



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI(NAIROBI LAW COURTS)

Misc. Appli. 482 of 2008

PETER MWONGERA M'TWARUCHIUAPPLICANT

Versus

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

THE PS, LOCAL GOVERNMENT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE COUNTY COUNCIL OF MERU CENTRAL.....4TH RESPONDENT

LYDIA GITHUMA.....5TH RESPONDENT

ROSE NKIROTE MURIUNGI.....6TH RESPONDENT

RULING

By a Chamber Summons dated 11th August 2008, the ex parte Applicant seeks leave of this court to apply for the following orders;

1. An order of certiorari to remove into this court and quash the Gazette notice No. 7070 dated 5th August 2008 and published by the Minister for Local Government;
2. An order of mandamus directed at the 1st Respondent the Minister for local Government to gazette the revocation of Gazette notice No. 7070 dated 5th August 2008 and reinstatement of the Applicant as nominated councillor;
3. An order of prohibition do issue to prohibit the 3rd Respondent, the County Council of Meru Central and/or her officers from proceeding with the swearing in of Lydia Githuma and Rose Nkirote Muriungi nominated via Gazette No. 7070 and No. 7071 dated 5th August 2008 as new nominated councilors for the Council of Meru Central;
4. That the grant of leave herein do operate as stay of the said decision of the Minister of Local Government to revoke the nomination of the Applicant as a Councillor in County Council of Meru Central pending the hearing and determination of the substantive Notice of Motion or until further orders

of this court, ie till the decision of the 1st Respondent of 5th August 2008 be stayed and status quo prevailing before the 1st Respondent on 5th August 2008 be reverted to whereby the Applicant do remain as a nominated councillor of County Council of Meru Central. Lastly the Applicant seeks costs of the Application.

The Chamber Summons is brought pursuant to Order 53 Rules 1, 2 and 3 of Civil Procedure Rules, S. 3A Civil Procedure Act, S. 8 and 9 of the Law Reform Act and S.60 of the Constitution.

The Applicant named the following Respondents, The Minister for Local Government, the Permanent Secretary for Local Government, the Attorney General, the County Council of Meru Central, Lydia Githuma and Rose Nkiorote Muriungi.

The Applicant was represented by Mr. Mugambi, the 1st, 2nd and 3rd Respondents by Mr. Omondi and 4th, 5th & 6th Respondents by Mr. Arithi.

The Chamber summons is supported by the affidavit of the Applicant and a statement, both dated 8th August 2008. In the statement, the grounds upon which the Application is premised are that the decision by the illegal, ultra vires his powers under the Local Government Act and is unconstitutional in that it contravenes S.33 of the Constitution. In his affidavit, the Applicant deponed that he was nominated as Councillor on 25th February 2008 and it was revoked vide gazettee notice No. 7070 dated 5th August 2008 which he exhibited (TMN 2). He denies having been served with any notice in writing by the Minister for Local Government of the intention to revoke as required by law. That the purported nomination of Lydia Githuma and Rose Nkiorote Muriungi as nominated Councillors should be stopped as his application would be rendered nugatory.

Mr. Omondi opposed the application on points of law; That the Chamber summons is fatally defective in that it is supported by an incompetent statement; That it is also incurably defective because it combines both Judicial Review and Constitutional remedies. Counsel relied on the case of **R EX PARTE NICHOLAS GITUHU KARIA HMISC 534/03** where Nyamu, Ibrahim and Makhandia JJJ held that one could not invoke the constitutional jurisdiction in a Judicial Review application. Mr. Omondi also submitted that the application was incurably defective for reasons that it is not brought in the name of the Republic. For that proposition he relied on the Case of **EVANS MUSUNGU V CMC ELDORET MISC 1026/07** where this court held that Judicial Review applications are brought in the name of the Republic and the Applicant had not done so.

Mr. Arithi agreed with Mr. Omondi's submissions and added that no notice had been issued on the Registrar for the prayer of mandamus which now appears in the Chamber Summons. The 2nd point taken is that no verifying affidavit is filed save for an affidavit; that the person named in the gazette notice whose nomination was revoked is not the Applicant as the names are different and that the Applicant is a stranger to the gazette notices.

