REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 1648 of 2005

IN THE MATTER OF AN APPLICATION BY JAMES MWANGI WAWERU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

HE LOCAL GOVERNMENT ACT, CAP 265 LAWS OF KENYA

AND

IN THE MATTER OF COUNCILLOR JAMES WAWERU

B E T W E E N

REPUBLIC…….....APPLICANT

AND

HON. MUSIKARI KOMBO FOR LOCAL GOVERNMENT..…1ST RESPONDENT

ATTORNEY GENERAL…….....……2ND RESPONDENT

MURANG'A COUNTY COUNCIL…….....……3RD RESPONDENT

ELECTORAL COMMISSION OF KENYA..….....……INTERESTED PARTY

EX PARTE: JAMES MWANGI WAWERU

J U D G E M E N T

Background Facts:- the Parties

Ex Parte Applicant – James Mwangi Waweru

The Applicant herein, James Mwangi Waweru was nominated as a Councillor in the Murang'a County Council following the General Elections held on 27th December, 2002, and his nomination was published

in the Kenya Gazette Issue of 11th February, 2003.

However by a Special Issue of the Kenya Gazette Number 8573 dated 21st October, 2005 but published on 25th October, the Minister for Local Government Hon. Musikari Kombo revoked the nomination of the Applicant, and by Gazette Notice Number 8574 of the same date nominated the Interested Party one Wilson Kinyua Giteru as Councillor of the County Council of Murang'a, in effect replacing the Applicant as Councillor. The Applicant was aggrieved and pursuant to the leave granted by the Court under the provisions of Order LIII rule 1 (2) of the Civil Procedure Rules, the Applicant filed on 18-12-2005 a Notice of Motion dated 16th December, 2005, and sought the following orders-

(a) an Order of Certiorari, to quash the decision of the Minister for Local Government (the First Respondent) contained in the special issue of the Kenya Gazette Notice No. 8573 revoking the nomination of James Mwangi Waweru **as nominated Councillor of Muranga's County Council,**

(b) an order of prohibition stopping Wilson Kinyua Giteru from assuming the offices or functions of a nominated Councillor in the Muranga's County Council,

(b) an Order of mandamus compelling the Third Respond (the Murang'a County Council) to allow the Applicant to resume his office and work as a nominated Councillor of Murang'a County Council.

The Attorney-General was joined as principal legal adviser to the Government of Kenya in terms of the Constitution, and of Section 13 of the Government Proceedings Act, (***Chapter 40, Laws of Kenya***) which requires all documents in connection with any civil proceedings by or against the Government to be served upon the Attorney-General. Although the said Act defines an "**officer**" as including the President, the Vice-President, a Minister, an Assistant Minister and any servant of the Government, judicial proceedings are not civil proceedings under Section 8 of the Law Reform Act, (***Cap. 26, Laws of Kenya***) – which clearly states that the High Court shall not in its civil or criminal jurisdiction issue any of the prerogative orders of certiorari, prohibition or mandamus) joinder of the Attorney-General in Judicial review proceedings although a good practice for purposes of speed in determining those matters, non joinder of the Attorney-General is in my opinion, not fatal to an application in judicial review.

Although there are no orders sought against it, the Electoral Commission of Kenya represented by Ms Jemimah Keli Advocate, is the ultimate affected party as I will show in the course of this judgment. So the protagonists herein are the Minister for Local Government represented by the Attorney-General, the Murang'a County Council, represented by P.M. Wamae & Co. Advocates. The Interested Party Wilson Kinyua Giteru was represented by K. Macharia & Co. Advocates who filed on 22-02-2006 a Replying Affidavit sworn by the Interested Party on 20th February, 2006 which I shall also refer in the course of this judgement.

For the Murang'a County Council Mr. P. M. Wamae, filed on 3-05-2006 the Replying Affidavit of one Albert Leina sworn on 2nd May, 2006 and also grounds of objection dated 2-05-2006 as to why the orders sought should not be granted.

