REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Miscellaneous Application 84 of 2009

IN THE MATTER OF AN APPLICATION BY LUCY BOSIRE FOR JUDICIAL REVIEW

(PROHIBITION)

AND

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

AND

IN THE MATTER OF SECTION 33 OF THE CONSTITUTION

AND

IN THE MATTER OF SECITON 26(b) & 27(2) OF THE LOCAL GOVERNMENT ACT, CAP 265

AND

IN THE MATTER OF EXTENSION OF THE PERIOD OF NOMINATION

AND

IN THE MATTER OF MUNICIPAL COUNCIL OF KISII

BETWEEN

REPUBLIC……APPLICANT

-VERSUS-

THE DEPUTY PRIME MINISTER &

MINISTER FOR LOCAL GOVERNMENT……1ST RESPONDENT

PERMANENT SECRETARY, MINISTRY OF LOCAL GOVERNMENT…….

…2ND RESPONDENT

THE INTERIM INDEPENDENT ELECTORAL COMMISSION…….3RD RESPONENT

ATTORNEY GENERAL…….4TH RESPONDENT

MUNICIPAL COUNCIL OF KEISII……5TH RESPONDENT

AND

ORANGE DEMOCRACTIC

MOVEMEMENT……1ST INTERESTED PARTY

EVERLYNE NYANONYI MANASE……..2ND INTERESTED PARTYEX-PARTE LUCY BOSIRE

RULING

The Genesis of the instant proceedings is the Notice of Motion dated 3rd August, 2009 and filed in court on 6th of August, 2009. In the said Notice of Motion, **Lucy Bosire**, hereinafter referred to as "***the applicant*** " sought three substantive orders to wit;

(i) ***An Order of Judicial Review in the nature of Prohibition to prohibit the Deputy Prime Minister and Minister of Local Government, Permanent Secretary, Ministry of local Government, the Attorney General, Municipal council of Kisii, hereinafter referred to as the 1st, 2nd, 3rd, 4th and 5th respondents respectively and more particularly the 1st respondent from degazetting and or de-nominating the applicant as a nominated councillor in and or within municipal council of Kisii, the 5th respondent, without complying with section 27(2) of the Local Government Act,***

(ii) ***An order of Judicial Review in the nature of Prohibition to prohibit the 3rd respondent from approving and or forwarding the name of Everline Nyanonyi Manase hereinafter referred to as the 2nd interested party to the 1st respondent for Gazettement and or nomination whatsoever and or howsoever and finally,***

(iii) That the costs of the application be borne by the respondents and interested parties.

The grounds upon which the applicant was hoisted were that the applicant was duly proposed and nominated by Orange Democratic Movement hereinafter referred to as ***"the 1st interested party"*** as a councilor with the 5th respondent and was Gazetted as such on 25th February, 2008 for a period not exceeding 16 months. At the expiry of the term aforesaid the applicant was re-nominated and re-Gazetted as such councillor on 3rd July, 2009. However the 1st interested party has since irregularly and without any reason whatsoever proposed to substitute the applicant with the 2nd interested party. No meeting whatsoever was convened and or held by the 1st interested party prior to the proposed substitution. The applicant is apprehensive that the 1st respondent is likely to act on the proposal of the 1st interested party to her detriment. Such an action by the 1st and 3rd respondents against the applicant would be unconstitutional as would contravene the provisions of section 33 of the Constitution. The applicant's rights and liberties are bound to be contravened in the circumstances. The proposed substitution was arrived at in contravention of the rules of Natural Justice and that the decision was contrary to law, a travesty of justice and abrogates the applicants rights and legitimate expectations.

The applicant swore an affidavit in support of the application dated 3rd August, 2009. In the said affidavit the applicant merely reiterated and expounded on the grounds in support of the application aforesaid. Suffice to add that according to the applicant having been re-nominated and duly gazetted the 1st respondent had exhausted his statutory jurisdiction and hence cannot re-visit the issue of nomination of another person in lieu of the applicant and that the 1st respondent has no jurisdiction whatsoever to degazette the name of an already nominated and Gazetted councillor. In the premises any intended action by the 1st and 3rd respondents in terms aforesaid would be blatantly unconstitutional.

