IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kwach, Omolo & Akiwumi JJ A)

CIVIL APPEAL NO. 99 OF 1994

BETWEEN

1. JOHN MWANGI KING'ORI

2. ALI MWANZI

3. HESBON NGANYI

4. ALEX MAGELO

5. JOE AKETCH .....APPELLANTS

VERSUS

1. STEVE FLAVIAN MWANGI

2. CITY COUNCIL OF NAIROBI .....RESPONDENTS

(Appeal from a judgement of the High Court of Kenya at Nairobi (Mr Justice Githinji) dated 20th May, 1994

in

HCC Suit No 1544 of 1994)

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JUDGMENT

Kwach JA. John King'ori Mwangi (the first appellant), Ali Mwanzi (the second appellant), Hesbon Nganyi (the third appellant), Alex Magelo (the fourth appellant) and Joe Akech (the fifth appellant) are councillors of the City Council of Nairobi, a local authority established under the Local Government Act (cap 265) (the Act). Steve Flavian Mwangi, the first respondent, is also a councillor, and was until his resignation on Sunday, 31st July 1994, the Mayor of Nairobi and for the purposes of this judgment, I shall refer to him as "the Mayor". The second respondent is the City Council of Nairobi (the Council) a

statutory corporation.

Nairobi City was run for many years by a succession of commissions appointed by the Minister for Local Government until after the last general elections in December 1992 when councillors were elected to run the affairs of the City Council and other local authorities. The Mayor was elected to his office on 24th February, 1993 at the first meeting of the Council as required by section 13 of the Act.

On 7th April, 1994, a number of councillors including these appellants, exercising their right under section 75(1) of the Act, sent a letter to the Mayor requesting him to call a special council meeting to discuss certain matters which they specified as:

"1. Discuss the conduct of His Worship the Mayor

2. Election of the Mayor, Deputy Mayor, Committee Chairmen and Deputies."

The Mayor obliged and fixed a special meeting of the Council for Wednesday, 20th April, 1994 at 1.30 pm in the council chamber. It is the events that occurred at that meeting that precipitated the suit that has given rise to this appeal. At the commencement of the meeting at the request of the Mayor, the Town Clerk advised that the meeting had been properly

convened and that discussions on the items listed on the agenda should follow in the order in which they appeared. When the fifth appellant (Joe Akech) rose to speak on the item concerning the conduct of the Mayor, a vigilant councillor one C K Muratha intervened to inquire whether standing order No 42 had been complied with. There is no evidence that anyone dealt with or condescended to respond to Councillor Muratha's inquiry, which, as subsequent events were to show, has turned out to be one of the most critical issues in this appeal. From this point, the record shows, the meeting degenerated into a bedlam making it impossible for the Town Clerk to make a record of the proceedings.

There was a group of 45 councillors bitterly opposed to the Mayor and were hellbent to get rid of him at this meeting. They were infact instrumental in getting the Mayor to convene the special meeting. The fourth appellant moved that the Mayor should leave the chamber (and of course the chair) so that the councillors could discuss him. This was seconded by Councillor Kamanda. The Mayor refused. He stayed in the chamber and remained in the chair. The 45 councillors then purported to hold their own meeting from which they excluded the rest of the councillors presumably loyal to the Mayor. In that so called meeting, the fifth appellant read what were alleged to be charges against the Mayor and these were unanimously passed by this group of councillors. After reading the charges the fifth appellant ended by saying:

"My fellow councillors, in view of these accusations against Mayor Mwangi and his colleagues we the majority councillors meeting here today in this constituted special meeting propose with immediate effect appropriate disciplinary action".

It is to be noted that the nature of the disciplinary action to be taken against the Mayor was not specified and there is no evidence that a copy of the charges had been made available to the Mayor as is required by the Rules of Natural Justice. What these councillors did and at the same meeting, was to proceed to elect a mayor, deputy mayor, committee chairmen and their deputies. The first appellant was elected mayor, the second appellant was elected deputy mayor and other councillors were elected as chairman of various committees.

There is no doubt that the meeting at which the Mayor was purportedly ousted was characterised by shouting and physical fighting. After these dubious elections, the persons elected to various positions and the other councillors opposed to the Mayor, took steps to assert their authority on the Council claiming that they were the legitimate holders of those offices.

They apparently genuinely believed that they had the mandate of their electors to direct the affairs of the Council.

To prevent his ouster and the inevitable disruption of Council business, the Mayor filed a suit on 25th April, 1994, against these 5 appellants and the Council, now the second respondent. In his plaint, the Mayor sought an interlocutory injunction against the appellants and the Council to restrain them from purporting to hold or acting and conducting themselves as if there had been a valid election affecting the offices of the Mayor and his deputy and committees of the Council; and a declaration that since February 1993 there had been no valid election or voting which validly removed the Mayor and any purported election or vote of no confidence was null and void.

The first, third and fifth appellants filed a joint defence on 9th May 1994 denying the Mayor's claim and also raised a counterclaim against him asking for an injunction against him to restrain him from holding himself out and passing off as the Mayor of Nairobi and a declaration that the councillors were entitled to elect such persons as they pleased to the post of mayor. The second and fourth appellants also filed a joint defence in person and denied the Mayor's claim. In both these defences, the appellants sought to justify what they did or happened at the meeting of 20th April 1994. They contended that the meeting was orderly and that the resolutions were made by the unanimous verdict of the councillors. They also contended that the Mayor having convened the meeting he could not now question its validity of the resolutions passed at the meeting: and that the Mayor had no contractual or public duty or right to the office of the Mayor. The second respondent also filed a defence stating it was ready to abide by any orders made by the Court and prayed for the Mayor's suit to be dismissed with costs.

On 25th April 1994, the Mayor applied for a temporary injunction against the appellants and the Council. On 26th April, 1994, the advocate for the first, third and fifth appellants filed a notice of preliminary objection and an affidavit sworn by the second appellant, in opposition to the Mayor's application. Among the objections specified in the notice to be taken were:

"(1). That the plaintiff has no *locus standi* as an alleged rate payer, to institute the suit filed herein.

(2). That the provisions of order XXXIX of the Civil Procedure Rules do not apply to this suit at all. A suit by a ratepayer must in law be by judicial review and not a plaint.

(3). The plaintiff's hitherto elective post was terminated by a valid resolution of the 6th respondent (sic) authority and as provided by section 16 of the Local Government Act and there being no other candidate the first respondent (sic) was lawfully elected.

(4). The elections having taken place on 20th April 1994, this honourable Court cannot in law restrain that which has already taken place.

(5). The first respondent (sic) was lawfully elected by 45 councillors out of 53 elected councillors who together with 18 nominated councillors constitute the electoral college of the 6th respondent authority. The plaint filed herein cannot quash the decisions made by the electoral college.

When the application came before Aluoch J *ex parte* on 25th April 1994, she declined to grant the orders sought by the Mayor and directed that all the defendants be served as the matter was of some general public interest. She adjourned the application to 26th April 1994 for hearing *inter partes*. On that day Mr Ngatia raised his preliminary objections and on 29th April 1994, Aluoch J delivered a ruling in which she dismissed all the objections. She also ordered that the status quo be maintained pending the hearing of the application. It is to be noted that there has been no appeal against the ruling and orders of Aluoch J.

On 11th when the case came before Githinji J, for the first time, Mr Ngatia is recorded as having told the judge:

"We did not file a replying affidavit to the Chamber Summons but we have filed a defence ..... From the directions of the Honourable Chief Justice what is for hearing today is the main suit and not the application. I am prepared for hearing of the main suit. We will call oral evidence to support the defence and counter-claim."

Although the understanding of both Mr Kinyua and Mr Muturi Kigano was that it was the Mayor's application that was to be heard on that day, nevertheless it was finally agreed by all concerned that the case be heard and disposed of and the judge ordered accordingly and set out the procedure to be followed. Mr Ngatia did not complain about this, and

he could not have done, because this was precisely what he had asked the judge to do.

