



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 32 OF 2012

JOEL KIPSANG SOY.....1ST PLAINTIFF

DAVID KIPKURUI KOECH.....2ND PLAINTIFF

JOSEPH TANUI MENGICH.....3RD PLAINTIFF

PATRICK BOSIRE.....4TH PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF TRANS-NZOIA.....1ST DEFENDANT

AINEA O. INDAKWA.....2ND DEFENDANT

R U L I N G

1. The application dated 21/3/2018 has been filed by the defendant. It is brought under **Order 1 Rule 10 of the Civil Procedure Rules**. It seeks an order that the name of **Ainea O. Indakwa** the second defendant, be struck out of these proceedings.

2. The application is supported by the sworn affidavit of the 2nd defendant dated 21/3/2018. The grounds upon which the application is made are that the 2nd defendant is no longer the clerk to the County Council of Trans-Nzoia by virtue of which position he was originally sued and that the County Council of Trans-Nzoia ceased to exist by virtue of the promulgation of the Constitution of Kenya 2010; He is therefore not a proper party to this suit.

3. The plaintiffs oppose the application. The replying affidavit sworn by the 1st plaintiff on behalf of all the plaintiffs has been filed. They term the application as incompetent, unmerited and an abuse of the court process. The plaintiffs state that these proceedings were commenced before the promulgation of the 2010 Constitution; that the 2nd defendant was then a Clerk to the then County Council of Trans-Nzoia; that all assets and liabilities and in addition, employees of the County Council of Trans-Nzoia were taken over by the County Government of Trans-Nzoia; that the Trans-Nzoia County Assembly is part of the County Government; that the 2nd defendant has merely been deployed to a newly created “Department” within the Trans-Nzoia County and that he was sued for the acts he did when in office that long ago. It is averred that no other person in the County Government can answer to those acts better than him. The plaintiffs aver that if the 2nd defendant is struck out of these proceedings, their case would be weakened.

4. The 2nd defendant filed submissions on his said application on 29/3/2018 and the plaintiffs on 17/4/2018.

5. Though the County Council of Trans-Nzoia was replaced by the County Government that succeeded it the plaintiffs are quick to point out that even their staff were assumed by the County Government. This including the 2nd defendant, whom they aver was merely deployed to another Department. In their view, nothing changed and the 2nd defendant should be retained in the suit.

6. However the 2nd defendant submits that he was a Town Clerk within the meaning of **Cap 265**, now repealed, and his duties as such were provided for at **Section 129** were as follows:-

129. (1) “The town clerk of a municipal council and the clerk of every other local authority, shall be the chief executive and administrative officer of the local authority of which he is the town clerk or the clerk, as the case may be, and shall have the general responsibility of coordinating the whole of the work of the local authority”.

The 2nd defendant does not stop there. He cites **Section 129 (2)** which reads as follows:-

129 (2) “In the discharge of the functions of his office he shall have all the powers and duties conferred and imposed upon the town clerk or the clerk, as the case may be, by this Act or any other written law and, in particular, but without prejudice to the generality of the foregoing, he shall have the powers and duties assigned to him by, and be responsible for the matters specified in, Part I of the Third Schedule, and such other duties as may be assigned to him by the local authority of which he is the town clerk or the clerk, as the case may be”.

From there he proceeds to **Section 129(4)** which provides as hereunder:-

129 (4) “The town clerk or clerk, or other officer thereto authorized in writing by the town clerk or clerk, may subject to the general or specific directions of the local authority, exercise the powers of the local authority, and all acts done by such officer in exercise of those powers shall be deemed to have been done by the local authority”.

7. The 2nd defendant submits that **Article 176 (1) of the Constitution** created a County Government for each County which consists of a County Assembly and an executive. By virtue of the **County Governments Act No. 17 of 2012** the **Local Governments Act Cap 265** was repealed and powers of local authorities were assumed by the County Governments as long as they fell within the **4th Schedule** to the Constitution.

8. The argument advanced by the 2nd defendant is that the capacity under which he was sued to quote the exact words “*sublimated with the demise of the initial 1st defendant*”. His former duties as a Clerk are, so goes the argument, now vested in a different person and office elsewhere within the County Government Executive Structure.

9. It is further argued that though **Article 185 of the Constitution** vests the legislative power of a County in a County Assembly the position of a Clerk to the County Assembly is a creature of **Section 13** of the **County Government Act No. 17 of 2012** as read with **Section 13(3)** of the same Act. Therefore and I agree, with the 2nd defendant on this argument, the powers of a Clerk under the repealed **Cap 265** and the powers of a Clerk under the **County Governments Act No. 17 of 2012** are drastically different. I therefore reject the plaintiffs assertion that the 2nd defendant was merely transferred from one department to another; the functions of the County Executive under the Governor, which took over the assets and liabilities of the former County Council are totally different from those the County Assembly where the 2nd defendant is now placed.

10. The 2nd defendant draws attention to **Section 34 of the Act No. 17 of 2012** which vests the executive authority of the County in the County Executive Committee comprised of the Governor, his Deputy and members of appointed under **Section 35** thereof. He submits that under the new governmental structure, there exists no nexus between the defendants in so far as this suit is concerned.

