REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1168 OF 2003

SHEM OMONDI ……. PLAINTIFF

VERSUS

SEEMFOD HOLDINGS LIMITED ……. DEFENDANT

R U L I N G

The Plaint was filed on 13/11/03. Although it is not clear from the court file when the said Plaint and summons were served upon the Defendant, M/s Lubullelah & Associates Advocates did file a Memorandum of Appearance on 28/11/03. Thereafter the Defence was lodged in court on 4th December 2003.

The record shows that the Defence was served upon the plaintiff's advocates on 9/12/03. In response to the said Defence, the Plaintiff filed a Reply to Defence on 22/12/03. The said Reply to Defence was filed 13 days after the Defence had been received by the Plaintiff. The delay in the filing of the Reply to Defence has given rise to 2 applications;

(i) The Defendant has applied to strike out the Reply to Defence

(ii) The Plaintiff has applied for enlargement of time, so that the Reply to Defence may be deemed to have been filed in time.

When the 2 applications came before me, I requested the parties to deal with them together. Both the parties accepted to handle the 2 applications together, so that if the court granted the enlargement of time as sought by the Plaintiff, the Defendant's application to strike out the Reply to Defence would be dismissed. Conversely if the court disallowed the application for enlargement of time, the Reply to Defence would be struck out.

In his submissions, Mr. Omoti, advocate for the Plaintiff, stated that the delay in filing the Reply to Defence was due to understandable and excusable circumstances. The said circumstances were set out in the affidavit of the Plaintiff. In the said affidavit, the Plaintiff explains that he is resident at Nyamira in Nyanza Province. He usually communicates with his advocates through his mobile phone. However, the said communication has to be initiated by him, because the safaricom network at his home is only received at a distance from home.

By the time he phoned his lawyer, on 17/12/03, the time for filing the Reply to Defence had already lapsed. However, his advocate explained to him the need to take some action in the case. He therefore travelled to Nairobi 2 days later, on 19/12/03, which was a Friday. The Plaintiff met his advocate on Monday 22/12/03, when he instructed his advocate to draw and file the Reply to Defence. The Plaintiff's advocate took action on the same day.

The foregoing steps are said to be understandable and excusable. However, the Defendant disagrees. It is the contention of the Defendant that the court cannot enlarge time to operate retroactively.

Secondly, the Defendant accused the Plaintiff of inordinate delay in bringing this application. It is said that the Reply to Defence should have been filed by 15/12/03. Therefore, the application for enlargement of time ought to have been filed soon thereafter; instead of waiting to do so on 5/2/04.

There is no doubt that the application for enlargement of time was not brought at the earliest possible opportunity. To that extent therefore, the Defendant is right to complain that there was a delay in the lodging of the application. I must now ask myself if the said delay was inordinate. I must also look at the reasons advanced by the Plaintiff, to explain the delay, so as to be able to decide whether or not the said delay was excusable in the circumstances.

My calculation shows that the application for enlargement of time was filed some 30 days after the last day when the Reply to Defence ought to have been filed. The 30 days' period is arrived at by excluding the 17 days pursuant to Order XLIX rule 3A. Looked at in isolation, the period of 30 days would be construed as inordinate. But some explanations have been tendered by the Plaintiff, and the court is obliged to give due consideration to the period of delay within the circumstances. In that regard, the Defendant submits that the Plaintiff's advocates failed to demonstrate the efforts they made in contacting their client. The Defendant went on to say that it is only the Plaintiff who made efforts to contact his advocate.

The court has noted that the Plaintiff's lawyers could not have tried to contact their client, as it is the Plaintiff who always initiated communication, through his mobile phone, as and when he was at a spot where there was the safaricom network. But even if the Plaintiff's advocates had failed to take other steps to reach their client, this court would be reluctant to penalise the Plaintiff for the failure of their advocates. As was conceded by the Defendant's advocate, the Plaintiff did make the requisite effort to communicate with his lawyers.

Furthermore, I have noted (from Exhibit SO1 annexed to the Plaintiff's supporting affidavit), that the Plaintiff's advocates were in communication with the Defendant's advocates. The said communication was intended to procure the extension of time for the filing of the Reply to Defence, without having to go through a formal application, such as the one before the court. I am therefore satisfied that it is only after the Defendant's advocates notified the Plaintiff's advocates, on 12/1/04, that they would proceed to apply to strike out the Reply to Defence that it became necessary for the Plaintiff to apply for enlargement of time. The period between the said notification and the filing of the application was about 24 days. In my view, and given the mode of communication between the Plaintiff and his advocates, I hold that the delay in the circumstances of this case was not inordinate. I find the explanations tendered by the Plaintiff and his advocates to be reasonable.

Was this application made in bad faith? The Defendant submits that the plaintiff's application for enlargement of time was made in bad faith. The application was only filed after the Plaintiff was served with an application to strike out the Reply to Defence. It was therefore the contention of the Defendant that the Plaintiff was only moved into action by the application to strike out the Defence.

