



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**MISC. APPLICATION NO. 4 OF 2010**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI & CERTIORARI  
AND**

**IN THE MATTER OF: THE MAGISTRATE'S JURISDICTION ACT CAP 10 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP 21 LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF: THE LOCAL GOVERNMENT ACT CAP 2005,  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE ELECTIONS OF CHAIRMAN OF VARIOUS  
COMMITTEES THEREOF**

**BETWEEN**

- 1. ADDU KASSIM AHMED**
- 2. TAIB HUSSEIN ABDALLA**
- 3. JAMES KIMIRI GATHIRWA**
- 4. ABDALLA BOCHA**
- 5. ZAHARA SHEE**
- 6. MOHAMED SHALI KALE**
- 7. SAMWEL MUIRURI.....APPLICANTS**

**AND**

**RESIDENT MAGISTRATE'S COURT GARSEN.....RESPONDENT**

**RULING**

By a notice of motion dated 9<sup>th</sup> April 2010, made under section 8 and 9 of the Law Reform Act, and Order LIII Rules 3, 4 and 5 of the Civil Procedure Rules, the exparte applicants seeks for an order of certiorari to issue to quash the decision by the Respondent, made on 9<sup>th</sup> November 2009 in Garsen RMCC No. 22 of 2009 Omar Ali Salim V The County Council of Lamu and the Chairmen of the various committees of the said council held on 12<sup>th</sup> April 2009, null and void.

Secondly an order for certiorari quashing the decision of the Respondent made on 8<sup>th</sup> March 2010 in Garsen RMCC 22 of 2009 Omar Ali Salim V County Council of Lamu and the Chairmen of the various committees of the said council held on 12<sup>th</sup> August 2009 null and void.

(3) An order to issue quashing the decision of the Respondent made on 8<sup>th</sup> march 2010 in Garsen RMCC No. 22 of 2009, directing the Town

Clerk of the Lamu County Council to organize fresh elections for the said council.

(4) An order of certiorari to quash the proceedings of the Respondent in Garsen RMCC No. 22 of 2009.

(5) An order of prohibition directing the Respondent to refrain from any further proceeding with Garsen RMCC No.2 of 2009.

The application is premised on grounds that:-

- (a) **The applicants were elected chairman of the Lamu County Council and Chairman of the various Council committees on 12<sup>th</sup> August 2009.**
- (b) **The Garsen RMCC No.22 of 2009, was commenced and prosecuted without notice to the Applicants.**
- (c) **The orders of 9<sup>th</sup> November 2009 and 8<sup>th</sup> March 2010, were made;-**
  - (i) **Without jurisdiction**
  - (ii) **In breach of the principles of natural Justice**
  - (iii) **In breach of the principle of Proportionality**
  - (iv) **Unreasonableness**
  - (v) **In abuse of power**
  - (vi) **Contrary to public policy and public interest**
  - (vii) **Contrary to the legitimate expectations of the Applicants**

The statutory statement made under Order LII Rule 2 in support of the Notice of Motion, sets out the Reliefs sought and the grounds upon which they are sought. It is stated that the applicants are councilors of various wards in the Lamu County Council and by an election held on 12<sup>th</sup> August 2009, the 1<sup>st</sup> applicant was duly elected as the Chairman of the Lamu County Council, whilst 2-6<sup>th</sup> Applicants were elected as chairman of the following communities within the County Council:-

2<sup>nd</sup> applicant-Finance

3<sup>rd</sup> applicant-Tourism and Environment

4<sup>th</sup> applicant-Port Development

5<sup>th</sup> applicant-Planning

6<sup>th</sup> applicant-Education and Social Services

7<sup>th</sup> applicant-Municipal reforms

Various proceedings were taken out by various persons to prevent the elections that resulted in the election of the applicants namely:-

1. **Mombasa High Court Petition No.339 of 2009 Swaleh S. Swaleh Imu and 4 others V County Council of Lamu and Another(now Malindi HC Petition No. 2 of 2009)**
2. **Nairobi HC Petition No.459 of 2009 – Swaleh S. Swaleh Imu and 4 others V County Council of Lamu and Another**
3. **Mombasa HC Petition No. 340 of 2009**
4. **Mombasa HC Miscellaneous Application No.352 of 2009 Ali Binu Mohammed V The County Council of Lamu and Another**
5. **Hola RMCC No. 9 of 2009, Paul Kimani Njuguna V The County Council of Lamu**
6. **Garsen RMCC No.22 of 2009 – Omar Ali Salim V The County**

