



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**MISCELLANEOUS CIVIL APPLICATION NO.90 OF 2011 (JR)**

**IN THE MATTER OF: AN APPLICATION BY THE CLERK, COUNTY COUNCIL OF TRANS-MARA & COUNTY COUNCIL OF TRANS-MARA FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

**AND**

**IN THE MATTER OF: LOCAL GOVERNMENT ACT. CAP 265 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: CONVENTION OF ANNUAL GENERAL MEETINGS**

**AND**

**IN THE MATTER OF: THE ANNUAL GENERAL MEETING HELD ON 11<sup>TH</sup> JULY 2011**

**AND**

**IN THE MATTER OF: SECTIONS 74 & 76 OF THE LOCAL GOVERNMENT ACT**

**AND**

**IN THE MATTER OF: KILGORIS SRMCC NO. 30 OF 2011**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE SENIOR RESIDENT MAGISTRATE'S  
COURT, KILGORIS ..... RESPONDENT**

AND

STEPHEN KINGI )

MICHAEL OLOLABURA) ..... INTERESTED PARTIES

AND

EX-PARTE

THE CLERK, COUNTY COUNCIL OF TRANS MARA

COUNTY COUNCIL OF TRANS-MARA

RULING

1. Consequent upon the leave granted to the Ex-parte applicant on 17<sup>th</sup>
2. October 2011, the applicant filed the substantive notice of motion also dated 17<sup>th</sup> October 2011 seeking orders that:-
  1. The application herein be heard on priority basis owing to the obtaining special and/or peculiar circumstances.
  2. The Honourable court be pleased to grant an order of Judicial Review, in the nature of *certiorari*, to remove unto the High Court and Quash the pleadings, proceedings and/or Decisions, if any, of the Respondent vide, Kilgoris SRMCC No. 30 of 2011, between Stephen Kingi & another –vs- The Clerk, County Council of Trans-Mara & Another.
  3. The Honourable Court be pleased to grant an Order of Judicial Review in the nature of *Prohibition*, to issue prohibiting the Respondent, from hearing, further hearing, entertaining and/or handing down, any determination and/or decision, vide, KILGORIS SRMCC NO.30 OF 2011, between STEPHEN KINGI & ANOTHER –VS- THE CLERK, COUNTY COUNCIL OF TRANS-MARA & ANOTHER, affecting and/or concerning the performance of the statutory and/or administrative duties of the applicants and in particular, the convention of the statutory Annual General Meeting of the 2<sup>nd</sup> Ex-parte Applicant held on the 11<sup>th</sup> day of July 2011.
  4. Costs of this application be borne by the respondent and the interested parties jointly and severally.
  5. Such further and/or other orders be made as the court may deem fit and expedient.
3. The application is supported by the statement of Facts (Judicial Review) dated 13<sup>th</sup> October 2011, the Affidavit in Verification of Statement of Facts together with annexures thereto dated 13<sup>th</sup> October 2011, and is also premised on the following grounds:-
  - a) Leave to institute the instant application for Judicial Review in the nature of *Certiorari & Prohibition* was issued on the **17<sup>th</sup> day of October 2011**.
  - b) The 1<sup>st</sup> Ex-parte Applicant is the Chief Executive Officer of the 2<sup>nd</sup> Ex-parte Applicant.
  - c) The 1<sup>st</sup> Ex-parte Applicant is vested and/or conferred with statutory jurisdiction to call for and/or convene all the meetings of the 2<sup>nd</sup> Ex-parte Applicant.

