



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 16 of 2007

GEOFFREY THIONG'O KAMAUPLAINTIFF

VERSUS

FRANCIS NJOROGE MWANIKI.....RESPONDENT

RULING

1. The Plaintiff/Applicant has moved this court by the Notice of Motion application dated 4/02/2010 seeking leave of this Honourable Court to amend the Originating Summons out of time. The application is brought under Order 49 Rule 5 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act.
2. The application is based on the grounds that the delay in filing this application was caused by previous counsel acting for the Plaintiff and that the Applicant is not indolent since he only came to know of the consent orders made between his previous counsel and counsel for the Respondent in January 2010. The Applicant also says that the application is not only meritorious but that an amended Originating Summons will enable the Applicant to lay all the facts before the court so that the court is enabled to determine the issues in controversy with a degree of certainty. There is also a supporting affidavit sworn by **Geoffrey Thiong'o Kamau**, the Plaintiff/Applicant on 4/02/2010. The deponent refers to his earlier applications dated 29/07/2007 and 9/05/2007 both of which applications were withdrawn by consent of the parties on 3/06/2008. By the same consent order, the Plaintiff was to remain outside the suit premises and the Defendant to remain on the suit premises pending the hearing and determination of the Originating Summons dated 10/01/2007. The Applicant was granted leave to file an application to amend the Originating Summons within 21 days from the 3/6/2008, namely on or before 24/06/2008. The Applicant now says that his previous advocate did not inform him of the said date.
3. The application for leave to amend out of time is opposed. The Replying Affidavit is sworn by **Francis Njoroge Mwaniki**, the Respondent herein. The Respondent says that the Applicant filed a similar application dated 11/07/2008 which application was dismissed on 6/03/2009 and therefore that the issue of amendment raised by the Applicant in the instant application is res judicata.
4. From the record, the Applicant's application dated 11/07/2008 was heard by the Chief Deputy Registrar and orders dismissing the same were made on 6/03/2009. There is no dispute that the Plaintiff's application dated 11/07/2008, by which the Applicant sought leave to amend his Originating Summons was dismissed.
5. At the hearing of this application, **Mr. Karanja Kibathi** advocate ventilated the Applicant's case and reiterated the averments as found on the face of the application and in the Supporting Affidavit. Counsel also argued that the instant application is sitting properly before this court and within the provisions of the Civil Procedure Rules.
6. On his part, **Mr. Macharia Waiganjo** for the Respondent contended that the Applicant's present application is res judicata in light of

the orders made by the Chief Deputy Registrar on 6/03/2009. Mr. Macharia also argued that in any event, there was such inordinate delay on the part of the Applicant that this court would not even have had to exercise its discretion in the Applicant's favour.

7. In reply, Mr. Karanja submitted that the consent order which allowed the Applicant to file a formal application to amend the Originating Summons did not emanate from the Applicant but from the Applicant's previous advocate.
8. I have now considered the application. I have also considered the submissions made by both parties. After considering all the above, I find that the Applicant's application dated 4/02/2010 is res judicata. It is not disputed that a similar application was made and a decision made on it by a competent court on 6/03/2009. That decision was that the application had no merit since the Applicant had proceeded to file the application for leave to amend outside the 21 days granted by Ang'awa J on 3/06/2007. The issue raised by the Applicant to the effect that the consent order of 3/06/2007 giving the Applicant the liberty to file the stated application did not emanate from him is irrelevant for purposes of this application. Infact it would appear that the Applicant is an indolent litigant. He did not have to sit and wait for more than a year to know the status of his case. In any case, what the Applicant should have done was to apply to set aside/review the consent orders of 3/06/2007 instead of proceeding to file other irregular applications with the court.
9. In the premises, I find that the Applicant's application dated 4/02/2010 lacks merit. The same is hereby dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of March, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. S.W. Ndirangu for Kibuthi (present) for the Plaintiff/Applicant

Mr. Macharia Waiganjo (absent) for the Defendant

Weche – court clerk