



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

JR MISCELLANEOUS APPLICATION NO. 2 OF 2010

THE REPUBLIC.....APPLICANT

AND

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

THE Town Clerk Municipal Council Of Nyeri.....2ND RESPONDENT

PARTY OF NATIONAL UNITY (PNU).....3RD RESPONDENT

EX-PARTE:

**JANE WANJIRU KAMUTU.....1ST
APPLICANT**

**ESTHER MUTHONI KARIUKI.....2ND
APPLICANT**

INTERESTED PARTIES:

1. MOLLY W. NJOGU
2. GRACE WANYEKI

JUDGMENT

Pursuant to the leave given by this Court on 19th January 2010, **JANE WANJIRU KAMUTU** and **ESTHER MUTHONI KARIUKI**, the 1st and 2nd Applicants herein, took out the Motion dated 27th January 2010 in which the Applicants sought for the following reliefs:

1. *That this Honourable court be pleased to issue an order of Certiorari directed against the 1st Respondent to quash the decision(s) and/or proceedings in the letters dated 12th January, 2010 and/or the decision(s) dated 13th January 2010) of the 1st Respondent, (which decision(s) and/or order has subsequently been published in the Special Issue of Kenya Gazette vol. CXII–No. 7 of 19th January, 2010 after the filing of the application for leave) to revoke and/or terminate the nomination of the applicants as councillors of Nyeri Municipal Council. And/or further quash the 1st Respondent’s decisions and/or order and/or proceedings published in the*

special issue of Kenya Gazette Notice vol. CXII–No. 7 of 19th January 2010 revoking and/or terminating the nomination of the applicants as councillors of Nyeri Municipal Council.

2. *That this Honourable Court be pleased to issue an order of Mandamus directed at the 1st Respondent namely, the Minister for Local Government to re-nominate and/or to degazette the revocation, or termination, and/or to gazette the reinstatement of the applicants as nominated councillors of Nyeri Municipal Council, and to revoke and/or degazette the nominations of Molly W. Njogu and Grace Wanyeki as Councillors in Municipal Council of Nyeri who are believed to have been nominated in replacement of the applicants.*
3. *That this Honourable court be pleased to issue an order of Prohibition directed at the 1st respondent, the Minister for Local government, prohibiting him from revoking and/or gazetting the decision to revoke and/or terminate the nomination and/or any revocation of the nomination of the applicants as set out in the letter dated 12th January, 2010, (also dated 13th January, 2010) (and/or as now set out in the Kenya Gazette Notice vol. CXII-No. 7 on 19th January, 2010) or thereabout and/or gazetting any other person in purported replacement of the applicants as nominated councillors of Nyeri Municipal Council. And/or further nullify the proceedings of the swearing in of the persons appointed as councillors in the place of the applicants.*
4. *All such other orders as the Honourable Court would deem just and equitable to grant in the circumstances.*
5. *That the costs of this application be provided for.*

The Applicants each swore an affidavit in support of the Motion. The Motion is further verified by the verifying affidavits of **Jane Wanjiru Kamutu** and **Esther Muthoni Kariuki** (Applicants). The Motion was served upon the **MINISTER FOR LOCAL GOVERNMENT, THE TOWN CLERK, MUNICIPAL COUNCIL OF NYERI** and **THE PARTY OF NATIONAL UNITY**, the 1st, 2nd and 3rd respondents herein. The 1ST Respondent filed the Replying affidavit of the Honourable Musalia Mudavadi, Deputy Prime Minister and Minister for Local government, to oppose the Motion. The 2nd and 3rd respondents did not file any response to the Motion, but their learned counsels were nevertheless allowed to make oral submissions when the Motion came up for hearing. By a Notice dated 3rd June 2010, the Applicants notified the Respondents of their intention to amend their statement and the Motion dated 27th January 2010. Accompanying the Notice were the amended Notice of Motion, the amended statement and two new verifying affidavits one by each of the Applicants. When the Motion came up for hearing, **Miss Stella Munyi**, the learned Senior Principal Litigation Counsel, appearing for the 1st Respondent, applied to have a typographical error in paragraph 10 of the replying affidavit of Hon. Musalia Mudavadi corrected by deleting the date i.e. 13th January 2010 and substituting it with 15th January 2010. I will come back to the issues touching on the aforesaid amendments shortly.

