



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL SUIT NO.38 OF 2009

BETWEEN

DAVID OSCAR OWAKO.....PLAINTIFF

AND

CHEMELIL SUGAR COMPANY LTD & 7 OTHERS.....DEFENDANTS

RULING

Background

1. This matter has been in court since it was filed in 2009. Numerous Interlocutory applications were filed and disposed off while others were not.
2. On 10th October, 2016, the court certified as urgent the Plaintiff/Applicant's notice of motion dated 6th October, 2016 and fixed it for directions on 25th October, 2016.
3. On 25th October, 2016, the court directed that the matter be fixed for pre-trial directions on 15th November, 2016.
4. After various mentions and in order to ensure that the matter is finalized once and for all the court on 20th December 2016, directed the Plaintiff/Applicant as follows;

The Plaintiff shall file and serve all witness statement together with all supporting documents upon the defendant in default of such service this suit shall stand dismissed.

5. The court fixed the matter for mention on 3rd February, 2017 in the hope that the Plaintiff/Applicant will have complied with the order so that the defendant may also comply with the part of their case.
6. When the matter came up for mention on 3rd February, 2017, it came to the attention of the Plaintiff/Applicant only filed its documents that morning and had not even served them.
7. The court after considered its duty to expeditiously deal with matters under Article 159 of the Constitution and the duty imposed on the parties to assist the court to achieve its mandate and finding that the Plaintiff/Applicant had failed in its duty dismissed the case with costs to the defendants.

Application

8. The dismissal order triggered the notice of motion dated 24th July, 2018. The Applicant seeks the following orders:

- 1. That the witness statements be duly filed before this Honourable Court**
- 2. That the orders issued on 19th October, 2016 be executed**

3. Costs be provided for

9. The application is based on grounds among others that witness statements were filed within time and the Plaintiff/Applicant
10. The application is supported by an affidavit sworn by the Plaintiff/Applicant on 24th July, 2018 in which he reiterates the grounds on the face of the application.
11. The 1st and 3rd Defendants/Respondents opposed the application on the basis of grounds of opposition dated and filed on 20th September, 2018. The main ground of opposition is that the application is misconceived, untenable and an abuse of the court process by reason of the fact that the entire suit has been dismissed.
12. On 20th September, 2018, the Plaintiff/Applicant sought and was granted leave to file a further affidavit and the application was fixed for hearing on 30th October, 2018. When the application came up for hearing on 30th October, 2018, the Plaintiff/Applicant had not filed a further affidavit and he relied wholly on the affidavit in support of the application and annexures thereto. The respondents were not represented on 30th October, 2018.

ANALYSIS AND DETERMINATION

13. I have considered the notice of motion in the light of the supporting affidavit, annexures thereto and grounds of opposition.
14. It is not disputed that this suit was dismissed on 3rd February, 2017. I have perused the court file and I did not see any order that was issued by the court on 19th October, 2016. And even such order was issued, it is of no consequence since the suit and all orders thereto stand dismissed.
15. I wholly agree with the contention by the 1st and 3rd Defendants/Respondents that this application is misconceived, untenable and an abuse of the court process by reason of the fact that the entire suit has been dismissed and exists upon which this court would order for filing of witness statements.

DISPOSITION

17. In the end and for the reasons given on the assessment above, the notice of motion dated 24th July, 2018 is found to have no merit and it is dismissed with costs to the 1st and 3rd Defendants/Respondents.

DATED AND SIGNED IN KISUMU THIS 6TH.DAY OF DECEMBER 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - FELIX

For the plaintiff - PRESENT IN PERSON

For the defendant - MR RAGOT/MR OTIENO