REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Misc. Appli. 422 of 2006

SALIM JUMA ONDITI……..PLAINTIFF

Versus

THE MINISTER FOR LOCAL GOVERNMENT & OTHERS…RESPONDENT

JUDGMENT

By a Notice of Motion dated 3rd August 2006, and expressed to be brought pursuant to Sections 8(2) of the Law Reform Act and Order 53 Rule 3(1) of the Civil Procedure Rules, the Applicant seeks the following orders against the Minister for Local Government, the City Council of Nairobi and Elijah Omondi Otieno;

(a) An order of certiorari to remove to the Hon. Court and quash the decision of the 1st Respondent contained in the special issue of the Kenya Gazette of 19th July 2006 and appearing in Gazette Notice No. 5380 revoking the nomination of the Applicant as a councilor in the City of Nairobi;

(b) an order of certiorari to remove to the Hon. Court and quash the decision of the 1st Respondent contained in the Special issue of the Kenya Gazette Notice No. 5381 nominating the 3rd Respondent Elijah Omondi Otieno as a councilor in the City of Nairobi;

(c) An order of prohibition stopping or prohibiting the 1st and 2nd Respondents from barring or stopping the Applicant from attending the meetings of the City Council of Nairobi and from exercising his functions and duties of a nominated councilor of the City Council of Nairobi.

The Notice of Motion is premised on the Verifying Affidavit of the Applicant dated 27th July 2006 and a statement of the same day.

The application was opposed and the 1st Respondent filed grounds of opposition on 28th November 2007 and are dated 23rd November 2007. The 2nd Respondent also opposed the application and filed submissions on 22nd March 2008.

The factual background of the Applicant's case is that the Applicant was a nominated Councillor in the City Council of Nairobi following the General Election of 27th December 2002 which was published in Kenya Gazette 8/04 of 11th February 2003 (SOO1). That his name was forwarded by Narc Party and the ECK forwarded the name to the Minister of Local Government the late Hon. Karisa Maitha but on 5th July 2006 the 1st Respondent revoked his nomination as a councilor by notice published in the special issue of the Kenya Gazette issue No. 5380 of 19th July 2006 (SOO2) and instead appointed the 3rd

Respondent Elijah Omondi Otieno as a nominated councilor vide Gazettee Notice No. 5381. That the Respondent never served him with notice of revocation in terms of S.27(2) and 267 of the Local Government Act and that he was never notified that his tenure as a nominated councilor would be shorter than five years and that he found out from NARC and ECK that they were not consulted before the said revocation.

That his legitimate expectation to serve as a councilor for five years was frustrated by the Respondents actions and that so far he has not been given any reasons for the said revocation. Ms Aulo, Counsel for the Applicant submitted that the decision of the 1st Respondent was made without jurisdiction and is ultra vires the Local Government Act and that the case of **TAIB ALI TAIB V MINISTER OF LOCAL GOVERNMENT MISC APPLICATION 158/06** raised similar issues as those raised herein and the Court of Appeal held that a nominated Councillor had to be served with notice of termination in accordance with S. 27 as read with 267 of the Local Government Act before it could be revoked, and that the Minister had to give reasons for such revocation.

Ms. Aulo also submitted that the court will not be acting in vain by granting the orders as the record still stands and it should be set straight and that the Applicant will be entitled to costs and other claims that he was entitled to when serving as a councilor.

In opposing the application, the Respondent relied on the following grounds, that the application has been overtaken by events, that courts do not issue orders in vain and the application is misconceived and bad in law. Ms Chesire who urged the application on behalf of the Respondent said that though the facts may be similar to the **TAIB CASE** the difference is that time is spent and new councilors are more in office and orders that are sought are now overtaken by events and if granted the court would be acting in vain.

In regard to the prayer for an order of certiorari, counsel submitted that the prayers having been spent, the same would not serve any purpose.

