



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 116 of 2008

FRANCIS MWANGI MUTURI)

DEDAN KINGORI KIRAGU)

JOSEPH MUTONGA NYUGUTO in capacity as members of

Kenya African National Union (KANU) being Treasurer, Assistant Treasurer and

Member Nyeri Municipality PLAINTIFFS/APPLICANTS

VERSUS

KANJA NJERU 1ST DEFENDANT

PETER NDIRANGU WARURU 2ND DEFENDANT

FAULU KENYA LTD 3RD DEFENDANT

R U L I N G

By a plaint dated 23rd September 2008 and filed in court on the same day, the three Plaintiffs suing in their capacity as members of Kenya African National Union (Kanu) and as bonafide officials being the treasurer, Nyeri Municipality, Assistant Treasurer Tetu branch and member, Nyeri Municipality respectively and also as members of Kanu, Nyeri District branch commenced these proceedings against the defendants claiming a declaration that any sale or lease or intended sale or lease of the Kanu – Nyeri branch offices by the 1st and 2nd defendants is illegal, null and void for want of mandate. They also prayed for an injunction restraining the 1st and 2nd defendants from leasing out, selling or in any other way alienating Kanu – Nyeri branch offices. They also asked for costs.

The Plaintiffs' suit was informed by the fact they were officials of Kanu, Nyeri District branch, whose offices are situated on land parcel, Nyeri Municipality Block 1/98 hereinafter referred to as the suit premises. Those suit premises are registered in the names of Mwai Kibaki, Isaiah Mathenge, John Kihoro Matu Roy and David Munene Kairu as Trustees. In or about September 2008 the Plaintiffs noticed construction works undertaken on the suit premises and upon their own investigations it came to their knowledge that the suit premises had either been leased out or sold or was in the process of being leased out or sold. That the persons who were dealing with the suit premises as aforesaid were the 1st and 2nd defendants who apparently had leased or sold the suit premises to the 3rd defendant. That the 1st and 2nd defendants had no mandate to conduct such transaction on behalf of Kanu, Nyeri District branch hence

the purported sale or lease or intended sale or lease of the suit premises was null, void and illegal. Hence the suit.

Contemporaneously with the filing of the suit, the Plaintiffs took out a Chamber Summons application under certificate of urgency seeking interim injunction orders against the defendants. The grounds in support of the application were that the 1st and 2nd defendants had no mandate to sell or lease out the suit premises. That the actions of the 1st and 2nd defendants aforesaid went against the grain of the Kanu constitution. The Plaintiffs would be deprived of the use of the suit premises at the expense of the 3rd defendant, a body corporate but not a member of Kanu. That the 1st and 2nd defendants had received Kshs.1,200,000/= from the 3rd defendants without mandate and more so in individual capacities hereby exposing the plaintiffs who are bonafide Kanu members to a claim not of their making.

The application was supported by an affidavit sworn by the 1st plaintiff on his own behalf and on behalf of the other plaintiffs. That affidavit merely reiterated and expounded on what has been set out in the plaint as well as grounds in support of the application aforesaid. The application came up for hearing ex-parte before Kasango J who certified the same to be urgent but declined to grant any interim orders. On 8th October 2008 the application came before me for hearing interpartes. However the same could not proceed as the defendants had just been served with the application and required time to put in their papers in reply. The application was thus adjourned and interim injunction was thus issued by the consent of the parties to last until the hearing and determination of the application interpartes.

In the meantime the 3rd defendant through Messrs Kamotho Maiyo & Mbatia Advocates filed a replying affidavit. In the main it deponed that it was advised that the 1st and 2nd defendants were trustees of the suit premises and on that basis it negotiated to rent the suit premises. Subsequently it entered into a written lease agreement with the said trustees for a term of ten years at a monthly rent of Kshs.40,000/=. They also agreed that it would pay rent in advance for two and half years amounting to Kshs.1,200,000/=. In compliance with the terms agreed, the 3rd defendant paid the aforesaid amount. The plaintiffs were all along aware of the transaction and never raised any objection. As far as the 3rd defendant was concerned, it was enjoined in this suit wrongly as it seems that the dispute between the plaintiffs and 1st and 2nd defendant were merely leadership wrangles. In the premises if injunction is granted against it, it will impose hardship on it as it had already made an advance payment of rent for 2½ years and it has to look for other offices and pay additional rent and this would interfere with its business operations and cash flow. It thus sought the dismissal of the application.

