



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CASE CIVIL NO. 304 OF 2010**

**JAMES OGATA NYANTENGA..... PLAINTIFF**

**VERSUS**

**1. THE CLERK TOWN COUNCIL OF KEROKA**

**2. THE TOWN COUNCIL OF KEROKA..... DEFENDANTS**

**RULING**

1. The plaintiff brought this suit against the defendants on 27<sup>th</sup> October, 2010 seeking judgment for; a sum of Ksh. 3,309,000/=, mesne profits and costs. In his plaint, the plaintiff averred that at all material times, the plaintiff was and still is the registered proprietor of all that parcel of land known as **LR. No. East Kitutu/Mwamangera/1376**(hereinafter referred to as “**the suit property**”). The plaintiff averred that sometimes in the year 2004, the defendants proceeded to demolish the buildings that the plaintiff had put up on the suit property. The plaintiff averred that the said demolition was in breach of a lower court order that had restrained the defendants from proceeding with the demolition of the said buildings unless the plaintiff was duly compensated therefor. The plaintiff averred that the damage that was occasioned to the plaintiff by the said demolition was assessed at Ksh.3,165,000/=. The plaintiff claimed from the defendant the said sum of Ksh. 3,165,000/= being the cost of the damaged building and mesne profits to cover the lost rent. The defendants filed a joint statement of defence on 23<sup>rd</sup> November, 2010 denying the plaintiff’s claim in its entirety. The suit has never been listed for hearing since it was filed in the year of 2010.
2. What is now before me is the plaintiff’s application dated 14<sup>th</sup> November, 2014 seeking leave to amend the plaint, to add or join Nyamira County Government to this suit as 3<sup>rd</sup> defendant. The plaintiff’s application was brought under Order 1 rule 10 of the Civil Procedure Rules that gives court the power to substitute, add or strike out parties to a suit. The plaintiff has contended that the addition of Nyamira County Government as a party to this suit would assist the court in determining real issues in controversy in the suit. The plaintiff’s application was brought on the grounds that after the promulgation of the Constitution of Kenya 2010 and the holding of the first general elections under the said constitution on 4<sup>th</sup> March, 2013, the defendants herein namely, Town Council of Keroka and its clerk ceased to exist their places having been taken over by the County Government within whose jurisdiction the said former town council now falls. The plaintiff has contended that in the circumstances, it is necessary to join Nyamira County Government as a party to this suit. In his affidavit in support of the application, the plaintiff deposed that he made inquiries from Kisii and Nyamira County Governments to ascertain whether the suit property lies within Kisii or Nyamira County. Kisii County Government responded to his inquiry and informed him that the greater part of Keroka town is within Nyamira County while part of it falls within Kisii County. Kisii County Government Attorney advised the plaintiff that

