REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVL SUIT 318 OF 2004

CHILDREN OF GOD RELIEF INSTITUTE ……..……...…1ST PLAINTIFF

REV. DR. ANGELO D'AGOSTINO, SJ, MD ……...….2ND PLAINTIFF

VERSUS

NATION MEDIA GROUP LTD ……...……...…….1ST DEFENDANT

DR. MOSES OTSYULA ……...…….2ND DEFENDANT

RULING

This Ruling relates to an application brought by way of a Notice of Motion dated 31.08.2004 and filed in court on 9.09.2004 in which the 2nd Defendant herein seeks one principal order that he be granted an extension of time to file his Defence to the Plaint out of time, and that the Defence and Counter Claim be deemed as duly filed upon payment of requisite fees. The application is grounded upon the averments stated in the face of the application and the Supporting Affidavit of Peter Opondo Kaluma, Counsel for the 2nd Defendant. These averments will appear in the body of this Ruling.

The application was opposed by Miss Janet Mutua who in her submissions relied upon the 24 page Replying Affidavit of Sr. Mary Owens, IBVM, the Deputy of the second Plaintiff, the Rev. Dr. Angelo D'agostino, SJ MD the Directors of the first Plaintiff, Children of God Relief Institute.

The Second Defendant's Counsel Peter Opondo Kaluma has sworn an Affidavit (the Supporting Affidavit) dated 31.08.2004 in which the counsel in essence admits that he or his firm drew up, but failed to file the Defence and Counter Claim dated 31.08.2004. He avers that the Memorandum of Appearance and the Replying Affidavit were actually filed on 29.06.2004 when the Defence and Counter Claim ought to have been filed. The time between that date and the date of filing of the application herein is well over 69 days. In his submissions, Mr. Kaluma told this court that the clerk responsible for this "mess" is now deceased, and dead men tell no tales. He prayed that the 2nd Defendant, his client should not suffer because of counsel's negligence.

Miss Janet Mutua in opposition to the application was firm in her submissions that the time having expired there was nothing to extend, and this Defendant's application should be dismissed with costs. She submitted that the Affidavit by Mr. Kaluma was incompetent as counsel should not himself swear an Affidavit in matters which are contentious. He could be inviting himself to cross-examination in matters of fact of which he is not competent to testify to. For this proposition she relied upon the case of KISYIAN INVESTMENTS LTD & ANOTHER VS. KENYA FINANCE LTD & OTHERS (H.C.C.C.

NO. 3504 OF 1999). Miss Mutua also relied upon the case of CHARLES OMWATA OMWOYO VS. AFRICAN HIGHLANDS & PRODUCE LTD. (Milimani Commercial Courts Nairobi Miscellaneous Application No.308 of 2002), where Ringera J (as he then was) in dismissing the Plaintiff's application seeking to transfer the case to a subordinate court held that a mistake or negligence of an Advocate is not a good ground for relief to favour a client.

Whereas I would generally agree with this proposition as a ground for upholding and encouraging high standards of advocacy, I am of the opinion that each case must be looked at on its own merits. In the **Keysian** case (supra), it was I think, correctly found that an Advocate was not competent attest to the contentious matters in that application. In the **Omwoyo vs. African Highlands** case, the issue was whether the court could transfer a case on grounds of want of jurisdiction. I think Ringera J. (as he then was) was right in exercising his discretion to refuse to transfer an incompetent suit to another court. The right cause in that situation was really to strike out the whole suit, and subject to limitation of actions of law, allow parties to file a fresh suit in the proper court.

Where however, as in this case, there is a competent suit, and express enabling provision to make an application in relation thereto, the court has discretion in terms of the relevant rules to exercise its discretion to grant or deny the relief sought.

The application here is not expressed to be brought under the provision of Order XLIX, rule 5. It did however come out clearly during the submissions of both Counsel that this was the order and rule pursuant to which the application was made. It is however desirable in these matters that the applicant lays down the chapter and verse upon which his application is grounded. Rule 5 of Order XLIX of the Civil Procedure Rules is in these terms -

5. 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.