Let me set out in brief the facts which gave rise to the filing of this Motion. After the General Elections of the year 2007, the Applicants herein were nominated to serve as councillors in the Municipal Council of Nyeri, by the Hon. Uhuru Kenyatta, the Deputy Prime Minister and the then Minister for Local Government vide gazette notice No. 1276 of 22nd February 2008. By gazette notice No. 6373, the 1st Respondent extended both the Applicants' terms to enable them serve the said Municipal Council as nominated councillors until the next General Elections of 2012 with effect from 25th June 2009. In exercise of his powers under *Section 27* of the Local Government Act, Chapter 265 Laws of Kenya, the 1st Respondent revoked the nomination of the Applicants herein as nominated councillors on 13th January 2010 by the letter dated 12th January 2010. By the Kenya gazette notice No. 393 dated 19th January 2010, the Applicants' termination of nomination was published to the rest of the world. The 1st Respondent published the nomination of Molly W. Njogu and Grace Wanyeki, the 1st and 2nd Interested Parties herein, as nominated councillors to serve in the Municipal Council of Nyeri vide the Kenya Gazette Notice No. 394 of 19th January 2010. Though the gazette notice is not express, it can only be inferred that

the Interested Parties were nominated to replace the Applicants. When the Applicants learnt of the aforesaid developments, they were prompted to take out the proceedings now before this court.

Having set out the background of the facts leading to the filing of this Motion, let me now turn my attention to the issue raised and argued for the determination of this court. Before considering the merits or otherwise of the Motion, let me dispose of certain preliminary issues which arose during the substantive hearing of the Motion. When **Mr. C. N. Kihara**, learned advocate for the Applicants, was called upon to submit the case of his clients, he began by seeking for leave to amend the statement dated 18th January 2010 and the Motion dated 27th January 2010. His application is stated in the notice dated 3rd June 2010. That notice is accompanied by four documents namely:

- (i) Amended Notice of Motion.
- (ii) Amended statement of facts.
- (iii) Verifying affidavit of Jane Wanjiru Kamutu (1st Applicant).
- (iv) Verifying affidavit of Esther Muthoni Kariuki (2nd Applicant).

Basically, the Applicants are seeking to bring the aforesaid amendments to introduce the following to these proceedings *inter alia*:

- (i) The names of the Interested Parties i.e. Molly W. Njogu and Grace Wanyeki.
- (ii) An order of *Certiorari* to quash the decision contained in the Kenya Gazette Notice No. 394 to appoint the Interested Parties as nominated councillors of the Municipal Council of Nyeri.
- (iii) An order nullifying the proceedings of the swearing in of the Interested Parties purportedly appointed as councillors in the Municipal Council of Nyeri in place of the Applicants.