On 11<sup>th</sup> August 2009, Omar Ali Salim filed a plaint at the Respondent's court, seeking:-

- (a) **a declaration that the intended meeting to conduct elections of the Chairman of the County Council of Lamu was unlawful**
- (b) **An order of injunction to restrain the Defendant, its agent and or servants from holding and/or conducting any elections for the position of Chairman of the Lamu County Council or any other positions in the said council scheduled for 12<sup>th</sup> August 2009. On the same date, an injunction was issued by the Respondent but that order was never and has never been served on the Respondent.**

On 30<sup>th</sup> September 2009, the said Omar applied by way of Chamber Summons to the Respondent in the said Garsen RMCC No.22 of 2009 for an order to nullify the elections of 12<sup>th</sup> August 2009.

On 8<sup>th</sup> March 2010, the Respondent made a declaration nullifying the election of the applicants as the Chairman and Chairman of the respective committees of Lamu County Council.

The applicants contend that the proceedings that culminated on the Order of 8<sup>th</sup> March 2010, were done without their participation and the orders of 9<sup>th</sup> November 2009 and 8<sup>th</sup> March 2010 therefore ought to be quashed.

The verifying affidavit sets out the facts in issue.

The application is opposed, and in the replying affidavit sworn by Omar Ali Salim on his own behalf and on behalf of three others namely Ali Bunu Mohamed, Sheikh Abdallah Aboud and Hassan Abdallah Al-Beity, he depones that the Abu Kassim Ahmed is not the Chairman of the Lamu County Council as a consequence of orders made by the Resident Magistrate Garsen on 11<sup>th</sup> and 25<sup>th</sup> August 2009, 9<sup>th</sup> November 2009 and 8<sup>th</sup> March 2009, in RMCC 22 of 2009.

He terms the application as lacking merit as the same arguments/issues raised were advanced and considered before the Resident Magistrate Garsen. Further that pleadings were served together with the order of 11<sup>th</sup> August 2009, but the County Council of Lamu ignored the same and did not attend court on 25<sup>th</sup> August 2009 for interpartes hearing and so the court confirmed the orders.

It is his contention that the applicants were aware of the proceedings in Garsen from 12<sup>th</sup> August 2009 when the order of 11<sup>th</sup> day 2009 was served on the Town clerk and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> applicants obstructed and or blocked his advocates on record in the Garsen Case, and the process server Michael Thoga Mbwana, from serving the said order, which was pinned to the door of the county hall – he has annexed photographs showing persons who appear to be in a physical confrontation state. It is his contention that the 1<sup>st</sup> applicant participated in the proceedings and attended court, either directly or through the Town clerk and ended filing an application in the said proceedings.

The 1<sup>st</sup> applicant then attended court on 1<sup>st</sup> February 2010 and discussed the matter with a view to reconciliation and on 12<sup>th</sup> March 2010, the 5<sup>th</sup> applicant attended court at Garsen accompanying the Town Clerk – which is an indication that she was aware of the proceedings.

The interested party maintains that there was no breach of the rules of natural justice because:-

- (a) Applicants were notified of the said case, when the Town clerk was served with the restraining order of 11<sup>th</sup> August 2010, stopping the elections of 12<sup>th</sup> August 2010.
- (b) The applicants were notified of the said case when the county council of Lamu was served with the summons to enter appearance, plaint and application for injunction and infact the council discussed the said case – copies of an application and the Town clerk's minutes are referred to.

It is his contention that the Resident Magistrate Court at Garsen had the jurisdiction to hear and determine the said case and that the practice directions relating to the filing of suits did not prohibit the filing of the suit at Garsen and the practice directions

emphasized an adherence on section 11-12 of the Civil Procedure Act on the place of serving and not on jurisdiction.

Further that the principle of proportionality does not apply to justify an illegality, and if it were to apply in the circumstances of this case, then the same would favour the annulment of the elections since the same were made in breach of a court order and contrary to democratic norms.

It is argued that the annulment of the election will not create a leadership vacuum because those who were holding the leadership positions before the said illegal elections would continue to discharge the required services until proper elections are called or the minister concerned, issue appropriate directions.

The Respondents insists that the Resident Magistrate Garsen had the necessary power and legal mandate to make the orders and there was no abuse of power. Further that having participated in the proceedings through the Town Clerk, then the doctrine of legitimate expectations does not apply and the Respondent approved public policy by nullifying the illegal elections which were not made in accordance with the rule of law.