PROVIDED that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

My understanding of this rule is that time for the doing of any act required under the Rules of Procedure may be enlarged even if the application for such enlargement is made after the time for doing the requisite act has elapsed. The only condition to this general **power** to enlarge time is that the price for such enlargement of time shall be borne by the party seeking an order for enlargement of time to do what he ought to have done within the time prescribed by the rules.

In the ordinary course of pleading the 2nd Defendant ought to have filed his Defence within 15 days after he has entered an appearance in the suit, and serve it on the Plaintiff within seven (7) days from the date of filing the Defence (Order VIII rule 1 (2))

The Memorandum of Appearance herein was filed on 29.06.2004. The 15 days within which the Defence was to be filed expired on or about 14.07.2004, when the application herein was made, just under sixty (60) days had lapsed beyond the prescribed period of 15 days. This was in my view gross negligence on the part of the 2nd Defendant's Counsel.

In the case of **Charles Omwaka Omwoyo vs. African Highlands and Produce Co. Ltd**. (supra), Ringera J. (as he then was) referred to the decision of the Court of Appeal in the case of **Mawji vs. Lalji & Others** (Civil Appeal No. 236 of 1992) where Kwach JA, "**drew a line between negligence, pure and simple, and a genuine error or mistake on the part of an advocate**," and cited with approval the dicta of Lord Griffins in the case of **Kettelman vs. Hanseh Properties Ltd.** [1988], ALLER. 38, at page 62 where the learned Lord of Appeal in ordinary said -

"Another factor that a judge must weigh is the balance in the pressure on the courts caused by the great increase in litigation and consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings."

Ringera J. (as he then was) after expressing his view, that he was of the same persuasion, as Lord Griffins (the learned Lord Appeal) (of which I am too) went on to say … "I think the time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavor".

In as much I am of certainly of the same persuasion as their Lordships on these matters, the dicta of the learned Lord of Appeal in **Kettleman vs. Hansel Properties Ltd**. (supra) as cited with approval in **Mawji Lalji & Others** (supra) and **Charles Omwaya Omwoyo vs. African Highlands & Produce Co. Ltd.** (supra), their Lordships in the same dicta implicitly acknowledged that there will be cases in which justice will also be better served by refusing to allow the negligence of the lawyer to fall on the heads of their clients and allow not merely amendments, but other reliefs, such as extension of time so that a party is not shut out completely from ventilating his side of the matter in dispute. I am persuaded that this is one such case.

Wamiti vs. Wambugu & 2 Others [1986] KLR 440, was a case of fraud by the advocate's clerk. The Court held **inter alia** that "**if an advocate's clerk is fraudulent and conceals his dealings with a client there is not much the advocate can do until the fraud is discovered and the period of the fraud cannot be held against the lay client."**

Admittedly this is not a case of fraud by the Advocate's clerk who is said to be dead. He cannot speak for himself as to why he failed to file the 2nd Defendant's Defence along with the Memorandum of Appearance with the 41 page Replying Affidavit sworn and filed on 29.06.2004 by the 2nd Defendant. Whereas it is indeed in the interest of the whole community that legal business should be conducted efficiently, the same interests cry out that the same legal business while being conducted efficiently, will not, without consideration, condemn the client for the error, and indeed as in this case, for the error and negligence of his Advocate.

In the result therefore, the provisions of Order XLIX rule 5 of the Civil Procedure Rules being permissive as already analysed above, and for the reasons stated in the foregoing passages of this Ruling, the 2nd Defendant's application dated 13.08.2004 and filed on 9.09.2004 succeeds. There shall be orders accordingly.

The 2nd Defendant shall serve the 2nd Defendant's Defence upon the Plaintiff's Advocates and the 1st Defendant's Advocates (for good order) within seven days of the date of this order. The Plaintiffs may within fifteen days of service of the 2nd Defendant's Defence file a Reply thereto. There shall be orders accordingly.

The enabling rules require that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise. The application herein is in the name of the 2nd Defendant but the real culprit is his Advocate. There shall therefore be an order that Peter Opondo Kaluma Advocate for the firm of Lumumba & Mumma Advocates for the 2nd Defendant shall personally pay -

(a) The costs occasioned by the application;

(b) The costs occasioned by the orders herein

It is so ordered.

Delivered and dated at Nairobi this 9th day of November 2004

ANYARA EMUKULE

Ag. JUDGE