



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISCELLANEOUS CIVIL APPLICATION NO 802 OF 2003**

**Republic**

v

**Maitha & another ex parte Waudi**

**RULING**

Constitutional law - interpretation of the Constitution - Constitution providing for the nomination of persons to be Members of the National Assembly - President having executive appointing authority but not powers to revoke a nomination - powers of nomination of members of the National Assembly applied mutatis mutandis to the nomination of councillors for Local Governments by the Local Government Act (cap 265) - executive authority vested in the Minister for Local Government

- Minister empowered to revoke the nomination of a councillor whether section 27 of the Local Government Act (cap 265) was inconsistent with the Constitution in giving the Minister a power over councillors which the President did not have over members of the National Assembly. Local Government Ministerial powers - nomination of councillors - power of the Minister for Local Government to revoke the nomination of a councillor whether the Minister's power to revoke a nomination was unconstitutional - whether the Minister was bound to consult with the Electoral Commission of Kenya - whether publication of notice of the revocation in the Kenya Gazette is a proper form of notice to the local authority or to the councillor affected Constitution of Kenya section 33

- Local Government Act (cap 265) sections 26, 27.

The Constitution of Kenya section 33 set out the criteria for the nomination of persons as members of the National Assembly. The persons are to be appointed by the President from persons nominated by parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality. It was further provided that the names of the nominees were to be forwarded to the President through the Electoral Commission.

In sections 26 and 27 of the Local Government Act (cap 265), it was provided that these principles for the appointment of nominated members of the National Assembly were to apply mutatis mutandis to the

nomination of councillors. Further, it was provided that the term of office of every nominated councillor would be five years or any shorter period specified by the Minister at the time of nomination and finally, the Minister was

empowered, in his discretion, to terminate the nomination of a councillor by notice in writing delivered to the councillor.

The applicant was nominated by the National Rainbow Coalition (NARC) Party as a Councillor in the Municipal Council of Mombasa. The nomination was accepted by the Electoral Commission of Kenya and forwarded to the Minister for Local Government (the V respondent) who subsequently published the nomination in the Kenya Gazette.

Later, the Minister revoked the nomination of the applicant. Both the revocation and the nomination of one Fred Oyicho in place of the applicant were published through separate notices of the Kenya Gazette.

The applicant brought judicial review proceedings against the Minister and the Attorney General seeking an order of certiorari to quash the revocation of his nomination. The following question arose for determination:

(a) Considering that section 33 of the Constitution (which had been imported into the provisions of the Local Government Act relating to the nomination of councillors) did not make any provision regarding the revocation of nomination of members of the National Assembly, was section 27(2) of the Local Government Act unconstitutional for being in conflict with the Constitution or was it to be construed as vesting discretionary power on the Minister to revoke a nomination of a councillor?

(b) If the Minister had the power to revoke the nomination of a councillor, was he required to consult with the Electoral Commission of Kenya before making the revocation?

(c) Was the revocation of the nomination of the applicant and the nomination of another person in his place legal or constitutional?

Held:

1. The Minister was obliged to have the notice of the revocation in writing and to deliver it to the Council. An advertisement or notice to the world in the nature of a Kenya Gazette notice was not such notice as was required by section 27(2) of the Local Government Act.

2. The wording of the proviso section 27(2) of the Local Government Act was such that whereas in nominations, political parties and the Electoral Commission of Kenya would be consulted, in revocation, the Minister was to act "in his discretion" "at any time". It was against the spirit of section 33 of the Constitution to require the Minister to make consultations only regarding nominations and then allow the Minister to revoke the nomination without the same process of consultation. As

the President could not do that under section 33 of the Constitution, then *mutatis mutandis* the Minister should not do it under statute.

3. Therefore, the proviso to section 27(2) was inconsistent with the Constitution in as far as it purported to contradict section 33 of the Constitution in that regard. Where a law is inconsistent with the Constitution, the Constitution would prevail. In this case, section 33 of the Constitution, which had no clause on the revocation of nomination, would prevail.

4. The appointment of Fred Oyicho in place of the applicant was illegal and it could not stand.

Application allowed, orders of certiorari granted.

Cases

No cases referred to. Statutes

1. Law Reform Act (cap 26) section 8(2)
2. Local Government Act (cap 265) sections 9, 10, 12, 26(2); 27(2); 28; 41; 53A; 53C; 54
3. Civil Procedure Rules (cap 21 Sub Leg) order LIII rule I
4. Constitution of Kenya section 33(1), (4)

Advocates

Mr Orengo for the Applicant Mr Meso for the Respondents Ms Keli for the Interested Party

January, 2004, Lenaola Ag J delivered the following Ruling.

