



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

**Misc Civ Appli 1620 of 2006**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**  
**IN THE MATTER OF: THE SOCIETIES ACT CAP 108 LAWS OF KENYA**  
**IN THE MATTER OF: ORDERS LIII OF THE CIVIL PROCEDURE RULES**  
**CAP 21 LAWS OF KENYA**  
**IN THE MATTER OF: LOCAL GOVERNMENT ACT CAP 265 OF THE LAWS**  
**OF KENYA**

**IN THE MATTER OF: THE NATIONAL PROGRESSIVE PARTY REPUBLIC**

**VERSUS**

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

**THE ELECTORAL COMMISSION OF KENYA.....2ND RESPONDENT**

**THE REGISTRAR OF SOCIETIES.....3RD RESPONDENT**

**Ex-parte**

**DAVID NZIOKA KITHUSI .....APPLICANT**

**JAMES B. KIAMBA**

**FRANKLIN MAKOLA**

**JOSEPH M. MUSYOKA**

**MUMO WA KITUSA**

**RAPHAELS STANLUS MUSYOKA KIMITI.....INTERESTED PARTIES**

**RULING**

Before me is a Notice of Motion dated 7<sup>th</sup> April 2006 filed by Ogonji & Tiego advocates on behalf of the applicant David Nzioka Kithusi. It is purported to be brought under Order LIII Rule 3 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act Cap. 26, as well as section 6(6) and 39 (c) the Local Government Act Cap 365 of the Laws of Kenya. It was brought under certificate of urgency and seeks for two orders, one of which has been spent, that –

- i) (Spent)
- ii) judgment be entered for the ex parte applicant in terms of the prayers sought by judicial review vide Notice of motion dated 29<sup>th</sup> November 2005.

The application has grounds on the face of the Notice of Motion, and is supported by the affidavit of the applicant David Nzioka Kithusi sworn on 7<sup>th</sup> April 2006. The grounds of the application are that the interested parties by a letter dated 13<sup>th</sup> March 2006 conceded to the orders sought in the proceedings; that the Registrar of Societies had no objection to the orders being made in terms of the Notice of Motion dated 29<sup>th</sup> November 2005; that the Electoral Commission of Kenya required a formal court order to enable it advise the Minister for Local Government to degazette the nomination of the 5<sup>th</sup> interested party and revoke the denomination of the ex parte applicant; lastly, that the applicant needed the court order to enable him procure travel documents to enable him attend a councilors tour in Tanzania commencing 9<sup>th</sup> April 2006.

On 10<sup>th</sup> April, 2006, the application was certified as urgent by

Hon. Justice Osiemo, and fixed for inter partes hearing on the 11<sup>th</sup> April 2006. When the application came for hearing before me during the court vacation on 11<sup>th</sup> April 2006, Mr. Tiego appeared for the applicant, Ms. Keli appeared for the 2<sup>nd</sup> respondent Electoral Commission of Kenya, Mr. Adera for the 3<sup>rd</sup> respondent the Registrar of Societies, Mr. Wandago appeared for the interested parties, while there was no appearance for the 1<sup>st</sup> respondent, the Minister for Local Government.

At the hearing of the application Mr. Adera, Ms. Keli and Mr. Wandago said they had no objection to the application and sought to be released. I released them.

Then Mr. Tiego argued his application. He submitted that they

were seeking for judgment to be entered in terms of the prayers sought in the application for judicial review. They were only seeking for orders of certiorari to quash the Minister's gazette. They were abandoning prayers 3, 4 and 5 in the application for judicial review.

I observe that the main motion was filed through Notice of

Motion dated 29<sup>th</sup> November 2005. It was a Notice of Motion brought under the Provisions of Order LIII rule 3 of the Civil Procedure Rules (Cap 21), Section 8 and 9 of the Law Reform Act Cap 26, and section 6(2) and 39(c) of the Local Government Act Cap. 265. It sought for –

- i) An Order of Certiorari to bring to this court Gazette Notice numbers 8581 and 8582 both dated 13<sup>th</sup> October 2005 and published by the Minister for Local Government for purposes of being quashed.
- ii) An order of Mandamus directed at the 1<sup>st</sup> Respondent (Minister for Local Government) to gazette the revocation of Gazette Notice Numbers 8581 and 8582 dated 13<sup>th</sup> October 2005 and reinstatement of the applicant as a nominated councillor to the Town Council of Kangundo.
- iii) An order of Prohibition directed to the Respondent from receiving any proposal from the interested parties to revoke the nomination of the applicant as a councillor for the Town Council of Kangundo or to degazette the applicants nomination.
- iv) An order of Prohibition directing the 2<sup>nd</sup> respondent from directing the 1<sup>st</sup> respondent to revoke the nomination of the applicant as a councilor of the National Progressive Party to the Town Council of Kangundo.
- v) The costs of these proceedings.

Some interim orders were made in the Notice of Motion dated 29<sup>th</sup> November 2005. That application still appears to be pending and the applicant has filed this Notice of Motion before me. The main ground is the fact that the National Progressive Party vide their letter dated 13<sup>th</sup> March 2006, have written to the Electoral Commission of Kenya that they now wished to retain the applicant as Councillor for Kangundo Town Council, whom they had earlier nominated vide their letter dated 10<sup>th</sup> January 2003, instead of Raphaels Stanslans Musyoka Kimiti.

The legal requirements for filing a Notice of Motion under Order LIII of the Civil Procedure Rules are clear. Order LIII rule 1(1) provides that leave has to be obtained from the court. Rule 3(1) provides that where such leave has been granted by the court, the substantive application by way of Notice of Motion shall be filed within 21 days.

I have not been shown any leave granted by this court to file the Notice of Motion dated 7<sup>th</sup> April 2006. I have also not been told that the Notice of Motion was filed within 21 days from the date of leave, as provided for by law. The application, in my view, does not comply with mandatory legal requirements for filing of such application. It is fatally defective and has to be dismissed.

That is not all. Order LIII applies to applications for Mandamus, Prohibition and Certiorari. The Notice of Motion dated 7<sup>th</sup> April 2006 does not ask for any of those orders. Instead it seeks that judgment be entered in another Notice of Motion dated 29<sup>th</sup> November 2005. In my view, there cannot be a Notice of Motion to enter judgment on another Notice of Motion, under the law. There is no such provision under Order LIII of the Civil Procedure Rules. On that ground also, the Notice of Motion dated 7<sup>th</sup> April 2006 cannot stand.

For the above reasons the Notice of Motion dated 7<sup>th</sup> April 2006 is hereby dismissed. As none of the parties who sent counsel on the hearing date asked for costs, and as, in my view, the Notice of Motion dated 29<sup>th</sup> November 2005 is still pending, I will order that costs be in the cause. It is so ordered.

Dated and delivered at Nairobi this 30<sup>th</sup> day of May 2006.

George Dulu

Ag.Judge

In the presence of -