

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 717 OF 2006

FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF

Versus

AZIM JIWA RAJWANI.....DEFENDANT

RULING

Extension of time: Delay caused by inability to raise fee on time

[1] I am being asked to extend time and allow the defendant to file defence and counter-claim. Mr Otieno submitted that, on 28.5.2012, the Applicant was granted leave to amend his defence and plead a counter-claim within 14 days. The Applicant did not comply. He later applied for extension of time to comply with the orders made on 28.5.2012. The court was kind enough and on 11.7.2012 allowed the Applicant to file the defence and counter-claim within twenty one days. That time again lapsed; no compliance. The reason he gives is that he was not able to raise the court fee of Kshs. 70,225 on the counter-claim within the limited time given by the court to file the defence and the counter-claim. He now has the requisite court fees and is ready to file the defence and the counter-claim. He advanced other reasons in support of his application that; 1) the proposed counter-claim involves a substantial sum of money and unless he is allowed to file it, he will suffer great prejudice; 2) the Respondent will not suffer any prejudice by this extension; and 3) it is only fair and in the interest of justice that he is allowed to file the counter-claim. Mr Otieno urged the court to be guided by the Overriding Objective of the court and extend time as requested for. That course gives the parties an opportunity to present their cases in full, and also enable the court to determine the real issues in controversy. He submitted that the point relied upon by the Respondent to oppose the extension of time herein is a mere technicality. He referred the court to the case of **STEPHEN WACHIRA MARAKARU v TANA AND ATHI RIVER DEVELOPMENT AUTHORITY [2009] eKLR** on technicalities.

Respondent opposed any extension: an afterthought?

[2] Mr Mwangi, counsel for the Respondent termed the application for extension as an afterthought. He had his reasons. The Applicant had applied previously for similar orders based on the same grounds the current application is founded. The matter was, therefore, dealt with by the court and cannot be revisited. The current application is an application for review of court orders made on 28.5.2012 only that it has mimicked the earlier application dated 22.2.2012 to make it look like a fresh application. It is *res judicata*. He relied on the case of **KARANJA KARENJU v AG [2008] eKLR**. The application being made was anticipated and should have complied. It has been made too late in the day and it caught up by lashes. Now the Applicant is ambushing the Respondent for he did not inform the Respondent of his predicament. The Respondent's case is ready for hearing but the Applicant has always filed application after application to prevent the case from proceeding. Justice demands the case to proceed to hearing. He asked the court to dismiss the application.

COURT'S RENDITION

[3] The Applicant has applied for extension of time to file defence and counter-claim. It is

expressed to be made under Order 8 rule 6, Order 53 rule 6 of the Civil Procedure Rule (CPR), Sections 2A, 2B, 3, 3A and 63(e) of the Civil Procedure Act (CPA). I have meticulously gone through the provisions of the CPA and I do not seem to see section 2A and 2B. But let me give them the benefit of the doubt and go by the submissions of counsel for the Applicant, that they meant sections 1A and 1B on Overriding Objective the CPA. One other matter; Order 53, rule 6 of CPR has been quoted, and I do not think it applies here. Once again, I presume the Applicant meant Order 50 rule 6 of the CPR; but parties, especially where counsels are engaged, should draft meticulous pleadings free of any careless mistakes. Nonetheless, I will determine the substantive issues.

[4] A re-statement of the law; the court has power to enlarge time or period which has been fixed by or granted by the court for doing of any act prescribed or allowed by CPA, even if the original period fixed or granted may have expired. The power is discretionary and not fettered at all, except it should be exercised judiciously and upon defined principles of the law. See section 95 of the CPA and Order 50 rule 6 of CPR. These provisions are styled in a manner that recognizes that there had been an earlier period of time which had been fixed or extension or extensions of time which had been granted but expired. I think, this is so because enlargement of time is a matter of discretion of the court; and will depend on the circumstances of each case which certainly vary from case to case. Therefore, previous enlargement *per se* does not limit the power of the court to enlarge time. Except, any previous enlargement or enlargements will be considered by the court in determining whether the Applicant has abused the process of the court and should not, therefore, benefit from any discretion of the court.

