REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 63 of 2009 (UR 36/2009)

LEKISHON OLEGEEM ……...…… APPLICANT

AND

PETER NKOIDILIA ……....…. 1ST RESPONDENT

MOSES YAMPOI ……..…….…….. 2ND RESPONDENT

DANIEL LANGAT.....3RD RESPONDENT

DANIEL MUTENDEI …….. 4RD RESPONDENT

JOSEPH SUMOLEI ……...……. 5TH RESPONDENT

LUCY OLGOSINE ……...…… 6TH RESPONDENT

THE CLERK, COUNTY COUNCIL, TRANS-MARA …. 7TH RESPONDENT

COUNTY COUNCIL OF TRANS-MARA …..……... 8TH RESPONDENT

(*Application for Stay of Execution of the Ruling and Order of the High Court of Kenya*

at Kisii (Musinga, J) dated 3rd of March, 2009

in

H.C.C.A. No. 192 of 2008)

****

RULING OF THE COURT

By his chamber summons dated 10th July, 2009 and professing to have been brought under **Order 39 Rules 1, 2, 3** and **9** of the Civil Procedure Rules, ***sections 3A & 63 (e)*** of the Civil Procedure Act, ***sections 74 & 76*** of the Local Government Act and "*All the Enabling Provisions of the Law*," Lekishom Olegeem, the applicant herein asked the Chief Magistrate's Court at Kisii basically for two orders, at least as concerns the motion now before us, and those orders were:-

"***1. ……***

2. Pending the hearing and determination of the instant Application, the Honourable Court be pleased to grant an <u>Interim Order of Injunction</u> restraining the 1st to 6th Defendants/Respondents, from occupying, conducting and/or holding themselves out, as the bona fide officials of the 8th Defendant, whatsoever.

3. The Honourable Court be pleased to grant an Order of <u>Temporary injunction</u>, restraining the 1st to 6th Defendants by themselves, agents, servants and/or any other person acting on the Defendants behalf, from occupying, conducting and/or holding themselves out, as the bona fide officials of the 8th Defendant, whatsoever, pending the hearing and determination of this Suit.

4. The Honourable Court be pleased to grant an Order of Temporary injunction restraining the 7th Defendant, from recognizing the 1st to 6th Defendants as duly elected officials of the 8th Defendant, whatsoever, pending the hearing and determination of this Suit."

The "*Defendants*" against whom those orders were sought are now the eight named respondents as per the notice of motion brought under ***Rule 5 (2) (b)*** of the Court of Appeal Rules and lodged in the Court on 11th March, 2009.

The basis of the claim made in the Chief Magistrate's court was the plaint filed in that court by the applicant on 11th July, 2008. He alleged that he is one of the elected councillors in the County Council of Trans-Mara the 8th respondent. On 8th June, 2008, the 7th respondent in his capacity as the Administrative Officer of the 8th respondent published and/or caused to be published a notice convening the first Annual General Meeting of the 8th respondent on the 9th day of July, 2008. He further stated that the 8th respondent is comprised of 22 elected councillors who are supposed to be joined by a further 7 nominated councillors, making a total of 29 councillors who constitute a full council. The applicant's complaint was that the aforesaid notice was issued before the County Council was fully constituted in that the nominated councillors had not been gazetted. The applicant contested the chairmanship of the 8th respondent (the County Council) but lost. He contended in his plaint that the nominated councillors, who could have been his supporters, had been disenfranchised and as such he lost the election. He sought the following prayers:

"***(i) Declaration that the notice dated 25th June, 2008 convening the first Annual General Meeting of the 8th defendant was pre-mature, illegal, null and void.***

(ii) Declaration that the elections held on the 9th day of July, 2008, pursuant to the notice dated 25th June, 2008, was irregular, illegal and void for all intent and purposes.

(iii) Permanent injunction do issue, restraining the 1st to 6th defendants by themselves, agents, servants and/or any person acting on the defendants' behalf from occupying, conducting and/or holding themselves out, as the bona fide officials of the 8th defendant whatsoever.

(iv) Permanent injunction restraining the 7th Defendant from recognizing the 1st to 6th defendants as duly elected officials of the 8th defendant, whatsoever."

It is apparent, therefore, that the prayers made in the chamber summons which we have already set out were obviously to secure interim orders pending those sought in the plaint. The chamber summons was heard by Mr. Mbogo, the acting Chief Magistrate, and by his ruling dated and delivered on 4th October, 2008 the learned Magistrate concluded as follows:-

"***Regarding the issue of whether or not the Eighth Respondent was not properly constituted at the time***

of holding its first Annual General Meeting and whether or not the resultant elections that were held a nullity, both parties were in agreement that they would be nominated councillors were yet to be gazetted by the time the Eighth Respondent held its first Annual General Meeting on the 9th July, 2008. Whether or not the Eighth Respondent properly constituted (sic) as at 9th July, 2008 and whether or not the resultant elections were a nullity is an issue that should go to full trial and cannot be determined at the preliminary stage. The same case would apply to the issue of whether or not the Seventh Respondent indulged himself in illegality."

