



**REPUBLIC OF KENYA**

**COURT OF APPEAL OF KENYA AT NAIROBI**

**CIVIL APPEAL 283 OF 2007**

**1. THE TOWN CLERK MUNICIPAL COUNCIL OF EMBU**

**2. THE MUNICIPAL COUNCIL OF EMBU.....APPLICANTS**

**AND**

**JOHN N. M. NYAGA .....RESPONDENT**

**(Application for stay of execution pending appeal from the ruling and order of the High Court of Kenya**

**Embu (Lady Justice Khaminwa) dated 7<sup>th</sup> day of November, 2007**

**in**

**H.C.C.C. NO. 138 OF 2007)**

**\*\*\*\*\***

**RULING OF THE COURT**

The applicants seek an order under *Rule 5 (2) (b)* of the Court of Appeal Rules that the execution of the Ruling/Order of the superior court (Khaminwa J) dated 7<sup>th</sup> November, 2007 in Embu *High Court Case No. 138 of 2007* be stayed pending the hearing and determination of the intended appeal.

The respondent *John N. M. Nyaga* was elected as a councillor of Kamiu ward for Municipal Council of Embu in the year 2001 and subsequently, on 6<sup>th</sup> July, 2006 he was elected as the mayor of the Municipal Council of Embu. On 23<sup>rd</sup> October, 2007 the Minister for Local Government dissolved all councils to pave way for the civic election to be held together with Presidential and Parliamentary General Elections on 27<sup>th</sup> December, 2007.

The dissolution of the council was published in the *Kenya Gazette No. 10228* of 23<sup>rd</sup> October, 2007 and it was in the following terms:

**“DISSOLUTION OF COUNCILS**

***In exercise of the powers conferred by section 58 (1) of the local Government Act, consequently upon the dissolution of Parliament, the Minister of Local Government dissolves all local authorities with***

**effect from 23<sup>rd</sup> October, 2007”.**

On the same day (i.e. 23<sup>rd</sup> October, 2007) the Permanent Secretary, Ministry of Local Government issued guidelines to all Town Clerks on how the affairs of the councils could be managed. Regarding the office of the Mayors, Chairmen and Councillors, the circular notified the Town Clerks that with the dissolution of the councils, the offices of the Mayors, Chairmen and Councillors had been rendered vacant and that all office holders should vacate their offices and surrender all properties of councils.

The Permanent Secretary issued a subsequent circular dated the same day stating in part:

**“..... It has come to my notice that some Mayors/Chairmen have chosen not to vacate their offices contrary to section 58 (1) of Local Government Act Cap. 265. With the dissolution of councils all civic leaders cease to be councillors and by extension the offices of the Mayor/Chairmen fell vacant.**

**Subsequently, I am directing that Mayors/Chairmen who have not complied with the law must do so immediately. All Town Clerks are hereby directed to implement the directive and ensure that all council property has been returned and accounted for”.**

The respondent subsequently filed a suit in the High Court – *H.C.C.C. No. 138 of 2007*. He averred in the plaint that as a Mayor he was supposed to continue in office until another Mayor is elected and sought a declaratory order to that effect in addition to a prayer for a permanent injunction restraining the Town Clerk and the Municipal Council from barring him from performing any duty as a Mayor and from enjoying his office, civic regalia, motor vehicles and other facilities due to the Mayor. The plaint was accompanied by an interlocutory application for interlocutory injunctions in the same terms as in the Plaint. By the application the respondent sought a further order that he be allowed to continue in his office as a Mayor to perform all his duties and use all the facilities that he was entitled to.

The application was heard inter partes by the superior court (Khaminwa J) and allowed on 7<sup>th</sup> November, 2007 and two the prayers were granted “*pending the hearing and determination of the case*”.

The applicants have filed a Notice of Appeal.

The principles which guide this Court in applications for stay of execution, injunction or stay of proceedings are well known (see *Wasike vs. Swala* [1984] KLR 591.

The application is supported by the affidavit of J. M. Muturi, the Acting Town Clerk of Municipal Council of Embu. He deposes in paragraph 17 that the intended appeal is arguable for the reasons he has enumerated in that paragraph.

The decision of the superior court was mainly dependent on the construction of **section 13 (2)** of the Act which provides:

**“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 offices”.**

The superior court construed that section to mean that Parliament did not intend that the office of the mayor should at any time be vacant; that Parliament never intended the occupant of the office to be removed until a replacement is in office.

**Section 58 (1)** of the Act under which the Minister dissolves all councils provides:

**“Where there is general election under the National Assembly and Presidential Elections Act, there shall simultaneously be held an election of all councillors required to be elected under this Act and for that purpose the Minister shall forthwith upon dissolution of Parliament, dissolve all Local authorities”.**

**Section 12 (1)** of the Act provides, among other things, that a Municipal council shall consist of a number of councillors as may be elected, nominated or appointed.

**Section 13 (1)** of the Act provides that a Mayor of a municipal council shall be elected by the council from among the councilors at the first meeting of the council and subsequently at each second annual meeting of the council. By **section 27 (1)** of the Act, the term of office of the elected councillor is 5 years.

The Acting Town Clerk deposes in paragraph 17 of the supporting affidavit, among other things, that **section 13 (2)** of the Act is inapplicable once the council is dissolved; that a mayor cannot continue to be in office while enjoying the perks and privileges of such office when a council is dissolved; that the respondent who by operation of law ceased to be a councillor cannot sit as a mayor; that the respondent did not move the superior court to quash the order of the minister dissolving all councils and that **section 13** of the Act was not properly construed.

It is clear from the Act that the Mayor is elected from amongst the councillors and that the mayor and the councillors constitute a council.

It is not also contested that a Mayor is elected periodically every two years and that the Minister acted lawfully when he dissolved all councils to pave way for civic elections. Some of the pertinent questions which arise, are firstly, whether **section 13 (2)** of the Act applies to periodic elections of Mayors or to all cases including when the Council has been dissolved pursuant to law, and secondly, whether the office of a Mayor can legally exist when the whole council including the offices of councillors has been lawfully dissolved. On analysis, we are satisfied that the intended appeal raises a serious question of national importance on the interpretation of the law regarding the term of office of a Mayor.

The Acting Town Clerk further deposes that unless the orders of the superior court are stayed, the intended appeal would be rendered nugatory.

The respondent has been granted at an interlocutory stage the same reliefs that he seeks in the suit. The interlocutory orders are operative pending the hearing and determination of the suit. It is highly improbable that the respondent would be interested in the prosecution of the suit having obtained the desired orders or that the suit would be heard before the 27<sup>th</sup> December, 2007 when national civic elections are due. It would be unjust and a heavy financial burden to the Council which is run by public funds to maintain a Mayor in office indefinitely when the existence of the office is seriously contested. Furthermore, the Council would suffer great financial loss, if it is ultimately found that the office of a Mayor to which the respondent has been restored by a court order did not legally exist after the dissolution of the Council. On the other hand, if the application is allowed and the appeal is ultimately dismissed, the respondent can be adequately compensated for any financial loss that he may have suffered.

In the final analysis, the application is allowed with the result that the execution of the Ruling/Orders of the superior court dated 7<sup>th</sup> November, 2007 is stayed pending the hearing and determination of the intended appeal.

The costs of this application shall be costs in the intended appeal.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of December, 2007.**

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**W. S. DEVERELL**

.....

**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR