



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 64 OF 2014

ELIJAH KINYUA NG'ANG'A

MWAI WA MUTHIGI

WAWERU MUGO

MUIRURI NJUGUNA.....PLAINTIFFS

V E R S U S

GITU WA KAHENGERI

JACOB NYAGA

MAU MAU WAR VETERANS ASSOCIATION

THE REGISTRAR OF SOCIETIES.....DEFENDANTS

RULING

The 4th Defendant, has by notice dated 13th May, 2014, raised a preliminary objection to the Plaintiffs' application by Notice of Motion dated 20th March, 2014. That application seeks orders to restrain by way of injunction the Defendants from participating and holding the meeting scheduled for 29th March 2014 and a mandatory injunction to compel the 4th Defendant to register the officials of the 3rd Defendant.

The notice is based on the following grounds –:

- i. The Honourable court lacks jurisdiction to grant a mandatory injunction against the 4th Defendant as the same is expressly barred by the provisions of the Government Proceedings Act.
- ii. The Honourable Attorney General was not served with a Notice of intention to sue and this offends the provisions of the Government Proceedings Act.
- iii. The Plaintiffs lack *locus standi* to be granted the order of mandatory injunction sought herein;
- iv. The order sought by the Plaintiffs is bad in law, misplaced and incapable of being effected.

Preliminary objections are raised on matters of law only. In the case of **MUKISA BISCUIT CO. –vs- WEST END DISTRIBUTORS LTD [1969] EA 696**, Law, JA stated:-

“...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

In the same case Sir Charles Newbold, P said:-

“...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”

By virtue of the first point of objection, Section 16 of the Government proceedings Act provides thus –

“(1) In any civil proceedings by or against the Government the Court may, subject to the provision of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:-

Provided that –

Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; . . (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which would not have been obtained in proceedings against the Government.”

The Plaintiffs argue that under article 23(3) of the Constitution, injunction lies against the Government and this includes interlocutory injunctions which are traditionally issued in situations of urgency where a right is threatened.

However, the Plaintiffs herein have not alleged infringement of any of their rights in order to invoke that provision of the Constitution. In any case, by virtue of ***Legal Notice No. 117 of 2013: Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*** prescribes that a claimant wishing to invoke article 23(3) of the Constitution should approach court vide a petition (Rule 10).

The 4th Defendant only needs one valid objection to this application. The first objection is valid. The Preliminary Objection raised to this application is well merited and grounded in law. The Notice of Motion application dated 20th March 2014 is hereby dismissed with costs to the 4th Defendant.

Dated and delivered at Nairobi this 17th Day of December, 2014.

A.MBOGHOLI MSAGHA

JUDGE