And also that:-

"In my view, the acts complained of are still continuing and an injunction can issue. It is also clear that Section 16 of the Government Proceedings Act, Chapter 40 of the Laws of Kenya does not come to the aid of the Respondents as was correctly submitted by the applicant's counsel since the Eighth Respondent is not a government.

And also that:-

"***It is my finding that the applicant herein has satisfied this court that he has a prima facie case with probability of success. In a nutshell, the application is meritorious. In the circumstances, therefore, I hereby proceed to grant prayers 3, 4 and 5 of the application."***

It is worthy of note that by granting the applicant the prayers he sought, the learned Magistrate in effect restrained the respondents jointly and severally either by themselves, their servants and/or agents from performing their duties as elected and administrative officials of Trans-mara County Council and thus rendering the said Council inoperational. There can be no doubt at all that the scope of those orders is extremely wide and their effects drastic. It was therefore not surprising that the respondents were aggrieved by the aforesaid ruling and preferred an appeal in the High Court of Kenya at Kisii.

The records laid before us show that together with the memorandum of appeal, the respondents also filed an application by way of a notice of motion brought under **Order XLI rule 4** of the Civil Procedure Rules and ***section 3A*** of the Civil Procedure Act. They sought stay of execution of the Ruling and Orders made by the Chief Magistrate's court pending hearing and determination of the said appeal.

The learned Judge, Musinga, J found the application meritorious and granted the injunctive orders sought. Undaunted, the applicant now seeks before us an order that:-

"***2. The Honourable Court be pleased to grant an Order of Stay of Execution and/or Enforcement of the Ruling and/or Order dated 3rd March, 2009 in Kisii HCCA No. 192 of 2008, together with all consequential orders, pending the hearing and determination of the intended appeal to this Honourable Court."***

We reiterate that we can only stay the order if the applicant satisfies us on two scores, one, that he has an arguable appeal, i.e. an appeal which is not frivolous, and two that unless we grant to him an order of stay his proposed appeal, were it to succeed, would have been rendered nugatory. Those are the two principles which this Court applies when considering an application under ***Rule 5 (2) (b)*** of the Court's Rules. The High Court applies totally different principles and those have to be found in the old and well known case of **GIELLA VS. CASSMAN BROWN & CO. LTD. [1973] EA 358** which was one of the cases considered by Musinga, J in his ruling proposed to be challenged before us.

Mr. Oguttu, learned counsel for the applicant, contended that he has an arguable appeal, first on the basis that the notice convening the first Annual General Meeting of Trans Mara County Council was directed towards the swearing in of the nominated councillors, who at the material time of the notice had neither been nominated nor gazetted; secondly, that the learned Judge could not in law stay orders of injunction issued under the provisions of **Order 39 rule 4** of the Civil Procedure Rules. On the other hand, Mr. Letangule for the respondents, submitted that the appeal was frivolous.

The intended appeal to this Court would be a second appeal and so only a point of law may be taken. See ***section 72*** of the Civil Procedure Act. But, the draft memorandum of appeal incorporated in the record of the motion has set out seven grounds which mainly attack the learned Judge for having "*misunderstood and misconceived the circumstances obtained in the application before him and consequently, arrived at an erroneous decision*." With respect we do not, without any further elaboration, read any point of law in those grounds of appeal.

Further, we would agree with the learned Judge that once an official of a local authority has been elected and sworn into office, he remains elected and competent to serve until his election is nullified. Thus, in the circumstances of this case the orders of injunction issued against the respondents by the Chief Magistrate were erroneous, and misconceived and ought not to have been granted at all. See **Republic vs. Magaju & Another [2004] e KLR** Again, we express great doubt as to whether the application is competent in that it seeks a stay of execution of "stay of execution" given by the superior court..

We have carefully considered the grounds of appeal contained in the draft memorandum, the materials made available to us and the submissions both by Mr. Oguttu and Mr. Letangule for the applicant, and the respondents respectively. We have little difficulty in reaching a conclusion that the legal arguments to be canvassed in the intended appeal appear *ex facie* to have no merit. Having found the intended appeal not arguable, we need not consider the second limb of the application.

In the result, we order that this application be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 8th day of May, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

…….

JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR