



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 518'A' OF 2012

Formerly HCC 79/2009

LALJI SHIVJI KERAI.....PLAINTIFF

VS

MUNICIPAL COUNCIL OF ELDORET.....DEFENDANT

(Application for amendment; plaintiff seeking to amend the plaint to add the County Government of Uasin Gishu as a defendant; argument that the County Government has now taken over the litigation from the Municipal Council of Eldoret; whether necessary to amend the plaint in the circumstances; no need to amend the plaint as the law has automatically catered for the continuance of litigation as filed although the benefit or loss of the litigation will now be of the County Government; not necessary therefore to effect amendment; application seeking to add the County Government disallowed; amendment allowed on other aspects of the claim)

RULING

The application before me is that dated 2nd August 2014 filed by the plaintiff. It is an application seeking to amend the plaint and is brought under the provisions of Order 8 Rules 3,5, and 7 of the Civil Procedure Rules, 2010. The plaintiff seeks to amend the plaint by adding the County Government of Uasin Gishu as a defendant and to add a prayer for damages for loss of income.

Probably, a little background will shed light as to why the plaintiff has thought it necessary to amend his plaint.

This suit was instituted on 20 May 2009 by the plaintiffs against the Municipal Council of Eldoret as the sole defendant. In the original plaint, the plaintiffs averred that they are the owners of the land parcel Eldoret Municipality Block 8/667 having purchased it for value and that they became registered owners of the land on 7 July 2005. They moved to put up a perimeter wall in September 2008 but it is claimed that employees of the Municipal Council of Eldoret came into the land on 10 February 2009 and confiscated an inspection card from the plaintiffs' supervisor. The plaintiffs then suspended construction work; by that time they claim to have spent an amount of kshs. 2,654,172.80/=. It is further stated that on 10 March 2009, the defendant (Municipal Council of Eldoret) trespassed into the land and demolished all the developments that the plaintiff had made on the suit land and created a road access through the land. Owing to this, the plaintiffs contend that it is now impossible and uneconomical to proceed with developments. They also claim a sum of Kshs. 10,214,172.80/= as damages. It was further pleaded that the plaintiff was constructing godowns which would have earned them a sum of Kshs. 542,000/= as monthly rent and which income they have lost.

The Municipal Council of Eldoret, as sole defendant, entered appearance and filed defence on 3 June

2009. They refuted all the allegations of the plaintiffs and pleaded that they cannot be liable for the actions of a third party. In the alternative, they pleaded that any developments on the suit land were being carried out without the benefit of approved plans.

Through an application dated 28 September 2009, the plaintiffs filed an application to amend the plaint to include the District Land Registrar, Uasin Gishu and one John Kipchumba as defendants. In the amended plaint, they claimed inter alia that the District Land Registrar had issued a lease to John Kipchumba bearing a new parcel number Eldoret Municipality Block 8/590 but which is the same as the land parcel number Eldoret Municipality Block 8/667 which they own. They have contended that this is illegal and have sought to have that title cancelled. That application to amend was allowed. The State Law Office entered appearance on behalf of the District Land Registrar, Uasin Gishu. John Kipchumba has not yet entered appearance to this suit despite being served.

As stated earlier, through this application, the plaintiffs want to further amend their plaint to include the County Government of Uasin Gishu as the 4th defendant. They also want to claim damages at the rate of kshs. 542,000/= being loss of rent for the leasehold period of 99 years.

Mr. Njuguna for the applicant argued that under the provisions of Section 33 of the 6th Schedule of the Constitution of Kenya, 2010, the County Government of Uasin Gishu is deemed to be the successor of the Municipal Council of Eldoret. In his view it is therefore necessary to enjoin them. He averred that it is still necessary to retain the Municipal Council of Eldoret as defendant since later, the Municipal may come into existence and it will do no harm to retain them.

Mr. Wabwire for the State did not oppose the application. There was no appearance on the part of counsel for the Municipal Council of Eldoret and they did not file any response to the application.

I have considered the application. It is not the first time that I have been faced with an application of this nature. In the case of ***Titus Gatitu v Municipal Council of Eldoret, Eldoret E&L Case No. 207 of 2012***, the plaintiff sought to amend his plaint to have the County Government of Uasin Gishu substituted for the Municipal Council of Eldoret as defendant. The basis of that application was that the Municipal Council of Eldoret ceased to exist after the formation of the system of county governments. In that application, I agreed with the applicant that the Municipal Council of Eldoret no longer existed owing to the repeal of the Local Governments Act, CAP 265 by Section 134 of the County Governments Act (Act No. 17 of 2012), which repeal took effect on 13 March 2013. I however declined to allow the request for substitution. My view of the matter was that Section 33 of the Sixth Schedule of the Constitution of Kenya 2010, continues the functions of the defunct Municipal Councils through their respective County Governments. That section provides as follows :-

33. An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.

I further held that for the circumstances of that case, the County Government of Uasin Gishu would be deemed as the proper defendant. I however did not allow an amendment to reflect that substitution, because in my view, the provision of Section 59 of the Urban Areas and Cities Act, (Act No. 13 of 2011) provides for litigation involving Municipal Councils to continue as filed without the necessity to reflect an amendment of the parties. That provision states as follows :-

59. Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.

Finally, I held as follows and I quote:-

I can take judicial notice of the fact that the County Government of Uasin Gishu is the successor to the

Eldoret Municipal Council. It is the County Government of Uasin Gishu which has taken over the functions that were being previously conducted by the Municipal Council of Eldoret. It follows therefore that for the purposes of this suit, they must be deemed as the entity who is now defendant in place of the Municipal Council of Eldoret. If there is going to be judgment for the plaintiff, the judgment has to be executed against the County Government of Uasin Gishu and if there is a benefit for the defunct Municipal Council, such benefit has to be that of the County Government of Uasin Gishu. However, as stipulated in Section 59 of the Urban and Cities Act, it is not necessary to effect any amendment to the parties as the proceedings are to continue as filed. The proceedings herein will therefore be continued as filed, but the benefit or burden, as the case may be, is now that of the County Government of Uasin Gishu.

I see no reason to depart from that holding.

For the purposes of this suit, the County Government of Uasin Gishu, for all intents and purposes ought to be deemed as having taken the place of the Municipal Council of Eldoret in the litigation but it is not necessary to effect any amendment of the parties. I know that no harm would be caused by an amendment, but I would not want to set a precedent where all litigants having suits against Municipal Councils or County Councils, will be obligated to amend their pleadings, in light of the provisions of Section 59 of the Urban Areas and Cities Act, which directs the proceedings to be continued as filed. I believe the provisions of Section 59 were aimed at saving litigants unnecessary delays and expenses.

For the above reasons, I disallow the application in so far as it seeks to add the County Government of Uasin Gishu as a separate party to this suit. I however allow the application in so far as it seeks to amend the reliefs sought in the suit. I make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

N/A for Ms J.N. Njuguna for plaintiff/applicant

N/A for M/s Gicheru & Co for 1st defendant/respondent.

N/A for 2nd & 3rd defendants who have not entered appearance.