



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC NO.8 OF 2015

WESLEY KIBII ARAP RUTO.....1ST PLAINTIFF

PETER KIPSANG KEMEI.....2ND PLAINTIFF

ANNAH RONO.....3RD PLAINTIFF

KIMALEL CHUMO.....4TH PLAINTIFF

VERSUS

PARAMINDER SINGH.....1ST DEFENDANT

THE NATIONAL EXECUTIVE COUNCIL (NEC) OF

KENYA AFRICAN NATIONAL UNION.....2ND DEFENDANT

RULING

(Plaintiffs being members of KANU and suing their party for selling certain land; application by defendant to strike out suit for being res judicata and for being vexatious; argument that suit also offends the Political Parties Act's provisions on dispute resolution and the Constitution of KANU on dispute resolution; dispute mechanism under the Political Parties Act and KANU constitution not bar to these proceedings as other parties involved; there having been a previous suit that was compromised by consent; subject matter different; res judicata not applicable; but suit not disclosing cause of action since land already transferred to purchaser; land no longer belonging to KANU; political party having legal personality but not the entity sued; purchaser of the property not sued; no cause of action; suit dismissed)

The application before me is that dated 28th May, 2015. It is an application filed by the defendants and said to be brought under the provisions of Section 17 Rule 5, Order 50 Rule 1 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act, and all enabling provisions of the law. The application seeks orders to have this suit dismissed or struck out with costs. The grounds upon which the application is founded are as follows :-

(1) That the suit herein offends the provisions of Section 40 (1) and (2) of the Political Parties Act, Act No. 11 of 2011 rendering the suit incompetent.

(2) That the suit herein offends the provisions of Article 21(1) of the Kenya African National Union (KANU) party Constitution hence rendering the court without jurisdiction.

(3) That the suit herein is *res judicata* Kericho High Court Civil Suit No. 77 of 2013 between Joseph Kiplangat Soi & 2 Others vs Nick Salat & 4 Others.

(4) That the suit is incompetent, bad in law, frivolous or vexatious, fatally defective and or an abuse of the court process.

(5) That the suit does not disclose any reasonable cause of action against the 1st defendant.

The application is supported by the affidavit of the 1st defendant. He has annexed copies of the KANU constitution; a consent order issued in the case Kericho HCCC No. 77 of 2013; and a copy of the title to the land parcel Kericho Municipality LR No. 631/1034 now Kericho Block 5/422 (the suit property).

The application is opposed, but before I go to the gist of the objections raised by the plaintiffs, I think it is important that I lay a little background to this suit.

This suit was commenced by way of plaint filed on 5 March 2015. The plaintiffs have pleaded that they are life members of the Kenya Africa National Union (KANU) which is a political party, and that they are the elected interim officials of its Kericho sub-branch. They have brought this suit in that capacity and on behalf of the other KANU members within Kericho County. Their case is that the 2nd defendant, the National Executive Council of KANU, illegally and unprocedurally resolved to dispose of the land parcel Kericho Municipality LR No. 631/1034 also known as Kericho Block 5/422, without the consent and/or knowledge of the Kericho Sub-branch life members and other KANU members. It is averred that this was intended to deprive the plaintiffs of their proprietary rights over the suit property. It is pleaded that in a meeting held on 3 July 2013, it was resolved by the 2nd defendant that the suit land should not be sold but that they have now learnt that the 1st defendant is in the process of taking over the property. In the suit, the plaintiffs want a permanent injunction to restrain the defendant (probably 1st defendant) from trespassing into the suit land, costs and interest.

Together with the suit, the plaintiffs filed an application for injunction, to restrain the defendants from subdividing, selling, fencing, erecting any structures or doing any other act which is prejudicial to the plaintiff's proprietary interest in the suit property. In the application, it is averred that the defendant (not specified which defendant) has demolished their KANU sub branch office. The supporting affidavit is sworn by the 1st plaintiff. He has stated that the land is registered in the name of three trustees who have since died. It is deposed that in the month of February 2015, the 2nd defendant trespassed into the suit property, destroyed the fence and demolished their sub-branch office under unclear circumstances. It is their view that the defendants have no legal right to interfere with the property.

The defendants entered appearance and filed a joint defence. They pleaded inter alia, that the property was legally and procedurally sold by the 2nd defendant. It was also pleaded that there have been previous proceedings, being ***Kericho Civil Suit No. 77 of 2013, Joseph Kiplangat Soi & 2 Others vs Nick Salat & Others*** which has been determined, and that this suit is therefore *res judicata*. The defendants also filed a notice of preliminary objection that the suit offends the provisions of Section 40 (1) and (2) of the Political Parties Act, Act No. 11 of 2011; the provisions of Article 21 (1) of the KANU Constitution; and that the suit is *res judicata*.

