



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

PETITION NO. 39 OF 2011

01. MURABU CHAKA
02. MSHENGA V. RUGA
03. JUMA G. BWENI
04. NGOME C. KIDILO
05. MBITO MONGO
06. MATHIAS MUTUA
07. ANTHONY LUKUNI
08. IDD MASEMO
09. NASSIR KILANGA
10. FATUMA NCHIZUMA
11. SAID NZUGA
12. HASSAN A. JABIR
13. MWENDA CHIRIMA
14. GLADYS T. NZOTSO
15. SAID KALIMA
16. MUSA A. MUSA
17. SWALEH SIMBA
18. HAMISI J. RASO
19. JOHN M. MBONDO
20. MDUNE J. NYONDO
21. ALI LUVI
22. MIDIAD K. RERI
23. JERUMANI MAKRAA.....PETITIONERS

VERSUS

1. NDURUMO WA GAKUI
2. HATIBU ABDALLA MWASHETAN.....RESPONDENTS

R U L I N G

1. By a notice of motion dated 15th July, 2011, the petitioners who are all councilors with the county council of Kwale, moved this court for orders *inter alia* of temporary injunction; firstly restraining the 1st respondent Ndurumo wa Gakui who is a county clerk to the County Council of Kwale from conducting and or participating in elections scheduled for 18th July, 2011 pending the hearing and determination of this petition; secondly, an order restraining the 2nd respondent or any other person (s) acting on his behalf from threatening the petitioners with death and in particular warning them from participating in any elections of the council pending hearing and determination of this petition.

2. On the 15th July, 2011 the petitioners motion was certified as urgent, and interim orders were granted pending the inter parte hearing of the motion. The notice of motion dated 15th July, 2011 was subsequently served on the respondents. The motion was heard *inter partes* on 28th July, 2011. The ruling was reserved for today. However, the court gave further interim orders varying the orders of 15th July, 2011 and granting liberty to the 1st respondent to publish an appropriate notice in the local daily for the holding of an annual meeting of the council and elections and also restraining the respondents from interfering with the petitioners' right to campaign for the elective positions.

3. In the affidavit which was sworn by the 1st petitioner Murabu Chaka it was deponed that the petitioners had not been served with an appropriate notice for the holding of the annual general meeting which was scheduled for 18th July, 2011. Only the 1st petitioner was served and even the purported service on the 1st petitioner was alleged to be defective as he was only given 5 days notice instead of the required 7 days.

4. The respondents swore replying affidavits in response to the affidavit sworn by Murabu Chaka. However, during the hearing of the motion counsel for the respondents opted to forego the replying affidavits in order to speed up the hearing of the motion. This was because the petitioner sought to have the hearing of the motion adjourned to enable them respond to the issues which were raised in the replying affidavit. Thus the motion was argued based on the law only. That being the position the issue of the alleged non service of the notice for the annual meeting was not disputed.

5. It is clear that section 76 (1) of the Local Government Act requires that a notice period of at least 7 days be given before the holding of the annual general meeting of a local authority. In this case, it was evident that the notice which the 1st respondent purported to give did not comply with section 76 (1) of the Local Government Act. Given that section 29 as read with section 74 of the Local Government Act gives the deadline for carrying out elections of the council. It became imperative that interim orders are given by the court to enable the 1st respondent comply with that deadline. Indeed, the petitioners' complaint was that the law was not complied with. Although County Council of Kwale is a body corporate, the responsibility to issue a notice of the annual meeting is a statutory function to be undertaken by the County Clerk who in this case is the 1st respondent. Thus the petitioners have properly moved the court by seeking orders against the 1st respondent who is the county clerk to ensure that an appropriate notice is given to them in accordance with the law.

6. The petitioners also complained that the 2nd respondent interfered with their fundamental right to campaign for positions during the annual general meeting. Under Article 38 of the constitution, the petitioners have a right to campaign for elective public office and to participate in elections for such office. Any attempts to interfere with the exercise of this right would be a violation of the petitioners' fundamental right. The issue as to whether the petitioners' fundamental right was actually interfered with by the 2nd respondent is one that will have to be determined during the hearing of the main petition. However, since the elections have to be held before the hearing of the petition, it was necessary out of abundant caution to issue restraining orders against the 2nd respondent as sought by the petitioners.

7. These are the reasons that informed my granting of the interim orders. The above being the position, the notice of motion dated 15th July, 2011 is disposed of by my confirming the interim orders granted on 28th July, 2011. Costs of the application shall be in the cause. Those shall be the orders of the court.

Dated and delivered this 3rd day of August, 2011.

H. M. OKWENGU
JUDGE

In the presence of:-

..... for the Petitioners

..... for the Respondents
..... Court Clerk