



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Civil Appli 480 of 2008
**IN THE MATTER OF AN APPLICATION BY COUNCILLOR PAUL MUGEITHI 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 NOTICES NUMBER 7070 AND 7071 OF 5TH AUGUST 2008
BETWEEN
REPUBLIC APPLICANT
AND
MINISTER FOR LOCAL GOVERNMENT..... 1ST RESPONDENT
COUNTY COUNCIL OF MARAGWA 2ND RESPONDENT
PAUL MUGEITHI JOEL : EX PARTE

JUDGMENT

The Notice of Motion dated 3rd September, 2008 is the subject matter of this instant judgment. The Notice of Motion is brought under Order LIII Rules 1(1)(2), 3(1) and 4th of the Civil Procedure Rules and section 3A of the Civil Procedure Act Cap 21 Laws of Kenya. The 1st Respondent is the appointing authority under the provisions of the Local Government Act, Cap 265 Laws of Kenya. The 2nd Respondent is a Local Authority under the said Local Government Act. Nancy Wanjiru Kamande has been enjoined as an interested party whose appointment to replace the ex parte Applicant as a councilor is under challenge. The Ex-parte Applicant is a nominated councilor at the 2nd Respondent whose nomination and appointment has been revoked by New Revival Generation Party and the 1st Respondent respectively hence the Applicant has filed these proceedings to challenge the revocation.

The ex-parte Applicant seeks the following orders:-

1. An order of certiorari to remove into the High Court and quash the Gazette Notice No. 7070 of 5th August, 2008 to the extent that it revoked the nomination of the Applicant as a nominated Councilor of the County Council of Maragwa and to remove into the High Court and quash Gazette Notice No. 7071 of 5th August, 2008 to the extent that it illegally nominated one Nancy Wanjiru Kamande to replace the Applicant as a nominated Councilor of the County Council of Maragwa.
2. An order of Prohibition prohibiting the 1st and 2nd Respondent from swearing in of Nancy Wanjiru Kamande the person nominated by Kenya Gazette Notice No. 7071 of 5th August, 2008, or any other person so nominated to replace the Applicant from being and/or assuming office as a nominated Councilor.
3. An order of Mandamus compelling the 1st Respondent to revoke Gazette Notice No. 7070 of the 5th August, 2008, to the extent that it revoked the nomination of the Applicant and to forthwith reinstate and gazette the Applicant as a nominated councilor to the County Council of Maragwa with full pay of all his

salaries and emoluments.
4. Costs of this application.

The application is supported by the affidavit of the ex-parte Applicant sworn on the 3rd September, 2008 and it is also grounded on the statutory statement dated 13th August 2008. The Applicant was represented by Mr. Juma Advocate.

The application was opposed by the 2nd Respondent and the Interested Party. The 1st Respondent relied on the grounds of opposition filed in *High Court Misc Civil Application No. 208 of 2008, Republic v Minister for Local Government and others*. Mr. Humphrey Gitu the clerk at the 2nd Respondent swore a replying affidavit on the 17th October, 2008 and it was filed in court on the same day. The interested party one Nancy Wanjiru Kamande swore a replying affidavit on the 23rd September, 2008 and had the same filed in court on the same date. The 1st Respondent was represented by **Mr. Omondi**, State Counsel from the Attorney General's Chambers. The 2nd Respondent was represented by **Mr. Omboga** Advocate while the Interested Party was represented by the **Mrs. Ngugi** Advocate.

The grounds upon which the motion is brought are clearly stated in the statutory statement and they are:-

- (a) The Applicant filed Judicial review Proceedings being Judicial review Case no. 208 of 2008 between himself, and the Minister for Local Government, County Council of Maragwa and Nancy Wanjiru Kamande.
- (b) On 22nd April, 2008, orders were issued staying Gazette Notice No 2953 and 2954 of the 11th April, 2008 published by the 1st Respondent which orders are in force.
- (c) Further orders were issued against the 1st Respondent from allowing or nominating any person whatsoever to replace the Applicant herein as a nominated councilor of the County Council of Maragwa till the hearing and determination of the Judicial review Misc Case No 208 of 2008.
- (d) The 1st Respondent appointed the Attorney General to represent him in the said proceedings whereof the 1st Respondent actively participated.
- (e) The Publication of Gazette Notice No 7070 and 7071 of 5th August, 2008 is not only ultra vires sections 28(2A) and 40 of the Local Government Act Cap 265 Laws of Kenya but also directly touches on the matters in the pending Judicial Review Case No 208 of 2008 which has valid stay orders.
- (f) The 1st Respondent has in disregard of the stay orders issued on 29th April, 2008 Published Gazette Notice No 7070 and 7071 of 5th August, 2008 in disobedience of the aforesaid orders of the Honourable Court.
- (g) Although the 1st Respondent has gazetted the names of Nancy Wanjiku Kamande and Boniface Mburu Chege, they have not been sworn in and or assumed office to replace the Applicant.
- (h) The effect of Gazette Notice Nos. 7070 and 7071 of the 5th August, 2008, is to defeat the orders granted on 29th April 2008 and to render the proceedings in Judicial Review Case No. 208 of 2008 nugatory.
- (i) The 1st Respondent, contrary to his oath of office to uphold the law, has outrightly engaged in disobedience of the same and disregarded the judicial institution of the Republic of Kenya.
- (j) The 1st Respondent's decision is bad in law, an abuse of power, in disregard of the constitutional powers of the High Court and the Constitution of Kenya, contemptuous of the court hence unlawful and ought to be quashed by this court.

A brief factual background of this case is that the ex-parte Applicant was nominated by the New Revival Generation Party as a nominated Councilor at the County Council of Maragwa in February 2008. The Applicant was subsequently appointed by the 1st Respondent as a councilor through publication of a Gazette Notice No 1276 on the 22nd February, 2008. He was sworn in as a nominated councilor by the clerk of the County Council of Maragwa on the 25th February, 2008. On 11th April, 2008 the 1st Respondent caused to be published a special Kenya Gazette Notice No. 2953 purportedly in exercise of his powers under section 40(1) of the Local Government Act terminating the term of office of the

Applicant as a member of the County Council of Maragwa and at the same time in the same Gazette Notice nominated other persons as members thereof.

On 21st April 2008, the Applicant filed Judicial review proceedings at Nairobi, J R No. 208 of 2008 seeking leave to challenge the contents of Gazette Notice no. 2952 and 2953 of 11th April, 2008. Leave was granted by Hon Mr. Justice G. Dulu on 22nd April, 2008 which leave was to operate as stay of Gazette Notice No. 2952 and 2953 of the 11th April, 2008. The orders granted by **Hon Mr. Justice G. Dulu** are still in force. On 5th August, 2008, the 1st Respondent published Gazette Notice Nos 7070 and 7071, purporting to revoke the nomination of the Applicant as a councilor of the County Council of Maragwa and replaced him with Nancy Wanjiku Kamande and Boniface Mburu Chege.

The 2nd Respondent and the interested party opposed the application. The 2nd Respondent contends that it is not the appointing authority and the provisions of the Local Government Act do not empower it to act independently in either revoking or nominating a councilor and its basic and primary role is to swear in a councilor who has been duly nominated and gazetted by the 1st Respondent.

