REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 198 OF 2004

IN THE MATTER OF AN APPLICATION BY DOROTHY NDUKU NZIOKA

FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND MANDAMUS

IN THE MATTER OF THE CONSTITUTION OF KENYA AND THE

LOCAL GOVERNMENT ACT, CHAPTER 265 OF THE LAWS OF KENYA

AND

IN THE MATTER OF COUNCILLOR DOROTHY NDUKU NZIOKA

BETWEEN

REPUBLIC……..….APPLICANT

VERSUS

HON. E.K. MAITHA, MINISTER FOR

LOCAL GOVERNMENT……..……..….1ST RESPONDENT

ATTORNEY-GENERAL…….…….....….2ND RESPONDENT

ELECTORAL COMMISSION OF KENYA…….INTERESTED PARTY

***Ex Parte*:**

DOROTHY NDUKU NZIOKA

JUDGEMENT

1. **The Application, the Prayers, and the Depositions**

This was an application for Judicial Review Orders brought by virtue of

Section 8(2) of the Law Reform Act (Cap. 26), Order LIII rule (1) of the Civil Procedure Rules, Section 33 of the Constitution of Kenya, and Sections 26 and 27 of the Local Government Act (Cap. 265). The required leave to move the Court in this manner had been obtained by the Applicant on 24th February, 2004. The Applicant's prayers are as follows:

(a) an Order of Certiorari to remove into the Court and quash the decision of the first Respondent contained in the Kenya Gazette of 13th February, 2004 and appearing therein as Gazette Notice No. 1094, revoking inter alia, the nomination of ***DOROTHY NDUKU NZIOKA*** as a Councillor in the Machakos Municipal Council;

(b) an Order of Certiorari to remove into the Court and quash the decision of the first Respondent contained in the Kenya Gazette of 13th February, 2004 and appearing therein as Gazette Notice No. 1093, nominating Councillors for various local authorities including the Machakos Municipal Council;

(c) an Order of Mandamus compelling the first Respondent to reinstate ***Dorothy Nduku Nzioka*** to her previous position as a Nominated Councillor in the Machakos Municipal Council;

(d) the Respondents do pay the costs of this application.

The application was based on a statutory statement filed in accordance with Order LIII rule 1(2) of the Civil Procedure Rules, and annexures thereto, and the Verifying Affidavit of ***Dorothy Nduku Nzioka*** sworn on 23d February, 2004 and filed on 24th February, 2004. There are also grounds stated on the face of the Notice of Motion, and these are:

(i) that, the first Respondent had failed to apply the criteria and principles for the nomination of Councillors as required by the Constitution and the Local Government Act (Cap. 265);

(ii) that, the first Respondent's power and authority are limited to the appointment of persons nominated by political parties and approved and ratified by the Electoral Commission of Kenya;

(iii) that, the first Respondent has acted in excess of its jurisdiction;

(iv) that, Section 27 of the Local Government Act (Cap. 265) is not consistent with the criteria and principles contained in Section 33 of the Constitution;

(v) that, Section 27 of the Local Government Act is void to the extent of its inconsistency with Section 33 of the Constitution;

(vi) that, Section 27 of the Local Government Act undermines the principles of representative Government as characterised by local authorities;

(vii) that, the decision of the first Respondent undermines the principles of democracy and good governance;

(viii) that, the decision of the first Respondent is unlawful and mischievous.

The main elements of the Applicant's statutory statement are as follows:

(a) that, the Applicant was nominated by the National Rainbow Coalition (NARC) as a Councillor in the Machakos Municipal Council, following the general elections of 27th December, 2002;

(b) that, NARC forwarded the Applicant's name to the Electoral Commission of Kenya for verification and confirmation of her qualifications and to ensure compliance with the criteria and principles in the Constitution and the Local Government Act;

(c) that, the Electoral Commission then forwarded the Applicant's name to the first Respondent for appointment as a Nominated Council and for the publication of her name as such in the ***Kenya Gazette***;

(d) that, the first Respondent duly appointed the Applicant as a Nominated Councillor and caused the appointment and nomination to be published in the ***Kenya Gazette;***

(e) that, on 13th February, 2004 the first Respondent revoked the said nomination and published the revocation of nomination in the ***Kenya Gazette*** No. 1094;

(f) that, the first Respondent nominated ***SERAH NZEMBI NZIOKA*** as Councillor to take the place of the Applicant and this second nomination was published in ***Gazette Notice*** No. 1093 in the ***Kenya Gazette*** of 13th February, 2004;

(g) that, the first Respondent has no powers to revoke the nomination of the Applicant as a Councillor in the purported exercise of Section 27(2) of the Local Government Act;

(h) that, the first Respondent had not sought the authority or approval of the nominating body which is the political party, NARC.