- d) The powers and/or obligations of the 1<sup>st</sup> Applicant are donated vide the 3<sup>rd</sup> Schedule of the Local Government Act, Chapter 265, Laws of Kenya.
- e) On the other hand, the 2<sup>nd</sup> Ex-parte Applicant is a Local Authority created pursuant to Section 28 of the Local Government Act, Chapter 265, Laws of Kenya.
- f) The 2<sup>nd</sup> Ex-parte Applicant is obliged to hold a Statutory Annual General Meeting on a yearly basis, between the **30<sup>th</sup> day of June** to the **15<sup>th</sup> day of August** in any particular year.
- g) Besides, the Agendas to be discussed and/or canvassed during the statutory Annual General Meeting are also statutorily provided for.
- h) In particular, the 1<sup>st</sup> Ex-parte Applicant is obliged to convene a Statutory General Meeting of the 2<sup>nd</sup> Ex-parte Applicant, in line with the provisions of Sections 74 & 76 of the Local Government Act, Chapter 265, Laws of Kenya.
- i) The convention of the Statutory Annual General Meeting of the 2<sup>nd</sup> Ex-parte Applicant is the exclusive statutory duty and/or preserve of the 1<sup>st</sup> Ex-parte Applicant.
- j) Besides, the 1<sup>st</sup> Ex-parte Applicant is obliged and/or obligated to issue and serve the requisite Notices, calling or and/or convening the Statutory Annual General Meeting (s) of the 2<sup>nd</sup> Ex-parte Applicant.
- k) On the **4<sup>th</sup> day of July 2011**, the 1<sup>st</sup> Ex-parte Applicant herein called for and/or convened the Statutory Annual General Meeting of the 2<sup>nd</sup> Ex-Applicant on the **11<sup>th</sup> day of July 2011**.
- l) Pursuant to the convention of the statutory Annual General Meeting, the 1<sup>st</sup> Ex-parte Applicant issued and served the requisite Notice (s) in line with Sections 74 & 76 of the Local Government Act, Chapter 265, Laws of Kenya.
- m) Subsequently, the scheduled statutory Annual General Meeting of the 2<sup>nd</sup> Ex-parte Applicant herein, took place on the **11<sup>th</sup> day of July 2011**.
- n) Notwithstanding the convention of the statutory Annual General Meeting of the 2<sup>nd</sup> Ex-parte Applicant, the Interested Parties herein failed and/or neglected to attend same.
- o) Nevertheless, the Interested Parties herein have since moved to Court and commenced proceedings vide KILGORIS SRMCC NO.30 OF 2011, seeking to impeach and/or invalidate the convention of the statutory Annual General Meeting and the attendant elections.
- p) The suit vide KILGORIS SRMCC NO.30 OF 2011, seeks to challenge and/or impugn the performance and/or exercise of statutory duties of the 1<sup>st</sup> Ex-parte Applicant.
- q) The performance and/or exercise of the statutory duties by the 1<sup>st</sup> Ex-parte Applicant are not subject to the jurisdiction of the respondent.
- r) In the event of any *ultra vires* action and/or decision by the 1<sup>st</sup> Ex-parte Applicant, such action can only be *impugned* by the Honourable High Court.
- s) Consequently, the Respondent herein is not seized with jurisdiction to inquire, interrogate and/or investigate the propriety and/or otherwise, of the convention and holding of the 2<sup>nd</sup> Ex-parte Applicant statutory General Meeting.

- t) In a nutshell, the proceedings before the respondent have been mounted in vacuum.
- u) At any rate, the proceedings before the respondents are *a nullity ab initio*.
- v) The proceedings vide KILGORIS SRMCC NO. 30 OF 2011, constitutes and/or amounts to abuse of the due process of court.
- w) The proceedings and orders, if any, issued vide KILGORIS SRMCC NO.30 OF 201, are in contravention of the Provisions of Sections 74 & 76, of the Local Government Act, Chapter 265, Laws of Kenya.
- x) The actions of the Respondent are unconstitutional.
- y) That the decision of the Respondent are contrary to Law and constitute a travesty to justice.
- z) This honourable court is seized of jurisdiction to ensure that all quasi-judicial bodies like the respondent act within the parameters of the law.
- aa) It is in the interest of justice that the instant application be heard and allowed *Ex-Debito Justitiae*.

4. The application is opposed vide the Replying Affidavit sworn by Stephen Kingi, a resident of Keyian Location, within Trans mara East District and who is the 1<sup>st</sup> Interested Party in this matter. The gist of the said Replying Affidavit is that the subordinate court at Kilgoris had the requisite jurisdiction to deal with the matters before it. The deponent urged this court to dismiss the applicant's application.

