



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Civil Appli 208 of 2006**

**IN THE MATTER OF AN APPLICATION BY COUNCILLOR PAUL MUGETHI JOEL FOR  
JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI, PROHIBITION AND  
MANDAMUS**

**AND**

**IN THE MATTER OF LOCAL GOVERNMENT ACT, CAP 265 LAWS OF KENYA**

**AND**

**IN THE MATTER OF GAZETTE NOTICE NUMBER 2953 OF 11<sup>TH</sup> APRIL, 2008**

**BETWEEN**

**PAUL MUGETHI JOEL .....RESPONDENT/EX-PARTE APPLICANT**

**AND**

**MINISTER FOR LOCAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**COUNTY COUNCIL OF MARAGUA.....2<sup>ND</sup> RESPONDENT**

**NANCY WANJIRU KAMANDE....APPLICANT/INTERESTED/AFFECTED PARTY**

**R U L I N G**

Before me is an application by way of Notice of Motion dated 29<sup>th</sup> May, 2008 filed by M/s Wanjiru Theuri & Company advocates on behalf of the applicant/interested/affected party, named as NANCY WANJIRU KAMANDE. It was filed under Order 53 of the Civil Procedure rules and section 3A of the Civil Procedure Act. The substantive order sought is as follows-

***THAT this Honourable Court be pleased to discharge its orders given on 22<sup>nd</sup> April 2008 granting the respondent/applicant herein that PAUL MUGETHI JOEL stay on the execution of the Kenya Gazette No. 2953.***

The application has grounds on the face of the Notice of Motion. It is also supported by the affidavit of

the interested party **NANCY WANJIRU KAMANDE** sworn on 29<sup>th</sup> May, 2008.

The grounds of the application are that **PAUL MUGETHI JOEL** failed to disclose material facts to the court, and that he had also failed to comply with orders granted on 22<sup>nd</sup> April, 2008.

In the affidavit, on the other hand, it was deponed that the interested party was proposed by her political party for nomination as a councilor, and her name forwarded to the Electoral Commission of Kenya. However, the Minister did not gazette her name as a nominated councilor, and therefore she filed High Court Miscellaneous Application No. 90 of 2008 on 5<sup>th</sup> March, 2008, which was served on the Minister for Local Government and on **PAUL MUGETHI JOEL** on 1<sup>st</sup> April 2008. Thereafter, the Minister gazetted her name as a nominated councilor under Gazette Notice No. 2952. However the interested party was not sworn in because of a spelling mistake in her name. It was also deponed that as she waited for the spelling mistake to be corrected, she was informed by the Town Clerk that the Clerk was served with a court order on 29/4/2008, in this present case, staying execution of the Gazette Notice of 11/4/2008. It was deponed that the applicant herein **PAUL MUGETHI JOEL** misled the court by failing to disclose that there was pending High Court Miscellaneous Application Number 90 of 2008, which he was aware of.

**PAUL MUGETHI JOEL** swore a replying affidavit to the application, on 13<sup>th</sup> June, 2008. In the said affidavit, it was deponed that the interested party was not a member of New Revival Generation Party as alleged. It was also deponed that the application No. 90 of 2008 was served on him on 8<sup>th</sup> April, 2008, without the statement, and affidavits. In any case the interested party had not pursued that application, and following gazette notice No. 2953, that application was overtaken by events.

The 2<sup>nd</sup> respondent, the **COUNTY COUNCIL OF MARAGUA** filed a replying affidavit sworn by **HUMPREY GITU** the Clerk on 12<sup>th</sup> June, 2008. It was deponed that Nairobi High Court Miscellaneous Application No. 90 of 2008 did not in any way affect the 2<sup>nd</sup> respondent as it targeted the 1<sup>st</sup> respondent (**MINISTER FOR LOCAL GOVERNMENT**) only. It was also deponed that the mere failure to disclose the existence of Nairobi H.C. Miscellaneous Application No. 90 of 2008 could not be sufficient ground to discharge the orders issued. It was also deponed that the applicant had not shown that her name had been corrected through gazettment to warrant granting of the orders sought.

The interested party **NANCY WANJIRU KAMANDE** filed a further affidavit sworn by herself on 26<sup>th</sup> June, 2008, in response to the replying affidavit filed. It was deponed that **PAUL MUGETHI JOEL** had vied for the 2007 elections through **SAFINA** party. It was also deponed that the interested party's name had never been forwarded by the **PNU** party, and that the interested party was not claiming the slot of **PAUL MUGETHI JOEL**. It was further deponed that the orders issued in HCC Miscellaneous Application No. 90 of 2008 were complied with.

