



REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL CASE 138 OF 2007

JOHN M NYAGA PLAINTIFF

VERSUS

THE TOWN CLERK MUNICIPAL COUNCIL1ST DEFENDANT

THE MUNICIPAL COUNCIL OF EMBU 2ND DEFENDANT

RULING

Application dated 30/10/2007 seeks orders that defendants by themselves, their agents or anybody acting under the instructions of the defendants be restrained from barring the plaintiff from entering upon his office performing his duties as the mayor of the Municipal Council of Embu using facilities and enjoying the privilege of a Mayor to wit office space, the Mayoral car, Mayoral flag, Civic Regalia, Mayoral allowances and any other facility and / or privilege due to the office of the Mayor pending the hearing and determination of this case. The second prayer is for an order that the plaintiff applicant and his deputy be allowed to continue in office as Mayor and Deputy Mayor respectively to perform their duties / functions and to use the facilities as well as any facilities due to the Mayor and Deputy Mayor pending hearing and determination of this suit.

In the plaint filed by the applicant he seeks declaration that the Mayor is by law required to continue in office until election of another Mayor and a permanent injunction to restrain the Defendant from barring the Applicant from performing the duties of Mayor.

The application is based on the grounds stated in the application and supported by affidavit sworn by the applicant in which he swears that he was elected as councilor of the Municipal Council Kamiu Ward in the year 2002 and on 6/7/2006 he was elected Mayor. On 23/10/2007 the Minister dissolved all local authorities following dissolution of Parliament so as to pave way for fresh election. That on 24/10/2007 the Ag. Town Clerk locked the Applicants office and has since then denied him access and use of his said office of Mayor and has withdrawn from the applicant the Mayor's car, Mayoral flag, the Civil Regalia and is now preventing him from discharging duties as Mayor of Embu Municipality. That he is entitled to be in office until another Mayor is elected but now no other Mayor has been elected. That the action of the Town clerk is illegal and breach of the Local Government Act. Applicant relies on provision of Local Government Act Cap 265 Section 13 (2) of which states that subject to Section of the Mayor shall unless he resigns or ceases to be qualified or becomes disqualified continue in office until his successor is elected and assumes office Section 13(3). During the term of his office, the Mayor shall continue to be a member of the council notwithstanding the provisions of this Act and any rules made thereunder relating to the retirement of members of the council.

In reply the Town Council has filed an affidavit wherein he refers to plaintiff as “**immediate former Mayor**”. He swears that after dissolution of the local authorities Permanent Secretary issued two Circulars dated 23rd October, 2007 to all town clerks of Municipalities and other local authorities directing that all Mayors in the country had ceased to be councillors with the dissolution of the councils and therefore consequently their offices had fallen vacant. The dissolution was gazetted as Notice No. 10228 dated 23/10/2007. The Permanent Secretary directed that offices of Mayors / Chairman and Councillors have been rendered vacant and the holders should vacate the offices and surrendered all Council property. The Permanent Secretary also directed that the affairs of local authorities be run by committees of Chief Officers and head of departments. The second circular was dealing with the Mayors / Chairman who have refused to vacate their offices contrary to Section 58(1). In my copy of the Act Section 58 is marked repealed. The Town clerks were authorized to implement the direction and ensure all council property has been returned. Under the provisions of the Act the Minister’s role is specified in certain areas but not authorized to run the affairs of the Council. The duties of Town Clerk of a Municipality as set out under Section 129 of the Act are contained in part 1 of the third schedule and also other duties as many be assigned to him by the local authority of which he is the Town Clerk. His powers status and duties are set out in the Act. He may receive assignments from the Municipal Council of Embu. The role of the Minister under this Section is set out under Section 129 (3). The Minister may from time to time by Order amended part 1 of the third schedule as it concerns the duties of the Town Clerk. The duties are set out:-

- (a) Town clerk shall be responsible for convening all meetings of the Municipal Council.
- (b) He shall advise the Municipal Council and all committees on all matters upon which his advice is necessary including standing orders thereof and local Government Legislation.
- (c) He shall either personally or by his nominee attend all meetings of Municipal authority and its committee or subcommittees.
- (d) He shall advise the Mayor or Chairman as the case may be on all matters pertaining to the office of Mayor.
- (e) Subject to any general directions which the Municipal Council may give he shall have the charge and custody of and be responsible for all documents belonging to the council which shall be kept as the council may direct.
- (f) He shall have the duty of ensuring that the business of the Municipal Council is carried out with order, regularity and expedition in accordance with the bylaws regulation, resolutions and Standing Orders of the Council.
- (g) He shall have the responsibility of the general correspondence of the Council.
- (h) Where document will be a necessary step in the legal proceedings he shall sign such documents unless of written law otherwise requires or authorizes another person to sign such document.
- (i) He shall have the conduct of such negotiations on behalf of the council.
- (j) He shall have the responsibility of conveying decisions of the Council to officers of local authorities relating to their work and conduct.
- (k) He shall where legally qualified give general legal advice to the council.
- (l) He shall be responsible for conducting all ballots and all proceedings necessary for determining of any question by lot.

It is clear therefore the powers of the Minister is limited to amending that schedule which sets out the duties and functions of the Town Clerk. He is the Chief Executive Officer of the Council. The circulars of

the Permanent Secretary above mentioned are not authorized by law (Act 265). The Town Clerk receives no directions in performing his duties. He has to follow the provisions of the Act or any assignments given by his Council. The action of the Town Clerk in denying the applicant use of his Mayoral office and other Mayoral facilities contravenes the provisions of Section 13 (2) which states that “subject to Section 16, the Mayor shall, unless he resigns or ceases to be qualified or becomes disqualified, continue in office until his successor is elected and assigned”. It is not alleged that the applicant has been disqualified from holding the office of Mayor. Section 14(1) provides for the election of the Mayor by secret ballot. It is provided that election of the Mayor shall be the first business transacted at the first meeting of the Council.

Section 14 (2) states “on the election of the Mayor the outgoing Mayor shall preside unless the office of the outgoing Mayor is vacant for any reason in which case those present shall elect a Chairman among themselves to preside for the purpose of such election.”

Upon reading the provisions set out in respect of the office of the Mayor it is clear the Parliament in enacting the Local Government Act did not intend that the office of the Mayor should at any time be vacant. The Mayors perform ceremonial functions and maintains the dignity of the Council and it appears the Parliament never intended the occupant of the office to be removed until a replacement is in office. In this case the Applicant has purported to plead for the Deputy Mayor. However there is no indication that the Deputy Mayor is interested in the case or that has given authority that his case be argued by the Applicant. No orders are made in that behalf.

From the above, it is my view that the Town Clerk is acting in violation of express provisions of the Local Government Act and an injunction is appropriate to restrain him from continuing to commit breach of law. This is an interlocutory application pending the hearing of the suit. I am satisfied that the applicant has demonstrated a prima-facie case and I allow the application and grant orders sought in terms of prayer (b) and (c).

The Respondent shall pay the costs of this Application to the applicant.

Dated this 7th November, 2007.

J.N. KHAMINWA

JUDGE

Khaminwa – Judge

Njue – Clerk

Mr. Okwaro for Applicant

Mr. Gacheru HB for Kathungu for Respondent.

Ruling read in open court.

J.N. KHAMINWA

JUDGE