



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 171 OF 2012

COUNTY COUNCIL OF BARINGO.....PLAINTIFF

VERSUS

DAVID ROBERTS WILDLIFE LIMITED.....DEFENDANT

RULING

1. The plaintiff vide a Notice of Motion dated 10th June 2019 filed on the same date and expressed to be brought under Order 8 Rule 3, order 1 Rule 1 of the Civil Procedure Rules and sections 3A and 100 of the Civil Procedure Act, Cap 21 Laws of Kenya sought the following orders:-

- 1. Grant of leave to the Plaintiff/Applicant to amend its plaint dated 25th February 2011.***
- 2. That the plaintiff/Applicant be allowed to amend the plaint in terms of the draft amended plaint annexed to the application.***
- 3. That the costs of the application be in the cause.***

2. The application was supported on the grounds set out on the face of the application and the affidavit sworn in support by Mutai K. Owen advocate for the plaintiff. Amongst the grounds preferred in support of the application are as follows:-

(b) That it has emerged that it is necessary to amend the plaint to indicate the correct status of the plaintiff as its has since changed into being the County Government of Baringo.

(c) That the amendment of the plaint is necessary for the purposes reflecting all the plaintiff with its proper status so that it can proceed to have its claim against the Defendant for due determination thereof by this Honourable Court.

3. In the affidavit in support Mr. Mutai advocate deponed at paragraphs 3 and 7 as follows:-

(3) That at the moment, the plaintiff is nonexistent as it has since become the County Government of Baringo. It is thus paramount for this status to be properly captured so that it may proceed and take any further necessary action in this matter.

(7) That the purpose of the amendment is to allow the plaintiff to participate in these proceedings in its rightful status as no action can be taken by the plaintiff in its former status.

4. The Defendant swore a replying affidavit through its director, Murray Roberts in opposition to the application. The defendant's contention was that the plaintiff was dissolved and had ceased to exist and that as there was no transition plan or arrangement made to take over the prosecution of the suit through the Transition Authority established under the **Transition to Devolved Government Act No.1 of 2012**, the suit ceased to exist on the expiry of the mandate of the Transition Authority on 4th March 2016. The Defendant further contended the County Government of Baringo was a creature of the Constitution 2010 and was not an automatic Successor of the defunct County Council of Baringo which was itself a body corporate established under the repealed Local Governments Act, Cap 265 of the Laws of Kenya. The Defendant contended that the suit herein having not been transferred by the Transition Authority to the County Government of Baringo, it ceased to exist by operation of the Law and that the proposed amendment is unconstitutional and an illegality and ought to be refused.

5. The parties canvassed the application by way of submissions, and furnished authorities in support of their arguments. The plaintiff in their submissions filed on 7th October 2019 reiterated the well settled principles that the court must consider in granting or denying an application

for leave to amend. The Court of Appeal case of *Eastern Bakery –Vs- Castelino (1958) EA 461* is one of the earlier cases which established the general principle that Courts should normally freely allow amendment of pleadings at any stage of proceedings if it can be done without occasioning injustice or prejudice to the other party. Where prejudice can be compensated by an award of costs, the leave to amend the pleadings should ordinarily be granted. The principles enunciated in the *Eastern Bakery –Vs- Castelino* case (*Supra*) have been adopted and applied generally by the Courts. In the case of *Central Kenya Ltd -Vs- Trust Bank Ltd & 5 others (2000) eKLR* the Court of Appeal stated:-

“—The overriding consideration in application for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such, delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs”

6. In the instant matter the issues go beyond mere amendment of the pleadings. The defendant had contended there is no suit in existence as the plaintiff ceased to exist following dissolution after the 2010 constitution was promulgated which established County Governments. The defendant argued there was established a mechanism through which the assets and liabilities of the defunct Local Authorities were to be assigned and/or transferred to the County Governments and if the said mechanism which was established under the Transition to Devolved Government Act No. 1 of 2012 was not invoked then the suit ceased to exist after the mandate of the Transition Authority expired.

7. The defendant has submitted that the County Government of Baringo is not the legal successor of the defunct County Council of Baringo in respect of the instant suit as deponed by Mutai K. Owen in his supporting affidavit. The defendant placed reliance for its submission on the case of *Interim County Secretary, County Government of Kakamenga -Vs- Republic; Exparte Ali Adam & Another (2017) eKLR* where the Court of Appeal was called upon to determine whether County Governments automatically assumed and subsumed the responsibility for the assets, liabilities and staff of the defunct local authorities. The court held that the County Governments were not automatic legal successors, of the defunct local authorities holding further that the legislative provisions relating to transition to devolved Governments had to be complied with. In effect the Court of Appeal was echoing the often cited dictum in the case of *Speaker of National Assembly -vs- Karuma (2008) IKLR (EP) 425* where the court of appeal stated as follows:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament the procedure should be strictly followed.”

