



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.16 OF 2011

AGNES MASHA WANJA.....PLAINTIFF

=VERSUS=

1. KAZUNGU KAMBI

2. FRANCIS NDUNGU

3. KASSIM MBONA NDIFU

4. ROBERT MATANO

5. COUNTY COUNCIL OF KILIFI.....DEFENDANTS

R U L I N G

1. The Application before me is dated 11th November 2014. In the Application, the 5th Defendant is seeking for the following reliefs:

(a) That the Plaintiff's claim against the 5th Defendant herein be struck out.

(b) That alternatively, an order of summary judgment be entered in favour of the 5th Defendant.

(c) That costs of the suit and application be provided for.

2. The Application is premised on the grounds that there is no prayer in the Plaintiff claiming any relief against the 5th Defendant; that the facts set out in the Plaintiff do not disclose a cause of action against the 5th Defendant and that the 5th Defendant has no legal or equitable basis on which it ought to be required to defend the suit.

3. In the alternative, the 5th Defendant has averred that it is not a legal entity capable of being sued and that the proceedings taken against the 5th Defendant are a nullity ab initio.

4. The Plaintiff filed Grounds of Opposition in which she averred that the prayer for Summary Judgment cannot issue because the 5th Defendant has not filed a counter claim against the Plaintiff and that the relief for striking out is drastic and can only be issued in exceptional circumstances where amendments

would not cure the alleged irregularity.

5. The 1st to 4th Defendants also filed their Grounds of Opposition. The 1st -4th Defendants averred that the 5th defendant is a necessary party and was properly sued.

6. The advocates filed written submissions for their respective parties which I have considered.

7. The 5th Defendant is seeking to strike out the Plaintiff as against it. In the alternative, the 5th Defendant is asking for summary judgment to be entered in its favour.

8. This suit was commenced by way of a Plaintiff on 11th March 2011.

9. The Plaintiff's claim is that on unspecified dates, the Defendants encroached on a road reserve meant for public use, particularly the Plaintiff who uses it to access her suit property. The Plaintiff is seeking for an order of demolition of the structures created by the 1st-4th Defendants.

10. In their Defences, the 1st- 4th Defendants denied that they have constructed their structures on a road reserve. According to the Defendants' statements, the structures they built were actually approved by the 5th Defendant.

11. It is trite law that, it is the responsibility of the 5th Defendant, to prohibit or control the use and development of land and buildings in the interest of proper and orderly development in its area; to consider and approve all development applications and grant all development permission and to ensure the proper execution and implementation of approved physical development plans (See Section 29 of the Physical Planning Act).

12. The 1st -4th Defendants have denied that they have constructed their houses on a road reserve. The 1st- 4th Defendants have further stated that the developments that they made on the suit properties were approved by the 5th Defendant.

13. Consequently, the 5th Defendant is a necessary party in these proceedings notwithstanding the fact that the Plaintiff is not seeking a specific relief as against it.

14. In any event, the law allows a Plaintiff to join who is in doubt as to the persons from whom he is entitled to obtain redress to join two or more Defendants in order that the question as to which of the Defendants is liable, and to what extent is determined. (See Order 1 Rule 7 of the Civil Procedure Rules).

15. The 1st – 4th Defendants having averred that the 5th Defendant was aware about the structures that they put up, the 5th Defendant should respond to that allegation in its Defence to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

16. The 5th Defendant has not placed any evidence before me to show that it was not a legal entity as at 11th March 2011.

17. Indeed, in the 5th Defendant's Defence, it has averred that it ceased to exist after the enactment of the County Government Act, 2012. This suit was filed before the enactment of the said Act.

18. The prayer for summary judgment cannot issue because the 5th Defendant has not filed a counter claim.

19. For those reasons, I dismiss the Application dated 11th November 2014 with costs.

Dated and delivered in Malindi this **11th** day of **September** 2015.

O. A. Angote

Judge