

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1566 OF 1996

HUDSON KUNGU KAHOCIO PLAINTIFF

VERSUS

H. SINGH DHAMU DEFENDANT

R U L I N G

There are two applications in this matter, one by the defendant for dismissal of suit for want of prosecution dated 11th December, 2000 and the other by the plaintiff for leave to amend the plaint dated 10th November, 1999.

While the former application was filed in court on 2nd March, 2001, the latter was filed on 8th May, 2001.

Counsel for both parties appeared in court on 15th May, 2001 and agreed that we dispose of the application for dismissal first.

Counsel for the applicant stated that there was no reason why the suit had not been set down for hearing since the last appearance on 27th July, 1999. According to her the plaintiff had lost interest in the case, hence the suit should be dismissed with costs.

Counsel for the respondent filed no replying affidavit to the application but in court he submitted that Order XVI rule 5 of the Civil Procedure Rules under which the application has been filed gives the court a discretion either to grant or not to grant the order sought and that since there is an application by the respondent for leave to amend the plaint, he should be given a chance to prosecute his case. Counsel added that the leave being sought is to enable respondent add a second party to enable him have locus standi in the case.

That it was in the interest of justice which outweighs all other things.

I agree with counsel that the rule under which the application has been made gives the court a wide discretion to grant or not the order being sought. However, such discretion should be exercised judicially.

And this can only be possible when a party against whom the application is made lays the grounds for the exercise of such judicial discretion.

Counsel for the plaintiff says the case could not have been fixed for hearing when the plaintiff had no locus standi in the matter. This is actually self defeating. The plaintiff, who admits to have had no locus standi in the matter, filed this suit in court on 28th June, 1996 and has never had it prosecuted since the last appearance in court on 27th July, 1999.

And even when he was served with the application for dismissal he filed no replying affidavit to lay the basis for the delay.

And though he drafted his application for leave to amend the plaint on 10th November, 1999, he never filed it for more than one year only to be woken up by this application when he filed his on 8th May, 2001.

These are not acts of a person who is serious about his case in court. Even then a casual took at the body of the draft plaint shows that even in that plaint shows that even in that plaint the plaintiff has no

claim against the defendant and/or he still has no capacity to institute this suit having been only a director of the 2nd plaintiff. The latter, a limited liability company appears to me to be the one with the requisite capacity to sue.

For the above reasons, I am unable to exercise the courts discretion in favour of the plaintiff. The suit is, therefore, dismissed for want of prosecution with costs thereof and those of this application.

Delivered and dated this 22nd day of May, 2001.

D.K.S AGANYANYA

JUDGE