

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1735 OF 2000

COMMERCE BANK LTD. PLAINTIFF

VERSUS

PARADISO COURT LTD. & 3 OTHERS DEFENDANT

RULING

This application by way of Notice of Motion brought under Order 49 rule 5 of the Civil Procedure Rules and Sections 3A and 95 of the Civil Procedure Act is seeking that the time within which to file the Reply to Defence be extended and that the Reply to Defence annexed to the same Application be deemed as having been filed and served. The grounds for the same application are that the delay in filing the same Reply to defence was inadvertent and arose from a misplacement of defence within the offices of the Plaintiff, that this was an error on the part of counsel for the Plaintiff and the consequence of the same mistake should not be visited upon the client and lastly that none of the parties will be prejudiced in any way by the extension of time to file Reply to Defence out of time. In the Supporting Affidavit sworn by Edith Muriu, the learned counsel for the Plaintiff, she says mainly that the Plaintiff's advocates were served with Defence on 26th March 2001 at 11.00 a.m.; that the said defence was inadvertently filed in another file relating to the same client and so was misfiled. The mistake was discovered on 15th May 2001. She (the Defendant) then wrote to their client for further instructions but the same instructions were not received until 5th June 2001 and the same Reply to defence is intended to bring to light the real issues in controversy between the parties to the court.

The Respondents opposed the application and filed an Affidavit sworn by their learned counsel Njoroge Wachira. In the same Affidavit the Respondent state that the application is incurably defective; that the Reply to defence annexed to the Affidavit was filed without first seeking leave of the court to file it out of time, that there is inordinate delay of 2 1/2 months and that the court should not exercise its discretion in favour of the indolent.

I have considered the application. I think the Respondents contention that the Reply to Defence annexed was filed without leave having been obtained first is misplaced and cannot stand. It is clearly based on a mistake.

The mistake is that as reply to defence annexed was dated 19th June 2001 and did bear a court's rubber stamp dated 20th June 2001, it was filed on its own. This is not correct. In the original application before the court which is the controlling document, Reply to Defence is indeed annexed as an exhibit only and is not a document filed on its own. I have checked all the Receipts in the file and I cannot see any receipt indicating that the Reply to Defence was ever filed as a document on its own at any time before filing this application. The original copy does not bear any court stamp and is genuinely treated as an exhibit – part of Exhibit EWM 1. I think it is proper that in such an application as the one before me a copy of the Draft Pleading should be annexed to enable me know whether the document is of any importance to the entire case in terms of meting out justice to all parties.

The other contention by the Respondent is that there was inordinate delay. The Applicant's allegation at paragraph 6 and 7 have not been disputed. That in fact means that the delay worth considering is the delay between 15th May 2001 and 19th June 2001, as I do accept that in any office and in any chamber of an advocate, a mix up in filing, particularly when the client has many files can easily occur. As to the delay between 15th May and 19th June 2001, I would not consider it inordinate having given credit to time taken to get instructions and to prepare the documents for the court.

I do feel that the Reply to Defence to be filed is not frivolous. It raises matters that may very well need to be considered by the court.

This is a matter which calls for the exercise of my discretion and I will exercise my discretion in this matter.

The application is allowed. The Applicant is granted leave to file Reply to Defence within 5 days of the date hereof. The Respondents will have costs of this application in any event. Orders accordingly.

Dated and delivered at Nairobi this 21st day of September 2001.

ONYANGO OTIENO

JUDGE