

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 571 OF 2011

BELLEVUE DEVELOPMENT COMPANY LIMITED.....PLAINTIFF/APPLICANT

Versus

VINAYAK BUILDERS LIMITED1ST DEFENDANT/RESPONDENT

NORMAN MURURU2ND DEFENDANT/RESPONDENT

RULING

[1] When the application dated 13th June, 2014 came up for hearing on 2nd July, 2014, Mr Muturi for the Applicant applied for the Preliminary Objection and Replying Affidavit filed by the Respondent to be struck out for they offended order 51 rule 14 of the Civil Procedure Rules. The complaint lay in the fact that the P.O. and the Replying affidavit were served on him on the previous Friday, and so, the two filings were not served “not less than three (3) clear days before the date for hearing” as required by Order 51 of the Civil Procedure Rules. Mr Mutubwa insisted they served in accordance with the law.

[2] Order 51 rule 14 requires a replying affidavit and a notice of preliminary objection to be filed and served on the applicant “**not less than three (3) clear days before the date for hearing**”. The requirement in the said rule is a matter of fair hearing as it avoids what I call “practice by ambush” of the Applicant with serious evidentiary material that may require thoughtful consideration. I think the quarrel here is based on the fact that service was on Friday, the 27th June, 2014. But, Order 51 rule 9 of the CPR must be satisfied if I should hold that there were no three clear days left to the date of hearing, i.e. 2nd July, 2014. It provides that “**service effected after five in the afternoon on Friday is deemed to have been effected on the following Monday**”. There is no affidavit of service or an affidavit by the advocate for the Applicant which the Court can use to ascertain the actual time of service; the important aspect is that it must have been after five in the afternoon for the service is to be taken to have been effected on the following Monday. For that reason, I am not able to strike out the P.O. and the Replying affidavit. Instead I direct the substantive application to be heard expeditiously. It is so ordered.

Dated, signed and delivered in court at Nairobi this 6th day of October, 2014

F. GIKONYO

JUDGE