The 1st and 2nd defendants too filed a replying affidavit through Messrs Wambugu Mureithi & Company advocates. The same was sworn by the 1st defendant on his own behalf and on behalf of the 2nd defendant. In the main he deponed that the plaintiffs were not members of Kanu. Instead they were members of another political party known as Narc-Kenya. That himself and the 2nd defendant were the duly elected and recognised officials of Kanu, Nyeri Municipality branch as chairman and organising secretary respectively. Accordingly the Plaintiffs had no capacity to institute these proceedings. He contended that they leased out the suit premises to the 3rd defendant as a way of settling the outstanding debt of Kshs.13,021,317/= on account of rates due to Nyeri Municipal council. In doing so they followed each and every step as required by the party constitution which was for the benefit of party members. He also deponed that the plaintiff's suit was bad in law and incompetent for non-compliance with the law.

Upon the Plaintiffs being served with those replying affidavits, their counsel, Mr. Muhoho sought and was granted leave to file further affidavit to counter what had been deponed to by the defendants. He subsequently did so. That subsequent affidavit dealt at length with the issue as to whether the Plaintiffs were members of Kanu and their capacity to sue.

On 25th May 2009, the 3rd defendant filed a Notice of Preliminary Objection on the grounds:-

“1. That the Plaintiffs’ suit is bad in law as it offends the express provisions of Kanu constitution and in

particular Article 23 thereof.

2. The Plaintiffs have no locus standi in the instant suit.....”

This Notice of Preliminary Objection was argued before me on the same day. Expounding on the same, Mr. Kiama, learned counsel for the 3rd defendant submitted that the Plaintiffs were members of Kanu. However they were not trustees of Kanu. Under article 29 of Kanu constitution only trustees can sue and be sued. The Plaintiffs thus being not trustees and having not been authorised by trustees to bring this suit, the suit was bad in law. Secondly, the dispute being largely about membership of Kanu, there was a dispute resolution mechanism within the Kanu constitution. The dispute ought to have gone to arbitration under article 23 of the constitution. For all these submissions counsel relied on the case of Kimani Ngunjiri v/s David Manyara NKR HCCC No. 59 of 2005 (UR).

Mr. Wambugu, learned Counsel appearing for both 1st and 2nd defendants associated himself fully with Mr. Kiama’s submissions and added that the suit being a representative suit, Order 1 rule 8 of the civil procedure rules was not complied with thereby rendering the suit incompetent.

Mr. Muhoho’s response was that, annexed on the plaint was authority to sue given to the Plaintiffs by Kanu members. In any event the Plaintiffs too had filed the suit in their individual capacity. Much as Kanu constitution talks of internal resolution mechanism, that alone did not divest the court from hearing and determining the dispute. Finally he submitted that the Plaintiffs had the necessary locus standi as the suit premises are registered in the names of trustees on behalf of Kanu members, Nyeri branch. They are such members.

I have carefully considered the Notice of preliminary objection and the rival submissions by respective counsel. In considering this matter, the starting point ought to be article 23 of the Kanu constitution. It is therein provided that:-

“1. No member, as a condition-precedent for membership of the Party, shall resort to a court of law for the resolution of any dispute arising out of the conduct of any party matter, issue or affairs, unless the machinery established has been exhausted.

2. If the dispute in question arises out of or relates to the outcome or the conduct of any nominations for elections or elections within the party or any matter connected therewith, the aggrieved members shall refer the same to the KANU National Elections Appeals Tribunal established under this Article and in the case of any other dispute it shall be referred to arbitration as provided under this Article.

From the foregoing it is very clear that a member of Kanu is expressly forbidden from going to court in a bid to resolve any dispute arising out of the conduct of any party matter, issue or affair; unless the dispute resolution mechanism of the party are exhausted. In the event of a dispute touching on the conduct of elections, the aggrieved party shall refer the same to the Election Appeals tribunal set up in the constitution and in the event of any other dispute, it shall be referred to arbitration as provided under the article. It appears to me that the dispute herein would fall under the later category of disputes. Accordingly, the dispute ought to have been referred to arbitration panels established pursuant to Article 23(4) thereof. The Plaintiff and defendants all claim to be bonafide members of Kanu, Nyeri branch. Of course the 1st and 2nd defendants have disputed the Plaintiffs’ claim to life membership of Kanu. However that is not the issue for consideration for now. We shall for purposes of this ruling accept that indeed the plaintiffs and 1st and 2nd defendants are all members of Kanu. The dispute revolves around the management of the suit premises which belong to Kanu, Nyeri branch. As members of Kanu, the Plaintiffs as well as the 1st and 2nd defendants are beholden to their Kanu constitution. They ought therefore to have referred this dispute to arbitration as per their constitution instead of rushing to court. I do not agree with the submission of Mr. Muhoho that much as Kanu constitution talks of internal resolution mechanism, that alone does not divest this court from hearing and determining the dispute. The need to invoke internal dispute resolution mechanism within Kanu is couched in mandatory terms. The plaintiffs have no alternative but to comply. In my view courts of law should be reluctant to interfere

