

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CIV APPLI 122 OF 2006

IN THE MATTER OF NAIROBI HCCC 435 OF 2001

AND

IN THE MATTER OF ROCKY DRIVING SCHOOL –VS- UNITED INSURANCE CO. LTD.

BETWEEN

ROCKY DRIVING SCHOOL.....APPLICANT

AND

AGIMBA & ASSOCIATES, ADVOCATES.....RESPONDENT

RULING

When the originating summons herein came up for directions on 8th March, 2006 the court ordered that the Respondent may file and serve his replying affidavit within ten (10) days of that date, that is, on or before 18th March, 2006. In the event he did not.

The Respondent has now come to court by chamber summons dated 11th May, 2006 seeking the main order that the court be pleased to enlarge the time limited by the order of 8th March, 2006 to enable him to file the replying affidavit within seven (7) days of the date of such enlargement. The failure to file the replying affidavit within time is explained in the supporting affidavit sworn by the Respondent's learned counsel, MR. NEVILLE WALUSALA AMOLO. That explanation is that the learned counsel fell ill and was thus unable to draw up the replying affidavit and file the same within the time allowed. When presenting the application learned counsel stated that he has since prepared the replying affidavit which runs to some forty-two (42) paragraphs, and that the same is now ready for filing.

The Applicant filed a replying affidavit on 30th May, 2006 in opposition to the application. Its learned counsel, MRS RASHID, readily conceded that the same was filed and served out of time. I permitted her to address the court on any point of law. Her only submission was that the delay in the present case is inordinate and not adequately explained.

I have considered the submissions of the learned counsels. The present application was filed on 15th May, 2006. If we recall that the replying affidavit should have been filed on or before 18th March, 2006, the delay here was slightly under two months. In the circumstances of this case I do not consider the delay inordinate. At any rate, the indisposition of the Respondent's learned counsel, as set out in the supporting affidavit, adequately explains the delay. Apart from that, it will be noted that the originating summons is brought under Order 52 of the Civil Procedure Rules. By dint of rule 10 (2) of the said Order, no appearance need be entered to the summons and no affidavit in reply need be filed and all parties may be heard without entering an appearance. So, whether or not the Respondent files a replying affidavit, he would be entitled to be heard upon the originating summons.

In the circumstances therefore I will allow the application and extend the time limited by the order of 8th March, 2006 by seven (7) days from the date of delivery of this ruling. The Applicant/Respondent shall have the costs of this application. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 16TH DAY OF JUNE, 2006.