



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 364 of 2002**

**MWALIMU CO-OPERATIVE SAVINGS &**

**CREDIT SOCIETY LTD.....PLAINTIFF**

**VERSUS**

**KENYA ALLIANCE INSURANCE COMPANY LTD.....DEFENDANT**

**R U L I N G**

Delay in the preparation and delivery of this ruling has been occasioned by my recent illness and hospitalization. The delay is regretted.

When this suit came up for hearing on 27<sup>th</sup> October, 2004 learned counsel for the Defendant indicated that he intended to raise a preliminary objection to the suit in terms of paragraph 6 of the defence. The court then directed him to file and serve an application in that regard under Order 6, Rule 13 of the Civil Procedure Rules (hereinafter referred to as the "Rules") within fourteen (14) days from that date. When the matter came up for mention on 12<sup>th</sup> November, 2004 learned counsel for the Defendant informed the court that such application had indeed been filed by chamber summons dated 11<sup>th</sup> November, 2004. When that application came up for hearing on 2<sup>nd</sup> February, 2005 it turned out that the application had been filed out of time. Learned counsel for the Defendant therefore sought adjournment in order to bring an application for extension of time to regularize the filing of that application. Such application was brought by notice of motion dated 23<sup>rd</sup> March, 2005. It is the subject of his ruling.

The application is brought under Order 49, Rule 5 of the Rules. It seeks orders that the time fixed by the order of court dated 27<sup>th</sup> October, 2004 for the filing of an application under Order 6, Rule 13 of the Rules by the Defendant be enlarged and that the Defendant's application by chamber summons dated 11<sup>th</sup> and filed in court on 12<sup>th</sup> November, 2004 be deemed to have been duly filed. The grounds for the application are that the day delay was inadvertent, excusable and not inordinate or meant to obstruct justice and that the prayers sought if granted would not occasion any prejudice to the Plaintiff that cannot be remedied by way of costs. There is a supporting affidavit sworn by one **ANTHONY THUO**, the Defendant's Advocate. In paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of that affidavit the delay is explained. The Plaintiff opposes the application upon the grounds set out in the replying affidavit sworn by one **NYAMODI WILLYS NYAMOGO**, learned counsel for the Plaintiff. Those grounds are, *inter alia*, that the application is misconceived and an afterthought, and that the Defendant has not explained the delay in filing the application. The Defendant therefore is not deserving of the court's discretion.

I have considered the submissions of the learned counsels. Rule 5 of Order 49 of the Civil Procedure Rules donates to court the power to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules or by summary notice or by order of the court. Such enlargement of time shall be upon terms (if any) as the justice of the case may require and may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Costs of any application to extend any time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise. The court therefore has a wide discretion.

As per the order of 27<sup>th</sup> October, 2004 the Defendant should have filed the application by chamber summons dated 11<sup>th</sup> November, 2004 within fourteen (14) days of the 27<sup>th</sup> October, 2004, that is on or before 10<sup>th</sup> November, 2004. The application was filed on 11<sup>th</sup> November, 2004, that is one day out of

time. This is not an inordinate delay. There is sufficient and acceptable explanation for the delay in the supporting affidavit sworn by the Defendant's counsel. No prejudice will be occasioned to the Plaintiff by allowing the application that cannot be made good by an award of damages. The application by chamber summons dated 11<sup>th</sup> November, 2004 raises an issue which, if determined in favour of the Defendant, may determine the suit. It is therefore appropriate that the application be heard and determined on merit.

In the event, I will allow the notice of motion dated 23<sup>rd</sup> March, 2005. The chamber summons dated 11<sup>th</sup> November, 2004 is hereby deemed to be duly filed. There will be a penalty to the Defendant. That penalty will be that the costs of this application are awarded to the Plaintiff. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 27<sup>TH</sup> DAY OF JANUARY, 2006.**