Ms. Maina, Counsel for the 2nd Respondent relied on their submissions. According to the 2nd Respondent, the Minister has discretion to terminate the nomination and the court cannot direct the Minister on how to perform his duties. Counsel relied on the case of **CHIEF CONSTABLE OF WALES ex parte EVANS (1982) 1 WLR 1155**.

As regards service of notice counsel submitted that once there was gazettement it served as adequate notice. That the Minister acted lawfully within his powers and the orders sought cannot be granted.

I have now considered the application the submissions of all counsel, the affidavits filed and documents in support of the application. The Respondents did not file any replying affidavits and the facts as stated by the Applicant are not disputed. S.27 provides of Local Government Act for terms of the office of councilors. S. 27 (2) provides that the term of any councillor nominated under S. 26(b) shall be 5 years or such shorter period as the Minister may at the time of nomination specifying. It reads:

"**27 (1) ……..**

(2) The term of office of every councillor nominated under S.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 any time in his discretion terminate the nomination of a councillor by notice writing delivered to the councillor, and thereupon his office shall become vacant.

(3) …….. "

No doubt the Minister has a discretion to shorten the period which a nominated councillor can serve but that is subject to his giving of a notice in writing to the councillor. In this case, did the Minister not do so? I would agree with the court's decision in **TAIB'S CASE** that the Minister's discretion cannot be

unfettered to terminate the nomination without giving any reason for it, complying with the principles of natural justice. It is upto the Minister to exercise his powers reasonably but his exercise of powers in this case was unreasonable and arbitrary as no notice was given and no reasons were given. In the case of **ASSOCIATED PROVINCIAL PICTURES HOUSES LTD V WEDNESBURY CORPORATION (1948) 1 KB 223** the court had this to say of a decision that is unreasonable;

page 229

"**It is true discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey their rules, he may truly be said and often is said to be acting unreasonably Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."**

In the instant case it would be expected of the Minister to give reasons for his decision in exercise of his discretion under the Act but not just revoke the nomination without a word.

The next issue is whether the Minister ever served any written notice on the Applicant as required by S. 27 (2) Local Government Act. Section 267 of the Act provides for how documents are served under the Act. It reads

"**267. Any notice, order or other document required or authorised by this Act or by any other written 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 -**

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 approved 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 the newspaper circulating in the area of local authority."

The provisions of S. 267 are clear that service can be gazetted only if the methods of service mentioned under the Section are not possible. There is no evidence that the Minister ever attempted to serve the notice on the Applicant before he resorted to service by gazette notice. Like the court held in the **TAIB CASE**, the Minister failed or neglected to comply with provisions of the Act when he purported to terminate the Applicants nomination without notice and his actions would be availed Judicial Review.

There is no doubt that this application has been overtaken by events in that the term of 5 years was served and lapsed in 2007 when general elections were held on 27th December 2007. There are now new councilors in office. The impugned decision contained in the gazette notice of 19th July 2006 numbers 5386 and 5381 would be quashed by certiorari for having been made ultravires the Local Government Act and the Minister having acted arbitrary and in violation of rules of natural justice. The Applicant also

seeks an order of prohibition to stop the 1st and 2nd Respondent attending meetings of City Council or exercising the functions of a nominated councillor. The said councillor has already served 5 years and new officers are in office. Prohibition issues to stop a public officer or body from acting in excess or without jurisdiction. It issues to stop a contemplated decision which is yet to be made. (See the case of **KENYA NATIONAL EXAMINATION COUNCIL V RE CA 206/96)** The decision made by the Respondent was acted upon and the 3rd Respondent has already served the 5 years term from 2002 to 2007 and an order of prohibition would not issue.

I do agree with the submissions that courts do not act in vain and if the court were to quash the said decisions it would be acting in vain. Judicial Review remedies are discretionary and the court may, decline to grant them even if deserved if they are not the most efficacious in the circumstances.

I find that the order of certiorari would not serve any purpose at this stage even if granted and the court will dismiss the Notice of Motion but will order that the 1st Respondent pays the costs of the Notice of Motion.

Dated and delivered this 17th day of June 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Ms. Maina for 2nd Respondent