**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**
**Civil Case 29 of 2003**

**NATIONAL HOSPITAL INSURANCE FUND (NHIF)…..… PLAINTIFF**

**VERSUS**

**EQUITY BUILDING SOCIETY……………….……….DEFENDANT**

**R U L I N G**

This is an application expressed to be brought under Order X11 Rules (1) and (2), Order XLIX Rule 5 of the Civil Procedure Rules Sections 3A and 63(e) of the Civil Procedure Act by the plaintiff for leave to enlarge time for filing notice of non-admission and further that the notice of non-admission filed on 24.4.2006 be deemed duly filed and served.

The reasons for the application are that the time to serve the notice has lapsed due to an oversight on the part of counsel and that the defendant will not in any way be prejudiced if the notice is allowed out of time. The application is supported by an affidavit sworn by Hassan N. Lakicha, counsel for the plaintiff in which he depones that his office was served with a notice to admit documents but he only came to know about the same when the time to respond limited by the rules had lapsed. He blames pressure of work for his failure to comply with the rules and contends that no prejudice will be occasioned to the defendant if the application is allowed.

The application is opposed and there is a replying affidavit worn by one Gerald Gachoka Warui the defendant's General Manager Operations. It is deponed in the replying affidavit that the application has been made in bad faith and is merely meant to deny the defendant a right that has accrued under the Law. In the premises the defendant contends that it will be prejudiced greatly if the application is allowed.

The application was canvassed before me on 13.11.2006 by Mr. Hassan Learned counsel for the plaintiff and Mr. Mungai Learned counsel for the defendant. Substantiating the grounds for the application counsel for the plaintiff admitted that he was to blame for the delay in serving a notice of non-admission and citing several authorities, submitted that his mistake should not be visited upon his client. Counsel placed reliance on the case of **Joseph Njuguna Muniu – vs – Medicino Giovanni: Nairobi C.A. No.216 of 1997 (UR)** for the proposition that mistake of counsel is sufficient reason for failure to take action which failure occasions prejudice to his client. Reliance was also placed upon the case of **Husband's of Marchwood Ltd – vs – Drummond Walker Developments Ltd [1975] 2All ER 30** for the proposition that Rule 2(2) of Order XII is designed to secure compliance with the rules on discovery but is not aimed at punishing a party who fails to comply. Counsel also referred me to Order XLIX Rule 5 of the Civil Procedure Rules and submitted that in the interest of justice the extension sought should be granted.

Counsel for the defendant, on his part argued that sufficient reason had not been given for the delay in filing the notice of non-admission and the plaintiff had not shown that it would suffer prejudice if the application is refused. Reliance was placed on the case of **Joseph Charagu Ndungu – vs – Joakim Ndungu Charagu: Civil Application No.Nai 183 of 1993 (UR)** for the proposition that a party who makes default in obeying the rules and seeks the exercise of the court's discretion in his favour must give good reasons and the court must take account of the successful respondent's corresponding right. Counsel further relied upon the case of **Mwangi Kinuthia –vs – Joseph Njoroge Mwangi: Civil Application No.Nai 397 of 1996 (UR)** in which the Court of Appeal which was considering an application for extension of time to file an intended appeal out of time observed as follows:-

At page 2 of the ruling:

"**a burden lies on a party who seeks the exercise of a court's discretion in his favour to place some material before the court upon which material the discretion is to be exercised. To simply say** "*it is the mistake of my counsel*"**, is really no answer. As I once said, pure and simple inaction by counsel or refusal by him to act, cannot, in my view amount to a mistake which ought not to be visited on a client."**

Having heard the rival submissions made to me by both counsels and further having considered the affidavit evidence placed before me and authorities cited, I take the following view of the matter. Order XII Rule 2(1) and (2) reads:-

"**2(1) Any party to a suit may by notice in writing call upon any other party to admit any document, saving all just exceptions, and if the other party desires to challenge the authenticity of the document he shall, within 14 days after service of such notice serve notice that he does not admit the document and that he requires it to be proved at the hearing.**

**(2) If such other party refuses or neglects to serve notice of non-admission within the time prescribed, he shall be deemed to have admitted the document, unless the court otherwise orders."**

A plain reading of sub-rule (2) above shows that failure to file a notice of non-admission will not automatically be deemed admission of the document by the party failing to serve a notice of non-admission as the court may order otherwise. In effect therefore the discretion to determine whether or not the failure will be deemed admission remains with the court. It cannot therefore be said that on the failure to serve notice of non-admission, the defendant in the case at hand is now entitled to an absolute right acquired under the Law.

Order XLIX Rule 5 of the Civil Procedure Rules reads:-

"**5. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."**

It is clear from the provisions of the above rule that the court has a discretion to enlarge time limited by the Rules or by any order of the court on terms and "***as the justice of the case may require."***

The discretion to enlarge time seems free subject to "***terms."***

In the application at hand, counsel for the plaintiff has freely taken responsibility for the delay in serving the notice of non-admission. Proceedings under Order XII of the Civil Procedure Rules are really pre-trial proceedings. They are intended to facilitate an expeditious and orderly trial. In the case at hand the pre-trial proceedings are yet to be completed. The suit is at its early preparatory stage. To refuse this application in my view would occasion the plaintiff serious prejudice as it may be deemed to have admitted documents merely because its legal adviser failed to serve a notice of non-admission in time.

That in my view would be to punish the plaintiff for its counsel's mistake. In **Joseph Njuguna Muniu – vs- Mecicino Giovanni (Supra)**, counsel for the appellant had been served with a hearing notice but failed to attend at the hearing as the hearing date had not been diarised and judgment was entered against the counsel's client. The High Court refused an application to set aside the judgment and on appeal the Court of Appeal said as follows:-

"**We know that administrative mistakes of this kind do occur in the offices of busy practicing advocates ……………..**

**In our view the explanation given by Janmohamed was good enough to show why she failed to attend at the hearing of the suit."**

The appeal was allowed and the exparte judgment and decree set aside. That decision in my view is closer to the matter at hand where counsel for the plaintiff states that although the notice to admit documents was served, the same was filed away without being inspected because of pressure of work – and by the time counsel's attention was drawn to the matter the time to file a notice of non-admission had already lapsed. Those circumstances are different from those that obtained in the case of **Joseph Charagu Ndungu –vs – Joakim Ndungu Charagu (Supra)**. In that case, the applicant sought extension of time to file an appeal out of time 1 ½ years after failing to file the appeal within 60 days that had been granted to him earlier. And in **Mwangi Kinuthia – vs- Joseph Njoroge Mwangi (Supra)** an applicant again sought extension of time to file an appeal out of time. A previous appeal filed 3 years after the judgment had been struck out. He took 2 ½ months thereafter to lodge the application for extension of time to lodge the appeal afresh. In the latter application, the applicant merely blamed his former advocates without more. It is no wonder that the application was refused. Those in my view are different circumstances from those we have in this application where counsel for the plaintiff has explained the delay.

The upshot of the matter is that the plaintiff's application is allowed in terms of prayers 1 and 2 thereof. The plaintiff shall pay the defendant's costs of the application.

Orders accordingly.

**DATED** at **NAIROBI** this **6th** day of **DECEMBER, 2006.**

**F. AZANGALALA**

**JUDGE**

**6/12/06**

**MARY KASANGO**

**JUDGE**

**6/12/06**