11. The applicant relies on the case of **Argos Furnishers Ltd -vs- Municipal Council of Mombasa Civil Suit No. 130 of 2008 (UR)**. The holding in that case is that the suits that had been instituted against the former local authorities can be prosecuted as against the current County Governments.

12. In my view the main question that arises is whether the 2nd defendant should be retained in these proceedings or should be struck out. This involves finding out whether he is a necessary party. In the case of **Kizito M. Lubano -vs- Kemri Board of Management & 8 Others 2015 eKLR (NBI) Pet. No. 47 of 2015** the court stated as follows at paragraph 52, 53, 54, 55, 56:-

52. The above finding is not a departure from the position long held in the Case of Werrot and Company Ltd & others versus Andrew Douglas Gregory & Others, HCCC No. 2363 of 1998, LLR 2828;

For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.

53. The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein. See Benjamin Kipketer Tai versus Kenya Commercial Bank, HCCC No.87 of 2003 (Kisumu) [2003] LLR 8071. In this regard therefore I wish to refer to Amon –vs- Raphael Tuck and Sons Ltd [1956] 1 ALL E.R. AT Page 273 it was held inter alia that;

... A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the Court effectually and competently adjudicate upon and settle all the questions involved in the cause or matter.

54. In this case therefore, and noting the decision in Benjamin Kipketer Tai Case and in Amon case, the non-joinder of KEMRI is not fatal to the suit. The Petitioner has set out the orders sought against each Respondent and granted the history of the matter, he has laid a background relating to each Respondent with regard to the Petition herein. The 1st Respondent manages KEMRI which is a state corporation and issued the letter of dismissal; the 2nd Respondent is the chief officer of KEMRI and acted for and on behalf of such body; 3rd Respondent is the parent ministry with regard to KEMRI while the 4th Respondent is the chief officer in charge of the 3rd respondent; the 5th Respondent is a constitutional commission with the mandate of ensuring compliance with chapter six of the Constitution with regard to leadership and integrity; the

6th Respondent supervised the petitioner; the 7th Respondent is head of KEMRI human resource function while the 8th Respondent is the legal advisor of the national government; and the 9th Respondent as an independent commission on administration of justice addressed this matter before it was filed in court. Each party herein is clearly assigned a role with regard to the background of the Petition even where there may be no specific payer against such a party. Where KEMRI is not joined and the Court establishes that there is a good case against such a body, there is discretion to order as appropriate. See *Marekere University versus St. Mark Education Institute Ltd & Others*, Kampala High Court Civil Suit No.378 of 1993 [1994] KALR 26.

The fact that the plaintiff chose to file a suit against the two defendants only, implicitly meant that it did not sue anyone else ... it is clear that it has not indicated that it wishes to sue any other party.

55. I hasten to add, where a suit is suitable before court, non-joinder of a party cannot remove responsibility from other parties sued as respondents. An omission of any party as Respondent cannot be a justification by other parties that the suit should not move simply because such other party is not joined. See *Busienei versus Transnational Bank (K) Ltd* [2002] 1 KLR 784. Where the Court is satisfied that there is a case against the respondents before court, such a case must be addressed on its merits. This Court recognizes that employment and labour relations operate in an intricate manner and in a majority of cases, an employee will know who their supervisor is and might never know how the entity under which they work under is legally registered, even where the case was the converse and such an employee has all the requisite details, fair labour relations dictates that the Court operate without undue regard to technicalities and ensure substantive justice. That is my reading of the provisions of Article 41 and 159 of the Constitution read together with section 20(1) of the Employment and Labour Relations Court Act. To allow the respondents escape responsibility where such exists, would be tantamount to rendering fair labour practice and fair industrial relations ineffective.

56. I therefore find the joinder of the respondents herein is necessary as this will enable the Court to effectually and completely adjudicate upon and settle all questions involved in the petition. Where there is an omission to join KEMRI as a right party, such non-joinder does not remove responsibility from the other respondents. Such non-joinder does not render the Petition fatal.

13. The court in the Kizito case was considering the joinder of parties at the beginning of the proceedings. The challenge to the inclusion of the 2nd defendant herein is being made long after the proceedings commenced, but it is not in doubt that these proceedings were properly commenced against him by virtue of his acts or omissions in relation to the suit land. Can he then opt out of these proceedings, or be granted leave to do so? In my view the answer to this question lies in an examination of the original reasons behind his joinder in the first place. If the facts that gave rise to a cause of action show that he did or failed to do anything whether in his private or official capacity, for which only him can testify first land, then in my opinion the 2nd defendant should not be allowed to depart from these proceedings for he is a necessary party. As I have indicated, the test is to be applied to the facts as they were at the commencement of the suit and not at any later stage, for that is when the cause of action against him crystallized.

14. Accordingly I find that the 2nd defendant should continue being a party to this suit and therefore the application dated 21/3/2018 has no merits. Consequently I dismiss the said application with costs to the plaintiffs.

Dated, signed and delivered at Kitale on this 31st day of May, 2018.

MWANGI NJOROGE

JUDGE

31/5/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Barongo for the plaintiffs

Mr. Lowasikou holding brief for Katama Ngeywa for the defendants

COURT

Ruling read in open court in the presence of counsel for the parties.

MWANGI NJOROGE

JUDGE

31/5/2018