The substantive Notice of Motion aforesaid was filed pursuant to the leave granted by this court on 29th July, 2009. Going by the affidavit of service on record, all the respondents and interested parties were duly served with the Notice of Motion. On behalf of the 1st 2nd and 4th respondents, the Attorney General entered appearance and filed Grounds of Opposition to the Notice of Motion. He took the position that the prayers sought were speculative in nature and did not lie in law. The orders sought if granted would have the effect of stopping a process which can otherwise be lawfully set in motion by the 1st interested party. The final ground of opposition was that the application lacked merit and was infact an abuse of the court process. The other respondents and interested parties did not however see the need to file appearance or papers in opposition to the application. At the end of the day therefore the contest was between the applicant and the 1st, 2nd and 4th respondents.

When the application came up for hearing before me on the 10th March,2010, **Mr. Oguttu,** learned counsel for the applicant indicated that the 3rd and 5th respondents had been served with the Hearing Notice but were absent. The same went for the interested parties. Being satisfied as to the service of the parties going by the affidavits of service on record I allowed **Mr. Oguttu** to prosecute the application the absence of 3rd, 5th respondents and the interested parties notwithstanding. The court proposed and the proposal was taken up by **Mr. Oguttu** and **Mr. Kipkosgei**, learned litigation counsel for the 1st, 2nd and 4th respondents that do file and exchange written submissions. They subsequently did so and I have carefully perused and duly considered the same alongside cited authorities.

So what are the issues for determination in the instant application? To my mind those issues were ably captured by **Mr. Oguttu** in his written submissions: They are:-

(i) Whether or not the provisions of section 27(2) of the Local government Act are effective and operational.

(ii) Determination of the Constitutional effect of the provisions of section 33 of the Constitution.

(iii) Whether the 1st respondent is seized and or possessed of mandate to de-nominate the applicant.

(iv) Whether the powers of the 1st respondent if any, are subject to the rules of Natural Justice.

(v) Costs.

Dealing with the 1st issue, it is clear in mind that this issue has been the subject of many decisions of this court as well as the court of appeal. Accordingly it is a path that is well beaten. In other words, the issue and or efficacy of the provisions of the section 27(2) of the Local Government has been the subject of a plethora of pronouncements by the High court differently constituted as well as the court of appeal. From these pronouncements two schools of thought have emerged. One school of thought was first broached by **Lenaola J.** with **Ibrahim J** in tow. It holds the view that the said provisions are void to the extent that the same are inconsistent with the provisions of section 33 of the Constitution of Kenya. In the case of **NBI. HCCC.MISC.Application No. 75 of 2004, Republic –v-s- Hon. E.K.Martha & 2 others, Ex-parte Hon. Otieno Karan,(UR) Lenaola.J** was emphatic that ***"……Counsel says that the principles applied to*** section ***26(2) do not apply to section 27(2). He is saying that nomination and the revocation are two unrelated matters. But I have said at page 18 paragraphs 8 of this ruling that nomination and the term of office are related to revocation. I am now saying for clarity that the intention as far as I can see of the drafters of section 26(2)***

was to elevate the principles of nomination to a constitutional level. I am also saying that since section 33 of the constitution or in fact any part of it does not have a revocation clause in the nature of section 27(2) and the proviso thereto , my mind is unchanged that the Minister should not have that power which in any event the President is denied by the Constitution, in the case of nomination of members of parliament…..” In the earlier case of **H.C.MISC.APP.NO. 802 of 2003. Republic.V. Hon. E.K. Martha & 2 Others Exparte Joseph Okoth Waudi, (UR),** the same Judge had held. ***“…..I am to my mind convinced that it would be against the spirit of section 33 of the Constitution to allow consultation upto the point of appointment and then allow the Minister to revoke the appointment without the same process of consultation. The President cannot do that under section 33 and Mutatis Mutandis the Minister should not do that under statute in spite of the express provisions of section 27(2) of the Act. Without belabouring the point, the proviso to section 27(2) in as far as it purports to contradict section 33 of the Constitution is inconsistent and I so declare…”***

