



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND DIVISION
ELC CIVIL NO. 1113 OF 2013

GEORGE ALBERT AMBUGA.....PLAINTIFF

-VERSUS-

KAJIADO COUNTY GOVERNMENT.....1ST DEFENDANT

WESLEY KASUKU LESANJO.....2ND DEFENDANT

RULING

1. Before me for determination is a preliminary objection to the Plaintiffs application brought by way of motion. The objection is to the effect that the prayers sought cannot be issued against the Defendants by virtue of the provisions of the Government Proceeding Act (Cap 40) and the Civil Procedure Act. The objection is also premised on the fact that the facts of the case are undisputed. In my view the preliminary objection meets the threshold of what a preliminary point of law is as outlined in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- Westend Distributors Ltd [1969] EA 696**.
2. Briefly, the Plaintiff has filed suit against the Defendants seeking a permanent injunction to restrain the Defendants from demolishing the Plaintiffs rental premises known as Plot No. 1197 NoonKopir Trading Centre. The Plaintiff also seeks damages. The 1st Defendant is described as a county government established under Article 176 and Schedule 1 of the Constitution. The 2nd Defendant is an individual who works for gain in Kajiado County. The Notice of Motion the subject of objection was also filed alongside the plaint. The Plaintiff claims that he is the beneficial owner of the suit property which was allocated to him in the year 2003 by the defunct Kajiado County Council. He says that the suit property was surveyed and determined not to be part of a road reserve but the Defendants are intent in demolishing structures put up by the Plaintiff on the property allegedly on the basis that the property is part of a road reserve. The Defendants contend that they issued the Plaintiff with an appropriate notice and duly earmarked the structures to be demolished on 11th August, 2014. The Plaintiff seeks injunctive orders against the intended demolition.
3. The Defendants objection *in limine* is to the effect that Section 16 of the Government Proceedings Act prohibits the issuance of injunctive orders against the Government and as the 1st Defendant is

a government no injunction should issue.

4. In my view this objection should only extend to the 1st Defendant as the 2nd Defendant is a subject and an individual sued in his personal capacity. An injunction can thus be issued directed to and at him.
5. With regard to the 1st Defendant, I would also have a brief answer. There is no doubt that pursuant to Article 23 of the Constitution of Kenya, injunctive orders can nowadays be issued against the national government where threats to fundamental rights are alleged by a subject. In civil proceedings however, the Government Proceedings Act (Cap 40) at Section 16 is rather explicitly. Such relief is not permitted against the government. The said Section however permits the court to issue declaratory orders in lieu of the injunction prayed for. The Section does not suggest in any manner that an application for injunction against the government will be a nonstarter but rather grants powers to the court to issue a declaratory order instead. In effect a preliminary objection intended to dispose of a suit or application on the basis of Section 16 in a summary manner ought not succeed. Such applications and suits should be heard on their merits and then the court left to determine whether to completely deny the relief or return a persuasive verdict through a declaratory order. In the instant case it is to be noted that the Plaintiff is actually alleging that his right to acquire and own property is being interfered with. If proven, the court may as well endeavor to ensure that there is a stoppage to such interference either by way of a restraining order as allowed by Article 23 of the Constitution or through a declaratory order as allowed by Section 16 of the Government Proceedings Act.
6. Perhaps, I may also add that in my view the “Government Proceedings Act (Cap 40) applies to the national government. It does not apply to county or devolved governments. The latter are rather independent of the national government and under Section 6(1) of the County Governments Act, No. 17 of 2012 are corporate bodies with perpetual succession. It is certainly unlikely that the intention of Kenyans in promulgating the Constitution in 2010 was that the county governments were to wield the same powers and enjoy the same privileges as the National government. Consequently, unless and until the Government Proceedings Act is amended to extend its application expressly to county government, the Act cannot be deemed by implication to apply to the devolved or county governments. The two levels of government though constitutionally expected to liase and cooperate with each other are not equal partners and do not enjoy the same powers and privileges, unless expressly stated under the Constitution or any written law.
7. The upshot is that I am not convinced that the preliminary objection is well grounded. It should not be upheld. I dismiss it with costs to the Plaintiff.

Dated, signed and delivered at Nairobi this 5th day of March, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent