



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Miscellaneous Civil Application No 252 of 2004**  
**Republic ..... APPELLANTS**  
**VERSUS**  
**Mayor Mombasa Municipal Council..... RESPONDENT**  
**JUDGMENT.**

Local Government judicial review application for orders of mandamus to compel the Minister allow a mayor to resume his seat - where the applicant had been nominated as mayor of a municipality but the Minister had sought to quash his nomination where the respondents purported to deny the applicant entry into the councillors' meeting proof of court discretion applicable principles whether the applicant established his case on a balance of probabilities - Constitution of Kenya section 60.

The applicant sought orders of mandamus to compel the P and 2<sup>nd</sup> respondents to permit his resumption to his seat and his duties as the nominated councilor of Mombasa Municipal Council. He also sought an order of prohibition to restrain the 191 and 2<sup>nd</sup> respondents from interfering with the applicant's performance of his duties. It was the applicant's contention that he was in law and in fact the nominated councilor as the Minister's decision to revoke his nomination had been quashed and that the respondents' decision to deny him entry into the meetings of the Municipal Council was in excess of their jurisdiction.

The respondents were opposed to the application on the grounds that the orders sought were discretionary. They further argued that they had not been party to the case filed by the applicant which quashed the decision of the Minister's directive and as such they were not to be bound by orders emanating from the decision. The respondents also objected to the form in which the application had been brought to Court.

Held:

1. No constitutional issues were raised as the application was in the nature of a judicial review.
2. Being a nominated councilor the applicant was entitled to the rights and responsibilities enjoyed by councilors. Any attempt by anybody to stop him from attending the meetings amounted to an exercise of excess jurisdiction.

### 3. Service of the court order quashing the decision of the Minister to revoke

the applicant's nomination was enough notification that the applicant had resumed his original position as gazetted.

Application allowed

Cases

#### 1. Farmers Bus Service & others v Transport Licensing Appeal Tribunal

[1959] EA 779

#### 2. Mohamed Ahmed v R [1957] EA 523 Statutes

1. Constitution of Kenya sections 33, 60, 67, 84

2. Local Government Act (cap 265) section 26

3. Civil Procedure Rules (cap 21 Sub Leg) orders L, LIII

4. Law Reform Act (cap 26)

Advocates

Mr Orengo for the Applicant

**April, 2004, the following Ruling of the Court was delivered.**

Councillor Joseph Okoth Waudi moved the Court seeking an order of mandamus to compel 1<sup>st</sup> and 2<sup>nd</sup> respondents to permit or allow the applicant to resume his seat, office, duty and functions as a nominated councilor of Mombasa Municipal Council.

The applicant further sought an order of mandamus to issue, compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to enforce or give effect to the ruling of the High Court in Nairobi, being HC Misc Civil Application No 802 of 2003, and finally, the applicant sought an order of prohibition stopping in inhibiting the first and second respondents or any officer, servant, agent or authority acting for or under the 1<sup>st</sup> and 2<sup>nd</sup> respondents from barring the applicant from taking part in the proceedings and work of the Mombasa Municipal Council or interfering with the applicant in the performance of his duties and functions as a nominated councilor of the Mombasa Municipal Council. The applicant also prayed that the respondents be condemned with the costs of this application.

The application was supported by a statutory statement and a verifying affidavit. The 1<sup>st</sup> respondent in these proceedings is His Worship the Mayor of Mombasa Municipal Council. The 2<sup>nd</sup> respondent is the Town Clerk of Mombasa Municipal Council and Electoral Commission was named as an interested party. The replying affidavit was sworn by Town Clerk, Rashid Mwakiwiwi.

Before the commencement of the hearing of the application, counsel for the interested party addressed the Court, saying that they were not opposing the application.

Mr Orengo who appeared for the applicant said that in law and fact, the applicant is a nominated councilor, as the Minister's decision to revoke his nomination had been quashed, yet an attempt by the applicant to resume his duties was stopped by the respondents who deny the fact.

The applicant decided to come to Court, other than force his way into the meetings of the council. The advocate for the respondents opposed the application saying that the orders sought are discretionary, and

further, that there was no evidence to show that the 2 respondents prevented the applicant from attending the meetings. That the newspaper cutting attached amounted to hearsay evidence.

The advocate further contended that the respondents were not a party to the case filed by the applicant which quashed the Minister's directive and or order, so they cannot be bound by orders emanating from that case.