5. When this application came up for hearing on 16<sup>th</sup> January 2012, the parties agreed to canvass the same by way of written submissions, which submissions have since been filed and exchanged. The parties again appeared before me on 23<sup>rd</sup> January 2012 for highlighting of their respective submissions.

6. On the part of the applicant, counsel highlighted four main points, the first one being on the issue of jurisdiction. Counsel submitted that the decision convening the Statutory Annual General Meeting of the 2<sup>nd</sup> applicant was made in execution of statutory and administrative duties

bestowed upon the 1<sup>st</sup> Ex-parte applicant by dint of **section 76** of the **Local Government Act, Cap 265**, and that in case of any grievance arising as a result of such a decision, the only door open for such a grievant is Judicial Review proceedings and not through orders of declarations as envisaged by the Interested Parties herein.

7. **Section 76** of the **Local Government Act** provides as follows:-

**“76 (1) Notice in writing of the time and place, and the business**

**proposed to be transacted at every meeting of a local authority shall be published at the offices of the local authority and be served by the clerk of the local authority on every member thereof, and, in the case of an urban council, on such persons as the Minister may specify, either personally or by post or by leaving the same at his usual place of residence or at his business address; and every such notice shall be served in the case of a meeting of a municipal council not less than twenty-four hours before the meeting and, in the case of a meeting of any other local authority, not less than seven days before the meeting:**

**Provided that the accidental omission to serve notice of any meeting required to be served under this subsection shall not affect the validity of that meeting.**

**(2) Except in the case of business required by this Act or any other**

**written law to be transacted at the annual meeting of a local authority or as provided by the standing orders of the local authority, no business shall be transacted at a meeting of a local authority other than that specified in the notice relating thereto.”**

8. To buttress the arguments on jurisdiction as above stated, reliance was placed on the case of **Julia Kaburia –vs- Manene Kabeere & 4 others, Court of Appeal at Nyeri, Civil Appeal No.340 of 2002**. The argument put forward by counsel for the Ex-parte applicant is that an order for declaration does not and cannot quash an administrative decision whether such decision is lawful or otherwise. In the **Kaburia case**, (above) the appellant Julia Kaburia was aggrieved by the judgment and decree of the superior court (Kasanga Mulwa J) given on 1<sup>st</sup> August 2002, and as subsequently amended whereby the superior court set aside the judgment of the subordinate court dated 15<sup>th</sup> September 1998 in **Meru CMCC No.556 of 1994**.

9. The case in the subordinate court had been filed by Manene Kabeere in about August 1994 against Julia and 2 others. Later, by leave of the court the Methodist church of Kenya was joined as the 4<sup>th</sup> defendant. The dispute in the court below related to a number of land parcels namely 760, 761, 906, 911 and 926 all situated in Meru II Adjudication Section. The dispute arose from a decision of the District Land Adjudication Officer Meru dated 17<sup>th</sup> March 1992. In or about 1994, Kabeere filed **Misc. Application No.34 of 1994** in the Chief Magistrate’s court at Meru seeking leave to file suit against the Land Adjudication Officer and the Attorney General out of time. The leave was granted on 16<sup>th</sup> June 1994, thereby setting in motion the process of filing the intended suit by Kabeere. Kabeere claimed in the plaint that he had been discriminated against in the sub-division of the subject parcels of land. The suit was heard by the Methodist the Meru Chief Magistrate Mr. S.A. Wamwayi who dismissed the same.

