



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

J.R. MISCELLANEOUS CIVIL APPLICATION NO. 558 OF 2009

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 265 LAWS OF KENYA

AND

IN THE MATTER OF THE NOMINATION OF COUNCILORS

MICHAEL NJOROGE

MWAURA.....APPLICANT

VERSUS

THE MINISTER FOR LOCAL

GOVERNMENTRESPONDENT

PETER NJOROGE MUNYIRA

INTERESTED PARTY

RULING

The ex parte applicant, hereinafter referred to as “**the applicant**” filed an application dated 28th September, 2009 seeking the following orders:

“1. That an order of this honourable court do issue calling before it for purposes of having it quashed, Gazette Notice No. 8217/2009 dated 30th July, 2009 and an order of certiorari do issue quashing the said Gazette Notice No. 8217/2009.

2. That an order of this honourable court do issue calling before it, for purposes of having it quashed the Gazette Notice No. 8218 of 2009 dated 30th July, 2009 and an order of certiorari do issue quashing the said Gazette Notice No. 8218 of 2009.

3. That an order of prohibition do issue prohibiting the respondent from revoking the nomination of the applicant as a nominated councilor of the Municipal Council of Kiambu.”

The application was made on the grounds that:

“(a) The applicant was duly nominated by the respective party and his name forwarded to the then Electoral Commission of Kenya (ECK) by their respective parties (sic) for nomination and has been serving as a nominated Councillor since 22nd February, 2008.

(b) The Minister for Local Government has no authority to nominate any other person as a nominated Councillor.

(c) That on 22/06/09 the Minister for Local Government vide Gazette Notice No. 6373 of 2009 dated 18th June, 2009 re-nominated the appointment of the applicant as a Councillor to the Municipal Council of Kiambu.(sic)

(d) The Minister’s actions were ultra vires and in breach of powers conferred upon him under Section 26(2) and 39, Local Government Act, Cap 265 in that the Minister has no power to substitute and delete names approved and forwarded by the Electoral Commission of Kenya as nominated by respective political parties.”

In his affidavit in support of the application, the applicant stated that he was nominated to represent interests of the physically handicapped persons in the said Council. He said that the initial nomination was for a period of 16 months which expired and the respondent re-nominated him together with others to the Municipal Council of Kiambu. This was vide **Gazette Notice No. 6373 of 2009** dated 18th June, 2009 and published on 22nd June, 2009.

The applicant lamented that the respondent, without regard to the mechanism set out and practiced in nominating him to the Council and without due process, purported to revoke his nomination vide **Gazette Notice No. 8217 of 2009** dated 30th July, 2009. Simultaneously with the revocation the respondent also purported to nominate the interested party to serve as a nominated Councillor in his place. He added that his name had been submitted by the Kenya Africa National Union (**KANU**), an affiliate party of the Party of National Unity (**PNU**) in the 2007 General Election. He further stated that the respondent, in purporting to revoke his nomination, did not comply with the practice set out by the Inter Party Parliamentary Group (IPPG). He stated that the Minister acted in breach and outside the powers conferred upon him under **Section 33** of the **Constitution of Kenya** (now repealed) and **Section 26(2)** and **39** of the **Local Government Act**.

The interested party filed a replying affidavit and stated that his nomination as a Councillor was gazetted on 31st July, 2009 vide gazette notice no. 8217. The said nomination was instigated by PNU vide a letter to the Interim Independent Electoral Commission dated 6th of July, 2009. Consequent upon that letter the Interim Independent Electoral Commission wrote to the Deputy Prime Minister/Minister for Local Government, on 23rd July, 2009 confirming his nomination. The interested party therefore stated that the Minister did not act unilaterally as alleged by the applicant and neither had he contravened the provisions of **Section 33** of the **Constitution** and **Sections 26** and **39** of the **Local Government Act**.

The Minister for Local Government swore a replying affidavit and stated that on 27th July, 2009 his office received a letter dated 23rd July, 2009 from the Chairman, Interim Independent Electoral Commission, informing him of the PNU's position and requesting his office to effect the revocation of the appointment of the applicant and replacing him with the interested party. In exercise of powers bestowed upon him under **Section 40** of the **Local Government Act**, the Minister proceeded to revoke the nomination of the applicant vide Gazette Notice No. 8217 aforesaid and in his place nominated the interested party herein. The Minister further stated that in so doing he observed the laid down procedures and exercised due diligence following advice of the Interim Independent Electoral Commission.

Parties filed their respective written submissions which I have carefully perused. Miss Mbilo, Litigation Counsel, who appeared on behalf of the Minister, submitted that the Minister has power to nominate and denominate a Councillor and that he rightfully revoked the appointment of the applicant as a nominated Councillor. She further submitted that publication of Gazette Notice No. 8217 was sufficient notice in compliance with the proviso to **Section 27(2)** of the **Local Government Act**.

Mr. Mogeni for the applicant submitted that the applicant's nomination was unlawfully revoked in that he was not given a hearing before the revocation was done. He further contended that he was not served with any notice as required under **Section 27(2)** of the **Local Government Act**.

The major issue for determination before this court is whether the Minister for Local Government has power to revoke the nomination of a Councillor whose term is supposed to run for a period of 5 years. If so, what is the right procedure? This issue was conclusively decided by the Court of Appeal in **TAIB vs MINISTER FOR LOCAL GOVERNMENT & 4 OTHERS (2008) 3 KLR (EP) 433**. The court held that there was no inconsistency between **Section 33** of the **Constitution of Kenya** (now repealed) and the proviso to **Section 27(2)** of the **Local Government Act** in so far as the proviso gave the Minister for Local Government discretion to terminate the tenure of a nominated Councillor but upon giving appropriate notice to the Councillor. In exercising that discretion the Minister is not obliged to hear the Councillor whose nomination is being revoked. The court emphatically stated that the Minister must comply with the proviso to **Section 27** of the **Local Government Act**. The section provides as follows:

“27(1) The term of office of the elected Councillors specified in Section 26(a) shall be 5 years.

(2) The term of office of every Councillor nominated under Section 26(b) shall be 5 years or such shorter period as the Minister may, at the time of the nomination, specify.

Provided that the Minister may at any time in his discretion terminate the nomination of a Councillor by notice in writing delivered to the Councillor, and thereupon his office shall become vacant.”

The above quoted provision of the law is explicit that the Minister has discretion to shorten the period which a nominated Councillor can serve but in so doing, he has to give a notice in writing to the Councillor. He is also supposed to give reasons for the revocation. The crucial question therefore is whether such notice was given to the applicant herein. There is no evidence that the Minister made any effort to serve notice of the intended revocation upon the applicant and neither did he give any reason for his act. In **TAIB's Case**, the Court of Appeal considered how such notice ought to be served in terms of **Section 267** of the **Local Government Act**. The section reads as follows:

“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 –

- (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 connection 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 in at least one newspaper circulating in the area of the local authority.”

Upon careful interpretation of the above section, Omollo and Waki JJA. held that service of the notice as required by the proviso to **Section 27(2)** of the **Local Government Act** cannot be effected through publication in the Kenya Gazette in the first instance without any attempt to effect personal service.

In view of the foregoing, I find and hold that although the Minister had power to revoke the nomination of the applicant, he failed to serve him with a notice of revocation and to advance any reason for so doing. It follows therefore that his actions are amenable to judicial review remedies.

Having come to the above conclusion, I grant the orders sought by the applicant. The respondent shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Thuo for the Interested Party

Mr. Kamau for Miss Mbilo for the Respondent

Miss Ngode for Mr. Mogeni for the Applicant