



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 102 OF 2018

KENYA AFRICAN NATIONAL UNION.....PLAINTIFF

VERSUS

1. EMMANUEL ZIRO LUGHANJE.....1ST DEFENDANT

2. FRANCIS CHENGO NGOWA.....2ND DEFENDANT

3. JAMES CHEMBE.....3RD DEFENDANT

4. ANDREW MATTAZA.....4TH DEFENDANT

5. JEREMIAH MANGARO.....5TH DEFENDANT

6. JIMMY KABWERE WANJE.....6TH DEFENDANT

7. RIZIKI BAYA THOYA.....7TH DEFENDANT

RULING

1. By a Complaint dated 4th May 2018 and filed herein on 7th May 2018, the Kenya African National Union (KANU) a registered Political Party filed this suit seeking to have a Sale Agreement dated 1st September 2008 and said to be executed on its behalf by the 2nd, 3rd, 4th, 5th, 6th, and 7th Defendants on the one part and the 1st Defendant on the other rescinded for being marred by fraud and false representation. In addition, the Plaintiff sought an order of a permanent injunction to issue restraining the 1st Defendant from in any way interfering with its tenants on Plot No. 4090, Malindi. The Plaintiff further sought to be granted mesne profits and general damages.

2. Filed contemporaneously with the suit was a Notice of Motion application also dated 4th May 2018 wherein the Plaintiff sought temporary injunction orders restraining the 1st Defendant in particular from trespassing on, demanding rent or threatening to evict tenants or in any manner dealing with the suit property commonly known as KANU Office, Malindi.

3. Upon being served with the suit papers and the aforesaid application, Emmanuel Ziro Lughanje, the 1st Defendant herein filed a Notice of Preliminary Objection dated 21st May 2018 stating as follows:-

i) That both the Complaint and the Notice of Motion are incurably defective and is an abuse of the Court process;

ii) The Plaintiff has no capacity to sue in its own name nor can it be sued as such;

iii) The suit has not yet complied with the mandatory requirements of the law in particular order.....(sic);

iv) Authorisation to file suit is lacking and hence the suit is bad in law.

4. Subsequently the parties agreed that even before the Notice of Motion dated 4th May 2018 is heard, the Preliminary Objection be disposed of first by way of written submissions.

5. I have considered the Preliminary Objection and the submissions filed by the Learned Advocates for the parties. I have also perused and considered the authorities which the Advocates referred me to.

6. In support of the Preliminary Objection, the 1st Defendant submits that the Plaintiff is an association of members and that the 2nd, 3rd, 5th, 6th and 7th Defendants are its members. The 1st Defendant further submits that the 4th Defendant was also a member of the Plaintiff but is now deceased. There was however nothing offered in support of this claim.

7. Be that as it may, the 1st Defendant contends that this dispute is one between a political party and its members and that as such the same ought to have been heard and determined first by the party internal mechanism and then by the Political Parties Disputes Tribunal as provided under Section 40(1) of the Political Parties Act.

8. It is the 1st Defendant's position that by filing this suit, the Plaintiff has contravened its own Constitution as well as the Political Parties Act and that hence, this Court lacks the jurisdiction to entertain the same.

9. At the risk of repeating the tired phrase, jurisdiction is everything. Without it, a judicial tribunal or Court cannot move an inch in the process of adjudication of disputes (*see The Owners of the Motor Vessel "Lillian S" –vs- Caltex Oil Kenya Ltd (1989) KLR 1*). Jurisdiction is obtained through legislation or the Constitution. Where a Court or tribunal acts in the absence of jurisdiction, such action would be void and every proceeding founded on it is also bad and incurably so (*see Mcfoy –vs- United Africa Company Ltd (1961) 3 ALL ER 1169*).

10. In the matter before me, it is not in controversy that the 2nd to the 7th Defendants herein were members of the Plaintiff Political Party. This can be discerned from paragraphs 7 to 10 of the Plaintiff's Supporting Affidavit to the Motion dated 4th May 2018 where the Plaintiff through one Joseph Towett deposes as follows:

"7. That it has now come to the attention of the National Executive Council, which is the top most decision making organ of the party that the 1st Respondent claims to have purchased the offices for a sum of Kshs 1,000,000/- from the 2nd, 3rd, 4th, 5th, 6th and 7th Respondents who were then the Party's Malindi Branch Officials and trustees in accordance with its Constitution. Annexed hereto and marked as exhibit JT-1 is a copy of the alleged sale agreement dated 1st September 2008."

8. That the purported sale of the offices was never brought to the attention of the Party's National Executive Council for approval before being allegedly sold to the 1st Respondent. Annexed hereto and marked JT-2 is a copy of the Party Constitution.

9. That all branch officials and trustees are aware of the procedures for disposing off party property having been supplied with copies of its Constitution.

10. That unless the National Executive Council approves the purchase or sale of any property belonging to the party, such transaction is null and void.

11. According to the 1st Defendant, this is therefore an intra-party dispute which ought to be settled through the Party's internal mechanisms as provided in its Constitution and/or under Section 40(1) of the Political Parties Act through the Political Parties Dispute Tribunal as created under the Act.

12. With respect, I am unable to see how the resolution of the dispute between the Plaintiff and the 2nd to 7th Defendants herein would resolve the question as to whether the 1st Defendant lawfully acquired the property situated on the said Plot No. 4090, Malindi. As I understood the Plaintiff, the 1st Defendant claims to have purchased the suit property from those officials for a sum of Kshs 1000, 000/-. The Plaintiff disputes that its said officials had the wherewithal to dispose of the suit property as they purported to have done and that accordingly, the 1st Defendant acquired any rights to the suit property by dint of the impugned transaction. I did not hear the 1st Defendant to claim that he is also a member of the said party and that those internal processes would deal completely with the subject matter herein.

13. As Ojwang, J (as he then was) stated in *Oraro –vs- Mbajah (2005) 1KLR 141:-*

"....A 'Preliminary Objection' correctly understood is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a Preliminary Point.... Anything that purports to be a Preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

14. In the circumstances herein, I do not find any merit in the Preliminary Objection dated and filed herein on 21st May 2018. The same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 28th day of March, 2019.

J.O. OLOLA

JUDGE