The 2nd Respondent further argues that the parties directly involved with the issues at hand are the Electoral Commission of Kenya and the 1st Respondent and as such the Applicant has no cause of action against the 2nd Respondent. The 2nd Respondent further submits that under the law, the Minister for Local Government may at any time in his discretion terminate the nomination of a nominated councilor by notice in writing delivered to the councilor and thereafter his office shall become vacant.

The interested party contends that this instant application is an abuse of the court process in that there is still High Court Misc Application No. 208 of 2008 filed by the Applicant involving the same parties and subject which is still pending before this court.

The interested party further contends that Gazette Notice Nos 7070 and 7071 of 5th August, 2008 merely gave effect to Gazette Notice No. 2953 of 11th April, 2008 as it was merely correcting the spelling of the names which had erroneously been misspelt in Gazette No. 2953.

The interested party submits that the Applicant failed to disclose to the court the pending of High Court Misc 90 of 2008 where the Applicant is a party and as such he has not come to court with clean hands and his application should be dismissed.

The Interested party further argues that the Applicant has not demonstrated that the Minister for Local Government has exceeded and abused his statutory powers or failed to perform the statutory duties. It is the contention of the interested party the Minister for Local Government only acted in accordance with the decision of the New Revival Generation Party which revoked the nomination of the Applicant and replaced him with the interested party and as such the said Minister never abused his or exceeded his powers.

The Interested Party has argued that the Applicant was not the only person affected by the decision by the Minister for Local Government which was intended to correct some unfairness. The said Minister was not unreasonable in his decision.

The Applicant has also filed skeletal submissions. The Applicant contends that the 1st Respondent has also violated sections 28(2A) and 40 of the Local Government Act. Section 28(2A) provides as follows:-

“The criteria and principles for appointment of nominated members of the National Assembly under section 33 of the Constitution shall mutatis mutandis apply to the nomination of councilors under this section.”

Section 33 of the Constitution states:-

(1) Subject to this section, there shall be twelve nominated members of the National Assembly

appointed by the president following a general election, to represent special interests.

(2) The persons to be appointed shall be persons who, if they had been nominated for a parliamentary election, would be qualified to be elected as members of the National Assembly.

(3) The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly taking into account the principle of gender equality.

(4) The proportions under subsections (3) shall be determined by the Electoral commission after every general election and shall be signified by the Chairman of the Commission to the leaders of the concerned parliamentary parties, the president and the speaker.

(5) The names of the nominees of parliamentary parties shall be forwarded to the president through the Electoral Commission who shall ensure observance of the principle of gender equality.”

Section 40 of the Local Government Act Cap 265 laws of Kenya provides as follows:-

“(1). The term of office of every councilor nominated under section 39(1) (c) shall be five years or such shorter period as the Minister may, at the time of nomination specify:

a) Provided that the Minister may at any time in his discretion terminate the nomination of such a councilor by notice in writing delivered to the councilor and thereupon his office shall become vacant.

2. The term of office of every councilor appointed under paragraph (b) or (d) of section 39 shall be five years or such shorter period as may, at the time of appointment, be specified by the council which appoints such councilor:

Provided that, where any such council ceases to be a councilor of the urban or area councilor, as the case may be, of the Municipal council which appointed him, he shall forthwith cease to be a councilor of the county or town council.

3. The term of office of the elected councilors specified in section 39(1) (a) shall be five years.

The Applicant contends that there is no basis at all why the 1st Respondent ignored the written law. The 1st Respondent was under an obligation to notify the Applicant as per the provisions of section 40(1) of the Local Government Act. The 1st Respondent could only have validly nominated a councilor to replace the Applicant if the seat fell vacant. The 1st Respondent ought to have notified the Applicant which he did not thus exposing himself to the proceedings herein.

The Applicant argues that the 1st Respondent revoked the nomination of the Applicant in disobedience to the court orders in Judicial Review case No. 208 of 2008.

The application of Gazette Notice Nos. 7070 and 7071 of both the Local Government Act but also directly touches upon the matters now pending in Judicial Review Case No. 208 of 2008 whereof the court has made stay orders.

ANALYSIS

The court has considered all the arguments advanced by each party herein. Judicial review is a special jurisdiction of the High Court which is exercised only when it is the most efficacious remedy available. The scope of judicial review is a well trodden area and this court has on numerous occasions addressed the same. In the case of *REPUBLIC v JUDICIAL SERVICE COMMISSION EX PARTE PARENO, HIGH COURT MISC CIVIL APPLICATION NO. 1025 OF 2003*, this court held inter alia:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important in every case that the purpose of the remedy of judicial review is to ensure that the individual is given a fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matters in question”.

The concern of this court is the credibility of the decision making process which led to the impugned decision in this application. The court can only intervene where the decision making process is wanting. In judicial review, there has been unprecedented growth in the last six years as regards the grounds for intervention and the courts are facing challenges of new emerging trends and situations. However, there are several main grounds that trigger judicial review such as, abuse of discretion, illegality, improper motive, excess of jurisdiction, irrationality among others. As a result of fast growth in this area, the courts must to examine each case on its own facts and merits.

Going by the facts of this case, in the view of the court, the following are the issues that call for determination:-

- (a) Whether the decision by the 1st Respondent was made in blatant breach of the rules of natural justice?
- (b) Whether the decisions by the 1st Respondent to revoke the nomination of the Applicant as a councilor at the County Council of Maragwa and to nominate Nancy Kamande on the 5th August, 2008 is unreasonable and illegal.
- (c) Whether the 1st Respondent acted in excess of his powers in arriving at the decisions of the 5th August, 2008 revoking the nomination of the Applicant and replacing him with the interested party?

The onus of demonstrating to this court that the challenged decisions were arrived at in blatant breach of the rules of natural justice, or that the said decisions are unreasonable or that the 1st Respondent exceeded the powers vested in him squarely lies on the Applicant. The Applicant must discharge the burden in order to succeed by availing tangible evidence or demonstrate illegality including abuse of power.

I now wish to address the issues vis a vis the evidence on record. The rules of natural justice are fundamental and are a cushion to ensure that public bodies do not take any decision at their whims to the detriment of those affected. The applicable rule in this instant case is expressed by the principle *audi alteram partem* which means “hear the other side.” Ordinarily each party to a dispute should be given an opportunity to state its case particularly if the decision taken will negatively affect it. In the case of *RIDGE v BALDWIN (1963) 2 ALLER 66 at page 81*, Lord Reid Stated as follows:-

“Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void”

Similar sentiments are also contained in the case of *GENERAL MEDICAL COUNCIL v SPACKMAN (1943) 2 ALLER 337 at page 345* where Lord Wright held as follows:-

“If the Principles of natural are violated in respect of any decision, it is indeed, immaterial, whether the same decision would have been arrived at in the absence of the departure from the essential Principles of Justice. The decision must be declared to be no decision.”

However, when an administrative agency is formulating a decision circumstances to which the principles of natural justice are applied, it need not observe the strict procedure of a court of law. In the case of *BOARD OF EDUCATION v RICE (1911) A.C. 179 at page 182* Lord Loreburn LC stated as follows:-

“In such cases the Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer oath and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.”

