



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL MISCELLANEOUS APPLICATION 16 OF 2008

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE SIAKAGO.....RESPONDENT

EX-PARTE

1.JOSEPH MUNYIITA

2.ISA IRERI NGUNIA

3.CRISPIN NJAGI

4.SILAS MURIA NYAKI

5.AGNES WAENI

6.FELISTA KANINI NGARI

7.JACTON MWANIKI NJUKI

8.JOSEPH NYAGA NJUKI

9.DANIEL IRERI NGARI

10.ANTONY NYAGA NJUGUNA

11.LUCY WANJIKU NYAGA

12.BENJAMIN NZAU MULU

13.WILIAM MUKUI NYAGA

14.PETER MUKENGWA WAMBUA.....APPLICANTS

AND

1.DUNCAN IRERI MBUI

2.THE CLERK COUNTY COUNCIL OF MBEERE.....INTERESTED PARTIES

RULING

The Ex-parties applicants who are 14 in number through Morris Njage & Co advocates moved this court by way of judicial review on 13/03/08 under a Certificate of Urgency. They were seeking the court's leave to apply for an order of certiorari to remove into the High Court for the purpose of being quashed the undated order made by the principal magistrate Siakogo in Principal Magistrate Civil Case 606/08.

The copy of the said order which was attached to the application for leave was not dated. The same was however not a certified copy and its authenticity is questionable. I say so because the 1st interested party has in his replying affidavit dated 2.7.2008 annexed a copy of the same order which though not certified was clearly dated. That is nonetheless not the issue.

I have carefully gone through the pleadings to herein including the application for leave and the statements of facts and the annexures thereto. I have also considered the replying affidavits and, the preliminary objection and grounds of opposition the authorities cited and the law applicable in this matter. I will be very brief in this ruling because in my considered view with the application as submitted by counsel for the interested party is incurably defective and amount to an abuse of the court process. I say so because the application was brought to court pursuant to an interim order of injunction granted or issued by the principal magistrate at Siakago court. As rightly stated by counsel for the interested party such an order was only valid for a period of 14 days. Indeed the disputed order clearly indicated that the application was to be heard inter parties on 17/03/08 instead of waiting for the application to be heard inter-parties, the ex-parties applicant rushed to the high court under certificate of urgency and filed the application for leave to file for certiorari orders. His first option should have been to challenge that order before the same magistrate and seen order been set aside. The applicant would then have had the opportunity to give their reasons for asking that the interim order s be set aside. I agree that rushing to this to this court for orders to quash interim orders while there were other options available to the ex-partie applicants was tantamount.

To abuse of the court process although consent for the ex- partie applicants submitted that there were stay orders against the magistrate order, no such orders were annexure to the application. This therefore means that the magistrate orders expired as at 17/03/08 and there would be nothing to quash. This application was therefore a non-starter. I would also wish to point out that the council which falls under the Local Government act does not fall within the purview of the Government proceeding Act. The clerk to the council unlike the Attorney General does not represent the Government of Kenya. An injunction can therefore rightly issue against him. These are nonetheless issues that ought to have been confessed before the trial magistrate in an application to set aside the ex-partie orders or at the inter partie hearing. Judicial review proceeding must not be seen as a panacea all cases. The court should only be moved in that jurisdiction where no other appropriate remedies are available. For the above reasons I am satisfied that the notice of the, option before me is not properly before the court. I need not therefore discuss the other issues on merit which have been raised by the ex partie applicant -: i.e. as to whether the elections were properly conducted or not. This notice of motion is devoid of merit .I dismiss the same with costs to the interested parties.

W. KARANJA

JUDGE

15/06/09

Delivered, signed and dated at Embu this 15th day of June, 2009.

In presence of:-

Mr. Okwaro - also holding brief for Mr.Njagagua for 2nd interested party.

W. KARANJA

JUDGE

15/6/2009