REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 48 OF 2020

MARTHA BETTY E. MIYANDAZI.....1ST APPLICANT

JUSTINA WANJIRU NDUGU.....2ND APPLICANT

CHRISTINE ATIENO OTIENO.....3RD APPLICANT

HELLEN WANJIRU KURUTU.....4TH APPLICANT

VERSUS

RAHAB MWIKALI MUIHU(being sued as the chairlady of

Maendeleo ya Wanawake Organisation)...1st RESPONDENT

RUTH KAWIRA.....2ND RESPONDENT

LUCY NGUGI.....3RD RESPONDENT

KAREN OKETCH.....4TH RESPONDENT

IRENE WACUKA JOHN.....5TH RESPONDENT

RULING

The Notice of Motion dated 9th March, 2020 seeks the following orders:-

1. **THAT the Application be certified as extremely urgent and its service be dispensed with in the first instance.**

2. **THAT the defendants be restrained either by themselves, servants, agents or any other persons acting on their behalf from organizing, convening and or conducting an annual general meeting for Maendeleo ya Wanawake Organization until proper elections are carried out.**

3. **THAT the defendants be restrained either by themselves, servants, agents or any other persons acting on their behalf from interfering with the management and activities of Nairobi, Kisumu, Murang'a and Laikipia county offices.**

4. **Costs and interests of this application.**

The application is supported by the affidavit of Martha Betty E. Miyandazi sworn on even date. The first respondent through her counsel filed a Notice of Preliminary Objection raising the following two issues:-

1. **THAT the Honourable Court lacks Jurisdiction to Adjudicate this matter by virtue of Article 22 (vi) of the Constitution of Maendeleo Ya Wanawake Organization 2020.**

2. **THAT the Doctrine of Constitutional Avoidance implores for the dispute herein to be resolved vide the Dispute Resolution Mechanism created under Article 22(vi) of the Constitution of Maendeleo Ya Wanawake Organization 2020.**

Counsel for the 2nd, 3rd and 5th respondents filed grounds of opposition dated 16th December, 2020. The five grounds of opposition are:-

> **1. That this Honorable court cannot grant the orders sought in the Application herein and at the interlocutory stage as the said orders are final orders.**
>
> **2. The Applicants have failed to demonstrate the balance of convenience and irreparable injury needed for this Honorable Court to grant final orders at the interlocutory stage.**
>
> **3. The Application herein offends the dicta in the decision of Vivo Energy Kenya Limited -v- Maloba Petrol Station Limited & 3 Others (2015) eKLR and Stephen Kipkebut t/a Riverside Lodge and Rooms -v- Naftali Ogola (2009) eKLR where it was stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage.**
>
> **4. The Application herein is a non-starter, vexatious, premature and lacks merit and the same ought to be dismissed with costs.**
>
> **5. The Application herein is otherwise an abuse of the court process.**

Parties agreed to determine both the application and the objections together by way of written submissions. Counsels for the respective respondents did file their written submissions but counsel for the applicant did not.

According to counsel for the 1st respondent, this court lacks jurisdiction to adjudicate the matter. Article 22(VI) of the Constitution of Maendeleo ya Wanawake 2020 provide as follows:-

> **"In the event of a dispute either between different organs of Maendeleo or between the leadership of the maendeleo at the national level or any other dispute not provided for under Article 23(e), the council of the wise will resolve the dispute."**

Counsel submitted that the nature of the dispute revolves around branch organs of Maendeleo Ya Wanawake Organization and that the applicants have to exhaust the internal dispute resolution mechanism. Counsel relies on the case of **REPUBLIC –V- COUNCIL OF LEGAL EDUCATION; Ex Parte Desmond Tutu Owuoth (2019) eKLR** where the court held:-

> **"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."**

Counsel for the first respondent also referred to the case of **MUI COAL BASIN LOCAL COMMUNITY & 15 OTHERS –V- PERMANENT SECRETARY, MINISTRY OF ENERGY & 17 OTHERS (2015) eKLR** where the Court stated:-

> **"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases."**

It is urged by the 1st respondent that there is a mechanism to solve disputes within the organization and it is imperative that the parties pursue the alternative mechanism before coming to court.

On their part, counsel for the 2nd, 3rd and 5th respondents reiterate that this court lacks jurisdiction to determine the matter. Counsel referred to the case of **GEOFFREY MUTHINJA KABIRU & 2 OTHERS –V- SAMUEL MUNGA HENRY & 1756 OTHERS** where the Court of Appeal stated as follows:-

> **"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. . . This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."**
>
> **Section 9(2) of the Fair Administrative Action Act provides:-**
>
> **"The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any**

other written law are first exhausted.

This must be read with Section 9(3) which provides:-

"The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1)."

Counsel maintain that Article 22 of the Maendeleo Ya Wanawake Constitution 2020 provides that in case of a dispute between the different organs of Maendeleo Ya Wanawake the council of wise will resolve the dispute.

With regard to the Plaintiffs' application, it is submitted that the same is seeking a mandatory injunction at this stage. Counsel referred to the case of **VIVO ENERGY KENYA LIMITED –V- MALOBA PETROL STATION LTD & 3 OTHERS (2015) eKLR** where the Court of Appeal stated:-

"As regards grant of a mandatory injunction, this Court has stated time without number that at the interlocutory stage a mandatory injunction will only be granted in clear cases or where special circumstances exist. In *KENYA BREWERIES LTD V. OKEYO [2002] EA 109* this Court stated as follows on interlocutory mandatory injunctions:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff."

The applicants are delegates of Maendeleo Ya Wanawake Organization (MYWO) from different counties. The 1st applicant is from Nairobi County, the 2nd applicant is from Murang'a County. The 3rd applicant is from Kisumu County while the 4th applicant is from Laikipia County. Their main contention is that the 1st respondent is trying to impose other delegates namely the 2nd to 5th respondents as the delegates from the counties where the applicants were already elected. It is contested that the acts of the respondent are contrary to the Constitution of MYWO. The application dated 9th March, 2020 seeks to restrain the respondents from interfering with the applicants' positions and operations.

Counsel for the applicants did not appear to prosecute the application. Directions were given that the application and the Preliminary Objection be determined by way of written submissions. Counsel for the applicant did not file any submissions. The matter was mentioned on 20th January 2021 to confirm filing of submissions but counsel for the applicant did not appear. The case was further mentioned on 28th January 2021 but once again counsel for the applicants did not attend court.

The respondents contend that there is an internal mechanism under the MYWO Constitution aimed at resolving disputes. I do agree with the contention by the respondents that the complaints ought to have been handled internally first before being brought to court. There is no contention by the applicants that the internal mechanism has failed or refused to deal with the dispute.

Article 159 of the Constitution of Kenya 2010 provides for the promotion of alternative forms of dispute resolution. These include mediation, arbitration and reconciliation. Such mechanism are aimed at solving disputes among parties internally without undergoing the rigorous court process. It is the litigants who know their disputes very well and the law recognizes the fact that even rivalries can sit together and be guided to resolve their disputes.

Article 22 of the MYWO Constitution provides that any dispute involving members of the Organisation be resolved internally by the Council of the wise under Article 23(e). It is evident that the applicants rushed to court without invoking the internal dispute resolution mechanism. No reasons are given for this decision. I do therefore find that the case is premature and the same is referred back to the Organisation for resolution.

In the end, I do find that the Preliminary Objection is merited and the same is hereby allowed. The application dated 9th March 2020 is hereby dismissed with costs to the respondents.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH, 2021

……

S. CHITEMBWE

JUDGE