It is deemed that the operations of the Council have been paralysed, as the action plan, including the budget for the whole year had been resolved and the previous officials will continue with their responsibilities until new elections are held or further directions given by the Minister for Local Council.

It is argued that in any event, the execution of resolutions of the Council is made by Senior Officers under the advise of the Town clerk, and the Council can still meet at any time, as the status of its members have not been affected by the change of leadership.

It is further deponed that the applicants have confused two legal principles that is Jurisdiction and place of suing. Further that the applicants have failed to appreciate who constitutes the Lamu County Council and the relationship between themselves and the Town clerk of the Council, and applicants have also failed to appreciate the principals of natural justice and legitimate expectation. In the alternative, and on a without prejudice basis, the applicants had an opportunity to be heard but chose not to, thereby waiving their right to be heard.

Mr Mabeya for the applicants submitted that an election was called for on 12/08/09 for the County Council of Lamu – before that date, various suits had been filed - and various orders obtained, some stopping and some allowing the elections. Out of the elections of 12<sup>th</sup> August 2009 the applicants were elected to various committees and on 1/09/09, the 2<sup>nd</sup> applicant executed a performance contract to run County Council of Lamu – the same is annexed as AKA 1 page 1-5.

In the Garsen case, the plaintiff had prayed for declaration that the intended elections were unlawful and for injunctive orders. Subsequently on 30/09/09, the interested party filed in Garsen Court, a motion under Order XXXIX Rule 2A and 2 praying for the arrest of the Town Clerk and committal to Civil Jail, and for a declaration that the elections which had been held were null and void.

Mr Mabeya explains that in the Garsen suit, there were only two parties – that is the County Council of Lamu, and the interested party. The interested party indicated that the elections had been carried out on 04/08/09 – and the application was heard exparte and the court at Garsen granted orders that;-

- (1) The clerk to the County Council of Lamu, the Respondent herein, one Patrick Duya, be detained in prison for six (6) months.**
- (2) It is hereby declared that, the elections of the Chairman of the County Council of Lamu, and that of the Chairpersons to the various committees of he said council held on 12<sup>th</sup> August 2009 are null and void.**

It is Mr Mabeya`s argument that these proceedings were never served on the exparte applicants and as at 30/09/09 which the application was being made, both the court at Garsen and the interested party were aware that elections had been conducted.

Lamu County Council then attempted to have orders set aside but the Garsen court only set aside orders of committal to civil jail thereby maintaining the orders of declaration which had been made on 8<sup>th</sup> March 2010.

The orders by the Garsen Court are now being challenged – not on merits, but the process, which the exparte applicants say, was irregular in that;-

1. **The orders were granted in breach of the rules of Natural Justice and had directly affected the rights of the exparte applicant who were never parties to these proceedings and were therefore condemned unheard.**

In response to this Mr Aboubaqr who acts for the interested party urged this court to consider that the dispute which gave rise to the application in Garsen was between Omar Ali Salim(Plaintiff/Applicant) versus The County Council of Lamu(Defendant/Respondent).

He urged this court to consider that under section 28 (i) and (3) of Cap 265(Local Government Act), there is a clear provision as to what constitutes a county council to include the councillors and so obviously the applicant constituted the defendant as its members without, which here would be no County Council and it would be misleading for them to now claim that they never participated in the Garsen proceedings.

Mr Aboubaqr submits that the order, summons and pleadings were served upon the Council and that was sufficient service upon the exparte applicants as members of the council – so they were heard because they raised issues through the council as the council even sat and discussed the proceedings which had taken place in Garsen vide min 24/09.

There is also the issue concerning jurisdiction – Mr Mabeya submits that section 15 Civil Procedure Act requires that suits be filed in courts within the local limits, where the case of action arose in Lamu, and by moving from Lamu to Garsen to file the proceedings, the interested party abused the court process and definitely court shopping. Mr Mabeya argued that the Trial Magistrate in Garsen ought to have returned the plaint to Lamu and although the Resident Magistrate's jurisdiction is national, it is fettered by section 13 (2) of Cap 10 which empowers the Chief Justice to direct a court as to where it should set and these provisions when read along with the Practice Direction in Gazette Notice Number 1756 of 2009 should have alerted the Garsen Court the proceedings with the matter, it was acting in excess of jurisdiction and in abuse of power.

