



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE 899 OF 2001**

**AFRISON IMPORT & IMPORT LTD. .... PLAINTIFF**

**VERSUS**

**CONTINENTAL CREDIT FINANCE LTD. & ANOTHER ..... DEFENDANT**

**RULING**

The plaintiff brings this application under orders L rule 1, and XLIX rule 5 of the Civil Procedure Rules and rule 11(3) of the Advocates (Remuneration) Order, section 3A & 95 of the Civil Procedure Act, (cap 21), and other enabling provisions of the law. The application is by way of a Notice of Motion is dated 28th April 2003.

Upon the hearing of the application, counsel for the plaintiff sought and the Court with the consent of the defendant's counsel Mr Kariuki granted an amendment to the application in the following manner: -

"1. That the period within which to make the application herein be extended. 1A. That leave be granted to the plaintiff to appeal against the ruling herein dated 28th February 2003.

2. That costs of this application be in the cause."

In the ruling of 28th February 2003, the Court declined to interfere with and dismissed the plaintiff's application challenging the costs taxed at Ksh 740,000/= by the Taxing Officer under rule 11 (2) of the Advocates (Remuneration) Order.

The plaintiff seeks the leave of this Court under rule 11(3) of the Advocates (Remuneration) Order to appeal to the Court of Appeal. Rule 11 (3) provides as follows:-

"11 (3) Any person aggrieved by the decision of the judge upon an objection referred to such judge under sub-paragraph 2 may, with leave of the judge but not otherwise appeal to the Court of Appeal"

The plaintiff also asks the Court to extend time under order XLIX rule 5 of the Civil Procedure Rules to enable it presumably lodge its appeal to the Court of Appeal under rule 11(3) of the Advocates (Remuneration) Order cited above. Order XLIX rule 5 is in these terms:

Rule 5 "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by any 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 any case may be given, and such enlargement may be ordered although the application for the same is not made until after expiration of the time appointed or

allowed. Provided that the costs of any application to extend such time and of any order made there at shall be borne by the parties making such application, unless the Court orders otherwise.”

The subject application is principally made under rule 11 of the Advocates (Remuneration) Order. Rule 11 (1) enables any party to object to the decision of the taxing officer within fourteen days after the decision by giving notice in writing to the taxing officer of the items of taxation to which it objects. Under rule (2) the taxing officer is obligated to forthwith record and forward to the objector the reasons for his decision on the affected items, and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all parties concerned, setting out the grounds of his objection.

Rule 11(4) of the said Advocates (Remuneration) Order empowers the High Court in its discretion by order to enlarge the time fixed by subparagraph (1) or subsection (2) for the taking of any step; and the application for such an order may be made by Chamber Summons upon giving every other interested party not less than three clear days in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlargement may already have expired.

Section 95 of the Civil Procedure Act, under which the application is also sought provides in similar vein that “where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the Act, the Court may, on its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

The application is supported by the affidavit of one Francis Mburu, the Managing Director of the plaintiff. In it, the plaintiff acknowledges that 14 days have elapsed since the ruling was read and leave has not been applied for within the period allowed by Rule 39 (a) of the Court of Appeal Rules.

Rule 39(a) of the Court of Appeal Rules provides as follows:

39. In civil matters –

(a) “where an appeal lies with leave of the Superior Court application for such leave may be made informally, at the time when the decision against which it is desired to appeal is given, or by motion or Chamber Summons according to the practice of the Superior Court, within fourteen days of such decision.”

The plaintiff therefore seeks two orders from this Court, firstly that it be granted leave to appeal to the Court of Appeal against the ruling of the Court dated 28th February 2003. Secondly the plaintiff seeks an enlargement of time in terms of rule 39(a) of the Court of Appeal Rules.

The defendant opposes this application. In its grounds of opposition filed on 27th January 2004 the defendant says that the application is bad in law and fatally defective, that the plaintiff is guilty of inordinate delay in prosecuting its application and the whole idea of the application is an abuse of the Court process. Annexed to the grounds of opposition is an affidavit of one David Njogu, an advocate of this Honourable Court. The affidavit of David Njogu in essence urges that the plaintiff’s application is inordinately late. The plaintiff has taken 9 months to prosecute its application, the Court proceedings were ready more than 7 months ago, and the plaintiff has failed to take any steps to prosecute its application, and that the only reason for taking interest in it now was merely to forestall the defendant’s application in the Court of Appeal to have the Notice of Appeal smitten or struck out. Counsel for the defendant, Mr Kariuki reiterated these averments in his submissions and more forcefully submitted that the plaintiff’s application is bad in law and incompetent for failing to say with any specificity what time the plaintiff sought to be extended besides referring to rule 39(5) of the Court of Appeal Rules.

I have considered the application herein together with the plaintiff’s supporting affidavit and the plaintiff’s counsel’s submissions. I have also considered the defendant’s grounds of opposition, and the annexed affidavit of David Njogu whose firm of Njogu & Co Advocates have the conduct of this case.

The plaintiff has cited the provisions of the Civil Procedure Act and the Advocates (Remuneration) Order, relevant to its application. The plaintiff singularly omitted to state in its application the prescribed time upon which the Court could exercise its discretion to enlarge. In this court's view submission or reference to a rule of procedure in an Affidavit in support of an application does not constitute an application. Section 3A of the Civil Procedure Act will not aid the plaintiff where there is a clear provision of the law governing a matter in which a step or steps shall be taken in an action. In the result therefore the plaintiff's application is bad in law, and incompetent. As to the plaintiff's second leg of the application, that is, leave to appeal to the Court of Appeal under Rule 11(3) of the Advocates (Remuneration) Order is dependent upon the enlargement of time, the same is hereby declined. The plaintiff's application as amended and the hearing is dismissed with costs.

**Dated and Delivered at Nairobi this 12th day of February 2004.**

**M. J. ANYARA EMUKULE**

**JUDGE**