10. The plaintiffs appealed to the High Court. At the hearing of the appeal, it was contended *inter alia*, that the jurisdiction of the subordinate court had been improperly invoked as the decision of the Land Adjudication Officer could only be quashed through judicial review procedure, despite the fact that leave to institute the suit had been granted. Kasanga Mulwa J did not agree, stating that an objector under the Land Adjudication Act need not only come to court by way of judicial review, and entered judgment for the plaintiffs. On appeal to the Court of Appeal, the Court of Appeal held that the legality of the decision of the Land Adjudication Officer dated 17<sup>th</sup> March 1992 could only be reversed by the High Court through Judicial Review proceedings or under the High Court’s supervisory powers if the decision was found to have been made without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice. Counsel for the applicant urged this court to find and to hold that the decision by the Interested Parties to file a suit to contest the decision of the Ex-parte applicants in the SRM’s Court Kilgoris was untenable in law.

11. Secondly, counsel for the applicant submitted that the proviso of **section 76 (1) of the Local Government Act** clearly stipulated that failure to give notice as provided under the section does not invalidate the decisions and proceedings of the statutory meeting for which such notice would have been given. It was further submitted that the procedure adopted by the Interested Parties in contesting the decision of the ex-parte applicants is not supported by the statutes. Reliance was placed on the case of **Republic –vs- Francis R. Magaju & another, Ex-parte City Council of Nairobi, Nairobi HC Misc. Application NO.954 of 2004** (unreported). The point that was made by the court in the above case, and which point is relevant in the instant case is that in deciding this application, this court must strike a delicate balance between the public and private interests, with a view to ensuring that private or personal interests do not supercede public interest.

12. Counsel for the applicants also contended that this court ought to adopt the position taken by the Court of Appeal in the **Kaburia case** (above) and uphold the now well established view that an administrative decision can only be reversed through Judicial Review proceedings. Counsel referred to a number of the cases relied on by the Interested Parties and submitted that most of the said decisions were made before the Kaburia case. In particular, counsel referred to the following cases:-

·**James Mwangangi & 64 others –vs- Wote Town Council [2004] e KLR.**

**Onesmus Masika Musola & 9 others –vs- Town Clerk, Town Council of Matuu [2008] e KLR.**

**·Philip Kathukya Nyumba & 4 others –vs- County Council of Kitui [2008] e KLR**

**·Parvi Holdings Limited –vs- Nairobi City Council [2006] e KLR**

**·Zacharius Mweri Baya –vs- Mohamed Sheikh Abubakar [2010] e KLR and**

**·Samwel Chacha Rioba –vs- George Joseph Keginga & 2 others [2010] e KLR.**

13. Counsel for the Interested Parties relied on the above authorities in saying that a declaratory suit is an alternative to judicial review proceedings. He submitted that in his capacity as the Chief Executive Officer and/or Administrative Officer of the 2<sup>nd</sup> Ex-parte applicant, the 1<sup>st</sup> Ex-parte applicant is bestowed with the executive and administrative powers and is therefore mandated to discharge and/or give effect to the powers, duties and roles conferred upon the 2<sup>nd</sup> Ex-parte Applicant. The two Interested Parties, according to the pleadings are councilors and/or members of the 2<sup>nd</sup> applicant and are, according to submissions, entitled to participate in decision making processes of the 2<sup>nd</sup> Ex-parte applicant by attending meetings of the 2<sup>nd</sup> Ex-parte applicant and to vote at such meetings. It is contended that many important decisions are made at such meetings, including election of Chairman, and Deputy Chairman, Mayor and Deputy Mayor. Counsel submitted that the Interested Parties are eligible for any of the positions of leadership within the ranks of the 2<sup>nd</sup> Ex-parte applicant.

14. As far as this case goes, it was contended on behalf of the Interested Parties that the 1<sup>st</sup> Ex-parte applicant, in an effort to deny the Interested Parties an opportunity to participate in the election process at the Annual General Meeting scheduled for 11<sup>th</sup> July 2011 chose to inform only members who were aligned to him, while well knowing that important matters were on the agenda for discussion. The agenda for the said Annual General Meeting was set out in the notice dated 4<sup>th</sup> July 2011:-