The right to hear the other side is not necessarily a right to personal hearing before the body making the

decision, what is vital in such a situation is to ensure that the party to be adversely affected by the decision is timely informed of the substance of the case it has to meet which must be reasonably and clearly formulated. Such a party who stands to be prejudiced should be given a reasonable opportunity to present its case.

In this instant case, there is absolutely no evidence on record that the 1st Respondent informed the Applicant of the revocation of his nomination as a councilor. All what the 1st Respondent did was to publish Gazette Notice No. 7070 where he revoked the nomination of the Applicant and also Gazette Notice No. 7071 where he appointed Benson Mburu Chege and Nancy Wanjiru Kamande to replace the Applicant. The 1st Respondent has relied on the grounds of opposition filed in the ***HIGH COURT MISC. APPLICATION NO. 208 OF 2008 REPUBLIC v MINISTER FOR LOCAL GOVERNMENT & OTHERS***. The grounds are:-

1. **“A case for issuance of an order of certiorari has not been set out.**
2. **Order L 111 rule 7(1) has not been complied with**
3. **Facts should be in the verifying affidavit and not statement.**
4. **The Minister has power to revoke nomination of a councilor.**
5. **There was no breach of the rules of natural justice neither was the Minister actuated by malice.”**

With great respect the grounds are generalities with little to offer. The 1st Respondent did not even file any skeletal arguments and the said grounds do not assist the court. It is true that the 1st Respondent has power to revoke nomination of a councilor but only in accordance with the law. The allegation that there was no breach of rules of natural justice and that the Minister was not actuated by malice are open ended statements which do not address the issues at hand. For the above stated reason I find that the 1st Respondent never informed the Applicant of his revocation as a councilor and that was in flagrant breach of the rules of natural justice.

The second issue is whether the revocation of the Applicant as a councilor and replacing him with the interested party was unreasonable and illegal. It is not in doubt that the 1st Respondent has power to revoke the nomination of a councilor under section 40 (1). The said Proviso is couched in discretionary terms and it is not a blank cheque for the 1st Respondent to act arbitrarily. It is now trite law that statute power must be exercised fairly. No one has the right to use or invoke statutory power in bad faith. In the celebrated case of ***ASSOCIATED PROVINCIAL PICTURES v WEDNESBURY CORPORATION (1948) IKB 223***, Lord Green Mr. Stated as follows:-

“Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such a person or body properly directing itself on the relevant law and acting reasonably could have reached that decision”

It is implied that whenever a public body or person is exercising discretion, the resultant decisions are reasonable and justifiable. The guiding principle should be fair treatment to all who stand to be adversely affected by the decision taken. The law on the termination or revocation of a councilor is set out in the proviso to section 27(2) of the Local Government Act and it provides as follows:-

“Provided that the Minister may at any time in his discretion terminate the nomination of a councilor by notice in writing delivered to the councilor and thereupon his office shall become vacant”

In the case of ***TAIB A. TAIB v THE MINISTER FOR LOCAL GOVERNMENT AND 4 OTHERS***,

CIVIL APPEAL NO. 107 OF 2006, the Court of Appeal laid down the process by which a councilors nomination may be terminated by the Minister as follows:-

- “(a) The termination is to be done by a notice which has to be in writing.**
- (b) The notice in writing has to be delivered to the councilor**
- (c) The termination of the nomination takes effect upon the written notice being delivered to the councilor”**

Section 267 of the Local Government Act defines the word ‘deliver’ as follows:-

“Any notice, order or other documents required or authorized by the act or by any bylaw made under this act to be served on any person (whether the expression ‘serve’ or ‘give’ or ‘send’ or ‘deliver’, or any other expression is used), then, unless contrary intention appears therein, such notice, order or other document may be served, and shall be deemed to have been effectively served if served:-

- (a) Personally upon the person on whom it is required or authorized to be served, or if such person can not be reasonably be found personally upon any agent of such person or personally upon any adult member of the family of such person who resides with him, or**
- (b) By post, or**
- (c) By affixing a copy of the same or some conspicuous part of any premises or land to which it relates or in connection with which it is required or authorized to be served, or**
- (d) Where from any case whatsoever, it is not possible to effect service of the notice, order or other document in any of the manner specified in paragraph (a) (b) & (c) by publication of a copy thereof in the Gazette and in at least one of the news paper circulating in the area of the local authority”**

Even without seriously endeavouring to examine the action taken by the 1st Respondent, it is clear that, there was no notice in writing delivered and or served upon the Applicant relating to his revocation as a councilor as the only step the 1st Respondent took was to gazette the revocation of the Applicant. The gazette is no solace for the 1st Respondent because the notice in writing is the starting point. Failure to give notice in writing makes the process of revocation illegal and unfair. Gazette is the last result where it is not possible to effect service of the notice and such gazette must be accompanied by some notice in a newspaper circulating in the area the councilor serves.

Going by the laid down procedure of revocation of a councilor, the action taken by 1st Respondent falls far below the requisite requirements and it makes the Gazette notice No. 7070 a mockery of the process. It is clear that the 1st Respondent did not follow the proper procedure laid down under the Local Government Act Cap 265 Laws of Kenya in its effort to revoke the nomination of the Applicant as a councilor. The decision was unfair, arbitrary and illegal and therefore constitutes procedural impropriety.

The third issue the court must address is whether the 1st Respondent exceeded his powers in arriving at the challenged decision. In the case of *WEST MINISTER CORPORATION v LONDON AND NORTHWESTERN RAIL CO (1905) AC. 426 at page 430, Lord Macnaughten* held as follows:

“It is well settled that a public body invested with statutory powers such as those conferred upon the cooperation must take care not to exceed or abuse its powers. It must keep within the limit of authority committed to it. It must act in good faith and must act reasonably”.

Every public body or administrative agency owes its powers to the Act donating the same and it will be acting without jurisdiction in so far as it may purport to act outside or exceed those powers. Any decision taken without jurisdiction is void for lack of jurisdiction is a major grounds for intervention by courts in judicial in review proceedings

In the *TAIBU'S* case, *Omollo J. A* stated as follows:-

“..... Nominated councilors do not serve their tenure as nominated councilors at the pleasure of the Minister of the Local Government just as nominated member of National Assembly do not serve their tenure as nominated members at the pleasure of his Excellency the President. The practical effect of the said proviso to section 27 (2) of the Act appears to me to place the tenure of nominated councilors to be at the pleasure of the Minister, and this can only go to strengthen my view that the provision is contrary to the Principles set out in section 33 of the constitution. If nominated councilors do no serve at the pleasure of the 1st Respondent then as a matter of common sense, it must follow and I do find and hold, that before the 1st Respondent can terminate their nomination, he must comply with the rules of natural justice, namely give to the affected nominated councilor the charge which he (1st Respondent) considers is serious enough to warrant the termination of the nomination, invite the comments of the concerned councilor and then thereafter take whatever action he deems appropriate. Decisions taken after following due process are more likely to be well grounded and better informed than those made in violation of the requirements of the rules of natural justice”.