I am afraid that I do not accept the Defendant's contention. The affidavit of the Plaintiff, as read with exhibit "SOI" illustrate that the Plaintiff had been consciously taking steps to regularize the fate of the Reply to Defence. It is apparent that once the Defendant declined to indulge the Plaintiff, it became necessary for the Plaintiff to make a formal application for enlargement of time. I do not therefore find any evidence of bad faith on the part of the Plaintiff.

But it is true that the application to strike out the Reply to Defence was filed and served prior to the filing of the application for enlargement of time. Assuming that the latter application was actually filed in response to the application to strike out the Reply to Defence, would that by itself be an act of bad faith? To my mind, the action would be the most logical step by a party who acknowledges that unless the time for taking a particular step is enlarged, the step would be voidable. It would not be evidence of bad faith.

By the same token, I do accept the Plaintiff's submission that although he did not file a Replying Affidavit to the application to strike out the Reply to Defence, he was nonetheless entititled to rely on the matters set out in his supporting affidavit, sworn on 3/2/04.

Indeed, I believe that when the parties agreed to ague the 2 applications together, that was a clear manifestation of their acknowledgement that the applications were completely intertwined.

Enlargement of time not to have retroactive effect? The

Defendant submitted that the provisions of Section 79G of the Civil Procedure Act, and Order 49 rule 5 only empower the court to exercise its discretion to enlarge time before something is done. It was further submitted that this court could not enlarge time for filing of the Reply which had previously been lodged in court on 22/12/03. It was therefore contended by the Defendant that the application for enlargement of time was incurably defective. The Defendant therefore asked the court to dismiss the application dated 3/2/04, and simultaneously grant the orders to strike out the Reply to Defence, as prayed in the Defendant's application dated 13/1/04.

In the light of these submissions, I am obliged to set out herebelow the provisions of S.79G, and 0.49 rule 5:-

> "S.79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

The foregoing provisions of S.79G fall under the umbrella of Part VIII of the Civil Procedure Act, which is headed "Appeals to the High Court and Court of Appeal" . Furthermore, the said section falls under the sub-title "General Provisions Relating To Appeals".

I am therefore unable to appreciate the relevance of the said provision to these proceedings. The Plaintiff herein is not seeking to have any appeal admitted out of time. I believe that the Defendant's advocate cited this section in error.

Order 49 rule 5, reads as follows;

> "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, 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 he same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend and any order made thereon shall be borne by the parties making such application, unless the court orders otherwise".

A plain reading of the foregoing rule indicates that there is no restriction as to when the application for enlargement of time can be made to the court. Indeed the rule appears to be deliberately worded so as to permit the filing of an application for enlargement even after the expiration of the time appointed or allowed to take any particular action. The rule does not state that an application for enlargement must be made before a party has taken the step in relation to which the enlargement is sought.

If the Rules Committee wished to impose such a limitation, it could have done so. But it did not impose any such limitation. I therefore see not justification for imposing a limitation as to the time (in relation to the act in respect of which enlargement is sought). In this case the applicant has already filed and served the Reply to Defence. The pleading is thus a part of the record. I see no good reason for expunging it from

the record, through an order that it be struck out. I therefore decline to strike out the Reply to Defence. My decision in this regard is informed by the decision of the Court of Appeal in Trust Bank Ltd V Amalo Co. Ltd [2003] 1 E A 350 at 352, wherein the court delivered itself thus;

> "The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put awhile ago by Georges CJ (Tanzania) in the case of Essanji & Another V Solanki [1968] E A at 224
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> "The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right".
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> That accords with the policy of the law as can be gleaned from Order IX, rule 1 of the Civil Procedure Rules whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so".

In this case the Reply to Defence is already before the court, as I have observed earlier. The grant of the extension of time so that it is deemed to have been filed within the stipulated period, as extended by this court, is no more than the formalisation of the pleading in the court records. In my understanding, such extension of time does not in any way occasion prejudice to the Defendant, as the suit is still at the stages of infancy. I therefore grant orders enlarging time, so that the Reply to Defence is deemed to have been filed within time. I further order that upon payment of requisite court fees, the said Reply to Defence be deemed as duly filed. However, the costs of the application shall be borne by the Plaintiff in any event.

I also direct that the costs of the Defendant's application dated 13th January 2004 be borne by the Plaintiff, even though I did dismiss the said application. The costs are awarded to the Defendant, because the Plaintiff was guilty of delay in filing the Reply to Defence. The application by the Defendant was thus necessitated by the Plaintiff's default. And although the court has accepted the explanation advanced by the Plaintiff for the said delay, the Plaintiff nonetheless occasioned the need for the Defendant to file the application.

Dated at Nairobi this 2nd day of March 2004.

FRED A. OCHIENG

Ag. JUDGE