



APA INSURANCE LIMITED..... PLAINTIFF

VERSUS

SWAZ INSURANCE BROKERS LIMITED..... DEFENDANT

R U L I N G

This application by way of Notice of Motion has been brought by the defendant under Order XLIX Rule 5 Order L Rule 1 of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all enabling provisions of the Law. It seeks one primary order that the time granted to deposit KShs.500,000/= in the ruling of 2.2.2007 be enlarged on such terms as the court may deem fit. The deposit was a condition for an order of stay of execution.

The primary ground for the application is that although the defendant furnished its advocates with a cheque for the said sum on time, the advocates delayed in communicating with the plaintiff's advocates with the result that a deposit in a joint account would not be achieved within the time ordered by the court. Technically therefore there was default.

The application is supported by an affidavit sworn by one Evans Mwaura Kamau a director of the defendant. In this affidavit it is deponed *inter alia* that the defendant, after the said ruling, arranged for the funds and the target was realized on the 14th day of the period ordered whereupon a cheque for the sum ordered was issued in the joint names of the parties' respective advocates but due to inadvertence/mistake on the part of a messenger of the defendant's advocates, the letter informing the plaintiff's advocates of the cheque was received on 21.2.2007. Counsel for the defendant freely admitted that the delay in communicating with the plaintiff's advocates was caused by them and their client should not be punished for their mistake or inadvertence.

The plaintiff has opposed the application on the basis of grounds of opposition filed by its advocates. The main grounds are that the defendant has failed to satisfy the conditions set by the ruling of 2.2.2007 and the failure to comply has not been explained satisfactorily.

I have considered the application and the submissions made to me by counsel. Having done so, I take the following view of the matter. The jurisdiction to enlarge time is donated by Order XLIX Rule 5 of the Civil Procedure Rules.

The rule 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.”

The order the defendant allegedly breached was in the following terms:-

“There shall be a stay of execution for the next two weeks to allow the defendant time to raise the sum of KShs.500,000.00.

If the defendant raises the said funds and the same are deposited in the joint account, the judgment herein will stand set aside therefore.

However, should the defendant fail to raise the sum of KShs.500,000.00 within the prescribed period, the interim stay of execution shall lapse at the end of two weeks and execution may thereafter proceed.”

It is not in dispute that the defendant complied with that order although on the last day of the order. The defendant’s advocates through inadvertence informed their counterparts five days later with the consequence that a joint account in the names of the advocates could not be opened within the time appointed although the defendant had availed the funds. In the eyes of the plaintiff the order of stay had lapsed by the time their advocates got to know of the funds and the judgment stood set aside at the end of the appointed time.

The court does not lose sight of the fact that the order was to be complied with by the defendant. It was the defendant to avail the funds. It did so but to its advocates. What more could it do? In any event the 5 days delay in communicating with the advocates for the plaintiff was not inordinate and has in my view been satisfactorily explained.

In Trust Bank Limited – vs – Amolo Company Limited CA No.215 of 2000 (UR) the Court of Appeal observed as follows:-

“The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their merit” and that “errors should not necessarily deter a litigant from pursuit of his right”

(See also Essenji and Another – vs – Solanki [1968] EA 224).

In the application at hand, the advocates for the defendant erred in not communicating with the advocates for the plaintiff in time. I would not visit such a mistake or inadvertence upon their client. I will therefore exercise my discretion in favour of the defendant. The time granted in the ruling of 2.2.2007 is hereby enlarged for a period sufficient enough to enable the parties’ respective advocates to open a joint account as ordered by Hon. Ochieng J on 2.2.2007.

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

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mwaura holding brief for Burugu for the defendant and Owanga holding brief for Onyango for the plaintiff.

F. AZANGALALA

JUDGE

16/5/07