8. In the case D.K Musinga JA and A.K JA agreed with S Gatembu JA rendered a dissenting judgment. Musinga JA in his judgment underscored the role of the Transition Authority in shepherding the process towards the transition to devolved government. Under paragraph 12 and 13 of his judgment he stated as follows: -

12. The preamble to the Transition to Devolved Government Act stipulates that it is: “An Act of Parliament to provide a framework for the transition to devolved government pursuant to section 15 of the Sixth Schedule to the Constitution, and for connected purposes.”

13. Section 4 of the said Act established the Transition Authority whose functions are set out under section 7 of the Act and include, to “prepare and validate an inventory of all existing assets and liabilities of government, other public entities and local authorities”. Under the Fourth Schedule to the Act, the Transition Authority was required, among other duties, to, “audit assets and liabilities of local authorities, to establish the assets, debts and liabilities of each Local Authority” and provide a mechanism to secure assets and liabilities of Local Authorities during phase one of the transition period, which was the period between the commencement of the Act and the date of the first election under the new Constitution, 4th March, 2013.

9. The judge was emphatic that the appropriate law relating to transition to devolved system had to be faithfully adhered to. Under paragraph 23 of his judgment Musinga JA summed up as follows:

24. Pursuant to section 15 of the Sixth Schedule to the Constitution, Parliament enacted an appropriate law that spelt out how assets and liabilities of defunct Local Authorities were to be dealt with and, in my view, the statutory path, however long winded and convoluted it may appear, is always the safest route in reaching the desired destination.

10. A. Murgor JA wrote the leading majority judgment in the case with which Musinga JA agreed. In her consideration whether section 33 of the Sixth Schedule of the Constitution could be construed to mean that the County Governments were the legal successors of the local authorities the judge stated as follows:-

Since offices or institutions as defined by the Constitution are limited to those within the national or county governments or the public service, it clearly was not intended that county governments were to be construed to be the offices or institutions contemplated by section 33. To the contrary, County Governments were established under Article 176 of the Constitution as a newly created tier of self-government, with a different structure and orientation from the defunct local authorities. Without any express provision to designate them as legal successors of the defunct local authorities, it cannot be inferred that County Governments should be included within the definition of legal successors as provided by section 33.

11. The judge further held that section 59 of the Urban Areas and Cities Act was only applicable in regard to any Legal rights or cause of action that had already accrued by the time of the enactment of the Urban Areas and Cities Act against a body established by Law and even then such rights and any cause of action could only be dealt with in accordance with the transition provisions.

Section 7(1) of the Transition to Devolved Governments, Act, 2012 provided how the transition to devolved governments was to be managed. It provides thus:-

7(1) The Transition Authority shall facilitate and Co-ordinate the transition to the devolved system of government as provided under Section 15 of the Sixth Schedule to the Constitution.

Under section 7(2) (e) of the Act, the Transition Authority was to cause to be prepared an inventory of all assets and liabilities of the local authorities that were intended to be transferred to the County Governments.

Section 7(2) (e) provides:-

“Prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities.

12. It is not disputed that the plaintiff, County Council of Baringo was dissolved by the Minister for Local Government Vide Gazette Notice No.469 of 15th January 2013. Following the dissolution the organ that was mandated to facilitate and Co-ordinate the transition to the devolved system of Government was the Transition Authority. The defendant submitted that there was no evidence that indeed the defunct County Council of Baringo took the appropriate action to have the present suit transferred to the County Government of Baringo for prosecution.

13. In the case of *Republic -Vs- County Secretary Murang'a County Government, Exparte Stephen Thiga Thuita (2014) eKLR* Ngaah, J stated that the body that was mandated to inventorise the assets and liabilities of the local authorities was the Transition Authority established under Section 4 of the Transition to Devolved Government Act ,2012. He further held that where there was no evidence the Transition Authority had transferred the assets and/or liabilities, the County Government could not be held responsible. The judge in the judgment stated thus:-

“ As at the time of this application was argued, there was no evidence and none was brought to the attention of the Court that such a criteria is now in place as contemplated under the Transition to Devolved Government Act without this criteria, it would be premature to attribute the local authorities to the County Government”.