Mr. Kihara urged this Court to allow the amendments so that the Court can effectually determine the issues in dispute. The learned advocate argued that the intended amendment will not introduce new issues to these proceedings. Miss Munyi, learned Senior Principal Litigation Counsel, was of the view that the amendments proposed on the Motion are not authorized by law. It is said that under *Order LIII rule 4 (2)* of the civil procedure rules, it is only the statement which can be amended. It is said the proposed amendments go beyond what is allowed by law. It is further argued that the amendments proposed in the statement will introduce evidential matters contrary to the law. I have considered the rival submissions made by learned counsels concerning the amendments of the statement of facts and the Notice of Motion. The Notice of intention to amend is stated to be premised under the provisions of *Order LIII rule 4 (2)* of the Civil Procedure Rules. Under the aforesaid provision, a party intending to amend his/her statement is obliged to serve a notice of intention and the proposed amendments of his statement. It is obvious that the law does not expressly provide for the amendment of the Motion. The contents of the statement is stated under *Order LIII rule 1(2)* of the Civil Procedure rules to include: (a) the name and description of the applicant, (b) the relief sought and (c) the ground on which it is sought. The same provision also gives an applicant a chance to seek for leave to file further affidavits. The Applicants have sought for leave to amend both the statement and the Motion. What prompted the Applicants to issue the Notice is the new facts disclosed by the replying affidavit of the Hon. Musalia Mudavadi. At the time of seeking for leave to institute judicial review proceedings, the 1st Respondent had just revoked the nomination of the applicants. By that time, the Minister had not gazetted the nomination of the Interested Parties herein as councillors. It is only logical for the Applicants to amend their statement at this stage. I have already set out the kind of amendments the applicants seek to introduce. The applicants have introduced the names of the Interested Parties, the reliefs against them and the grounds. Those proposed amendments are the ingredients recognized by *Order LIII rule 1 (2)* of the Civil Procedure Rules, therefore there is no reason why the Applicants should be denied the order. If the amendment is not allowed then the orders sought by the Applicants will be of no use because their slots as nominated councillors will have been taken over by the Interested Parties. The intended amendment is necessary to enable the Applicants bring the Interested Parties on board as envisaged under *Order LIII rule 3(2)* of the Civil Procedure Rules which clearly states that all parties directly affected by the proceedings or order sought should be served. In any case the amendments to be introduced flow from the same transaction. The Applicants have each filed a verifying affidavit. The rules permitted the Applicants to file further affidavits to respond to new issues raised by the affidavits filed by the opposite side. I have already stated that the Replying of the Hon. Musalia Mudavadi, raised new issues which must be answered by the Applicants. I am convinced the Applicants are entitled to the order of leave to amend the statement. Though the rules do not expressly allow the amendment of the Notice of Motion, it is obvious that it is not possible to isolate the amendment of the statement from that of the Motion. What is important is to ensure that the amendments sought to be introduced in the statement are in consonance

with those reliefs sought at the leave stage. The reliefs sought at the leave stage are leave to institute judicial review orders of Certiorari, Mandamus and Prohibition. The Applicants have not gone beyond the aforesaid reliefs when they sought for leave to amend their statement. I allow the amendments proposed by the Applicants. I also admit the verifying affidavits of the applicants which affidavits were duly served upon the parties participating in this dispute.

The second preliminary issue which was argued also relates to an amendment of a typographical error in paragraph 10 of the replying affidavit of the Hon. Musalia Mudavadi. Miss Munyi applied to have the date when the Applicants allegedly received the written notice of revocation of their nomination to be indicated as 15th January 2010 as opposed to 13th January 2010. It is said the same is a typographical error. Mr. C. N. Kihara opposed the application on the ground that the law does not allow correction of affidavit evidence. It is also pointed out that the amendment is being sought after the Applicants have made their submissions. With great respect, I do not think Mr. Kihara's submission is right. The error sought to be corrected is a typographical error which occurs daily in our lives. I have looked at the affidavit of service of Lucas Omayo annexed to of the replying affidavit of the Hon. Musalia Mudavadi and it is clear that the same states that the process server served the Applicants on 15th January 2010. I am convinced the Hon. Minister did not intend to contradict the averments in the affidavit of service. Such an error can even be corrected *suo moto* by the court. The hands of the court are not tied simply because the document sought to be amended is an affidavit. I allow the amendment of paragraph 10 of the replying affidavit of Hon. Musalia Mudavadi as prayed.

The third preliminary point raised by the learned Senior Principal Litigation Counsel is to the effect that the Applicants each filed a further affidavit in support of the Motion dated 27th January 2010 without leave of Court hence those affidavits should be struck out and expunged from record. Mr. Kihara, conceded that the Applicants filed the aforesaid affidavits without seeking prior leave. Under *Order LIII rule 4 (2)* of the Civil Procedure rules, the Applicants were obliged to seek for leave to use further affidavits. They did not issue the necessary notice, hence the affidavit of the Applicants filed to accompany the Motion dated 27th January 2010 save for the verifying affidavits are improperly on record hence incompetent. The preliminary point therefore is well founded, consequently the affidavits are hereby ordered struck out and expunged from record.

