



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE 1403 OF 2001

JOSEPH MAINGI MUGWIKAPLAINTIFF

- V E R S U S -

MUOROTO THUITA INVESTMENT LTDDEFENDANT

R U L I N G

This application is brought by a chamber summons dated 21st April, 2005 and made under Ss. 3A and 100 of the Civil Procedure Act, O.XLIX rule 5, O.VIA rules 3, 5 and 8 and O.VIII rules 2, 17 (2) (3) of the Civil Procedure Rules, and all enabling provisions of the law. It seeks from the court the following orders –

1. THAT the Honourable court be pleased to enlarge the time within which the defendant/applicant may file its amended defence as ordered by the Honourable Court on 24th November, 2004
2. THAT the Honourable court be pleased to grant leave to the Defendant/applicant to file its counter claim against the plaintiff/respondent 3. THAT the plaintiff/respondent be at liberty to file his amended reply to the amended defence as well as his defence to the counterclaim within 14 days after the service of the amended defence and counterclaim
4. THAT costs be in the cause. The application is supported by the annexed affidavit of SAMUEL NJUGUNA KAMAU and is based on the following grounds-
 - (a) On 24th November, 2004, the court granted the plaintiff/respondent leave to amend his plaint within fourteen (14) days of the said order.
 - (b) The court further ordered that the defendant be at liberty to amend and file its defence within fourteen (14) days of service of the amended plaint.
 - (c) The advocates formerly on record for the defendant did not attend the hearing of the aforesaid application despite being served.
 - (d) On the 30th November, 2004, the plaintiff served his amended plaint upon the defendant's former advocates who failed to file an amended defence within the prescribed time.
 - (e) The defendant should not be punished or held at fault for the sins of their former advocates. (f) It is imperative that the defendant be given time to amend its defence and file a counter claim for the purposes of determining the real questions in controversy between the parties and to ensure that the court is seized of all the facts. (g) The plaintiff/respondent shall not be prejudiced by the defendant's application seeking enlargement of time so as to amend its defence and the filing of a counter claim against the plaintiff. The

application is opposed. On 30th May, 2005, the Advocates for the plaintiff filed a notice to the effect that the plaintiff would oppose the application on the following grounds –

- (i) That the application is made in bad faith, has no merit, is incurably defective and an abuse of the court process
- (ii) That the delay in filing an amended defence in time has not been satisfactorily accounted for
- (iii) That the applicant is acting mala fides
- (iv) That the defendant has persistently been breaching orders made by this Honourable Court.

At the oral hearing of the application, Mr. Githinji appeared for the defendant's/applicant's while Mr. Mugambi appeared for the plaintiff/respondent. Mr. Githinji relied on the grounds on the face of the record and the supporting affidavit of Samuel Njuguna Kamau. He argued that the applicants were let down by their erstwhile advocates who neither attended the hearing of the respondent's application for amendment of their plaint, nor filed any amended defence to the amended plaint which had introduced as new cause of action. He then submitted that the sins of Advocates should not be visited upon their clients. He further referred to O. XLIX rule 5 of the Civil Procedure Rules and S. 95 of the Civil Procedure Act to the effect that the court has power to enlarge time as prayed for in this application. Mr. Githinji also submitted that the application had been brought without inordinate delay; that he other side would not be prejudiced, and that in the interests of justice the applicant should be granted leave to amend the defence and file a counter claim. Finally, he submitted that the application was brought in good faith and that the grounds of opposition had no merit. He then referred the court to HAJI AHMED SHEIKH t/a HASA HAULIERS v. HIGHWAY CARRIERS LTD., C.A. No. 46 of 1986 (Mombasa).

Opposing the application, Mr. Mugambi argued that the applicant's had not satisfactorily accounted for the delay and that the application was a mere afterthought.

Counsel submitted that the applicant's previous advocates had consciously taken a decision not to file a defence, and therefore there was no negligence on their part, and there would be no injustice to a litigant when its advocate chooses to do nothing. He also submitted that the application was brought in bad faith and was an abuse of the process of the court as the applicant had a bad history of disobeying all court orders in this matter. He then asked the court to dismiss the application.