On 9th March, 2004 the Attorney-General's office gave notice of its appointment, to represent the first Respondent; and on the same day ***Mr. A.O. Meso,*** Litigation Counsel in the Attorney-General's Chambers, filed a notice of preliminary objection, which asserts as follows:

(i) that, the application is incompetent and incurably defective;

(ii) that, no evidence has been duly tendered in support of the application.

One day before, on 8th March, 2004 an Advocate working with the Interested Party, ***Jemimah Wanza Keli*** of the Electoral Commission of Kenya, had sworn a replying affidavit, in the following terms:

(a) that, the Applicant had been nominated as a Councillor by the National Rainbow Coalition (NARC), for membership of the Machakos Municipal Council during the 2002 general elections;

(b) that, the NARC nomination of the Application was duly verified by the Interested Party and forwarded to the first Respondent for gazettement;

(c) that, the Applicant was gazetted as Councillor vide Gazette Notice No. 1092 by the first Respondent;

(d) that, on the 19th of January, 2004 the nominating political party, NARC, wrote to the Interested Party requesting it to de-nominate the Applicant along with other Councillors;

(e) that, acting on the request of the nominating party, the Interested Party verified that the proposed party nominee, one ***SERAH NZEMBE***, was a registered elector and qualified to be a Councillor under the law;

(f) that, the proposed nominee was qualified to be nominated as Councillor in the Machakos Municipal Council;

(g) that, the Interested Party then forwarded the names to the Minister for Local Government, under covering letter of 19th January, 2004 for the purpose of revocation of the nomination of the existing Councillors concerned and the nomination of the new party nominees;

(h) that, the procedure followed in the nomination and the revocation was in accordance with the law;

(i) that, the political party having appointing powers should also have revocation powers in respect of nominated Councillors as well as the powers to replace those whose nominations were revoked.

On 25th March, 2004 the Applicant filed a further affidavit in support of her Notice of Motion. She depones as follows:

(a) that, the deponent who is the aggrieved party, had not been personally served with the Minister's impugned notice of intended revocation of her nomination;

(b) that, the deponent was not accorded a chance by the Minister to know the reason for revoking her nomination, and neither was she accorded an opportunity to defend herself;

(c) that, the defendant was, in effect, condemned by the Minister unheard.

On 21st May, 2004 the ***Hon. Emmanuel Karisa Maitha***, the first Respondent, filed a replying affidavit in which he deposes as follows:

(i) that, on or about 19th January , 2004 the National Rainbow Coalition wrote to the Electoral Commission of Kenya advising ECK to de-nominate Councillors including the Applicant;

(ii) that the ECK thereupon, wrote to the Ministry advising the deponent to revoke the nomination of the various Councillors including the Applicant;

(iii) that, upon receipt of the letter from ECK, the deponent proceeded to revoke the nomination of the Applicant, in exercise of the powers conferred upon him by the Local Government Act (Cap.265).

(iv) that, the deponent believes the advice tendered to him by the State Counsel, that the impugned revocation of the Applicant's nomination was in every respect valid and in accordance with the law;

(v) that, the deponent has been advised by the State Counsel, whom he believes, that the nominating party (NARC) has authority to institute the process of revocation of nominations, and that the nominating party ought in this instance to be enjoined as an interested party in the suit herein;

(vi) that, the deponent equally believes the advice of the State Counsel, that the Minister's discretion to revoke the nomination of a Councillor, by virtue of the Local Government Act (Cap. 265), ought to be exercised upon receipt of due advice from the Electoral Commission acting on the indications of the nominating party.