On 10th July, 2006, one Stanley Muchoki Ngari a Councillor of Iyego ward Murang'a County Council, Kangema Constituency sought by an application of the same date orders to vary the Court's orders of 30th November, 2005 to the extent that they prohibited the Muranga County Council from holding elections for the Chairman and Vice-Chairman. That application was subsumed in the hearing of the substantive motion of 16th December, 2005, the subject of this judgement.

When this motion was urged before me, the sole issue upon which Counsel for the various parties addressed me was whether the Minister for Local Government in revoking and proceeding to nominate another person as Councillor (one Wilson Kinyua Giteru), the Interested Party, acted in accordance with the Constitution and the Local Government Act (***Cap. 265, Laws of Kenya***), or put differently, whether once a person has been nominated by a parliamentary party under Section 33 of the Constitution, the

Minister retains residual power under Section 40 of the Local Government Act to revoke such appointment. As expected, there were submissions for the Applicant and the Electoral Commission of Kenya that the Minister retains no such power to revoke the nomination, and for the Respondent and the Interested Parties that the Minister retains such power. But before I deal with those submissions, I wish to dispose of several procedural issues raised by Mr. Ombwayo, learned Counsel for the Minister and the Attorney-General.

Firstly, it was Mr. Ombwayo's submission that reliefs had been sought by the Applicant in terms of Order LIII rule 1 (2) of the Civil Procedure Rules which require that an application for leave shall be accompanied by a statement setting out inter alia the description of the applicant and the relief sought, and grounds therefor and that the Applicant had failed to do so.

Some pleadings are usually of a great help in these matters. More attention should have been employed by Counsel for the Applicant in designating the requirements of the said rule 1 (2) of Order LIII, by clearly setting out the reliefs sought. I am however satisfied that the Applicant has adequately discharged that obligation under paragraphs 32-35 of the Statement although erroneously entitled "***Facts Relied On"*** which should have been "***Reliefs Sought***"

The ***second*** issue of practice and procedure raised by Mr. Ombwayo related to the citation and reliance by the Applicant upon constitutional provisions and in particular Section 33 of the Constitution of Kenya. Counsel submitted that this was a judicial review application which had its own practice and procedure rules, whereas the applications under the Constitution had their own rules, and should not be mixed.

Whereas learned Counsel for the First and Second Respondents is correct that both Constitutional and judicial review applications have their respective rules of practice and procedure, there is no prohibition in law to refer to an applicable provision of the Constitution which may aid the interpretation of the particular provision of the law, the subject matter of the application for judicial review. In this case reference to Section 33 of the Constitution is directly in issue in relation to Section 40 of the Local Government Act under which the Minister purported to revoke the Applicant's nomination as a Councillor. Relief was not sought under the Constitution, and no application of the practice and procedure of the Constitutional applications is in question.

The ***third*** preliminary issue raised by Mr. Ombwayo concerned the practice by some Counsel to file Affidavits (sometime called Supporting Affidavits) to the substantive motions once leave has been granted. It was Mr. Ombwayo's submission that since no leave had been granted to the Applicant to file a Further Affidavit the filing by the Applicant of an Affidavit together with the Notice of Motion was contrary to both rules **3 (1)** (the motion be filed within 21 days – no reference to an Affidavit) and rule **4 (2**) of Order LIII – (only the Court may allow the filing of further Affidavits).

In this case the Applicant filed a Supporting Affidavit together with the Notice of Motion on 18-12-2005. There is no provision for such practice and the same should be severely discouraged in judicial review applications. In this matter however no prejudice has been caused upon the Respondents as the only annexture to the Affidavit is the Court Order, and which was not something that could be challenged as such or was in dispute. I would not therefore expunge that Affidavit from the Court record.

The ***fourth*** preliminary issue raised by Mr. Ombwayo is whether a person who is directly affected by the prayers in an Application under rule 3 (2) of Order LIII may only be heard in opposition to the application in terms of rule 6 of Order LIII of the Civil Procedure Rules.

This objection was raised in the context of the submissions of Miss Jemimah Keli, learned Counsel for the Electoral Commission of Kenya (the 1st Interested Party), that in their understanding of the relevant provisions of the Local Government Act, in light of Section 33 of the Constitution there was no residual power in the Minister to revoke the appointment of a nominated Councillor.