14. In the instant matter it is clear the Transition Authority completed its mandate on 4th March 2016. No evidence has been availed to demonstrate that the present suit was inventorised and transferred to the County Government of Baringo to continue with its prosecution. The objective of the Transition to devolved Government Act, 2012 is aptly captured in its preamble thus:-

“An Act of parliament to provide a framework for the transition to devolved government pursuant to Section 15 of the Sixth Schedule to the constitution, and for connected purposes”

15. The Act provided for an elaborate mechanism to have the assets and liabilities (which definitely would have included any pending court cases) transferred and/or inherited by the County Governments. Where there were pending cases as the present one unless there was an inventory indicating the case was transferred and/or an express intimation by the County Government that it had accepted to take over and proceed with the prosecution of the case, it cannot be assumed that it was the legal successor of the defunct local authority for purposes of the prosecution of the case. The process of identifying and preparing an inventory of all the assets and liabilities (including any choses in action) of the County Council was required to be done within the period of three years by the Transition Authority. As it was not done and /or the present suit was not included in any such inventory it follows that as at 4th March 2016, when the mandate of the Transition authority lapsed, there was no plaintiff in the suit since the County Council of Baringo had been dissolved and the suit was not transferred to the County Government of Baringo to continue with the prosecution of the same.

16. I agree with the submission by learned counsel for the defendant that any suit by the defunct County Council of Baringo which was not identified and transferred by the Transition Authority in conformity with the provisions of the Transition to Devolved Government Act, 2012 effectively ceased to exist. In my view the status of the suit as from 4th March 2016 was synonymous with the situation where a plaintiff dies and consequently as from that date there was no plaintiff in the suit since the plaintiff was dissolved and there was no compliance with the transition requirements. The County Government of Baringo perhaps ought to have made an application for the revival of the suit and to be substituted as the plaintiff if they could satisfy the court with reasons as to why there was no compliance with the provisions of the Transition to Devolved Government Act, 2012. The application for amendment of the plaint, to have the name of County Government of Baringo, as the plaintiff on the basis that the County Council of Baringo became County Government of Baringo is misconceived since there was a clear procedure set out through which the suit could have transited to the County Government of Baringo which was not followed. The latter was not an automatic legal successor of the County Council of Baringo and the suit could not therefore have automatically devolved to it.

17. The plaintiff's counsel referred the Court to the ruling delivered by my brother Hon Justices Munyao in this matter on 30th July 2019 where he observed that by virtue of Section 59 of the urban Areas and Cities Act, 2011, suits for or against the defunct local authorities could be continued by the County Governments as the successors of the County Councils. I have made a determination backed by the court of Appeal decision in the case of *County Government of Kakamega -Vs- Republic Exparte Ali Adam & Another (2017) eKLR* that the County Governments were not the automatic successors of the defunct local authorities. The judges in the Court of Appeal matter were agreed that the County Governments were not automatic legal successors of the defunct local authorities. No express provisions exist to that effect, either in the Constitution or the County Governments Act, 2012.

18. Mr. Mutai advocate for the plaintiff further referred the court to a ruling by Munyao J in the case of *Samuel Kiplagat Namiri & 2 others -Vs-Town Council of Eldama Ravine & 8 Others (2014) eKLR* where Munyao J, had expressed similar views as in the ruling I have referred to by him herein above. In the ruling he stated thus:-

“The Local Government Act ceased operations on 13th March 2013 which was the date of the final announcement of all the results of the 2013 elections in line with the provisions of section 134 of the County Government Act. There after County Governments took over the functions of the defunct local authorities”

19. The judge further held by reason of section 59 of the Urban Areas and Cities Act, 2011 suits against or by local authorities could be continued without necessity to substitute the County Governments. With respect to my learned brother, it is my view that in his ruling he did not particularly consider the application of the Transition to Devolved Government Act 2012 which clearly established and set out a procedure through which the assets and liabilities of the defunct local authorities were to be transferred to the County Governments. I am not sure whether, if he had considered the Transition Provisions of the Act, he would still have reached the same conclusion. For my part, I am persuaded the present suit has no plaintiff and indeed the suit ceased to exist following the dissolution of the plaintiff and the lapse of the mandate of the Transition Authority by effluxion of time. In the circumstances the application for amendment to substitute the plaintiff is superfluous.

20. The defendant had further argued the Court had no jurisdiction to entertain the suit as the suit was statute barred on account of the provisions of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. As I have already found and held there is no valid suit in existence as the plaintiff who instituted the suit ceased to exist, I see no reason to engage in further exercise to consider whether the suit is time barred. Besides as the County Government of Baringo could determine to bring a fresh suit in its name I do not wish to deal with determination of issues that could be prejudicial to their interest should they take that option.

21. The application before me was one seeking leave to amend the plaint to substitute the County Government of Baringo in place of the County Council of Baringo and I have held that it cannot be done for the reasons that I have discussed herein above. The Notice of Motion dated 10th June 2019 is accordingly dismissed. As the plaintiff in the suit ceased to exist by reason of dissolution I cannot order costs against a non-existent party. The parties will bear their own costs of the suit and the application.

22. Orders accordingly.

Ruling dated, signed and delivered at Nakuru this 28th day of November 2019.

J M MUTUNGI

JUDGE