



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NUMBER 7 OF 2020

FESTUS KARUKI KATHENDU.....1ST PLAINTIFF/APPLICANT

ROSEMARY NKATHA KIMATHI.....2ND PLAINTIFF/APPLICANT

VERSUS

NCBA BANK PLC LIMITED.....1ST DEFENDANT/RESPONDENT

LYDIA N. WAWERU

T/A PURPLE ROYAL AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

1. The matter was certified urgent on 08:06:2020. The application was served upon the Respondent both at Meru and Nairobi; on 11:06:2020 for hearing this morning. The court is aware of the constraints in both operation and travelling into and out of Nairobi during this Covid-19 pandemic.

2. The Respondent did not act on the application until yesterday on 16:06:2020 when they gave instructions to their Advocates Ms. Chege Kabathi & Co. Advocates. The said Advocates did a superb job and were able to file their Appointment and Replying Affidavit admittedly at 7:38 am this morning. Mr. Atheru for the applicant indicates that he has not received the Replying Affidavit said to be 195 pages. He has urged that since the Respondent failed to adhere to the Civil Procedure Rules that require service of such documents within 3 clear days of the hearing date, the respondent should be barred from the hearing and the application be allowed as unopposed. In the alternative he prays that he be granted time to look at the Replying Affidavit and if need be respond thereto. That in the meantime an interim injunction in terms of prayer No. 2 of the motion be granted. Mr. Maina is opposed to the grant of injunction.

3. I have considered the presentations by the learned Counsel. No doubt that the Respondent was served in good time. It delayed in filing its response. It gave its advocates instructions belatedly, only yesterday. If it were not for the diligence of the said Advocate, the application would have been heard as unopposed this morning.

4. Be that as it may, there is a Replying Affidavit on record. It has been filed in breach of the 3 clear day Rule. Can the Court deny the Respondent a hearing and hear the Applicant ex-parte? I think not. Since the Respondent has shown an interest to be heard, the rules of procedure can be bent to accommodate a willing litigant like the Respondent. I reject Mr. Atheru's invitation to block the Respondent from being heard. I agree with Mr. Maina that all that can be done, and for interest of justice is to give Mr. Atheru with his client time to consider the Replying Affidavit and file a response thereto, if need be.

5. There are properties which are due for sale on 25/06/2020. That is on period of about 7 days. Both the application and the suit is about preserving the properties meant for auction. If the auction proceeds, then both the application and the suit will but be rendered nugatory.

6. This Court is alive to the fact that this is a Commercial dispute. The Court cannot re-write the contract between the parties. However, there is a dispute which must be resolved. The rights and obligations of the parties must be weighed in the scales of justice in time before either can enforce them. Had the Replying Affidavit been filed and served in good time, nothing would have been easier that to ask the parties to proceed with the matter this morning. However, now the matter cannot proceed as that would be extremely prejudicial to the applicant who has not seen the respondent's response.

7. I have considered the representation by Mr. Maina that the applicant does file his response within 3 days then the application be heard. That may not be possible for reason of the Court diary and in any event the Court cannot consider the respective party's cases and render its decision before the date of sale.

8. For those reasons, I am inclined that while the matter should be resolved as soon as possible, the following are the directions I give: -

- a) The Replying Affidavit filed by the respondent this morning is admitted as having been filed within time.
- b) The respondent to ensure that the said Replying Affidavit is served upon Mr. Atheru Advocate before close of business today.
- c) The applicant to file and serve a Replying Affidavit, if need be, within 7 days.
- d) The application be dispensed with by way of written submissions.
- e) The applicant do file and serve his written submissions within 14 days of service of the Further Affidavit
- f) The Respondent do file and serve written submissions within 14 days of service by the applicant.
- g) The matter be mentioned on 28/7/2020 for highlighting of the submission.
- h) In order to safeguard the subject matter of the suit and application and in order to avoid further costs, I will suspend the auction set for 25/06/2020 in terms of prayer No. 2 of the Motion. The applicant however, shall bear the costs incurred to-date for the said suspension.
- i) The order will be in force until the said 28/07/2020.

A. MABEYA

JUDGE

17/06/2020