2. **Submissions for the Applicant**

Perhaps the most critical issue in respect of which ***Mr. Kauma Mussilli*** for the Applicant made submissions, an issue which is likely to determine the outcome of these proceedings, is the relationship between Section 27 of the Local Government Act (Cap. 265) and Section 33 of the Constitution. The main thrust of the depositions made on behalf of the Respondents is that, whatever shortcomings one may associate with the apparently unprincipled and capricious removals of nominated Councillors from their positions and their replacement in a cavalier-looking fashion, ***this is all done under the umbrella of Section 27 (2) of the Local Government Act (Cap. 265).***

Section 27 of the Act thus provides:

"(2) The term of office of every nominated Councillor 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 Councillor by notice in writing delivered to the Councillor, and thereupon his office shall become vacant."

The power to nominate Councillors by the Minister is provided for in Section 26 of the Act. It is by that Section provided:

> "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; ……
>
> (c) ……..
>
> (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 Councillors under this Section.

There is, therefore, a statutory obligation placed on the nominating authorities for councillors to comply with the conditions of nomination which are set out in Section 33 of the Constitution. And what are those conditions?

Let us look at S.33(2) of the Constitution: it would dictate that those to be nominated as Councillors must be *"persons who if they had been nominated for a [Council] election, would be qualified to be elected as [Councillors]"*.

Let us look at S.33(3) of the Constitution: it would require that those to be appointed as Nominated Councillors be "nominated by the parliamentary parties according to the proportion of every parliamentary party in the [elected Council membership], taking into account the principle of gender equality."

Mr. Mussilli for the Applicant submitted that Section 27 of the Local Government Act, in so far as it provides for the revocation of appointment of Nominated Councillors, was inconsistent with the principles in Section 33 of the Constitution which provides for parliamentary nominations and which the Local Government Act, by virtue of its Section 26, ***has abstracted and made part of its own profile of statute law.*** Counsel did not, however, make any specific submission on the legal significance of detaching a specific provision from the Constitution and attaching it to the scheme of operation of an ordinary statute. All laws are, of course, by Section 3 of the Constitution, subject to the supremacy of the Constitution. But I think that in a unique situation in which a portion of the Constitution is excerpted and fitted into the content of an ordinary statute, its functioning within that statute will be governed by the normal mode of the operation of the whole statute, and it could not claim superiority over the remaining parts of the enactment in question. I think the real significance of the reference in Section 26 of the Local Government Act, to the Constitution, is that that section is required to accommodate and be governed by those ***principles,*** rather than by the specific provisions of the Constitution.

In this regard, counsel's somewhat bare submission that section 27 of the Local Government Act is necessarily void because of inconsistency with Section 33 of the Constitution does not, at face value, carry validity – though this does not rule out an inconsistency at a fundamental level of principle. And the principle has to turn on the idea of ***democratic election and representation***, which the Constitution is to be taken as a whole to provide for**.** ***Mr. Mussilli*** submitted that: *"Decisions of the first Respondent undermine the principles of democracy and good governance"*.

What is the fundamental principle in Section 33 of the Constitution? That section is concerned to give effect to the representation of special interests in the National Assembly; it seeks to ensure that those nominated to Parliament are in the first place qualified to stand as candidates for elected seats; it seeks to uphold the democratic intent of the people as expressed in political party strength in Parliament; it seeks

to promote the principle of gender equality; it entrusts the responsibility for facilitation of these principles to the Electoral Commission. The basic principle seems to be that a certain limited portion of the parliamentary strength in numbers, is to be reserved to a form of ***indirect*** democracy purveyed by political parties, outside the framework of direct elections by the voters themselves.

Counsel for the Applicant contended that the foregoing principles are offended by Section 27 of the Local Government Act (Cap.265) which has set up a procedure for ***Ministerial revocation*** of appointments of Nominated Councillors. As must now be quite clear, the ***political party***, under Section 33 of the Constitution, is entrusted with the primary role in the indirect democratic process attached to the nomination of a section of the parliamentarians.