The fourth preliminary point raised by the learned Senior Principal Litigation counsel is to the effect that both the Motion dated 27th January 2010 and the proposed amended Motion dated 3rd June 2010 imported the application of *Section 3A* of the Civil Procedure Act. Mr. Kihara stated that the Applicants merely invoked the inherent power of the court. He, however, conceded that the law governing judicial review applications did not permit the importation of other provisions save for the provision of The Law Reform Act and *Order LIII* of the Civil Procedure Rules. The objection raised by Miss Munyi is well merited but in my humble view it will not render the whole Motion(s) fatally defective because the Applicants also cited the provisions of the Law Reform Act and *Order LIII* of the Civil Procedure Rules.

The fifth preliminary point raised and argued by Miss Munyi relates to the competency of the statement. According to her, the statement and the proposed amended statement contains matters of evidence hence it should be struck out for being incompetent. Mr. Kihara did not address his mind to this submission. In the case of **COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY THRO' REPUBLIC =VS= SILVANO ONEMA OWAKI T/a MARENKA FILLING STATING C.A. NO. 45 OF 2000 (Unreported)**, the Court of Appeal expressed itself at page 2 in part as follows: ***"The statement is required by rule 1(2) of order LIII of the Civil procedure Rules to set out the name and description of the applicant, the relief sought and the ground on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case."***

I have carefully examined the statement accompanying both the Motion and the amended Motion. In both statements it is clear that the Applicants have filed a statement containing facts titled "Salient facts and grounds relied on by the applicant". In **R =VS= WANDSWORTH EXPARTE READ [1942] 1 K.B. 281** it was stated as follows:

"The statement" should contain nothing more than the name, the description of the applicant, the relief sought and the grounds on which it is sought. It is not correct to lodge a statement of all facts, verified by an affidavit."

It would appear the objection raised by Miss Munyi is merited. The question is whether or not the same will lead to the statement being struck out. I have anxiously considered that issue and I am of the view

that the statement contains the other ingredients envisaged under *Order LIII rule 1 (2)* of the Civil Procedure Rules save that the Applicants added facts which should have been channeled through the verifying affidavits. I will excuse the little mistake on the part of the applicants because the applicants have filed comprehensive verifying affidavits. The story could have been different had the Applicants filed a bare affidavit verifying the facts in the statement.

Having concluded the preliminary objections raised and argued by learned counsels from both sides, let me address my mind to the merits or otherwise of the amended notice of Motion dated 3rd June 2010. In the Amended Motion, the applicants sought for the following orders:

1. ***“That this Honourable court be pleased to issue an order of Certiorari directed against the 1st Respondent to quash the decision(s) and/or proceedings in the letters dated 12th January, 2010 and/or the decision(s) dated 13th January 2010) of the 1st Respondent (which decision(s) and/or order has subsequently been published in the Special Issue of Kenya Gazette vol. CXII No. 7 of 19th January, 2010 after the filing of the application for leave) to revoke and/or terminate the nomination of the applicants as councillors of Nyeri Municipal Council. And/or further quash the 1st respondent’s decisions and/or order and/or proceedings published in the issue of Kenya Gazette Notice Vol. CXII No. 7 Gazette Notice No. 394 of 19th January 2010, consequently nomination the interested parties as the nominated councillors of Municipal Council of Nyeri.***
2. ***That this Honourable Court be pleased to issue an order of Mandamus directed at the 1st Respondent namely, the Minister for Local Government to re-nominate and/or to de-gazette the revocation, or termination, and/or to gazette the reinstatement of the applicants as nominated councillors of Nyeri Municipal Council, and to revoke and/or degazette the nominations of Molly W. Njogu and Grace Wanyeki as Councillors in Municipal Council of Nyeri who are believed to have been nominated in replacement of the applicants.***
3. ***That the Honourable court be pleased to issue an order of Prohibition directed at the 2nd Respondent, The Town Clerk Nyeri Municipal Council, prohibiting them from revoking and/or Gazetting the decision to revoke and/or terminate the nomination and/or any revocation of the nomination of the applicants as set out in the letter dated 12th January, 2010, (also dated 13th January, 2010) (and/or as now set out in the Kenya Gazette Notice vol. CXII-No.7 on 19th January, 2010) or thereabout and/or Gazetting any other person in making any declaration that either of the interested parties namely; Molly W. Njogu and Grace Wanyeki to be the purported replacement of the applicants as nominated councillors of Nyeri Municipal Council of Nyeri. And/or further nullify the proceedings of the swearing in of the persons/interested parties purportedly appointed as councillors in the place of the applicants.***
4. ***All such other orders as the Honourable Court would deem just and equitable to grant in the circumstances.***
5. ***That the costs of this application be provided for.”***

