



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Miscellaneous Application 240 of 2009

COUNCILLOR JOHN MANG'UYE 1ST APPLICANT

COUNTY COUNCIL OF KITUI 2ND APPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE KITUI RESPONDENT

RULING

1. The Chamber Summons dated 14/7/2009 is premised on Order LIII Rules 1 and 2 of the Civil Procedure Rules and what is sought is that leave be granted to the Applicant to institute judicial review orders of certiorari and the proceedings in Kitui SRMCC No. 321/2009 be brought forth to this court and quashed. Further, that the orders of leave should operate as a stay of the proceedings.

2. I have read the Statement of Facts and the Verifying Affidavit together with its annexures and I also have before me, Kitui SRMCC No. 321/2009. What is uncontested is that on 30/6/2009, the 2nd Applicant issued a Notice for the convening of an Annual General Meeting of the County Council of Kitui and the same was scheduled for 8/7/2009 but on 7/7/2009, the subordinate court issued an order of injunction restraining the Council from holding the Annual General Meeting. On 8/7/2009, the said orders were stayed and on 9/7/2009, the initial orders were vacated as there was no appearance for the Respondents and the court for good measure added as follows:-

“the court orders that fresh notice for the election (be) given giving (sic) reasonable time for all the interested parties to be in attendance for the exercise”.

3. On 10/7/2009 the parties through their advocates appeared before the subordinate court and having heard them, the learned magistrate decided that “status quo” orders should be issued. That order was apparently unclear and in clarification he stated as follows:

“For avoidance of doubt and for elimination of any ambiguity in my orders, I grant stay of orders of 9/7/2009 and the purported intended meeting by the respondents should not be held until further orders of this court”.

4. On 13/7/2009, the advocate for the original Applicants appeared and stated that the Annual General Meeting had gone ahead and that he required orders that the Respondents who had been elected should not assume office. The orders were granted until hearing inter-partes on 21/7/2009. On the same day, an application to strike out the entire suit was filed and the issue raised is that the court had no jurisdiction to entertain the dispute. That application is pending undetermined.

5. I am now also aware that one other suit relating to the issue before me is pending before this court i.e. H.C.C.C. No. 216 of 2009 and an application for leave to institute contempt orders against the present Applicants is also pending before me i.e. H.C.C.Misc. No. 246 of 2009. Clearly therefore the plethora of applications before the subordinate court is a phenomenon now transferred to this court but that is a non-issue.

6. At this stage and having set out the background to the present Application, all I am required to determine is whether prima facie the subordinate court had the jurisdiction to determine the dispute before it. I say so because there is no doubt that the Applicants have an interest in the issues in contest.

7. I am aware of the decision of Mwera J in H.C. Misc. 241/199 – R vs Thomas Kisome ex-parte County Council of Kitui where the learned judge in circumstances involving the same County Council of Kitui, and in an episode that happened 10 years ago and with an uncanny resemblance to the present proceedings, concluded that a subordinate court had no jurisdiction to issue an injunction against a local authority and that any remedy in issues relating to elections or meetings of such authorities should be filed before the High Court.

8. Ang'awa J was more categorical in Ali & 3 Others vs City Council of Nairobi, (2003) KLR 596 where she held as follows:-

“The City Council of Nairobi is a local authority and just like the government no injunction can lie against it and its officers. The proper remedy in such a case should be an application by way of judicial review”.

9. Without predetermining the issues to be canvassed at the substantive hearing where prima facie the issue of jurisdiction is raised, it may mean that without it, all the proceedings before the subordinate court may well be a nullity.

10. Prima facie therefore I am satisfied that there is a good case to grant the leave sought.

11. As for the prayer for stay of proceedings, I will grant the order for reasons that elections have been held, whether legally or not, and no prejudice would be caused to any party if the orders are issued even as this court investigates the substance of the complaint.

12. In the event, prayers 2 and 3 of the Application dated 14/7/2009 are allowed as prayed.

13. Costs in the cause.

14. Orders accordingly.

Dated and delivered at Machakos this 20th day of July 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Mutia h/b for Mr Mutua for Applicant

ISAAC LENAOLA

JUDGE