When the matter first came before me, I directed that an appropriate application codifying the issues in the preliminary objection, be filed. That is how this application came to being.

The plaintiffs have opposed the application through the replying affidavit of Wesley Kibii arap Ruto, the 1st plaintiff. He has averred that this suit does not offend the provisions of Section 40 (1) and (2) of the Political Parties Act; that the suit is not *res judicata* since the parties herein are not similar to the ones in *Kericho HCCC No. 77 of 2013*; and that the application is an abuse of the court process.

In his submissions, Mr. Orina for the applicants, submitted that the dispute herein ought to have been referred to the tribunal established by Section 39 of the Political Parties Act. It was his view that the dispute herein is between a member of a political party and the party itself and therefore ought to be

referred to the tribunal. He also submitted that Article 21 of the KANU constitution, provides for a dispute resolution committee, which is a condition precedent to a member resorting to a court of law. He relied on the case of *Francis Mwangi Muturi & 2 Others vs Kanja Njeru & 2 Others (2009) eKLR*. He further submitted that the 2nd and 3rd plaintiffs were in attendance in a meeting held on 3 July 2013, whereby it was resolved that the suit *Kericho HCCC No. 77 of 2013*, be resolved and a consent later entered into compromising the suit. He submitted that the case is *res judicata*. He also submitted that according to the KANU constitution, it is only the trustees who can sue or be sued on behalf of the party. He submitted that the plaintiffs are not trustees of KANU and therefore lack *locus standi*.

Ms. Chepkurui Koech for the plaintiffs, on her part, submitted that the Kenyan Constitution at Article 48 provides for access to justice and that the provisions of the Political Parties Act and the KANU constitution cannot override the constitution. She also submitted that this suit is not *res judicata* as the present suit involves different issues and different parties. She was further of the view that the case discloses a reasonable cause of action.

I have considered the matter and the submissions of counsel. It is apparent that I need to decide the following issues :-

- (i) *Whether this suit is res judicata.*
- (ii) *Whether this suit offends the provisions of Section 40 (1) and (2) of the Political Parties Act.*
- (iii) *Whether this suit offends the provisions of the KANU Constitution.*
- (iv) *Whether this suit is vexatious, frivolous and does not disclose a reasonable cause of action.*

Issue 1 : Is this suit res judicata ?

It has been argued by the defendants, that there has been a previous suit, *Kericho HCCC No. 77 of 2013* which has been resolved. The applicant did not annex pleadings of this suit save for a consent order said to have been issued on 11 December 2014. The only way one can tell whether a current suit is similar to a previously decided suit, is by annexing the pleadings of the former suit. It is not enough to merely state that a suit is *res judicata* to a previously decided suit and hope that the court will go out of its way to find material for the applicant. It is upon the applicant to place before court the pleadings of the other suit and all other relevant material so as to demonstrate the similarity between the current suit and the previously decided suit.

Without pleadings having been annexed, I am unable to tell what the dispute was in the suit *Kericho HCCC No. 77 of 2013*. Neither can I tell whether or not this suit is *res judicata* *Kericho HCCC No. 77 of 2013*, merely by looking at the consent order annexed.

It was mentioned that the plaintiffs were present in a meeting which resolved that the matter *Kericho HCCC No. 77 of 2013*, but no minutes of such meeting have been annexed, and I cannot tell whether the plaintiffs participated in any such meeting.

If I am to assess whether this suit is *res judicata* by merely looking at the Order annexed and the documents filed by the parties, I will hold that the suit is not *res judicata*. From what I can discern from the limited material in the record of this case, in the earlier suit *Kericho HCCC No. 77 of 2013*, three plaintiffs sued KANU and other parties, seeking to stop the sale of the suit property. Through a ruling dated 27 January 2014, Waithaka LJ directed the parties to pursue their dispute before the Political Parties Disputes Tribunal. She in the meantime ordered a stay of sale of the suit property. It appears as if the parties compromised the case, which paved way for the transfer of the suit property to a company known as Simbagate Holdings Limited who are the current proprietors of the property.

In this suit, the plaintiffs want a permanent injunction to stop the defendants from interfering with the suit property. To me, the matters pleaded in this case and in the case *Kericho HCCC No. 77 of 2013* are

different. The prayers are also different. I think the doctrine of *res judicata* does not apply in those circumstances.