As already stated, the reasoning by **Lenaola J.** received overwhelming support from **Ibrahim J.** He delivered himself on the same issue thus in the case, **HC.Misc.Application No. 66 of 2004 Antony Musila Momangi .V. Emmanuel Karisa Maitha & 2 others (UR)** ***“……..there is no doubt to this court that the provision of section 33 of the constitution which is superior law has been legislated to apply directly within the armbits of the local Government Act. There are those who see this aspect as having the effect of elevating the principles of nomination of councillors in a county council to a constitutional level. Others would look at it as “****domestication****” of constitutional principles into the act. Whichever way one may look at it, the effect is the same. When it comes to interpretation or construction of the provisions of the Act, if there is any inconsistency ambiguity or doubt then the provision of section 33 would prevail and override those in the Act….. There is a clear conflict between the provision of section 33 of the Constitution and section 27(2) of the Act. If the provision of section 33 of the Constitution and section 33 (sic) of the Constitution(sic) is to apply Mutatis Mutandis to nomination, then I do not see why the said provisions should not apply when it comes to revocation or termination of the said very nomination. The process of nomination and revocation or termination are interlinked dual process and one cannot de-link the two…..if there was an intention by parliament to exchange the application of section 33 wholly and with its full intent and effect, from any aspect of nomination of a councilor, it would have said “……I do hereby hold that section 33 of the Constitution does not provide for or contemplate the termination of the nomination of a councillor. Due to the aforesaid conflict and or inconsistency, the provision of section 33 must prevail. I hold that section 27(2) of the Local Government Act is void to the extent of the aforesaid inconsistency….”*** Ibrahim J maintained that streak in the case of **HC.Misc.App.No.917 of 2004 Republic –vs- Minister for Local Government & another (UR).**

Yet there is a second school of thought spear head by **Sergon J**. In the cast you will not fail to find **Visram J** as he then was and **Musinga J.** Their take is that section 27(2) of the **Local Government Act** was not inconsistent with

section 33 of the Constitution. In the case, **HC.MISC.APP,No. 158 of 2006 Taib A. Taib** .V. **The Minister for Local Government & Others (UR)Sergon J** emphatically stated ***"…….when parliament, through section 26(2) of the Local Government Act directed the minister for Local Government to nominate councillors by applying the criteria and principles set out under section 33 of the Constitution did parliament intend to take away the Minister's power to revoke the nomination? In order to get the true intention of the legislature I think the best rule of interpretation is to avoid the repugnancy clause by deeming the two provision to co-exist so that section 33 of the constitution would be domesticated under the Local Government Act to be applied to the process of nomination and that section 27(2) of the Local Government Act would be retained to take care of denomination of nominated councilors. In my view, I am convinced that parliament intended to retain section 27(2) of the Local Government Act as an exception to the domesticated section 33 of the Constitution. I respectively depart from the view taken by my learned brothers, Justices Ibrahim and Lenaola and hold that parliament conferred to the minster for Local Government the power to revoke the denomination of councillors…"*** **Visram J** on his part and in the case of **Mumbi Ngaru .V. Social Development Party HCC.NO. 1152 of 2000 (UR)** upheld the revocation of appointment of a nominated councillor by the Minister for Local Government thereby confirming that Minister for Local Government could revoke at any time in his discretion the appointment of a nominated councillor.

It must be appreciated that no appeals were preferred against the decisions by **Visram, Ibrahim** and **Lenaola JJ** aforesaid. Luckily however, the decision of **Sergon J** was the subject of an appeal to the court of appeal being **Civil appeal no.107 of 2006 Taib A. Taib .V. the Minister for Local Government**(2007)eKLR. The court of appeal having reviewed all the decisions by the four judges aforesaid and other authorities cited, in a majority decision by **Githinji** and **Waki, JJA** endorsed **Sergon J's** position. Indeed **Githinji JA** stated interlia:-

"……it is however, contended that section 27(2) of the Act is inconsistent with section 33 of the Constitution and therefore void. Firstly, there is no specific provision in section 33 of the Constitution or in the entire constitution either providing that the term of a nominated councilor cannot be abridged or that the minister has no power to terminate the nomination. Had the constitution provided so, then, it would have been easy to understand the appellant's case. The alleged inconsistency only arises from the construction put to section 26(2) of the Act by the appellant. I would respectfully agree with the construction of section 26(2) by the learned Judge in his lucid and well reasoned judgment. Section 26(2) incorporates by reference, the criteria and principles of appointment of nominated members of National Assembly under section 33 of the Constitution to the nomination of councillors under section 26 of the Act. In that case, the legal principle is that the provisions of section 33 of the Constitution so incorporated must be generally consructed as if they were set out in full in section 27(2) of the Act……. The criteria, principles and method of nomination of members of parliament in section 33 of the Constitution having been transplanted into section 26(2) of the Act, they apply to the nomination of councilors and section 33 of the Constitution becomes

