



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

JUDICIAL REVIEW NO. 60 OF 2009

**IN THE MATTER OF AN APPLICATION BY SOSPETER KAMBOGO MWANGI FOR
ORDERS OF JUDICIAL REVIEW FOR ORDERS OF**

**CERTIORARI AND PROHIBITION AND IN THE MATTER OF THE LAND DISPUTES
TRIBUNAL ACT (ACT NO. 18 OF 1990)**

REPUBLIC.....APPLICANT

AND

THE HONOURABLE MINISTER FOR LOCAL GOVERNMENT.....1ST
RESPONDENT

THE INTERIM INDEPENDENT ELECTORAL COMMISSION OF KENYA.....2ND
RESPONDENT

AND

EX-PARTE – CLLR. NORAH WAMBUGWA GATHIGI

RULING

The subject matter of this ruling is the Motion dated 17th December 2009 in which Councillor **Norah Wambugwa Gathigi**, the *Exparte* applicant herein, has sought for the following orders:

- 1. That This Honourable Court be pleased to issue an order of Certiorari to remove into court and quash the order and/or decision(s) and/or proceedings taken by the Respondents more particularly exhibited in the letter dated 28th July, 2009, and the special issue of the Kenya Gazette dated 31st July, 2009, and the 1st Respondent's decision published therein dated 30th July, 2009, revoking/terminating the nominations of the applicant as a nominated Councillor and/or as nominated/appointed to serve as the Government Officer in the County council of Nyeri.***
- 2. That By way of Prohibition Order, the respondents to refrain, stop and cease from picking,***

appointing and Gazetting any other Civic nominees from either themselves and/or originating from other political parties (including from SAFINA Party) for nomination as nominated councillor in the County Council of Nyeri and in the place (seat) already allocated to the Ex-parte applicant as more particularly described hereinabove.

3. That By way of MANDAMUS the respondents, be directed to re-nominate appoint, and/or nominate and issue a notice in Kenya Gazette where concerned, the Ex-parte applicant as the civic nominee, as a nominated/appointed Councillor, and/or as a Government Officer in the County Council of Nyeri as more so nominated before the decisions and proceedings complained of in the month of July, 2009, which were set out in the special issue of the Kenya Gazette dated 31st July, 2009.

4. This Honourable Court be pleased to grant such other orders that are analogous and/or necessary adjuncts to the reliefs being sought hereinabove and/or directions that it may deem fair and just to grant in the circumstances.

5. That the costs of this application be provided for and/or be in the cause.

The Motion is supported by the *Exparte* Applicant's affidavit sworn on 17th December 2009. The Minister for Local Government, the 1st Respondent herein, filed two replying affidavits to oppose the Motion.

I have considered the grounds set out on the face of the Motion plus the facts deponed in the affidavits filed for and against the Motion. I have further considered the oral submissions made by learned counsels from both sides. Before delving deeper into the merits or otherwise of the Motion, let me give a brief background of the dispute. The *exparte* Applicant was nominated as a councillor in the County Council of Nyeri vide the Special Gazette Notice No. CX No. 33 of 2008 dated 11th April 2008. By a letter dated 28th July 2009 and by a Special Gazette Notice CIX No. 66 dated 31st July 2009 the 1st Respondent revoked the *Exparte* Applicant's nomination as a Councillor. It is said that the 1st Respondent was prompted to denominate the *Exparte* Applicant as a nominated Councillor on the advice of Safina Party, her nominating party. Upon receipt of that information, the *Exparte* applicant moved to this Court to challenge the revocation of her nomination as a councillor. Having given the brief background of the dispute, let me now address my mind to the issues raised for and against the Motion.

It is the submission of the *Exparte* Applicant that the 1st respondent revoked her nomination as a Councillor without affording her a right of hearing. It is also the *Exparte*'s Applicant's contention that she was not given notice nor reasons required before her nomination could be revoked. The *exparte* applicant further argued that the 1st respondent was actuated by malice, highhandedness, improper motive and contrary to the *exparte* Applicant's legitimate expectation when he proceeded to revoke her nomination.