In a brief reply, Mr. Githinji submitted that the issues in the previous orders had been laid to rest and cannot blur the present issues; and that the allegation that the proposed amended defence raises baseless issues is not for this forum.

I have considered the application and the rival submissions of both counsel.

Dealing with the last issue raised by Mr. Mugambi, I agree with Mr. Githinji for the applicant that the conduct of the applicant vis-a-vis the previous court orders is not relevant to this application. To consider any past breaches of court orders would only poison the court's mind against the applicant, and that would not be in the interests of justice as the court might approach the issues herein with a biased mind. I will say no more of those past orders.

The main issues in this matter are whether the court should enlarge the time within which the defendant/applicant may file its amended defence, and whether the applicant should be granted leave to file a counter claim against the plaintiff/respondent.

On 24th November, 2004, the court ordered that the applicant was at liberty to amend and file its defence within 14 days of service of the amended plaint. The applicant's advocates then on record were not in attendance when these orders were made.

Consequently, for some reason(s) not disclosed to the court, they did not take any action after service on

them of the amended complaint on 30th November, 2004. Indeed, it was not until after the new advocates had come on record on 19th April, 2005, was the matter given any follow up action.

Section 95 of the Civil Procedure Act states as follows –

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.” These words are substantially

echoed in O. XLIX rule 5 of the Civil Procedure Rules which is in the following words –

“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.”

These provisions no doubt cloth the court with unfettered discretion to enlarge time even though the application for enlargement is not made until after the period originally granted has already expired as in this instance. However, I reckon that wide as it may be, such discretion ought to be exercised judicially.

As observed above, the then Advocates for the applicant were served with the amended complaint on 30th November, 2004. Paragraph 11 of the supporting affidavit of Mr. Samuel Njuguna Kamau attests to the fact that those former advocates did not contact any of applicant’s directors on the issues raised in the amended complaint served on the former, nor did they seek the director’s instructions on whether to file an amended defence or not.

When the new advocates sought such instructions, the directors were all for the filing of an amended defence and counter claim if only to counter the issues raised in the amended complaint, as well as what they perceived to be a new cause of action substituted in the said amended complaint. The accusing finger for the non filing of the amended defence points to the advocates formerly on record. Should the applicants be faulted for the acts and omissions of those Advocates?

In the case of *Haji Ahmed Sheikh T/A Hasa Hauliers v. Highway Carriers Ltd.* Mombasa Civil Appeal No. 46 of 1986, the Court of Appeal was of the view that even though a client is bound by the acts of his advocate who is his agent nevertheless, in administering justice, the litigant should not be made to suffer for the mistakes and errors of his advocate. This principle applies with equal force to this case. The applicants were granted liberty to file an amended defence but did not do so on time because of some sin of omission on the part of their advocates. The need to file such an amended defence is as much alive today as it was when the liberty to do so was granted on 24th November, 2004. In the interests of justice, I think that the applicants should be accorded a chance to file the amended defence as it will assist the court in determining the real question in controversy between the parties following the amendment to the complaint. The same applies to the application for filing a counter claim. I bear in mind the principle that amendments sought before hearing ought to be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs. In the present case, no injustice will be occasioned to the respondents as, in addition to costs, they will also be at liberty to file an amended reply to the amended defence as well as their defence to the counter claim.

Being of the above persuasion, I accordingly make the following orders –

1. The defendant/applicant be and is hereby granted leave to file and serve its amended defence within 14 days from today.
2. The defendant/applicant be and is hereby granted leave to file and serve its counterclaim against the plaintiff/respondent.

3. The plaintiff/respondent be at liberty to file and serve his amended reply to the amended defence as well as his defence to the counter claim within 14 days after the service of the amended defence and counter claim.

4. The defendant/applicant will bear the costs of this application in any event.

Dated and delivered at Nairobi this 1st day of August 2005.

**L NJAGI
JUDGE**