



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISC CIVIL APPLI 409 OF 2006

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY WAY OF ORDERS OF MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CHAPTER 265 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE ILLEGAL, DISCRIMINATORY AND UNREASONABLE PURPORTED MAYORAL ELECTIONS OF THE CITY COUNCIL OF NAIROBI HELD ON THE 19TH JULY 2006

AND

IN THE MATTER OF

REPUBLIC.....APPLICANT

VERSUS

JOHN GAKUO 1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI..... 2ND RESPONDENT

DICK WATHIKA.....3RD RESPONDENT

FERDINARD WITITU.....4TH RESPONDENT

EXPARTE

MAIN KAMAU.....1ST APPLICANT

CHARLES KIYO MURATHA..... 2ND APPLICANT
KAVEMBA RICHARD MUTINDA.....3RD APPLICANT
BETHWELL OMONDI OKAL.....4TH APPLICANT
GEOFFREY MAJIWA..... 5TH APPLICANT
JAMES OUGO OPETE OPETE.....6TH APPLICANT
WESONGA MAURICE LENDI..... 7TH APPLICANT

RULING

The application before me is a notice of motion dated 27/7/09 brought pursuant to S 3, 3A and 63 (e) of the Civil Procedure Act. The Applicant's seek orders that the suit be marked as having abated, and in that alternative, the suit be marked as withdrawn with no orders as to costs and that each party do bear its own costs. The motion is supported by grounds found on its face and a supporting affidavit sworn by Maina Kamau on 27/7/09. The notice of motion is opposed and the Respondent filed a replying affidavit sworn by counsel for 1st and 2nd Respondent, Mr. J. Mugo, and grounds of objection both dated 7/8/09.

The ex parte applicants filed these Judicial Review proceedings challenging the election of the 3rd and 4th Respondents as Mayor and Deputy Mayor of Nairobi in elections held on 19/7/06. After leave had been granted and a notice of motion filed, the court gave directions on how the motion should proceed. In December 2007 there were other elections by which time the 3rd and 4th Respondents completed their terms and were elected members of parliament. The 1st Respondent has since retired as Town Clerk. That though the Applicant's counsel diligently took the necessary steps towards prosecution of this matter, it has been overtaken by events and that is why the prayers in the motion.

The Respondents contend that the application is bad in law, not made in good faith as relates to the issue of costs. Counsel urged that the application was brought under certificate of urgency, an indication of its importance. Upon service of the Respondents, the counsel was instructed to file a reply in which they expended time and incurred costs. That the Respondent also filed arguments with documents on which they expended time and expenses to prepare. That this matter was then delayed when the applicants filed an application dated 4/12/06 seeking leave of the court to adduce evidence by way of video recording of the proceedings of the Annual General Meeting on 19/7/06, at the hearing of the substantive notice of motion. That the Respondents again filed a replying affidavit opposing that application and subsequently the same was withdrawn on 29/1/08. According to the Respondent, it is the Applicant who blocked the expeditious disposal of the matter and the videos intended for use were served on 11/12/07, it took time to have it analyzed. Counsel also urged that under Order XXIII Civil Procedure Rule abatement of a suit is only available upon death of the parties. That under S 27 of the Civil Procedure Act, costs will normally follow the event unless for good reason the court orders otherwise. The main motion herein is a judicial review application brought pursuant to Order 53 Civil Procedure Rule. That being so, the applicant can not move this court under the Civil Procedure Act or its rules because they are not available in Judicial Review.

In interpreting S 8 of the Law Reform Act, the Court of Appeal in the case of **HOTEL KUNSTE V THE COMMISSIONER OF LANDS (1995 – 1998) KLR** held that Judicial Review is a special jurisdiction and neither the Civil Procedure Act nor its Rules apply. S 3, 3A and 63 (e) of the Civil Procedure Act which the Applicant has invoked do not apply to this application since Order 53 Civil Procedure Rule does not provide the procedure for approaching the court for such an application. The Applicant should have come under the inherent powers of the court.

I do agree with the Respondents counsel that a suit can only abate if the Plaintiff or Defendant dies and

the claim does not survive him in (see Order 23 Civil Procedure Rules). Neither the Applicants nor Respondents have died.

This notice of motion has indeed been overtaken by events. The Respondents have no objection to its withdrawal. The only issue left is whether the Applicant should bear the costs of the application. This application was filed in 2006 having been brought under certificate of urgency. The court after giving directions was ready to hear the parties on 16/10/06, but a supplementary issues arose and it was put off to be heard on 6/17/06. Later the Applicant filed the application seeking to adduce further evidence by way of video recording. The matter dragged on till it was overtaken by events with the elections that took place in December 2007.

Although S 27 of Civil Procedure Act does not apply to these proceedings, we can be guided by the principle in that section that costs follow the event. A lot of effort and preparation has been put in this matter, relying affidavits by Respondents, arguments and even authorities were filed by the parties. There were several appearances before the court. All these involve time and costs. The Respondents have incurred costs and expended time in preparation of this case. In fact when 3rd and 4th Respondent's term was drawing to a close in 2007, the Applicants should not have moved to withdraw the motion instead of letting the parties incur more costs.

In sum the notice of motion dated 4/8/06 is hereby withdrawn with costs to the Respondents.

Dated and Delivered at Nairobi this 13th day of October 2009.

R.P.V. WENDOJH

JUDGE

In the Presence of:-

Mr. Mugo for 1st and 2nd Respondent and holding brief for

Mr. Nderitu for the 3rd and 4th Respondent.

Ms Karanu for Applicants

Muturi - court clerk