

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 93 of 2001

MOHAMMED OLUNGA ODUORAPPLICANT

V E R S U S

THE MUMIAS OUTGROWERS CO. LTD.RESPONDENT

RULING

In a ruling dated 22-7-2005, this court ordered that a proper verifying affidavit be filed and served within 21 days from that date (22/7/05) failing which the suit herein would stand struck out for want of compliance with Rule 1 (2) of Order VII of the Civil Procedure Rules.

On 31.10.2005, the 1st Defendant made an application under Order VI Rule 13A of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21, seeking orders that:-

(a) The suit be struck out for being incompetent and for failure to comply with the orders made on 22.7.05 and costs. No affidavit was filed as the application was premised on Rule 13(1) (a) of Order VI and not as erroneously shown on Rule 13A of Order VI. I can excuse the error but counsel should be more circumspect.

When the application came up for hearing before me on 20.3.06, Mr. Akwala, learned counsel for Applicant urged the court to strike out the suit because the verifying affidavit had not been filed within 21 days as ordered by the court on 22-7-05. Moreover, he submitted, the affidavit did comply with Order XVIII because it was sworn by counsel when it should have been filed by the plaintiff. The affidavit, he contended, did not also disclose the sources of the information. Mr. Kasamani, the learned counsel for the Respondent, submitted on the other hand that two affidavits were filed, one on 1/8/5 and the other on 12/8/05. He submitted that he relied on the affidavit filed on 12/8/05 and conceded that it was filed two days late but it was the substance that counted and the slight lateness could be overlooked. As regards the contents of the affidavit, he submitted that the averments were within the knowledge of the counsel deponing and that the affidavit was therefore competent.

The verifying affidavit relied on and filed in court on 12.8.05 and sworn on 29.7.05 by Mohammed Olunga Oduor, the Plaintiff, was filed out of time. Mr. Kasamani did not deny this fact. No extension of time was sought or obtained to file it out of time. It did not comply with the order made on 22-7-05. On this ground, it is struck out. Court orders are not made in vain and to say that the affidavit was only a little late was somewhat flippant.

As the suit has not complied with Rule 1(2) of Order VII of the Civil Procedure Rules, it is hereby struck out with costs to the Defendants.

Delivered, signed and dated at Kakamega this 18th day of May. 2006

G. B. M. KARIUKI

J U D G E