



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 245 OF 2016

JAPHETH MUTISIA MASILA t/a JARPHY COMMERCIAL ENTERPRISES.....PLAINTIFF

-VERSUS-

KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....DEFENDANT

HAMISI JUMA GUGU t/a GUGGU & COMPANY AUCTIONEERS.....AUCTIONEER

RULING

1. Through the application dated 30th September 2020, the auctioneer herein seeks to review/set aside the orders issued by this court on 30th September 2020 on the basis that the auctioneer's advocate gain access to the court's online session at the time the impugned orders were issued despite the fact that they had filed a replying affidavit to the application dated 26th August 2020.
2. The defendant opposed the application through the replying affidavit sworn on 16th October 2020 wherein their deponent avers that the auctioneer did not comply with the court's orders of 16th September 2020 directing him to file a replying affidavit within 7 days and that the auctioneer was therefore in contempt of the court's said orders.
3. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the auctioneer has made out a case for the granting of the orders to review/set aside this court's orders of 30th September 2020.
4. It is trite law that courts are vested with discretionary powers to set aside ex parte orders and that the power must be exercised judiciously and only in the most deserving cases.
5. I have perused the proceedings of 30th September 2020 and I note that on the said date, the auctioneer's advocate did not attend court for the online mention despite the fact that the mention date had been taken by consent on 16th September 2020. I further note that owing to the absence of the auctioneer's advocate from the court session of 30th September 2020, counsel who appeared for the defendant sought and obtained the orders sought in the application dated 26th August 2020.
6. When seeking the said orders, the defendant's advocate also informed the court that the auctioneer had not filed any response to the application dated 26th August 2020.
7. I have perused the auctioneer's annexure marked "MAM-19" and I note that it is a copy of a receipt dated 23rd September 2020 from the judiciary portal indicating that the auctioneer's advocate filed a replying affidavit, an annexure and a Notice of Appointment of advocates.
8. I am therefore satisfied that contrary to the defendant's claim that the auctioneer did not comply with the directions on the filing of a replying affidavit, the same was duly filed on 23rd September 2020. This court is alive to the fact that the online filing of pleadings has presented a few challenges to litigants and their advocates thus contributing to the delay in the uploading of the said pleadings or the sending of feed back to the litigants regarding the status of the filed documents.
9. I further find that, the fact that the instant application is dated and filed on 30th September 2020, the very same date that the court issued the impugned orders, is an indication that the auctioneer's advocate is sincere in his claim that he was unable to log into the court's online session in time and was only able to learn of the impugned orders much later after the same had been issued. I find that the prompt filing of the instant application shows that the auctioneer is a diligent litigant who should not be denied an opportunity to present his case.

10. For the above reasons, I find that the application dated 30th September 2020 is merited and I therefore allow it with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 3RD DAY OF JUNE 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Mohamed for the Auctioneer.

Mr. Njuru for Defendant.

Court Assistant: Sylvia.