It is true that the 1st Respondent has immense powers under the Local Government Act, Cap 265 laws of Kenya but all statutory powers must be exercised judiciously. There cannot be unfettered discretion on the 1st Respondent in disregard of principles of fairness. No statute ever allows any one on whom it confers discretion to exercise such discretion arbitrarily, capriciously or mala fide. In my view the 1st Respondent revocation of the nomination of the applicant was done ultra vires or in excess of the power donated to the 1st Respondent simply because, he failed to abide by the aforesaid section 282 of the Local Government Act Cap 265 Laws of Kenya. He did not follow the procedure of revoking the nomination. The notice of revocation ought, to have been given or served on the Applicant before publication in the Kenya Gazette. The publication in the Kenya Gazette was a notice to the entire world which again was more of putting the cart before the horse. There is no evidence on record of any attempt whatsoever to serve the notice of revocation on the Applicant by the 1st Respondent. For the avoidance of doubt the court must restate that no person or authority has the power to violate peoples fundamental rights under the guise of any principle whatsoever without inviting prompt intervention by this court under s 84 of the Constitution.

This court has previously dealt with excess of statutory powers as a ground of judicial review. In the case *NAIROBI HIGH COURT MISC CIVIL APPLICATION NO. 1769 of 2003 REPUBLIC v MINISTRY OF PLANNING AND ANOTHER EX PARTE PROFESSOR MWANGI KIMENYI*, the court held inter alia: -

“So where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refuse to take relevant factors in to account in reaching its decision or based its decision on irrelevant factors, the court would intervene that on the ground that the body has in each case abused its power. The reason why the court has to intervene is because there is a presumption that where parliament gave a body statutory power to act, it could be implied that parliament intended it to act in a particular way.”

In view of the above, the powers donated to the 1st Respondent under section 27 of the Local Government Act Cap 265, are only intended to be exercised as prescribed therein, and a departure from the laid down procedure makes the actions of the 1st Respondent amenable to judicial review. After all as observed by Omollo, J. A. to extent s 27 conflicts with s 33 of the Constitution the later must prevail.

The prerequisite for nomination as a councilor is that someone must be sponsored by a political party and the name is then forwarded to the Electoral Commission of Kenya for onward transmission to the 1st Respondent for appointment and gazettelement. The nominated councilor is then sworn to office by the clerk of the local authority. In my view once the oath of the office has been taken upon swearing then one becomes a nominated councilor. In the cases before court and for which this judgment is binding

following the use of this case as a test case there are two categories of applicants namely:-

1. Those who are sponsored by political parties but the sponsorship was later withdrawn and the 1st Respondent then revoked their nomination although initially their nomination was legitimate. They include:

(i) This instant case.

**(ii) HIGH COURT MISC CIVIL APPLICATION NO 521 OF 2008
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 4 OTHERS
EXPARTE - M'MBETSA BEJA M'MBETSA.**

**(iii) HIGH COURT MISC CIVIL APPLICATION NO 100 OF 2008
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT.
EXPARTE - RACHAEL WANJIRU KAMWERU AND 2 OTHERS.**

2. Those who although they were not sponsored by any political party, were nevertheless appointed and gazetted by the 1st Respondent and subsequently sworn in as councilors although initially their nomination was illegal and the Electoral Commission of Kenya had notified the 1st Respondent of the anomaly. Such cases include the following:-

**(i) HIGH COURT APPLICATION NO 479 OF 2008.
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 3 OTHERS.
EXPARTE - JOHN NGENE MUNIU.**

**(ii) HIGH COURT APPLICATION NO 474 OF 2008.
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 3 OTHERS.
EXPARTE - ABDULRAHMAN AHMED ABDALLA AND 3 OTHERS.**

**(iii) HIGH COURT APPLICATION NO 478 OF 2008.
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 3 OTHERS.
EXPARTE - NICHOLUS MBURUGU MUGAMBI.**

**(iv) HIGH COURT APPLICATION NO 482 OF 2008.
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 5 OTHERS.
EXPARTE - PETER MWONGERA M'TWARACHIU.**

**(v) HIGH COURT APPLICATION NO 484 OF 2008.
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 4 OTHERS.
EXPARTE - GABRIEL RWIGI NTHIGA.**

**(vi) HIGH COURT APPLICATION NO 485 OF 2008.
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT.
EXPARTE - YASSER ALI SHEIKH AND 2 OTHERS.**

**(vii) HIGH COURT APPLICATION NO 518 OF 2008.
REPUBLIC v THE ATTORNEY GENERAL & 4 OTHERS.
EXPARTE - YUVENALIS AYIECH NYABWARI AND ANOTHER.**

**(viii) HIGH COURT APPLICATION NO 589 OF 2008.
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 2 OTHERS.
EXPARTE - NICHOLUS MBURUGU MUGANBI AND ANOTHER.**

**(ix) HIGH COURT APPLICATION NO 542 OF 2008.
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND ANOTHER.
EXPARTE - JOHN KIGE.**

**(x) HIGH COURT APPLICATION NO 505 OF 2008.
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 4 OTHERS.
EXPARTE - MARTHELINA LESILAMPA.**

The above two groups in my view have no distinction as far as the procedure for revocation is concerned. What is crucial is whether or not the Applicant has been sworn in to the office as a councilor. If the oath of office has been taken, then the 1st Respondent has no option but to follow the laid down procedure for revoking the nomination in order to correct the anomalies or what in his view is unlawful. The 1st Respondent cannot hide behind withdrawal or lack of sponsorship by a political party. He must

religiously follow the law and only after complying with the law can he then take the appropriate action to remedy the situation. The judicial review court in this instance is only addressing the decision making process and not the merit of nomination and appointment. The court can not substitute its decision with that of the 1st Respondent. The business of the court is to insist on the 1st Respondent following the proper decision making process. Thus in all these cases appropriate notice under s 40 should have been given to the Applicant where it was not given the Applicants who have been duly sworn could justifiably argue that they have legitimate expectation to serve as councilors and that expectation was thwarted by the Minister. He can only erase the expectation by following the proper procedure for denomination.

Surely where a councilor has been nominated and sworn the right of a political party to recall the nomination should never arise as a matter of good public administration.

I now turn to the Applicant's prayers in this application. He seeks an order of certiorari to remove in to this court and quash Gazette Notice No. 7070 of 5th August, 2008 which revoked the applicant nomination as a nominated councilor of the County Council of Maragwa and also to remove in to this court and quash Gazette Notice No. 7071 of 5th August, 2008 which nominated Nancy Wanjiru Kamande to replace the Applicant as a nominated councilor at the County Council of Maragwa. I have already made a finding that the decisions by the 1st Respondent under challenge were made in blatant breach of the rules of the natural justice. All such decisions should not be allowed to see the light of day the judicial review courts as they are void ab initio. Secondly, the said challenged decisions in the Kenya Gazette Notice Nos. 7070 and 7071 were arrived at unlawfully as the 1st Respondent did not follow the laid down procedure under section 27 of the Local Government Act Cap 265 Laws of Kenya. The 1st Respondent as a Minister is duty bound to lead by example by complying with written law. Failure to abide by the law exposes his decisions to Judicial review proceedings. For the above stated reasons the Gazette notices Nos. 7070 and 7071 must be quashed. Consequently, an order of certiorari is hereby issued to remove into court, the 1st Respondent's decision dated 5th August, 2008 contained in the Kenya Gazette Notice No. 7070 and 7071 revoking the nomination of the Applicant as a nominated councilor of Maragwa County Council and replacing the 1st Applicant with Nancy Wanjiru Kamande the interested party and I accordingly and forthwith quash the said decision.

