



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 413 OF 2015

GABRIEL NYAMU NGUNDI t/a

GARMA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

THE GOVERNMENT OF MAKUENI COUNTY.....DEFENDANT

RULING

The Defendant filed a Notice of Preliminary Objection dated 9th June 2015 stating that the application and the Plaint are *frivolous, defective, bad in law* and *an abuse of the Court process*, as they offend the provisions of **Section 16 of the Government Proceedings Act, Cap 40 Laws of Kenya**. Thus, they are fatally defective and ought to be struck out.

The Defendant filed written submissions in support of the objection. Therein, it was submitted that the Constitution creates two levels of Government - National and County Governments which, under **Article 6(2)** thereof, are distinct yet interdependent and shall conduct their mutual relations on the basis of consultation and co-operation. This is echoed under **Article 189** which calls for cooperation between the National and County Governments. On this basis, counsel submitted that the Defendant is Government for all intents and purposes and thus **Section 16 of the Government Proceedings Act** is applicable. Further, that though the said Act came into force before devolution, there was no reason why the County Government should be excluded from the operations of the said Act. Consequently, that the orders of injunction sought against the County Government of Makueni is unsustainable. In support of this submission, counsel relied on the case of **Kilimanjaro Safari Club Limited v Governor – Kajiado County HCCC No. 442 of 2011 (2014)eKLR** where Justice Ogola made a finding that the County Government is Government and that the provisions of the Act apply in proceedings brought against County Governments.

The Plaintiff did not file any response or submissions to the objection raised by the Defendant. Despite the objection being uncontroverted, the Court must still make a determination on merit.

Section 16 of the Government Proceedings Act provides for the nature of relief against the Government, and forbids the Court from issuing injunctive orders against the Government. The Section reads:

16. Nature of relief

(1) In any civil proceedings by or against the Government the court shall, subject to the

provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that—

- i. where in any proceedings against the Government any such 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; and*
- ii. in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.*

(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 could not have been obtained in proceedings against the Government.

The question that arises herein is whether the County Government falls within the safeguards of **Section 16 of the Government Proceedings Act**. In my view, I think not. County Governments are governed by the **County Governments Act, 2012** and at Section 6 are body corporates with perpetual succession. The said Act does not prohibit Courts from issuing injunctions against County Governments. Further, I am of the view that the Constitution is very clearly that however much the two levels of Government are interdependent, they are distinct. It is my finding therefore that the County Government is not Government as suggested by the Defendant. I hold the same view with my colleagues as follows:

James Muigai Thungu v County Government of Trans-Nzoia & 2 Others Land Case No. 31 of 2015 [2015] eKLR. Obaga J.

The aforesaid Act forbids courts from giving an injunction against the Government. The section quoted hereinabove extends the same protection to Government Officers. This Act was in place even before the devolved system of Government came into force. The question which then arises is whether the Act can extend to the County Government. The County Governments are body corporate with power to sue and be sued. There is no provision in the County Government Act of 2012 which protects them from injunction orders. I do not think that it was the intention of the legislature that the County Governments were to enjoy the same status as the National Government. If this was the intention, then the Government Proceedings Act would have been amended to expressly include County Governments. I therefore do not find that the County Government can come under the umbrella of the Government Proceedings Act, when it comes to injunctions against them as well as their officers.

George Albert Ambuga v Kajiado County Government & another ELC CIVIL No. 1113 OF 2013 [2015] eKLR Onguto J.

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.

Where the legislature intends for **section 16 of the Government Proceedings Act** to apply to the County Government, then an amendment would suffice. I am aware that in **April 2014**, a **Government Proceedings (Amendment) Bill 2014** was introduced at the Senate for purposes of amending **Section 21 of the Act**, which provides for Satisfaction of Orders against the Government, to the effect that the said section applies to any civil proceedings by or against a County Government. The amendment was passed in **December 2014**.

The upshot of the foregoing is that the Preliminary Objection by the Defendant fails and is hereby dismissed. Since there was no response to the objection, I shall not make an order as to costs.

Dated, Signed and Delivered this **15th** day of **April, 2016**

L. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff (Though notified)

M/s Mogire or the Defendant

Lerionka : Court Clerk

L. GACHERU

JUDGE

Court

Ruling read in open court in the presence of M/s Mogire for Defendant and absence of Plaintiff's advocate though notified.

L. GACHERU

JUDGE