The case was then heard and on 20th May 1994 Githinji J delivered judgment which has given rise to the present appeal. On the basis of the pleadings and the evidence before him, the judge identified the issues for determination as follows:

"(1). What is the tenure of office of the Mayor of Nairobi?

(2). Can the Mayor of Nairobi be removed from office before expiry of the statutory term?

(3). Was he validly removed from office in the council meeting from 20th April 1994?

(4). Are the defendants properly sued and can the Court grant the reliefs sought"

On the basis of a circular dated 6th July 1993 issued by the Permanent Secretary, Ministry of Local Government, in purported compliance with which the Council did not hold its annual meeting in 1993, as required by section 74 of the Act, the judge held that the second annual meeting at which the Mayor's term would come to an end under section 13(1) of the Act, would be the annual meeting of the Council to be held between 1st July 1995 and 15th August 1995, and he extended the Mayor's term accordingly.

Secondly, the judge held that it is impracticable procedurally and legally impossible to pass a vote of no confidence against a presiding mayor and the purported vote of no confidence alleged to have been passed by the 45 councillors had no legal effect and could not abridge the term of the Mayor. Lastly, the judge held that all the 6 defendants were properly sued. He gave judgment for the Mayor and awarded costs against all the 6 defendants. He also dismissed the counter-claim with costs.

The Council has not appealed and has been joined as a second respondent in this appeal. The appellant's memorandum of appeal contains 6 grounds of appeal and I propose to deal with them in their numerical order.

The first ground of appeal is that the learned judge erred in law in framing the issues as he did. There is really no substance in this ground because a trial judge is under a duty to frame issues. In my opinion, having regard to the pleadings and the evidence led at the trial, the judge correctly framed the pertinent issues for determination.

The second ground of appeal concerns the construction of sections13, 14 and 16 of the Act, the complaint being that the judge erred when he held that the phrase in section 16 of the Act "from any cause whatsoever" did not introduce a new category of grounds on which the Mayor can be dismissed. Sections 13 and 16 of the Act so far as material provide:

"13(1) The Mayor of a municipal council shall be elected by the Council from among the councillors at the first meeting of the Council and subsequently at each second annual meetings of the Council and, a mayor elected in the year 1968 or later shall hold office until next annual meeting but one of the Council.

(2) 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 assumes office.

16(1) In the event of the office of mayor or deputy mayor becoming vacant from any cause whatsoever during the term of office of such mayor or deputy mayor, a successor shall, at the next meeting but one of the Council after the vacancy occurs, be elected by the councillors from among themselves, by secret ballot, and the person so elected shall, subject to section 18, forthwith enter upon his office and shall

serve as mayor or deputy mayor, as the case may be, for the remainder of the period for which the Mayor or Deputy Mayor whose office became vacant, had been elected".

Mr Ngatia, for the appellants, submitted that "any cause whatsoever" in section 16(1) of the Act created an additional ground upon which a mayor may cease to hold office within the meaning of section 13(2) of the Act. He said that if councillors by a majority vote out a mayor or pass a vote of no confidence against him, his office would thereby become vacant from any cause whatsoever. This submission must be wrong for two simple reasons. First, there is no provision under the Act for a vote of no confidence to be passed against a mayor. It is expressly provided for under section 59 of the Constitution of Kenya in relation to the Government of Kenya. Under that section, if a vote of no confidence is passed against the Government of Kenya by the National Assembly, the President is obliged either to resign from his office or dissolve Parliament. This is a draconian measure which Parliament, in its own wisdom, denied the local authorities. It is not the type of power that can be implied; it must be expressly given where it is

intended that it should be available. I agree entirely with the judge that there is no place for votes of no confidence in the local authorities.

Secondly, the submission must be wrong because if it was intended that councillors should have power simply to vote out a mayor, there was nothing to stop Parliament saying so in the Act. This ground of appeal accordingly fails.

The third ground of appeal is that the learned judge erred in law in holding that the plaintiff's tenure of office as Mayor shall expire in the second annual meeting to be held between 1st July 1995 and 15th August 1995. I shall deal with the remaining grounds of appeal before coming back to this one.

The fourth ground of appeal is that the learned judge erred in law in holding that the meeting of 20th April 1994 was not a legal meeting and further erred in finding that the resolutions passed at the said meeting were null and void. The meeting of 20th April 1994 was convened for the declared purpose of discussing the conduct of the Mayor and conducting elections to fill the vacancies created by his inevitable ouster.

Standing Order No 42 (Second Schedule to the Act) to which I have already alluded elsewhere in this judgment, and which applies to the Council, states-

"42(1) No member of the Council shall make personal accusations against nor impute improper motives to any other member or members of the Council in any meeting of the Council.

(2) Any such accusations or imputations shall be made in writing and forwarded to the Clerk who shall refer the same to the next meeting of the appropriate committee of the Council for investigation".

The 45 councilors were in flagrant breach of this standing order because they sought to make personal accusations against another member, namely the Mayor, in a council meeting, a matter which is expressly forbidden by the order. They had no right to do so.

If they wanted to make personal accusations against the Mayor, they were required, in the first instance, to submit them in writing to the Town Clerk who would refer them to the appropriate committee for investigation. Such accusations could not be made directly at a meeting of the Council as the 45 councillors attempted to do. The fact that the meeting had earlier

been advised by the Town Clerk that the items on the agenda could be discussed made no difference and lent no legitimacy to the proceedings because the advice she gave was wrong in law.

With regard to the resolutions alleged to have been passed at the meeting of the 45 councillors, they could not have passed any or any valid resolution because their so called meeting was not chaired by the Mayor. It was chaired by some usurper who arrogated to himself the position of chairman. There is incontrovertible evidence that councillors fought each other and it is impossible to see how, in the chaos

that reigned in the chamber, any meeting could have been held and a resolution passed. Be that as it may, there is no evidence on record that any resolution was passed even going by the account given by the appellants.

If by their actions at the meeting, the 45 councillors succeeded in ousting the Mayor, which as I have held they did not, they could not legally proceed to elect his successor at the same meeting. Section 16(1) expressly provides that if the office of the Mayor or Deputy Mayor falls vacant, elections to fill those vacancies are to be held at the next meeting but one of the Council. In the present case, the elections to fill the vacancies left by the ouster of the Mayor and his deputy on 20th April 1994 could not be held at the same meeting. So the elections held at the meeting held by the 45 councillors were null and void and of no legal effect whatsoever and those claiming to have been elected mayor and deputy mayor or other positions were mere pretenders. It must follow from what I have said that this ground of appeal fails and I reject it.

Ground 5 of appeal deals with the judge's finding concerning the effect of the vote of no confidence alleged to have been passed by the 45 councillors. I have already said that there is no room for votes of no confidence in the business of running local authorities. It is as well this dangerous weapon has not been placed in the hands of councillors bearing in mind the calibre of persons getting into those positions these days.

The complaint in ground 6 is that the learned judge erred in law in holding that the suit was properly before the Court and also erred in making a decision for the benefit of persons not before the Court and which decision was contrary to the provisions of the Local Government Act. The allusions to the Act must of course relate to the exemption of members from personal liability given under section 87 of the Act but as the section itself makes it clear, only matters or things done in good faith are covered. There is no insurance against things done maliciously and in bad faith as was done by the 45 councillors at the meeting of 20th April 1994. That apart, all these

matters had been dealt with by Aluoch J as preliminary objections and dismissed. As I have already said, the appellants did not appeal against her decision. It is true that these same objections were repeated in the defences filed by these appellants on 9th May 1994 and 12th May 1994 but this could not in law give them a new lease of life so long as Aluoch J's order remained. The Mayor was faced with a situation where he was being barracked by rowdy and violent councillors leaving him with no alternative but to take to Court those of them that he identified as the ring leaders. In doing so, he is to be commended for acting as a responsible citizen and for upholding the dignity of his office in the face of extreme provocation.