In my understanding of the provisions of rule 3 (2) above, the requirement is merely that persons ***directly affected*** be served. There is no restriction that such persons may only be heard in opposition.

On the other hand rule 6 clearly states any person whether directly affected or not, who expresses a wish (in my opinion by written application to be so heard for the sake of order and disposal of matters or else the Court could be held to ransom by busy bodies and hecklers), will be heard in opposition. So a person directly affected such as the Electoral Commission of Kenya – in the administration of electoral law, is at liberty to be heard for or in opposition on any application which is served upon it. Miss Keli's submissions in support of the Application were therefore perfectly in order.

Having disposed of these procedural objections, I now revert to the substantive submissions by learned Counsel for the various parties. I am grateful to Counsel for their Skeletal Arguments, dated 26-09-2006, filed on 27-09-2006 for the Applicant) dated and filed on 9-10-2006 (for the 2nd Interested Party) and dated 13-10-2006, and filed on 16-10-2006 (for the 3rd Respondent – the Murang'a County Council).

As already stated above, the single issue for decision is whether the Minister for Local Government has power to revoke the appointment of a nominated Councillor, and in turn appoint another. Again as stated the submissions were at variance. Counsel for the Applicant, relying upon the decisions of my brothers I. Lenaola Ag. Judge as he then was (in ***Republic -Vs- Hon. E.K. Maitha Minister for Local Government & Attorney-General (Misc. Application No. 802 of 2003), and Ibrahim J. (in Republic –Vs. Minister for Local Government and Municipal Council of Mombasa (Misc. Application No. 917 of 2004)*** submitted that the Minister for Local Government had no such power to revoke the appointment of a nominated Councillor.

In support of that position Miss Keli, for theElectoral Commission of Kenya, suggested that if there is such power of revocation, the same can only be exercised in terms of the principles of Section 33 of the Constitution as applied by Section 28 (2A) of the Local Government Act to nomination of Councillors.

In contrast, and in opposition to the position held by my brothers in those cases, both Mr. Ombwayo, Mr. Wamae, and Mr. Macharia were fervently of the view that the Minister has power to revoke the nomination of a Councillor once appointed by a parliamentary party. They urged me to depart from the decisions of my two brothers and follow that of Sergon J. ***in Republic -Vs- Minister for Local Government & 4 Others, Ex Parte Taib Ali Taib*** (High Court at Mombasa Misc. Application No. 158 of 2006) where, Sergon J. held that the Minister had such power and would revoke at will the nomination of any person appointed by a parliamentary party to be nominated a Councillor.

For the purposes of the opinion I shall eventually find and hold I set out in the following passages of this judgement the relevant provisions of the Local Government Act, and later Section 33 of the Constitution of Kenya.

Section 28 (1) & (3) of the Local Government Act provides for the establishment and incorporation of every county or town council with perpetual succession and a common seal. Section 28 (2) provides for the establishment of a County or Town Council by the Minister in consultation with the Electoral Commission of Kenya. The establishment is by order in the Gazette. Once a County Council or Town Council has been so established, it must be managed or administered by a Council comprising of persons called councillors who are either elected, nominated or appointed under Section 39 of the Act. For those persons who are not elected as Councillors, Section 28 (2A) of the Act, (a provision first introduced by Act No. 10 of 1997) provides for the criteria of their nomination in the following terms-

"**Section 28(2A). The criteria and principles for appointment of nominated members of the National Assembly under Section33 of the Constitution shall** MUTATIS MUTANDIS **apply to the nomination of Councillors under this Section."**

In turn Section 39 which provides for the number of Councillors of a county or town council, provides,

39 (1) The number of Councillors of a county or town council shall be as follows-

(a) - (b)

(c)- such number of Councillors nominated by the Minister to represent the Government, or any special interests as the Minister may by order determine."

Section 40 (1) is also relevant and provides as follows:-

40(1). The term of office of every Councillor nominated under Section 39 (1) (c) shall be five years or such shorter period as the Minister may, at the time of nomination specify.

PROVIDED **that the Minister may at any time in his discretion terminate the nomination of such a Councillor by notice in writing delivered to the Councillor and thereafter his office shall become vacant.**

Those are the relevant provisions for nomination of a person to be a Councillor of a County or Town Council. The concern here is the revocation of the appointment of such person to a County Council. The criteria for nomination of any person to be a Councillor to a County or Town Council, is the same. That criteria is provided for under Section 33 of the Constitution, and which provision is as follows-

33 (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 subsection (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 in the nominations.

Translated into the provisions of Section 28 (2A) of the Local Government Act, the criteria for nomination of a Councillor whether to Municipal Council (such as Nairobi or Mombassa or Kisumu Nakuru or Eldoret or similar municipalities), may with the necessary changes or adaptations (***Mutatis Mutandis***) in the context, be rendered as follows-

(1) The number of Councillors is determined by the Minister in consultation with the Electoral Commission (Section 39)

(2) The persons to be nominated as Councillor must be qualified for nomination to stand for electoral ward seat.

(3) The persons must be nominated by a parliamentary party;

(4) The proportion is determined by the Electoral Commission after general election (which includes election of local authorities Councillors).

(5) The proportion is signified by the Chairman of the Electoral Commission, to the leaders of the parliamentary parties and in the case of Councillor, to the Minister rather than the President and the Speaker) (Director of Local Government Elections an officer under Local Government Election Rules.

(6) The names of nominees of the various Councils are forwarded *(by the parliamentary parties)* ***to the Minister through the Electoral Commission who ensures the observance of the principle of gender equality in the nominations (of Councillors).***

It is observed that under the nomination principles established under Section 33 of the Constitution there is no provision for revocation or recalling of a nominated member of Parliament under the provisions of Section 33 of the Constitution, the same criteria, or principles upon which a person is nominated to be a councilor in a municipal council under Section 27 (2) of the Local Government Act, or to a County or Town Council under Section 28 (2A) of the Constitution.

The issue then becomes whether after a parliamentary party has nominated its candidate for appointment by the Minister as a nominated Councillor, without specifying the duration for such nomination, the Minister retains residual power under Section 39 (1) of the Local Government Act to ***firstly*** specify the duration of such appointment, and ***secondly*** to revoke such appointment.

Considering the second issue (revocation of appointment) of a Councillor to a Municipal Council) in the case of ***REPUBLIC –VS- HON. E.K. MAITHA, MINISTER FOR LOCAL GOVERNMENT***, ex parte Joseph Okoth Waudi & Another (High Court Misc. Application No. 802 of 2003) (unreported), Lenaola Ag. J. ***(as he then was***) expressed himself thus:-

"**Section 27 (2) in as far as it purports to contradict Section 33 of the Constitution, is inconsistent (***therewith***) and I so declare. I am fortified in this finding by the fact that Section 27 (2) was itself a creation of Act No. 11 of 1984 and yet Section 33 of the Constitution and Section 26 (2) of the Act all came into being vide Act No. 7 and No. 10 of 1997 respectively. The last amendment should prevail and in any event, and in this case, a Constitutional amendment subsequent to a statutory amendment is always superior. Where a law is inconsistent with the Constitution, then the Constitution shall prevail (Section 3 of the Constitution). In this case Section 33 shall prevail as Section 33 has no revocation clause, the revocation clause under Section 27 (2) is void.**

Ibrahim J. was of the same vein in the case of **REPUBLIC -VS- MINISTER FOR LOCAL GOVERNMENT**, ex parte Benedict John Kamanzyu & Others (***High Court Misc. Application No. 917 of*** 2004) where referring to his earlier decision in the case of **REPUBLIC –VS- MINISTER FOR LOCAL GOVERNMENT**, Exparte Anthony Musila (Mulonzi) Mumangi (High Court Misc. Application No. 669 of 2004 (**Nairobi)** unreported) said-

"…….**There is no doubt to this Court that the provisions of Section 33 of the Constitution which is superior law has been legislated to apply directly within the ambit of the Local Government Act. There are those who see this aspect of having the principles of nomination of Councillors in a County Council elevated to a constitutional level, Others would look at it as** "*domestication"* **of the Constitutional principles into the Act. Whichever way one may look at it, the effect is the same. When it comes to interpretation or construction of the provisions of the Act, if there is any inconsistency, ambiguity or doubt then the provisions of Section 33 would prevail over and override those of the Act, in this case Section 39 (1) and 40 of the Act."**