1. This is an interesting application for Judicial Review brought under section 8(2) of the Law Reform Act, cap 26 Laws of Kenya, order 53 rule I of the Civil Procedure Rules, section 33 of the Constitution of Kenya and sections 26 and 27 of the Local Government Act, cap 265 Laws of Kenya.

The prayers sought are:-

1. An Order of certiorari to remove and quash the decision of the first respondent contained in the Kenya Gazette of 20<sup>th</sup> June 2003 and appearing therein as Gazette Notice No 4201 revoking, inter alia, the nomination of Joseph Okoth Waudi as the councillor in the Mombasa Municipal Council.

2. An order of certiorari to remove and quash the decision of the first respondent contained in the Kenya Gazette of 20<sup>th</sup> June 2003 and appearing therein as Gazette Notice No 4200 nominating councillors in various Local Authorities including the Mombasa Municipal Council.

3. The respondents do pay the costs of this application.

2. The application is based on the statutory statement filed on 31<sup>st</sup> July 2003 and the supporting affidavit of Joseph Okoth Waudi, sworn on 29<sup>th</sup> July, 2003.

3. The issues of fact are really not in contention and belie the fact that it

elicited points of law that must be carefully looked at and that is why I

find the same very interesting.

Facts in Support

4. The applicant was nominated by the National Rainbow Coalition (NARC) Party as a councillor in the Municipal Council of Mombasa. As is the requirement, the party sent the applicant's name for verification by the Electoral Commission of Kenya. The Electoral Commission accepted the nomination, approved his name and credentials and forwarded it to the Minister of Local Government for gazettelement and therefore formal appointment of the applicant as a nominated councillor aforesaid. The Minister who has been enjoined as the 1<sup>st</sup> respondent in this matter proceeded to make the appointment and gazetted the applicant as a lawfully nominated Councillor of the Mombasa Municipal Council. The matter ought to have ended there but did not.

5. On 20<sup>th</sup> June 2003, the Minister revoked the nomination aforesaid and published the revocation in

Kenya Gazette Notice No 4201. He also nominated one Fred Oyicho as a councillor in place of the applicant vide Gazette Notice No 4200.

6. It is the decision to revoke the applicant's nomination that invoked these proceedings.

Law in Support

7. Mr Orengo for the applicant addressed me on sections of the law that he on behalf of the applicant deemed applicable and which in his view the Minister for Local Government totally disregarded or misunderstood.

8. I was referred firstly to section 33 of the Constitution, and I was urged to find that this is a section that should check any excessive use of power by the Minister and to ensure that he consults when making certain decisions.

Section 33 of the Constitution reads in part as follows:-

"(1) Subject to this section, there shall be twelve nominated members of National Assembly appointed by the President following a general election, to represent special interests.

(2)

(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 principal of gender equality.

(4) The proportions under sub-section (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 principal of gender equality in the nominations."

9. I was then asked to read this section within the context of sections 26 and 27 of the Local Government Act.

Section 26 aforesaid provides as follows:-

"The number of councillors of a municipal council shall be as follows:-

(a).....

(b) Such number of councillors nominated by the Minister to represent the Government or any special interests, as the Minister may, by order determine:

(1).....

(2) 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 27 on the other hand provides that:-

"M.....

(2) The term of office of every nominated councilor nominated under section 26(b) 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 a councilor by notice in writing delivered to the councilor, and thereupon this office shall become vacant."

10. I am urged to find that where the Minister revokes a councillor's nomination, he ought to deliver notice to the Councillor. Gazettement is not such notice. Further, that the proviso to section 27(2) is repugnant to section 33 of the Constitution and should not be allowed to stand.

Respondent's case

11. Before I turn to the case as argued for the Minister and the Attorney General, I should note here that the Electoral Commission of Kenya appeared in this matter as an interested party and correctly so.

12. The Commission's take on the application as submitted by Ms Keli was really simple: it was not consulted on the revocation and it discharged its mandate in law by forwarding the applicant's name to the Minister. On the substance of the application itself, her words were, "ECK acted within the law. We do not oppose the application."

13. The respondents were however, of a totally different view. Mr Meso who appeared on their behalf admitted that the tenure of the proviso to section 27(2) is to water down what section 26(2) provide. He also submitted that consultation with the Electoral Commission of Kenya is only in certain instances for example in section 9 and 10 of the Act, but not in revocation of nominations. Section 9 relates to powers of the Minister with respect to counties and section 10 related to electoral areas.