Further, and as a matter of strict procedure, those objections should not have been dealt with in the form in which Mr Ngatia presented them. An application should have been made by summons in chambers under order 1 rule 22 of the Civil Procedure Rules. As for alleged non-joinder of other potential defendants, order 1 rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties and gives the Court the power to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Mr Ngatia's other submission was that the matter should have come to Court by way of an application for judicial review. On the evidence, there was no decision made by the Council at a properly convened and conducted meeting of the Council which could be the subject of an application for judicial review by anyone who may have felt aggrieved. A suit for an injunction and a declaration was the only course open to the Mayor in the circumstances. For these reasons, I reject this ground of appeal as well.

I now return to the third ground of appeal. The judge held that the circular issued by the Permanent Secretary, Ministry of Local Government, dated 6th July 1993, addressed to all town clerks, clerks to councils and urban councils, had the effect of extending the Mayor's term to the annual meeting to be held between 1st July and 15th August 1995. In paragraph 1 of the circular, the Permanent Secretary said:

"(1)The law is very clear in that the term of office for mayors/chairmen of local authorities is two years.

Therefore the elections of mayors/chairmen of councils cannot be held in 1993 since this will be contravening the law".

The judge thought that this particular paragraph had the effect of postponing the 1993 annual meeting of the Council and that therefore the

1994 annual meeting would be the first such meeting for the purposes of determining the tenure of office of the Mayor. In so thinking there can be no doubt that the judge was wrong. First, the circular by its terms did not cancel or postpone the 1993 annual meeting of any council. Secondly, even if that was the intention, neither the Minister for Local Government nor his Permanent Secretary has any power to do so. Annual meetings of local authorities are covered by section 74 of the Act which provides as follows:

"74(1) A local authority shall in every year hold an annual meeting and at least three other meetings, which shall be as near as may be at regular intervals, for the transaction of general business:

Provided that any local authority other than a county council or a municipal council, may hold such lesser number of meetings as the Minister may approve.

(2) The annual meeting shall be held as soon as may be after 30th June, but not later than 15th August, in every year on such day and at such hour as may be appointed by the local authority or, if no hour is so appointed at twelve noon.

(3) The other meetings shall be held on such days and at such hours as the local authority may from time to time appoint."

Annual meetings are mandatory as can be seen by the use of the word shall in section 74 of the Act and no one, not even the Minister, can stop them being held. So for the purposes of this case, the first annual meeting was the annual meetings for July/August 1993, whether held or not, and the Mayor would in normal circumstances have been entitled to remain in office until the second annual meeting to be held between 1st July and 15th August, 1994. I have come to the conclusion that the judge's order extending the Mayor's tenure of office to the annual meeting to be held between 1st July and 15th August 1995, was made in error, and ought to be set aside. This ground of appeal therefore succeeds. Although this was the most important order made by the judge and against which much of the appellants counsel's firepower has been directed, for some reason, it was not included in the formal decree.

I think I ought to say a few words about the order for costs made against the appellants. There is no specific ground of appeal against this but we allowed Mr Ngatia to address us on the matter as we felt that the judge

had wrongly exercised his discretion by ordering the appellants to pay the Mayor's costs. It is true that the appellants behaved very badly during the meeting and indeed afterwards, but I feel that they would perhaps have not committed these acts of hooliganism if they had been properly advised by the Town Clerk. It is the duty of the Town Clerk to advise the Council and its committees and subcommittees on all matters upon which her advice is necessary, including the standing orders thereof and local government legislation. On the evidence, I am satisfied that the Town Clerk did not give the necessary advice which failure amounted to a serious dereliction of duty. In these circumstances the proper order to make would have been to order the City Council of Nairobi to pay the costs of the Mayor.

Mr Ngatia cited a number of authorities but I have not dealt with any of them as they did not seem to me to be relevant to the issues in dispute in this appeal.

For these reasons, I would allow this appeal to the limited extent of setting aside that part of the judge's order extending the Mayor's tenure of office to a date between 1st July and 15th August, 1995 and part of his order awarding costs against the appellants and substitute therefor an order that the Mayor's costs in the High Court be paid by the City Council of Nairobi. As for the costs of this appeal, since the appeal has succeeded only on one out of six grounds, I would grant the appellants one third of their costs to be paid

by the City Council of Nairobi. I would also give the Mayor his full costs of the appeal to be paid by the Council.

As Omolo and Akiwumi JJ A also agree, this appeal is allowed to the extent indicated, along with the orders I have proposed. The Council can now meet and elect a new mayor and his deputy before 15th August, 1994.

Omolo JA. My Lords, this appeal, basically concerns the interpretation to be given to the various sections of the Local Government Act, the Act hereinafter. One Steve Flavian Mwangi, the 1st respondent, at the time or times material to the suit, was the Mayor of the City Council of Nairobi, the 2nd respondent. The 1st respondent was elected a councillor for Kasarani ward during the general elections of 1992 and subsequently elected the Mayor of the 2nd respondent on the 24th February, 1993. John Mwangi Kingori, the 1st appellant, Ali Mwanzi, the 2nd appellant, Hebson Nganyi, the 3rd appellant, Alex Magelo, the 4th appellant and Joe Aketch, the 5th appellant are all councillors of the 2nd respondent.

By a letter dated the 7th April, 1994, and addressed to the 1st respondent 43 councillors, and among them the five appellants, requisitioned a special

meeting of the 2nd respondent and that requisition was obviously made pursuant to the provisions of section 75 of the Act. The 1st respondent complied with that request and on the 20th April, 1994 a special meeting of the 2nd respondent was convened. In his plaint dated the 25th April, 1994 and filed in the High Court on the same day, the 1st respondent alleged that the 1st to 5th appellants without any reasonable cause, lawful excuse and in total disregard of the relevant law and the office holders' rights and the interest of the Council, purported and held themselves out to the officers, servants and agents of the 2nd respondent and to the general public that there had been a due change of the persons holding the offices of the Mayor, the Deputy Mayor and Committee Chairmen of the 2nd respondent. The 1st respondent had asked the High Court orders for, *inter alia*,

(a) an interlocutory injunction to restrain the appellants by themselves, agents servants or otherwise howsoever, from purporting to hold out or act or conduct themselves as if there had been a valid election changing the office holders of the offices of the Mayor, Deputy Mayor and Committee Chairmen of the 2nd respondent and

(b) a declaration that ever since February, 1993 to the date of the suit there had been no valid elections or any voting or any valid removal of the 1st respondent from the office of the Mayor, the Deputy Mayor and Committee Chairmen of the 2nd respondent and that any purported election or voting of no confidence is contrary to the provisions of the law and the same is null and void.

At the same time as the plaint was filed, the 1st respondent also filed an application by way of chamber summons under order 39 rules 1, 2, 3 and 7 of the Civil Procedure Rules asking for a temporary injunction in the terms already stated. The application by way of chamber summons came up for hearing *ex parte* before Aluoch, J, on the same day, ie the 25th April, 1994. She declined to hear the application *ex parte* and ordered that it be served on the other side for hearing *inter partes* on the 26th August, 1994. Knowing the frequency with which *ex parte* injunctions are applied for and obtained from the High Court-indeed such injunctions are granted as a matter of course and without any reason or reasons being assigned therefore as is mandatory required by order 39 rule 3(1) - I would myself commend the bold step taken by Aluoch, J in insisting that the application be served on the opposite parties. When the hearing resumed before her on the 26th April, 1994, Mr Ngatia, who argued the appeal before us on behalf of all the appellants, appeared only for the 1st, 3rd and 5th appellants and by then, he had filed what he had called "notice of preliminary objection". The grounds of objection contained therein were six and they were to the effect:

1. That the plaintiff (1st respondent) has no *locus standi* as an alleged rate payer to institute the suit filed herein.

