



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 66 OF 2018

JOSEPH KISILU NZAU.....PLAINTIFF

VERSUS

DAVID MAITHYA MUNYASYA.....1ST DEFENDANT

FRANCIS MUSYOKA MUNYASYA.....2ND DEFENDANT

RULING

1. The application for determination is dated 19th January, 2021 filed on behalf of Plaintiff/Applicant under certificate of urgency. It is brought under Section 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, 2010.

2. The Applicants seek the following Orders:

i. Spent

ii. Spent

iii. That an order do issue setting aside the proceedings and Orders of the court given on 7/8/2020 and any subsequent orders therein and the Applicant herein be granted leave to file a replying affidavit and submissions to the Respondent's application dated 16th July, 2020

iv. That the draft replying affidavit annexed to this application be deemed to have been duly filed.

v. That costs of this application be in the cause.

3. The application is supported by the affidavit of Anne M. Munyao, Advocate for the Plaintiff/Applicant sworn on 19th January, 2021. In a nutshell, the application is premised on grounds that Counsel for the Applicant omitted to file a response to the Defendants'/Respondents' earlier application dated 16th July, 2020 due to the ravages of the COVID-19 pandemic which forced them to close down their Makueni branch office where their file is located. That mistake on the part of the Plaintiff's counsel should not be visited on an innocent litigant. That it is in the interest of justice that the Plaintiff/Applicant be granted an opportunity to be heard.

4. The Defendants/Respondents have opposed the application vide the replying affidavit by F. M. Masika, Advocate for the Defendants/Respondents sworn on 27th January, 2021. It is contended that the above application is not based on any known provisions of law. That the Applicant is disobeying court orders. That the application has no merit and should be dismissed with costs.

5. At the time of writing this ruling, none of the parties had filed their submissions in compliance with the directions issued on 28th January, 2021. Nonetheless, I shall proceed on the basis of the pleadings on record.

6. The Applicant has invoked the discretion of this Court under the provisions of Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The said provision saves the inherent powers of the Court to do all that is necessary to ensure that justice is done and to avert abuse of court process. I am inclined to give the Plaintiff/Applicant the opportunity to respond to the application dated 16th July, 2020. Therein lies the substantive issue for determination. That notwithstanding, this Court takes exception to such dereliction especially when there is evidence that the Plaintiff/Applicant was served with the necessary court process on 28th July, 2020 and 10th August, 2020.

7. The upshot of the foregoing is that the application partially succeeds. I allow prayer 4 thereof. Parties are directed to comply with the Order dated 28th July, 2020. Costs of this application to the Defendants/Respondents.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2ND DAY OF MARCH, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kemboi