in the running and management of societies and private members clubs unless of course there is breach of rules of Natural Justice or the said clubs and or societies act outside their mandate. The plaintiffs having filed this suit in breach of the mandatory provisions of their constitution forbidding them from so doing unless and until certain condition precedents are met, the suit is premature and bad in law. In reaching this conclusion I have considered the case of Hinga & Another v/s P.C.E.A. (1986) KLR 317. In this case, the court dismissed the suit because it was rushed to court when the procedure as laid down in the Church's constitution had not been exhausted. Similarly in the case of Joseph Muya and Others v/s Ruth Schaeffer & Others HCCC No. 100 of 2004 (UR) the court struck out a suit which had been filed in contravention of express provisions of a constitution of the self help group.

The other issue taken up by the defendants is of course on the question of locus standi. Article 29 of the Kanu constitution provides interalia:-

“1. All land, buildings and other immovable property invested and securities which are acquired by the party shall be vested in the names of five trustees (hereinafter called the “Trustees”) elected as provided under this Constitution.

2.

3.

4.

5.

6. The trustees shall subject to the written approval of the National Executive Council have power to sell, purchase, and or transfer any immovable properties of the party and cause monies belonging to the party to be invested in or used or exchanged for the purchase of such bonds, mortgages, shares and other forms of investment as deemed fit.

From the above it is apparent that all land, buildings and other immovable property acquired by the party shall be vested in the names of five trustees. It is upto these trustees it would appear to sue or be sued in their capacities as trustees of the party. The said trustees too are required to maintain, collect rents, pay outgoing, repair and keep a list of the party's properties. When the Plaintiffs filed this suit, they did not describe themselves as trustees. Indeed they are not. They described themselves as “suing in their capacity as members of the Kenya African National Union (KANU) and as the Bonafide officials being the TREASURER NYERI MUNICIPALITY, ASSISTANT TREASURER TETU SUB BRANCH AND MEMBER NYERI MUNICIPALITY RESPECTIVELY and suing on behalf of members of KENYA AFRICAN NATIONAL UNION (KANU) Nyeri District Branch.....” The right to bring and maintain an action and to be sued by this article is vested in the trustees and not individuals of Kanu. The Plaintiffs are not trustees. Indeed in the Plaint, they have in paragraph 6 of the Plaint listed the following as registered trustees; Mwai Kibaki, Isaiah Mathenge, John Kihoro Matu Roy and David Munene Kairu. These are the trustees in which the suit premises are vested. They are the only ones mandated to bring and maintain action with respect to the suit premises and not the plaintiffs. It matters not that the plaintiffs have brought this action in the capacities that they have described themselves above. As stated by Musinga J in the case of Kimani Ngunjiri (supra) “..... The question of locus standi in a suit of this nature is very important because an individual member of a party cannot just wake up and purport to file a suit in court for the benefit of the party or a branch thereof without appropriate legal authority to do so” Yet this is what has happened in the instant suit. Clearly therefore the Plaintiffs are busybodies and had no capacity and or locus standi to bring this suit.

Finally, for all intents and purposes, this was a representative suit. For such a suit order 1 rule 8(2) of the civil procedure rules require that a Notice of the institution of the suit be given to all persons with interest in the suit. For such Notice to issue the Plaintiff(s) must move the court as appropriate. This has not been done in the circumstances of this case thereby rendering the suit incompetent once again.

In the upshot, I uphold the preliminary objection with the consequence that this suit is struck out with costs to the defendants. The defendants too shall have the costs of this application.

Dated and delivered at Nyeri this 17th day of September 2009

M. S. A. MAKHANDIA

JUDGE