



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Misc Civil Appli 636 of 2005**

**IN THE MATTER OF: APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL  
REVIEW PROCEEDINGS FOR ORDERS OF CERIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: LOCAL GOVERNMENT ACT (CAP 265)**

**AND**

**IN THE MATTER OF: MUNICIPAL COUNCIL OF MOMBASA**

**1. KOMBO JUMA MZEE**

**2. DAVID NJOROGI GAITHUMA**

**3. JOSTONE KAMBU POLE**

**4. KENNEDY MUTHINI NDIVA**

**5. TIMOTHY LEWA MANGI**

**6. JUNIOR WAMBUA KYAKA**

**7. ALI SALIM MWAKUNYAPA**

**8. JOHNSON MKENYA WAMBUNYA**

**9. JUMAA GOSHI MWEJUMA**

**10. MILTON MWONGELA KAVEKE**

**11. ADNAN HASSAN BORI KUSHE**

**12. MARGARET AKOTH OLANG**

**13. ALI MOHAMED MWACHEWA**

**14. MOHAMED**

**DAWUD.....  
APPLICANTS**

**- VERSUS -**

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

**THE TOWN CLERK**

**MOMBASA MUNICIPAL COUNCIL.....2ND RESPONDENT**

**RULING**

The Ex-Parte Applicants (the Applicants) have, by their chamber summons dated the 22nd August 2005 sought under Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Sections 8 and 9 of the Law Reform Act leave to apply for the judicial review orders of certiorari and prohibition. Before they could be heard Mr. Abuobakar representing Councillor Said M. Mwalimu and Mr. Gekonde representing seventeen other Councillors of the Municipal Council of Mombasa sought to be heard in opposition to the application arguing that their respective clients who are interested parties in this matter will suffer grave injustice if they are not heard at this stage. Messrs Gikandi and Khatib for the Applicants strongly opposed the application and submitted that there is no provision for according interested parties audience at leave stage. They argued that the interested parties should hold their horses until they are served with the notice of motion if leave is granted.

Given the importance and urgency of this matter and in the interest of justice I allowed the interested parties' counsel to address me on the matter even though they had not filed any papers in this matter. The Applicants seek leave to apply for an order of certiorari to bring to this court for purposes of being quashed the decision of the Minister for Local Government and the Town Clerk Municipal Council of Mombasa ordering fresh elections for the chairmen of all standing committees of the Municipal Council of Mombasa on the grounds that the decision is ultra vires the provisions of the Local Government Act Cap 265 of the Laws of Kenya (the Act) and that the decision was made in breach of the rules of natural justice. Mr. Gikandi teaming up with Mr. Khatib for the Applicants argued that the Minister has no powers under the Act to order a repeat of the election of committee chairmen of local authorities. The Applicants, he said, were elected chairmen of various committees in a regularly conducted Annual General Meeting of the Council held on the 25th July 2005. As far as their clients are concerned no complaint has been lodged against their election. If there is any such complaint rules of natural justice require that they should be heard before any action affecting their rights is taken. They have not been notified of any such complainant or accorded an opportunity of being heard.

The Applicants also seek an order of prohibition to prohibit the second respondent from implementing or enforcing the decision of the Minister calling for fresh elections of the committee chairmen of the Municipal Council of Mombasa. The Applicants finally pray for an order that one leave granted should operate as a stay of the implementation of the said decision arguing that if the stay is not granted elections will be held and their application will be rendered nugatory. Opposing the application Messrs Abuobakar and Gekonde for the interested parties argued that the application is first and foremost incompetent for failure to annex a copy of the decision sought to be quashed. Even on its merits, they contended, the application should be dismissed. The Minister, they said, acted under Section 248 of the Act after an investigation had been carried out under Section 245 of the Act. They further argued that the application is not brought in good faith in that the Applicants who are in office illegally are seeking to perpetuate the illegality. They further submitted that the Applicants will not suffer any prejudice if the elections are held as they can always challenge them.

In a short rejoinder Mr. Gikandi submitted that their clients have explained their failure to exhibit a copy of the decision sought to be quashed. They said the Minister ordered the elections through a press

conference and all they have as of now is a copy of the newspaper report on the matter. I have considered these rival submissions. I have also perused the application as well as the accompanying statement and the verifying affidavit together with the annexures thereto. It is not in dispute that the Minister for Local Government held a press conference on 22nd August 2005 and called for a repeat of the election of the chairmen of the various committees of the Municipal Council of Mombasa. The first Applicant has stated in paragraph 19 of the verifying affidavit that to the best of his knowledge the Minister's directive to the Town Clerk was verbal and all the Applicants have is a newspaper report of it. I am satisfied that given the time interval between the issue of the directive by the Minister and the filing of this application the Applicants have explained to my satisfaction their failure to exhibit a copy of the decision. Even if no satisfactory explanation had been given failure to exhibit the decision sought to be quashed cannot render the application for leave incompetent. Order 53 Rule 7(1) forbids the applicant questioning:

**“...the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar...” (emphasis is mine)**

The motion referred to in this provision is the Notice of Motion filed pursuant to leave if granted. This is not the hearing of such motion. The Applicants can always seek leave to file a supplementary affidavit and exhibit the decision before the hearing of the motion. I find that this application is competently before court. At this state all that I am required to decide is whether or not the Applicants have made out an arguable case for the grant of leave. They contend that the Minister has no powers under the Act to order a repeat of the election of the chairmen of the various committees of any local authority. They also contend that even if the Minister had any such authority he would have been obliged to give them a hearing before taking any action, which affects their interests. These are matters, which can only be conclusively decided after hearing both parties and any interested parties. Suffice it to say that having considered the matter on the basis of the material placed before me I am satisfied that the Applicants have made out a case for the grant of leave to apply for the judicial review orders of certiorari and prohibition and I accordingly grant them leave.

The Applicants have also sought an order that the leave granted should operate as a stay of the implementation of the said decision calling for a repeat of the elections. The Minister ordered on 22nd that the elections be held this morning, the 24th August 2005. The Applicants could not have come to court earlier and be heard on the main application before today. I agree with them that if a stay is not granted their application will be otiose. Consequently, I direct that the leave granted shall operate as a stay to stay the elections of the chairmen of the various committees of the Municipal Council of Mombasa until the notice of motion to filed pursuant to the leave granted herein is filed, heard and determined.

Given the wrangling in the council and in the interest of justice for the residents of the Municipal Council of Mombasa I order the Applicants to file and serve the Notice of Motion within ten days and have it fixed for hearing within fourteen days thereafter. The costs of this application shall be costs in cause.

**DATED and delivered this 24th day of August 2005.**

**D. K. MARAGA**

**JUDGE**