



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L 285 (CONSOLIDATED WITH 286) OF 2013**

**JOHN MICHAEL WANJAU.....PLAINTIFF**

**VS**

**MUNICIPAL COUNCIL OF ELDORET.....DEFENDANT**

***(Suit filed against the Municipal Council of Eldoret; Preliminary objection raised that the Municipal Council of Eldoret no longer exists given the repeal of the Local Governments Act; whether suit against the Municipal Council of Eldoret could be sustained given the provisions of the County Governments Act; proper party to sue; whether the mistake could be cured by amendment; preliminary objection sustained but plaintiff directed to effect amendment to plaint to sue proper party)***

**RULING**

1. I have to decide a preliminary objection raised by counsel for the defendant. The preliminary objection is drawn as follows :-

*1. That the defendant was not a legal entity capable of being sued on the date this suit was filed by virtue of the provisions of the repealed Local Government Act (Chapter 265) Laws of Kenya as read together with the provisions of the County Governments Act and the Transition Authority Act.*

*2. That the suit and all the proceedings taken against the defendant including the application dated 14th May 2013 are a nullity ab-initio.*

*3. That the plaintiff's suit and application are therefore incurably defective, bad in law and ought to be struck out.*

2. This suit was commenced by way of a plaint that was filed on the 15th May 2013, although dated 14th May 2013. In his plaint, the plaintiff has pleaded that the defendant is a local authority within Uasin Gishu County. On the 23rd February 2012, the plaintiff submitted building plans to the Municipal Council of Eldoret proposing to develop his land parcel Eldoret Municipality Block 11/1143 situated at Mwanzo Estate within Eldoret Municipality. The plans were approved but thereafter on 24th September 2012, the Municipal Council of Eldoret withdrew the approval. The plaintiff has contended that this withdrawal of the approval was unlawful and illegal. He has sought a declaration inter alia that the withdrawal of approval is unlawful. He has also sought a permanent injunction to restrain the defendant from interfering with the plaintiff's quiet enjoyment of his land parcel. Alongside the plaint, the plaintiff filed a Motion dated 14th May 2013, seeking orders to have the approved plans reinstated.

3. A similar suit being Eldoret, Environment & Land Court Case No. 286 of 2013 was also filed. The plaintiff in that case is Wangari Wanjau who is the registered owner of the land parcel Eldoret Municipality Block 11/1144. She has drawn a fairly similar plaint, seeking similar orders. She has averred

that she forwarded building plans to be approved by the Municipal Council of Eldoret which was done so on 23rd February 2012 but the approval was withdrawn on 24th September 2012. She also filed an application to have the approved plans reinstated which is also dated 14 May 2013.

4. The issues in the two suits are similar and Counsel for the defendant raised the same preliminary objection. I therefore consolidated the suits for purposes of taking the objection and the ruling herein will therefore also apply to Eldoret ELC Case No. 286 of 2013.

5. It is common knowledge that a new Constitution was promulgated on the 27th August 2010 to replace the independence Constitution of 1963. Part of the changes brought about by the 2010 Constitution was the introduction of County Governments. There are 47 County Governments created by the Constitution which are spread over the Republic of Kenya. These are noted in Schedule 1 of the Constitution. The idea behind the creation of the County Governments was so that they can inter alia take over the functions that were being performed by Municipal Councils and County Councils. Municipal Councils and County Councils were a creation of the Local Government Act (Chapter 265) Laws of Kenya.

6. Mr. Omusundi for the defendant argued that the Municipal Council of Eldoret cannot be sued as it is no longer in existence following the repeal of the Local Government Act by Section 134 of the County Governments Act, Act No. 17 of 2012. He stated that the existence of the defendant was premised on Section 5 and 6 of the Local Government Act which no longer exist owing to the repeal of the statute.

7. Mr. Marube for the plaintiff was of a contrary opinion. He contended that the Municipal Council of Eldoret still exists. He argued that Section 2 of the Urban and Cities Act, Act No. 13 of 2011, provides for a 3 year transition period, which is 3 years after elections. He also pointed at Sections 13 and 14 of the same statute as creating Boards to run Municipal Councils. He further relied on Section 59 of the Urban and Cities Act, as saving pending actions. His view was that proceedings are permitted to continue under the names of Municipal Councils until the lapse of 3 years from the general election. Mr. Marube, in the alternative, argued that if I find the suit to be unmaintainable, then I ought to allow an amendment pursuant to the provisions of Order 1 Rules 9 and 10, to reflect the proper party.

8. I have considered the objection. The sole legal point, in my view, is whether at the time the suit was filed, the Municipal Council of Eldoret was in existence and whether a suit against such entity is currently maintainable.

9. The starting point is probably Article 184 of the Constitution of Kenya, 2010 which provides as follows :-

**184. (1) National legislation shall provide for the governance and management of urban areas and cities and shall, in particular—**

*(a) establish criteria for classifying areas as urban areas and cities, (b) establish the principles of governance and management of urban areas and cities; and*

*(c) provide for participation by residents in the governance of urban areas and cities.*

*(2) National legislation contemplated in clause (1) may include mechanisms for identifying different categories of urban areas and cities, and for their governance.*

10. Previously, urban areas, cities and local authorities were established under the Local Government Act, Chapter 265, Laws of Kenya. The Local Government Act was repealed by Section 134 of the County Governments Act, which provides as follows :-

*134 (1) The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution.*

11. The first general elections under this Constitution was held on 4th March 2013. The final

announcement of the results was done on 13 March 2013, vide the Kenya Gazette, Gazette Notice No. 3155 of 13 March 2013. It is thus on 13 March 2013 that the Local Government Act was repealed.