When the amended Motion came up for hearing, Mr. C. N. Kihara, learned advocate for the Applicants, beseeched this Court to grant the orders sought in the Amended Notice of Motion dated 3rd June 2010 on the basis of the grounds stated on the face of the application. The first ground argued by the Applicants’ learned counsel is that the 1st Respondent revoked their appointment as nominated councillors without following the law and the due process. It is argued that the 1st Respondent in collusion with the 3rd Respondent and other unknown persons revoked the Applicants’ nomination without giving them notice nor hearing them. Miss Munyi opposed this ground by relying on the replying affidavit of the Hon. Musalia Mudavadi which indicated that the Minister received representation from the Party of National Unity (P.N.U.) and the Interim Independent Electoral Commission urging him to revoke the nomination of the Applicants as nominated councillors. Miss Munyi further pointed out that he caused a notice to be served upon the Applicants before he gazetted the revocation of their nomination pursuant to the provisions of *Section 27* of the Local Government Act. I have considered the rival submissions of learned

counsels from both sides. There is no doubt that the parties to this dispute appear to appreciate the fact that Parliament retained the power to terminate the term of a nominated councillor under *Section 27* of the Local Government Act. The majority decision of the Court of Appeal confirmed this position in the case of **TAIB ALI TAIB =VS= MINISTER FOR LOCAL GOVERNMENT & 4 OTHERS C.A. NO. 107 OF 2006 (Unreported)**. At pages 23-24 in his judgment **WAKI J.A.** stated as follows:

“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. The measure of control can only be discerned from the provisions of the Act. In those circumstances, I think, with respect, that it would be unfair to compare what the president can do under the Constitution with respect to nominated MPs with what the Minister can do with nominated councillors. 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 of 1997 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.”

At pages 12-13 of his judgment, **GITHINJI J.A.** stated as follows:

“Applying all the above principles to this appeal, it is clear that the proviso to Section 27 (2) of the Act expressly gives the Minister power to terminate the nomination of a councillor. It is argued that the Minister should not have that power. The court is required to proceed on the assumption that the legislature does not make mistakes. The power of the Minister to terminate the nomination of a councillor is not inconsistent with the other provisions of the Local Government Act. Indeed it is clear that the Act gives the Minister very wide executive powers to control the local authorities. The power to terminate the nomination of a councillor is given in a plain and unambiguous terms and it behoves the court to give effect to it as an expression of legislative intention.”

The decisions of Waki and Githinji Justices of Appeal is in agreement that the Minister for Local Government has power to terminate at any stage the nomination of a councillor in any local authority. The question which must be answered here is whether or not the Minister properly exercised that power. Under *Section 27 (2)* of the Local Government Act, the Minister for Local Government is enjoined by law to deliver a written notice to the affected councillor before the office of such a councillor can be declared vacant. In other words, the Minister must deliver a written notice to the councillor in the manner prescribed under *Section 267* of the Local Government Act before publishing the decision to terminate the nomination in the Kenya Gazette. The Minister is given guidance on how the notice should be delivered under *Section 267* of the Local Government Act 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 “service” 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 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;
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 connexion 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 manner 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 local authority.”

