



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JR MISC. APPL NO. 341 OF 2009**

**IN THE MATTER OF: AN APPLICATION BY MARY WAMBUI NGENGI FOR JUDICIAL  
REVIEW ORDERS OF**

**CERTIORARI PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**AND**

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

**AND**

**IN THE MATTER OF: THE COUNTY COUNCIL OF LAMU**

**BETWEEN**

**MARY WAMBUI**

**NGENGI.....APPLICANT**

**VERSUS**

**1 THE DEPUTY PRIME MINISTER, MINISTER FOR LOCAL GOVERNMENT.....1<sup>ST</sup>  
RESPONDENT**

**2. THE COUNTY COUNCIL OF LAMU.....2<sup>ND</sup>  
RESPONDENT**

**AND**

3. SUSAN WAMUYU

GAITHO.....INTERESTED PARTY

**RULING**

Before Court is the Judicial Review Application brought by way of chamber summons dated 3<sup>rd</sup> August 2009 and filed in court on the same date. The Applicant **MARY WAMBUI NGENGI** by this application seeks the following orders

- (i) **An order of certiorari to remove into the High Court of Kenya and quash that part of the decision of the Deputy Prime Minister and Minister for Local Government contained in the GAZETTE NOTICE NO. 8217 dated 30<sup>TH</sup> JULY 2009 published in the Kenya Gazette of 31<sup>st</sup> July, 2009 specifically revoking the nomination/appointment of MARY WAMBUI NGENGI as nominated Councillor for the county council of Lamu.**
- (ii) **An order of certiorari to remove into the High Court of Kenya and quash that part of the decision of the Deputy Prime Minister and Minister for Local Government contained in GAZETTE NOTICE NO. 8218 dated 30<sup>TH</sup> JULY, 2009 published on 31<sup>st</sup> JULY 2009, specifically nominating/appointing the 2<sup>nd</sup> interested party SUSAN WAMUYU GAITHO as a nominated councilor for county council of Lamu.**
- (iii) **An order of Prohibition barring the respondent from prohibiting and/or stopping the Applicant from carrying out the exercise of her office functions, duties and powers as a nominated councilor of the Country Council of Lamu.**
- (iv) **An order of prohibition barring the 2<sup>nd</sup> Respondent from recognizing and/or permitting the 2<sup>nd</sup> interested party SUSAN WAMUYU GAITHO from taking up the seat and exercising the duties of the office of a nominated councilor.**
- (v) **An order of Mandamus compelling the 2<sup>nd</sup> Respondent (the County Council of Lamu) to allow the applicant to resume and continue with her office and work as a nominated Councillor of the County Council.**

The matter first came up *ex-parte* before the court under certificate of urgency on 3/8/2009 on which date leave to seek Judicial Review Orders as granted and such leave operated as a stay of the decision of the Minister of Local Government in terms of prayer (3) of the Certificate of urgency.

Thereafter by way of an amended Notice of Motion dated 20<sup>th</sup> April 2011 the Interested Party came before the court seeking inter alia the following orders;

**“(4) THAT an injunction order issue restraining the Town Clerk from releasing any form of remuneration, salaries or any form of allowances to the Applicant and to restrain the town clerk from extending to the Applicant any right of suffrage, attendance to council meetings or assumption of any privilege or right as a nominated Councillor until the hearing and determination of these Judicial review proceedings”**

The Applicant in her supporting Affidavit dated 3/8/2009 averred that on 8/02/2008 she was nominated as

a councillor in Lamu by the Safina Party and issued with a certificate of Nomination by the party. Subsequently without any revocation of her own appointment the Deputy Prime Minister and Minister for Local Government by way of a decision published in the Kenya Gazette on 22<sup>nd</sup> June 2009 i.e Gazette Notice No. 6373 did nominate the applicant to serve as a councillor to the County Council of Lamu. However in a Gazette Notice No. 8217 dated 30/7/2009 the Applicant nomination as a councillor was revoked and by that very same gazette notice the 1<sup>st</sup> interested party was nominated to serve in her stead as a councillor. The Applicant submits that the revocation of her nomination was arbitrary unreasonable malicious and not bonafide. She further avers that due process was not followed as no notice of her revocation was ever served on her personally. She finally prays that orders of certiorari issue to quash the decision made by the Deputy Prime Minister and Minister of Local government to revoke her nomination. I intend to proceed to determine the matters raised in this substantive Judicial Review application as this will also dispose of the prayers of the 1<sup>st</sup> interested party made in her Amended Notice of Motion dated 20/4/2011.

