



**IN THE HIGH COURT OF KIRIBATI
TE KABOWI AE RIETATA I KIRIBATI**

High Court Civil Case 27 of 2022

BETWEEN BOTIKA MAITINNARA
Applicant

AND BETIO TOWN COUNCIL
1st Respondent
TETABO MANAIMA
2nd Respondent

Appearances: Mr Banuera Berina for the Plaintiff
 Mr Monoo Mweretaka and Ms Fuatino Noa for the
 1st Respondent
 No appearance for the 2nd Respondent

Judgment: 23 December 2022

JUDGMENT

1. The Applicant through her counsel, Mr Berina, filed her originating notice of motion applying for the prerogative writ, *certiorari* according to Order 61, rule 4 of the High Court Civil Procedure Rules. The relevant rule is spelled out as,

“4. (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made by notice of motion, and there shall, unless the Court granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion or summons and the day named therein for the hearing.

(2) The notice or summons shall be served on all persons directly affected, and where it relates to any proceedings in or before a Court, and the object is either to compel the Court or an officer thereof to do any act in relation to the proceedings or to quash them or any order made therein, the notice of motion or summons shall be served on the clerk or Registrar of the Court and the other parties to the proceedings, and where any objection to the conduct of the Judge is to be made, on the Judge.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion or summons shall be filed before the notice or summons is put in the list for hearing, and, if any person who ought to be served under the provisions of the last preceding paragraph has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the Court on the hearing of the motion or summons.

(4) If on the hearing of the motion or summons the Court is of opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this Rule, the Court may adjourn the hearing, in order that the notice or summons may be served on that person, upon such terms (if any) as the Court may direct.”

2. At the initial hearing of this case, I made it clear that I am personally related to the second named Respondent. Both parties have no problem in having the case presided over by myself given that the case is principally between the Applicant and the 1st named Respondent, the Betio Town Council (BTC), thus no legal representation for the second named Respondent. The other important reason is the fact that there is no other High Court Judge to hear the case except myself while Chief Justice Hastings and Puisne Judge Lambourne were both suspended. I therefore agree to preside over the case.
3. The affidavits of services showed that both Respondents were served but only the first named Respondent was legally represented by the Attorney General’s office who advised

that the second named Respondent essentially have the same reply to the application thus no representation.

4. The evidence supporting the Applicant and the Respondents' evidence are in the form of affidavits and cross examination of the first Respondent's Clerk, Maraki Bokai.

The Applicant's case

5. The Applicant's application for leave was not objected to by counsel for the Respondent, Ms Noa, when the case was heard on 11 August 2022 and this court granted leave to the Applicant to bring this application according to Order 61, rule 4 of the Civil Procedure Rules.
6. The Applicant applied for two main remedies, firstly an order of certiorari removing into this court the decision of the first Respondent as conveyed to the Applicant by letter dated 4th July 2022 for the purpose of it being quashed and secondly, an order of certiorari removing into this Court the decision of the above-named first Respondent making the second named Respondent Mayor for Betio Town Council for the purpose of it being quashed.
7. The Applicant requested for an order to quash the decisions of the first named Respondent deciding that the Applicant's council seat is deemed vacant after being absent from three consecutive Full Council meetings and secondly, appointing the second named Respondent as Mayor.
8. The Applicant at all material times was one of the Betio Town Council councilors having being elected for the Betio South Ward in October 2020. She was also elected mayor unopposed for the BTC in the same month.

9. On 4 July 2022, Clerk Maraki Bokai, of the BTC wrote a letter to the Applicant advising that her seat as a council member is made vacant after failing to attend three consecutive meetings of the council without seeking permission for her absences.
10. In her application, the Applicant based her case on the following legal provisions:
- That section 11(2)(b) of the Local Government Act does provide for the seat of a member to become vacant when such member fails to attend 3 consecutive meetings of a Council;
 - That section 20(3)(b) sets out how a Council member should be notified of a council meeting.
11. The crust of the Applicant’s case relates to the failure of the BTC Clerk to serve the Applicant with the notice for the meetings the Applicant failed to attend. Section 20(3)(b) of the *Local Government Act* (1984) sets out that,

“Convening of meetings

20. (1) The president of a council may call a meeting at any time either on his own motion or upon requisition of one-third of the members of the council.

(2) If the president of a council refuses to call a meeting of the council after a written requisition to do so signed by one third of the members of the council has been presented to him or if, without so refusing, such president does not, within 2 days after such requisition has been presented to him, call a meeting to take place within 3 weeks of the date of the requisition, the persons presenting the requisition may forthwith, on such refusal or on the expiration of 2 days, as the case may be, call a meeting of the council.

(3) 7 days at least before the day of any meeting called under subsection (1) or subsection (2)-

(a) notice of the time and place of the intended meeting shall be published at the office of the council and, where the meeting is called by members of the council, the notice shall

be signed by those members and shall specify the business proposed to be transacted thereat;

(b) a summons to attend the meeting, signed by the clerk of the council shall be left at or sent by post to the usual place or abode of every member of the council and such summons shall, in the case of a meeting called by members of the council, state the business which they specified in the notice given by them as proposed for transaction thereat, and in the case of any other meeting, the business which is proposed by the president for the transaction thereat:

Provided that want of service of the summons on any member shall not affect the validity of a meeting.

