



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 14 OF 2004

1. MUNICIPAL COUNCIL OF BUSIA

2. THE CLERK MUNICIPAL COUNCIL BUSIA..... APPELLANTS

3. COUNCILLOR MICHAEL OSINYA

VS

COUNCILLOR FRANCIS MUKAMANI RESPONDENT

R U L I N G

The appellants took out a motion on the basis of sections 3 and 3 A of the Civil Procedure Act and under Order L rule 1 of the Civil Procedure rules and prayed for inter alia a stay of execution of the orders of the Senior Resident Magistrate sitting at Busia vide Busia S.R.M C.C. No. 265 of 2004 pending the hearing and determination of this appeal. The motion is supported by the affidavit of Onesmus Lang'at sworn on 15th July 2004. The Respondent resisted the motion by filing grounds of opposition dated 15th July 2004.

I will set out in brief the dispute that was taken before the Senior Resident Magistrate Busia before considering the grounds in support of this motion. It would appear from the record that Busia Municipal council, the 1st appellant held its mayoral elections on 1st July 2004. The Respondent who was the mayor at the time of elections had offered himself for reelection pursuant to the provisions of Section 13 (4) of the Local Government Act (Cap 265 Laws of Kenya). The end result of the election appeared disastrous to the Respondent where he lost the mayoral seat. Being dissatisfied with the disappointing election results the Respondent filed a plaint before the Senior Resident Magistrate's court at Busia with an aim of challenging the same. The suit is still pending for hearing. However the Respondent contemporaneously filed a chamber summons under Order XXXIX rules 1, 2 and 3 of the civil procedure rules. He successfully obtained an ex parte orders of injunction on 2/7/2004 whereby the newly elected mayor, Emelda Obwana was barred from assuming office in place of the Respondent pending the hearing of the chamber summons. The summons was fixed for hearing interpartes on 13th July 2004. The Senior Resident Magistrate's court also granted the Respondent exparte orders reinstating him to continue exercising his duties of the office of the mayor until further orders of the court.

When the summons came up for interpartes hearing on 13.7.2004 the same did not proceed for hearing as expected. The parties concerned raised preliminary issues which necessitated the summons to be adjourned for 14 days with an order extending the interim orders of injunction and reinstatement. This prompted the appellants to appeal against the extension of the two orders. The appellants now pray for the aforesaid orders to be stayed pending the hearing of this appeal.

The appellants were represented by Mr. Magori who argued the following grounds in support of the

motion. The first ground is that the S.R.M.'S Court had no jurisdiction to extend the interim orders because of two reasons: The first was that the law under order XXXIX rule 3 (2) of the civil procedure rules does not permit extension of an ex parte injunction and secondly that the trial magistrate did not have jurisdiction to restore the Respondent who had lost his seat in an election.

The Respondent's counsel opposed this ground stating that the trial court had powers to extend the interim order of injunction at the inter partes stage. Mr. Ashioya further argued that the Respondent was still the mayor pursuant to the provisions of section 13 (2) of the Local Government Act.

The first limb of appellants' argument in support of this ground relate to the interpretation of Order XXXIX rule 3 (2) of the Civil Procedure rules. It is clear that a court was barred from extending an ex parte order. The subrule did not specify at what stage a court can grant an extension. It is submitted by the Respondent's counsel that the court below had a right to extend ex parte orders at the inter partes stage. I have considered the two rivaling submissions over the issue and I think a court has a wide discretion to exercise as to whether to extend or refuse to extend interim ex parte orders at the inter partes hearing of the application. However it has no discretion at all to extend ex parte orders if the same came for inter partes hearing and it becomes apparent that the application and the ex parte order have not been served. To interpret the law otherwise will render the operation of the subrule superfluous and ineffective. However the discretion must be exercised judicially and according to the circumstances of each case. In the instant case before the trial court, it is evident that the applicants had complained that they were not served with the summons which gave rise to the ex parte orders granted on 2.7.2004. It is not denied. What was served is the extracted ex parte order. This obviously prompted the appellants to visit the court registry to peruse the court file as indicated by the record placed before this court. This matter is yet to be ventilated on appeal. However at this interlocutory stage I have to make a decision based on what was argued before me. In my humble view the Resident Magistrate did not seriously address his mind on this issue. Had he considered it he would not have extended the interim orders obtained on the basis of a summons which was deliberately unserved ostensibly to delay the hearing of the matter. What matters to be served is the application not the order.

On the second limb of this ground, it has been argued that the trial magistrate had no jurisdiction to restore the Respondent as a Mayor because his seat had been declared vacant and elections took place where he was voted out and replaced by Imelda Auma Obwana. The Respondent is of the view that he is still the mayor until a new mayor is elected. It is not denied that mayoral elections took place on 1.7.2004. The Respondent cried foul of the elections and sought to challenge the elections. The appellant is likely to establish on appeal that the trial magistrate had no jurisdiction to restore the Respondent to a seat which he had been voted out of. The appeal is yet to be heard hence I cannot make a definitive and conclusive decision at the interlocutory stage. I can only state I am satisfied that this ground is valid which has persuaded me to grant the appellants the prayers made.

The second ground argued by the appellants in support of the motion is that the appellants are likely to suffer because the council operations are likely to be paralysed yet there is a validly elected mayor who has duly been sworn in to assume the duties of the office of a mayor. Mr. Ashioya, for the Respondent is of the view that the operations of the council cannot be at a standstill when there is a deputy mayor. I have examined the provision of section 17 of the Local Government Act. The functions of a deputy mayor are clearly defined. The Section also states when a deputy mayor can have authority to exercise all the powers and discharge all the duties vested in and imposed upon the mayor under and by virtue of that Act. It is clear that the deputy mayor at this stage cannot automatically act in office because the order issued by the Senior Resident Magistrate on 2.7.2004 restores the Respondent to the position of a mayor. I am inclined to agree that the operations of the council are likely to be paralysed.

The motion before this court prays for this court to exercise its inherent power to stay the execution of the interim orders issued by the Senior Resident Magistrate on 2/7/2004 pending the hearing of this appeal. The court may execute its inherent jurisdiction even in respect of matters which are regulated by statute or by the rules of court. An important practical illustration of the court's inherent jurisdiction is the court's power to stay proceedings. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its processes so that the

court can maintain its character as a court of justice.

The record reveals that the ex parte orders which were extended restrained the appellants from facilitating one Imelda Auma Obwana assuming the office of the mayor. It should be noted that Imelda Obwana was and is not a party to the suit before the Senior Resident Magistrate. A court of Law cannot restrain a party who has not been enjoined to the suit. Rules of natural justice dictate that a party affected by an order must be served with the order and the pleadings so that he or she may know the basis of the orders. This cardinal rule appears to have been side stepped by the lower court. This alone enjoins this court to exercise its inherent power to correct the anomaly by making the necessary orders. I would have preferred that this appeal which arose out of an interlocutory application to be heard expeditiously but owing to the extreme urgency in the matter it became necessary for this application to be disposed of first.

The upshot therefore is that the notice of motion dated 15th July 2004 is allowed with costs to the appellants/applicants.

DATED AND DELIVERED THIS 19th DAY OF July 2004

J.K. SERGON

JUDGE