



REPUBLIC OF KENYA



**Nyambati v County Government of Kisii (Civil Suit 1209 of 2016)
[2023] KEELC 646 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 646 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 1209 OF 2016**

M SILA, J

FEBRUARY 8, 2023

BETWEEN

ALICE KERUBO NYAMBATI PLAINTIFF

AND

COUNTY GOVERNMENT OF KISII DEFENDANT

RULING

(Application to amend plaint; plaintiff having sued County Government of Kisii for encroachment; County Government owning adjacent land used as clay works; survey report indicating that the encroachment is not by the County Government but by a school; plaintiff seeking to amend to add Attorney General as defendant and leave to file suit out of time against Attorney General; draft amended plaint not having any pleadings against the Attorney General and indeed maintaining suit against the County Government; obvious that County Government is non-suited; plaintiff's remedy is in filing suit against the School not the County Government; prayer for extension of time cannot be considered in this suit for County Government cannot answer for the Attorney General; application dismissed)

1. The application before me is that dated November 2, 2022 filed by the plaintiff. The application seeks the following orders which I copy verbatim :-
 1. That the honourable court be pleased to grant extension of time to file suit against the Government.
 2. That the honourable court be pleased to grant leave to the plaintiff to add the Attorney General as a defendant to this suit.
 3. That the honourable court be pleased to grant leave to the plaintiff to further amend the amended plaint herein to include the Attorney General.



2. The application is said to be brought pursuant to the provisions of order 1 rule 10 (4), 11 and 14 of the Civil Procedure Rules, section 3A of the Civil Procedure Act, section 12 of the Government Proceedings Act (cap 40), section 27, 28, and 30 of the Limitation of Actions Act (cap 22) and all other enabling provisions of the law.
3. Before I go too far, I think it is prudent to provide the background leading to the application.
4. This suit was commenced through a plaint which was filed on March 4, 2008 against Gusii County Council as the sole defendant. In the plaint, the plaintiff pleaded to be the registered proprietor of the land parcel Wanjare/Bokeire/1738 (the suit land). She claimed that the Gusii County Council had trespassed into a portion of her land by digging trenches with intention to commence construction. In the suit, she asked for a permanent injunction against the defendant, an order of eviction, general damages for trespass, costs and interest. On May 26, 2016, an amended plaint was filed solely to change the name of the defendant to the County Government of Kisii. Parties agreed to have the matter referred to the District Land Registrar and District Land Surveyor to check whether there has been any trespass. The officers visited the site and filed a report dated August 9, 2018. That report acknowledges the plaintiff to be the owner of the suit land with neighbouring land being parcel No 1115 registered in name of Gusii County Council and measuring 0.05 Ha which land was reserved for clay works. That report noted that there was a school allegedly occupying about 5.7 acres of the suit land.
5. On June 10, 2019, the court (Mutungi J) adopted that report as the judgment of the court. The judge directed parties to discuss and see how the 5.7 acres occupied by the school could be hived off the plaintiff's land and the plaintiff be compensated. Several mentions followed with the parties stating that they were in discussion about the due compensation to the plaintiff. That was until the defendant filed an application on January 20, 2022 seeking to have the judgment of Mutungi J reviewed so as to correct an error apparent on the face of record. In that application, the defendant contended that the part of judgment which required the defendant to compensate the plaintiff was erroneous since the encroachment is by an entity which is not of the defendant. The application was heard by Onyango J, who delivered ruling on July 6, 2022. The judge agreed with the plaintiff that the report could not be implemented as between the plaintiff and defendant since the school was a separate entity from the defendant and proceeded to set aside the judgment.
6. It is after this ruling that the plaintiff filed this application and I have already mentioned the prayers sought.
7. When the application came up for hearing, Ms Esami fully relied on the contents thereof. Mr Mosota, for the defendant, did not oppose the application but was of the view that the defendant should not be in this matter.
8. I have considered the above.
9. It is apparent from the record that the encroachment that the plaintiff complains of is not by the defendant but is by a school which is identified to be Masagoye Primary School in a valuation report filed by the plaintiff, dated October 27, 2020, and prepared by M/s Otundo & Associates. The defendant owns the Plot No 1115 which is the clay works and there is no indication that the clay works have interfered with the plaintiff. From what I can see, the plaintiff's complaint is against the school.
10. In this application the plaintiff seeks to be allowed to join the Attorney General as defendant. There is no indication that the plaintiff wishes to drop the County Government from the suit and I wonder why the plaintiff insists on continuing this suit against the County Government. If she has a case against the County Government it will still be heard. I have however looked at the draft amended plaint and



nowhere does it seek to join the Attorney General and I have seen absolutely no pleadings that seek to make a case against the Attorney General.

11. My view of the matter is that the plaintiff should proceed to withdraw this case against the wrong defendant and proceed to sue the person or entity that has allegedly encroached into her land. This is not a case for amendment. The plaintiff should simply proceed to sue the correct party. In case I am wrong, the plaintiff is at liberty to prove her case against the County Government.
12. I am aware that in this application the plaintiff seeks to be allowed extension of time to sue the Attorney General. That to me, is coming in the wrong forum, for it is being filed in a suit where the defendant is completely non-suited and the Attorney General is not there to comment on whether or not such prayer should be granted. If the plaintiff wants that order, assuming that such order can be given, she is at liberty to engage the Attorney General directly on such litigation. It is pointless engaging the defendant who has no locus to speak for the Attorney General.
13. For the above reasons, I am not persuaded that I should allow this application and it is hereby dismissed. I however make no orders as to costs as the defendant filed nothing to oppose it.
14. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 8 DAY OF FEBRUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

