

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

Civil Case 619 of 2006

PWANI PACKAGING LIMITED.....PLAINTIFF

VERSUS

RESORT KENYA LIMITED.....DEFENDANT

R U L I N G

On the 3rd of August 2006, Resort Kenya Limited who is the defendant in the original claim was granted leave by the court to issue and serve a third party notice upon Alberto Canale within 21 days from that date. The defendant has now come back to this court through a notice of motion dated 3rd October 2007, seeking to have time enlarged to enable him serve a third party notice upon Alberto Canale.

The application is supported by an affidavit sworn by Githinji Marete, an advocate practicing in the firm of Njoroge Regero & Company Advocates, the advocates who are on record for the defendant. The advocate explains that the court order was not extracted until 24th August 2007, due to the High Court Vacation. He explains further that the time within which to serve the third party notice lapsed before they could establish the whereabouts of the proposed third party. The applicant maintains that it is in the interest of justice that Alberto Canale be joined in the suit to enable the court properly determine the issue of liability between the various parties.

Pwani Packaging Limited, who are the plaintiffs in the original suit filed grounds of opposition opposing the application. It is contended that the application lacks merit as the applicant has admitted that he cannot locate Alberto Canale and therefore, his remedy lies in the provision of Order V rule 17 of the Civil Procedure Rules. It is further contended that the failure to serve the third party notice is causing delay in the finalization of the matter, and therefore it is in the interest of justice that the application be dismissed.

The advocate for the respondent further added that the applicant has not asked for extension of a specific period as the application is not brought in good faith as the defence and counter-claim were filed way back in 1996.

Having considered this application, I am of the considered view that Order XLIX Rule 5 of the Civil Procedure Rules, gives the court the discretion to enlarge time fixed for the doing of any act under the Civil Procedure Rules. In this case the applicant has explained the delay in serving the third party notice. Contrary to the explanation given by the plaintiff's counsel, the applicant has not indicated that the third party cannot be traced such as to justify substituted service.

I think in the circumstances in this case, it is fair and just that time be extended to enable the defendant serve the third party notice.

Accordingly, time is extended for the defendant to serve third party notice upon Alberto Canale within 21 day of the date hereof. The applicant shall pay the costs of this application to the plaintiff.

Dated, signed and delivered this 4th day of December 2007.

H. M. OKWENGU

JUDGE