The Applicant second prayer is for an order of prohibition to the 1st Respondent and 2nd Respondent from swearing in the interested party one Nancy Wanjiru Kamande to replace the Applicant as a nominated councilor pursuant to Kenya Gazette Notice No. 7071 dated 5th August, 2008. The order of prohibition operates to prevent unlawful specific acts intended to be perpetrated in the future. The decision in the Gazette No. 7071 of 5th August, 2008 has already been quashed for the reasons already given. The nomination of the interested party one Nancy Wanjiru Kamande having been quashed, in reality there is no decision to be implemented as such. This court is only dealing with the decision contained in the Gazette Notice No. 7071 of 5th August, 2008 but not any other subsequent decision, the 1st Respondent may make in accordance with the law. The court has only intervened because the decision making process was flawed. Since in the eyes of the court, the decision in Gazette Notice No. 7071 of 5th August, 2008 is unlawful, the same can not be effected now or in future. For the aforesaid reasons, an order of prohibition is hereby issued to prohibit the first and second Respondent from swearing in the interested party one Nancy Wanjiru Kamande on the basis of Gazette Notice No. 7071 of 5th August, 2008 to assume office as a nominated councilor at Maragwa Country Council.

The third prayer by the Applicant is for an order of mandamus to compel the 1st Respondent to revoke Gazette Notice No. 7070 of 5th August, 2008 and to forthwith reinstate and gazette the Applicant as a nominated councilor at the County Council of Maragwa with full pay of all his salaries and emoluments. Since the decision contained in the aforesaid Gazette Notice No. 7070 of 5th August, 2008 is already quashed, in my view it would be superfluous to issue an order of mandamus. The only statutory responsibilities the Minister has is to make any future decisions in accordance with the law. The court cannot make or force him to make particular decision. The Applicant in my view remains a nominated councilor until he is lawfully removed from office in accordance with the law. I find that the prayer for

an order of mandamus has no merit and the same is therefore dismissed.

On the fourth prayer for costs, it appears to me that the quashed decisions were made by the 1st Respondent who triggered the proceedings herein. There are many parties in this application whose participation was prompted by 1st Respondent. It would be unfair to condemn all the Respondents to pay costs. The 1st Respondent should take responsibility for his acts. Consequently, I award costs to the Applicant against the 1st Respondent.

As all the parties and counsel had agreed that this matter serves and be a test case in this judgment shall abide in the following cases:

1. HIGH COURT MISC CIVIL APPLICATION NO 100 OF 2008.

**REPUBLIC v MINISTER FOR LOCAL GOVERNMENT EXPARTE - RACHAEL WANJIRU
KAMWERU**

WILFRED MANGARA APENCHA

JACOB HAJI ALI

The Applicants herein are seeking the following orders:

1. An order of Certiorari to remove into this Court for quashing Gazettement of the nominated councilors of the city council of Nairobi contained in Gazette Notice Number 1276 of 2008 dated 22nd February 2008.

2. An order of the mandamus upon the minister for Local Government, the respondent ordering him to gazette the nomination of the Applicants as nominated councilors at the City Council of Nairobi.

I have keenly gone through the application and the submissions by the learned counsel. The 1st and 2nd Applicants were nominated by the party of National unity while the 3rd Applicant was nominated by the Democratic party of Kenya and their names forwarded by the Electoral Commission of Kenya for appointment as councilors at the city council of Nairobi. The Respondent did not appoint the Applicants who had been sponsored by the political parties but went ahead and appointed persons not sponsored by any political party and not submitted to the respondent by the Electoral Commission of Kenya.

The Electoral Commission of Kenya for appointment and those he gazzetted as appointed. However, the respondent ignored the Electoral Commission and failed to correct the names as advised.

The law on the nomination of councilors is clear. A person can only be nominated upon being sponsored by a political party and his or her name submitted to the Electoral Commission of Kenya for onward transmission to the Minister for the Local Government for Gazettement. The Minister of Local Government cannot substitute the hot or remove some names from the list of his mandate is purely to gazette and appoint the members submitted to him. In this instant case the respondent acted without jurisdiction and exceeded his powers when he refused to appoint and gazette the Applicants who had been sponsored and their names submitted to him by the Electoral Commission of Kenya. The act by the Respondent is indefensible and unreasonable and calls for intervention by this Court. The Applicants entitled to be appointed as nominated councilors. I have considered the Gazette Notice No. 1276 dated 26th February 2008, which also contain other persons who were validly appointed. The Applicants did not specifically mention the order of Certiorari would not be appropriate in the circumstances and the prayer one is therefore refused.

On the second prayer for Mandamus, the Respondents had no acceptable justification not to gazette and appoint the Applicants who had been duly sponsored by political parties and their names submitted by the Electoral Commission of Kenya to the Respondent for gazette. The law is clear that the Respondent's obligation upon the names being submitted to him is just to formally appoint. The refusal to appoint the Applicants was unlawful and cannot stand. Consequently I issue an order of Mandamus compelling the Respondent to perform his public duty of gazetting and/or appointing the Applicants as

nominated councilors at the City council of Nairobi.

2. HIGH COURT MISC CIVIL APPLICATION NO 474 OF 2008

**REPUBLIC v MINISTER FOR LOCAL GOVERNMENT
EXPARTE - ABDULRAHMAN AHMED ABDALLA
LEE KAMAU MUCHIRI
BADI ALI**

DISHON NJOKA NYAGA

The applicants prayed for an order of certiorari to remove to this Court for purpose of being quashed the decision of the Respondent contained in Legal Gazette Notices Nos. 7070 and 7072 of 5th August, 2008 revoking the nominations of the Applicants as councilors within the City of Nairobi.

I have keenly observed from the pleadings that the Applicants were never sponsored by any political party as required by the law. However, they had taken the oath of office as councilors. The Respondent has procedure laid down under section 27 of the Local government Act Cap 265, must be adhered to.

The respondent did not comply with the law before publishing the decisions in Legal Gazette Notices Nos 7070 and 7072 dated 5th August, 2008. For the above reasons the same must be quashed and accordingly I issue an order of certiorari to remove into this Court, the respondents decision dated 5th August 2008 contained in the Legal Gazzette Notices Nos. 7070 and 7072 and forthwith quash the decision.

On the prayer for costs of this application, I find that since the Applicants had no sponsorship, it would be unfair to award costs against the Respondent who was exercising his statutory power albeit unprocedurally. Consequently, I order each party to bear its own costs.