The counsel conceded that once the Court quashed the Minister's order revoking the nomination of the applicant, the situation went back to the position whereby the applicant is a nominated councilor whose duties are well known, so he does not need to come back to Court, as he does not need an order for prohibiting which will only interfere with the running of the council affairs. The advocate cited several decided cases which I have read through and considered.

In reply to the above submissions Mr Orengo for the applicant submitted that the 2 respondents could not have been joined in the earlier case because the decision complained of by the applicant did not emanate from them. He submitted that the order of mandamus is the most extensive which should be applied where there is a specific legal right which is violated as in the case where the respondents and or the agents stopped the applicant from attending council meetings, yet the order by the minister revoking his nomination was quashed by this Court.

Mr Orengo submitted further that the act of the respondents in refusing to allow a duly nominated and gazetted councilor to take part in the council meeting is acting in excess of jurisdiction or exercising jurisdiction which they do not have. An order of mandamus should be available to the

applicant in these circumstances. He criticized the respondent's failure to produce the original gazette notice, which nominated the applicant as a councilor. He contended that the one they produced, Gazette Notice No 4201, is the one where the Minister revoked the applicant's nomination, which revocation was quashed by the Court.

Mr Orengo made a reference to Sec 60 of the Constitution which gives the Court original unlimited jurisdiction in all civil matters. Such jurisdiction he said is under the Law Reform Act, but exercised by Sec 60 of the Constitution. He also referred to Sec 33 of the Constitution, which if read with Sec 26 of the Local Government Act, spells out how a councilor is to be nominated. These sections form the legal basis upon which the application is made, otherwise this application has no constitutional issues to be determined under either section 84 or 67 of the Constitution.

On the issue of want of form, Mr Orengo referred to order LIII as read with order L r 16, which requires a respondent, " who wishes to oppose any motion to file and serve a replying affidavit or a statement of grounds of opposition." He submitted that the respondents served him with a replying affidavit which did not complain about the format of the application. He submitted further that there is no legal basis for serving judicial review applications on the Attorney General. To this submission, he replied on 2 authorities- ie Farmers Bus Service & others vs The Transport Licencing Appeal Tribunal and Mohamed Ahmed vs R [1957] EA. The findings

in both cases which Mr Orengo relied on is that prerogative orders are issued in the name of the Crown, and applications for such orders must be correctly instituted

Despite the finding in the above 2 cases, counsel for the respondents submitted that the format of such applications do not include interested parties.

Having summarized the arguments from the two learned advocates, I first considered whether there were any constitutional issues raised in the application considering that certain sections of the Constitution were quoted in the heading.

From the submissions of the counsel for the applicant which I considered, I found that there are no constitutional issues raised as this is a proper application of the judicial review.

Both advocates were in agreement on the fact that the applicant is presently "a nominated councilor", the Minister's revocation of his nomination having been quashed by the High Court.

Being a nominated councilor, therefore, the applicant is entitled to the "rights and responsibilities" so to speak, enjoyed by other councilors, including attending council meetings. Any attempt by any body including the 2 respondents from stopping him from attending meetings amounts to excess jurisdiction in that they would be exercising jurisdiction they do not have.

The 2 respondents have denied accusations tabled against them, and termed the evidence placed before Court as "hearsay".

The fact of the matter is that the applicant does not participate in the meetings and or proceedings of the council as a nominated councilor, because of being "barred or stopped by the IA and 2, d respondents and by officials of the Mombasa Municipal Council", as averred in para 8 of the verifying affidavit, an averment which the respondents denied in the replying affidavit, dated 23<sup>d</sup> March 2004. I find the respondent's averment in para 6 of the replying affidavit, rather absurd, to say the least. The revocation of his nomination by the Minister having been quashed, by an order of the court, which order was served on both the respondents. I find that service of that order on the respondents was sufficient notice and or information to the respondents that the applicant resumed his original position of nominated councilor, as the gazette notice nominating him was and is still valid. A requirement by the respondents of a letter or correspondence from the applicant "seeking or requesting to be allowed to resume his duties", has no basis whatsoever, and I reject.

The respondents were not parties to HC Misc 802 of 2003, and quite rightly so, because they had not revoked the applicant's nomination and no orders were therefore directed at them.

From the evidence and submissions which I have considered from both advocates, I have come to the conclusion that the first and second respondents, their servants, agents, and or persons working under them prevented the applicant from taking up his position as a councilor, or taking part in the proceedings of the council. I am satisfied that the applicant is entitled to the orders sought, and I proceed to grant orders in terms of prayers a, b, c and d in the notice of motion dated 4<sup>th</sup> March 2004.

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