



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

**Civil Case 468 of 2002**

**CAFÉ DEL SOL LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**FORTUNE PROPERTIES LTD.....1<sup>ST</sup> DEFENDANT**

**PETER KARIUKI THIRO T/A LIBCO MERCHANTS.....2<sup>ND</sup> DEFENDANT**

**SAMSHER NAZERALI T/A STEAK & CURRY HOUSE.....3<sup>RD</sup> DEFENDANT**

**RULING**

I have before me an application for one primary order that the time within which the plaintiff can comply with the order of 2.3.2006 be enlarged. By that order the plaintiff was to either deposit a cash sum of KShs.500,000.00 in an interest bearing account, in the joint names of the plaintiff's and the defendants' advocates or provide a Bank Guarantee to the defendant's advocates in the sum of KShs.500,000.00 by a bank and on terms approved or acceptable to the defendants and in default of such deposit or bank guarantee within 60 days from the date of the order the defendants' advocates were at liberty to apply for appropriate orders.

The application is by the plaintiff and is expressed to be brought under the provisions of Section 3 of the Civil Procedure Act, Order XLIX Rule 5 of the Civil Procedure Rules and all other enabling provisions of the law.

The main ground for the application is that the plaintiff has already obtained a bank guarantee from Investment and Mortgages Bank Limited for the ordered sum of KShs.500,000.00 and it is only fair and just that the time of 60 days within which the applicant was to comply be extended and/or enlarged. The plaintiff further contends that the defendants will not suffer any prejudice if the orders sought are granted.

The application is supported by an affidavit sworn by one Karim Janmohamed a director of the plaintiff company. In that affidavit, it is inter alia deponed that the ordered limitation period lapsed before compliance due to factors beyond the deponent's control. It is further deponed that the delay in complying with the court's order in time was due to the fact that the plaintiff's business went under after the matter giving rise to this suit, causing difficulties in either depositing the cash or raising the guarantee. The affidavit further reiterates that no prejudice will be occasioned to the defendant if the extension sought is granted.

The application is opposed and the defendant has filed a replying affidavit sworn by one Mercy Kamau the 1<sup>st</sup> defendant's Legal Officer who also has the authority of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to swear the

said affidavit. In the affidavit, it is deponed that the plaintiff has made no effort to comply with the order of the court and has also not given any reasons for the failure to comply with the court order. It is also deponed that the guarantee obtained by the plaintiff has not been forwarded to the defendants nor did the defendants accept or approve the same. It is further deponed that the defendants have continued to be prejudiced as costs continue to rise without any assurance that the same shall be met should the plaintiff fail in its case and the defendants cannot in the meantime prosecute their counterclaim.

The application was canvassed before me on 24.9.2007 by Ms Wambugu Learned counsel for the plaintiff and Ms Mwangi Learned counsel for the defendants. Counsel reiterated the positions taken by their clients in the said affidavits.

I have considered the application, the affidavits filed by both parties and the submissions of counsel. Having done so, I take the following view of the matter. Order XLIX Rule 5 of the Civil Procedure Rules reads as follows:-

**“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 .....**”

Emukule J ordered the plaintiff to either deposit KShs.500,000.00 or furnish a bank guarantee aforesaid within 60 days of his order. The order was made on 2.3.2006 and the plaintiff should have complied with the order by 2.5.2006. The plaintiff obtained the guarantee on 10.5.2006. The delay involved is therefore of a mere 8 days. The plaintiff’s primary reason for the delay is that its business **“went under”** due to difficulties caused by matters that gave rise to this suit. That reason does not impress the defendants who swear that they continue to be prejudiced as the costs continue to rise without any assurance that the same shall be met should the plaintiff’s action fail and further that they cannot prosecute their counter claim.

In my view, the delay by the plaintiff cannot be described as inordinate unreasonable or inexcusable. The prejudice alleged by the defendants in my view is not such as to deny the plaintiff its day in court. In **Trust Bank Ltd – vs – Amalo Company Ltd [2003] 1EA 350** the Court of Appeal held as follows:-

**“1. The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible, disputes shall be heard on their own merit (Essenji and Another – vs – Solanki [1968] EA 224 followed).**

**The spirit of the Law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for not doing so.”**

The fact that the plaintiff obtained a bank guarantee though belatedly is a sufficient demonstration that it is desirous that it is desirous of moving on with its suit. There is no allegation that the plaintiff does not have a reasonable cause of action. In the premises, I think it would not be a proper exercise of my discretion to remove the plaintiff from the seat of justice. I find that the plaintiff has established a case for extension of time to comply with the order of Emukule J. In the premises, the plaintiff’s application dated 23.5.2006 and filed on the same date is allowed in terms of prayer 2 thereof.

The plaintiff should now deposit security or furnish the bank guarantee in the terms given by Emukule J, within fifteen (15) days from the date hereof in default of which the defendants are at liberty to move the court as they deem fit.

The plaintiff shall also pay the defendants costs of this application.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER, 2007.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:**

Geshon for Wambugu for the plaintiff and Mumgara for Marete for the defendant.

**F. AZANGALALA**

**JUDGE**

**30/10/07**