



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 53 OF 1996**

**SEIFUDDIN B.J. MOOSAJEE & CO. AND ANOTHER  
..... PLAINTIFF**

**VERSUS**

**PETER MUSYOKA & ANOTHER  
..... DEFENDANT**

**RULING**

On 25th October 1996, Summons for Directions came up before Lady Justice Ang'awa when Mr. Jiwaji, the learned Counsel for the Plaintiff/Respondent applied to amend the plaint in this case. Mr. Njenga then representing the Defendant had no objection and the court granted leave to the Plaintiff to amend their plaint "within 30 days of that day's date" and serve the Defendant who would also amend their Defence if they wished. Mr. Jiwaji however pleaded for more time as his client was then in India. Mr. Mwangi did not object still and suggested 90 days as adequate. The court then granted leave to amend plaint within 90 days of the then date of hearing i.e. within 90 days from 25.10.96. The records show that the amended plaint was dated 21st March 2000 and was filed on 22nd March 2000. That was clearly long after 90 days from 25.10.96. It was indeed after over three years.

The Defendant/Applicant has filed this application before me seeking that the amended plaint dated 21st March 2000 and filed on 22nd March 2000 be struck out on the grounds it is an abuse of the process of this court in that it was not filed within the time specified in the court's order of 25th October 1996 and no order had been made enlarging the 90 days that was given on 25.10.1996. There is an Affidavit in support of the same application which mainly repeats what I have stated herein above i.e. the narrative history as contained in the court records.

The Respondent's response is that the application is an afterthought, scandalous, frivolous, vexatious and is only meant to delay the assessment of damages for the profane reasons that the amended plaint was filed after 90 days; that the defendant is estopped from prosecuting the application and that the assessment of damages should proceed. There were Replying Affidavit and annexures in support of the opposition.

It is not in dispute that the court's order of 25.10.1996 was not complied with. It is not in dispute that the amended Plaint was filed out of the time allowed. I may say well out of time. It is not in dispute that the Respondent/Plaintiff never sought enlargement of that time. It is not in dispute that enlargement of the time given on 25.10.1996 was not given by the court as none sought for it. It is clear that Mr. Jiwaji was on 25.10.96 very conscious of the need to enlarge time as that is why on 25.10.1996 when only 30 days was given at first he sought more so that he would not file amended plaint outside the time allowed. One cannot comprehend why having been so much on his guard about time element which he new was of essence, he decided to file the amended plaint so late and without time having been enlarged.

The Plaintiff/Respondent maintains that the Applicants are estopped from raising this matter as the previous advocates for the Defendant had negotiated certain aspects of this matter without raising the question of the lateness in filing the amended plaint. He had no authority to show me to the effect that parties can water down and compromise a court order by conduct. Further if those other advocates had agreed to the extension then one does not know why they did not write to say so or why Order 49 Rule 6

which specifically states that consent by parties for such enlargement of time must be in writing was not complied with. Even worse, the Plaintiff/Respondent has not offered any reasons for failing to file the same amended plaint over three years after the time allowed by the court.

I have no alternative but to grant this application. The Respondent/Plaintiff is now seeking together with his submissions that I exercise my inherent powers and enlarge time under Section 95 of the Civil Procedure Act. That Section requires that I exercise my discretion in enlarging the time. As I have stated, no reason has been given for noncompliance with court's order and no reason has been given for seeking enlargement so late. Discretion can only be exercised upon reason. Any arbitrary exercise of discretion is in itself illegal and unjust. All parties to a suit are entitled to justice and I cannot exercise my discretion unjustly.

The Application dated 26th March 2001 and filed into the court on 26th March 2001 succeeds. Amended plaint dated 21st March 2000 and filed into the court on 22nd March 2000 is struck out. Costs to the Defendant/Applicant. Orders accordingly.

**Dated at Mombasa this 13th Day of December, 2002.**

**J.W. ONYANGO OTIENO**

**JUDGE**