



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**

**Civil Case 9 of 1999**

**SAMSON KIBOI KISEMBE**

**ANDREW M. KIBOI.....PLAINTIFFS**

**VS**

**JOSEPH WAFULA KHAOYA.....DEFENDANT**

**RULING**

The plaintiff/applicant filed the application dated 29.1.2007 under Order VIA rule 3 & 8 of the Civil Procedure Rules seeking the following orders:-

- a) *That the plaintiff be and is hereby granted leave to amend his plaint.*
- b) *That the draft amended plaint annexed hereto be deemed duly filed upon payment of relevant court fees.*
- c) *That the defendant be at liberty to reply as maybe directed by the court.*

The application is premised on the 6 grounds enumerated on the face of the application. It is also supported by the affidavit of the applicant dated 29.1.2007. He has annexed a draft copy of the amended plaint. The application was opposed by counsel for the defendant/respondent on 2 grounds – to wit:-

1. *The suit on which the application is founded is incompetent and otherwise bad in law as pleaded in paragraph 5 of the defence. The proposed amendment will not cure the incompetence.*
2. *The application is misconceived and lacks merit.*

I have considered the application along with the grounds for and against it. Apparently, according to paragraph 5 and Mr. Kakoi's submission, the suit is bad because the plaintiffs lack the requisite *locus standi* to file the same. This was the thrust of the objection and Mr. Kakoi did not raise any other ground. In response to this ground, counsel for the applicant in his reply sprung a copy of a Grant of Letters of Administration issued to the plaintiffs on 8.3.99.

It is nonetheless noted that the said grant was issued after the plaint had already been filed i.e on 23.2.1999. It is clear therefore that by the time the plaint in question was filed, the plaintiffs lacked the necessary *locus standi* to file this suit. The Grant of Letters of Administration is what clothed them with the capacity or *locus standi* to file this matter. This grant does not operate retrospectively and takes effect from the date when it was issued. In this stand, I am persuaded in the Decision on GITAU & 2 OTHERS -VS- WANDAI & 5 OTHERS Civil Case No. 2100/1987 and also by RE KATUMO & OTHERS.

Although both High Court Decisions, I find them very persuasive on this subject and I adopt their findings fully. This is also the position pertaining in England for a long time as can be seen from several cases on the subject e.g. INGALL VS MORAN [1944] K.B/AER 97. HILTON VS SUTON LAUNDRY [1945] 2 AER 425 and BURNS VS CAMPBELL [1951] 2 AER 965 and FINNEGAN VS CEMENTATION CO. LTD.

The principle set out in these cases was adopted with approval by Lord Denning in BOWLER -VS- JOHN MOWLEM & CO. LTD [1954] AER 556 when he stated:

*“The law on this subject as laid down by several decisions of this court is this; if a plaintiff brings an action in a representative capacity as administratrix, then that action is a nullity if she was not at that date administratrix by law with a proper grant. Even if she obtains a grant within a week, a month or a year afterwards, it does not relate back. The writ is a nullity from the date of its issue.”*

It is clear therefore from the foregoing that the plaintiffs herein lacked the requisite *locus standi* to file this matter when they did so. The reason I have dealt with this matter in detail is because in my considered view, the issue of lack of *locus standi* does not just affect the application for amendment of the plaint. It goes into the root of the validity of the entire suit. That being so, there will be no point of just dismissing the application for amendment only for the defendant to file another application seeking the striking out of the entire suit. In circumstances such as this, it is in the interests of justice and expediency for the court to move itself *suo moto* and proceed to strike out the plaint itself. Accordingly, the application dated 29.1.2007 is dismissed. Further, the suit which the plaintiffs filed without *locus standi* is hereby struck out with costs to the defendant/respondents.

Orders accordingly.

**W. KARANJA**

JUDGE

DELIVERED, Signed and Dated at Bungoma this 12<sup>th</sup> day of June, 2007.