



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC NO. 910 OF 1997**

**MOHAN GALOT..... PLAINTIFF**

**-VERSUS-**

**CITY COUNCIL OF NAIROBI now**

**NAIROBI COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY WATER & SWERAGE COMPANY LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 18<sup>th</sup> February, 2014 the parties to the suit mutually fixed this case for a pre-trial conference to be convened on 27<sup>th</sup> October, 2014. On the said date however Mr. Mwenesi for the 1<sup>st</sup> Defendant notified the court that the 1<sup>st</sup> Defendant wanted to raise a preliminary issue of joinder or misjoinder to the proceedings. As the Plaintiff had not fully complied with the provisions of Order 3 Rule 2 and Order 11 generally, the court directed the parties to fully comply with the requirements of Order 3 Rule 2 as well as Order 7 Rule 5 of the Civil Procedure Rules. The court also then directed that the 1<sup>st</sup> Defendant would be heard on the issue of misjoinder at the next pretrial conference which was then slated for 24<sup>th</sup> November, 2014. Prior to the said date however the 1<sup>st</sup> Defendant filed a formal application to strike out the 1<sup>st</sup> Defendant's name and also as a party to these proceedings.

2. The underlying facts are brief. The Plaintiff is the proprietor of all that property known as L.R. No. 7022/7. The property is situate within the administrative borough of Kiambu County. The 2<sup>nd</sup> Defendant like the 1<sup>st</sup> Defendant before it supplies water to the residents of the larger Nairobi county and its environs.

3. Within his parcel of land the Plaintiff erected a "massive dam". Sometime in 1996 water spilled from the 1<sup>st</sup> Defendant's water reservoir in Kiambu County. The Plaintiff says the 1<sup>st</sup> Defendant's water system broke down. Water, effluence and waste as a result flooded the Plaintiff property. Property was destroyed. The Plaintiff's dam was affected. As a result the Plaintiff's filed suit against the 1<sup>st</sup> Defendant. It was a suit pegged both on a Rylands –v- Fletcher liability and also on negligence. The suit was filed in April, 1997.

4. Apparently, the Plaintiff claimed repeat occurrences when the 1<sup>st</sup> Defendant's reservoir bursts its brim in 2001, 2002, 2003 and 2004. The spillages caused massive erosions as well as corrosions and pollution due to the various water treatment chemicals. The Plaintiff sought to amend its plaint in 2008 and was duly granted the court's permission on 5<sup>th</sup> November, 2008.

5. Sometime in the year 2010, the Plaintiff apparently discovered that the 1<sup>st</sup> Defendant water reservoir which intermittently seemed to have catastrophic results rather than the lifesaving purpose water is associated with, was being managed and controlled by the 2<sup>nd</sup> Defendant. The Plaintiff sought permission of the court to join the 2<sup>nd</sup> Defendant to the proceedings and, with the consent of the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant was joined. That was on 19<sup>th</sup> April, 2010. A Further Amended Plaint was duly filed on 7<sup>th</sup> May, 2010. The 2<sup>nd</sup> Defendant having been duly served filed its defence statement. Save for the descriptive paragraph on the 2<sup>nd</sup> Defendant and an averment that the 2<sup>nd</sup> Defendant in December, 2003 took over the provision of water and sewerage services from the 1<sup>st</sup> Defendant including control of the allegedly culpable water reservoir the contents of the statement of claim were as they had been since the filing of the Amended plaint.

6. The 1<sup>st</sup> Defendant's current application is pegged on the Affidavit of one Karisa Iha. It is simple and straight forward. The 1<sup>st</sup> Defendant contends that there is an agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant where the latter has agreed to indemnify the former against all actions, suits, expenses, proceedings claims and costs arising from non-compliance with any statute or other equipment. The 1<sup>st</sup> Defendant has relied on the Agency Agreement between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant, where 2<sup>nd</sup> Defendant agreed inter alia to

*“..... take over the conduct of all the suits pending before the court on account of water and sewerage Department and all the outstanding judgment debts and [shall] keep the council fully indemnified at all times in this respect”.*

7. There is no doubt that under Order 1 Rule 10(2) of the Civil Procedure Rules the Court may at any stage of the proceedings order the name of any party joined either as Plaintiff or Defendant to be struck out. The court too has powers at any stage of the proceedings, to join whether as a Defendant or a Plaintiff any person whose presence may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

8. The question is whether the 1<sup>st</sup> Defendant was or is improperly joined to these proceedings. I do not believe so. The 1<sup>st</sup> Defendant was always in control of the circumstances which led to the claim herein. The claim is in the nature of strict liability. It would not be proper to excuse the 1<sup>st</sup> Defendant from these proceedings. If excused the issue of indemnity itself would be of no use. Indemnity can only arise if there is judgment against the said 1<sup>st</sup> Defendant and where the law truly feels it proper to order the indemnity. Before then though a party must be held culpable.

9. Even, if the court was to get involved in the purely private arrangement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the indemnity to occur the court must first determine whether the 2<sup>nd</sup> Defendants obligations were primary obligations. In asking the court to let go of the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant is simply asking the court to issue a summary judgment order. Yet the 2<sup>nd</sup> Defendant has expressly denied inheriting the 1<sup>st</sup> Defendant's liabilities.

10. The issue of indemnity aside, it is quite apparent that most of the alleged acts of omission and/or commission complained of on the part of the 1<sup>st</sup> Defendant took place prior to the year 2003. It would be critical to have the 1<sup>st</sup> Defendant as a party in the circumstances. The 2<sup>nd</sup> Defendant was then even not in existence and in my view the said 2<sup>nd</sup> defendant cannot alone fight liability fully and properly on the face of the pleadings. It is to be noted too that in paragraph 6 of its defence statement, the 2<sup>nd</sup> Defendant has

denied taking over all liabilities arising from the 1<sup>st</sup> Defendant's negligent acts.

11. My view is that if the provisions of order 1 Rule 10(2) are rationally applied there is need for the continued joinder of the 1<sup>st</sup> Defendant to these proceedings not only as a necessary party but also as a proper party to the proceedings for a complete and final decision of the questions involved in this suit. The continued joinder of the 1<sup>st</sup> Defendant will not imperil the trial but will instead assist the court and the trial process.

12. Finally, I also find the application by the 1<sup>st</sup> defendant to have its name struck out misconceived as the ground on which the 1<sup>st</sup> Defendant seeks to be struck out is a matter of law between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant as to a promised indemnity between them. The proper course should have been for the 1<sup>st</sup> Defendant to either amend its defence and plead this point or for the 1<sup>st</sup> Defendant to take out a notice of claim against a co-defendant under the provisions of Order 1 Rule 24(1) (a) of the Civil Procedure Rules. The 1<sup>st</sup> Defendant has done neither.

13. For the foregoing reasons, without deciding the merits of the suit against the Defendants or merits of the alleged indemnity between the two defendants, I do not find that the 1<sup>st</sup> Defendant is improperly joined in this suit. I consequently dismiss the application dated 20<sup>th</sup> November, 2014 with costs to the Plaintiff.

14. I further direct that the parties proceed to take pre-trial directions on this relatively old case within the next sixty (60) days.

15. Orders accordingly.

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of November, 2014.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

.....for the Plaintiff