It is clear to my mind that a correct application of Section 26 (nomination of Councillors by the Minister) and Section 27 (revocation of the nomination of Councillors) has to be in accordance with the fundamental principle in Section 33 of the Constitution: and this dictates that the nomination (and, of course, the revocation of nomination) of Councillors must be expressed in the Act to be the primary responsibility of the ***Political parties*** and not of the ***Minister.***

Although affidavits have been sworn for the Respondents which suggest that in the impugned revocations of nomination the Minister merely acted as a mouthpiece of the political parties, I am concerned with the express provisions of Section 27 of the Local Government Act (Cap.265). Even if the Minister were to strictly comply with the principle running through Section 33 of the Constitution, by allowing the political party to play its role as the originator of the nomination process for Councillors, it will still remain true that Section 27 of the Local Government Act stands out as a naked effrontery to the principles set out in the said Section 33 of the Constitution. Let me recall that section 27 of that Act stipulates: *"… the Minister may **at any time** in his discretion terminate the nomination of a councillor …."* The effect of this provision in Section 27 of the Act, is that the principle of **indirect democracy** in the nomination of Councillors, an indirect democracy purveyed by the political parties, is now ***usurped by the Minister.*** This usurpation is a contradiction of the principle in section 33 of the Constitution. Quite plainly therefore, ***Section 27 of the Local Government Act (Cap. 265) is unconstitutional and must be struck out***. It is to be struck out firstly because it contradicts the plain intent of Section 33 of the Constitution, and secondly because it pretends to validate an authoritarianism, now being bestowed upon the Minister, which the Constitution as the supreme law has expressly forbidden.

Such an observation has indeed already been made by my brother, the Honourable ***Mr. Justice Lenaola*** in another Judicial Review matter, ***Republic v. Hon. E.K. Maitha & Others,*** *ex parte* ***Joseph Okoth Waudi,*** Misc. Civil Application No.802 of 2003. In his words:

> *"I am …. 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 [of the Constitution] and **mutatis mutandis** the Minister should not do that under statute in spite of the express provisions of Section 27(2) of the Act."*

The learned judge went on to hold:

> *"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 so I 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 ….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."*

I am wholly in agreement with the decision of the learned judge. The term, therefore, of a Nominated Councillor is to be regarded as five years or such period as would have been specified at the very beginning. The Minister has no authority to revoke the nomination of a Councillor and it matters not whether he pleads that he was not himself taking the revocation decision and was only acting upon a

series of recommendations – whether from a political party or from the Electoral Commission of Kenya or from both.

Counsel for the Applicant drew my attention to an aspect of Section 27 of the Local Government Act (Cap.265) which, even had it been held to be valid in law, had not been complied with by the Minister in his purported revocation of the Applicant's status as a Nominated Councillor. The proviso to Section 27(2) states that in revoking the nominated status of a Councillor, the Minister is to give "*notice in writing delivered to the Councillor"*. Although it is not in dispute that the Minister had not complied therewith, I will make no further comment on this, since I have already held that the Minister lacked legal authority to revoke the Applicant's status as a Nominated Councillor.

3. Submissions for the Respondents

Mr. Meso from the Attorney-General's office made submissions the main thrust of which was that, the Minister in purporting to revoke the Applicant's status as a Nominated Councillor, was in no way overbearing as he was only implementing recommendations emanating from the NARC party and from the Electoral Commission of Kenya. ***Mr. Meso*** also assumed that in the measure in which the Minister was merely implementing the recommendations of others, and insofar as Section 27 of the Local Government Act (Cap.265) existed which purported to confer powers of revocation upon the Minister, then ***ipso facto***, the Minister was acting lawfully and this Court must uphold what he did, and dismiss the application.

Mr. Meso acknowledged that it is precisely the said purported revocation of the Applicant's status, that led to this application for Judicial Review. He acknowledged too, that this Court has the jurisdiction to check and control all inferior tribunals carrying statutory duties of an administrative or quasi-judicial character, where the performance of such tasks might affect the rights of the subject. And even more to the point, counsel recognised that it fell within the jurisdiction of this Court to determine whether the Minister, in the instant case, did indeed have power duly conferred by the enabling statute (the Local Government Act (Cap. 265)), to revoke the nominated status of the Applicant as a Councillor.