inoperative as a Constitutional provision with respect to the nomination of councilors under the Local Government Act. That being my view, it follows that section 27(2) of the Act cannot be inconsistent with section 33 of the constitution. Moreover, section 27(2) of the Act unlike section 33 of the constitution does not deal with the criteria and principles for the nomination of councillors….."

Waki JA on his part having reviewed the purport of all the amendments to the act since 1963 was of the view that parliament, in retaining the provision of section 27 intact, having amended section 26 by adding subsection (2) thereof, intended to give the Minister for Local Government executive functions with a view to controlling Local authorities. He delivered himself on the issue thus:-

"…….section 26 itself has been revisited on no less than seven times since 1963 and five times for section 27. The latest was in Act No.10/97 which added section 26(2) but the side note still remained "*number of councilors****:" Some powers of the minister were severely restricted and some were taken away, while others were left intact when those amendments were made. Unlike the President who cannot control members of Parliament in view of the principle of separation of powers, the minister, under the Act has been given executive functions for control of Local Authorities….section 27 which is about Terms of Office of Councillors remained intact when section 26 was amended. Can it be said that parliament was oblivious of that section when Act No.10/97 was passed. I do not think so. In my view, the Powers of the Minister were deliberately retained under that section and it will take a clear amendment of the Law to eliminate that perception. Section 33 of the constitution and section 26 Cap 265 provides the process of nomination. They make no provision for removal which is found elsewhere ……..I agree with Sergon J in the circumstances that the provisions of section 26 and 27 of Cap 265 are mutually exclusive and section 27(2) is neither inconsistent nor repugnant to section 33 of the Constitution. I so find.***

However the minority view of the court was expressed by **Omolo J.A.** thus ***"…….I personally do not understand how or why an ordinary Act of parliament would domesticate the provisions of the constitution but whatever that may mean of parliament, despite having enacted Section 26(2) of the act had still intended to retain the renovation provisions in Section 27(2), one would have expected parliament to have in some way qualified the provisions of section 26(2) of the Act. It must be remembered that the provisions contained in Section 33 of the constitution were brought in by amendments in 1997 (IPPG Amendments) and the object of the amendments was clearly to deprive the President of the power to be in sole charge of the process of nomination. In other words the unbrindled power of the President to nominate was taken out of his hands and given to the parliamentary political parties, so that the president would only be entitled to influence the nomination of the number of person which his own parliamentary political party would be entitled to nominate. Section 26(2) of the Act brought in to effect the amended section 33 of the Constitution. If the powers of the President to nominate were being and were successfully***

challenged and the challenge written in the constitution then I do not myself understand how it can be said that the unbridled powers of the minister to revoke the nominations would remain wholly untouched…..For my part, I have no doubt at all and entirely agree with Lenaola and Ibrahim JJ that the provisions of section 27(2) of the Act which still gives the 1st respondent unbrindled discretion to at anytime terminate the tenure of a nominated councillor is in clear conflict with the criteria and principles set out in section 33 of the constitution and to the extent of that conflict and terms of section 33 of the constitution…… the proviso to section 27(2) of the Act in so far as it is inconsistent with the criteria and principles set out in section 33 is void….."

Musinga J later also found himself saddled with a similar problem in **HC.MISC.APP.NO. 76 OF 2009 James Maobe Manyisa .V. The Deputy Prime Minister & Minister for Local Government and others.** He sought refuge in the majority decision of the court of Appeal in the case of **Taib A. Taib** aforesaid and thereby also became a disciple of **Sergon J.** He held thus ***"……in view of the emphatic findings by the two learned judges of the court of appeal, I cannot agree with the submissions of Mr. Oguttu that the provisions of section 27(2) of the Local Government are inconsistent with the provisions of section 33 of the constitution. I further reject the submission that the Minister for Local Government, the 1st respondent herein has no power to denominate a councilor. In Taib's case the court of appeal found that the minister has such power but in exercising the same the proviso to section 27(2) of Cap 265 requires him to serve a notice in writing to the councillor whose nomination is sought to be terminated. Until the law is amended to state otherwise, the Minister is still vested with the aforesaid power…"***

