



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI. NAI NO. 256 OF 2008**

**ORANGE DEMOCRATIC MOVEMENT KENYA ..... APPLICANT**

**AND**

**HENRY BILL MWENDWA..... 1ST RESPONDENT**

**MWIYATHI MUTIA..... 2ND RESPONDENT**

**JOSEPH KALENGA ..... 3RD RESPONDENT**

**ABAROBA GODANA..... 4TH RESPONDENT**

**THE TOWN CLERK, MINICIPAL COUNCIL OF MAVOKO .....5TH RESPONDENT**

**THE TOWN CLERK, COUNTY COUNCIL OF KITUI..... 6TH RESPONDENT**

**THE TOWN CLERK, MUNICIPAL COUNCIL OF KITUI ..... 7TH RESPONDENT**

**THE MINISTER FOR LOCAL GOVERNMENT ..... 8TH RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 9TH RESPONDENT**

**(Being an application for an injunction pending the lodging, hearing and determination of an intended appeal from the judgment and order of the High Court of Kenya at Nairobi (Dulu J.) dated 28th August 2000**

**in**

**H.C.C. MISC.C.APPLICATION NO. 68 OF 2008)**

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**RULING OF THE COURT**

By Gazette Notice No. 1276 of 22nd February 2008, Henry Billy Mwendwa, Miwathi Mutua, Joseph Kalenga and Abaroba Godana the 1st , 2nd , 3rd and 4th respondents in the application before us, were notimated, among other people, to serve as councilors in various Local Authorities in the country. They were nominated to represent various political parties in the country, among them, the Orange Democratic Movement Kenya, the applicant in the motion before us. The nomination of the four mentioned persons, among other people, was revoked through Gazette Notice No. 1277 of 25th February 2008, signed by Uhuru Kenyatta, as Minister for Local Government.

The aforementioned four persons were aggrieved and on 27th February 2008, upon application, were granted leave to apply for orders of certiorari, to remove to the High Court for quashing, the minister's decision in revoking their nomination, and for prohibition to prevent the respective local authorities to which they were nominated from exercising their powers as nominated Councilors. They filed their application on the basis of which the superior court (Dulu J) granted the orders of certiorari and prohibition on 28th August 2008. Following that decision Gazette Notice No. 1277 of 2008, was quashed. The effect of that quashing was that the 1st to 4th respondents herein became eligible to be sworn in as Councillors. The applicant herein had identified persons who in their opinion should have been nominated as Councillors representing that party. The persons the party nominated were not accepted by the Minister. In its view, Dulu J's decision worked against the interests of the party. It therefore intends to challenge the learned Judge's decision in an appeal to this Court yet to be filed.

It filed and served a Notice of Appeal declaring its intention of appealing and immediately filed this application under certificate of urgency. The motion is dated 15th September, 2008, and was filed in Court on 16th September, 2008. There are only two prayers, the first one being that this Honourable Court grant it an injunction restraining the various local authorities into which the 1st to 4th respondents were nominated, from swearing them in as councilors pending the lodging, hearing and determination of its intended appeal against the aforesaid decision. The second prayer is for the costs of the application. That motion was certified as urgent and was listed to be heard, on priority basis on 24th September 2008.

When the motion came before us for hearing the 1st, 2nd, 3rd and 4th respondents had already been sworn in as Councillors. The 1st, 2nd and 3rd respondents were sworn in on 18th September, 2008, a day after they had been served with the motion. The 4th respondent was sworn in on 16th September, 2008, a day before he was served with the motion.

In his submissions before us, Mr. Nyaoga for the applicant submitted that the 5th , 6th ,and 7th respondents, who are the 'chief'officer of Local Authorities into which the 1st to 4th respondents were nominated , stole a march on the applicant by swearing them in hurredly, and should therefore, not be permitted to benefit from their own mischief. In his view the local authorities concerned should have waited until after the determination of this motion before conducting the swearing in ceremony. Mr. Nyaoga submitted further that the powers of the Court under ***rule 5(2)(b)*** under which this application was brought, are wide and include a power to grant an injunction in circumstances as those disclosed in this application. He conceded that, prima facie, the application has been overtaken by events but wondered whether the Court should consider itself helpless where a party has stolen a march on another party.