The fact that the Applicant was in the first instance validly nominated on 3/8/2009 as a councillor to the Lamu County Council is not in any doubt nor is this fact disputed by any of the Respondents. Her certificate of Nomination dated 8/2/2008 and signed by **HON PAUL KIBUGI MUIITE** as the party leader of the Safina Party is sufficient proof of this. The bone of contention is the subsequent revocation by way of a notice in the Kenya Gazette of this nomination of the Applicant and the manner in which it was done.

I believe there would be no disagreement that just as a procedure exists to validly nominate an individual as a councillor equally there must exist a procedure by which such a nomination can be revoked. It is this procedure that the applicant complains was ignored by the 1<sup>st</sup> Respondent in revoking her nomination.

Rules relating to the nomination and revocation of councillors is found in Section 26, 27,39 and 40 and section 267 of the **LOCAL GOVERNMENT ACT, CAP 265 LAWS OF KENYA**. The instant case relates to the nomination to a County Council. S. 27 of Cap265 provides for the **'TERMS OF OFFICE OF COUNCILLORS'** – section 27(2) provides as follows:-

***“(2) the term of office of every councillor nominated under section 26(b) shall be five years or such shorter period as the Minister may at the time of nomination, specify provided that the Minister may at anytime in his discretion terminate the nomination of a councillor by notice in writing delivered to the Councillor, and thereupon his office shall become vacant”***

This provision therefore appears to give the Minister power to revoke the nomination of a councillor. However, section 26(2) of the very same Act provides as follows

***“26(2) the criteria and principles for appointment of nominated members of the National Assembly under s. 33 of the Constitution shall ‘mutatis mutandis’ apply to the nomination of councillors under this section”.***

Thus s. 33 of the old constitution (which was applicable for these events) is deemed to be applicable law. It must be noted that whilst the local Government Act provides for the revocation of the nomination of a Councillor:-Section 33 of the Constitution (which is supreme law) did not provide the Minister with any such authority to revoke the nomination. Therefore there is an apparent conflict between s.27 (2) of Cap 265 and s. 33 of the Constitution. It is trite law that the Constitution being the Supreme law takes precedence over and naturally would prevail over any other written law.

**[SEE REPUBLIC –V- HON MUSIKARI KOMBO FORLOCAL GOVERNMENT AND 3OTHERS EXPELTE JAMES MWANGI WAWERU]**

As such I do find that s. 27(2) of the local Government is a nullity in so far as it donates to the Minister with powers to revoke the nomination of a Councillor, which powers have not been donated by s. 33 of the Constitution.

Even if this were not the case the said s. 27(2) provides that a Councillor must be **notified** in writing delivered to that Councillor of intent to revoke his/her nomination. Was this procedure complied with? The applicant in her supporting affidavit told the court that she only learnt of her purported revocation from reading a Gazette Notice No. 8217 of 30/07/2009. Does this gazette notice fulfill the requirements of 'notice in writing delivered to the Councillor?' – Clearly not. S. 267 of the Local Government Act is headed '**SERVICE OF DOCUMENTS**' S. 267(a) provides

***“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 maybe 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”.***

The Applicant is categorical that at **no time** was she ever personally served with notice of her revocation. Mr. Okonji for the interested party however, insists that the applicant was infact served with notice as required by law. He refers to a Notice of Revocation of Nomination dated 28/7/2009 signed by Hon Musalia Mudavadi, Deputy Prime Minister and Minister for Local government. Together with this notice is an affidavit of service sworn on 23/6/2011 by one **MICHAEL THOYA M'MANA** whom in paragraph (1) of the said affidavit of service describes himself as a **licenced court process server**'. As a court I must express great concern and indeed trepidation at the manner in which these two documents were introduced into these proceedings. The hearing of this application commenced on 28/6/2011 in the morning session. Mr. Mogaka for the applicant made his oral submission in support of the application and +concluded at about lunch time. The court then adjourned and indicated that the hearing could proceed at 2.30p.m. to allow Mr. Okonji an opportunity to respond to the submissions of Mr. Mogaka.

Upon resuming at 2.30 p.m. Mr. Mogaka rose once again and alerted the court that during the lunch break after he had closed his oral submission counsel for the Respondent informed him that the affidavits had been filed allegedly on 23/6/2011. This is very curious. These documents somehow appear to have made their way into the court file over the lunch-break.

Mr Mogaka had no notice of their existence and as such did not address them in his submissions. Even more curious is that Mr. Kamau who represented the Hon- attorney General in these proceedings categorically told the court that he was unaware of and had no notice at all of either the purported Notice of Revocation nor the affidavit of service. This is indeed serious since these documents rightly ought to have been in the possession of the state, and ought to have been introduced or at the very least referred to by Mr. Kamau.

The Replying Affidavit dated 3/06/2010 sworn by one **PAULINE NYANGUTHI MURITHI** a Principal State Counsel made no reference at all to the existence of these documents at all. The question of Notice

to the applicant and the service of such notice is central to this matter. Why would the respondents' allegedly having '**proof**' of notice and its service only bring this to the attention of Mr. Mogaka after he has concluded his submissions to the court. Why would the state law office be totally in the dark about the existence of this so-called notice and the service of the same.

It cannot be that Mr. Okonji '**forgot**' to include these documents all this time and only 'remembered' their existence after Mr. Mogaka had concluded his submission. If these documents were genuine and authentic then they would have been served on Mr. Mogaka long before the hearing of this application commenced and certainly the lawyer representing the Attorney-General would have been aware of their existence and they would certainly have been referred to by Ms Pauline Muriithi state counsel in her replying affidavit. How is it that the 1<sup>st</sup> interested party a civilian is able to obtain and '**slide**' into the court files documents which originated from and indeed were purportedly signed by the Deputy Prime Minister while the Hon Attorney –General is seated in court totally oblivious to the existence of these crucial documents.

As a court I harbor very grave doubts about the authenticity of both the purported Notice of Revocation as well as the purported affidavit of service. I am in agreement with Mr. Mogaka that this is what can rightly be '**sharp practice**' and cannot be condoned by this court.

I am therefore not persuaded that such a Notice of Revocation did actually exist nor am I persuaded that it was served as alleged; otherwise these documents would have been brought to the attention of **all** parties to the suit long before lunch-hour of the hearing date.

Apart from these above, a reading of the purported affidavit of service reveals even greater anomalies. The affidavit of service is dated 23/06/2000. The year 2000 has been altered in black pen to read 2011 no doubt to correspond with the date of filing of the replying affidavit of the interested party. The court is not told when or by whom this alteration was made and that alteration is not authenticated by a signature.

A reading of the Affidavit of Service raises even more concerns. At para(2) it is indicated that the alleged notice was to be served upon the applicant in Mpeketoni in Lamu. The process-server Michael Thoya avers that all his attempts to trace the applicant bore no fruit. He finally effected service by leaving he notice on the applicant's father. The name of this '**father**' who was served is not divulged. The process-server claims to have communicated with the applicant by phone. He does not divulge the telephone number upon which he finally traced her. The affidavit is in my view vague and again I am left in grave doubts as to this veracity. On the whole I am not persuaded that personal service or any service at all of this Notice of Revocation was effected on the applicant or indeed on any other person as required by the law. A notice of her revocation in the Kenya Gazette without personal notice to the applicant **does not** fulfil the requirements of s. 267.

For the above reasons I find that there was no proper service on the applicant thus the purported revocation of her nomination as a Councillor was null void and of no effect. I do therefore; allow this present application in terms of prayer 2(i) thereof. Since the purported revocation of the nomination of the applicant was null and void- it follows that any attempt to nominate the 1<sup>st</sup> interested party as a Councillor suffers the same fate and cannot be upheld. As such I do hereby allow prayer 2(ii) of the present application. Further, I do grant orders of prohibition in terms of prayers 2(iii) and 2(iv) as well as the order of mandamus in terms of prayer 2(v). This application for Judicial Review is successful and costs are awarded to the applicant.

**Dated and delivered in Mombasa this 12th day of September 2011**

**M. ODERO**

**JUDGE**

**In the presence of**

Mr. Okenji for interested party

**M. ODERO**

**JUDGE**

**12/09/2011**