



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC MISC NO. 2B OF 2020

JULIA KARWIRWA BENSON.....APPLICANT

VERSUS

CONSOLIDATED BANK (K) LTD.....1ST RESPONDENT

SAMWEL MWENDA MBOGORI.....2ND RESPONDENT

MUGA AUCTIONEERS & GENERAL MERCHANT.....3RD RESPONDENT

RULING

1. Before me is a notice of motion dated 9th February 2021 brought pursuant to Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules as well as Section 1A, 1B, 3A & 80 of the Civil Procedure Act. The applicants (respondents in the miscellaneous suit) seek the following orders;

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2. That the Honorable court be pleased to review and/or set aside its ruling delivered on 3rd February 2021 allowing the applicants application dated 12/02/2020 with no orders as to costs on the ground that the same was unopposed by the 1st respondent.

3. That the Honorable Court be pleased to re-hear the application and make a determination on the merits.

4. That the cost of this application be provided for.

2. The application is based on the grounds on the face of it and on the supporting affidavit of **Albert Anjichi** the 1st respondent's legal manager. The applicants contend that pursuant to the court's directions given on 3/11/2020 directing them to file their replying affidavit by close of business that day, they did file the document electronically and were issued with a receipt on the same day at 14:56:52 pm. It is only the hard copy which was stamped on 5.11.2020. The court did not consider the replying affidavit on the basis that the same was filed out of time, hence they were condemned unheard.

3. The application is opposed vide the replying affidavit of Julia Benson dated 18/02/2021. She avers that the application is an afterthought and has been overtaken by events as the Court's ruling seeking to be reviewed has since been fully implemented. That the 1st respondent's replying affidavit was received at the registry and served upon the applicant on 5/11/2020 contrary to the court's direction which were that the 1st respondent was not to just pay for the replying affidavit but rather to actually file and serve the replying affidavit. Thus the application is ill-advised, bad in law and an abuse of the court and it is in the interest of justice that it be dismissed. Further, the applicants herein will have their day in court during the hearing of the appeal and they stand to suffer no prejudice.

4. The 1st respondent filed a supplementary affidavit dated 8/03/2021 sworn by **Albert Anjichi** who avers that the allegation by the applicant that the court orders had already been implemented is not true as they filed the application herein on 12/02/2021 and the applicant filed her memorandum of appeal on 17/02/2021 which proves that the filing of the memorandum of appeal was triggered by service of the 1st respondents application. He avers that they duly complied with the court's directions by filing and serving electronically pursuant to covid-19 regulations and Order 5 Rule 22B of the Civil Procedure (Amendment) Rules and urge the court to grant the orders sought in the application.

5. I have carefully considered all the arguments raised herein. The court in its judgment dated 3/02/2021 in paragraph 3 stated thus;

“The court granted the respondents their wish and ordered them to file their response by close of business on 3/11/2020. The

said order was not complied with, nor was a request made to extend time to file the replying affidavit. In the circumstances, the replying affidavit filed after 3/11/2020 is hereby disregarded. The application is hence unopposed.”

6. The 1st respondents avers that they filed their response to the application on 3/11/2020 as evidenced by the court filing receipt. They apparently effected service thereafter upon the respondent’s advocate via email. None of the parties advocates clarified this issue of electronic filing and service on 18.11.2020 when the court gave a date for ruling. However, I note that Mr. Ndubi had on that day of 18.11.2020 addressed the court as follows; **“We can have a ruling date based on affidavits”**, of which M/S Ngesa responded that; **“That is okay”**. The logical presumption to make is that the replying affidavit of the current applicants was to be considered in the determination of the application.

7. That being the case, I do allow the application dated 9.2.2021. Each party to bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 10.3.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE