



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

REVISION NO. 1 OF 2004

Republic.....Applicant

Versus

Kipkelion Town Council.....1st Respondent

All Residents Of Kipkelion Town Council.....2nd Respondent

ORDER ON REVISION

On the 5th of November 2004, Kipkelion Town Council filed a Miscellaneous Criminal Application before the Principal Magistrate's Court Kericho against all the residents of Kipkelion Town Council seeking the following orders:-

(i) All the livestock grazing and loitering within Kipkelion Town Council be arrested and detained by Kipkelion Town Council.

(ii) For any livestock found grazing or loitering in town, the owner be fined Kshs 200/- per head per day.

The Application was based on the fact that Kipkelion Town Council had passed such a resolution to discourage the grazing of livestock within the environs of the town.

The advocate of the Council appeared before the Senior Resident Magistrate and was granted the orders as prayed. Some residents of Kipkelion Township had their livestock detained. Being dissatisfied with the said detention, they appeared before the Principal Magistrate Kericho, who upon perusal of the file referred the matter to this court for further directions under the provisions of Section 362 of the Criminal Procedure Code.

I have perused the application filed by the Kipkelion Town Council. The said application is grounded upon a resolution passed by the full council of the said Kipkelion Town Council on the 23rd of September 2004. The said resolution adopted the proposal of the finance, staff and general purposes committee which proposed that:

(i) All the livestock kept in town be removed within fourteen (14) days after notice had been duly issued.

(ii) The owner of any animal found grazing in town should be ordered to pay Kshs 200/- fine per head per day.

(iii) The D. O. and the OCS be informed.

It is this resolution that the Town Council sought to be adopted by the court through a Miscellaneous application filed before court. This court is now being called upon to examine the proceedings of the subordinate court with a view of satisfying itself as to the correctness, legality or propriety of the order issued by the Senior Resident Magistrate.

In the first instance, I would have thought that if the Town Council wanted to regulate the grazing of domestic animals within the boundaries of its jurisdiction, it would have passed a by-law as provided by **Section 201 to 206 of the Local Government Act (Cap 265 of the Laws of Kenya)**. As it were, the said “resolution” lacks any force of the law as it is not a by-law of the Town Council. Further for the said “resolution” to be efficacious, the laid down procedure for the publication of the by-law to the residents of Kipkelion Town Council has to be complied with. In the absence of such by-law, the Town Council cannot seek to circumvent the law by adopting an unorthodox procedure of filing a Miscellaneous Criminal Application before the Magistrate’s Court to “adopt” its “resolution” which was passed in contravention of the law.

Further it is doubtful whether the said order issued by the Senior Resident Magistrate could be given effect to in view of the fact that it was not directed at any particular resident but to “all the residents of Kipkelion Town Council.” Our criminal justice system is based on the premises that it is only individuals who can be charged with a criminal offence. Criminal liability attaches on an individual and not to a group of people. There can never be a situation where a group of people would be subjected to a criminal process whose ultimate result would be to collectively punish them. The said application presumed that all the residents of Kipkelion Town Council were served and notified to appear in court so that in the event there was default in obeying the orders of the court by the “resolution” of the Council, then the proposed punishment would ensue. From my reading of the record of the court, the said order was obtained ex-parte. No resident of Kipkelion Town Council was served. It is trite law that no person can be made to suffer any punishment which is not provided by the law. No person can be made to suffer any punishment without the due process of the law being followed. **(See Section 77 of the Constitution of Kenya)**.

In the circumstances therefore, I do hold that the reference to this court has merit. The order issued by the Senior Resident Magistrate was unlawful. The same is not envisaged by the law. I therefore invoke the revisionary jurisdiction of this court as provided by **Section 362 and 364 of the Criminal Procedure Code** and reverse the order of the Senior Resident Magistrate issued on the 5th of November 2004. The Town Council is advised to adhere to the provisions of the **Local Government Act** and make an appropriate application to the Minister of Local Government to approve its resolutions to become by-laws of the council. Any action that may have been taken pursuant to the said reversed order of the court is hereby ordered set aside.

DATED at NAKURU this 15th day of January 2005.

L. KIMARU

JUDGE