On the other hand Sergon J. held a different view on the interpretation of Section 33 of the Constitution in relation to Section 26 and 27 (2) of the Local Government Act in respect of the nomination and revocation of a nominated Councillor to a Municipal Council. The case was **REPUBLIC –VS- MINISTER FOR LOCAL GOVERNMENT, THE PERMANENT SECRETARY FOR LOCAL GOVERNMENT,THE ATTORNEY-GENERAL, and the MUNICIPAL COUNCIL OF MOMBASA Ex** Parte Taib Ali Taib (*High Court at Mombasa Misc. Civil Application No. 158 of 2006)* (***Original Nairobi H.C. Misc. Civil Application No. 94 of 2006).*** Sergon J. held that the Minister had power to revoke the nomination of a Councillor under the provisions of Section 27 (2) of the Act (i.e in relation to a nomination for instance to City Council of Nairobi or to a Municipal Council). Counsel for the Respondents, including Mr. Ombwayo asked me to follow this decision, and not those of either Ibrahim, J. or Lenaola J. respectively.

For the reasons I shall presently set out in the passages following, I am unable to travel the road paved by my Senior brother Sergon J. I hold the view held by Ibrahim and Lenaola JJ in the respective cases cited above. And what are my reasons for ***holding*** that once a person has been nominated by a parliamentary party for appointment either as a Member of Parliament by the President, or the Minister for Local Government in respect of a Councillor to the City Council of Nairobi, or to a Municipality in respect of Municipalities, Town or County Councils, neither the parliamentary party, nor the President, nor the Minister can revoke and de-gazette such appointment. The principal reason is that there is no ***claw-back*** or ***re-call clause*** or provision in the Constitution under which the parliamentary party may recall or revoke the nomination and therefore the President or the Minister may revoke the appointment of such person to Parliament, or to a local authority.

It is correct that according to the letter of Section 40 (1) (proviso), the Minister is donated power at his discretion to terminate the nomination of a Councillor. The power is exercised by a notice in writing delivered to the Councillor, and that upon delivery and receipt of that notice of termination, the office of Councillor becomes vacant. Section 27 (2) of the Act is to the same. In the view of my brother Sergon J. as expressed at page 11 of his Ruling in the ***Taib Ali Taib Case. Parliament intended to retain Section 27 (2) of the Local Government Act as an exception to the domesticated Section 33 of the Constitution…… and that Parliament conferred to the Minister for Local Government the power to revoke the nomination of Councillors."***

My brother Sergon J. argued that the amendment took away the Minister's absolute power to pick the candidates to be nominated as Councillors but retained the power to de-nominate at will and held ***"that the office of Councillor is not statutorily underpinned, that it is a paradox, but courts of law cannot play the role of Parliament,"*** and relied on ***Maxwell*** on the Interpretation of Statutes, 12th Edition by P.St. J. Langan at pages 47-48…….

"***In the interpretation of statutes, the interpreter may call to his aid all those external or historical facts which are necessary for comprehension of the subject matter, and may also consider whether a statute was intended to alter the law or leave it exactly where it stood before. But although we can have in mind the circumstances when the Act existed so far as these are common knowledge…….. we can only use these matters as an aid to the construction of the words which Parliament used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but cannot be inferred from the words of the Act."***

The historical circumstances under which a particular law was passed or enacted are encompassed in what textbook writers and other scholars refer ***to as the mischief rule.*** The Mischief Rule is a rule of interpretation of statutes, or put differently, an aid to interpretation. It lays down the proposition that before arriving at any particular interpretation of the statute, the court will consider and be aided by establishing what the law was before the statute was enacted or amended, the injustice or mischief which existed before the enactment of the statute, and would the interpretation of the statute in the matter before Court perpetuate that injustice or mischief which existed before the enactment of the law?

