



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE 106 OF 2009

PONYOCHI KUNYOBO & 7 OTHERS ::::::::::::::::::::::::::::::::::: PLAINTIFF

V E R S U S

MUNICIPAL COUNCIL OF KAKAMEGA ::::::::::::::::::::::::::::::::::: 1ST DEFENDANT

THE CLERK TO THE MUNICIPAL COUNCIL OF KAKAMEGA :::: 2ND DEFENDANT

JOSEPHAT SERENGE ::::::::::::::::::::::::::::::::::: 3RD DEFENDANT

R U L I N G

The applicants herein filed this application seeking orders that the 3rd respondent be restrained from assuming office as the Mayor or in any manner acting as a Mayor of the Municipal Council of Kakamega and that the respondents be restrained from holding elections of the Deputy Mayor and Chairmen of various committees.

Mr. Anziya, learned counsel for the applicants submitted that the mayor for the Municipal Council of Kakamega was to be elected on 10th July, 2009. The 3rd respondent was appointed as the mayor and that the election was illegal as **section 14 (1) and (2)** of the Local Government Act (Cap 265) was contravened. Counsel submitted that the person who chaired the meeting was not the outgoing mayor as provided by **section 14** of the Local Government Act.

Counsel for the applicant further submitted that the person who chaired the elections did not wait for one group to nominate its candidate. It's alleged there was chaos but it is not stated who caused the chaos. The 1st applicant was a candidate for the post of mayor and was forcefully removed from the venue by police who were purportedly effecting a court order which had not been served upon the 1st applicant.

Mr. Fwaya, counsel for the 1st and 2nd respondents submitted that the meeting of 10th July, 2009 was properly constituted. The 2nd defendant was served with a court order emanating from Kakamega Chief Magistrate Civil Case Number 237 of 2009 which had been issued on 9th July, 2009. This order called upon the 2nd respondent to ensure that the 1st applicant did not participate in the voting. The 1st

respondent complied with that order.

Counsel for the 1st and 2nd respondent further submitted that the 1st applicant is free to participate in subsequent elections as the court orders granted on 9th July 2009 were not extended on 21st July, 2009 when the matter was fixed for inter partes hearing. The Kakamega Municipal Council lacks officials and the elections of committee chairmen should be allowed to proceed and that public interest should not be compromised by personal interest.

Mr. Wanyonyi, learned Advocate for the 3rd respondent submitted that the applicants' application is fatally defective as it was amended yet there is no provision in law for amendment of chamber summons or notice of motions. Counsel urged this court to expunge the amended chamber summons from the records. Learned counsel further submitted that there was a court order in CMCC 237 of 2007 restraining the 1st applicant from participating or attending the meeting convened for elections on 10th July, 2009. The 1st applicant was not supposed to be in that meeting. The court order has the force of law and its merits would be determined during the hearing of that case.

Learned counsel for the 3rd respondent further submitted that the procedure for the meeting was agreed upon by consensus by the participants and that the 2nd respondent advised on the person who was to chair the meeting. A public officer by the name Musungu was agreed upon because of his neutrality. Counsel submitted that there was no competitor for the post of mayor and the 3rd respondent was elected unopposed. The 3rd respondent was sworn in and is discharging his duties as a mayor of Kakamega Municipal Council.

The applicants in an application for injunction must show that they have a prima facie case with a probability of success and that they would suffer irreparable damages not capable of compensation should the court decline to grant the orders sought or that the balance of inconvenience tilts in their favour. The applicants contend that there were no lawful elections held on 10th July, 2009 and that the law governing those elections was contravened. The 1st applicant contends that his rights as a councilor were violated as he was whisked out of the election venue before the elections yet he had not been served with a court order.

From the respondents' annextures, a notice was issued on 3rd July 2009 for the Annual General Meeting to be held on Friday 10th July 2009 at 10.00 a.m. in the Council Chambers. The Agenda for the meeting was as follows:-

1. ***Election of the presiding Chairman***
2. ***Election of the Mayor***
3. ***Election of the Deputy Mayor***
4. ***Swearing in of His Worship the Mayor and Deputy Mayor***
5. ***Election of Chairmen to various committees***
 - (i) ***Finance, Staff & General Purposes Committee***
 - (ii) ***Town Planning and Works Committee***
 - (iii) ***Education, Housing and Social Services***
 - (iv) ***Public Health and H.I.V. Committee***
 - (v) ***Environment Committee***

(vi) **Audit Committee**

6. Constitution of members to Committee.

The first respondent has also annexed the minutes of the above meeting held on 10th July 2009 and those present at the meeting were :-