12. Municipalities were previously created by Section 12 of the Local Government Act which provided as follows :-

*12. (1) For every municipality there shall be a municipal council established under this Act and every municipal council shall consist of such number of councilors as may be elected, nominated or appointed under section 26.*

*(2) The Minister, in consultation with the Electoral Commission shall, by order, establish a municipal council in respect of any municipality for which there is not in existence a municipal council established under this Act.*

*(3) Every municipal council shall, under the name of "The Municipal Council of .....", be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time), and shall by such name be capable in law of suing and being sued, and of acquiring, holding and alienating land.*

13. The Urban Areas and Cities Act, Act No. 13 of 2011 makes provision for creation of urban areas, cities and municipalities, in order to implement the provisions of Article 184 of the Constitution. Section 9 of the Urban Areas and Cities Act, provides that the County Governor, may on the resolution of the county assembly, confer the status of a municipality on a town that meets the criteria set out by the Act. I have not been informed, and I have no knowledge, that there has been a resolution creating a new Municipal Council of Eldoret, apart from the one that existed prior to the repeal of the Local Government Act.

14. The same statute in its transitional provisions permits the continuation of existing litigation in the name of the former statutory bodies created under the repealed Local Government Act. It provides as follows :-

*59. Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.*

15. The date of commencement of the Urban Areas and Cities Act is noted in Section 1 of the Act and it states that the Act shall come into operation on the repeal of the Local Government Act. The Local Government Act, as we have seen was repealed when the County Governments Act came into force. Section 1 of the County Governments Act, states that the Act shall come into operation upon the final announcement of the results of the first general election. The County Governments Act, therefore came into operation on 13th March 2013, when the final results of the general election were announced. It is the same day when the Local Government Act was repealed.

16. One of the Municipalities created by the repealed Local Government Act, was the Municipal Council of Eldoret. In my view, once the Local Government Act was repealed, then all bodies created by the statute ceased to exist. This suit which was commenced on 15th May 2013, was therefore filed when the Municipal Council of Eldoret was no longer in existence. It is a suit filed against a non-existent entity and is in my view unmaintainable. Neither is it saved by the transitional provisions of Section 59 of the Urban Areas and Cities Act, because the suit was commenced after the repeal of the Local Government Act and not prior.

17. The other issue I need to decide is whether the suit ought to be struck out or whether it may be cured by amendment. Mr. Marube sought relief under Order 1 Rule 9 and 10. These two provisions provide as follows :-

*Rule 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

*Rule 10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.*

*(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*

*(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.*

*(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.*

18. In my view, the provisions of Order 10 Rule 2 as read with Rule 4 may be of utility to this suit. These clauses bestow upon the court discretion to order the name of a party improperly joined, whether as plaintiff or defendant, struck out and the name of any person who ought to have been joined, added.

19. Moreover under the provisions of Order 8 Rule 3, the court also has discretion to permit a party to amend its pleadings. The said clause is drawn as follows :-

*Rule 3 (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.*

*(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.*

*(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.*

*(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.*

*(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.*

20. In the case of *Nita Ganatra Suing as The Receiver Manager of Dawat Restaurant Ltd vs Shimmers Plaza Ltd & Another (High Court Civil Case No. 1001 of 2001)* (reported in the [www.kenyalaw.org](http://www.kenyalaw.org)), the plaintiff as receiver manager, instituted the suit in her own name. A preliminary objection was taken that the law does not permit a receiver manager to commence proceedings in her name but rather in the name of the company and therefore the suit ought to be struck out. Visram J (as he then was) declined to strike out the pleadings and stated as follows :-

*"The proper plaintiff would, therefore, be the company under receivership and the Receiver Manager is merely its agent. However, in order to do justice to the parties herein, this Court will decline to strike out the plaint and instead invoke its powers under Order VIA Rule 5 and direct that the plaint and the Chamber Summons application dated 20th June, 2001, be amended by the removal of "Nita Ganatra" and in her place be put the name of the Company under Receivership, that is , Dawat Restaurant Limited. I believe that the non-joinder of the Company was a bona fide mistake deserving to be corrected under Order 1 Rule 10."*

21. Given that the laws on county governments are not only still fairly new, but also complex and copious, it is in my view excusable, that the plaintiff would sue the Municipal Council of Eldoret rather than the County Government of Eldoret. I think there was a genuine, bona fide mistake, on the part of the plaintiff in suing the Municipal Council of Eldoret. I believe that this is a fit case in which I ought to exercise my discretion under Order 1 Rule 10 and Order 8 Rule 3 of the Civil Procedure Rules, 2010, and allow the plaintiff to amend the plaint by substituting the name of the defendant.

22. For the above reasons I uphold the preliminary objection to the extent that the plaintiff ought not to have sued the Municipal Council of Eldoret as the same no longer existed at the time of filing suit. I will not however strike out the suit but give leave to the plaintiff to amend the plaint so as to reflect the proper entity as defendant. This ought to be done within the next Seven (7) Days.

23. For the circumstances of this objection, I think it is fair that each party bears its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2013

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Read in open Court*

*In the Presence of:-*

*Mr. N. Marube present for the plaintiff.*

*Mr. Y. Barasa present holding brief for Mr. Omusundi of M/s Gicheru & Co for the defendant*