



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISCELLANEOUS APPLICATION 242 OF 2009**

**COUNTY COUNCIL OF MAKUENI .....APPLICANT**

**AGAINST**

**THE PRINCIPAL MAGISTRATE'S COURT AT MAKUENI.....RESPONDENT**

**ATHANAS NGANDA ..... 1<sup>ST</sup> INTERESTED PARTY**

**PETER MWANTHI ..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Chamber Summons dated 14/7/2009 is premised on Order LIII Rule 1 (2) of the Civil Procedure Rules and in it the Applicant, County Council of Makueni seeks orders that leave be granted to it to apply for an order of certiorari to remove into this court for purposes of being quashed, the order of the Respondent Court issued on 8/7/2009 in **PMCC No. 126 of 2009** and also for leave to apply for an order of prohibition to prohibit the Respondent from hearing, continuing with or in any manner whatsoever entertaining the said suit. It is also sought that the leave, if granted should operate as a stay of all the proceedings in the aforementioned suit.

2. I have had occasion to read the Statement of Facts and the Verifying Affidavit together with its annexures and I also called for and have the original record in **Makueni PMCC No. 126/2009**. I have also taken into account the submissions by Mr O.N. Makau for the Applicant and I further note that the case being made out is as follows:-

The Applicant held a meeting on 25/6/2009 and its annual budget was read and tabled. At that meeting it was agreed that the Annual General Meeting would be held on 8/7/2009 and a Notice was duly issued to all Councilors including the Interested Parties who acknowledged receipt thereof. That on 8/7/2009, the Interested Parties obtained an injunction restraining the Applicant from holding its Annual General Meeting contrary to the provisions of the Local Government Act and yet, it is alleged, the subordinate court has no such powers. Further, that for want of jurisdiction the orders of injunction are a nullity and the same should be quashed.

3. As I understand it, at this stage, I am merely at this level supposed to determine if the Applicant has

a sufficient interest in the matter and whether in fact a prima facie case has been made for grant of the orders sought. In this case there is no doubt that the Applicant Council has a sufficient interest because when it is stopped by a court from performing statutory functions to wit hold an Annual General Meeting and conduct its day to day business, then it can challenge that decision.

4. Further, the only issue to address is whether at this level I can discern some evidence that the subordinate court may have exceeded its mandate by issuing orders of injunction as it did on 8/7/2009. I have been referred to the decision of Mwera J in **R vs Thomas Kitonga Kisome ex parte County Council of Kitui, Misc. Appl. No. 241/1999** where Mwera J held that a reading of Section 61, Section 63A, Section 65 and Section 66 of the Local Government Act alongside the provisions of Order XXXIX Rule 1 of the Civil Procedure Rules would lead one to the conclusion that a subordinate court had no power to issue injunctive reliefs against Local Authorities. He concluded by stating that the proper venue for determining such an issue is the High Court.

5. Ang'awa J in *Ali & 3 Others vs City Council of Nairobi* (2003) KLR 596 also 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 would be an application by way of judicial review”.**

6. Without prejudging the substantive proceedings, prima facie there may be a case that issues of the nature placed before the subordinate court may have been placed before it in error and the court may have exceeded its jurisdiction. Without jurisdiction, whatever orders are made are a nullity and prima facie law satisfied that there would be need to call the decision made on 8/7/2009, examine it and ultimately determine whether indeed the Applicant's contention can be sustained.

7. In the event I will grant leave as prayed in prayers (b) and (c) of the Summons dated 14/7/2009. The leave so granted is sought to be a stay of the decision in issue.

8. I have agonized over the issue of an order of stay. If I grant it, I would effectively be discharging the injunction and the Annual General Meeting would be held, elections conducted and the subsequent proceedings before me would be purely academic. If I do not grant, there is the risk that the Council may not hold elections before 15/8/2009 as it is the law. What to do?

9. After serious consideration of the issue the scales of justice would tilt towards my taking the cautious view that to grant the orders of stay would be a better and less painful decision as the effects can be mitigated in the ultimate decision that this court may make.

10. In the event prayers (a), (b), (c) and (d) of the Application dated 14/7/2009 are granted.

11. Costs in the cause.

12. Orders accordingly.

Dated and delivered at Machakos this 20<sup>th</sup> day of July 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Makau for Applicant**

ISAAC LENAOLA

JUDGE