due to counsel's mistake the same should not be visited upon the plaintiff.

The application is supported by an affidavit sworn by one Mohamed Hussein Dossani, the plaintiff's General Manager. In the affidavit it is, *inter alia*, deponed that on or about 22<sup>nd</sup> October 2008, the plaintiff forwarded, to its advocates, a cheque for Kshs. 13,456,164.00 for onward transmission to the defendant's advocates and the latter received the same on a without prejudice basis and threatened to proceed with the sale of the plaintiff's properties. It is also deponed that the computation of time by the plaintiff's advocates turned out to be incorrect. In the premises, the plaintiff prays that the mistake of its advocates should not be visited on it and the enlargement of time sought should be granted.

The defendant has opposed the application and contends that the failure to comply with the order of the court is unjustified and is inexcusable especially as the plaintiff is enjoying injunctive orders. In the premises, the defendant prays that the plaintiff's application be declined.

I have considered the application and the submissions of counsel. Having done so, I take the following view of the matter. The jurisdiction to enlarge time is found in Order XLIX Rule 5 of the Civil Procedure Rules which reads as follows:-

“5. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules or

by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order thereon shall be borne by the parties making such application unless the court orders otherwise.”

On 23<sup>rd</sup> July 2008, I granted an order of injunction in favour of the plaintiff conditional on the plaintiff paying to the defendant Ksh. 13,456,164/= within ninety (90) days from the date of the order. The plaintiff through its counsel’s oversight did not comply with the condition of the injunction within the said ninety days. It did so two (2) days later. That delay was caused by counsel’s inaccurate computation of the said period. The delay is in any event not a prolonged one and the plaintiff has persuaded me that the reason for the delay absolved it from blame. In Trust Bank Limited – v – Amalo Company Limited [2003] 350 the Court of Appeal held as follows:-

“The principal which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit (Essenji and Another - vs – Solonki [1968] E.A. 224 followed....)errors should not necessarily deter a litigant from the pursuit of his rights.”

In the matter at hand, the plaintiff’s counsel has erred in computation of the period I had appointed, which error led to the delay in remitting the said sum of Kshs. 13,456,164.00 to the defendant. Counsel has freely admitted the error. Should the plaintiff, who could have complied within the appointed time if the correct period had been communicated, suffer for its counsel’s mistake? In the circumstances of this case, I think not. In those premises, I will exercise my discretion in favour of the plaintiff. The time granted in the order of 23<sup>rd</sup> July 2008 is hereby enlarged for a period sufficient enough to include the date the plaintiff paid to the defendant the said sum of Kshs. 13,456,164.00. The injunction granted on 23<sup>rd</sup> July 2008 is deemed not to have lapsed but remains in force. To avoid doubt as to the efficacy of that injunction and in the event that the injunction granted on 23<sup>rd</sup> July 2008 cannot be revived, I grant a fresh injunction in exercise of the inherent powers of the court on the same terms for the same period.

The costs of this application shall be borne by the plaintiff.

The parties are directed to conclude pre-trial procedures with dispatch and in any event within the next thirty (30) days and thereafter fix this case for hearing on the basis of priority.

I further grant each party liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF MAY 2009.

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Gathuku holding brief for Kasmani for the Respondent and Mabeya for Balala for the Applicant.

**F. AZANGALALA**

**JUDGE**

**19<sup>TH</sup> MAY 2009**