2. The provisions of order 39 of the Civil Procedure Rules do not apply to this suit at all. A suit by a rate

payer must in law be by judicial review and not a plaint.

3. The plaintiff's hitherto elective post was terminated by a valid resolution of the 6th respondent (2nd respondent) authority and as provided by section 16 of the Local Government Act and there being no other candidate, the 1st respondent (1st appellant) was lawfully elected.

4. The elections having taken place on 20th April, 1994, this honourable Court cannot in law restrain that which has already taken place.

5. The 1st respondent (1st appellant) was lawfully elected by 45 councillors out of 53 elected councillors who together with 18 nominated councillors constitute the electoral college of the 6th respondent (2nd respondent) authority. The plaint filed herein cannot quash the decisions made by the electoral college.

6. The plaintiff's (1st respondent's) application is misconceived in law, frivolous, an abuse of process and unmantainable.

I have found it necessary to set out in detail, the grounds of objection by Mr Ngatia before Aluoch, J, because by and large they succinctly summarise the attitude of the appellants throughout this litigation, namely that a special meeting of the 2nd respondent was convened on 20th April, 1994, that at that meeting a resolution was or resolutions were passed removing the 1st respondent, his deputy and chairmen of committees from their offices and that following that removal, the 1st appellant was unanimously elected to the office of the Mayor of the 2nd respondent. The preliminary objections taken before Aluoch, J, were strenuously argued on the 26th and 27th April, 1994 and she then reserved her ruling to the 29th April, 1994. Meanwhile, at the end of the hearing on the 26th April, 1994, she made an interim order to the effect that the status quo as it then existed was to remain in force until the finalization of the application. The effect of that order was apparently to keep the 1st respondent in office as the Mayor of the 2nd respondent and that order was subsequently extended until the proceedings were terminated by the final judgment of Githinji, J

dated the 20th May, 1994. By that judgment the learned judge held that the purported ouster of the 1st respondent as the Mayor of the 2nd respondent and consequent upon the alleged ouster, the purported election of the 1st appellant as mayor were all null and void and that the 1st respondent would remain the Mayor of the 2nd respondent until sometime between 1st July and 15th August, 1995. It is against the judgment that this appeal is brought.

Mr Ngatia for the appellants listed six grounds of appeal. These were that:-

1. The learned judge erred in law in framing the issues as he did.

2. The learned judge erred in law in his construction of sections 13 and 14 of the Local Government Act, cap 265 and further erred in his construction of section 16 of the said Act, in particular, when he held that in section 14 "from any cause whatsoever" had no meaning at all.

3. The learned judge erred in law in holding that the plaintiff's tenure of office as Mayor shall expire in the second annual meeting to be held between 1st July, 1995 and 15th August, 1995.

4. The learned judge erred in law in holding that the meeting of 20th April, 1994 was not a legal meeting and further erred in finding that the resolutions at the said meeting were null and void. In particular, the learned judge erred in failing to appreciate that a Court cannot make decisions on the basis of issues which were neither pleaded nor canvassed.

5. The learned judge erred in holding:

(a) That it was impracticable procedurally and legally impossible to pass a vote of no confidence against a presiding mayor;

(b) That the Mayor's term of office cannot be cut short by a vote of no confidence.

6. The learned judge erred in law in holding that the suit was properly before the Court and also erred in making a decision for the benefit of persons not before the Court and which decision was further contrary to the provisions of the Local Government Act.

Mr Ngatia did not argue these grounds necessarily in the order in which they are listed or individually. For my part I shall deal with ground one first and follow it with ground six which, in my view do not carry much substance. Ground one complains that the learned judge erred in framing the issues in the manner that he did. At any trial, it is the duty of the parties to agree on issues and frame them. This can be done either at the beginning of the trial or after the evidence has been heard though it is preferable to do so at the beginning of the trial so that the parties know exactly what issues they have to meet and can therefore lead evidence regarding the said issues. Githinji, J gave the parties a chance to agree upon and frame issues. They failed to do so with each side framing its own issues and filing the same in Court. The learned judge did not and could not have forced them to agree on issues. He then proceeded with the trial and at the end of it all, he was obviously of the view that the parties had failed to agree on issues and having heard the evidence he decided to frame issues as best he understood them. He did so and effectually disposed of the dispute before him. Mr Ngatia did not tell us what question was left unanswered by the issues framed by the judge. I can find none myself and in the circumstances, I am of the view that ground one has no merit whatsoever and must accordingly fail.

Ground six basically deals with the issue as to whether the suit was properly before the judge and on this aspect of the matter, I understood Mr Ngatia to be saying several things, namely:-

1. whether it was right for the 1st respondent to pick upon only these five appellants when at the very least 45 other councillors were involved in the matters about which the 1st respondent complained.

2. that the dispute fell within the domain of public law and that it was, accordingly, not right to come to Court by way of a plaint but rather that the respondent should have come by way of judicial review.

On the first head, Aluoch, J held during the preliminary objection taken before her that the matter was properly before the Court and she then allowed the application for an injunction to proceed to hearing on its merits. If she had thought that the matter was not properly before the Court, she would, no doubt, have struck out the application for injunction, for an injunction can only issue on a matter properly before a Court. There has been no appeal against her ruling and that was the same stand taken by Githinji J for at page 185 of the record, the learned judge says in his judgment:-

"It is not desirable to deal with the technical objections raised against the suit for the same objections were raised before Lady Justice Aluoch, heard and determined. The Court over-ruled the objections and specifically found that plaintiff could come to Court in the manner he did ..."

The appellants having failed to appeal against Aluoch, J's ruling, they cannot now be heard to raise those same complaints again. But even if there had been an appeal against the order of Aluoch, J I, for my part doubt very much whether there was any substance in these complaints. The only form of judicial review which would have been available to the 1st respondent in the circumstances would have been *certiorari*. That remedy can only call into the High Court and quash a decision which has been taken. At the end of the day all counsel who appeared before us in this appeal were forced to concede the ground that the meeting of 20th April, 1994, did not pass any resolution which could have been brought up to the High Court to be quashed. In any case I am myself of the clear view that in certain circumstances a declaratory suit may well be a far more efficacious remedy than one by way of judicial review. In my view this complaint is groundless.

As to why the 1st respondent sued only five appellants out of the many other councillors, my short answer is that they were clearly the ring-leaders of the rebellion against the Mayor. After the purported meeting on the 20th April, 1994, the 1st appellant, for instance, purported to assume the mantle of the Mayor of Nairobi, and he would appear to have styled himself "His Worship the Mayor" even before Mr Justice

Githinji. In those circumstances, someone had to stop him from assuming that office and that title and the 1st respondent was entitled to sue him and his close associates. If any benefits have been conferred upon persons not parties to the dispute, there has been no complaint before us by those persons that they have been given rights which they do not require; I cannot see what business of the appellants it is. There is equally no merit in ground six of the appeal and it must also fail.

I shall now deal with ground 4 which raises the issue of the meeting of 20th April, 1994.

I pointed out at the beginning of the judgment that that meeting was requisitioned by some 43 councillors and that they were entitled to do so under section 75(1) of the Act. The letter of 7th April, 1994, requisitioning the meeting contained the agenda which was to be discussed at the meeting

and the agenda were:

"Discuss conduct of His Worship the Mayor/election of the Mayor, Deputy Mayor, Committee Chairmen and Deputies".

I would myself reiterate the views expressed by Githinji, J. The 2nd respondent, the City Council of Nairobi, is a creature of statute and it can only do that which it is allowed to do by the statute creating it, and it can only do it in the manner allowed by the statute. Section 85 of the Act creates "Standing Orders" for all local authorities and those standing orders apply to all of them and local authorities have no powers to revoke or vary those orders. It was common ground that the purpose of the meeting of 20th April, 1994 was to discuss the conduct of the Mayor and in such circumstances, standing order No 42 applied with the result that if anyone wanted to discuss the conduct of the Mayor or any other councillor, then such a person was mandatorily required by standing order 42(2) to make his or her accusation or imputation in writing, forward the same to the Town Clerk, who must in turn refer it to the next meeting of the appropriate committee of the Council for investigations. It was agreed that the 43 councillors who wanted to discuss the conduct of the 1st respondent did not comply with these requirements. So that the meeting of 20th April, 1994 lacked any legal authority to discuss the conduct of the 1st respondent and any purported discussion of that issue was, of necessity null and void. Again the meeting wanted to elect the Mayor, his Deputy and Committee Chairmen. That would be a clear violation of section 16(1) of the Act which provides that a vacancy in the office of the Mayor and Deputy Mayor shall be filled only at the next but one meeting from the time the vacancy occurs. Even assuming that the councillors had power to remove the Mayor, they could not fill the vacancy so created at the same meeting in which they removed him; they would have had to wait until the next but one meeting occurring after the 20th April, 1994.

Meetings are not simply called for the love of them; they are called to transact business and as the matters stood, it was illegal for the councillors to discuss any of the items they had listed down for their meeting of 20th April. It must follow that since the meeting was called to discuss illegal issues, the meeting itself was illegal. If any resolutions were passed at that meeting they were all illegal but as I have said, no resolution was actually passed. From the foregoing reasoning it follows that ground four of the grounds of appeal is also unmeritorious and must equally fail.

Ground 5 deals with the issue of whether the councillors of a local authority

have legal power to pass a vote of no confidence in a mayor or his deputy. In this connection, Mr Ngatia rather invoked the general principles of democracy and it would appear he was saying that if the Mayor is elected by the councillors they should also be able to remove him. On the legal front, Mr Ngatia contended that the words:

"In the event of the office of the Mayor or Deputy Mayor becoming vacant from any cause whatsoever .."

In section 16(1) of the Act are wide enough to cover the removal of a mayor through a vote of no confidence. I do not agree with this proposition. The power to pass a vote of no confidence is such a drastic one that it cannot be implied in the Act. In respect of the Central Government, the Kenya Constitution specifically provides for the power in section 59. The section specifically provides for the

manner in which Parliament is to exercise that power, and in the event of the power having been exercised, what is to happen if the President does not comply. If Parliament had intended that councillors should have similar powers, it would have said so in the Act under which local authorities are constituted. It would be dangerous for the Courts to imply such powers in the Act and it may well be that Parliament had a very good reason for not conferring such powers on councillors. This case itself seems to me to be a good illustration of the immaturity and capriciousness with which such power may be exercised. So the words "from any cause whatsoever", must be limited to the causes recognised by the Act, namely, death, resignation, incapacity and disqualification. I would, accordingly, respectfully agree with Githinji, J and with my Lords that councillors of local authorities in Kenya do not have the legal capacity to pass a vote of no confidence in the Mayor or on anyone else. Ground 5 and equally ground 2 must also fail.

That finally brings me to ground 3 which deals with the judge's finding that the 1st respondent was not due for re-election until sometime between 1st July, 1995 and 15th August, 1995. It is common knowledge that the 1st respondent has in fact resigned his office as Mayor and as far as he is concerned that question is merely of academic interest. Section 13(1) of the Act provides that:

"The Mayor of a municipal council shall be elected by the Council from among the councillors at the first meting of the Council and subsequently at each second annual meeting of the Council and,....."

By section 14(1) of the Act, the election of the Mayor shall be the first business to be transacted at the first meeting of the Council. The first meeting of the 2nd respondent must have been on the 23rd February, 1993,

when the 1st respondent was elected Mayor. There is clearly a difference between the first meeting of the Council and the annual general meeting of the Council.

Section 74(1) of the Act provides that:

"A local authority shall in every year hold an annual meeting and at least three other meetings, which shall be as near as may be at regular intervals, for the transaction of general business.

Provided that any local authority other than a county council or a municipal council, may hold such lesser number of meetings as the Minister may approve".

This section, together with its *proviso* clearly means that a municipal authority such as the 2nd respondent must in a year hold an annual general meeting and at least three other meetings.

Councils which are not municipalities or county councils must hold an annual general meeting and, with the approval of the Minister, may hold less than three other meetings. And section 74(2) of the Act provides:-

"The annual meeting shall be held as soon as may be after 30th June, but not later than 15th August, in every year on such day and at such hour as may be appointed by the local authority or, if no hour is so appointed, at twelve noon".

The effect of this section must be that the 2nd respondent was under a statutory duty to hold its annual meeting somewhere after 30th June and in any case on or before the 15th August, 1993, and that was a duty which it could not postpone or defer. Githinji, J thought the Minister had postponed the annual meeting of the 2nd respondent. On the evidence before the judge, the Minister had done nothing of the kind but even if the Minister were to be minded to do so, he would not have such a power under the statute. So that the first annual meeting of the 2nd respondent must be deemed to have been held between the 30th June and the 15th August, 1993. The 2nd annual meeting of the 2nd respondent would accordingly be due between the 30th June, 1994 and the 15th August, 1994. The 1st respondent would, at the second meeting, be obliged to present himself for re-election if he still wished to be the 2nd respondent's Mayor. The learned judge was clearly in error in holding that the 1st respondent would only be due for election in 1995. Ground 3 of the grounds of appeal accordingly succeeds and the effect of that

must be that the 2nd respondent must hold the election

for the Mayor and the Deputy Mayor on or before the 15th August, 1994. In my judgment this appeal succeeds only on this one ground. I had the advantage of reading in draft the judgments of my Lords Kwach and Akiwumi and I am in entire agreement with them. I agree with the order on costs proposed by my Lord Kwach.

Akiwumi JA. The present appeal presents various matters of law which are of great public interest as they relate to the grassroots national issue of local government and which, because of what I am about to relate, require to be clarified. Since the revival of multi party politics, the average man in the street has become more conscious of, and enthusiastic about, his political role and more determined to play his part in forwarding the interests of his political party. Elections, parliamentary or local government, have therefore, assumed great importance in the political life of the ordinary citizen of the country. But this can also at times, engender over enthusiastic and intemperate behaviour.

The circumstances surrounding this appeal concern the government of the capital city of the nation, Nairobi, which after many years of rule by commissions whose members were appointed by the Minister of Local Government, was finally in February, 1993, brought under the governance of a freely and democratically elected municipal councillors representing various political parties. Under this new regime, Steve Flavian Mwangi who had been elected a councillor and whom I shall call "the Mayor", was at the first meeting of the City of Nairobi Council which I shall also call "the Council", held in February, 1993, elected by secret ballot as the Mayor of Nairobi. The provisions of the Local Government Act which I shall henceforth refer to as "the Act", and under which, the election of the Mayor took place, are sections 13(1) and 14(1) of the Act. They provide that after the election of a mayor at the first meeting of a council, subsequent elections shall take place at each second annual meeting of the Council. I shall deal with this in more detail later on. Suffice it to say, that the election of the Mayor as the Mayor of Nairobi took place at a time when the tide of free and democratic elections was running strongly than ever before, and in an atmosphere of excitement and euphoria. But it is not in the nature of honeymoons to endure and as time wore on, the Mayor became unpopular with an increasing number of his fellow councillors of the Council. This culminated in 42 of these councillors who became popularly known as "Club 45" requesting the Mayor by a letter dated 7th April, 1994, to call a special meeting of the Council to provocatively discuss his conduct and to elect a new mayor and deputy mayor of Nairobi and chairmen of the various committees of the Council and their deputies. In compliance with this request, the Mayor convened a special meeting of

the Council which was held on 20th April, 1994. It was obvious from the confrontational matters to be discussed at that meeting that tempers were bound to fly and that the legal implications of the meeting should be well studied and legal advice competently and impartially given. Indeed, nearly three months before the request for the special meeting was addressed to the Mayor, the Town Clerk had occasion in her letter of 19th January, 1994, to Councillor S M Maina, one of those who later signed the request for the special meeting, to advise him that when it came to discussing the conduct of the Mayor, standing order 42 of the Council must be complied with. Apart from the Town Clerk the special meeting was also attended by other legally qualified officials of the Council namely, the Deputy Town Clerk and the Acting Chief Counsel.

