



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 129 OF 2018

(Formerly Milimani ELC Case No. 433 of 2016)

EVANSON KAMAU WAITIKI.....PLAINTIFF

VERSUS

MICHAEL ODHIAMBO OPIYO.....1ST DEFENDANT

THE PUBLIC HEALTH OFFICER, KAJIADO COUNTY....2ND DEFENDANT

RULING

What is before Court for determination are two applications dated the 15th February, 2018 and 15th November, 2018. In the application dated the 15th February, 2018, the 2nd Defendant seeks to be struck out of the suit while in the one dated the 15th November, 2018 the Plaintiff seeks leave to amend his Plaintiff.

The application dated the 15th February, 2018 is premised on the grounds that the 2nd Defendant is an officer of the County Government of Kajiado mandated with health and sanitation duties in the County. The 2nd Defendant received a complaint from the Plaintiff herein, after which he visited the site and confirmed the 1st Defendant had complied with the notice as he had with him approved building plans. The Plaintiff has no claim against the 2nd Defendant who has fully acted and complied with his mandate. The suit against the 2nd Defendant was brought in bad faith, is ill conceived and intended to intimidate the 2nd Defendant from performing his lawful duties. At the time the suit was filed, the 1st Defendant had fully complied with the notice and therefore there is no cause of action against the 2nd Defendant. The application is supported by the affidavit of PETER KARIUKI MUGO the Public Health Officer – Kajiado County in charge of Kitengela Division where he reiterates his claim above and contends that any litigation with respect to public health matters should be directed to the county government instead. He insists that the County Public Health Office serves the public without discrimination and or favour and therefore cannot be embroiled in private dispute like the one between the Plaintiff and the 1st Defendant.

The application dated the 15th February, 2018 is opposed by the Plaintiff EVANSON KAMAU WAITIKI who filed a replying affidavit where he deposes that it is GLORIA MUMBE that visited the site and not the Public Health Officer as claimed. He disputes that the Public Health Officer discharged his obligations as claimed. He confirms that he lodged a complaint to the 2nd Defendant in respect of actions of the 1st Defendant and the 1st Defendant issued the 2nd Defendant with an official statutory notice which ordered the 1st Defendant to stop the excavations. He insists the Notice was not complied with because instead of backfilling the excavation, which extended upto the foundation of his house thereby weakening the same, the 1st Defendant instead covered the said backfilling with timber and iron sheets before pouring soil thereon in the guise of having complied with the order. He explains that he lodged a complaint to the Ombudsman vide a letter dated the 3rd May, 2016. He reiterates that excavation led to cracks on his building and has exposed the foundation. He avers that the 2nd Defendant is hence a necessary party to the suit as it aided the 1st Defendant in attempting to sanctify an otherwise illegal order. Further, that the 2nd Defendant failed to discharge its legal obligations.

In the application dated the 15th November, 2018, it is premised on the grounds that the Plaintiff wishes to amend the name of the 2nd Defendant to reflect the correct position in so far as the party sued is concerned. The error to be amended arose from a genuine mistake as to the status and capacity of the 2nd Defendant. No prejudice shall be suffered by either party, as the claim remains the same. The application is supported by the affidavit of the Plaintiff EVANSON KAMAU WAITIKI where he reiterates his claim and avers that at the time of lodging the suit, his advocates sued the 2nd Defendant in the manner as indicated. He contends that he wishes to rectify the position to reflect the correct name of the party intended to be sued. Further, that the proposed amendment does not introduce any new claim, neither does it alter the nature of the claim earlier lodged.

Both the Plaintiff and the 2nd Defendant filed submissions that I have considered.

Analysis and determination

Upon consideration of the materials presented in respect of the two applications dated the 15th February, 2018 and 15th November, 2018 the following are the issues for determination:

- **Whether the 2nd Defendant should be struck off this suit.**
- **Whether the Plaintiff should be granted leave to amend its Plaintiff**

As to whether the 2nd Defendant should be struck off the suit.

I note the suit herein involves around a claim against the 2nd Defendant for failing to undertake its obligations against the 1st Defendant. From the annexures in the application, It is evident the 2nd Defendant is an office under the County Government of Kajiado and it issued notices on behalf of the said County Government with respect to public health matters. The Plaintiff insists the 2nd Defendant failed to perform its obligation as the 1st Defendant did not undertake backfilling properly, culminating in cracks on his wall. After the Plaintiff reported the nuisance, I note the 2nd Defendant issued a notice as per the provisions of section 119 of the Public Health Act and I hence concur with the 2nd Defendant that it fulfilled its obligation and any litigation with respect to public health matters should be directed to the county government instead. It is against the foregoing that I find that there is no reasonable cause of action against the 2nd Defendant and will proceed to strike it off the suit.

As to whether leave should be granted to the Plaintiff to amend its Plaintiff.

The Plaintiff seeks leave to amend the Plaintiff to include the County Government of Kajiado as opposed to the Public Health Officer. From the draft amended plaintiff attached to the application, except for including the County Government of Kajiado and removing the Public Health officer from the suit, the Plaintiff has not altered his claim.

Order 8 Rule 3 (1) of the Civil Procedure Rules provide that: **‘(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.**

Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows:’ **(1) For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.’**

Order 1 Rule 10 of the Civil Procedure Rules provide that **‘ (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 plaintiff shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaintiff shall be served on the new defendant and, if the court thinks fit, on the original defendants.**

In the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR, the Court of Appeal in dealing with issues of amendment held a follows:’ The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago. Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; ‘

In relying on the abovementioned legal provisions as well as the authority cited above, since I have already made a finding above that the 2nd Defendant’s inclusion in the suit was a bona fide mistake and struck it off, I opine that the amendment sought to include the County Government of Kajiado is necessary for the determination of the real matter in dispute. . Further, I do not foresee any prejudice the Defendants will suffer if the amendment sought is granted to correct an error.

It is against the foregoing that I find the two applications merited and will allow them.

Costs will be in the cause.

I direct the Plaintiff to file and serve the amended Plaintiff within 14 days from the date hereof.

Dated and delivered at Kajiado this 1st Day of April, 2019

CHRISTINE OCHIENG

JUDGE