On the merits of the application Mr. Nyaoga submitted that the applicant has an arguable appeal as in his view orders were granted upon a wrong basis.

Mr. Eric Mutua appeared for the 1st to 4th respondents both inclusive, and submitted that the decision of the superior court against which an appeal is intended is in tandem with decisions of this Court on similar or related matters. He did not think that a march was stolen on the applicant as in his view there was no bar to the swearing in of his clients. Lastly, it was his view that the 5th to 9th respondents having not been parties in the superior court they were improperly joined in this application.

Mr. Nyaoga's answer to that was that the applicant had served a Notice of Appeal on them, and by rules of this Court it was proper to join them.

The powers of the Court under ***rule 5(2) (b)*** are discretionary, which discretion is wide and is exercisable judicially. Two principles guide the Court in such applications. First the applicant must show he has an arguable appeal, or put differently, that its appeal or intended appeal is not frivolous. The second principle is that the applicant must satisfy the Court, in addition, that unless it is granted a stay or injunction its appeal or intended appeal will be rendered nugatory.

We have considered the rival submissions of counsel. ***Rule 5 (2***) of this Court's Rules provides a complete answer to Mr. Nyaoga's submission.

The opening words of that rule read as follows:

***"Subject to the provisions of sub-rule (1) the institution of an appeal shall not operate to suspend any sentence or to stay execution, an injunction or a stay of any proceedings."***

The applicant wanted this Court to stop the swearing in of the 1st to 4th respondents as ***"councilors pending the lodging, hearing and determination of an intended appeal from the judgment and order of Mr. Justice Dulu delivered in the High Court on the 28th day of August 2008."*** There is no prayer for any injunction to stop these respondents from taking office or barring them from assuming office as councilors. With this in mind and considering the fact that there was no order in place staying the swearing in of the 1st to 4th respondents from being sworn as councilors the filing of this application ***per se*** did not preclude their being sworn in as councilors.

The respondents had notice of the filing of this application. The applicant's counsel in effect was complaining that by swearing in the 1st to 4th respondents the respective town clerks of the Municipal Council of Maroko, Kitui County Council and Municipal Council of Kitui, stole a march on the applicant. In other words they acted immorally and without any due regard to the rights of the applicant. However this is not a perfect world. The existence of the law is predicated on the fact that some people might want to take advantage over others. So the law governs inter-personal relationships to obviate such actions.

**Rule 5(2**) of this Court's Rules , in effect, provides as we stated earlier, a complete answer to Mr. Nyaoga's submission. The applicant did not obtain either an injunction or stay order to prevent the 1st to 4th respondents being sworn. They were sworn and such swearing in was not in breach of any law. Yes, it might have been immoral. However, this is a court of law not morals.

Mr. Nyaoga urged the view that to obviate injustice to the application this court should grant an injunction to stop the 1st to 4th respondents from taking office. There is no prayer for such an order in the application before us. If we were to grant such an order it will tantamount to us amending the application. Inherent powers cannot, properly, be invoked to fill in gaps in the applicant's motion.

In **Yego v. Tuiya & Another** [1986] KLR 726, an issue arose whether a mandatory injunction could issue even though it was not prayed for in the motion before the superior court. In his judgment in the matter the late Nyarangi JA, had this to say:

***"The High Court (Patel J) was urged to make an order to restrain the appellant from doing an act but not to do a particular act eg to vacate the land. The respondents asked for a remedy of an equitable nature which could not run with the land which would appear to be the effect of the eviction order."***

Likewise, the prayer for injunction could not follow the 1st and 4th respondents. The injunction was to stop them being sworn. But having been sworn as at the date this application came for a hearing it follows that the application had been overtaken by events and this Court will not in any way attempt to follow the 1st to 4th respondents without a specific prayer for injunction to stop them from assuming

office as councilors. Had the respondents' action been unlawful or irregular, perhaps the Court in exercise of its inherent power would have intervened to restore the status quo ante.

For the reasons above, the application dated 15th September 2008, fails and it is hereby dismissed but with no order as to costs.

Dated and delivered at Nairobi this 17th day of October 2008.

***P.K. TUNOI***

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***JUDGE OF APPEAL***

***S.E.O. BOSIRE***

**.....**

***JUDGE OF APPEAL***

***D.K.S. AGANYANYA***

**.....**

***JUDGE OF APPEAL***

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR.**