What happened at that meeting and which is common ground, is that after its formal opening, the Mayor then told the meeting what it was that those who had requested the calling of the meeting, wanted discussed. He listed these as:

"1. Conduct of H W the Mayor (Councillor S F Mwangi)

2. Election of mayor

3. Election of deputy mayor

4. Election of chairmen of committees

5. Election of deputy chairmen of committees."

He then sought the advice of the Town Clerk who advised that not only had the meeting been properly convened and that the matters to be discussed should follow the order in which the Mayor had listed them, but also that, even though standing order 42 of the Council had not been complied with, one of those who had requested the convening of the meeting, should therefore, report on the first item, namely, the conduct of the Mayor. As will be shown later, the advice given by the Town Clerk was clearly wrong, and having regard to the circumstances surrounding the calling of the special meeting, the matters to be discussed thereat, the earlier letter of the Town Clerk of 19th January, 1994, to Councillor S M Maina, and the fact that the Town Clerk must have known that standing order 42 had not been complied with, was also most unfortunate. It can also be said with some justification, that the advice given by the Town Clerk must have given impetus to the chaotic behaviour of the councillors that ensued.

After the giving of this advice, the Mayor then reminded the meeting that provisions of the Act and standing orders of the Council must be followed. Councillor Aketch then got up to speak but before he could do so, another Councillor, C K Muratha, who seemed to be one who liked things to be

done properly and according to the law, asked whether standing order 42 had been complied with. The Town Clerk who was present kept mum.

This standing order which applies to meetings of the Council is in the following terms:

"(1) No member of the Council shall make personal accusations against nor impute improper motives to any other member or members of the Council in any meeting of the Council.

(2) Any such accusations or imputations shall be made in writing and forward to the Clerk who shall refer the same to the next meeting of the appropriate committee of the Council for investigation.".

I am quite clear in my mind, that the objective of the first item of the agenda of the special meeting was to make personal accusations against the Mayor who is of course, first a councillor. It was not an agenda item under which praise was to be heaped upon him. It was for the exact opposite purpose. I am fortified in this view by the fact that in the course of the fracas that occurred on 20th April, Councillor Aketch, when he got the chance, read out not less than six charges of high handed and disrespectful behaviour on the part of the Mayor. Under these circumstances, the provisions of standing order 42 should have been complied with but this was not done and Councillor Muratha certainly had good reasons for asking whether standing order 42 had been complied with.

This question, instead of bringing the special meeting to its senses, inflamed passions which led to heckling which is not an unusual activity at such meetings and which can be forgiven, but more reprehensibly to fighting between the rival groups of councillors and utter chaos. It cannot really be said that in those circumstances a meeting was held at all. The well known conditions under which a meeting can be said to have been held such as, decorous behaviour and respect for elementary rules of procedure, were completely lacking at the meeting of such an important body as the Council.

In the midst of all this, Councillor Magelo then proposed that the Mayor leave the chair so that his conduct could be discussed in his absence. The Mayor quite rightly, refused to budge and what followed amidst the continuing chaos, can only be described as a futile *coup de etat* by Club 45 which proceeded to elect Councillor Kinyanjui as the chairman of the special meeting. It was then that Councillor Aketch read out the charges against the Mayor which without affording him the opportunity to make

an answer thereto, the members of Club 45 vociferously acclaimed. This chaotic so called special meeting of the Council also purported to elect Councillor King'ori and Councillor Ali Mwanzi respectively, as the new Mayor and Deputy Mayor of Nairobi. Other new office bearers were also elected. This outrageous behaviour was followed by Councillor King'ori planting himself surrounded by his adherents, on a seat in front of the Mayor, an act not calculated to restore peace and calm and indeed, did not do so. The opposite was the result.

Here again, it would be convenient to consider another legal issue, the validity of the so called election of the new mayor and deputy mayor of the Council. The relevant provisions of the Act are contained in section 16(1) thereof, which is in the following terms:

"16 (1) In the event of the office of mayor or deputy mayor becoming vacant from any cause whatsoever during the term of office of such mayor or deputy mayor, a successor shall, at the next meeting but one of the Council after the vacancy occurs, be elected by the councillors from amongst themselves, by secret ballot, and the person so elected shall, subject to section 18, forthwith enter upon his office and shall serve as mayor or deputy mayor, as the case may be, for the remainder of the period for which the Mayor or Deputy Mayor whose office became vacant, had been elected.".

It is clear from this section of the Act that even if the special meeting could be said to have validly removed the Mayor and the Deputy Mayor from office, the same meeting could not go on as it did, to elect their replacements. This can only be done at the next meeting but one of the Council. In short, therefore, the meeting called for 20th April to elect the new Mayor and Deputy Mayor of the Council and the election itself, were both illegal and null and void. The Town Clerk's advice on this issue was also wrong.

An important point which must now be made, is that not only did the total break down of order at the special meeting preclude any proper decisions from being made by that meeting, but what is more, it is also common ground that nothing like a proper decision or resolution was taken or adopted by the meeting, if one may be permitted to so describe it. Indeed, there are no properly recorded and approved minutes. There were thus, no decisions taken at the special meeting of 20th April.

The meeting held on 20th April, not having taken any decisions or being

capable of taking any, and having acted as already demonstrated in an illegal manner and without any colour of right in respect of at least, the first three items which were to be discussed at the special meeting, it was not at all surprising that the Mayor chose to come to Court by way of an ordinary suit, seeking an injunction against the defendants from behaving as if there had been a valid election of a new mayor, and deputy mayor and chairmen and deputy chairmen of committees of the Council and a declaration that he, his deputy and other office holders of the Council had not been removed from office by what had occurred on 20th April. He also sought damages and costs and interest thereon. The six defendants whom the Mayor sued were, it may be remembered, Councillor King'ori, who was the one who was illegally elected the new Mayor at the chaotic assembly on 20th April, and who planted himself surrounded by his supporters in front of the Mayor, as the first defendant; Councillor Akech who inspite of the non-compliance of the provisions of standing order 42 having being raised, read out the charges against the Mayor "when the chaos was still going on", as the fifth defendant; and Councillor Magelo who had before that, proposed that the Mayor should leave the chamber so that his conduct could be discussed, as the fourth defendant. In addition to these three, were two other councillors namely, Councillors Mwanzi, to whom the Town Clerk had addressed the letter dated 19th January, 1994, already referred to, and who was purportedly elected deputy mayor, as the second defendant; and Councillor Nganyi as the third defendant. The sixth defendant was the Council. The reason why the Mayor sued his Council is obvious enough and I need not go into it. The reasons why he sued the five councillors, apart from the show that Councillors King'ori, Mwanzi, Magelo and Akech put on on 20th April, and Councillor Mwanzi's prior knowledge that standing order 42 which should have been complied with, had not been so complied with, are, as set out in the plaint namely, that the five councillors were the ring leaders of those that requested the holding of the special meeting; that they caused by their conduct, the resulting chaos at the special meeting; forcibly purported to take over the special meeting and to instal two of their number Councillor King'ori and Councillor Mwanzi, as the newly elected Mayor and Deputy Mayor of the Council; and were in disregard of the law, maintaining to the officers and servants of the Council and the public at large, that there had been a valid election of new office bearers of the Council on 20th April. Apart from the five defendant councillors, there were other councillors who had also behaved in a similar way, but should that have prevented the Mayor from choosing to sue only the five councillors? This question has been raised in the course of this appeal and the short answer to be found in the following rule 9 of order 1 of the Civil Procedure Rules, is that what the Mayor chose to do is not fatal

to his suit:

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.".