The mischief rule, also referred to by legal historians as the rule in ***Heydons Case*** (1584), 3 Re 7a was given expression as follows:-

"***It was resolved by the Barrons of Exchequer that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law four things are to be discussed and considered. 1st, what was the common law before the making of the Act; 2nd, what was the mischief and defect for which the Common Law did not provide; 3rd, what remedy Parliament had resolved and appointed to cure the disease of the commonwealth; and 4th; the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the subtle invention and evasions for continuance of the mischief, and*** *pro privato commodo****, and to add force and life to the cure and remedy according to the true intent of the makers of the*** *Act pro bono publico."*

As ***C.K. Allen, Law in the Making 7th Edition***, observes at page 495, these propositions, though they have an archaic savour are still constantly recognized by the Courts as rules of practical importance, and these considerations will often be decisive in interpreting the effect of a statute. See In ***re Mayfair Properties & Co. 1898 2 Ch. 28, 35, Hickman –V- Pracey [1945] A.C. 305, 315.***

On my brother Judge Sergon's critical look at Section 27 (2) he concluded that parliament did not intend to deprive the Minister of the power to denominate.

My brother also considered the role of the parliamentary party, and found that the Applicant (Taib Ali Taib) had not received any succour from his nominating parliamentary party **NARC** so that all in all, the revocation of the nomination was in accord with the Act. My brother Sergon J. adopted the views expressed by Lord Denning MR in the case of ***Secretary of State for Environment –Vs- Associated Society of Locomotive Engineers and Firearms [1972] 2 QB. 455 at page*** ……..said –

"**The Courts would be no rubber stamps of the executive. If Parliament gives great powers to the Minister, the Courts must allow them to him, but at the same time they (***the courts***) must be vigilant to see that he exercises them in accordance with the law. He must act within lawful authority."**

Having given a critical look at Section 27 (2) of the Local Government Act (relating to the nomination of Councillors, and the role of parliamentary parties,) my brother Sergon J. ignored the mischief which the introduction of Section 33 of the Constitution into the Act intended to cure namely the unilateral exercise of power by a President and Ministers without regard to parliamentary parties with regard to nomination of persons to Parliament and to local authorities.

The issue or question here ultimately is, what is the law within which the Minister must act? Is it merely sufficient to say that Parliament intended to retain the powers of denomination in the Minister after taking the powers of nomination away, and vesting them in the parliamentary parties? I do not with very great respect to my brother Sergon J. think so. On the contrary, I think that the Courts must be vigilant and ensure that the Ministers do exercise their powers in accordance with the law. And what law are we talking about?. It is the law of the Constitution, and all enabling law. For instance the Interpretation and General Provisions Act (***Cap 2, Laws of Kenya***), provides in Section 51:-

51. ***Where by or under a written law a power or duty is conferred or imposed upon a person to make an appointment or constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve a board, commission, committee or similar body appointed, constituted or established, in exercise of the power or duty and to*** **reappoint, reconstitute or re-establish it.**

(2) Where the power or duty of a person under this Section is exercisable only upon the recommendation, or is subject to the approval or consent, of another person, then the power shall, unless a contrary intention appears, be exercisable only upon that recommendation or subject to that approval or consent."

In summary, Section 51 of the ***General Provisions*** and ***Interpretation Act*** clearly provides that power to appoint includes power to suspend, dismiss, re-appoint…. and where such appointment was subject to consultation or consent of another party that appointment or suspension of the person appointed must be done in consultation or with the consent of the person or party concerned. That is the general law of interpretation in respect of appointments, suspension and revocation of appointments. That law is also in consonance with the provisions of Section 28 (2A) of the Local Government Act which incorporated into this Act, the constitutional principles for the nomination of members of Parliament, to the nomination of Councilors to County, Town, in Municipal and City of Nairobi, Councils. I set out these principles at the beginning of the this judgement, and may again be summarized as follows-

(1) nominated Councillors represent special interests (Section 33 (1)- which need not necessarily be

inconsistent with government interests or in conflict with objects good of governance).

