



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 153 OF 2006

FRANSISCO A. MUSA.....1ST PLAINTIFF/RESPONDENT
NGIDOYWANI LOKERMOL.....2ND PLAINTIFF/RESPONDENT
LOKODIRA ANDREMA3RD PLAINTIFF/RESPONDENT
JOHNSON MAITWA LORIAMA.....4TH PLAINTIFF/RESPONDENT
LOTE TANDURA5TH PLAINTIFF/RESPONDENT
PETER RITONY.....6TH PLAINTIFF/RESPONDENT
KAMONGRIANTUKEI7TH PLAINTIFF/RESPONDENT
PSIKOU KIRAN8TH PLAINTIFF/RESPONDENT
EMOCHO ETIR TOWOT.....9TH PLAINTIFF/RESPONDENT
NYANGARENG APANGOROR.....10TH PLAINTIFF/RESPONDENT
ARIWAYA WURINGO.....11TH PLAINTIFF/RESPONDENT
PKIROR LOCHIAMERI..... 12TH PLAINTIFF/RESPONDENT
ABRAHAM CHEMALA.....13TH PLAINTIFF/RESPONDENT
RICHARD ACHAKI14TH PLAINTIFF/RESPONDENT

VERSUS

STEPHEN IKUA – DISTRICT COMMISSIONER

WEST POKOT DISTRICT.....1ST DEFENDANT/APPLICANT

ANTHONY KAMITU – OCPD.....2ND DEFENDANT/APPLICANT

I.K. DUWALE – DISTRICT COMMISSIONER, TRNAS NZOIA.....3RD DEFENDANT/APPLICANT

DAVID KERIMA – OCPD WEST POKOT DISTRICT.....4TH DEFENDANT/APPLICANT

THE COMMISSIONER OF POLICE.....5TH DEFENDANT/APPLICANT

COLONEL J. M. MWANGI.....6TH DEFENDANT/APPLICANT

THE PERMANENT SECRETARY,

OFFICE OF THE PRESIDENT – PROVINCIAL ADMINISTRATION...7TH DEFENDANT/APPLICANT

THE PERMANENT SECRETARY,

OFFICE OF THE PRESIDENT – INTERNAL SECRETARY.....8TH DEFENDANT/APPLICANT

THE PERMANENT SECRETARY,

OFFICE OF THE PRESIDENT – DEFENCE.....9TH DEFENDANT/APPLICANT

THE HON. ATTORNEY GENERAL.....10TH DEFENDANT/APPLICANT

RULING

1. The notice of Motion by the defendants/applicants seeks to amend the defence to exclude the 1, 2, 3, 4 and 6th defendants for the simple reasons that at the time of the alleged offences they were not acting on their own but in their official capacities. The substantive argument contained in the supporting affidavit of Peter Kuria blames the general defence filed by his colleagues Janet Langat which in essence did not capture the details now contained in the draft amended defence.

2. Essentially paragraph 7 of the said affidavit states that they were sued contrary to the provisos of Section 12 of the Government proceedings Act Cap 40.

3. The respondents through one Francisio A. Musa has respondent vide a replying affidavit dated 19th October 2018. They have argued that the same has been made 10 years after the closing of pleadings. He said that they stand prejudice as they may be forced to gather fresh evidence too late in the day.

4. The court has perused the written submissions on record as well as the attached authorities. The case of *Kassam Vs Bank of Baroda (Kenya) Ltd (2002) eKLR* aptly captures the reasons to be considered whether to allow and application for amendment or not. These include;

“ a) Whether the amendment sought embodies a legally valid claim or defence

b) The reason why the subject matter of the amendment was not included in the ongoing pleading or offered sooner than it was

c) Delay or disruption of judicial administration.

d) The extent to which the amendment departs from the original claim or as in our case, defence, or tends to complicate the issues.

e) Whether the amendment is offered by the plaintiff or the defendant. Thus, if an amendment will necessitate delay in bringing up the case for trial, there may be undue hardship to the plaintiff. Delay more often works against a plaintiff's interest than against those of a defendant.”

5. This suit is generally old and the delay has been occasioned by both sides. I do not see any reasons why the parties failed to prosecute the same. Infact the record clearly showed that the court out of its own volition issued notice for its dismissal.

6. As to the application at hand, it appears that the reasons given by the applicant for the delay are purely its internal mechanisms and bureaucratic changes. This has nothing to do with the plaintiff. The plaintiffs as stated above are equally guilty of laches. They ought to have processed the matter for trial.

7. Were the parties to be expunged from the defence acting in their line of duty?

Paragraph 27 of the plaint state as hereunder;

“ On the 16th June 2006, the 1,2,3,4 and 6th defendants by themselves and or police officers, General Service unit officer and Kenya Army officer under their joint command and authority raided the plaintiffs homes in Namiti Area of Trans Nzoia County -----”

8. Earlier under Paragraph 26 the 10th Defendant, the Attorney General had been sued and described as;

“ ----- as the legal representative of the Government of Kenya which is liable for the acts and omissions of all the above defendants who are government officer/employees in the performance or purported performance of their duties -----”.

9. Clearly in whatever case, they were in their line of duty. The Provisions of Section 12 Cap 40 insulates them from personal liability. A cursory look at the plaint states as much.

10. Consequently, I find that the amendment sought in the application to amend the defence so as to exclude them is valid and reasonable. I do not see any prima facie evidence to suggest that either of these parties jointly or severally acted outside the scope of their duties. If there was one then the same should come out probably during trial.

11. While appreciating that the application has been brought after inordinate delay, I find as I did above that the plaintiffs were also guilty in the delay. More importantly I do not see any prejudice the respondents stand to suffer should the defence be amended.

12. Consequently the application is hereby allowed. The applicant is granted 14 days to file and serve the amended defence. The respondents shall have the cost of the application.

Orders accordingly.

Delivered, signed and dated at Kitale this 22nd day of January, 2019.

H.K. CHEMITEI

JUDGE

22/1/19

In the presence of:

Kiarie for Plaintiff

No appearance for Defendant

Court Assistant – Kirong

Ruling read in open court.