



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1296 of 1998**

**BIO FOOD PRODUCTS LTD. ....**  
**.....PLAINTIFF**

**VERSUS**

**ELEGANT FREIGHTERS LTD. ....**  
**.....DEFENDANT**

**R U L I N G**

Elegant Freighters Ltd. the Defendant in this case, filed this Notice of Motion on the 15<sup>th</sup> June 2005 seeking an extension of time within which to file an Amended Defence and Counter-claim. There is power to extend time under Order 49 rule 5 of the Civil Procedure Rules.

The Plaintiff was filed way back on the 15<sup>th</sup> June 1998. The Defendant filed its Defence on the 1<sup>st</sup> July 1998 and the Reply to the Defence was filed on the 13<sup>th</sup> July 1998. No active steps were taken by the Plaintiff to prosecute the suit but on the 17<sup>th</sup> March 2004, the Defendant applied for leave to amend its Defence and include a Counter-claim. Leave was granted on the 24<sup>th</sup> June 2004 and the Defendant was ordered to file its Amended Defence and Counter-claim within twenty-one days. The Defendant did not do so but without seeking leave of the court filed the Amended Defence and Counter-claim on the 27<sup>th</sup> August 2004. The Plaintiff filed a Reply to Amended Defence and Defence to Counter-claim under protest on the 9<sup>th</sup> September 2004.

Having filed the Amended Defence and Counter-claim out of time without leave, one would have expected the Defendant to move expeditiously to regularize the position. However, no application was filed notwithstanding the fact that the Plaintiff filed its Reply to Amended Defence and Defence to Counter-claim under protest on the 9<sup>th</sup> September 2004 as aforesaid.

The present application was not brought until the 15<sup>th</sup> June 2005 – a delay of more than ten months: and this was after this case had come before me on the 15<sup>th</sup> February 2005 for hearing and I had pointed out a number of procedural irregularities and ordered counsel for both parties to have them regularized. I also gave a clear indication to the Defendant’s Advocate to apply for leave to extend time to file Amended Defence and Counter-claim. The Defendant went to steep for another four months before filing the application dated the 14<sup>th</sup> June 2005.

The affidavit in support of this application was sworn by Mr. Fred Athuok, learned Counsel for the Defendant, and in relation to this particular delay, he deponed in paragraph 8 of his affidavit dated the 14<sup>th</sup> June 2005 thus

“8. THAT the delay herein in filing this Application is highly regretted.”

And he added for good measure that he did not regard the delay to be inordinate.

Mr. Mwangi, for the Plaintiff, both in his Grounds of Opposition and in submissions pointed out that the Plaintiff had put the Defendant on notice, when he filed the Reply to Amended Defence and Defence to

Counter-claim under protest on the 9<sup>th</sup> September 2004. And even after the irregularity had been drawn to the attention of the Defendant's Advocate on the 15<sup>th</sup> February 2005, the Defendant took no steps until some four months later on the 15<sup>th</sup> June 2005.

Having considered the Defendant's conduct in this matter, I reject the reasons given for the delay which in my view, and with respect to learned counsel for the Defendant, is not only inordinate but also plainly inexcusable. That being my view on the matter, the Notice of Motion dated the 14<sup>th</sup> June 2005 must fail and it is hereby dismissed with costs to the Plaintiff. It must follow from this dismissal that the Amended Defence and Counter-claim dated the 16<sup>th</sup> August 2004 was improperly filed on the 27<sup>th</sup> August 2004. Consequently, it is hereby struck out and expunged from the court record.

Dated and delivered at Nairobi this Tenth day of February 2006.

P. Kihara Kariuki

Judge