It is not possible for me, however, to agree with the further submission of Counsel that: *"At the outset, it is not within the jurisdiction of the Court in an application for Judicial Review to determine the constitutionality or otherwise of a provision of statute law; that jurisdiction must be exercised as per section 67 of the Constitution"*.

What does the said Section 67 of the Constitution provide? I think the relevant part of it is sub-section (1), and it provides as follows:-

"Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate Court and the Court is of the opinion that the question involves a substantial question of law, the Court may, and shall if a party to the proceedings so requests, refer the question to the High Court."

Was counsel suggesting that this Court may not make interpretations of the Constitution unless the matter arose in a lower Court and was referred to the High Court, by virtue of Section 67 aforesaid? With great respect, that would be a misunderstanding of the law. Those in the legal profession all recognize that by Section 60 of the Constitution, the High Court is "*a superior court of record, [with] unlimited original jurisdiction in civil and criminal matters*", and hence this Court does not wait on references emanating from lower Courts. More specifically, in the present constitutional dispensation, the High Court is the Constitutional Court, with the basic authority to hear and determine all constitutional questions whether at first instance or upon reference from other tribunals.

Besides, it has to be recognized that the Constitution as the basic law of the land, constitutes the juridical medium in which this Court operates as it determines questions of legality, in the resolution of disputes brought before it. I do not agree with counsel for the Respondents, that this Court can extract itself from that constitutional medium, and determine fundamental public law questions such as those which are the hallmark of Judicial Review, without resolving any constitutional issues in its path.

Mr. Meso was intent on proving that the Minister had been right in purporting to revoke the status of the Applicant as a nominated Councillor, and in that behalf he cited the Court of Appeal case, ***Kenya National Examinations Council v Republic*** **ex parte** ***Geoffrey Gathenji Njoroge and Nine Others***, Civil Appeal No. 266 of 1996. He submitted that it had been in that case held that Judicial Review did not lie to correct the course, the practice or the procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That case, in the words of counsel, held that "*once it is established that the authority has power (discretion), then the authority cannot by way of mandamus be compelled to exercise the power or discretion in a particular way*".

Mr. Meso disputed the applicability of Section 33 of the Constitution in the present proceedings, maintaining that "*that section does not provide for the de-nomination of [nominated parliamentarians*]." Therefore, counsel submitted, this provision was inapplicable in respect of the nomination scheme for Councillors under Section 26 of the Local Government Act (Cap.265); and so, counsel submitted: "*Revocation of the nomination of Councillors is thus left to be dealt with by Section 27(2) of the Local Government act"*. ***Mr. Meso*** arrived at this conclusion through what he saw as a plain meaning approach to constitutional interpretation, in aid of which be cited two cases: ***Pinner v Everett*** [1969] 1 WLR 1266 and ***McCormick v Horsepower Ltd*** [1981] 1 WLR 993. He also cited F.A.R. Bennion, ***Statutory Interpretation***, 3rd ed. (London: Butterworths, 1997), as well as other authorities on the interpretation of statutes.

Counsel referred me to an earlier Judicial Review matter in this Court, ***Republic v. Minister for Local Government and others,*** *ex parte* ***Mumbi Ngaru***, Misc. Civil Application No. 1152 of 2000, in which the Honourable ***Mr. Justice Visram*** had remarked as follows:

> *"Moving on to another aspect, it is quite clear that only the Minister has the statutory power to denominate a nominated Councillor. That power must only be exercised by him within the statutory limits. He cannot, in the exercise of that power rely on the advice of any other person or authority and if there is danger or a real likelihood of danger that he is going to exercise that power wrongly, he may be restrained by an order of prohibition. The letter by the Electoral Commission addressed to the Minister's Permanent Secretary in this case has muddled the exercise of the power, and I am of the view that it is appropriate to prohibit the Minister from relying on that extraneous matter in deciding whether or not to denominate the applicant. He must exercise that authority by himself as authorized"*.

The decision in the ***Mumbi Ngaru*** case, as I see it, does not help the Respondent's case, as it would render unlawful all the correspondence that came from the NARC party and the Electoral Commission to the Minister and upon which the Minister admittedly relied in purporting to revoke the nominated status of the Applicant as a Councillor.