This later case is on all fours with the situation obtaining here. In view of the court of appeal holding and **Musinga J's** observations in the case stated hereinabove, I think in me the wing led by **Sergon J** has a new recruit and or disciple. Clearly section 27(2) of the Act gives the Minister Powers to terminate and or revoke the nomination of a councillor. The minister's discretion to do so may be exercised at any time. The only clog on the minister's power is that he/she is required to issue the councillor sought to be denominated with a written notice of the intention to do so which must be delivered to him. The majority decision of the court of appeal is binding on me. The legal effect of that decision is that the provisions of section 33 of the constitution were incorporated in the Local Government Act and having been so incorporated must be generally construed as if they were set out in full in section 27(2) of the said Act. As correctly submitted by **Mr**. **Kipkosgei**, the criteria, principles and method of nomination of members of parliament in section 33 of the constitution having been transplanted into section 26(2) of the Act they apply to the nomination of councillors and section 33 of the constitution becomes inoperative as a constitutional provision with respect to the nomination of councillors under the **Local Government Act.** It follows therefore that section 27(2) of the **Act** cannot be inconsistent with section 33 of the constitution as earlier held and believed by **Ibrahim** and **Lenaola JJ.** In the end I hold that the provisions of section 27 (2) of the Act are effective and operational. The Minister for the time being responsible for local

authorities can in his sole discretion revoke or denominate and a nominated and Gazetted councilor. However in exercising those discretionary powers, one hopes that the minister would act in the best interest of the local authority concerned. The powers must not be exercised capriciously but reasonably. It should not be exercised so as to settle scores. I deally it is expected that a nominated councillor should see through his entire term. But there may be situations when such nominated councillor runs foul of the party dogma and does not toe the line of the party that nominated him. He no longer acts in the best interest of the said party or espouse the party principles. In those circumstances it would be perfectly in order I would imagine for the nominating party to request the minister to denominate such councillor.

The 2nd issue is whether the 1st respondent has jurisdiction and or mandate to revoke the nomination of a councillor. The applicant takes the view that upon her nomination and Gazettment, her nomination cannot be terminated by the 1st respondent, not until she sees out her entire term. This position cannot be entirely correct in view of my finding elsewhere in this ruling that the provisions of section 27 of the Local Government Act are clear and unambiguous. The minister is given powers ***"at any time in his discretion to terminate the nomination of a councillor by Notice in writing delivered to the councillor, and thereupon his office shall become vacant….."***

Ofcourse rules of Natural justice would apply in the event that the 1st respondent was bent on denominating the applicant even if he had absolute discretion to do so. However there is no evidence that the 1st respondent would comply with the request of the 1st interested party. It should be born in-mind that it is the 1st interested party which expressed its desire to the 1st respondent to have the applicant denominated. In its letter dated 22nd July, 2009 addressed to the chairman of the 3rd respondent, the 1st interested party requested the 3rd respondent to revoke the nomination of the applicant and replace her with the 2nd interested party. The letter was merely copied to the 1st respondent. I would want to assume that the copying of the letter to the Minister was merely for information. I cannot assume that he will act on it. Or even if he was to act on it he will not comply or apply the rules of Natural Justice .To hold otherwise is tantamount to promoting speculation in judicial proceedings. This is not our forte. I deally the complaint about the allegeded breach of Natural Justice should therefore be addressed to the 1st interested party by the applicant and not the respondents. The 1st interested party's constitution and or nomination rules if at all they exist were not availed to court. I am therefore unable to say how the nomination and the denomination of members is conducted in that party. It may well be that the rules allow the organs of the party to recommend for the denomination of a councillor in the manner proposed by the letter aforesaid. The converse may also be true. However, I do not think that I am in a position to fault the respondents and or the 1st interested party at this stage.

In view of the foregoing, I find no merit in this application and is accordingly dismissed with costs to the 1st, 2nd

and 4th respondents.

Dated, signed ant delivered at Kisii this 23rd April, 2010.

ASIKE-MAKHANDIA

JUDGE