



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Application 478 of 2008

NICHOLAS MBURUGU MUGAMBI.....PLAINTIFF

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

Nicholas Mburugu Mugambi has filed an amended Chamber Summons dated 11th August 2008 seeking leave of this court to commence Judicial Review proceedings against the Minister for Local Government, the Permanent Secretary for Local Government, the Attorney General, the County Council of Meru Central, Lydia Githuma and Rose Nkirote Muriungi. The Applicant seeks leave of this court to move for an order of certiorari to quash gazette notice 7070 of 5th August 2008 published by the Minister of Local Government; an order of mandamus directed against the 1st Respondent to degazette gazette notice 7070 of 5th August 2006 and reinstate the Applicant as a nominated Councillor; An order of prohibition to prohibit the 3rd Respondent from proceeding to swear the 5th and 6th Respondents as nominated Councillors for Meru Central and that the grant of leave do operate as stay of gazette notice of 5th August 2008 and status quo prevailing before 5th August 2008 be reverted to.

The application is supported by an affidavit sworn by the Applicant on 11th August 2008, and amended statement of the same date.

The main grounds upon which this application is brought is that the revocation of the Applicant as a Councillor is illegal, made ultra vires the powers of the 1st Respondent and also contravenes S.33 of the Constitution, and that it breached rules of natural justice in that he was not notified of the intended revocation and was never heard.

The application has been opposed. Mr. Omondi, Counsel for the 1st, 2nd and 3rd Respondents opposed the Chamber Summons on points of law which are that the application is defective in that it is not brought in the names of the Republic, and that does not only go to form but the substance of the application and should be struck out.

The 2nd objection is that the Applicant has invoked both Judicial Review and Constitutional jurisdictions which is improper. He relied on **R V THE COMMISSIONER OF POLICE ex parte NICHOLAS GITUHU KARIA HMISC 534/03** where Nyamu, Ibrahim and Makhandia JJJ held that Judicial Review and Constitutional jurisdictions cannot be mixed in one application.

Mr. Arithi for the 4th, 5th and 6th Respondents also opposed the application and three affidavits were filed by the 5th and 6th Respondents in person and another by Stephen Miriti Njuguna, the

Clerk to the County Council of Meru Central.

I have considered the objections raised. I must first of all correct the position taken by both Respondents that this application is wrongly instituted. As per the decision in **FARMERS BUS CO. LTD. V TRANSPORT LICENSING TRIBUNAL (1959) EAP 779** which was adopted by Justice Ringera in **JOTHAM MULATI WELAMONDI V CHAIRMAN ECK**, a Chamber summons application for leave to commence Judicial Review proceedings should be brought in the name of the Applicant. However once the leave is granted, the Notice of Motion is brought in the name of the Republic who steps in the shoes of the ex parte applicant to bring the application against the State. That is what this court held in the case relied on by the Respondents – **EVANS MUSUNGU V CM COURT ELDORET HMISC 1026/07**. The Respondents have quoted that case out of context. The Amended Chamber Summons is properly before the court and brought by the correct party. It is only after leave is granted that the Applicant can bring the application in the name of the Republic. In **TAIB V R HMISC 107/04** is not relevant here because in that case it is the Notice of Motion which was wrongly intituled but not a Chamber Summons.

On the 2nd objection that the Judicial Review jurisdiction cannot be mixed with the Constitutional jurisdiction, I do agree with the 1st Respondent. This is because the jurisdiction under Order 53 which is donated by S. 8 and 9 of the Law Reform Act is sui generis. It is a special jurisdiction in which any notice provision of the law cannot be invoked including the constitution or the Civil Procedure Act and Rules, The Court of Appeal confirmed the position in **KUNSTE HOTEL V COMMISSIONER OF LANDS CA 234/1995** and in **R V CCK CA 175/00**. The Applicant should bring his challenge either under the constitution or under Order 53 Civil Procedure Rules. To the contrary if the Applicant brought the Application under S.84 (1) of the Constitution the court is empowered under S. 84(2), to issue any orders or writs which include Judicial Review orders (see the case of **PETER WAWERU V REP HMISC 118/04**). The two jurisdiction should be differentiated. For the reason of the mix up in jurisdiction, the instant amended Chamber summons is incurably defective and should be struck out.

Judicial Review is a public law remedy. No orders can lie against individuals in their personal capacity. The 5th and 6th Respondents cannot be enjoined as Respondents but could only be brought in as Interested Parties. They are also struck off as Respondents with costs to them.

The Applicant also sought leave seeking an order of prohibition but the 5th & 6th Respondents have already been appointed as councilors and the prayer cannot lie to undo that which is already done. It can only be to stop that which is yet to be done. Leave would not be granted under the circumstances.

As to whether the application is incurably defective because the notice to the Registrar did not include a prayer for mandamus, I would reject that objection. It is the statement and application which should contain the prayers sought. Notice is a mere notification to the Registrar that an application is going to be filed against the State which can even be waived by the court. A Chamber Summons application cannot be defeated on the basis of the notice not stating all prayers sought.

From the foregoing I find that the Chamber Summons as it stands cannot be sustained and it is hereby struck off with costs to the Respondents.

Dated and delivered this 5th day of September 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of:-

Mr. Omondi for the 1st – 3rd Respondents

Mr. Muriuki holding brief for the 4th, 5th& 6th Respondents

Daniel: Court Clerk