In response to them, Mr Aboubaqr submits that section 15-18 of the Civil Procedure Act provides for place of suit, and there is no challenge on the substantive jurisdiction and whether the court had powers to make such orders. Why Garsen and not Lamu? Mr. Aboubaqr explains that it was not practical to go to Lamu as the Magistrate based in Lamu was on leave. To buttress his argument, Mr. Aboubaqr refer to section 16 of the Civil Procedure Act which provides that no objection as to place of suing shall be allowed on appeal unless it was raised at first instance and there has been consequent justice. It is pointed out that the question of jurisdiction had been raised in Garsen, and this gives the exparte applicants the opportunity to appeal and not come by way of Judicial Review.

Mr Mabeya further argues that the order were made in abuse of power as in granting declaration in an interlocutory application, the court terminated the prayers contained in the plaint were fully determined and there was no need for a trial – in effect, the court summarily determined the proceedings – yet the Civil Procedure requires a suit to be determined through viva voce evidence.

Further that the orders were made contrary to the legitimate expectations because applicants had gained certain rights as the elected persons following elections so they could not be removed from those positions without the due process in a properly constituted trial.

He argues that the orders were made contrary to public policy, that court must upheld both procedural and substantive law and he urges this court to consider decisions in **Mombasa Miscellaneous Application 264 of 1996 R V CM's Court Mombasa exparte Abdo Mohammed Bahajj and Co. Limited** where Waki J as he then was, held that;-

*“Certiorari will issue to quash a decision already made and will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such the reasons. Prohibition will forbid the continuation of proceedings before an inferior tribunal or court in excess of the jurisdiction or in contravention of the laws of the land. It is not only for excess of jurisdiction or absence of it, but also for departure from the Rules of natural justice”*

Mr Mabeya also submits that the respondent did not act fairly and urged this court to be guided by the decision in **CA No.70 of 1991, Murugi Kariuki V AG**. Of course the orders were made ex parte, and although Mr Aboubaqr maintains that the ex parte applicants were duly served courtesy of the Council being served, and that they participated by overtime of the affidavit sworn by the Town Clerk, Mr Mabeya points that the ex parte applicants were not individually served, and affidavit sworn by the Town clerk came in to days after the orders had been made.

Mr Aboubaqr`s response is that the orders given in Garsen were in conformity with the rule of law and it is the Ex parte Applicants who acted contrary to legitimate expectations by questioning service and choosing not to participate in the proceedings. Mr Aboubaqr admits however that under section 129 of Cap 265 relating to the functions of the county Council- the actions of the clerk are acting members including the applicants and the ex parte applicants never applied to be enjoined and cannot now complain.

There is no dispute that the matter which was before the Garsen Resident Magistrate involved Omar Ali Salim as the Plaintiff/applicant versus The Town Council of Lamu(Defendant/Respondent). To determine whether the ex parte applicants were condemned unheard, it becomes necessary to first address the issue as to who the ex parte applicants are, visa vis the defendants in RMCC 22 of 2009 (Garsen).

The ex parte applicants describe themselves as councillors – Mr Aboubaqr says they constitute members of the County Council and are actually the county Council, and that without them the court council does not exist.

Mr Mabeya says that, the Town County Council exists independent of the Councillors – members come after every five years (following elections) but the County Council exists. He clarifies that with regard to the role of the Town clerk as provided under section 129 of the Local Government Act, the clerk only represents the County Council and NOT individual rights of councillors so his participation by the Garsen proceedings did not constitute participation by eh ex parte applicants section 28 (1) and (3) the Local Government Act reads as follows;-

***28(1) for every county or township, there shall be county or town council established.....shall consists of such number of councillors as may be elected, nominated or appointed.***

***28(3) Every County.....shall be each and severally a body corporate perpetual succession and a commission seal.....and shall by such name be capable in law of suing and being sued.....***

It would then appear that the council is a separate entity from the councillors, indeed it is a body corporate, a legal person, and it then follows that the councillors cannot be sued or sue as individuals for acts done by the Council, and for that to happen, then the same principal of lifting the view would have to take place.

However there is the issue of not just acts done by the Council, but the positions held by the applicants who deem themselves as properly elected councillors, which position, by the stroke of an interlocutory application, was taken away ex parte and paved way for the Respondents to now clothe themselves with the same dress of contention. They became councillors through elections and not through acts by the Council.

In the provision of Cap 265, councillors are not defined but to my mind the Lamu County Council is an entity capable of suing and being sued and distinct from its members who are elected every five years – the interested party`s application, though citing only the council, had the spiraling effect of directly affecting the applicants. This then brings into focus the rules of Natural

Justice and specifically the principal of audi alteram partem that is the right to be heard. Although the complaint by the interested party related to the elections, the result was that individuals who had been elected, suddenly found themselves in the cold, yet they had not been given a chance to state their side of the story.