3. HIGH COURT MISC CIVIL APPLICATION NO 479 OF 2008 REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 3 OTHERS.

EXPARTE - JOHN NGENE MUNIU

The Applicant sought orders as follows:

- (a) An order of certiorari to remove into the High and quash the Gazzete Notice No 7070 dated 5th August, 2008 published by the Minister for Local Government.
- (b) An order of Mandamus directed at the 1st Respondent the Minister for Local Government to gazette the revocation of Gazzete Notice No 7070 dated 5th August, 2008 and reinstatement of the Applicant as nominated councilor.
- (c) An order of prohibition to prohibit the 4th Respondent, Nyahururu Municipal Council and or her officers from swearing on of IRENE WACHUKA JOHN nominated via Gazzete Notice Number 7071 dated 5th August 2008 to be a councilor at Nyahururu Municipal Council.

I have considered the evidence on record and the submissions by all learned counsel. Although the Applicant is already a councilor at the 4th Respondent there is no evidence on record concerning the Political Party that sponsored him for nomination and the 1st Respondent has powers to revoke the applicants nomination in accordance with the law. However, the 1st Respondent has not complied with the requirements of denomination. For the said reason I issued an order of certiorari to remove into this Court the decision contained in the Legal Gazzete Notice No. 7070 dated 5th August, 2008 for purposes of quashing and forthwith quash the said gazette Notice.

On the prayer for Mandamus, I do not find any public duty that remains after quashing the Gazette Notice No. 7070 dated 5th August, 2008 capable of being performed by the 1st respondent and the prayer is therefore dismissed.

On the prayer for prohibition, as I have already stated in this judgment, the 1st respondent has powers to revoke the nominations of councilors provided that he complies with the laid down procedure. It would be unlawful to prohibit the 1st respondent from executing his lawful mandate once he complies with the law. Consequently, I find that the prayer has no merit and I dismiss the same.

On the issue of costs, although the proceedings herein were prompted by the 1st respondent, the applicant is also not a deserving party. In the circumstances I order each party to bear its own costs.

**4. HIGH COURT MISC CIVIL APPLICATION NO 482 OF 2008
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT
AND 5 OTHERS.**

EXPARTE - PETER MWONGERA M'TWARUCHIU.

The Applicant is seeking orders as follows: -

1. An order of Certiorari to remove into the High Court Gazette Notice No. 7070 dated 5th August, 2008 published by the 1st Respondent.
2. An order of Mandamus directed at the 1st Respondent to Gazette the revocation of Gazette Notice No. 7070 dated 5th August 2008 and reinstatement of the Applicant as nominated Councilor.
3. An order of prohibition to prohibit 3rd Respondent, and or her officers from swearing in Lydia Githuma and Rose Nkirote Murungi nominated vide Gazette Notice number 7071 dated 5th August 2008 as nominated councilors at the country council of Meru Central.
4. Costs of this application.

I have considered the Application herein, the evidence on record and the submissions by the Learned Counsel. The Applicant through a Councilor was never sponsored by any political party in accordance with the law for nominating a councilor who is irregularly nominated. Although the Applicant has not come to Court with clean hands, the Court must insist that the 1st Respondent do follow the laid down procedure to legitimize the process. Failure to observe the procedure makes the actions of the 1st Respondent amenable to Judicial Review. For the said reasons I issue an order of certiorari to remove to this Court Gazette No. 7070 dated 5th August, 2008 for quashing and I accordingly quash it.

On the second prayer for mandamus, as I have already noted the 1st Respondent has power to dominate councilors in accordance with the law. I have also pointed out that the applicant was not sponsored by any political party as required by law. If the Court compels the 1st Respondent to reinstate the Applicant, the Court shall be over stepping its mandate and interfering with lawful exercise of statutory powers vested in the 1st Respondent. I find that the second prayer has no merit and I dismiss the same.

On the 3rd prayer, I find that the Gazette Notice No. 7071 was subsequent to Gazette Notice No. 7070 which I have already quashed. The process of revocation of nomination of the Applicant was flawed and replacing him Vide Gazette Notice No. 7071 is equally flawed. For those reasons, I do issue an order of prohibition against the 3rd Respondent from swearing in of Lydia Githuma and Rose Nkirote Muriungi as nominated councilors only on the basis of Gazette Notice No. 7071 dated 5th August, 2008 until there is a compliance on the issue of costs, neither the Applicant nor the Respondents have come to Court with clean hands and as such none deserves costs. Consequently, I order each party to bear its own costs.

5. HIGH COURT MISC CIVIL APPLICATION NO 484 OF 2008

**REPUBLIC v MINISTER FOR LOCAL GOVERNMENT
AND 4 OTHERS.**

EXPARTE - GABRIEL RWIGI NTHIGA.

The Applicant in this Application is seeking the following orders.

1. An order of certiorari to remove to the High Court to quash Gazette Notice No. 7070 dated 5th August, 2008 published by the 1st Respondent.
2. An order of Mandamus directed to the 1st Respondent to Gazette Notice Number 7070 dated and reinstatement of the Applicant as a nominated Councilor.
3. An order of prohibition to prohibit the 4th Respondent from swearing of Justin M'Mugambi Nkambi nominated vide Gazette Notice Number 7071 dated 5th August 2008 as a councilor at Chuka Municipal Council.
4. Costs of this Application.

This is just another similar application to the others I have dealt with. I have considered the evidence on record and the submissions by counsel. I have noted that the Applicant was not sponsored by any Political party on irregularity the Respondent is enjoined by law to act in accordance with the laid down procedure for domination. The 1st Respondent did not act in accordance with section 27 of the local Government Act thus exposing his actions to Judicial review. For the above stated reasons I issue an order of certiorari to remove the into this Court the Gazette Notice No. 7070 dated 5th August, 2008 for quashing and I quash the same forth with.

On the second prayer for mandamus, I do not see any reasonable Public duty which remains upon the 1st Respondent after quashing the revocation of the Applicant which calls for compulsion by Mandamus. The Court cannot compel the 1st Respondent to act in contravention of the law. The second prayer has no merit and it is not therefore dismissed.

On the third prayer, since the 1st Respondent had gazetted the 5th Respondent to replace the Applicant who was irregularly nominated, the execution of the decision contained in Gazette Notice Number 7071 would be unlawful. However, the Court cannot prohibit all future action by the Respondents. I therefore issue an order of prohibition against the third respondent from swearing Justin M'Mugambi Nkambi only, on the basis of the Gazette Notice Number 7071 dated 5th August, 2008.

On the issue of costs, I find that each party has a given level of shortcomings and it would be unfair to award costs to any of them and as such order that each party do bear its own costs.