(2) persons to be appointed are qualified for nomination, for local authority election or electoral wards *(Section 33 (4).*

(3) persons to be appointed to the local authority be nominated by a parliamentary party *(Section 33 (3)*

(4) the number of Councillors appointed would be proportional to the local number of seats garnered by each Parliamentary party at the election *(Section 33 (4).*

(5) that proportion is determined by the Electoral Commission of Kenya *(Section 33 (4) .*

If these are the Constitutional principles upon which the nomination and appointment of Councillors is predicated, can the Minister in exercise of his purported power under Section 40 (1) (proviso), revoke the appointment of any Councillor without reference to the parliamentary party who originally sponsored or nominated that Councillor for appointment under Section 28 (2A) of the Constitution? And where is the reference to the Electoral Commission of Kenya to certify the proportion in respect of each parliamentary party.?

In my very humble view, the Minister does not have such power. If I am wrong in that holding, there is another reason why I find and hold that the Minister does not have such power. It is that for the Minister to validly exercise that power, he must strictly adhere to the constitutional principles enshrined in Section 33 of the Constitution. In the absence of the application of those principles, the Minister would be acting unconstitutionally as to requirements for the nomination by Parliamentary parties and certification by the Electoral Commission of Kenya under the said Section 33 of the Constitution. In addition he would also be acting contrary to the provisions of Section 51 (2) of the Interpretation and General Provisions Act as regards the recommendation by the nominating parliamentary party.

In my humble view therefore to nakedly apply the provisions of Section 40 (1) proviso, and permit the Minister to interfere with the proportion of seats held by each parliamentary party in local authorities, is to maintain an anachronism from a by-gone era. That Section is clearly inconsistent with the clear provisions of the Constitution, and flouts the supremacy of the Constitution as clearly expressed in section 3 thereof. The cornerstone or the touchstone of validity of nomination is not the Local Government Act, but rather Section 33 of the Constitution. To the extent of the said Section 40 (1) being inconsistent with provisions of Section 33 of the Constitution, the said section is void.

The Republic of Kenya is a multi-party democracy founded upon the Constitution, and the rule of law. See sections 1 and 1A of the Constitution. According to ***Sir William Wade- Administrative Law, 9th Edition,"***

" ***the rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorized by law – and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."***

The Applicant sought among other orders an order of Certiorari to quash both the decision of the Minister for Local Government to revoke the nomination of the Applicant, as well as the appointment of the Interested Party as Councillor. An order of Certiorari will issue both for acting without and in excess of jurisdiction. In this case, the Minister for Local Government acted well without jurisdiction as envisaged by Section 33 of the Constitution as incorporated in Section 28 (2A) of the Local Government

Act. There shall therefore be removed and brought into this court and quashed both the decision of the first Respondent contained in the Special Issue of the Kenya Gazette Notice Number 8573 revoking the nomination of ***James Mwangi Waweru*** as nominated Councillor to Murang'a County Council as well as the decision of the First Respondent contained the Special Issue of the Kenya Gazette of 25th October, 2005 as Gazette Notice No. 8574 appointing ***WILSON KINYUA GITERU*** as nominated Councillor in Murang'a County Council.

Having granted the orders of Certiorari, it is unnecessary to consider the prayers for prohibition for the order of certiorari having quashed the decision of the First Respondent appointing the Interested Party as Councillor, he is incapable of and has no ***locus*** to stand as a Councillor of the Murang'a County Council.

Similarly having quashed by Order of Certiorari the decision of First Respondent there is no need to consider the prayer for mandamus.

The Applicant's Notice of Motion dated 16th December, 2005 and filed on 18th December, 2005 does therefore succeed, and unless the Applicant ceased to be a Councillor by voluntary resignation he remains a Councillor, and, entitled to all the rights and privileges of that office until the expiry of five years from the date of his appointment as a nominated Councillor.

Further, having come to the above conclusion, it is now not necessary to consider the Application of one Councillor Stanley Muchoki Ngari who had applied to have orders staying the election of Chairman and Vice-Chairman of the Third Respondent vacated.

It remains however to say that the Applicant had not sought the costs of the Application. There shall be orders of Certiorari as stated above, but each party shall bear its own costs.

Dated and delivered at Nairobi this 4th day of May, 2007.

M.J. ANYARA EMUKULE

JUDGE.