



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 38 OF 2016

STANLEY KIPROTICH BOINET.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF UASIN GISHU.....1ST DEFENDANT

DENNIS KIBET.....2ND DEFENDANT

SIMON ROTICH.....3RD DEFENDANT

DENIS KIBET.....4TH DEFENDANT

RULING

This ruling is in respect of an application brought by way of notice of motion dated 28th July 2017 by the 1st defendant/ applicant for orders that:

1. The 1st defendant be struck out or expunged from this suit.
2. The 1st defendant be awarded the costs of this application and the costs of the entire suit.
3. This Honourable court do grant any other order that it deems fit in the circumstances.

Mr. Chemoyai for the applicant argued the application and relied on the grounds on the face of the application together with the supporting affidavit. He submitted that the perpetrators who occasioned this suit are the 2nd 3rd and 4th defendants and as such the 1st defendant did not file a defence in the matter.

Counsel submitted that NEMA is a distinct entity from the County government and they are the ones who should have been sued. The letters annexed to the replying affidavit are from NEMA. He prayed that the 1st defendant be expunged from the suit herein.

Mr. Isoe Counsel for the plaintiff opposed the application and relied on the replying affidavit filed herein. He submitted that a letter annexed to the replying affidavit was addressed to the County Director of NEMA Uasin Gishu County who responded to the said letter from the District Commissioners' office. A further letter was written by a county surveyor uasin Gishu on the same subject matter. Counsel submitted that the plaintiff's suit raises triable issues and the 1st defendant chose not to file a defence. He urged the court to consider the provisions of Article 47,50 and 159 of the Constitution to serve substantive justice.

Mr. Isoe submitted that striking out pleadings will prejudice the plaintiff and prayed that the application be dismissed with costs.

Analysis and determination

This is an application by the 1st defendant seeking to be expunged from the current suit. The issue to be determined by the court is whether the applicant is a proper party in this suit and if so whether a cause of action has been disclosed against them.

According the Blacks' Law Dictionary, 9th Edition at page 1644, a "triable issue" is deemed to mean "subject or liable to judicial examination and trial" whilst "the trial" has been given to mean "a formal judicial examination of evidence and determination of legal claims in an adversary proceeding."

In my understanding triable issues are those that are subject to judicial examination in a Court for determination on their merits. The 1st defendant argued that the plaintiff should have sued NEMA as it is a distinct entity and that he has not established a cause of action against them, It is my considered view that the 1st defendant is a necessary party in these proceedings and that their presence before the court is necessary for the court to effectually and completely determine all the issues. The letters annexed are addressed to the Uasin Gishu County Director NEMA and the County Surveyor.

The 1st defendant will have an opportunity to file a defense and deny all the allegations put forth by the plaintiff. Further they will also have a day in court to cross – examine the witnesses in the case.

I therefore find that the application lacks merit and is therefore dismissed with costs.

I order that the 1st defendant do file its defense within the next 14 days.

Dated and delivered at Eldoret on this 30th day of January, 2018

M.A ODENY

JUDGE

Read in open court in the presence of:

Mr. Chemoyai for 1st defendant/Applicant

Mr. Isoe for the Plaintiff/Respondent

Mr. Koech – Court Assistant