Another matter that was raised in the course of this appeal which can be dealt with at this stage, is whether the Mayor's action in the High Court should have been brought by way of judicial review proceedings and not by an ordinary suit as was done. Prior to the early sixties, it was thought that what were then the prerogative orders of *certiorari*, prohibition and *mandamus* only lay against persons or bodies with judicial or quasi-judicial functions and did not apply to an authority exercising administrative powers. The distinction between judicial and administrative activities were swept away by the decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40. Judicial review now lies against an inferior court or tribunal, and against any persons or bodies like the Council, which performs public duties or functions. The types of reliefs available in judicial review proceedings are *certiorari*, prohibition, *mandamus*, claims for a declaration or injunction and for damages. In order to obtain the relief of *certiorari*, there must be a decision in this case, of the meeting of the Council or of the other defendants in an official capacity, which is sought to be quashed. There being as already shown, nothing that can be called a decision taken on 20th April, *certiorari* will not lie against the Council or the councillors who have been sued in their individual personal capacities. Prohibition is a relief that is only available where an inferior court or tribunal or a public authority like the Council, is proposing to adjudicate upon or determine a matter which is not within its jurisdiction. Apart from the defendant councillors who have been sued in their individual personal capacities, not being an inferior court or tribunal or a public authority, neither the Council nor the other defendants are proposing to adjudicate upon or determine a matter which is not within their jurisdiction. The relief for *mandamus* will obviously not lie against the defendants. Neither will claims in the absence of anything that can be called a decision of the Council, lie for a declaration or injunction or for damages in judicial review proceedings. There would be nothing to be reviewed.

And a last point which must be made in support of the Mayor's choice to bring his action by way of an ordinary suit, is that the Courts will not normally grant judicial review where there may be an alternative remedy available. In *R v Epping and Harlow General Commissioners ex parte Goldstraw* [1983] 3 All ER 257 which involved the exercise of the power of judicial review by the superior court, Sir John Donaldson MR had this to say at p562:

"That only leaves the residual jurisdiction of the Divisional Court, which of course is that which we are being asked to allow to be exercised. But it is a cardinal principle that save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.".

I need only add that apart from anything else, no "most exceptional circumstances" exist why the Mayor should have brought judicial review proceedings instead of the ordinary suit he brought against the defendants, which was an alternative remedy available to him.

What then happened to the suit that the Mayor instituted? The first, third and fifth defendants filed a defence to the effect that the Mayor, having himself, convened the special meeting, he could not deny its validity and that the Mayor having lost the confidence of the councillors, was together with the then other office bearers of the Council, properly removed from office and new officers elected in their places at that special meeting which had been orderly and at which, appropriate resolutions had been adopted. In their counter claim, the defendants sought an injunction to restrain the Mayor from continuing to hold himself out as the Mayor of Nairobi and a declaration that the councillors could elect whom they wished to be mayor. The second and fourth defendants filed their defence which was along the same lines as that filed by the first, third and fifth defendants. The defence filed by the sixth defendant, the Council, was, having regard to what had transpired at the beginning of the meeting, cynically to the effect that though the business of the special meeting was not concluded because of the chaos that had ensued, the Council had not been a party to it. An appropriate reply was filed by the Mayor and the suit went before Githinji J for trial.

The parties having failed to frame issues, the learned judge himself, quite rightly framed the following issues which he considered in his judgment:

-What is the tenure of office of the Mayor of Nairobi?

-Can the Mayor of Nairobi be removed from office before the expiry of the statutory term?

-Was he validly removed from office in the council meeting of 20/4/1994?

-Are the defendants properly sued and can the Court grant the reliefs sought?

Aggrieved by his judgment, the first five defendants, the appellants herein, have brought the present appeal which I propose to deal with as they relate to the issues as framed by the learned judge. The respondents are the Mayor and the Council.

On the first issue, the learned judge held that the term of office of the Mayor being for two years, and that re-election is to be held at the second general meeting of the Council, the Mayor's term of office which began in February, 1993, would end between lst July and 15th August, 1995. He was fortified in this view by a circular under the heading "Annual General Meeting 1993" and dated 6th July, 1993, from the Permanent Secretary of the Ministry of Local Government sent to all local government authorities. This circular, having referred to a previous circular by the same official dated 25th May, 1993, then went on to state as follows:

"The law is very clear in that the term of office for mayors/chairmen of local authorities is two years. Therefore the election of mayors/chairmen of councils cannot be held in 1993 since this will be contravening the law.

Votes of no confidence have no legal basis under the Local Government Act.

The election for chairmen for committees should ideally be held in 1994 annual general meeting since the current chairmen have only been in office for a few months. For the sake of stability of local authorities they should be allowed to continue in office until the next annual general meeting of 1994.

During the holding of annual general meetings for 1993 the councils may wish to review matters of policy decisions, past performance for the last one year and the goals for next year. Annual reports from the various departments of the Council may also be tabled for discussion and evaluation by policy makers".

The learned judge concluded in summary on the basis of this circular which he held constituted a binding directive from the Minister of Local Government, that since the Mayor had not been elected at the annual meeting of the Council in 1992, but in February, 1993, which is between that date and the annual meeting of 1993, the latter meeting should be postponed and held in 1994 as the first annual meeting of the Council, and

its second annual meeting held in 1995 during the period fixed by section 74 of the Act for the holding of annual meetings, that is to say, between lst July and 15th August, and which will enable the Mayor to serve for two years. The learned judge, though not asked to do so, held that the tenure of office of the Mayor would expire at the second annual meeting due to be held between lst July and 15th August, 1995.

The correctness of this *obiter* decision has in my view, been successfully challenged by Mr Ngatia, learned counsel for the appellants. I agree with him that the circular of 6th July, 1994, does not constitute a legally binding directive on the Council since the powers of the Minister of Local Government to issue instructions to a local authority under the Act, do not extend to the postponement of annual meetings of the Council. Yet, though the circular may have no binding effect on the Council it does express in a rather round about way, with respect to the holding of annual meetings, the correct position, which the learned judge misconceived. Whilst the statement in the circular that the "law is very clear in that the term of office for mayors ... is two years" is not entirely correct, the circular, however, correctly pointed out that

although mayoral elections could not be held during lst July - 15th August, 1993, annual meetings, because the current mayors had been elected only a few months prior to the holding of those meetings which would also be the first annual meetings to be held after their election, they should as the circular clearly implied, be held during the second annual meetings, which would take place between lst July - 15th August, 1994. In any case, far from postponing the first annual meetings, the circular suggested that "matters of policy decisions, past performance for the last one year and the goals for the next year" should be reviewed at those meetings. The circular of 25th May, 1993, which the later circular of 6th July, 1993, sought to clarify is also very clear. It pointed out correctly that the first meetings that were held after the General Elections in 1992, in pursuance of section 3 of the Local Government (Abridgement of Terms of Offices) Act, 1987, which does not apply to the City of Nairobi, to re-constitute local government authorities and at which, mayors and chairmen were elected, were quite different from the annual meetings to be held in 1993 in accordance with the provisions of section 74 of the Act and that these annual meetings would be the first annual meetings of the local government authorities concerned. With respect to the City of Nairobi which had been governed by a Commission established under section 252 of the Act, the life of that Commission was extended on 24th April, 1992, by the order known as the Nairobi City Commission (Extension of Tenure) Act, 1992, for one year from 31st March, 1992, or "until local authority elections are held throughout the country, whichever is the earlier". Judicial notice must be

taken of the fact that local authority elections were held throughout the country in February, 1993, thus terminating the life of the Commission which in turn, led to the re-constitution of the Council in February, 1993, and the election of the Mayor at its first meeting held also in February, 1993. Just like the other local government authorities referred to in the circular of 25th May, 1993, the first annual meeting of the Council was due to be held between lst July - 15th August, 1993, in accordance with section 74 of the Act and as I have already observed, was not, and could not, have been postponed on the instructions of the Permanent Secretary or Minister for Local Government. In any case, failure to hold an annual meeting as prescribed by the Act, is a breach of the law and advantage cannot be taken of such an unlawful act.