When the application came up for hearing before me, Mrs. Ngugi for the interested party/applicant, submitted that the applicant wanted the court to discharge the court orders issued on 22<sup>nd</sup> April, 2008. Counsel submitted that the interested party had filed Miscellaneous Application No. 90 of 2008 by way of judicial review proceedings against the Minister for Local Government, and the applicant was served with the application. Counsel emphasized that the ex-parte applicant herein was actually a member of **SAFINA** party as shown in documents filed.

However, in filing the present proceedings, the ex-parte applicant did not disclose the existence of Miscellaneous Application No. 90 of 2008. That non-disclosure, counsel argued was fatal, as the ex-parte applicant came to court with unclean hands. Counsel also contended that the same ex-parte applicant had now filed Miscellaneous Application No. 480 of 2008 on the same subject, which was coming before Nyamu, J. on 7/10/2008. Counsel urged me to allow the application.

Mr. Juma for the ex-parte applicant submitted that this application was brought in bad faith. Counsel submitted that the ex-parte applicant was under no duty to disclose the previous proceedings as the issues

were different. Counsel contended that these proceedings were necessitated by Legal Notice No. 2923 of 11/4/2008, which was different from the Legal Notice under challenge in the Miscellaneous Application No. 90 of 2008. Counsel submitted that documents filed established that the ex-parte applicant was actually nominated by the New Revival Party. Besides the ex-parte applicant was served on 8/4/2008 with documents in Application No. 90 of 2008 outside the time allowed by court. Therefore, the leave granted to the interested party had actually lapsed.

Lastly, Counsel submitted, Application No. 480 of 2008 was different, as it related to the degazettment of the applicant by the Minister in August, 2008. Counsel argued that the application by the interested party lacked merit and should be dismissed.

Mr. Omboga for the 2<sup>nd</sup> respondent, the **COUNTY COUNCIL OF MARAGUA**, submitted that they were relying on the affidavit sworn by **HUMPREY GITU** on 12/6/2008. Counsel submitted that the gist of the application is Miscellaneous No. 90 of 2008 did not in any way affect the 2<sup>nd</sup> respondent. However, the 2<sup>nd</sup> respondent would be required to comply with orders as granted by court.

Counsel submitted that mere non-disclosure of the existence of previous proceedings, was not sufficient reason for this court to discharge the orders of the court. Counsel submitted that, at the time of filing the present application, the interested party had not been sworn as a Councillor as apparent errors in the gazettment of her name had not been corrected. Subsequent corrections were made, after the court granted stay orders. Counsel submitted that there were no merits for granting the lifting of court orders, sought by the interested party.

In response to the counsel who made submissions, Mrs. Ngugi submitted that spelling mistakes were also made with regard to the ex-parte applicant herein.

This application has been brought under Order 53 of the Civil Procedure Rules as well as section 3A of the Civil Procedure Act. Courts have held severally that, judicial review proceedings are not governed by the Civil Procedure Act (**Cap. 21**) and the Civil Procedure Rules. Judicial review proceedings are governed by the provisions of the Law Reform Act (**Cap. 26**) and Order 53 of the Civil Procedure Rules, which rules get their validity from section 8 and 9 of the Law Reform Act.

The Law Reform Act and Order 53 of the Civil Procedure Rules do not provide for setting aside of orders made in judicial review proceedings. However, in my view, a court has inherent power to make such orders as are necessary to be made in the interests of justice, and to avoid abuse of the court process. Therefore, in my view, this court has jurisdiction to vary its own orders in judicial review proceedings, especially when those orders or decisions were made ex-parte, such as in our present case.

Having said so, in my view, this application lacks merits and will not succeed. Firstly, from the facts before me, I see no effect on the interested-party, arising from the orders which I granted on 22<sup>nd</sup> April, 2008. The orders of stay were directed against an action by the Minister, and applied to Gazette Notice No. 2953 of 11<sup>th</sup> April, 2008. I do not see how lifting my orders will affect her. Secondly, the previous proceedings No. 90 of 2008 filed by the interested party relate to Gazette Notice No. 1276 of 22<sup>nd</sup> February, 2008. Since the two matters relate to different Gazette Notices, the non-disclosure of one cannot be fatal to judicial review proceedings. It has to be appreciated that judicial review proceedings relate to specific actions complained of. Each action can precipitate its own proceedings, as happened in this case.

The interested party has a Legal right to join and has indeed joined the present proceedings and can canvass her case at the main hearing. She can request that the case be expedited. However, I find no merits in the application dated 29<sup>th</sup> May, 2008, and I will dismiss the same.

Consequently, I dismiss the application dated 29<sup>th</sup> May, 2008. The costs will follow the decision in the judicial review proceedings, when finalised.

Dated and delivered at Nairobi this 19<sup>th</sup> day of November, 2008.

George Dulu

Judge.

**In the presence of-**

Mr. Momanyi holding brief for Mr. Juma for ex-parte applicant/respondent.

Mr. Onyiso for 1<sup>st</sup> respondent