1. **Councilor H.P. Kunyobo**
2. **Councilor B.K. Andabwa**
3. **Councilor M.L. Bitinyu**
4. **Councilor P.K. Lutta**
5. **Councilor V.A. Nyapola**
6. **Councilor J.M. Shichele**
7. **Councilor J.A. Omukanda**
8. **Councilor J.T. Serenge**
9. **Councilor C.L. Okanga**
10. **Councilor G.E. Baraza**
11. **Councilor W.I. Khakabo**
12. **Councilor J.U. Anjere**
13. **Councilor H.M. VAGHELA**
14. **I. Musungu (P/Officer)**

There were also people in attendance who are listed as follows:-

1. **Provincial Local Government Officer (PLGO)**
2. **Gabriel Kinaiya** - **Town Clerk**
3. **Kennedy Opio** - **D/Town Clerk**
4. **Albert Ariku** - **Town Treasurer**
5. **Shalakha Munialo** - **Deputy Treasure**
6. **Hannington Maina** - **Administrative Officer**
7. **Everlyne Omunjalu** - **Public Health Officer**
8. **Laban Omwerema** - **Administrative Officer**
9. **Yuna Musungu**
10. **Pamela Ongalo** - **Social Welfare**

11. **Kevin Safari**

- **Internal Auditor**

12. **Sylvester Odhiambo**

- **Enforcement Officer**

13. **M'Mosi Otundo**

The attached minutes have only three main items. The first one is titled preamble/preliminaries. The Town Clerk, 2nd defendant herein, read the court order to those present during the meeting and ultimately the 1st plaintiff was “*moved out and the meeting proceeded*”. The 2nd defendant informed the councilors that the court order had to be complied with.

The second item was the election of the presiding Chairman and Public officer Isaac Musungu was unanimously agreed upon to chair the meeting. The third item was the election of the mayor. Councilor Josphat Serenge was elected unopposed after the presiding chairman asked if there was any other proposal for the seat three times with sufficient interval of time without response. The minutes indicate that after the new mayor took oath of office, chaos erupted and the meeting was called off.

The applicants herein are alleging that the 3rd respondent's elections contravened the law. **Section 14** of the Local Government Act, Cap 265 provides as follows:-

(1) The mayor shall be elected by the councilors present, by secret ballot, and such election shall be the first business transacted at the first meeting of the council, and thereafter at each second annual meeting of the council.

(2) On the election of the mayor the outgoing mayor shall preside:

Provided that at the first meeting of the council after its constitution, and subsequently if the office of the outgoing mayor is vacant from any cause, or if the outgoing mayor is a candidate for re-election as mayor, or if the mayor is for any reason unable to attend, the councilors present shall elect a chairman from among themselves (other than a candidate for the office of mayor) who shall preside for the purposes of such election.

(3) The person presiding at the election of the mayor shall have a deliberative vote only, and, in the case of equality of votes for two or more candidates, the election shall be determined by lot between those candidates.

(4) Notwithstanding subsection (1), no person who is a candidate for election to the office of mayor shall be entitled to speak or vote in the election.

From the above provisions, the outgoing mayor is supposed to chair such a meeting and if the mayor has offered himself for re-election then the councilors present are expected to elect one amongst themselves to chair the meeting for purposes of the elections. **Section 15** of the Local Government Act also requires that the Deputy Mayor be elected during the same meeting when the mayor is being elected.

In Kakamega CMCC 237 of 2009 the plaintiff is one **WELLINGTON INGANJI KHAKABO** who is a councilor at the Municipal Council of Kakamega. The defendants in that case are the 1st plaintiff herein, **PONYOCHI KUNYOBO** and the Town Clerk, Municipal Council of Kakamega. That suit was filed on 9th July, 2009 and the order extracted reads as follows:-

IT IS HEARBY ORDERED AS FOLLOWS-

(a) THAT this application be and is hereby certified as urgent and service of the same be dispensed with in the first instance.

(b) THAT pending the hearing and determination of this application a temporary injunction be

and is hereby issued restraining the 1st defendant from participating or offering himself for election for any post in the Mayoral, Deputy Mayoral, and position in any of the Committees within the Municipal Council of Kakamega and the 2nd defendant to be temporarily restrained from allowing the 1st defendant into the venue of the elections and or participating in the election scheduled for 10/7/2009 of the Municipal Council of Kakamega.

(c) THAT the OCPD Kakamega to enforce the order that the same is fully complied with by both parties.