1. Prayer
2. Apologies (if any)
3. Election of presiding Chairman
4. Election of Council chairman
5. Swearing in of the Council Chairman
6. Election of the Vice-Chairman
7. Swearing in of the Vice Chairman
8. Election of the Standing Committee Chairmen
  - (a) Finance Staff and General Purposes
  - (b) Town Planning, Markets and Works Committee
  - (c) Tourism Wildlife and Livestock Committee
  - (d) Education, Social Services and Housing Committee
  - (e) Health/HIV Aids Committee

(f) Adult Committee

9. Swearing in of Chairmen to Committees.

15. The Interested Parties submitted that even as late as Friday 8<sup>th</sup> July 2011, there was no notice on the notice boards at the 2<sup>nd</sup> Ex-parte applicant's premises calling for the AGM although the notice was purportedly dated 4<sup>th</sup> July 2011. That on 10<sup>th</sup> July 2011, the Interested Parties heard from the grapevine that the AGM was to be held the following day. The Interested Parties read mischief into such clandestine conduct on the part of the 2<sup>nd</sup> Ex-parte applicant. It was this apparent failure by the Ex-parte applicants to notify the Interested Parties about the AGM slated for Monday 11<sup>th</sup> July 2011 that drove the Interested Parties to the court corridors to get justice by filing a case at the subordinate court in Kilgoris.

16. Counsel for the Interested Parties also made the following specific submissions. It was contended that the **Local Government Act, Cap 265** does not specifically provide how or before which tribunal disputes arising under the Act can be resolved nor does the Act say that such disputes can only be addressed by way of judicial review proceedings, although admittedly the acts/decisions of the Ex-parte applicants are administrative in nature. Counsel cited **section 28 (3)** of the **Local Government Act** which reads:-

**“28 (3) Every county or town council shall, under the name of**

**“the County Council of .....” or “the Town Council of .....”, as the case may be, be each and severally a body corporate with perpetual succession and a common seal (with power to alter such seal from time to time) and shall by such name be capable in law of suing and being sued, and acquiring, holding and alienating land.”**

17. On the basis of the above provisions, counsel for the Interested Parties urged this court to find and to hold that the Ex-parte applicants' contention that their actions being statutory or administrative can only be challenged by way of judicial review proceedings to be a fallacy. Reliance was placed on the **Onesmus Masika case**(above) and also on the **James Mwangangi & others case**(above). In the latter case, 65 plaintiffs sued the Wote Town Council and simultaneously with the plaint, they filed an application for injunction to restrain the defendant, its agents, servants from replanning, alienating, selling, transferring or otherwise disposing of any portion of the land reserved for Wote Bus Park. It was contended in objection to the application that the court lacked jurisdiction to grant the orders sought; that the application was incompetent, bad in law and a non starter and that the applicant lacked *locus standi* in the suit. It was also argued that the respondent could not be challenged in the performance of its statutory duties under the Local Government Act.

18. As far as the issue of jurisdiction was concerned, it was argued in the **Mwangangi case** that because the respondents were acting in their administrative capacity in dishing out parcels of land to third parties, excluding the applicants, the applicants should have come to court by way of judicial review because the issue was one of administrative law and involved public interest. Wendoh J, referring to the cases of **Makueni County Council –vs- Alois Mwanja and Francis Njenga Karanja** held that **“a plaintiff may have two remedies available in law and the court cannot force the applicant to come in a particular way.”** A similar view was held by Dulu J in the case of **Ngige –vs- Chomba & 3 others** (above) when the learned judge, referring to the case of **Robert Entwistle –vs- Nairobi Baptist Church – Nairobi Civil Application No.312 of 1999 (CA)** stated that **“the mere fact that a decision can be challenged by way of judicial review does not prevent a party from taking proceedings for a declaratory suit.”**

19. Counsel for the Interested Parties also argued that the respondents were entitled under the Civil Procedure Rules to move the subordinate court for declaratory orders. Reliance was placed on Court of Appeal decisions in **Civil appeal No.12 of 1998 – Corporate Insurance Company Ltd. –vs- Elias Okinyi**. The issue that arose in that case was whether or not a declaratory suit, such as was filed in the SPM's court could be filed in the magistrate's court. It had been argued before the Court of Appeal that **“it was a matter of notoriety that such cases could only be filed in the High Court”**. This is what the Court of Appeal said on the issue –

“Section 3 (1) (c) of the Judicature Act, Cap. 8 Laws of Kenya, gives

the High Court and all subordinate courts power to exercise jurisdiction in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12<sup>th</sup> August, 1897.