I have considered the rival arguments made by Counsel. At this stage, the Applicant need only demonstrate that he has an arguable case without necessarily going into the case in depth.

I wish to point out that Mr. Omondi's submission that this application should have been brought in the name of the Republic is erroneous and that is not what the court said in the **EVANS MUSUNGU CASE**. It is trite that Judicial Review applications are brought in the name of the Republic but that is at the Notice of Motion stage. The chamber Summons is however brought in the name of the ex parte Applicant and once leave is given, the state takes over the prosecution of the application on behalf of the ex parte applicant. This was set out in the case of **FARMER'S BUS LTD V THE LICENSING APPEALS TRIBUNAL 1959 EA 779** and was followed by Justice Ringera in **JOTHAM MULATI WELAMONDI V ECK CHAIRMAN HMISC 54/02**. These cases set out the format to be taken in Judicial Review applications both at leave stage and Notice of Motion stage. At leave stage the application is by way of Chamber Summons and in the name of the applicant. After leave is granted, the Notice of Motion is brought in the name of the Republic. It was premature for the Respondent to bring

the Republic into the application. The application is proper.

I have seen the statement filed in support of the Chamber Summons. Order 53 Rule 1 (2) Civil Procedure Rules provides that the statement shall contain the name and description of the Applicant, the relief(s) sought and grounds relied upon. The statement herein offends that provision in that it does not fully describe the Applicant, it does not set out reliefs sought in full and lastly it is on the face of the application that sets out the grounds explicitly instead of in the statement as required. The statement filed does not comply with the above rules.

The other point taken was that the Applicant has wrongly mixed the Judicial Review and Constitutional jurisdictions. Judicial Review is said to be a special jurisdiction provided by Sections 8 and 9 of the Law Reform Act which donates power to Order 53 Civil Procedure Rules on procedure. When one invokes that jurisdiction he is neither exercising civil nor criminal jurisdiction (S.8) Law Reform Act and the Civil Procedure Act or Rules do not apply. See **KUNSTE HOTEL LTD V COMMISSIONER OF LANDS CA 234/94** and **R V CLK CA 175/00**. The **KARIA CASE** also addressed the issue in detail and held that Constitutional provisions cannot apply to this special jurisdiction under Order 53 Civil Procedure Rules and S.8 and 9 of the Law Reform Act. Invoking of the Constitution in this application renders the application incompetent. It would have been different however if the Applicant had filed a Constitutional application under S. 84 (1) because under S.84(2) the court can issue any writ or Orders as authorized by law which includes orders of Judicial Review or declarations or any other orders. See **PETER WAWERU V REP HMISC APPLICATION 118/04** where Nyamu, Ibrahim and Emukule JJJ gave orders of certiorari, mandamus in a constitutional application. The application as constructed is defective and is for striking out.

As to the failure to indicate in the notice to the Registrar that an order of mandamus was sought, I doubt that that omission would render the application incurably defective because the issuance of Notice to the Registrar can be waived by the court and besides, it is the statement and the Chamber Summons or Notice of Motion that has to contain the prayers sought in Judicial Review, that is a per Order 53 Rules 1 (2) and Rule 4 Civil Procedure Rules. That objection cannot be sustained.

Judicial Review is a public law remedy. The 5th and 6th Respondents are private individuals and orders of Judicial Review cannot lie as against them and they were wrongly enjoined to these proceedings as Respondents and their names are hereby be struck off with costs to them.

The applicant also sought leave to seek an order of prohibition but the same cannot lie towards that which has already been done. It can only stop that which is yet to be done, leave would not be granted under the circumstances.

As regards the issue of the parties to the application that is an issue that would need to be determined at the full hearing.

For the foregoing reasons this Chamber summons cannot see the

light of day. It is incurably defective and is for striking out. It is so struck out with the Applicant bearing the costs.

Dated and delivered this 5th day of September 2008.

R.V.P. WENDOH

JUDGE

Read in the Presence of:-

Mr. Omondi for the 1st-3rd Respondent

Mr. Muriuki holding brief for Mr. Arithi for the 5th – 6th Respondents

Daniel: Court Clerk