



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC NO. 14 OF 2010

COUNTY COUNCIL OF OLKEJUADO.....PLAINTIFF/RESPONDENT

-VERSUS-

TOWN COUNCIL OF KAJIADO.....1ST DEFENDANT/RESPONDENT

MUMTAZ GARDEN ESTATE.....2ND DEFENDANT/APPLICANT

RULING

In its Application dated 22nd July, 2016, the 2nd Defendant/Applicant is seeking for the following reliefs:-

- 1. THAT the Plaint filed herein be struck out as against the 2nd Defendant.**
- 2. THAT the costs be provided for.**

The Application is premised on the grounds that the Plaintiff has no cause of action either against the 1st Defendant or the 2nd Defendant; that the 1st Defendant and the Plaintiff are now one and the same entity and that the 2nd Defendant continues to suffer loss and damages because its house project has stalled.

The 2nd Defendant's director has deponed that the Plaintiff and the 1st Defendant became defunct after the promulgation of the Constitution and the County Government Act, 2012; that the continued pending of this suit for the past six years is oppressive to the 2nd Defendant and that in the interest of justice, the Application should be granted.

The County Secretary of Kajiado swore a Replying Affidavit and deponed that the Application is premature because the suit raises pertinent legal and factual issues surrounding the suit property; that the issue of assets under the defunct Local Authorities need to be interrogated and that the suit land was set aside for an air strip but was transferred in unclear circumstances.

According to the County Secretary, even though the Plaintiff and the 1st Defendant constitutionally metamorphosed into Kajiado County, the suit should be allowed to proceed.

In his submissions, the Applicant's counsel submitted that the Plaintiff's suit has lost its substratum since the Plaintiff and the 1st Defendant are now one entity; that the assertion that the suit property was meant for an airstrip amounts to introducing a new issue and that the dispute was purely a boundary dispute between the two Councils.

The Applicant's counsel relied on several authorities which I have considered.

The Plaintiff's/Respondent's counsel submitted that although the Plaintiff and the 1st Defendant are one and the same, the allocation of the suit land to the 2nd Defendant has never been ratified; that the cause of action is the irregular allocation of the suit land by the 1st Defendant and that the 2nd Defendant does not have a title yet.

The Plaintiff's counsel submitted that striking out the suit against the 2nd Defendant will not settle the matter and that the 2nd Defendant has never filed a defence to enable the court ascertain its position.

In its Plaint dated 26th January, 2010, the Plaintiff described itself and the 1st Defendant as local authorities established under the Local Government Act.

In the Plaint, the Plaintiff averred that it is the registered proprietor of land known as KJD/ILDAMAT/482; that in the year 2009, it discovered that the 1st Defendant had allocated the said land to the 2nd Defendant and that the 1st Defendant had no legal mandate to allocate, transfer or deal with the land in any manner.

The Plaintiff's prayer is for a permanent injunction restraining the Defendants from trespassing on the suit land.

In one of the Replying Affidavits sworn on 15th February, 2010, the then Town Clerk of Kajiado deponed that the 1st Defendant "has not and had never laid claim to the suit land known as KJD/ILDAMAT/482 but allocated an adjacent property to the 2nd Defendant and that the suit is essentially a boundary dispute between the two Councils which has been outstanding for long regarding distribution of assets and liabilities between the said councils."

Indeed, in its Defence dated 1st December, 2010, the 1st Defendant averred as follows:-

"6. The 1st Defendant further avers that it has never claimed any interest in the suit land, and states that any connection to the suit property is that the same borders the 1st Defendants' land which was allocated to the 2nd Defendant being KJD/ILDAMAT/31".

It is therefore obvious from the Plaint and the Defence by the 1st Defendant that the issue that was before the court was whether the land that was allocated to the 2nd Defendant/Applicant belonged to the Plaintiff or the 1st Defendant.

The 1st Defendant having admitted that it indeed allocated land to the 2nd Defendant, and in view of the fact that the Plaintiff and the 1st Defendant became one and the same entity after the general elections of March, 2013, the substratum of the suit disappeared.

Indeed, the Plaintiff cannot legally lay any claim as against the 1st Defendant, which has since merged with the Plaintiff and more so in a situation where the 1st Defendant claims that it legally allocated the land to the 2nd Defendant.

Consequently, the issues raised by the Plaintiff as against the Defendants cannot be litigated in the current state because doing so, the Plaintiff and the 1st Defendant will be at "cross purpose" and contrary to all norms of litigation.

In the circumstances, I allow the 2nd Defendant's Application dated 22nd July, 2016, as follows:

(a) The plait filed herein be and is hereby struck out with costs.

It is so ordered.

Dated and Delivered at MACHAKOS this 27TH day of JANUARY, 2017.

O. A. ANGOTE

JUDGE