



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 1018 of 2002

CROWN BERGER (K) LTD.....PLAINTIFF

VERSUS

HYSAL HARDWARE LTD..... DEFENDANT

RULING

The application herein is brought under order XLIX Rule 5 of the Civil Procedure Rules, S.95 and 3A of the Civil Procedure Act and all enabling provisions of the law. It seeks two main orders that:-

“Time be enlarged so as the particulars filed on 12th April 2005 and served upon the defendant be deemed as filed within time and that the suit be reinstated.

It is based on the grounds that:-

“The failure by the Plaintiff’s/Applicant’s Advocate to file and serve the particulars was not intentional but due to circumstances beyond its control. The particulars which were bulky were served without inordinate delay. The Defendant/Respondent has not suffered any prejudice as the particulars provided will enable the Defendant to comprehend the claim fully and prepare its defence. That the particulars provided will assist the Honourable Court to determine the real issues in controversy and the Plaintiff/Applicant stands to suffer irreparable loss if the suit stands dismissed for want of particulars which have been supplied to the Defendant. The Advocates’ inadvertence should not be visited on the client”

The application is supported by the Affidavit of Joan Mulinge an Advocate of the Court sworn on 23rd August 2005.

The application is opposed. Elijah Oluoch Asher’s also an Advocate of the Court has sworn a Replying Affidavit dated 6th July, 2006.

The Application was urged before me on 06.03.2008 and each Advocate appearing merely re-emphasized what is stated in their respective affidavits in support of or in opposition to the application.

I have considered this application and the affidavits as well as carefully considered submissions by Counsel and the authorities referred to me. I will start at Order XLIX Rule 5 of the Civil Procedure Rules which reads:-

“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 the 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 case 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 any order made thereon shall be borne by the parties making such application unless the Court orders otherwise”

The Advocates for the parties herein appeared before Azangalala J. on 14.03.2005 and the Defendants application for particulars to be supplied within a specified period was granted without opposition thereto. That same application prayed that the suit stands struck out should particulars not be supplied within the stipulated time. As it turned out the particulars were not supplied as ordered. The same were later filed on 12.04.05 instead of 27.03.05 as ordered by the Court. That is a delay of some seventeen (17) days. The delay is explained in the affidavit as being caused by Counsel’s inability to access their chambers and also for the need to obtain further particulars. The present application was filed on 23.08.05 under a certificate of urgency although the Court did not certify the same as urgent. Both Ms. Mulinge and Ms. Orowe are said to have attempted to prevail over Counsel for the Defendant over this application without success. Counsel for the Defendant submits that it was he who awoke Counsel for the Plaintiff/Applicants with his request to approve the draft order on 10.08.05.

It is common ground that the suit was struck out on a technicality – the default of supplying particulars within the time ordered. The delay in supplying the particulars cannot be said to be inordinate in my view. No prejudice has been shown to have been occasioned to the Defendant or to be occasioned. The delay in bringing the present application cannot, also in my view, be said to be inordinate.

There abounds cases to the effect that disputes in Courts should be determined on their merits and so as to serve the greater justice. One such case is that of TRUST BANK LTD V AMOLO CO. LTD (2003) 350. Where the Court of Appeal held as hereunder:-

“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”

In the present application I am persuaded to give the Plaintiff/Applicant a chance to pursue its claim and accordingly grant prayers 2 and 3 of the said application. The Plaintiff/Applicant will bear the costs of the application.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT IN NAIROBI THIS 2ND DAY OF MAY, 2008

In the presence of Maondo for Oluoch for the defendants/respondent.

P. M. MUILU

JUDGE

02.05.05