“Court” as defined in the Civil Procedure Act means the High Court or a subordinate court , acting in the exercise of its civil jurisdiction.

“Suit” as defined in the Civil Procedure Act means all civil proceedings commenced in any manner prescribed.

Order II rule 7 of the Civil Procedure Rules reads:

“7. No suit shall be open to objection on the ground that a merely

declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.”

As “court” includes a subordinate court it has jurisdiction to make a declaratory order such as was sought by the respondent, provided the value of the subject-matter is within the jurisdiction of that court.”

20. Also see generally Samwel Chacha Rioba’s case (above) in which a position similar to that taken by the Court of Appeal in the corporate Insurance case was held by the Court (Musinga, J) and Ngige –vs- Chomba & 3 other(above). The view held by learned counsel for the Interested Parties is that all the above decisions dealt with proceedings challenging administrative or statutory duties/decisions on the part of a public body/public officer, very much like what is happening in the instant case. Counsel urged this court to reject arguments put forth on behalf of the applicant based on this issue.

21. Regarding the provisions of **section 76** of the **Local Government Act**, and the question of notices, counsel argued that it was mandatory for the Interested Parties to be served with the notice calling for the meeting. The reason being that the section is couched in peremptory terms, the proviso to the said section notwithstanding. That in the instant case, failure to serve the Interested Parties’ with the notice of the meeting was not accidental but deliberate and that in any event the said proviso does not give a blanket immunity for failure to serve notice. It is admitted that the 1<sup>st</sup> Ex-parte Applicant is obliged and/or obligated to issue and serve the requisite notices calling for or convening the statutory AGM (s). Reliance was placed on the case of Taib A. Taib –vs- Minister for Local Government – Court of Appeal at Nairobi Civil Appeal No.107 of 2006 in which the Court of Appeal considered the provisions of **section 267** of the **Local Government Act** which reads:-

“267. Any notice, order or other document required or authorized by

this Act or by any by-law made under this Act or any other written law to be served on any person (whether the expression “serve” or “give” or “send” or “deliver” or any other expression is used), then, unless a contrary intention appears therein, such notice, order or other document may be served, and shall be deemed to have been effectively served if served –

(a) personally upon the person on whom it is required or authorized to be served, or, if such person cannot reasonably be found personally upon any agent of such person empowered to accept service on his behalf or personally upon any adult member of the family of such person who is residing with him; or

(b) by post; or

(c) by affixing a copy of the same on some conspicuous part of any premises or land to which it relates or in connexion with which it is required or authorized to be served; or

(d) where from any cause whatsoever, it is not possible to effect service of the notice, order or other document in any of the manners specified in paragraphs(a), (b) and (c) by publication of a copy thereof in the Gazette and

(e) in at least one newspaper circulating in the area of the local authority.”

22. The court in the Taib Case noted that there was no evidence at all that for some cause, it was impossible for the 1<sup>st</sup> Respondent therein to deliver to the appellant the notice of termination in any of the three ways set out under **section 267** of the **Local Government Act**, nor that it was impossible for the said 1<sup>st</sup> respondent to use any of those methods to effect service of the notice upon the appellant. In the result, the Court of Appeal held that the 1<sup>st</sup> Respondent’s failure to serve such notice rendered the process of denominating the Ex-parte applicant in that case illegal and void.

23. Finally, counsel for the Interested Parties argued that it would not be necessary as submitted by counsel for the applicants to amend the Local Government Act before the impugned AGM could be held again, because the Act does not say that such a meeting cannot be held again. It was further argued that the AGM of 11<sup>th</sup> July 2001 was not a regular meeting and because it involved important agenda items such as elections, there is no reason why the same cannot be repeated. That the Interested Parties were deliberately denied an opportunity to attend the meeting. Counsel distinguished the case of Republic –vs- Francis R. Magaju & another (above) and argued that the same was decided before the promulgation of the Constitution of Kenya, 2010 which raises the threshold of Governance and highlights the rights of individuals to participate in the electoral process of whatever kind. Counsel relied on the recent decision by Musinga, J in the case of Paul Waweru Mwangi –vs- Interim Independent Electoral Commission & another [2011] e KLR in which the court held that despite the expenses already incurred and detailed arrangements made for the Kamukunji by-elections, it was necessary for the court to discharge its duty and constitutional mandate in terms of **article 23 (1) and(3)** of the **Constitution of Kenya 2010** and to grant such orders as would promote the values of the rule of law democracy, participation of the people, good governance, integrity, transparency and accountability as spelt out in **article 10** of the **Constitution**.

24. Counsel also argued that the issues raised by the Ex-parte applicant are *res judicata* the ruling of 27<sup>th</sup> July 2011 which dismissed the Ex-parte applicant’s preliminary objection dated 14<sup>th</sup> July 2011. On the basis of the above and considering the provisions of **article 159** of the **Constitution of Kenya 2010** and the provisions of **sections 1A, 1B and 3A** of the **Civil Procedure Act**, counsel urged this court to dismiss the application. The above quoted sections of the law behove courts to dispense substantive justice rather than dwell on technicalities.

25. I have now carefully considered all the submissions and the law, including the authorities cited to me. The issues that arise for determination are:

- (a) whether the SRM’s court at Kilgoris had the jurisdiction to deal with the matter that was before it;
- (b) whether the Ex-parte applicants complied with the provisions of section 76 of the Local Government Act regarding the issue of notice and whether the failure to give such notice was accidental and therefore covered by the proviso to section 76; and
- (c) whether the issues raised by the Ex-parte applicants herein are *res judicata*, consequent upon the Ex-parte applicant’s preliminary objection dated 14<sup>th</sup> July 2011 being dismissed by the court on 27<sup>th</sup> July 2011.

26. After carefully considering the above matters, I am persuaded that the subordinate court had the requisite jurisdiction to deal with the matters that were before it. I am aware that judicial opinion is divided right in the middle on this issue and that there are decisions such as the Julia Kaburia case

(above). I subscribe to the school of thought attended by my learned brothers and sisters who made the decisions which have been relied upon by the Interested Parties. As rightly pointed out by counsel for the Interested Parties the Kaburia decision must be viewed against the background that gave rise to the whole case. The dispute in the case revolved around the resolution machinery as laid out in the Land Adjudication Act. The resolution mechanism was precise and there was no room for deviating from it. The instant case does not fall in that strict category. I have read **the Ngige –vs- Chomba case** and the **James Mwangangi Case**(above) and I agree with the ratio decidendi in those cases. I am satisfied that in the instant case, the Interested Parties were not prevented from filing a declaratory suit simply because the judicial review mechanism was available to them. They had a choice to make and they made that choice by filing a declaratory suit in the SRM's court at Kilgoris.

27. On the issue of notice to the Interested Parties I have already set out hereinabove the provisions of **section 76** of the **Local Government Act** which requires that notice of meetings are to be given in writing of the time and place and the business proposed to be transacted at every meeting of the local authority. The further requirement is that such notices are to be published at the offices of the local authority as a last resort. The first option is that the notices be served by the clerk of the local authority to every member thereof. **Section 267** provides for the mode of service under paragraphs **(a), (b) (c) and (d)** thereof. It is not in dispute that the two Interested Parties were members of the 1<sup>st</sup> Ex-parte applicant and were thus entitled to be served with the notice in the manner prescribed by the Act. There is evidence from the Replying Affidavits that on the Friday before the meeting on the Monday following, the two Interested Parties were at the offices of the 1<sup>st</sup> Ex-parte applicant but no notice had been published at the offices of the said 1<sup>st</sup> Ex-parte applicant. Then a notice appeared on Sunday, the eve of the AGM. Can it be said that the failure to serve the notice upon the Interested Parties by the 1<sup>st</sup> Ex-parte applicant was accidental, and therefore falling within the proviso to **section 76 (1)** of the **Local Government Act**?

28. In my considered view, there is no evidence that failure to serve the Interested Parties with the requisite notice was accidental. It therefore follows that failure to serve notice upon the Interested Parties was deliberate and that the same may have been intended to keep the Interested Parties from participating in the business of the meeting at which critical business, including elections was conducted.

29. The third issue is whether the instant application is *res judicata*.

It is contended on behalf of the Interested Parties that the Ex-parte applicants filed a preliminary objection dated 14<sup>th</sup> July 2011 and that a decision thereon was made on 27<sup>th</sup> July 2011. Indeed I have weighed and considered the ruling of the SRM's court. The preliminary objection was raised against the Interested Parties application dated 11<sup>th</sup> July 2011. The application sought orders of injunction against the Ex-parte applicants herein to stop them from convening an AGM scheduled for 11<sup>th</sup> July 2011 and from conducting any business and/or elections of various chairmen of critical departmental committees. The Ex-parte applicants' preliminary objection was premised on the following grounds:-

- (1) That the instant suit together with the attendant notice of motion application mentioned herein above are challenging the performance of administrative and/or statutory duties of the 1<sup>st</sup> defendant/respondent. Consequently this honourable court is devoid and digressed of jurisdiction to entertain the suit.
- (2) The instant suit and the orders sought thereunder are barred and or prohibited by dint of section 76 of the Local Government Act Chapter 265 Laws of Kenya and in particular the proviso thereto.
- (3) The instant suit does not raise and or capture any reasonable cause of action, whatsoever and howsoever.
- (4) The instant suit does not raise and capture any reasonable cause of action, whatsoever and howsoever.
- (5) The instant suit together with the notice of motion application herein amounts and or constitutes an abuse of the due process of the court.

(6) The instant application is premature, misconceived and otherwise legally untenable.

(7) The instant application [is] otherwise fatally defective and bad in law.

30. After hearing arguments made by parties before the SRM's court, on 27<sup>th</sup> July 2011, the preliminary objection was overruled. Is it then correct to say that this present application is *res judicata*. **Section 7** of the **Civil Procedure Act, Cap 21** of the Laws of Kenya provides that:-

**“7. No court shall try any suit or issue in which the matter directly and**

**substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

**Explanation (1) – The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation (2) – For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

**Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

**Explanation (5) – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

**Explanation (6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

31. The phrase, “*res judicata*” as defined in BLACKS LAW DICTIONARY, EIGHTH EDITION means “a thing adjudicated”, “an issue that has been definitely settled by judicial decision”, so that parties whose thing or issue has been so adjudicated cannot come back to the court and litigate the thing/issue a second time if that thing/issue arises from the same transaction or series of transactions and that could have been - but was not – raised in the first suit. The three essential ingredients for defence of *res judicata* are:-

**(a) an earlier decision on the same issue.**

**(b) a final judgment on the merits and**

**(c) the involvement of the same parties, or parties in privity with the original parties.**

32. After careful study of the proceedings before the lower court and in particular the ruling of the court dated 27<sup>th</sup> July 2011, I am persuaded that this application is indeed *res judicata*. This application and the application before the lower court arise from the same cause of action upon which a ruling was delivered on the preliminary objection which raised same/substantially same issues as the issues now before me and thirdly the parties are the same. There is no evidence on record to show that the Ex-parte applicants appealed the ruling of the subordinate court. That ruling still remains a judgment of a competent court with regard to the issues that are now before me.

33. In the premises and for the reasons given above, I find and hold that this application lacks merit. The

same is accordingly dismissed with costs to the Interested Parties.

34. It is so ordered.

**Dated and delivered in open court at Kisi this 16<sup>th</sup> day of February, 2012.**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Oguttu-Mboya (present) for Applicants

N/A for Respondent

Mr. O.M. Otieno (present) for Interested Parties

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**