



Editorial Note  
JUDICIAL REVIEW  
- LOCAL GOVERNMENT  
- S 245 (1) of LG Act Minister cannot appoint a person  
who is not a public officer  
- Public officer defined  
- Error of law as basis of review.

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC CIVIL APPLICATION NO 427 OF 2004**

**ROBERT GATHINJI KAMAT ..... PLAINTIFF**

**VERSUS**

**THE MINISTER OF LOCAL GOVERNMENT**

**HONOURABLE KARISA MAITHA ..... DEFENDANT**

**JUDGMENT**

This is an application for Judicial review. On 1st April 2004 Duty Judge Lenaola gave an exparte order for leave on 1st April 2004. Service on the Registrar had been dispensed with. The application is supported by a Statement filed on 1st April 2004 together with a verifying affidavit of the applicant sworn on the same date.

According to prayer (1) of the reliefs sought in the Statement, the applicant states that he seeks leave to apply for an order of certiorari to quash the Minister for Local Government's decision to revoke his appointment.

The applicant also seeks an order of prohibition to prohibit the Minister from appointing any other person to replace the applicant.

The applicant seeks costs as well. In the substantive motion dated 20th April 2004 the applicant seeks judicial orders of certiorari and prohibition. The grounds relied on are:-

- (i) That the applicant was appointed a public officer to Limuru Municipal Council on 21st November, 2003
- (ii) That the Minister revoked the aforesaid appointment unilaterally on 23rd March 2004 without any notice to the applicant and without giving him an opportunity to be heard
- (iii) The decision of the respondent to revoke the exparte applicant's appointment is biased and tainted with malice
- (iv) The respondent has acted without due regard to the rules of natural justice that none is to be

condemned unheard

(v) It is necessary to keep in check the excesses of the respondent to prevent abuse of the law and statutory powers which may lead to injustice

(vi) The notice under reference made by the respondent is illegal for want of jurisdiction and should be quashed. The verifying affidavit repeats the above points but copy of Gazette Notice 83 43 of 20th October, 2003 appointing inter alia the applicant and No 2137 of 23rd March 2004 appointing other persons and revoking the applicant's appointment have been attached.

The Attorney General's representative Mr Ombwayo who represents the respondent did not file any papers in reply. Instead he relied on following points 1) In the Statement no relief of the judicial order of certiorari has been sought and only the Order of prohibition has been sought.

He contends that the relief and the grounds specified in the Statement must tally with those set out in the substantive Notice by way of Notice of Motion and therefore the relief of order of certiorari sought in the Notice of Motion must be regarded as an additional ground or relief and it is in contravention of O 53 rule 4

2) That the order sought is to quash Gazette Notice 2137 which notice include other persons not served

3) That the Gazette Notice appointing the applicant and which purports to be based on S 245 (1) of the Local Government Act only gives him the power to appoint a public officer and that the applicant is not a public officer as defined under S 3 of the Interpretation and General Provisions Act cap 2 of the Laws of Kenya and this being the case the appointment having contravened the law is null and void and there is therefore nothing to quash

4) That the applicant did not file a certified copy of the decision together with the affidavit before the hearing of this application as required under O 53 rule 7. Concerning the point on whether the applicant is a public officer, the applicant relied on the letter dated 22nd May 2003 from the Permanent Secretary for Local Government which stated inter alia that the public officers are to be sworn like councilors and be treated for all purposes as councilors. It was therefore argued that the applicant should be regarded as if he has been appointed as a councilor. It was argued that the appointment per se confers on him the status of a public officer.

Turning to the contested points I hold that since the applicant did not seek the relief of the judicial order of certiorari in the Statement and it only surfaced in the Notice of Motion this is a contravention of O 53 rule 4 and I do uphold the respondents contention and I therefore strike out the prayer on certiorari. This leaves the prayer of the judicial order for prohibition. My holding of this is that as prohibition addresses or looks to the future and the Minister has not appointed any replacement nor is any threat to appoint alleged the order sought cannot be granted because there is no proof that an appointment is threatened.

On the point that other persons are involved I would only have upheld the objection if other appointments were going to be the subject matter of these proceedings and had not been served or reasons for non service had not been given. However it is clear that if the court were inclined to grant the orders the same could specify the applicant as the person entitled to the relief leaving the others. Even on common sense principles I would dismiss this objection.

Similarly on the last point that a certified copy of the decision has not been availed there is no mention in O 53 rule 7 of the need to certify a "decision". I hold that the Gazette notices clearly express the appointment and the revocation and these are the decisions under challenge, I hold it was sufficient to attach the Gazette notices.

Finally on the point that the applicant is not a public officer and could not be appointed under S 245(1), I am in full agreement with the argument presented on this, in that there is nothing in the application to demonstrate that as at the time of appointment the applicant was a public officer within the meaning set

out in S 3 of the Interpretation and General Provisions Act cap 2. S 3 defines Public officer as under:-  
“Public Officer” means a person in the service of or holding office under the Government of Kenya, whether that service or office is permanent or temporary, or paid or unpaid.”

The Minister did not therefore have powers under S 245(1) of the Local Government Act to appoint the applicant who was infact not a public officer and his appointment being contrary to statute was null and void from the start. I hold that the Minister’s appointment was in excess of his jurisdiction conferred by the Local Government Act and was ultra vires his power. By revoking the appointment the Minister must have acted on good advice. Had he not revoked the appointment this court would have quashed the appointment for this reason.

Where a public body or tribunal makes an error of law as in this case this court is entitled to quash the appointment but since the Minister had already corrected the error by revocation I need say nothing further – see ANIMISTIC LTD v FOREIGN COMPENSATION (No 2) [1969] AC 147 Since no judicial orders could be granted, for the reason that the reliefs and grounds, sought in the Statement were at variance in so far as certiorari is concerned and that prohibition operates as to the future, this application lacks substance and it cannot sustain itself on this ground alone.

In addition, or in the alternative since the applicant has not proved that he was a serving or existing public officer the application must fail on this ground as well. Under S 245 (1) the Minister can only appoint a serving public officer and the appointment must be for the purpose of conducting investigations, researches and inquiries.

Under S 113 the Minister has power to second a public officer but this provision has not been invoked and in the opinion of this court it would not have made any difference to this verdict. The arguments and authorities on the rules of natural justice cited to court although useful have no relevance in view of the above. In the result the application for judicial review is dismissed in its entirety. However as regards costs I make no order as to costs since the Minister was the author of the events described in this ruling.

DATED and delivered at Nairobi this 16th day of July 2004.

**J G NYAMU**

**JUDGE**