14. I am also urged to find that contrary to the submissions by the applicant's counsel, section 27(2) is not unconstitutional. It merely vests discretionary power on the Minister and he exercised it lawfully in this case.

15. Which point now brings me to my own appreciation of the matter.

I must note from the outset that I appreciate the reasoning of learned counsel and whichever way I rule, it would not be because of inadequate persuasion on their part and if I have not referred to certain issues raised, it would not be because I found the issue(s) irrelevant.

16. I should start, I think, by setting out the principles and criteria for the nomination of councilors and then proceed to look at the powers of the Minister and then see whether in this case they were properly applied. I shall thereafter look at whether the applicant for the reasons that I shall give is entitled to the orders he has sought from this Court.

Principles and Process of Nominating Councillors

17. The matter as I see it in this regard is very clear. Section 26(2) of the Local Government Act refers us to section 33 of the Constitution with regard to the criteria and the principles applicable.

18. Section 33 of the Constitution is the mother section as it were and there are a number of issues that arise from it.

19. In this case where the word "President" appears in section 33 of the Constitution the word "Minister" should be inserted to clarify section 26(2) and section 27(2) of the Act. A nominated councillor is deemed to represent the government or a special interest. The person must also in any event be qualified to have been elected a councillor.

20. The nomination is initiated by parliamentary political parties based on certain proportions agreed upon with the Electoral Commission of Kenya. My understanding is that the base figure is the number of

elected councilors in the Municipality and the Electoral Commission would ordinarily do the mathematics and ask parties to send in a specified number of names to form the lot of nominated councillors.

21. Once the Electoral Commission has received the proposed names, it vets them to ensure that qualifications are met and taking into account a general criteria, gender equality, which frankly in my view is yet to be met as a target for bringing women into mainstream leadership. Upon confirming that the candidate meets all the criteria set, the name is forwarded to the Minister for gazettelement and therefore the appointment process comes to an end.

22. All these things were done in this case but the issue before me is

whether the Minister having initially nominated the applicant, can also revoke that nomination. The issue begs an answer in that if the Minister and all parties concerned should apply the principles I have set out above as envisaged by section 33 of the Constitution, can he have extra power under statute to revoke such nomination?

Powers of the Minister

23. I have set out the process by which a nominated councilor comes to be such councilor.

24. The Minister's role as I gather is to appoint the councillor by the formal process of gazettelement. However, he has as I have said, the power to revoke the nomination and I agree with Mr Meso that the wording in the proviso to section 27(2) is such that whereas in nominations, parliamentary political parties and the Electoral Commission of Kenya are consulted, in revocation, the Minister acts "in his discretion" "at any time". The only other issue is that the notice to revoke shall be delivered to the council and in any event it must be in writing.

25. I do not doubt that in invoking the powers to revoke the nomination the Minister may have had good reason and he was acting within the law. I note however, that he did not deliver the notice in writing to the councilor as is required. An advertisement or notice to the world in the nature of a Kenya Gazette Notice is not in my view such notice as is required by section 27(2). I shall return to this point shortly.

26. The question that I must now confront and which keeps slipping from my grasps is this, is section 27(2) inconsistent with section 33 of the Constitution? If so, should I declare that section 33 is superior and therefore any acts purportedly done under section 27(2) of the Act are void to the extent of the inconsistency?

Section 33 of the Constitution and Section 27(2) of Local Government Act.

27. This matter as I said earlier raises the interesting question that I have posed above and in trying to answer it, I attempted to look for guidance in matters of a similar nature and was unsuccessful. Parties did not quote any authority where this or other Courts have addressed this apparent conflict of laws. I am left as it were to swim through uncharted waters, assuming that is the correct position. I also assume that the reason why have previously arisen or become notorious is that the 2002 General Election is only the second time after the section 33 of the Constitutional amendment that the issue of nomination of councilors is being undertaken.

28. Section 33 of the Constitution was part of the now famous InterParties Parliamentary Group (IPPG) negotiations when Kenya was going through fundamental changes on the political scene and as expected, certain laws had to change to reflect the changing political scenario. One of the changes had to do with the matter of nominated members of the National Assembly. Prior to Act No 7 of 1997 which introduced section 33 aforesaid, the President would appoint nominated members of the National Assembly without consultations with any other person or authority. With the increasingly influential political parties continuing their assault on the powers of the President, it was agreed that nominated Members of Parliament should be nominated from all parliamentary political parties and should in addition represent special interests and ensure gender equality (as far as possible!).