I do not think the interested party can hide behind the cloak of section 28 and use it to lift the skirt when it suits his circumstances. It is clear to me that the respondent has not met conditions for lifting the veil.

The prior notice alluded to as having been served on the council was not personally served on the individual councillors whose security of offices were affected. The premium of service as an ideal to the right to be heard( and therefore not being condemned unheard) was well captioned by Lord Green M R in the English case of Craig V Kanseen (1943) 1 KB 256 to this effect.

***“Apart from ex parte proceedings, the idea that an order can be validly made against a man who had no notification of any intention to apply for it, is one which has never been adopted.”***

Having made that observation, and recognizing the spirit of the overriding objective under section 1 A (1) – (3), then I am persuaded both the interested party and the Respondent had a duty to involve the individual councilors in the proceedings especially because the orders made by the Resident Magistrate had the effect of actually giving a final conclusion to the matter at an interlocutory stage.

Then there is the question of jurisdiction – did the RM lack jurisdiction to deal with the matter. The cause of action arose in Lamu, it is explained that the only reason the RM Garsen dealt with the matter( and why it was filed in Garsen) is that the Lamu Magistrate was away on leave. Under section 15 of the Civil Procedure Act “every suit shall be instituted in a court within the **local limits** of jurisdiction”

The Magistrate’s Act (Cap 10) section 3 (2) recognizes that a Resident Magistrate has national jurisdiction. Did the Trial Magistrate abuse his powers when he dealt with the matter. Ideally the suit should have been filed in Lamu. It is not denied that the Lamu Magistrate was on leave. The matter had to be heard urgently, the next nearest court was in Garsen, surely the Trial Magistrate cannot now be castigated for (a) exercising his national jurisdiction.(b)Expediently dealing with the matter because the Lamu Magistrate was not sitting, so that although the Practice Directions entered in Gazette Notice No.1756 of 2009 regarding place of suing, is explicit regarding the filing of suits as determined by the provisions of section 11-18 of the Civil Procedure Act, - I think this must be viewed in context – indeed it goes further to provide out that such filing must not be according to the preference or convenience of the Plaintiff – I think the idea was to stop court shopping, but where there is a “crisis” as was prevailing in Lamu, then I detect no abuse of power and indeed there would have been no logic in the Garsen Resident Magistrate ordering for the matter to be returned to Lamu at the time.

Apart from that, place of suing, does NOT take away jurisdiction as provided under section 3 of the Magistrate Court’s Act the provisions of section 11-18 was to curb mischief by parties. To that extent I do not find any excess of or lack of jurisdiction on the part of the Trial Magistrate nor can I term the same as an abuse of power.

I will combine the next three two issues because they are intertwined that is legitimate expectations, public policy and proportionality. This is because the three issues of involve a balance between the adverse effects of decision by an authority on the rights of concerned individuals, the need to secure certainty and predictability.

Surely these are the elective posts, not cast in stone, the effect of the decision made by the Resident Magistrate Garsen unfortunately has the effect of giving the interested party an unfair advantage at an interlocutory stage, and he may not even need to proceed to list for hearing the substantive suit – and all this, without giving the ex parte applicants a chance to state their case - bearing in mind that they too had been elected and had even signed performance contracts and then legitimate expectation was at worst – to be heard in court – they have been conclusively denied that opportunity and that cannot be seen as striking a balance

between the adverse effects of the decision made and the rights of those concerned.

The exparte applicant's legitimate expectation surely was that at least they would also tell the court how they came to hold office and why they are entitled to continue in these positions and the Resident Magistrate decision with all due respect was in breach of the duty to act fairly. As a consequence I do grant orders of certiorari to quash the decision made on 9<sup>th</sup> November 2009 and 8<sup>th</sup> March 2010.

Further the Respondent do refrain from any further proceedings with Garsen RMCC No.22 of 2009 until all the affected parties are enjoined in the matter. Since the Lamu Magistrate has now resumed duty I direct that this matter if it is to proceed at all, should do so in the court within the local limits from where the cause of action arose. I award costs of the application to the exparte applicants.

***Delivered and dated this 13<sup>th</sup> day of September 2010 at Malindi***

**H A OMONDI  
JUDGE**

Mr Aboubaqar for Respondent

Mr Omwancha holding brief for Applicant