



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**  
**CIVIL CASE NO. 466 OF 2003**

**CO-OPERATIVE BANK OF KENYA LTD.....PLAINTIFF**

**VERSUS**

**CLEMENT THUKU IKIGU.....DEFENDANT**

**R U L I N G**

The Defendant herein sought by chamber summons dated 28th September, 2004 the main order that the judgment herein passed ex parte against him be set aside unconditionally. On 24th November, 2004 the court (Kasango, J.) granted the Plaintiff leave to file a replying affidavit within seven days from that date, that is on or before 1st December, 2004. As it happened the replying affidavit was filed on 15th December, 2004, well out of the time extended on 24.11.2004.

When the application came up for hearing on 23rd February, 2005 learned counsel for Defendant orally applied for an order to expunge from the court record the replying affidavit and to proceed with the application **ex -parte**. In his reply, learned counsel for the Plaintiff conceded that indeed the replying affidavit was filed out of time. But in his view mere lateness to file the replying affidavit cannot be a sufficient reason to expunge a document from the record. He sought to rely on the view expressed by Bosire, JA in his judgment in **Court of Appeal, Nairobi, Civil Appeal No. 75 of 1998, Central Bank of Kenya -vs- Uhuru Highway Developers Ltds.** and Others (Unreported), where he stated,

***“.....I am .....unable to subscribe to the view expressed by Mr. Rebello that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind the court is obliged to consider them unless for a reason other than mere lateness it considers it undesirable to do so.....”***

The judgments of the other two judges of appeal (Kwach and Tunoi) were not made available to me. I am thus unable to tell whether Bosire, JA's was a dissenting view. In the submission of the Defendant's learned counsel the view expressed by Bosire, JA is **orbiter**. This would appear to be so, given the grounds of appeal the Court of Appeal was considering, which have been set out in the judgment of Bosire, JA.

Be that as it may, it should always be the aim of the court to do substantial justice to the parties, if possible by hearing and determining on merit the issues between them placed before it, without allowing itself to be side-tracked by procedural issues. The replying affidavit is a substantial document to which are annexed various documents. It is already on the court record. It was indeed filed out of time. But that is not the same as saying that it should not have been filed at all. It is not an illegal document merely because it was filed late, and in the circumstances of this case it would not do justice to the parties to expunge it from the record.

I hold that the right thing to do is to order that the replying affidavit be deemed to be duly filed. It is so ordered. But this will not be without some penalty to the Plaintiff. The Defendant will be entitled to some costs as his objection to the replying affidavit was not without justifiable cause. I will therefore award to him costs hereby assessed at Kshs.5,000/00. Orders accordingly. A hearing date for the chamber

summons dated 28th September, 2004 may be taken in the registry.

**DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF APRIL, 2005.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 22ND DAY OF APRIL, 2005.**