6. HIGH COURT MISC CIVIL APPLICATION NO 521 OF 2008 REPUBLIC V MINISTER FOR LOCAL GOVERNMENT.

EXPARTE – M'MBETSA BEJA M'MBETSA

The Applicant in this application seeks orders as follows:-

1. An order of certiorari to remove into the High court and quash the decision of the Respondent contained in the Gazette Notice Nos.7070 and 7071 dated 5th August, 2008 to revoke the nomination of M'Mbetsa Beja M'Mbetsa as a councilor for the County Council of Kwale and nominate Juma Hassan and Murabu Chaka Tsuma to the County Council of Kwale in the Applicant's place.
2. Costs

I have considered the application before court and the evidence on record. The applicant was nominated as a councilor under the sponsorship of Party of National Unity to that extent, the nomination is apparently valid. I have also examined the Applicant's verifying affidavit where he has deponed that

Juma Hassan and Murabu Chaka Tsuma purportedly nominated to replace him are members of Orange Democratic Movement Party. There is no evidence at all from the Respondent to controvert the allegations put forth by the Applicant. Assuming that the Applicant was validly nominated, there can be no justification for the Respondent to revoke his nomination and replace him with other persons. The law is clear on the powers of the 1st Respondent and he cannot capriciously exceed his jurisdiction. A nominated councilor does not serve at the pleasure of the 1st Respondent and unless there is an acceptable justification, once he is nominated, he must serve for the stated period of nomination. For the 1st Respondent to have purported to revoke the nomination of the Applicant, he was acting ultra vires and unreasonably and the court must intervene to ensure fair treatment. Consequently, I do issue an order of certiorari to remove into this court the decisions of the Respondent contained in the Gazette Notices Nos. 7070 and 7071 dated 5th August 2008 and quash them forthwith.

On the issue of costs, I find that the 1st Respondent had exceeded his jurisdiction and acted unreasonably which promoted the Applicant to file these proceedings and incur expenses and therefore I award costs to the Applicant against the 1st respondent.

7. HIGH COURT MISC CIVIL APPLICATION NO 518 OF 2008

REPUBLIC v THE ATTORNEY GENERAL AND 4 OTHERS EX PARTE - YUVENALIS AYIECHI NYABWARI AND TOM ONDARA.

The Applicants herein seek the following orders.

1. An order of certiorari to remove into the High Court and quash the Gazette Notice Number 7072 dated 5th August 2008 published by the 2nd Respondent.
2. An order of mandamus directed to the 2nd Respondent to gazette Notice Number 7072 dated 5th August, 2008 and reinstatement of the Applicants to public officers.
3. An order of prohibition to prohibit the 3rd and the 4th Respondents and or their officers from swearing in of the interested parties appointed vide gazette Notice Number 7072 dated 5th August, 2008 as public officers of the 3rd and 4th respondents I have considered this application in the light of the evidence on record and the submissions by counsel on record. The applicants in my view were irregularly nominated as they were not sponsored by any political party and the 2nd Respondent has statutory powers to rectify. However, the 2nd Respondent must denominate the Applicants in accordance with the law. I have noted that the 2nd Respondent did not follow Section 27 of the Local Government Act and as such, the Gazette Notice No.7072 dated 5th August, 2008 was unlawful. For the aforesaid reason I hereby issue an order of certiorari to remove into this court and quash the said Gazette Notice Number 7072 and I accordingly quash it. On the second prayer of mandamus, in my view the order is not available as it would be compelling the 2nd Respondent to perform an illegality. The prayer is therefore dismissed.

On the third prayer, it would also be unlawful for this court to entirely interfere with the future decisions of the 3rd and 4th Respondents. However, the Gazette Notice Number 7072 dated 5th August, 2008 was a furtherance of an illegality perpetrated by the 2nd Respondent who did not denominate the Applicants in accordance with the law. For the said reason, I hereby issue an order of prohibition against the 3rd and 4th Respondent to prohibit them from swearing in the Interested parties on the basis of Gazette Notice Number 7072 dated 5th August, 2008.

8. HIGH COURT MISC CIVIL APPLICATION NO 485 OF 2008

REPUBLIC v MINISTER FOR LOCAL GOVERNMENT.

**EXPARTE - YASSER ALI SHEIKH
NANCY SEENOI TAMOOH
NASHEE NANA MOHAMMED
AMOS MUCHEMI KIBOI**

The Applicants seek the following order in this application;

1. An order of certiorari to remove to this court for purpose of being quashed the decision of the Respondent contained in Legal Gazette Notice No.7070 and 7072 of 5th August, 2008 revoking the nomination of the Applicants as public officers respectively within their respective councils.
2. Costs of this application.

I have considered the application herein, the evidence on record and the submissions by the counsel for the Applicant. In my view although the applicants were nominated as councilors, their nomination was irregular in that they have no sponsorship from a political party. The Respondent has powers under the Local government Act Cap 265 to rectify the irregularity. However, in the exercise of his statutory powers, the Respondent must obey the law and comply with the laid down procedure of denomination. The Respondent did not follow section 27 of the Local government Act and as such his decisions contained in Gazette Notices Nos.7070 and 7072 are amenable to Judicial review. For the stated reasons I do issue an order of certiorari to remove to this court the decisions of the 1st Respondent contained in the Gazette Notices Nos.7070 and 7072 dated 5th August 2008 for quashing and I accordingly quash the said notices.

9. HIGH COURT MISC CIVIL APPLICATION NO 505 OF 2008

**REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 4 OTHERS.
EXPARTE - MARTHELINA LESILAMPA.**

The Applicant has sought the following prayers in her application.

1. An order of certiorari to quash the gazette Notice Number 7071 dated 5th August 2008 published by the 1st Respondent purporting to nominate the 5th Respondent.
2. An order of Mandamus directed at the 1st Respondent to gazette the revocation of the gazette Notice No. 7071 dated 5th August 2008 nominating the 5th Respondent as a councilor in Malalal Town council and to nominate a Samburu lady as a councilor.
3. An order of prohibition against the 4th Respondent, not to recognize the 5th Respondent as the duly nominated councilor vide Gazette Notice No. 7071 dated 5th August 2008 and proceed to treat the slot of nominated councilor as vacant.

I have considered the application herein together with the evidence on record and the submissions by counsel. On the prayers, I find the Applicant without locus. She is not a nominated councilor but an active member of Maendeleo ya Wanawake organization Samburu Branch. She has no basis to challenge the nomination of the 5th Respondent. The grounds the Applicant relies on cannot prompt intervention by this Court in Judicial review proceedings.

All the prayers the Applicant has sought have no merit and the application is gravely misconceived. Consequently, I dismiss the entire application with costs to the Respondent.

**10. HIGH COURT MISC CIVIL APPLICATION NO 539 OF 2008
REPUBLIC v MINISTER FOR LOCAL GOVERNMENT AND 2 OTHERS.
EXPARTE - NICHOLUS MBURUGU MUGAMBI
PETER MWONGERA TWARUCHIU**

The applicants sought the following orders:

1. THAT an order of certiorari do issue to move the High Court and quash Gazette notice No. 7070 dated 5th August, 2008 published by the Minister for local Government.
2. THAT an order of Mandamus directed at the 1st Respondent, the minister for local government to gazette Notice No. 7070 dated 5th August 2008 and reinstatement of the Applicant as nominated councilors.
3. Costs of the application.

I have considered the evidence on record and the submissions by the Learned counsel. The Applicants are councilors who have no sponsorship from any political party which is a fundamental requirement by the law. Indeed the 1st respondent in his statutory powers was trying to correct that anomaly save that he failed to confine himself to the relevant procedure and acted outside the law. It is solely upon the failure by the 1st respondent to comply with section 27 of the Local Government Act that I do issue an order of certiorari to remove into this Court the decision contained in legal Gazette Notice No. 7070 dated 5th August, 2008 for purposes of quashing and I forthwith quash the said gazette notice.