The 1st Respondent on his part urged this court to dismiss the Applicant's Motion on the basis that he acted within the law when he gazetted the notice revoking the Applicant's nomination as a councillor. It is argued that the Applicant has failed to prove that the rules of natural justice were breached. The 1st respondent pointed out that he caused a notice dated 28th July 2010 to be served upon the *exparte* applicant on 29th July 2010 – and that the revocation took effect upon receipt of the notice.

Having set out the nature of dispute before this court, let me now identify and determine the issues in dispute. I think the following issues arose for my determination:

(i) Whether or not the *Exparte* Applicant was served with a notice as envisaged under *Section 27 (2)* of the Local government Act?

(ii) Whether or not the 1st respondent was required to give reasons for his decision? Whether or not he gave reasons to the *Exparte* Applicant herein?

(iii) Whether or not the 1st Respondent was bound to hear the *Exparte* Applicant before arriving at his decision.

On the 1st issue as to whether or not the 1st Respondent served the Applicant with a notice as required under *Section 27 (2)* of the Local government Act. It is the submission of the 1st Respondent that he notified the Applicant on 28th July 2009 that he would revoke her nomination as a councillor upon the advice of her nominating party, Safina Party. I have carefully perused the affidavit of Service of one Mwangi Karoki, sworn on 3rd August 2009 which is attached to the further affidavit of Musalia Mudavadi, the Deputy prime Minister, and Minister for Local Government. It is clear that the notice of revocation of nomination dated 28th July 2009 was served upon Mr. Sammy N. Njuguna, the clerk Nyeri County Council, clerk who accepted service on behalf of the Applicant on 29th July 2009. In the case of **Taib A. Taib =Vs= Minister For Local Government C.A. No. 107 of 2006 at page 37** (unreported), the Court of appeal held *inter alia*

“that in the absence of any other provision relating to the mode of “delivery” of notice, the provision requires delivery on person or personal service. It is only “thereupon his office shall become vacant.” Delivery of notice is mandatory and a condition precedent before termination takes effect.”

I have carefully perused the affidavit of the *Exparte* Applicant and it is apparent from her averments in paragraphs 10 and 11 that the Applicant acknowledges receipt of the notice of revocation. I find that the Applicant was duly served with a notice as required under *Section 27 (2)* of the Local Government Act hence the 1st Respondent cannot faulted on this ground.

The second issue to be determined is whether or not the 1st Respondent was enjoined to hear the Applicant before making his decision. The Applicant avers that she had legitimate expectation that the Minister would hear her before revoking her nomination. There is no dispute that the 1st respondent did not hear the applicant before making his decision to revoke her nomination as councillor. It would appear *Section 27 (2)* of the Local Government Act merely gave the concerned Minister powers to act upon delivering a notice for revocation. The Political party which nominated the Applicant plays an integral part under *Section 26* of the Local Government Act. It is apparent from the Act that the political party will present the names of the person (s) it intends to propose to be appointed as nominated Councillors to the Interim Independent Electoral Commission which in turn presents those names to the Minister for appointment. It goes without saying that it is equally important for the nominating party to be consulted first before the nomination of its nominees can be revoked by the Minister. In the case before this court, it is quite clear that Safina Party and the Interim Independent Electoral Commission had approached the 1st Respondent to terminate the nomination of the Applicant. In the circumstances it cannot therefore be said that the Minister acted capriciously, arbitrarily or in bad faith. There is no evidence that the 1st Respondent had any personal interest in the matter.

The third issue which was argued is to the effect that the Minister did not give any reasons for his decision. Under *Section 27* of the Local Government Act, the Minister was not enjoined to provide reasons for his decision. In the case before this Court, the Minister merely disclosed to the Applicant that

he revoked her nomination on the request of Safina party, the applicant's nominating political party. In my view, the Minister was courteous enough to inform the Applicant the main reason why he had to terminate her services as a nominated Councillor.

In the end I think the Motion is for dismissal for want of merit. I so order with costs to the 1st Respondent.

Dated and delivered at Nyeri this 23rd day of September 2011.

J. K. SERGON
JUDGE

In open court in the presence of Wachira holding brief C. N. Kihara for the Applicant. No appearance Munyi.