My determination on the first issue is that the plaintiffs have not tabled before me material that will make me reach the conclusion that this suit is *res judicata* Kericho HCCC No. 77 of 2013.

Issue 2 : Does this suit offend the provisions of the Political Parties Act ?

It was submitted that the dispute herein ought to be referred to the tribunal established by the Political Parties Act. I have looked at the Political Parties Act. Section 39 (1) of the statute does establish a tribunal known as the Political Parties Disputes Tribunal. The jurisdiction of the tribunal is provided for in Section 40 which is drawn as follows :-

40. Jurisdiction of Tribunal

(1) The Tribunal shall determine—

- (a) disputes between the members of a political party;*
- (b) disputes between a member of a political party and a political party;*
- (c) disputes between political parties;*
- (d) disputes between an independent candidate and a political party;*
- (e) disputes between coalition partners; and*
- (f) appeals from decisions of the Registrar under this Act.*

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

It was argued that the dispute herein is between a member and his political party, which is captured by Section 40 (1) (b) above. However, the dispute herein is not purely between a political party and a member. The dispute also involves the 1st defendant and it has not been stated that the 1st defendant is also a member of KANU. The 1st defendant cannot therefore be submitted to the jurisdiction of the Political Parties tribunal. It follows therefore that this dispute, is not a dispute that only involves a member of a political party and the party and cannot be a dispute that can fall within the jurisdiction of the Political Parties Disputes Tribunal.

The objection based on the argument that this dispute ought to be forwarded to the political parties tribunal therefore fails.

Issue 3 : Whether the suit offends the provisions of Article 21 (1) of the KANU constitution.

Article 21 of the KANU constitution provides for KANU's dispute resolution mechanism. It provides as follows at Article 21 (1) and (2) :-

21 (1) No member, as a condition-precedent for membership to 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 herein 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 member shall refer the same to the 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.

It will be observed from the above that for electoral disputes, KANU has established an Elections Appeals Tribunal for resolution thereof, and for other disputes, the same are supposed to be referred to arbitration.

I however do not think that this dispute falls within the ambit of Article 21 of KANU's constitution. It is not an electoral dispute and cannot therefore be referred to the Elections Appeals Tribunal. It may fall within the purview of "any other dispute", but as I have explained in my discourse above, the dispute herein is not purely between KANU and its members. It encompasses another party who is not a KANU member and who cannot therefore be subject to the provisions in the constitution of KANU.

I am therefore unable to hold that the dispute is one which needs to be referred to the internal dispute mechanism provided by the KANU constitution.

Issue 4 : Does the suit disclose any course of action or is it frivolous, scandalous and vexatious ?

I have stated earlier that the plaintiffs in this case want orders of permanent injunction to restrain the defendants from the suit property and to restrain them from doing any other act which is prejudicial to their proprietary interest. It is not clear to me why the plaintiffs want these orders, for KANU is no longer the registered proprietor of the suit property. Neither is the 1st defendant the registered proprietor thereof. I am unable to see why he was sued, and why the plaintiffs would wish him to be permanently restrained from the suit property. The property is now held by Simbagate Holdings Limited who are not parties to this suit. It is not alleged that the property was fraudulently transferred to Simbanet Holdings Limited. I am unable to see the basis upon which the plaintiffs can seek the orders that they have sought in this suit. In other words, I do not see what their cause of action is. It is either that the case of the plaintiffs is hopelessly pleaded or it may be that they really do not have a cause of action. Whichever way, I am unable to see what the basis of their claim is.

I also note that the 2nd defendant is the National Executive Council of KANU. It has not been shown to me that this is a legal person in law. If the plaintiffs were aggrieved by an action of KANU, then the entity to sue is KANU, for according to Section 16 of the Political Parties Act, a political party registered under the Act, is a body corporate with perpetual succession and capable of suing and being sued in its own name. I do not see on what basis the National Executive Council of KANU is being sued and I doubt whether such entity can be sued, for as far as I am concerned, it lacks legal capacity to sue or be sued.

In light of the above, I am of the considered view that this suit does not disclose any cause of action, and is frivolous and vexatious. I have little option but to have it dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 30th DAY OF OCTOBER, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of:

Ms. Chepkurui Koech for Plaintiffs/Respondents

N/A for M/s E.M.Orina & Co. for Defendants/Applicants

Court assistant- Mr. Kenei