29. The procedure as I set out at paragraph 19-21 above was then

enacted to ensure that political parties and the President do not nominate persons who do not meet the criteria set out by the new section. The Electoral Commission of Kenya was the supervisory body charged with the responsibility to ensure that they complied. Discretion was in effect removed from the President and his duty under section 33(4) was to receive the vetted names and appoint under section 33(1). That is as much as I can say about the history of section 33.

30. As regards section 26(2) of the Local Government Act, again it too, was a product of the Inter-Parties Parliamentary Group (IPPG) negotiations. By Act No 10 of 1997, section 26(2) was inserted in the words which I set out at paragraph 9 above. The effect was therefore that the criteria and principles set out in section 33 of the Constitution were applied mutatis mutandis to the nomination of councilors. The spirit, as I understand it is to ensure that the Minister of Local Government like the President with regard to the National Assembly, did not exercise these powers to the exclusion of all other parties. Therefore, by the addition to section 26, he too is limited in his powers and all he can do is receive the vetted names and appoint by gazette in the Kenya Gazette.

31. I must at this point note that the general effect of Act No 10 of 1997 was to drastically reduce the powers of the Minister under the Act with regard

to elections and post-election matters. To illustrate this point, I should refer to section 12, which initially gave the Minister power (alone) to establish municipal councils. The powerful amendment was to the effect that when he does so, he shall "consult with the Electoral Commission". The same is true of the amendment to section 28 (with regard to establishment of county and from councils) and urban councils under section 41.

32. More drastically perhaps is the power of the Minister to make rules to determine the qualifications of a councilor under section 53A. This power was taken from the Minister to the Electoral Commission. This is also true of the general power to make rules under section 53C of the Act.

33. In section 54 where it was previously the duty of the Minister to alter electoral areas as the "appropriate authority" the power was even much earlier taken away from him Act No 1 of 1992.

34. What am I saying? I am saying that two clear issues arise from the amendments; firstly, the discretion given to the Minister was either taken away or made subject to consultations and secondly, the principles in section 33 of the Constitution must be adhered to in all cases of nominations.

35. I am to my mind convinced that it would be against the spirit of section

33 of the Constitution to allow consultations up to the point of appointment and then allow the Minister to revoke the appointment without the same process of consultation. The President cannot do that under section 33 and mutatis mutandis the Minister should not do that under statute in spite of the express provisions of section 27(2) of the Act.

36. Without belabouring the point, the proviso to section 27(2) in as far as it purports to contradict section 33 of the Constitution is inconsistent 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 Act No 10 of 1997 respectively. The last amendment should prevail in any event, and in this case a constitutional amendment subsequent to a statutory amendment is always superior.

37. 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 and section 33 has no revocation clause. The revocation clause under section 27(2) is void.

38. This being the case, section 27(2) gives the term of a councilor who is nominated to be five years or such shorter period as the Minister may determine, and I find that in the applicant's case, the term is five (5) years or such period as was specified on appointment. No more, no less!

39. I also note two other issues, which are important in determining this matter. There was no notice given to the applicant on revocation but since I have ruled that the proviso in which the notice is predicated is itself void, then the issue would rest there. Secondly, the Minister proceeded to appoint another councillor in place of the applicant. I have not been told what procedure was used to do to save for gazettelement. It would seem from the annexures to the applicant's affidavit that the Minister did not in this case follow the procedure I have so elaborately set out in this ruling. In effect the appointment of Fred Oyicho is itself illegal and should not stand.

40. I shall now come to a close by answering the question whether the applicant is entitled to the orders for Judicial Review.

### Conclusion

41. I am being asked to issue orders of certiorari. As I understand it, an order of that nature is issued where for example a decision is void and one that cannot be given the clothing of law. It applies for example in a case such as this one to remove and quash decisions of a Government Minister.

42. As I have found that the decision is inconsistent with section 33 of the Constitution, I am satisfied that this is a matter where I can without hesitation grant the orders sought.

43. Accordingly prayer (a), (b) and (c) of the Notice of Motion dated 5<sup>th</sup> August 2002 are hereby granted. In effect Gazette Notice Nos 4200 and 4201 contained in the Kenya Gazette of 20<sup>th</sup> June 2003 are hereby removed to this Court and the decisions contained therein stand quashed. Costs shall be paid by the respondents.