

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 53 of 2003

HENRY KIPTALAM BARNGETUNY:.....PLAINTIFF

VERSUS

STANELY A. NGETICH:.....DEFENDANT

RULING

The Plaintiff/Applicant vide his application dated 12th November,2006 seeks leave of the court to amend his plaint filled on 26th May 2003. He also seeks the annexed draft of amended plaint to be deemed as duly filled on payment of requisite fee. Lastly he seeks costs of the application to be in the costs.

Mr. Cheluget who prosecuted the application submitted that the applicant when he filed the plaint stated in paragraph 8 of the same that there was no suit pending or other proceedings in court between parties. However there was a land Dispute in Kapsabet whose award was adopted by the Kapsabet court as judgement. This fact was not disclosed and the intended amendment is to disclose that fact. The annexed draft amended plaint is accompanied by an affidavit which discloses that fact.

The application was opposed. Mr. Shivaji submitted that the applicant has come to court with unclean hands as he had deponed a verifying affidavit stating that there was no other suit between the parties. He had Pejured himself. Further he said that the application was brought after an inordinate delay. The plaint was filed in the 2003, Defendant filed a defence and clearly stated that there had been another suit between the parties. Since then no steps were taken by the applicant.

I have considered the application. Indeed it is clear that the applicant Pejured himself when he swore in the verifying affidavit that there was no other suit between the parties. He has not sworn any affidavit to explain that issue. Instead it was his counsel who deponed in the supporting affidavit that that issue was not disclosed to him and that is why it was omitted.

However, the above aside, I think there will be no prejudice suffered by respondent if the application is allowed. The Respondent/Defendant has himself disclosed that fact in his defence and I do note that he has also filed an application to have the suit dismissed for being resjudicate due to those previous proceedings. That application has yet to be prosecuted. The intended amendment only seeks to confirm what the respondent/defendant has pleaded and as such I do not see any prejudice he would suffer. I dare say that it is even in his interest that such a fact be disclosed. It is also true that the applicant did not take any action for almost two years but then the case has not been heard. It is therefore not too late to bring the application though the delay was not explained.

From the above therefore I find application has merit. Prayer (a) of the application is allowed and the plaintiff/applicant is hereby granted leave to amend the plaint filed on 26th May 2003. The amended plaint be filed within 15 days from today's date.

The applicant will however bear the costs of this application to the respondent which I assess as Shs.5000/= to be paid within the next 30 days.

Dated and delivered at Eldoret this 26th day of January,2007.

KABURU BAUNI

JUDGE

Ruling Delivered in the presence of:-

C.C - David

N/A - for Applicant

Mr. Shivaji for Nyachiro for Respondent.