



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 163 OF 2014**

**JOHN RIMUI WAWERU.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH NDUNG’U KAMAU .....2<sup>ND</sup> PLAINTIFF**

**JOSEPH KINYANJUI MUTHONI.....3<sup>RD</sup> PLAINTIFF**

**FAMILY SHADE LTD .....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**GITHUNGURI CONSTITUENCY**

**RANCHING CO. LIMITED.....1<sup>ST</sup> DEFENDANT**

**WORLD BANK(KENYA OFFICE).....2<sup>ND</sup> DEFENDANT**

**ATHI RIVER WATER SERVICES BOARD.....3<sup>RD</sup> DEFENDANT**

**SINO HYDRO COMPANY.....4<sup>TH</sup> DEFENDANT**

**GOVERNOR, KIAMBU COUNTY.....5<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

This suit was filed on 18<sup>th</sup> February 2014 by way of a Plaint dated 14<sup>th</sup> February 2014. The Plaintiffs claim that they are the owners of the various suit properties herein, being Residential Plots P179, P473, C54, and land parcels Ruiru /Kiu Block 2 (Githunguri) 4343, 2516, 2427, and 2263 all situated within Ruiru in Kiambu County.

They contend that the 4<sup>th</sup> Defendant having been commissioned by the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants commenced sewerage construction on the said suit properties in 2013, and the said Defendants are thereby guilty of trespass and illegal acquisition of the Plaintiffs’ land. The Plaintiffs sought judgment for the Defendants to deliver vacant possession of the suit properties, to stop construction of the said sewerage, and for mesne profits. Further, that the OCS Ruiru do supervise the eviction of the Defendants.

The 5<sup>th</sup> Defendant thereupon filed a Notice of Preliminary Objection dated 4<sup>th</sup> March 2014 seeking that the suit against him be dismissed with costs on the following grounds:

- a) That executive power and authority under section 6 of the County Government Act (No 17 of 2012) is vested in the County Government itself which is a body corporate and not in the Governor of Kiambu County as an individual.
- b) That section 133 of the said Act expressly provides that no personal liability attaches to a County Governor for acts done in the exercise of his power and functions under the Act.
- c) That in the premises the Plaintiff's suit is totally misconceived and an abuse of the court process.

The ruling herein is on the said Preliminary Objection by the 5<sup>th</sup> Defendant. The parties were directed by the Court to file and serve submissions on the Plaintiff's Preliminary Objection.

### **The 5<sup>th</sup> Defendant's Submissions**

The 5<sup>th</sup> Defendant's counsel filed submissions dated 13<sup>th</sup> March 2014 wherein he argued that the Plaintiffs at paragraph 11 of their Plaint allege that the 5<sup>th</sup> Defendant is the 'Executive Authority for Kiambu County', and that he commissioned the 4<sup>th</sup> Defendant to construct sewerage facilities on the suit properties. It was submitted that the 5<sup>th</sup> Defendant cannot be held to be personally liable for the alleged acts or omissions of the County Government of Kiambu. Further, that the County Government of Kiambu is specifically constituted, established and its functions allocated pursuant to Articles 6 and 176 of the Constitution as read together with the First Schedule of the said Constitution.

The 5<sup>th</sup> Defendant further submitted that section 6 of the County Government Act (No. 17 of 2012) the Kiambu County Government is declared by law to be a body corporate, and all claims arising out of the exercise of a county government's functions should be pursued as against the county government and not its officers or servants. Further, that section 133 of the Act shields members, staff and servants of the county government from personal civil liability for any act done in good faith in the execution of their duty or directions. Therefore, that the 5<sup>th</sup> Defendant has been improperly joined in these proceedings and his name should be struck out. The decisions in **Mwangi vs Tasker (1971) E.A. 385** and **Nirmal Singh vs Ram Singh (1961) E.A. 168** were cited in this regard.

### **The Plaintiff's Submissions**

The counsel for the Plaintiffs filed reply submissions dated 2<sup>nd</sup> April 2014 wherein he submitted that he did not oppose the application, and referred to the provisions of Articles 176 and 179 of the Constitution and section 6 of the County Government Act on the constitution of County Governments. It was further submitted that the Plaintiff is not an individual but an institution created by the Constitution, and he is not named nor is any personal liability or prayers being sought against him as a person. Lastly, it was submitted that Order 1 Rule 10(2) of the Civil Procedure Rules provides for substitution and addition of parties, and that should the Court allow the 5<sup>th</sup> Defendant's preliminary objection, the said Defendant be substituted with the County Government of Kiambu.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided are firstly, whether the 5<sup>th</sup> Defendant's Preliminary Objection raises a pure point of law, and if so, whether it has merit and should be upheld. The law on the circumstances when a preliminary objection may be raised was settled by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

**“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

A preliminary objection cannot therefore be raised if any fact requires to be ascertained, and the effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

The Plaintiffs have admitted in their submissions that they seek no personal liability as against the 5<sup>th</sup> Defendant, and therefore are suing him from acts arising from execution of his office as Governor of Kiambu County. There is thus a question of law raised as to whether in the circumstances the 5<sup>th</sup> Defendant can be sued in his capacity as Governor of Kiambu County, and the Court in this regard notes that section 133 of the County Government Act (No 17 of 2012) provides that members, staff and servants of a county government are exempted from personal civil liability for any act done in good faith in the execution of their duty or upon directions. Article 176 of the Constitution in this respect states that a county government for each county shall consist of a county assembly and a county executive, and under Article 179 the Governor is a member of the county executive committee and also the chief executive of the county. To this extent the Governor is both a member and staff of the county government and is to be afforded the protection in section 133 of the County Government Act.

The suit against the 5<sup>th</sup> Defendant is therefore improperly brought and is hereby struck out with costs payable to the 5<sup>th</sup> Defendant. The Plaintiffs have asked this Court that in the event that the 5<sup>th</sup> Defendant's preliminary objection is upheld, the 5<sup>th</sup> Defendant be substituted with the County Government of Kiambu. The Court notes that this request was made in submissions, and no application formal or otherwise for the said substitution laying the grounds thereof has been made by the Plaintiffs. In addition this Court has by dint of this ruling struck out the suit against the 5<sup>th</sup> Defendant, and therefore there is no such defendant in existence for purposes of substitution. The Plaintiffs should accordingly make a formal application for joinder of any additional parties they consider to be necessary in this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_4<sup>th</sup>\_\_\_\_ day of \_\_\_\_May\_\_\_\_, 2015.

**P. NYAMWEYA**

**JUDGE**