- the verification of the boundary between the two counties is in progress and as such the plaintiff has to ascertain whether the suit property is within Nyamira County or Kisii County Nyamira County Government did not respond to the plaintiff's inquiry.
3. The plaintiff's application was opposed by Nyamira County Government through statement of grounds of opposition dated 21<sup>st</sup> January, 2015. Nyamira County Government (hereinafter referred to only as "**the respondent**") contended that the plaintiff's application is misconceived and amounts to an abuse of the court process. The respondent contended that it has no relationship with Keroka Town Council to justify its joinder in these proceedings. When the application came up for hearing on 4<sup>th</sup> February, 2015, the advocates who appeared for the plaintiff and the respondent relied entirely on the plaintiff's affidavit and the respondent's grounds of opposition filed herein in support of and in opposition to the application respectively. I have considered the plaintiff's application and the grounds of opposition filed by the respondent in opposition thereto. What I need to determine in the application before me is whether good cause has been shown by the plaintiff to warrant the addition of the respondent as a defendant in this suit. Order 24 rule 8 of the Civil Procedure Rules provides that where there has been an assignment, creation or devolution of an interest during the pendency of a suit, the suit may, by leave of the court be continued by or against the person to or upon whom such interest has come or devolved. The plaintiff's contention is that the defendants herein have ceased to exist by operation of law and the interests that they had in the subject matter of this suit devolved upon, the respondent, Nyamira County Government against which he wishes to continue this suit. The respondent has objected to being joined in this suit on the main ground that it has no connection with the defendants and as such it has no interest in this suit in which it is sought to be added.
  4. It is not in dispute that the Town Council of Keroka and its clerk that were sued herein are no longer in existence. Town Council of Keroka ceased to exist with the repeal of the Local Government Act, Cap. 265 Laws of Kenya. The Local Government Act was repealed by section 134 (1) of the County Governments Act, No.17 of 2012. I am in agreement with the contention by the advocates for the plaintiff that after the repeal of the Local Governments Act, local authorities and offices such as that of the 1<sup>st</sup> defendant herein ceased to exist as legal entities and as such cannot sue and be sued and can neither proceed with nor be proceeded against with respect to any pending suit. The respondent has not contended that legal suits that were pending against the defunct local authorities prior to the repeal of the Local Government Act cannot be proceeded with against the County Governments. Such objection was raised in the case of **Dr. J. A. S. Kumenda & Another vs. The Clerk, Municipal Council of Kisii & 6 others, Kisii HC. Misc. Civil Application No. 3 of 2013, (unreported)** where I overruled the same. As I have stated above, the respondent's contention is that there is no nexus between it and the defendants herein that would justify its joinder to this suit. I am in agreement with the contention by the respondent that if there is no connection between it and Town Council of Keroka, the 2<sup>nd</sup> defendant herein, then there would be no basis upon which the plaintiff can seek to add it to this suit for the purposes of continuing against it with the claim herein that the plaintiff had against the said Town Council.
  5. It is clear from the plaintiff's affidavit and the annexures thereto that the plaintiff is not sure whether the suit property that is the subject matter of this suit is situated within Kisii County or Nyamira County. One thing is certain however, that the said property is situated within the former Town Council of Keroka. Since the acts that gave rise to this suit are alleged to have been committed by the former Town Council of Keroka and its clerk, the suit herein can only be proceeded with against the county within which the former Town Council of Keroka now falls. From the letter that was written to the plaintiff's advocates by Kisii County Government Attorney, there seems to be a dispute between Kisii County and Nyamira County over Keroka town. The dispute is in the public domain. Nyamira County is claiming that Keroka town falls wholly within its jurisdiction. Kisii County on the other hand is claiming that part of Keroka town falls within Kisii County. As stated in the said letter from Kisii County Government Attorney, the dispute is yet to be resolved. The said attorney has stated in his letter however that although they are claiming part of Keroka town, the town is nevertheless under the administration of Nyamira County.
  6. As I have stated above, Nyamira County Government, the respondent herein, did not respond to the plaintiff's advocates' letter inquiring about the status of Keroka town. The respondent has also not sworn an affidavit in response to the present application so as to state its position regarding

Keroka town. The issue of lack of nexus between the respondent and Keroka town which is a factual matter has been raised in the respondent's grounds of opposition. It is not clear to the court therefore why the respondent has claimed that it has no nexus to the defendants herein, Town Council of Keroka and its clerk. What the plaintiff is seeking leave to do is to add a party against whom he can proceed, with respect to the claim herein that he had against Town Council of Keroka and the clerk to that council. As stated above, the claim can be proceeded with against the County Government within whose jurisdiction Town Council of Keroka now falls. Since, there is a dispute between Kisii County and Nyamira County as to where the former Town Council of Keroka falls, the plaintiff in my view has the liberty at its discretion to add to this suit either Nyamira County Government or Kisii County Government whichever he thinks has close connection with the subject matter of the suit herein or both of them.

7. Order 1 rule 7 of the Civil Procedure Rules provides that if a plaintiff is in doubt as against whom to seek redress, he is at liberty to join as many defendants as he may deem necessary so that the issue as to who is liable to him is determined by the court. I am of the opinion that it would be for the court to determine at the trial whether there is nexus between the defendants herein and Nyamira County Government (the respondent). By granting leave to the plaintiff to add or join the respondent as a party to this suit, the court is not in any way determining the liability of the respondent to the plaintiff with respect to the cause of action that the plaintiff had against the defendants herein. The liability or otherwise of the defendants and the respondent to the plaintiff would be determined at the trial of the suit.
8. For the foregoing reasons, I do not think that the respondent would suffer any prejudice or injustice if the orders sought herein are granted. I would therefore allow the plaintiff's application dated 14<sup>th</sup> November, 2014 in terms of prayer (a) thereof. The plaintiff shall amend the plaint within 14 days from the date hereof. The cost of the application shall be in the cause.

**Delivered, dated and signed at Kisii this 20<sup>th</sup> day of February, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Momanyi for the Plaintiff

Mr. Bigogo h/b for Asati for the Respondent

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**