12. Section 20(3)(b) clearly states that 7 days at least before the day of any meeting called under subsection (1) or subsection (2), a summons to attend the meeting, signed by the clerk of the council shall be left at or sent by post to the usual place or abode of every member of the council and such summons shall, in the case of a meeting called by members of the council, state the business which they specified in the notice given by them as proposed for transaction thereat, and in the case of any other meeting, the business which is proposed by the president for the transaction thereat.
13. The Applicant submitted that there was no notice served on her for the alleged meetings and that the law is clear that there are no circumstances when service of the notice of hearing on a council member may be dispensed.
14. The Applicant submitted that the Applicant had never lost her seat as a Councilor and Mayor for BTC and that the appointment of the Second Respondent as Mayor on the alleged ground that the mayoral seat for BTC had become vacant was invalid and of no effect.

The Respondents' case

15. The BTC Clerk, Maraki Bokai, in his evidence stated that the Applicant was absent from six meetings of the Council including the following:

- Regular meeting of 29 April 2022
- Special Meeting of 2 May 2022
- Special Meeting of 17 May 2022
- Regular Meeting of 26 May 2022
- Special Meeting of 27 May 2022
- Regular meeting of 16 June 2022

16. Mr Bokai, asserted as well that the Applicant never sought permission for her absences nor lodged her letter of apology.

17. With respect to the Local Government Act's provision on the service of notice of meeting on councilors, Clerk Maraki, said that, *"the purpose of this case, it has to be clear that for every meeting of the FC (Full Council), it is a normal procedure that a notice of such meeting be served to all the members of the Full Council prior to the date and time of the meeting. But it is also common practice and usage that Regular meetings of the FC are scheduled at every Thursday on the third week of each month. This meeting schedule is well known by all the elected members and even by the staff of the Council as well and it has been followed for sometimes now."*

18. During cross examination, Clerk Maraki, stated that the Applicant was overseas during the meetings on her personal trip and so service of the notice was not done to her home address as provisioned by the relevant Act.

19. Mr Mweretaka, for the first Respondent asserted in his submission that even the notice of the meetings was not served, the Applicant was still aware of the dates particularly that they were often held every Thursdays of the third week of each month.

20. During cross examination of Clerk Maraki, it was clear that what he said about the schedule of meetings being held every Thursdays of the third week of each month was

not true as it could change. The meeting dates the Applicant was absent on, only the 26th of March and the 16th of June were held on Thursdays.

Court's findings

21. The crux of this application is the application of section 20(3)(b) of the *Local Government Act* 1984. The provision sets out that,
“7 days at least before the day of any meeting called under subsection (1) or subsection (2), a summons to attend the meeting, signed by the clerk of the council shall be left at or sent by post to the usual place or abode of every member of the council and such summons shall, in the case of a meeting called by members of the council, state the business which they specified in the notice given by them as proposed for transaction thereat, and in the case of any other meeting, the business which is proposed by the president for the transaction thereat.”
22. The reading of the provision above clearly states that it is mandatory for all members of the Council to be served with a summons or notice to attend the meeting. The use of the word ‘shall’ plainly stipulate that it is the duty of the Council Clerk to sign the notice and leave at or send by post to the usual place or abode of the councilor, in this case, the Applicant.
23. That never happens as stated by the Clerk in his affidavit. There are two reasons put forward by the Clerk in his evidence for not serving the Applicant with the notice of the meetings. Firstly, she was overseas on her personal trip so she was not at her home and secondly, he claimed that the Applicant should have known the dates of the meetings as usually there were held every Thursdays on the third week of the month.

24. The latter evidence is not true as the meetings in which the Applicant was absent were held on different days except for one meeting held on 26 May 2022 and 16 June 2022. The special meetings in May occurred on different days and not only on the third week of the month.
25. With respect to the evidence of the BTC Clerk, they are mere excuses for not serving the notice of the meetings to the Applicant foregoing the relevant law for the service of notice of the meeting under *The Local Government Act* of 1984.
26. The argument raised by the Respondent that had the notices were served on the Applicant for the meetings she was absent from, the outcome would be the same where she would fail to attend because she was overseas on her personal trip. This is true but the problem is, the notices were never served on the Applicant.
27. I also accept the submission and evidence of the Applicant that she was not aware of the meeting dates as it was not only on third Thursdays of every month but conducted on other days as well. There were dates on which she tried to join the meetings virtually but was rejected by the Full Council. I agree with Clerk Maraki that the majority's decision to reject the Applicant joining the meeting virtually could be made.
28. In light of the above discussion, this court finds that the first named Respondent have failed to comply with section 20(3)(b) of the Local Government Act 1984 not serving the Applicant with the proper notice of the meetings. To this extent, the Respondent's submission that the Applicant has failed to attend the meeting of the Council three times consecutively is rejected and so it is unlawful to deem vacant the Applicant's council seat as councilor for Betio South Ward as well as her mayoral seat. In addition, an in light of this court's findings, the decision of the first Respondent to appoint the second Respondent as mayor is also invalid and unlawful.

29. Orders of this court:

- a) An order of certiorari is granted against the decision of the first Respondent conveyed to the Applicant by letter dated 4 July 2022 stating that she has failed to attend three meetings of the Council for three times consecutively making her seat vacant, the decision is quashed;
- b) An order of certiorari is granted against the decision of the first Respondent made on or about 22 July 2022 making the abovenamed second Respondent Mayor for Betio Town Council, the decision is quashed;
- c) Costs is awarded to the Applicant to be taxed if not agreed.

THE HON. ABUERA URUAABA,
COMMISSIONER OF THE HIGH COURT