



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

Civil Case 1598 of 2000

NATIONAL INDUSTRIAL CREDIT BANK LTD..... PLAINTIFF

VERSUS

SPIDER HOUSE LIMITED & 2 OTHERS..... DEFENDANT

RULING

This is an application by the defendants expressed to have been brought under the provisions of Order XII Rules 2(1) and (2), Order XLI Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and any other enabling provisions of the Law. The defendants seek one primary order that leave be granted to them to file Notice of Non-admission out of time. The grounds for the application are as follows:-

- 1) That on 3.8.2005 the defendants advocates were served with a Notice to Admit documents but did not file their Notice of Non- Admission of the documents within the stipulated time.
- 2) That the mistake or error to file and serve the Notice of Non-Admission was due to an oversight and should not be blamed on the defendant.
- 3) That the defendant will suffer great prejudice in the event the suit proceeds without filing the Notice of Non-Admission as the documents will be deemed to have been admitted.
- 4) That no prejudice will be occasioned to the plaintiff as the hearing of the suit has not commenced.
- 5) That in the interest of justice, the defendant should have leave to file the Notice of Non-Admission out of time.

The application is supported by an affidavit sworn by one Beatrice Chelangat an Advocate in the firm representing the defendants. The affidavit is an elaboration of the above grounds. At paragraph 8 however Ms Chelangat depones that ***“the defendant stands to suffer great prejudice in that the said documents that are listed are the same ones that he intends to rely on (in) support of his defence and counter claim.”***

The application is opposed and there are Grounds of Opposition filed by the plaintiff’s advocates. The primary ground in my view is that as the defendants have indicated that they intend to rely upon the same documents the Notice of Non-Admission will serve no purpose and the Notice will only serve to delay the speedy determination of the case.

The application was canvassed before me on 3.3.2006 when counsel substantiated their clients' responsive positions taken in the supporting affidavit and Grounds of Opposition.

Having considered the application, the affidavit in support, the Grounds of Opposition and the arguments advanced before me I take the following view of the matter. As the Court of Appeal observed in **Trust Bank Limited –vs- Amolo Company Ltd: CA No.215 of 2000, (UR)** at page 4 of its judgment: *“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 own merit.”* and that *“errors should not necessarily deter a litigant from pursuits of his right.”* (See Essenji and Another –vs- Solanki [1968] EA at page 224).

In the application at hand, the Advocates for the defendants may have erred in not filling Notice of Non-Admission in time and such a mistake would not be visited on their clients. However, they too intend to rely upon the same documents that are the subject of the application. So what prejudice do the defendants stand to suffer if a Notice of Non-Admission is not served? In my view none. Indeed such a Notice of Non-Admission will only serve to increase costs in proving the documents. I am not satisfied that the application is merited. Accordingly I declined to grant the same. It is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF APRIL, 2006.

F. AZANGALALA

JUDGE

3/4/2006

Read in the presence of:-

FURTHER ORDER: As the subject matter of this suit is within the pecuniary jurisdiction of the Chief Magistrates Court, I order that this suit be and is hereby transferred to the Chief Magistrates Court for hearing and final disposal.

F. AZANGALALA

JUDGE

3/4/2006