



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MOMBASA

ELC NO. 261 OF 2009

MOHAMED OMAR MASUMBUKO.....PLAINTIFF

VERSUS

MOHAMED MAHFUDH & ANOR.....DEFENDANT

RULING

1. I need to make a decision over whether or not this suit should stand dismissed following my directions of 30 July 2020.

2. The background is that owing to its age (the suit was filed in the year 2009), the suit was fixed for hearing on 28 November 2018, on the court's own motion, so that it can be heard during service week (a programme where old cases are listed for hearing before a visiting Judge in order to assist in clearing case backlog). On that day, the case was placed before Matheka J, and counsel for the plaintiff stated that they wish to amend the plaint. The court recorded that this was a final adjournment for the plaintiff and listed the case for hearing on 12 February 2019.

3. On the 12 February 2019, the matter was before Omollo J for hearing. Ms. Kabole who appeared holding brief for Mr. Amadi for the plaintiff, asked for the file to be placed aside to 10.15am as she had been informed that the plaintiff is in the process of filing an application to amend the plaint. Later, when the matter was called out, Ms. Kabole stated that she no longer has instructions. The court observed that no application to amend had been filed from 28 November 2018. The court was of the view that the plaintiff is not keen with his case and dismissed his suit for failure to prosecute. It seems that on the same day, probably after the suit was dismissed, the plaintiff filed an application for leave to amend.

4. The plaintiff subsequently filed an application to reinstate the dismissed suit which application was allowed on 18 June 2019. His application to amend, which it will be recalled had been filed on 12 February 2019, was later listed for hearing on 5 November 2019. I allowed that application on 5 November 2019 and directed the plaintiff to file the amended plaint in 14 days and serve it in the usual manner. I directed the case to be mentioned on 20 February 2020 for a pre-trial conference. The court did not sit on 20 February 2020 and the case was rescheduled to 5 March 2020. On that day, Mr. Okanga held brief for Mr. Kadima for the plaintiff. I pointed out that no amended plaint had been filed despite the leave that was granted. Mr. Okanga said that his instructions were limited and was unable to respond. I gave time for the plaintiff to organise himself and directed that he pays court adjournment fees of KShs. 2,000/= and KShs. 2,000/= to counsel for the 1st defendant who was present in court, these to be paid in 14 days.

5. The matter next came up for mention on 16 June 2020. On that day, yet again, no amended plaint had been filed. Neither had the court fees nor costs to counsel been paid. Mr. Amadi who appeared for the plaintiff, asked for 7 days to pay the court fees and costs, and also promised to amend the plaint in the same 7 days. I reserved ruling which I delivered on 30 July 2020. In that ruling I thought the plaintiff had caused significant delay in the prosecution of his case. Nevertheless, I still accommodated the plaintiff. I found and ordered as follows :-

I will bend over backwards to accommodate the plaintiff but payment of court fees and costs to counsel are not negotiable. The plaintiff must pay the court adjournment fees and costs to counsel that had earlier been ordered. The plaintiff will pay a further adjournment fee of KShs. 2,000/= and a further KShs. 4,000/= to Ms. Moolraj for the attendances of 16 June 2020 and today's attendance. All these must be paid within the next 7 days. The amended plaint must be filed within the next 14 days but the plaintiff will pay a penalty of KShs. 3,000/= for not complying with the earlier order to file the amended plaint in 14 days. If the plaintiff defaults on any of the above, then his suit will stand dismissed.

6. When the matter came up for directions yesterday, Ms. Moolraj, learned counsel for the 1st defendant, submitted that the suit stands dismissed as no amended plaint was filed within the 14 days given by the court. She pointed out that an amended plaint was filed on 18 August 2020 and served on 7 September 2020, her view being that while all this was being done, there was no suit. Mr. Amadi, learned counsel for the plaintiff, conceded that the amended plaint was filed late. He submitted that they have otherwise complied with the other orders.

7. I agree with Ms. Moolraj that the order issued on 30 July 2020 was clear that the plaintiff had to comply with the various orders made therein or else his suit would stand dismissed. I have given a history of this case to demonstrate just how much accommodation the plaintiff has been given by court. His case had indeed earlier been dismissed for failure to prosecute and was reinstated by the court. His prayer for leave to amend was allowed but no amended plaint was filed in time. Despite the extension given by the court to file the amended plaint, the same was not filed, until the court had to put its foot down. More time was given to file the amended plaint but none was filed in time. Strictly speaking, this suit actually stood dismissed 14 days after 30 July 2020.

8. I am not however one to shut out a party if I can avoid it. I will use my discretion once more but I will have to subject the plaintiff to additional fines and costs because this tardiness and deliberate failure to abide by court orders simply cannot go on. That is why 11 years later, this case is still here with us, and certainly prejudice and inconvenience is being caused to the 1st defendant who appears to be keen to have this case finalized. Some form of punitive costs and fines have to be levied upon the plaintiff so that he can wake up and be serious with his case.

9. I will reinstate the suit, but the plaintiff will pay directly to court, a fine of KShs. 5,000/= and to the 1st defendant, additional costs of KShs. 15,000/= to compensate the 1st defendant for all this inconvenience. These must be paid to court and to counsel for the defendant within the next 14 days. If they are not so paid within that stipulated time, then this case will stand dismissed. If the plaintiff cannot abide by the above, then he cannot blame anyone but himself if his case is dismissed.

10. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF OCTOBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

IN THE PRESENCE OF:

Mr. Amadi for the plaintiff

Ms Moolraj for the 1st defendant

Mr Nguyo for the 3rd defendant

No appearance for 2nd defendant

Court Assistant; Wilson Rabongo