

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 89 of 2009

COUNCILOR MERCY NKIROTE MUTEGIPLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF CHUKA1ST DEFENDANT

THE Ag TOWN CLERK MUNICIPAL COUNCIL OF CHUKA....2ND DEFENDANT

COUNCILOR JOHN MBABU.....3RD DEFENDANT

RULING

The plaintiff by a plaint filed herein, prays for orders of declaration that the mayoral elections where the 3rd defendant was elected mayor of Municipal Council of Chuka hereinafter called the Council, be declared to have been obtained through abuse of the court process. The plaintiff further seeks a declaration that the second and 3rd defendants abused the court process when they obtained an order from Chuka SRM Case No. 39 of 2009 for those elections to proceed. It is stated in the pleadings of the plaintiff that the order obtained at Chuka Magistrate court went contrary to an order obtained by the plaintiff from Meru CMCC No. 293 of 2009. By that action, in Meru Magistrate Court, the plaintiff had sought to stop the mayoral elections because of that alleged abuse of court process. She seeks by the plaint filed in this action an order declaring that the 3rd defendant holds the office of mayor illegally. Finally, she seeks an injunction to stop the 3rd defendant from acting or holding himself as the mayor of the County Council of Chuka. She has moved by way of interlocutory application of a chamber summons dated 13th July 2009 and seeks by that application that an injunction be issued to restrain the 3rd defendant from holding himself as mayor of the County Council until the suit is heard and determined. The plaintiff by her affidavit in support stated that she was a serious contender of those elections of the Council. That a notice was issued by the Minister of Local Government to all local authorities reminding them that the annual meetings of councils should be held after 30th of June and not later than 15th of August 2009. She stated that she spoke to the 2nd and 3rd defendants whereby she informed them that she was sitting an important examination on 3rd July 2009 on the day on which the annual meeting of the council had been called, where the elections of the mayor amongst others were to take place. Because the 2nd and 3rd defendants were adamant that the meeting would proceed, she proceeded to file an action in Meru Chief Magistrate Court and obtained an order stopping those elections. The plaintiff did not state how or when that order was served if at all on the defendants. In a move which the plaintiff describes as cunning she stated that the defendants obtained an order of Chuka Magistrate Court ordering that the said elections should proceed. The title of the Chuka case number is John Mbabu as the plaintiff, the clerk Municipal Council of Chuka was the defendant. It is clear that that action was initiated by the 2nd defendant and not all the defendants as the plaintiff contents in this matter. In her supporting affidavit, the plaintiff finally stated that the defendant's illegality rendered the elections that took place to be a nullity. All the defendants filed replying affidavits. The current town clerk of the council stated in his replying affidavit that he had issued a notice on the 1st of July 2009 whereby he notification was given of the elections of the council which were to take place on 3rd July 2009. That notice in his view, complied with section 76(1) of the Local Government Act Cap 265. He stated that that sections provided that notice ought to be given of 24 hours of such a meeting. He stated that he never received protest to the notice and that to date, he had not been served with an order which allegedly was obtained by the plaintiff at the Chief Magistrate's Court Meru. He stated that he had however been served with a court order

which ordered that the elections should proceed. The 3rd defendant in his replying affidavit denied acknowledging the order obtained by the plaintiff. He confirmed that he was duly elected as the mayor of the council and subsequently signed form A as provided in the schedule to Cap 265 the Local Government Act. That the defendant swore a further affidavit wherein he annexed the minutes of a meeting of the DP political party in which meeting it was stated that the plaintiff had failed to serve the Chief Magistrate Court order stopping the elections upon the defendants. He also annexed an affidavit of the plaintiff filed in the Chief Magistrate Court Meru which reflected a different signature other than the one which is in the documents filed by the plaintiff in this action. I have compared those two signatures and I do concur with the defendants that the signatures are dissimilar. The plaintiff in response to that affidavit stated that she has three other different signatures that she uses. She further stated that the minutes of the DP political party meeting annexed to the 3rd defendants' affidavit were a forgery. The principles that will guide me in considering the present application are whether the plaintiff has shown a *prima facie* case with probability of success; an injunction will normally not be granted unless an applicant might otherwise suffer irreparable injury and if I am in doubt in respect of the first two principles, I will consider where the balance of convenience lies. See the case of GIELLA VS. CASSMAN BROWN & CO. LTD [1973] EA 358. Learned counsel Mr. Rimita in support of the application argued that the defendants could not object to the plaintiff's action on the basis that declaratory orders could not be issued. That is because as provided in Order II Rule 7 of the Civil Procedure Rules declaratory orders can be granted. That Rule is as follows:-

"No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not."

In support of that argument, learned counsel cited the case of Matalinga and others Vs. Attorney General High Court of Kenya Nairobi [1972] where it was held:-

"Before a declaration can be granted, there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with a present interest in opposing it."

Learned counsel further argued that the plaintiff was entitled to the prayers that were sought because the defendant had disobeyed the order of Chief Magistrate Court Meru. In support of that line of argument, the plaintiff relied on the case of Clarke and others Vs. Chadburn and others [1985] IALLER 216 where it was held:-

"An act done in willful disobedience of an injunction or court order was not only a contempt of court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others."

In the same line of argument, the plaintiff also relied on the case of Kenya Tourist Development Corporation Vrs. Kenya National Capital Corporation High Court Case No. 6776 of 1992. Here the court quoted from Halsbury's Laws of England and the case of Clarke and others Vs. Chadburn and others [1985] IALLER 216 as follows:-

"I need not cite authority for the proposition that it is of high importance that orders of the court should be obeyed. Willful disobedience to an order of the court is punishable as a contempt in court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others. I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequences of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

Bearing in mind the principles that have to guide me in considering the present application I find that the plaintiff failed to show a *prima facie* case with probability of success. The plaintiff's claim is that an order was issued by the Chief Magistrate Court Meru stopping the elections. There was no proof brought before me that the defendants were aware of that order. There certainly is no evidence of service of that order on the defendants. What the court however does have is the minutes of the meeting of DP political party where it seems to be acknowledged that the plaintiff was late in serving that order on the defendants and consequently, was unable to stop the elections. The plaintiff alleges that those minutes were forged but I note that they bear the signatures of the chairman and of the secretary. It is clear where the alleged forgery is. The plaintiff also fails to set out what obligation the defendant had to postpone the meeting because of her examinations. I am unaware of any legal obligation placed upon the defendants in that regard. The plaintiff having been nominated as a councilor in my view was obligated to carry out the duties of that office. Those duties in my view are full time in nature and for the plaintiff to seek postponement of a meeting on the basis that she is attending to examinations would in my view seem to be that the plaintiff was failing in her duties which come with her office as a councilor. Section 64 of Cap 265 places an obligation on councilors to attend councils meeting. Indeed, under that section, a councilor can lose his/her position for failing to attend meetings for four consecutive months. The plaintiff has not shown a *prima facie* case with probability of success. She also has not shown what irreparable damage she will suffer if an injunction is not granted. To the contrary, I would state that probably more harm will be suffered if an injunction would be granted because the people under the jurisdiction of the council will be left without a mayor and this would indeed affect the services that they expect from that office. Orders of injunction therefore would not only affect the defendant but would also affect the populace of Chuka town. Since I find that I have no doubt in respect of the first two principles of granting an injunction, I will not proceed to consider the 3rd principle where the balance of convenience lies. In the end, the chamber summons dated 13th July 2009 is dismissed and the costs thereof are awarded to the defendants.

Dated and delivered at Meru this 5th day of November 2009

MARY KASANGO

JUDGE