On the prayer for mandamus, the same is not merited because upon quashing the Gazette Notice No. 7070, nothing remains that the Court can compel the 1st Respondent to perform. The prayer for the order of mandamus is therefore dismissed. On the prayer for costs of this application, in my view, it would not be fair to award the Applicants costs as the 1st Respondents was exercising his lawful authority save un-procedurally. The applicants do not deserve costs and that prayer is dismissed to and each party shall bear its own costs.

11. HIGH COURT MISC CIVIL APPLICATION NO 542 OF 2008

REPUBLIC v MINISTER FOR LOCAL GOVERNMENT & ANOTHER. EXPARTE - JOHN KIGE

The Applicant is seeking orders as follows:-

1. An order of certiorari to remove into the High Court and quash the Gazette Notice No.7072 dated 5th August 2008 which revoked the nomination of the Applicant as a nominated of Ogembo Town Council.
2. An order of prohibition prohibiting the 1st and 2nd Respondents from swearing into the office one Richard Ondebu Kinanga nominated vide Kenya Gazette Notice No.7072 of 5th August 2008.
3. An order of Prohibition against the 2nd Respondent from allowing or causing Richard Ondebu Kinanga nominated vide Gazette Notice No.7072 of 5th August 2008 from being sworn in as a nominated councilor to replace the Applicant.
4. An order of Mandamus compelling the 1st Respondent to revoke Gazette Notice No.7072 of 5th August, 2008 that revoked the nomination of the Applicant and the Applicant as a nominated councilor at Ogembo Town Council.
5. An order of mandamus compelling the Respondent to reinstate or restore all the rights, powers and privileges of the Applicant as a nominated councilor at Ogembo Town Council.
6. The Respondents to pay the costs of this application.

I have already addressed the proper procedure for denomination which I have noted the 1st Respondent did not comply with. I have also noted that the Applicant was not sponsored by any political party for nomination by the 1st Respondent. I have no doubt that the 1st Respondent has powers to denominate a councilor. However, the 1st Respondent must exercise his mandate in accordance with the law to legitimize his actions. Since the 1st Respondent did not observe the procedure for denomination, I hereby proceed to issue an order of certiorari to remove to this court the decision contained in the Gazette Notice

Nol.7072 dated 5th August, 2008 and accordingly quash it.

On prayers Nos. 2 and 3 for an order of Prohibition this court cannot prohibit the 1st respondent or any other Respondent acting lawfully from carrying out any legitimate statutory powers. As I have noted, the 1st Respondent failed to comply with the procedure of denomination. If he chooses to start afresh and comply, this court cannot interfere with exercise of lawful authority. I find that prayers Nos. 2 and 3 have no merit and they are dismissed.

On prayers Nos. 4 and 5, the court finds that after quashing Gazette Notice No.7072 of 5th august, 2008, there remains no other public duty upon the Respondent which can be compelled through Mandamus. The prayers are therefore without merit and are dismissed.

On the issue of costs, I have noted that the Applicant has no party sponsorship and the 1st Respondent has also failed to comply with the procedure of denomination. In the circumstances I find that none of the parties deserves costs and I order each party to bear its own costs.

12. HIGH COURT MISCELLANEOUS APPLICATION NO. 606 OF 2008

REPUBLIC VS COUNTY COUNCIL OF NYERI AND MINISTER FOR LOCAL GOVERNMENT

EXPARTE: NJOROGE MUIRURI WAWERU

The Applicant seeks the following orders:-

- (a) An order of certiorari to bring to the High Court the decision of the 2nd Respondent and any officer acting under him revoking the nomination of the Applicant as a councilor for the County Council of Nyeri for purposes of quashing the decision.
- (b) An order of prohibition to prohibit the 2nd Respondent and/or other officers acting under him from revoking the nomination of the Applicant as a councilor in the County Council of Nyeri.
- (c) An order of mandamus directing the 2nd Respondent to gazette the Applicant as a councilor at the County Council of Nyeri.

I have considered the application together with the evidence on record. The Applicant was sponsored by the Party of National Unity and his name submitted to the 2nd Respondent through the Electoral Commission of Kenya. The then Minister for Local Government appointed the Applicant and gazetted him as a councilor. The Applicant's nomination was lawful and valid.

I do not see any reason why the 2nd Respondent could denominate a validly nominated person. A decision to do so would be unreasonable and unjustifiable. The Permanent Secretary in the Ministry of Local Government gave revocation notice to the Applicant and the revocation was gazetted in the Gazette Notice No. 7070 of 5th August, 2008. In the revocation notice, there was no reason given at all. The 2nd Respondent cannot exercise his powers capriciously. A validly nominated councilor does not serve at the pleasure of the 2nd Respondent. For those stated reasons I find that the prayer for certiorari is justified and I hereby issue an order of certiorari to remove in to this court the letter from the Permanent Secretary, Ministry of Local Government dated 31st July, 2008 and the Gazette Notice NO. 7070 dated 5th August, 2008 for quashing and I accordingly quash the same.

The second prayer is also merited because, the Applicant upon nomination, he is supposed to serve a specified period of time and the 2nd Respondent cannot unduly interfere. For those reasons I do issue an order of prohibition against the 2nd Respondent the Minister for Local Government from revoking the valid nomination of the Applicant until he has served his term or otherwise lawfully removed from office.

On the prayer for mandamus, in my view it will not serve any purpose to grant the same since the revocation is quashed and there is no other public duty remaining for the 2nd Respondent to execute. The prayer for mandamus is therefore refused.

13. HIGH COURT MISCELLANEOUS CIVIL APPLICATION NO. 516 OF 2008

**REPUBLIC VERSUS MINISTER FOR LOCAL GOVERNMENT
EXPARTE- DANIEL WAMWERE GITHINJI
SIMON MARARIA GATHURA
JOSEPH NJEHIA MWANGI**

The Applicants are seeking the following orders:-

1. An order of certiorari to remove to this court for purposes of being quashed the decision of the Minister for Local Government contained in the Legal Gazette Notice NO. 7070 of 5th August, 2008 revoking the nomination of the Applicants as councilors of Nakuru County Council (1st and 2nd Applicants) and Molo Town Council (3rd Applicant) respectively.
2. Cost of this application.

I have considered the application together with all the available evidence on record. There is nothing to show that the Applicants were validly nominated as councilors. There is no evidence of sponsorship by any political party. The Respondent has powers to revoke the nomination of the Applicants if they are irregularly nominated and this is possibly what prompted him to revoke the Applicants' nomination. However, there is a proper procedure laid down by section 27 of the Local Government Act on how the Respondent should denominate the invalidly nominated councilors. The Respondent did not follow the procedure and he acted contrary to the said section 27 which makes his actions amenable to judicial review. For those reasons I hereby issue an order of certiorari to remove to this court for quashing the decision of the Respondent contained in Gazette Notice NO. 7070 dated 5th August, 2008 and accordingly I quash the Gazette Notice.

On the issue of costs, the Applicants do not deserve costs because their nomination was irregular. I therefore order each party to bear their own costs.

Dated and delivered at Nairobi this 10th day of December, 2008.

J. G. NYAMU
JUDGE