[5] Mr Mwangi talked of this application being one of review of orders made on 28.5.2012 except it has masqueraded as a fresh independent application. He seemed to suggest some kind of abuse of process. But let me state the following on that submission. The provisions for enlargement of time have been enacted separately and are distinct from those relating to *Review* under Order 45 or *Judicial Review* under Order 53 of the CPR. Needless to say, these are totally different reliefs and are attended to by different principles. Their scope and application is also different. Probably, and I hope I am right, Mr Mwangi may have used the word "review" in its loose but not technical sense or perhaps he was looking at the eventual effect of any further enlargement of time to be akin to a review of the earlier orders which had granted a limited period of 21 days. But whatever use Mr Mwangi puts the word to, the distinction I have alluded to, is critical particularly when the court is considering the relevant factors in an application for enlargement of time which include but not confined to; 1) whether there has been indolence on the part of the Applicant or default which has not been explained; 2) is the Applicant guilty of abuse of the process of the court; 3) will the enlargement prejudice the defendant; 4) will the denial of further period to comply occasion prejudice to the Applicant given the circumstances of the case; 5) is enlargement necessary for the effectual and complete adjudication of the issues in controversy; and 6) in the overall, is it just to enlarge time in the circumstances of the case. The court, once it is convinced that it is in the interest of justice to enlarge time, it will exercise discretion in favour of the Applicant, but should decide the terms and conditions on which it will allow enlargement of time. That requirement serves the legitimate expectation on the part of the Respondent that he is not unfairly prejudiced.

[6] I am of the orientation that the court may allow a party to amend and file amended defence notwithstanding the fact that the party did not do so within the time allowed by the rules or granted by the court. This is a power which is expressly recognized under Order 8 rule 6 of the CPR on which the application herein is founded. It is true the Applicant was granted leave to amend his defence within 14 days; later on 28.5.2012 that time was extended with another 21 days. He did not act within the extended time. What he did was to file another application on 9th September, 2013. The delay herein goes beyond one year from the last date the Applicant ought to have complied with the orders issued on 28.5.2012. What explanation is the Applicant giving for the delay? He says that he was not able to raise the requisite court fee for it was substantial sum, that is, Kshs. 70, 225. These things bring me to a point where I should seek counsel and wisdom from the Constitution: Is there any guidance from Article 48 of the Constitution on access of

justice to all? It bears repeating, his reason for the delay is that he had financial difficulties in raising the court fee within the time that had been allowed by the court. I think that is different from saying that the fees were not reasonable and impeded him from accessing justice. Going by what he is saying, the law never left him without a remedy; Order 33 of the CPR was readily available to him and he ought to have taken advantage of it. Order 33 of the CPR, I believe gives effect to Article 48 of the Constitution, and allows a party, who is not possessed of sufficient means to pay the fee prescribed by law for the institution of suit to apply to file the suit as a pauper. The Applicant did not follow that clear path if he was really in need to access justice; he opted to wait until he is possessed of the fee needed. The Applicant did not also inform the court or the other party of his predicament. What a negligent pleader he is?

[7] He did not do things the way they should have been done. But, that notwithstanding, I am still constrained to exercise my discretion in favour of the Applicant; a course one may consider to be quite an abrupt turn. This is not an extravagant exercise of discretion, for it is well grounded on the pillars erected by the Constitution and reminiscent of what I stated earlier that; courts should always strive to serve substantive justice by allowing the parties to present their full cases before the court; to hear their grievances on merit rather than drive them away from the seat of judgment arbitrarily; and fasten proportionate resolution of disputes by applying less restrictive methods in adjudication of cases. I am also alive to the fact that leave to amend the defence had already been granted, and I believe the Respondent will not suffer any prejudice if a further limited period will be allowed for the Applicant to file his defence and counter-claim, for the Respondent has the right to file its response to the defence and counter-claim and raise any defence, including limitation towards the claim by the Applicant. In addition, the case has not been heard, albeit the Respondent blames the Applicant for the delay. In sum, I find the explanation given not to be unreasonable, although it ought to have been communicated to the court and the Respondent much earlier; or to have precipitated the taking of appropriate remedial action in law. The overall impression out of the circumstances of the case points to one thing; it is just to allow enlargement of time in order to give the Applicant a chance to present his full case and also enable the court to determine real issues in controversy completely and effectually. Since he says he has the money ready, he shall file and serve the amended defence and counter-claim as shown in the annexed draft defence and counter-claim within fourteen days from today. And subsequently, the provisions of Order 7 of the CPR on defence and counter-claim shall abide. Any default to so file will mean automatic foreclosure of any future enlargement of time on the same subject matter. Accordingly, the application dated 9th September, 2013 is granted in the terms above. I award costs of the application to the Respondent.

Dated, signed and delivered in open court at Nairobi the 4th day of March, 2014

F. GIKONYO

JUDGE