The 1st respondent has averred that he complied with the above provisions before terminating the nomination of the Applicants herein. I have carefully examined the averments contained in each of the verifying affidavits of the applicants and the replying affidavit of the Minister for Local Government. By the letter dated 12th January 2010 and signed on 13th January 2010, the Hon. Musalia Mudavadi wrote to each of the Applicants informing them that he had made a decision to terminate their nomination as

councillors in the Municipal Council of Nyeri on the advise of the Applicants' nominating party (P.N.U.) pursuant to the provisions of *Section 27* of the Local Government Act. Attached to the replying affidavit of the Minister are the copies of the two letters and the affidavit of service of Lucas C. Omayo, sworn on 20th January 2010. Mr. Lucas C. Omayo, a process server of this court, depones in his affidavit that he personally delivered the letter to Jane Wanjiru Kamutu (1st applicant) on 15th January 2010 at the Deputy Mayor's office, Municipal Council of Nyeri. The 1st Applicant admits having received the letter. In paragraph 10 of her verifying affidavit, Jane Wanjiru Kamutu depones as follows:

"10. That I learned of the aforesaid from the 1st respondent's letter dated 12th January 2010, and the decision to so revoke under the hand and sign of the 1st Respondent on 13th January, 2010."

In respect of the letter of Esther Muthoni Kariuki, (2nd Applicant), the process server depones that the Deputy Mayor called her whereupon she gave instructions that her letter be left with Mary Kanyingi, the secretary to the Town Clerk. Mr. Lucas Omayo deponed that Mary Kanyingi acknowledged receipt of the letter by appending her signature at the back of his copy. Esther Muthoni Kariuki, also like Jane Wanjiru Kamutu, depones in paragraph 10 of her verifying affidavit as follows:

"10. That, I learned of the aforesaid from the 1st Respondent's letter dated 12-01-2010 and the decision to so revoke under the hand and sign of the 1st Respondent on 13.01.2010."

It is therefore admitted by both the Applicants that they were served with the requisite notice by the 1st Respondent under *Section 27* of the Local Government Act. I find that the Minister for Local Government complied with the provisions of *Sections 27 and 267* of the Local Government Act before gazetting the termination of the nomination of the Applicants.

The second ground which was ably argued by Mr. Kihara is that the 1st Respondent did not assign any reason for his decision. The applicants further argued that they had legitimate expectation that they would have been notified of the complaint which was presented to the 1st Respondent leading to his decision. According to the applicants, the Minister abused his power when he failed to explain to the applicants the reasons for his action. It is further argued that the Minister should not have taken wholesomely the advise of the 3rd Respondent without carrying out his independent investigation to rule out any malice on the 3rd Respondent's part. In response to the aforesaid powerful submissions, Miss Munyi argued that the moment the 1st Respondent received representations from the 3rd Respondent, he was not bound to assign reasons to his decision so long as he informed the Applicants the person and or party who prompted him to act. I have carefully perused the contents of the letter addressed to each of the Applicants. The letters clearly state that the 1st Respondent acted on the advice of the Applicants' nominating Party. It must be noted that the Political Party plays an integral part in the appointment of nominated councillors under *Section 26* of the Local Government Act. It would appear the law is quite clear that the Political party will present the names of the persons it intends to propose to be appointed as nominated councillors to the Interim Independent Electoral Commission who in turn present those names to the Minister for appointment. It is important for the nominating party to be consulted first before the nomination of its nominees can be terminated. In the case before me, the political party which proposed the nomination of the Applicants and the Interim Independent electoral Commission, approached the 1st respondent to revoke the nomination of the Applicants. In the circumstances, it cannot be said that the 1st Respondent acted arbitrarily, capriciously or in bad faith. The 1st Respondent simply acted on the wishes of the Applicants' nominating party. He had no personal interest in the matter hence I cannot say he acted in bad faith. Under *Section 27* of the Local Government Act, the law did not enjoin the Minister to give any reasons for his decision. At least in this case the Minister disclosed to the Applicants that he had been prompted to terminate their nomination by the Party of National Unity. The Applicants served as the nominated councillors courtesy of the nominating Party, in this case P.N.U. The powers donated to the Minister are fairly weighty hence the same must be used to the best interest of the local authority. The Minister's powers cannot be said to be absolute because he must comply with the rules of natural justice and must assign reasons for his decision despite the fact that *Section 27* of the Local Government Act does not expressly enjoin him to do so. The matter before me is not so complex but it is rather confusing. I have already said that the Minister gave reasons for his decision. As to whether or not the reasons are sufficient is another subject altogether. The vexing question is whether the Minister complied with the rules of natural justice. It would appear the Minister had the option to choose who to hear between the Applicants and the nominating party. The evidence tendered shows the Minister heard the

