



REPUBLIC OF KENYA

restraining the 1st defendant from participating or offering himself for election for any post in the mayoral, deputy mayoral and position in any of the committees within the Municipal Council of Kakamega and the 2nd defendant to be temporarily restrained from allowing the 1st defendant into the venue of elections and/or participating in the election scheduled for 10/7/2009 of the Municipal Council of Kakamega.”

We were told that this order was served on the Town Clerk, the 3rd respondent herein, on the day of the election and that the 1st respondent was accordingly removed from the venue of the election. The elections were then held and the applicant, according to his supporting affidavit, was elected as the mayor unopposed and was declared the mayor of the Council, the 2nd respondent herein.

It appears that while all this was going on, another suit was filed in the High Court at Kakamega; the first plaintiff in that suit was the 1st respondent in the motion before us; there were six other plaintiffs and we understand they were all councillors in the 2nd respondent. The parties against whom the High Court suit was brought were the 2nd respondent, the 3rd respondent and the applicant herein who had been elected as Mayor on 10th July, 2009. Accompanying the suit was summons in chambers under **Order 39 Rules 1 (2) 2(A)** of the Civil Procedure Rules and **sections 63 (c) and (e) and 3A** of the Civil Procedure Act. The prayers made in the summons were that the applicant was to be restrained from assuming the office of the mayor, that all the three defendants named in the suit were to be restrained by an injunction from holding elections for the Deputy Mayor and Chair of other committees and that the applicant was to be restrained

“--- from assuming office as mayor or in any other manner acting as mayor or in any manner acting as mayor of the 1st, (sic) 2nd and 3rd Defendant be restrained from holding elections, for deputy and chair of various committees.”

This summons was filed on 10th July, 2009 but was amended on 13th July, 2009. It is the summons which Chitambwe, J heard and by his Ruling dated and delivered on 30th July, 2009, the learned Judge made various orders, amongst them being that the election of the applicant as mayor on 10th July, 2009 had not been conducted in accordance with the law, that the applicant was restrained from assuming the office of the mayor and that the Council and its clerk were to hold elections for the mayor, the deputy mayor and the chair of various committees. Those elections were to be held within twenty-one (21) days of the Judge's orders.

According to the replying affidavit of the 1st respondent, the elections ordered by the Judge were conducted on 12th August, 2009 and that one Vincent Anjeche Nyapola was elected the mayor. Nyapola is not a party to the motion before us and it appears that he has not been served with the notice of appeal.

As the application is under **Rule 5 (2) (b)**, the applicant was obliged to satisfy the Court on two issues, namely, that his intended appeal is arguable, i.e. that is not frivolous, and secondly that unless we grant the order of stay sought by the applicant, the intended appeal, were it to succeed, would have been rendered nugatory.

On the first point, having heard Dr. Khaminwa on the issue of the Judge's jurisdiction to grant the orders he did grant despite the existence of the case in the magistrate's court, we are satisfied that there is an arguable appeal. It is to be remembered that an arguable appeal does not imply or mean that an appeal must or will succeed in the end. It simply means the appeal is one which can be argued.

On the second issue, the elections to the various seats including that of the mayor and other committee chairs have been held. As we have seen they were held on 12th August, 2009. In the present motion, we cannot nullify those elections because we cannot, in the motion, conclusively determine the question of whether the Judge had or had no jurisdiction to make the orders he did make. That determination can only be made in the intended appeal and a hearing under **Rule 5 (2) (b)** cannot be converted into the hearing of an appeal. To declare the elections a nullity at this stage, as Dr. Khaminwa asked us to do, would be going far beyond the scope of **Rule 5 (2) (b)**. We are not persuaded that we should do so in this motion. As is commonly put in such situations the applicant's notice of motion has been overtaken by events and there is really nothing for the Court to stay. In the circumstances, we must order that the notice of motion be and is hereby dismissed. The costs of the dismissed motion shall be in the intended appeal. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 23rd day of October, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. OKUBASU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.