



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
JUDICIAL REVIEW 32 OF 2009

REPUBLIC.....APPLICANT
VERSUS

MINISTER FOR LOCAL GOVERNMENT.....RESPONDENT

ALIMA WESONGA MUKABANA.....INTERESTED PARTY

R U L I N G

1. The notice of Motion dated 4th September 2009 is premised on the provisions of **Order LIII Rule 3** of the **Civil Procedure Rules** and the specific prayers sought are as follows;

“a) That an order of CERTIORARI do issue to remove into this court and quash the decision of the Minister of Local Government contained in a Notice of Revocation dated 28th July 2009, revoking the nomination of Alima Wesonga Mukabana as the nominated Councilor of the Municipal Council of Mumias, an order of MANDAMUS compelling the said Minister to reinstate Alima Wesonga Mukabana as a nominated Councilor and an order of prohibition prohibiting the said Minister from making any replacement of the said Alima Wesonga Mukabana as a nominated Councilor of the Municipal Council of Mumias.

b) That the Ex-parte Applicant’s cost of this Application and for the ex-parte chamber summons dated 4th August 2009 – for leave, be paid by the Respondent.”

2. In the Verifying Affidavit sworn on 3rd August 2009 and in the Statement of Facts filed on 4th August 2009, the case for the ex-parte Applicant can be summarized thus;

3. That by Gazette Notice No. 6373 dated 22nd June 2009, she was nominated as a Councillor in the Municipal Council of Mumias. Thereafter, she was sworn in on 7th July 2009 and she was quite surprised when the Town Clerk of the Council approached her on 3rd August 2009 and showed her a letter dated 28th July 2009 whereby her nomination had been revoked by the Minister for Local Government.

4. It is her case that although she had been nominated by the Orange Democratic Movement, the said

Political Party never communicated any withdrawal of her nomination and the Minister for local Government acted ultra vires his powers when he acted as he did. Further, there was no notice given for the alleged revocation and she was not given a chance to be heard. Consequently, the revocation was illegal and ought to be quashed.

5. The Respondent in a Replying Affidavit sworn on 3rd June 2010 deponed that on 27th July 2009 he received a letter dated 23rd July 2009 from the chairman, Interim Independent Election Commission informing him that the Orange Democratic Movement had “**replaced**” a number of nominated Councillors and that he ought to effect the changes as per the law. He thereafter issued a Notice to the Applicant and thereafter revoked her nomination under **Section 27(2)** of the **Local Government Act**. That he acted within the Law and the Applicant’s case is misconceived and is an abuse of the Court process.

6. The Applicant filed a Further Affidavit on 2nd February 2011 and denied that the procedure for her revocation was done within the law and said that whereas her nomination was revoked, that of Rashid Rocky Omwendo was not and yet he too had been proposed for the revocation of his nomination.

7. I see no written submissions on behalf of the Respondent but in his Submissions, Mr. Nandwa for the ex-parte Applicant stated that there is no evidence that the Orange Democratic Party followed its Constitution when it withdrew the Applicant’s nomination. That **Articles 5, 7, 8 and 17** of the said **Constitution** provided for rights of members of the Party as well as the procedure to be followed in cases of alleged indiscipline on the part of a member. None of the Articles were adhered to in her case. That without all lawful procedures being followed, then the Minister’s discretion under **Section 27** of the **Local Government Act** was not properly invoked.

8. Reliance has been placed on the following decision;

“i) Civil Appeal No.226/1996 – Kenya National Examinations Council vs. Republic where the scope of the orders of Prohibition, Mandamus and Certiorari was addressed in extensoby the Court of Appeal.

ii) Misc. Appl. No.102/2006 – Republic vs. the Judicial Commission of Inquiry into the Goldenberg Affair, where the High Court addressed the issue of a fair hearing and matters ultra vires in determining the issue before it.

9. So far as I know, the procedure for revoking the nomination of Councillors was addressed extensively in Taib vs. Minister for Local Government Civil Appeal No.107/2006. I am also aware that in that case the two judgments of Omolo, J. A. and Waki J. A. were conclusive on certain issues which I shall shortly discuss. The judgment of Githinji J. A. was a dissent and for obvious reasons was not the judgment of the Court.

10. Warsame J. in High Court Misc. 156/2011 Birgen and 24 Others vs. Interim Independent Electoral Commission (IIEC) and 2 Others addressed similar matters and the learned Judge held that the proper procedure to be followed for denomination under **Section 27** of the **Local Government Act** is as follows;

i) The party initially withdraws nomination of a member it had nominated as a councillor.

ii) Notice is given to the Electoral Commission by the party which nominated the particular Councillor of its intention to withdraw its nomination.

iii) The Electoral Commission notifies the Minister that the nominating party has intimated its intention and recommended for the withdrawal of the nomination to a particular Councillor.

iv) The Minister may cancel the nomination after satisfying himself or herself as to the legal requirement or criteria.

11. He went further to add that neither the Electoral Commission nor the Minister were obligated to hear the Applicant/Councillor before making their decision which in any event is triggered by a decision

of the Political Party. Further, that once the Political Party's decision is not challenged, then the complaint is negated and the general principles in the Taib case cannot be applied. He concluded as follows;

“It is.....my decision that in the absence of any evidence or contention, it is premature to question whether the Minister has valid powers to exercise in respect of revocation of nomination of applicants.”

12. In the present case, the Applicant protested that she “never received any communication of whatever nature from Orange Democratic Movement (O.D.M) as regards revocation of this nomination.” However, like in the Birgen Case, she never enjoined the Party, even as an Interested Party, neither did she enjoin the Interim Independent Electoral Commission as a party, so that to seek that the Minister's final decision should be quashed without tracing the genesis of that decision would place the court in a precarious position. I say this because the Respondent in his Replying Affidavit was categorical that upon receiving the letter dated 23rd July 2009 from the Chairman of the Commission, he wrote to the Applicant on 28th July 2009 and stated as follows;

“RE: NOTICE OF REVOCATION OF NOMINATION

This is to notify you that your nomination as Councillor in the Municipal Council Mumias has been revoked. This revocation is done on the advice of your nominating party and in exercise of powers conferred upon the Minister by Section 27 of the Local Government Act.”

Signed by;

HON. MUSALIA MUDAVADI, EGH. MP

DEPUTY PRIME MINISTER & MINISTER FOR LOCAL GOVERNMENT.

cc ***Town Clerk,***

Municipal Council of Mumias

P. O. Box 227

MUMIAS.”

13. The Notice was not responded to by the Applicant and so the Respondent proceeded with the revocation. I have elsewhere above alluded to the letter dated 23rd July 2009 and in it, the Respondent was being asked by the Commission to ***“effect the changes as per the Law”*** and he invoked **Section 27** of the **Act** to do so. In the Taib case, although Omolo J. A. found that **Section 27** of the **Act** was not in consonance **Section 22** of the defunct Constitution, Waki J. A. disagreed and so the **Section** is still in our Laws and the Respondent acted within it.

14. On the whole, I am unable to find reason to grant the Motion dated 4th September 2009 and I will instead dismiss it with costs.

15. Orders accordingly.

I. LENAOLA

JUDGE

**DELIVERED, DATED AND COUNTER-SIGNED BY B. T. JADEN, JUDGE AT KAKAMEGA
THIS 1st DAY OF FEBRUARY, 2012**

B. T. JADEN
JUDGE