The 1st plaintiff was not aware of this order as he sat in the Council

Chambers on 10th July, 2009. The Town Clerk who is one of the defendants in the suit read the order and the 1st plaintiff was whisked out of the Council Chambers. The 1st plaintiff contends that he had offered himself to contest the position of the mayor. The process server's affidavit of service indicate that he was given the court order and other pleadings on 10th July, 2009 and served the 2nd defendant in his office. He went to serve the 1st defendant in the Council Chambers and saw two groups one led by Ponyochi Kunyobo seated on the left side and the other by Josephat Serenge whom I presume is the mayor who was elected. Although the process server states that he was given the documents to serve on 10th July, 2009, it is evident from his affidavit that he served the O.C.P.D. Kakamega Police Station on 9th July, 2009 at 4.30 p.m. in his office. This shows that there was still time to serve on the other defendants with the order on 9th July, 2009.

I do find that the court order obtained on 9th July, 2009 had the sole intention of blocking the 1st plaintiff from contesting the position of the mayor of Municipal Council of Kakamega. It is unfortunate that the Firm of Wanyama Wanyonyi & Company Advocates acted for the plaintiff in CMCC 237 of 2009 and are now acting for the 3rd defendant in this case who is the person elected as the mayor on 10th July, 2009. I do not wish to deal with the merits or otherwise of the court order but the manner in which it was served and the timing of the filing of the case leaves no doubt that the same was intended to block the 1st plaintiff from contesting the elections of the mayor. Counsel for the 1st and 2nd respondent contended that the order was not extended on 21st July, 2009 and therefore the 1st plaintiff is free to contest the position of Deputy Mayor or Committee Chairman.

Section 14 of the Local Government Act requires that in a meeting for the election of a mayor, the outgoing mayor or one of the councilors should preside over the meeting. This was not complied with. From the minutes of the meeting it is not known what is the position of I. Musungu in the Public Service. It is unfortunate that the Town Clerk who is the legal adviser to the council as provided in **section 129** and part 1 of the third schedule to the Act could not properly advise the council on this issue. The elections were therefore not conducted as per the law and cannot be held to have been valid.

Counsel for the third respondent has submitted that there is no provisions for amendment of chamber summons. I do not think that the law bars amendment to chamber summons and notice of motions. The plaintiff amended the plaint and the chamber summons. A meeting to elect the deputy mayor and Committee chairmen had been called for 20/7/09 and there was need to amend the chamber summons to capture that change of events. The third defendant has not shown what prejudice he has suffered as a result of the amendment. The amendment has not introduced any new issues. Further **Order VIA Rule 5** the court is empowered to allow amendments to any document. I do find that the amendment was in order and the amended chamber summons is correctly before the court. In **CENTRAL BANK OF KENYA VS KAMAL SHAH & NORLAKE INVESTMENTS LTD. (High Court Miscellaneous application No.427 of 2000)**, Milimani, Justice Azangalala allowed an application to amend a notice of motion.

The third respondent was elected unopposed. The minutes of the meeting indicate that there was chaos after the third respondent was sworn in. There were only twelve councilors in the council meeting. Since the 3rd respondent was elected unopposed, it follows that all the twelve councilors supported his

election. It is therefore unclear as to why there would be chaos in an election where all the electors support one candidate.

I am convinced that the plaintiff herein has established a prima facie case with a probability of success. The 1st plaintiff was denied the right to participate in the elections and that loss cannot be quantified. Similarly, the six other plaintiffs were denied the right to participate in properly conducted elections. Police officers were stationed at the council chambers to evict anyone who opposed the elections.

Litigation should be used for settling rightful claims but not to block others rights. If the plaintiff's intention was to ensure that the elections are properly conducted he could have pleaded for the entire elections to be postponed instead of targeting one individual. This court will not sit and watch helplessly while parties use the courts to enhance their personal interest. Both election winners and losers should be able to see that they have won or lost fairly.

I do find that the election of the 3rd respondent as the mayor of the Municipal Council of Kakamega was not done in accordance with the law. With all the irregularities, it will not be fair and just to allow the said election to stand. It is unfortunate that thirteen councilors could not assemble and cast their votes and elect one of their own as the mayor of the Municipal Council of Kakamega. I do therefore grant the plaintiffs' application herein and do order that the 3rd respondent is hereby restrained from assuming the offices of the mayor or in any other manner acting as the mayor of the Municipal Council of Kakamega. I do further order that the 1st and 2nd respondents ensure that fresh elections for the mayor, deputy mayor and committee chairmen are held within the next 21 days.

In the meantime, there shall be no vacuum as **section 13 (2)** of Cap 265 allows whoever was a mayor prior to the elections to continue in office until his successor is elected. Similarly **section 15 (2)** thereof allows the former deputy mayor to continue in office until his successor is elected and assumes office. In the same vein the former chairmen of the various committees should continue in office until their respective successors are elected. The respondents shall meet the costs of this application.

Dated, delivered and signed at Kakamega this 30th day of July, 2009

SAID J. CHITEMBWE

J U D G E