In my view, the correct position is that the term of office of a mayor may be for two years where a mayor is elected during an annual general meeting as in such a case, subsequent election will only take place on the second anniversary of his election, that is, during the second annual meeting to be held after his election. Where, however, a mayor is elected as in the case of the Mayor, in February, 1993, before the holding of the annual meeting for that year that is to say, during lst July - 15th August, his term of office may be less than two years since it will in accordance with sections 13(1) and 14(1) of the Act, end during the second annual meeting of the Council to be held between lst July - 15th August, 1994. He may be re-elected, of course. Whether the annual meeting next due after his election is held or not will not affect the position otherwise, an incumbent mayor through the postponement of annual meetings, may take unlawful advantage of the breach of the mandatory provisions of section 74 of the Act, to extend his tenure almost indefinitely, which would be utterly repugnant to the letter and spirit of the Act. This is how I interpret the relevant provisions of the Act.

I must therefore conclude that the learned judge erred in holding that the term of office of the Mayor which began with his election in February, 1993, would not come to an end during the holding of the annual meeting to be held in 1994, but in 1995. Indeed, his conclusion would have meant that the Mayor's term of office would have exceeded the two years which was the premise upon which the learned judge had based his reasoning.

And so the appellants succeed on their third ground of appeal which was that the learned judge erred in holding that the term of office of the Mayor will expire during the annual meeting of the Council to be held between lst July and 15th August, 1995.

The other grounds of appeal which relate to the second and third issues framed by the learned judge, are that he erred, in framing the issues the way he did; in his construction of sections 13 and 14 of the Act; in holding that the phrase "from any cause whatsoever" appearing in section 16(1) of the Act, had no meaning except within the narrow context of the specific grounds upon which a mayor may cease to be one, as specified in section 13(2) of the Act; in holding that the meeting held on 20th April, was illegal and the decisions taken thereat, to be null and void; and in holding that a vote of no confidence could not

be passed against the Mayor so as to prematurely terminate his term of office. These grounds were argued together by Mr Ngatia.

The learned judge dealt with the second and third issues together in great detail and arrived at conclusions which I will summarise in the following way.

He concluded that the grotesque irregularities that took place on 20th April, and the resultant break down of law and order, could not be described as a meeting for the conduct of any business of the Council. I have already pronounced myself on this and need not say any more. But assuming that what had happened on 20th April, could be described as a meeting contemplated under the Act, the learned judge held the view with which I entirely agree, that the meeting no matter how regularly it had been convened, could not debate the conduct of the Mayor in view of the provisions of standing order 42. Secondly, the purported elections of a new mayor and his deputy by the unanimous acclamation of Club 45, having regard to the obvious but mute protest of the Mayor and the more vocal objections of the other councillors opposed to Club 45, was contrary to section 14(1) of the Act which requires that such elections shall be by secret ballot. The learned judge also held, and this is clear from the accepted evidence as to what happened on 20th April, that, the Mayor, not having been given any opportunity to be heard after the charges against him had been read out, before he was adjudged to have lost the confidence of the majority of the councillors, that decision was in breach of the Rules of Natural Justice. And in any case, since the new Mayor and his deputy did not make the mandatory declaration of acceptance of office within seven days as provided for under section 18 of the Act, the offices had automatically become vacant on 28th April.

Mr Ngatia has criticized the learned judge's finding on the grounds that the special meeting having been regularly convened by the Mayor, and the Town Clerk having given her legal blessing to the holding of the meeting and to the business to be conducted thereat, what had taken place was

proper and legal. The learned judge had also wrongly applied principles of law such as the Rule of Natural Justice which requires that a party must be heard before he is condemned, which had not been pleaded. I myself, do not see anything wrong in the learned judge referring to general principles of law which he thinks are applicable to the matter before him, whether pleaded or not. Even if they are not applicable, does that vitiate the conclusions he arrived at, that are supportable otherwise? I would say no. Several of the reasons of the learned judge which I have already recounted and those that I have identified in the earlier part of this judgment, are by themselves, sufficient to conclude that though the meeting may have been properly convened, it had no power to do any of the things that it did.

But Mr Ngatia further argued that even if the meeting could not debate the personal conduct of the Mayor in view of standing order 42, the meeting was entitled to remove him from office before his term of office ran out, by means of a vote of no confidence which had been accomplished.

The relevant provisions of the Act are sections 13(2) which is in the following terms:

"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 assumes office",

and section 16(1) of the Act which has already been reproduced. In my view, if the two provisions are read together, they come to this, namely, that where a mayor has been removed from office for any cause whatsoever, he shall remain in office until his replacement assumes office, unless he resigns, or ceases to be qualified or becomes disqualified to remain a mayor. And so, the reasons specified in section 13(2) of the Act which can lead to the early termination of a mayor's term of office, are clearly intended for a different purpose than those which may lead to his earlier exit as provided for in section 16(1) of the Act. Mr Ngatia may be right in his argument that the learned judge erred in holding that the phrase "from any cause whatsoever" appearing in section 16(1) must be related, to or be within, the context of the reasons specified in section 13(2) of the Act. But what must be borne in mind, is that section 16(1) of the Act does not pretend to define the "causes whatsoever" from which the office of a mayor may become vacant,

neither does it pretend to be the section which empowers the removal of a mayor from office.

But can the removal of a mayor from office by means of a vote of no confidence be assumed under the phrase “from any cause whatsoever”? I would say no, because the phrase can only apply to what can be lawfully done and the removal from office by a vote of no confidence has, as the circular of 6th July, 1993, pointed out, no legal basis under the Act. A vote of no confidence which is a recognized constitutional and parliamentary procedure for bringing down a Government from power, is not provided for in the Act neither is it appropriate in the circumstances of a person elected by secret ballot as the Mayor of a Local Government Authority. The situation is different with respect to parliamentary proceedings where not only by convention, as in Great Britain, can the Government in power be brought down by means of a vote of no confidence, but also by written law, as specifically provided for in section 59(3) of the Constitution of Kenya. I have already dealt at length with the issues whether on 20th April, the meeting if at all it was one, could legally discuss the conduct of the Mayor and remove him from office and thereupon at the same meeting, elect his successor and that of his deputy and other office bearers of the Council. All I need say here, is that it cannot be done.

The appeal against the judgment of the learned judge with respect to the second and third issues framed by him must therefore be dismissed.

I have already dealt with the issue whether the appellants were properly sued and will here only say that as I have already held, they were properly sued. I would, however, like to add that this very issue was raised by way of a preliminary objection when the matter first came before Aluoch J during the hearing of an interlocutory application for an injunction brought by the Mayor. The learned judge ruled that the appellants had been properly sued, but the appellants did not appeal against that ruling and it is too late now to raise it again before this Court.

The present appeal succeeds only to the extent that I have already indicated. I have had the advantage of reading in draft the judgments of my Lords Kwach and Omollo with which I am in entire agreement. I also agree with the order as to costs proposed by my Lord Kwach.

Dated and delivered at Nairobi this 11th day of August 1994.

R.O.KWACH

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JUDGE OF APPEAL

R.S.C.OMOLO

.....

JUDGE OF APPEWAL

A. M. AKIWUMI

.....

JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR