REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS APPLICATION NO.242 OF 2009

REPUBLIC ..... APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE COURT AT MAKUENI ..... RESPONDENT

ATHANAS NGANDA .....1ST INTERESTED PARTY

PETER MWANTHI ..... 2ND INTERESTED PARTY

EX-PARTE: THE COUNTY COUNCIL OF MAKUENI

RULING

Pursuant to the leave granted by **Lenaola J.** on 20th July, 2009, the ex-parte applicant filed the substantive Notice of Motion on the same day. In the said Notice of Motion, the applicant sought the following orders:

"(a) .....

(b) ***That an order of Certiorari do issue to remove into this court for purposes of being quashed the order of the Respondent herein made on 8.7.2009 in Makueni PMCC No.126 of 2009;***

(c) That and order of prohibition do issue against the respondent herein prohibiting the said Respondent from hearing, continuing or in any other manner whatsoever, entertaining Makueni PMCC No.126 of 2009;

(d) That costs of this Application be paid to the ex parte Applicant.

The application was based upon the grounds set out in the statutory statement and the affidavit of one, **Danson N. Ngugi**. Briefly the facts leading to the application as can be gleaned from the aforesaid documents are that on 25th June, 2009, the applicant held a meeting whereat its annual budget was read and tabled. At that meeting it was also resolved that an Annual General Meeting (AGM) be held on 8th July, 2009 at 10 a.m. **Danson N. Ngugi**, a clerk to the applicant duly prepared and served Notice of AGM aforesaid to all members of the council and also published the said Notice on the applicant's Notice Board. However, on or about 8th July, 2009, the interested parties successfully obtained from the respondent orders of injunction against the applicant restraining it from holding the AGM. It is however,

a mandatory requirement of law that all local authorities hold their annual general meetings not later than 15th August, of each year. The applicant's case therefore, is that unless the orders sought were granted, the applicant would be rendered incapable of complying with the said mandatory statutory requirements. The case for the applicant was further that the respondent lacked jurisdiction to issue the orders of injunction and the interested parties if they felt aggrieved by the decision to hold the AGM, they should have filed Judicial proceedings instead of seeking injunctive orders by way of a suit. On that basis, the applicant mounted these proceedings to quash the decision of the respondent.

In reply, the interested parties through the 1st Interested Party swore an affidavit. They deponed that though on 25th June, 2009 they had a budget day, no full council meeting had been called. It was also not agreed that the AGM be held on 8th July, 2009. Therefore the Notices for the AGM by the clerk were issued without the authority and sanction of the full council. That in the suit they filed, they only challenged the Notices aforesaid. Thus they did not by their suit bar the holding of any other AGM lawfully called subsequent to 8th July, 2009.

When the motion came before **Lenaola J.** for inter partes hearing on 30th July, 2009, he directed that the same be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. However, soon thereafter, **Lenaola J.** left the station on transfer. It therefore fell on his successor, **Waweru J**. to craft and deliver the ruling. On 17th March, 2010, **Waweru J.** indicated that he could deliver the ruling on 4th June, 2010. This however, never came to pass as **Waweru J** was subsequently to leave the station on transfer as well. He however, carried along the file with the hope of crafting the ruling. On 17th November, 2011, **Waweru J.** returned the file without the ruling as he had been unable to craft the same due to his busy work schedule at his new division in the High Court of Kenya at Nairobi. He therefore requested me to decide on the fate of the application.

On 30th November, 2011, I summoned the parties involved and they all agreed that since they had all filed and exchanged written submissions, I should act on the same, craft and deliver the ruling. I so ordered.

I have had occasion to read the statement of facts, the verifying affidavit together with the annextures thereto, the replying affidavit and the annextures thereto, rival written submissions and the authorities cited. As I see it, the issue for determination is whether the respondent may have exceeded its mandate by issuing orders on 8th July, 2009. The order complained of was in these terms:

"***1. That the application be and is hereby certified urgent.***

2. That the respondent, his agents and or servants are hereby restrained from convening an annual General Meeting until this application is heard and determined.

3. That this application be heard interpartes on 20th day of July, 2009".

From the foregoing, it would appear to me that the orders sought to be quashed, lapsed on 20th July, 2009. It is trite law that judicial review orders do not lie where there would be no useful purpose to be served. The orders sought to be quashed by way of certiorari having lapsed, is there anything left for this court to quash. I entertain doubts.

How about the order of prohibition. The same is sought against the respondent to prohibit it from hearing, continuing to hear or in any other manner whatsoever entertaining Makueni PMCC No.126 of 2009. It is instructive that the applicant was not a party to that suit. That suit was between the interested parties and the Clerk, County Council of Makueni. How can a court of competent jurisdiction as the respondent be prohibited or barred from carrying out or performing its statutory duty of hearing a case by a party who was not a party to the said suit. A court cannot be prevented from hearing a case forever by someone who was not a party to the case. The case has to be determined in one way or another.

Reading the intitulement of the case, filed by the interested parties with the respondent and indeed the plaint and in particular paragraph 2 thereof, it is abundantly clear that it is the clerk to the applicant who was sued and not the applicant. The interested parties were clear that "***the respondent was sued in his own capacity as a clerk to the county of Makueni.***" The order issued was therefore directed at him and not the applicant. The applicant cannot therefore seek to quash an order which was not directed at it.

Even assuming that it was the applicant who had been sued, can an interlocutory injunction issue against it. The applicant thinks not and in support thereof relies on the decisions of **Mwera J.** in **HCC.Misc. Appl. No.241 of 1999, Republic Vs. Thomas Kitonga Kisome** and **Ang'awa J**. in **HCCC No.829 of 2003 Ali and others Vs. City Council of Nairobi** (***UR***). In all these cases the learned judges held inter alia that no injunction could issue against a local authority because it is akin to issuing an injunction against the government.

On the other hand, the interested parties take the view that the applicant just like any other subject is amenable to injunction. The only time he is not amenable is when the provisions of section 16(2) of the **Government Proceedings Act** come into play. In other words they are contending that a local authority is not government and can be sued and be sued in its name.

My view is as follows:

Section 162) of the government proceedings Act provides:

"... 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....."

Further, section 28(3) of the Local Government Act provides inter alia as follows:

".....Every county or town council shall, under the name of 'the county council of.....' or 'the town council of ....' as the case may be, be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued and acquiring, holding and alienating land."

Finally, government is defined in section 3(1) of the interpretation and general provisions Act as:-

"the government means the government of Kenya."

From all the foregoing, it is clear that there is no explicit provision that no injunction can issue against a local authority. I say so because if a local authority clan sue and be sued in its name, then I do not see why an injunction as remedy cannot issue at its instance or against it. In arriving at this conclusion I have received support from the decision of **Lessit J.** in **Onesmus Masika & 9 others Vs. Town council of Matuu, HCCC No.47 of 2006** ***(UR).*** The upshot of the foregoing is that injunctions can issue against local authorities.

In this case, the injunction was issued against the clerk to the applicant in his own capacity. The suit may or may not have been mounted in a proper court. However, the matter before the court concerned the clerk to applicant's conduct in issuing an order under section 74 of Cap 265. They contended that the notice calling for AGM on 8th July, 2009 was unlawful and prayed for an order restraining the clerk from commencing the meeting. Of course the jurisdiction of the respondent under Cap 265 is limited only to matters of election of Councillors to the local authority under section 61 and disqualification therefrom under section 63 A and 68 of the same Act. However as I have already stated the suit did not involve the applicant. In any event, the case had been set for interpartes hearing on 20th July, 2009 which was sometime away from 15th August, 2009. The same argument would have been advanced or canvassed before the said court for a ruling to be made thereon. No reason(s) have been advanced as to why the applicant would not have waited for such interpartes hearing to ventilate its

concerns.

The injunction obtained was against the clerk to restrain him from doing an unlawful thing. The injunction laid against him and not against the applicant. The suit again was against the County clerk and not the applicant. The application lacks merit. It is dismissed with costs to the Interested Parties.

Dated and **delivered** at **Machakos**, this **16th** day of **January**, 20**12**.

ASIKE-MAKHANDIA

JUDGE