

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
Civil Suit 35 of 2005

TITUS GATITU NJAU:.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF ELDORET:.....DEFENDANT

RULING

I have considered the submissions of both counsels. It is conceded that replying affidavit was served yesterday after it was filed the day before. the filing of the affidavit therefore do not meet the requirements provided by provisions of order 50 rule 16(10) CPR.

That rule requires a respondent who has been served with an application to file a replying affidavit or grounds of opposition and serve them not less than three days before the hearing date. Those provisions are concluded in mandatory terms. Any replying affidavit or grounds of opposition should be filed within that period. In this case that was not done and as such the affidavit filed two days before was filed out of the time provided for and as such it is of no effect. In short there is no replying affidavit which is on record now.

Order 50 rule 16(3) states that if no replying affidavit or grounds of opposition are filed the court may proceed ex-parte. I have stated that there is no replying affidavit as the one purported to be on record was filed out of time. The respondent had only one option which would have been consented in the right of the provisions of sub rule (3) of that rule to apply to file the replying affidavit out of time. Then the court may decide whether to allow him to do so or if the court declines to do so proceed to hear the application ex-parte. There is no application before me either formally or orally to allow respondent to file replying affidavit out of time. There is even no application for court to deem application filed and served yesterday to have been filed in time. Mr. Shivaji has only asked the respondent to be heard. He can't be heard when there is no affidavit properly filed.

In any case court was told that application was served almost two years ago. Respondent never bothered to file any replying affidavit. The reasons given by Mr. Shivaji that there are other application filed after that one not plainsible. In any case court was told that today's hearing date was served almost a month ago and yet no steps taken in time. Though the applicant on his party took time to prosecute his application the respondent should have been diligent and made his response in time. In the circumstances I uphold Mr. Chemtai's submissions that there is no valid replying affidavit on record and direct the application to be heard ex-parte.

DATED AND DELIVERED AT ELDORET ON 18TH APRIL 2007.

KABURU BAUNI

JUDGE