



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**

**Civil Suit 184 of 2003**

**LONRHO MOTORS EA LIMITED (in receivership).....PLAINTIFF**

**VERSUS**

**INSURANCE COMPANY OF EAST AFRICA LIMITED..... DEFENDANT**

**RULING**

The defendant's application dated 28<sup>th</sup> May 2003 was argued on 6<sup>th</sup> July 2004 and the court, after hearing counsels submissions, stated that ruling would be delivered on notice. That application sought an order that the plaintiff provide security for defendant's costs.

A ruling of that application was delivered in the presence of the defendant but in the absence of the plaintiff on 10<sup>th</sup> June 2005. The orders granted were that the plaintiff within two months was to provide kshs 1.5 million for deposit in joint names, of both counsels, in an interest earning account. That default, thereof, the suit was to be dismissed. That pending the provisions of security by the plaintiff, as aforesaid, all further proceedings in this suit were stayed.

The plaintiff has now moved this court by a Notice of Motion dated 15<sup>th</sup> August 2005. That Notice of Motion is brought under Orders XLIX Rule 5, and Order L Rule 1 of the Civil Procedure Rules and Sections 3A and 95 of the Civil Procedure Act.

The plaintiff, by that Notice of Motion seeks two orders, that

- That the court do enlarge time within which security for costs as ordered on 10<sup>th</sup> June 2005 is to be provided;
- That the court do grant stay of execution of the order made on 10<sup>th</sup> June 2005 pending the hearing and determination of the intended appeal by the applicant.

The application is supported by the affidavit of Agnes Muia, counsel representing the plaintiff

She depones that after the hearing of the application for security of costs, that is on 6<sup>th</sup> July 2004, the plaintiff wrote letters and made inquiries at the High Court registry which inquiries and letters got the response that the plaintiff's counsel's firm would be notified when the ruling was ready.

That by its response dated 20<sup>th</sup> July, but received by plaintiff's counsel on 28<sup>th</sup> July 2004, the court

informed the plaintiff's counsel, that the ruling was delivered on 10<sup>th</sup> June 2005.

Counsel deposed that her firm had not been given prior notice of that ruling and was unaware of that ruling until receipt of the aforesaid letter on 28<sup>th</sup> July 2005.

Plaintiff's counsel deposed that she forwarded a copy of the ruling, after obtaining it from the court, to her client, the plaintiff, and sought instructions.

The plaintiff on receipt of that ruling instructed its counsel to appeal.

Plaintiff's counsel stated that in view of the orders of 10<sup>th</sup> June 2005, the plaintiff's suit has been dismissed, hence why the plaintiff, was seeking an order of enlargement of time. She further deposed that since the plaintiff did not have adequate time to comply with provisions of the orders, its rights of appeal were prejudiced.

The plaintiff's learned counsel Mr. Olouch, in submissions stated that the plaintiff could not file a Notice of Appeal, because the same ought to have been filed within 14 days of the ruling. Plaintiff counsel referred to a case, RAWAL – VERSUS – THE MOMBASA HARDWARE LTD [1968] E.A. 392. Counsel said that the court has an inherent power, to enlarge time and thereby revive the suit. Counsel relied on the following portion of that case.

**“It is, I think important to consider carefully the obvious intention that nothing in the Act should prevent a court from exercising its inherent powers in such manner as would be necessary to prevent injustice.”**

Counsel submitted that the plaintiff relied on Section 3A of the Civil Procedure Act, which saved the inherent powers of the court.

Plaintiffs further submitted that the plaintiff would suffer substantially, if the suit which is seeking kshs 5, 096, 424/- was not revived. Counsel did try to fault the ruling that ordered the plaintiff to deposit kshs 1.5 million by referring to The Advocate's (Remuneration) Order, but I find that such argument ought to be confined within the intended appeal.

The defendant opposed the application, and the defendant's learned counsel Mr. Ouma stated that the plaintiff's application is predicated on the basis that the plaintiff did not receive the notice of the delivery of the ruling. He pointed out that the notice received by the defendant had both counsels names, on that basis counsel sought that the court would assume that the plaintiff's counsel received the notice. If indeed the plaintiff counsel had not received the notice, defence counsel argued, that there was need for the plaintiff to have obtained an affidavit from the deputy registrar to confirm the same.

Defence further argued that there is presently a subsisting suit, which is incapable of being the subject of the plaintiff's application.

Defence counsel faulted the plaintiff for failing to file a notice of appeal and for its failure to apply for proceedings.

The defendant argued that the court does not have power to entertain the plaintiff 's application.

I have looked at the record of the court file in this matter and more particularly I have looked at the Notice of ruling dated 27<sup>th</sup> May 2005. That notice was indeed addressed to both counsels in this matter, but on my examination on service I find the two copies of that notice in the court file have the acknowledgement stamp of the defendant's advocate. There is no evidence, of service of that notice, being effected upon the plaintiff's counsel. I do therefore find and hold that the plaintiff was not served with that notice of ruling. I do not accept the argument of the defence that it was necessary for the plaintiff to obtain an affidavit of the deputy registrar to confirm that service was not effected.

The defendant has not been able to dislodge the plaintiff's submission that the first time the plaintiff, had knowledge that the ruling, was delivered, was by the letter dated 20<sup>th</sup> July but received by the plaintiff on 28<sup>th</sup> July.

Having found that the plaintiff was not served with the notice of ruling, the next issue I need to address is, whether the defendant's submission, that this court does not have power to enlarge time, since the suit was dismissed on 10<sup>th</sup> August 2005, has basis.

The plaintiff relied, firstly, on Section 95 of the Civil Procedure Act. That section provides for enlargement of time to do an act prescribed or allowed by the Civil Procedure Act. I find the appropriate rule for enlargement of time and in this case relied upon by the plaintiff, is Order XLIX Rule 5. That rule provides: -

**“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.....”**

That rule makes it clear that the court has power to enlarge time, even after the period that was granted, has expired.

The plaintiff is entitled to the prayer for enlargement of time because; the plaintiff was not served with the notice of ruling. The arguments raised by the defendant that the plaintiff did get to know of the ruling after 28<sup>th</sup> July 2005, and therefore ought to have provided the deposit by then, is rejected. The 28<sup>th</sup> July 2005 was more than 1 ½ months after the ruling; the plaintiff therefore only had half a month to comply. That period, the plaintiff's counsel stated, was used in obtaining client's instructions.

I do not find any impediments to the plaintiff obtaining an order for enlargement of time, because they approved the order or because they requested for the amount of the defendant's party and party costs. The letter relied upon by the defendant, marked as an exhibit, was writing on a without prejudice basis and the production of it is contrary to Section 23 of the Evidence Act.

Having found that I can enlarge time, I find that the defendant did not oppose, either by affidavit, or orally, the prayer for stay pending appeal. The plaintiff will therefore be granted that prayer. The costs of the application will go to the plaintiff because it did not get notice of ruling.

The orders of this court are: -

- (1) That the court does hereby enlarge time as ordered by the ruling of 10<sup>th</sup> June 2005 for a period of two months from today's date within which the plaintiff should deposit the amount of kshs 1.5 million, as security of costs, in the joint interest earning account of both advocates.**
- (2) Having so enlarged that period of deposit of security of costs the court grants the plaintiff stay of the order for security of costs made on 10<sup>th</sup> June 2005 pending the hearing and determination of the plaintiff's intended appeal.**
- (3) That the costs of the application dated 15<sup>th</sup> August 2005 are awarded to the plaintiff.**

Dated and delivered this 28<sup>th</sup> November 2005.

MARY KASANGO

JUDGE