



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 665 of 1998

- *Order XII Rule 1 and 2, Order XLIX Rule 5, Order L, Rule 1 of the Civil Procedure Rules*
- *Leave to file and serve notice of Non admission*

REFRIGERATION COMPONENTS LIMITED.....PLAINTIFF

VERSUS

WILHAM KENYA LIMITED.....DEFENDANT

R U L I N G

This Notice of Motion application is brought under Order XII Rule 1 and 2, Order XLIX Rule 5, Order L, Rule 1 of the Civil Procedure Rules. It is dated 22nd April 2008 and in it the Applicant seeks the following orders.

- 1. THAT this Honourable Court do hereby grant leave to the Defendant/Applicant to file and serve the Notice of Non-Admission of Documents to the Plaintiff/Respondents out of time.**
- 2. THAT this Honourable Court do hereby extend time for the filing and service of the Notice of Non-Admission of Documents to the Plaintiff/Respondent.**
- 3. THAT this Honourable Court do hereby deem the Notice of Non-Admission attached hereto and served on the Plaintiff/Respondent as duly filed and served.**
- 4. THAT costs of this application be in the cause.**

The application is supported by an affidavit sworn by JOHNSON M'MPAPALE SHIVACHI the Administrative Manager of the Defendant/Applicant, dated 22nd April 2009. I have considered that affidavit. There are several grounds on the face of the application.

The application is opposed. Ms. Kamende for the Respondent has raised several grounds of opposition as follows:

- 1. That there has been a 5 year inordinate and unexplained delay in the filing of the said application.**

- 2. The affidavit is based on a fallacious but unproven assumption that the defendant was not advised of the service of the Notice to Admit Documents dated 2nd December, 2003 by its erstwhile advocates.**
- 3. The application is an affront to the professional ethics and etiquette of the legal profession. It imputes bad faith or incompetence upon erstwhile advocates on record.**
- 4. if indeed, the firm of M/S RAFFMAN DHANJI ELMS & VIRDEE ADVOCATES, was incompetent, so too is the current firm on record as indeed it was the same Philip Nyachoti, Esq Advocate who attended to this matter on all occasions on behalf of M/S RAFFMAN DHANJI ELMS & VIRDEE, ADVOCATES.**
- 5. The application herein is mischievous and brought in utmost bad faith and aimed at adjourning the hearing of this long pending matter when same is ripe for hearing and eventual determination.**
- 6. The application is affront to the Civil Procedure Rules. The rule on the consequences of failure to file a notice of non-admission will be meaningless if indeed the same could be circumvented for whimsical and unfounded reasons**
- 7. This is a fit and proper case for the defendant to institute suit for professional negligence against its erstwhile advocates on record if indeed the alleged negligence on the part of 'M/S RAFFMAN DHANJI ELMS & VIRDEE' is proved.**

I have considered the application together with the submissions by both counsels. The application is by the Defendant and is highly contested. The brief facts of the case are that on the 2nd December, 2003 the Plaintiff who is the Respondent in the application served upon Messrs Iseme, Kamau & Maema Advocates who were the Applicant's Advocate at the time the Notice to Admit Documents dated 2nd December, 2003. That notice was not responded to. On 22nd April, 2008, five years down the line, the Defendant has brought this application seeking the extension of time to file and serve a Notice of Non-Admission of documents in response to the notice served upon it five years ago.

Order XII rule 2 (1) and (2) states as follows:

“2. (1) Any party to a suit may by notice in writing call upon any other party to admit any document, saving all just exceptions, and if the other party desires to challenge the authenticity of the document, he shall, within fourteen days after service of such notice, serve notice that he does not admit the document and that he requires it to be proved at the hearing.

(2) If such other party refuses or neglects to serve notice of non-admission within the time prescribed, he shall be deemed to have admitted the document, unless the court otherwise orders”

Under the above rule, the Defendant had 14 days within which to respond to the Notice to Admit Documents, from the date of the notice. The Notice was dated 2nd December, 2003. The Defendant's advocate has argued that the explanation for the delay is in the change of advocates from Messrs Iseme, Kamau & Maema Advocates, who are acting for the Defendant at the time the notice was served, to Messrs Raffman Dhanji Elms & Virdee Advocates and subsequently to Messrs Nyachoti and Co. Advocates. The current Advocates, that is, Nyachoti & Co. Advocates, are blaming the initial Advocate, Messrs Iseme, Kamau & Maema for failing to inform the Defendant of the need to respond to the Notice to Admit Documents.

Ms. Kamende for the Plaintiff has drawn the Court's attention to the fact that Nyachoti & Co. Advocates took over the matter and has been on record since 2005. Ms. Kamende submitted that on 14th March, 2005 Messrs Nyachoti & Co. Advocates were in court for the Defendant when they appeared in the case for the first time.

It was necessary for Messrs Nyachoti & Co. Advocates to explain why, since March 2005, no action was taken to file the current application for the extension of time within which to file the Notice of Non-Admission of Documents. Between 2005 and today, there are approximately four years. That is a very long period of time. There should have been an explanation given to satisfy the court why the current application was not made earlier than now. The Plaintiff has argued that due to the prolonged delay in responding to the said notice, it assumed that the Defendants were agreeable to the admission of the documents and therefore did not follow up with the makers of the said documents for purposes of tracking them to give evidence in court on the documents in issue at the trial. It is the Plaintiff's contention that it will suffer great prejudice if six years after it served the notice, it will be required to look up the makers of the document. Ms. Kamene submitted, and it was not contested that the substantive case is coming up for hearing on 3rd June, 2009, which is 3 weeks away.

Having considered the arguments for and against the Defendant's application, I have come to the conclusion that no good explanation has been given why the Notice of Non-Admission of Documents was not made 14 days from the date the notice was served as prescribed under Order XII rule 2(2) of the Civil Procedure Rules. It is also important to note that the current advocate came on record for the Defendant since early 2005. No explanation has been given why the current advocate could not have filed the instant application within a reasonable time from the date he took over this matter on behalf of the Defendant. The Plaintiff has shown that it stands to suffer great prejudice, if this application is allowed. It is reasonable that the Plaintiff assumed that the Defendant was agreeable to the admission of documents in their notice issued to the Defendant when they did not respond to their notice within the fourteen days prescribed under the rules and thereafter within a reasonable time. The duty of the court is to do justice to all the parties. I do not believe that justice will be served if the Defendant is allowed to file a Notice of Non-Admission of Documents six years after a Notice to Admit documents was served upon it. The Plaintiff stands to suffer prejudice which is not compensatable by an award of costs. For this reason I will not allow the Defendants application and the same is dismissed with costs to the Plaintiff.

Dated at Nairobi this 8th day of May 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Tiego holding brief Mr. Nyachoti for the Applicant

Ms. Kamende for the Respondent

LESIIT, J.

JUDGE