nominating party. A careful interpretation of *Section 26* as read together with *Section 27* means that the Minister was bound to hear the nominating party. The law is silent as to whether or not he should hear the aggrieved party. It would appear the Minister was enjoined by law to only serve the Applicants with a notice. Having heard the 3rd Respondent, the Minister met the requirements of the rules of natural justice. This court has been urged to rule that the 1st Respondent failed to make inquiries from the 3rd Respondent as to whether the decision was properly reached to request him to revoke the Applicants' nomination. I do not think that is the role of the 1st Respondent. If he was required to make such inquiries, he will not effectively discharge his duties. The law has set up organs to deal with such disputes under the Political Parties Act.

Miss Munyi has raised two issues which Mr. Kihara did not sufficiently address this court in response. The first issue is whether or not the order for Mandamus can issue in these proceedings. It is Miss Munyi's view that the Applicants have asked for an order of Mandamus to issue against the 1st respondent to act in a given manner. I have looked at the prayer for Mandamus. The Applicants have sought the order to direct the 1st respondent to either re-nominate, de-gazette the revocation or termination or gazette their reinstatement and or to revoke or degazette the nomination of Molly W. Njogu and Grace Wanyeki, the 1st and 2nd Interested Parties herein. **In HALSBURY'S LAWS OF ENGLAND 4TH EDITION VOL. 1** at Para. 90: It is stated as follows:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

It is apparent from the way the order of Mandamus is framed, that the Applicants are seeking to command the 1st Respondent to perform his duty in a particular way. The duty imposed upon the 1st respondent under *Sections 26* and *27* of the Local government Act is general hence the court cannot direct the manner the 1st Respondent should perform. With respect, I agree with the submissions of Miss Munyi on this issue that the order for Mandamus is not available.

The second issue raised by Miss Munyi relates to the Prohibitory order sought by the Applicants. It is said the same is not available because what is sought to be stopped has already taken place. I have carefully looked at the prayer for prohibition, the Applicants have sought for an order of Prohibition directed at the Municipal Council of Nyeri, the 2nd Respondent, to prohibit it from revoking and or gazetting the decision to revoke or terminate the nomination of the applicants set out in the letter dated 12th January 2010. It is trite law that the order of Prohibition looks to the future. It cannot be issued if the act sought to be stopped has taken place. The gazetting of termination of nomination of the applicants and the nomination of the Interested Parties as councillors have already been gazetted. The order for prohibition cannot therefore be issued as it will serve no useful purpose. Courts cannot issue orders in vain. Even if the act sought to be prohibited had not taken place, I doubt whether I would have issued the order because the same is directed at the wrong party. The duty to gazette the termination of nomination and nomination of councillors is bestowed upon the Minister for Local Government and not the Local Authority. With respect, I agree with the submissions of Miss Munyi on this issue.

In the final analysis, I find the Motion dated 27th January 2010 and amended on 3rd June 2010 to be devoid of merit. The same is ordered dismissed with costs to the 1st Respondent. I will deny costs the 2nd, 3rd Respondents and the Interested Parties because none of them filed any grounds of opposition nor affidavits in reply.

Dated and delivered at Nyeri this 23rd day of July 2010.

J. K. SERGON
JUDGE

In open court in the presence of G. Mwangi holding brief Kihara for Applicant. Wahome for 2nd Respondent. Interested Party in person no appearance 3rd Respondent and Wairoma for 1st Respondent.