



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL CASE 790 of 2003
BENJA PROPERTIES LIMITEDPLAINTIFF
VERSUS
SAVINGS AND LOAN (KENYA) LTD.
THIMBA HOLDINGS LIMITEDDEFENDANTS

R U L I N G

This application by way of Notice of Motion has been brought by the plaintiff under Order XLIX Rule 5 and Order L Rule 1 of the Civil Procedure Rules, Sections 22, 95 and 3A of the Civil Procedure Act and all other enabling provisions of the law. It seeks one primary order that the time within which the plaintiff may do discovery be enlarged. The principal reasons why the enlargement of time is sought are that some of the documents for which discovery is sought have been in the custody of the 1st defendant until the 15.1.2007 by which time the period appointed to do discovery had lapsed and further that the plaintiff desired a recalculation of interest by professionals which recalculation could only be done on receipt of the said documents from the 1st defendant.

The application is supported by an affidavit sworn by Geoffrey Chege Kirundi the plaintiff's Managing Director who is also counsel for the plaintiff. In this affidavit, it is deponed *inter alia* that the plaintiff has been keen to make discovery within the time appointed by the court but could not do so because crucial documents relevant to the plaintiff's case could not be obtained timeously from the 1st defendant and from other sources. It is also deponed that besides delay in obtaining the said documents from the 1st defendant, the plaintiff sought a recalculation of interest by M/s Interest Rates Advisory Centre which recalculation was not finalized until the 21.2.2007 and which recalculation is very material to the plaintiff's case. It is further deponed that unless discovery time is extended the plaintiff will be prejudiced as the entire suit is dependent on the documents sought to be discussed. In the premises the plaintiff contends that it will serve the ends of justice if its application is allowed as the delay in making discovery has not been deliberate.

The defendants have opposed the application on the grounds set out in the replying affidavit sworn by one James E.O. Odwako, the 1st defendant's Mortgage Administration Manager. In that affidavit, the defendants have *inter alia* given the history of this matter and contend that the plaintiff's failure to make discovery within the appointed time is unjustified and inexcusable especially as the plaintiff is enjoying injunctive orders yet its indebtedness with the 1st defendant continues to soar. In the premises the defendants pray that the plaintiff's application be declined.

I have considered the application and the affidavits both for and in opposition to the application. I have also carefully considered the submissions made to me by 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 made thereon shall be borne by the parties making such application unless the court orders otherwise.”

On 28/9/06 I made an order that the parties give discovery within 14 days of the Order. The plaintiff filed this application 27/2/07, 5 months after the said order. That delay in my view is a prolonged delay and I am not persuaded that the reasons advanced by the plaintiff justify the delay in making discovery of the documents it already had in its possession. Indeed ever after obtaining possession of the documents the plaintiff did not act with dispatch.

However, this case has not yet been fixed for hearing. Indeed, in view of the current workload, it may not be listed for hearing during this session. In the premises, there is still time to give discovery before the suit comes up for hearing. In Trust Bank Ltd. vs. Amalo Co. Ltd. [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 [Essanji and another vs. Solonki [1968] E.A. 224 – followed”

The Court then observed as follows:-

**“... errors should not necessarily deter a litigant
from the pursuits of his rights.”**

In the matter at hand the plaintiff has erred in not acting with dispatch. It has clearly not complied with the Order of the Court to give discovery. But the suit is yet to be listed for hearing probably because of the heavy workload of the court. In those premises, I will excuse the error or want of diligence and give the plaintiff another opportunity to give discovery out of time. Accordingly, the plaintiff's application is allowed in terms of prayers 1 and 2 thereof.

The costs of the application to be borne by the plaintiff.

This case should now be fixed for hearing on priority basis.

Orders accordinly.

DATED and **DELIVERED** at **NAIROBI** this 21st day of May 2007.

F. AZANGALALA

JUDGE

Read in the presence of: MS Kamau holding brief for Mwangi for the defendant and Wasike, MS.
Holding brief for Kinindo for the plaintiff.

F. AZANGALALA

JUDGE

21/5/07