More importantly, I will depart from the aspect of the ***Mumbi Ngaru*** case that tends to approve the Minister's purported revocation of the nominated status of a Councillor. I believe that the Constitutional point related to that element was not canvassed before the Honourable ***Mr. Justice Visram***, and so the passage in his Judgment set out above is not to be seen as the ***ratio decidendi*** of that case, and may not be taken as persuasive authority in the instant proceedings.

In these proceedings the pertinent authority which I would acknowledge as persuasive is ***Republic v Hon. E.K Maitha and others,*** *ex parte* ***Joseph Okoth Waudi***. It is in that matter that the fundamental constitutional question was considered; and it is this issue in particular that, I think, must be the basis of the outcome in these proceedings. I am thus not in agreement with counsel for the Respondents who attempted to distinguish the ***Waudi*** case on the basis that "*there was no consultation with other parties*". As I have noted already, it is precisely such consultation which the ***Mumbi Ngaru*** case had held to be inappropriate. It is thus rather strange that counsel should contend: "*But in the instant case, there was consultation, triggered by the political party and the Electoral Commission"*.

From his submissions on substantive issues, counsel for the Respondents challenged the competence of the application in terms of formal propriety. He contended that the evidence sought to be relied on by the

Applicant, the main core of which was contained in the statutory statement of facts as verified by affidavit, was improperly brought before the Court and should be disregarded. Counsel submitted that the mode of delivering evidence must be by affidavit or ***viva voce*** rendition, but not by the statutory statement. He cited in aid the case, ***Commissioner – General, Kenya Revenue Authority through Republic v Silvano Onema Owaki t/a Marenga Filling Station***, Civil Appeal No. 45 of 2000. On the status of the statutory statement such as the one in the present proceedings, the learned Judges of the Court of Appeal held as follows:

> "We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of Rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976, Vol. 1 at paragraph 53/1/7:
>
> '***The application for leave "by a statement'*** – The facts relied on should be stated in the affidavit (see ***R v Wandsworth JJ ex parte Read*** [1942] 1 K.B. 281). "The statement" should contain nothing more than the name and the description of the Applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.'

At page 283 of the report of the case of ***R v Wandsworth Justices***, Viscount Caldecote, C.J. said:

'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior Court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this Court is by way of affidavit. For that reason the Court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.'

> The court in the ***Wandsworth*** case was considering the provisions of Order 53 of the English Rules of the Supreme Court which are ***in pari materia*** with our Order LIII of the Civil Procedure Rules."

To the same intent counsel cited the decision of this Court in ***Marie Elizabeth Christiane Adelaide de Brouwer v. Coraline Sheila Limet and Others***, Miscellaneous Civil Case No.1080 of 2001, where the Honourable Mr. Justice Visram had thus remarked:

> *"The Judges of Appeal [in Commissioner General, Kenya Revenue Authority through Republic V. Silvano Onema Owaki t/a Marenga Filling Station] in that case held that facts set out in the Statement were worthless. That is largely what happened in the case before me. The Applicant set out all the facts in the Statement and not in the affidavit, with the result that the same are of no evidential value and cannot be relied upon to assist her case. That being the case, I do not find it necessary to consider the other issues agitated before me as nothing useful will be achieved thereby"*

Relying on the forgoing authorities, ***Mr. Meso*** for the Respondents submitted that the Applicant had failed to place before the Court any evidence that would serve as the basis for a proper exercise of jurisdiction; and he called for the dismissal of the Judicial Review application. The merits of this submission must be considered right from the leave-stage proceedings, where ***Mr. Meso*** had made a similar submission. The Honourable ***Mr. Justice Lenaola,*** at that "threshold" stage, made the following remarks:

> *(a) that under Order LIII rule 2, the Statement of Facts filed with the application for leave for Judicial Review should essentially be a short document dealing only with certain ground facts which would generally remain constant, at least in the short term, namely -*
>
> (i) ***name of the Applicant***;
>
> (ii) ***description of the Applicant***;

(iii) the relief sought;

(iv) the grounds upon which it is sought.

(b) *that, the Statement of Facts must travel with a Verifying Affidavit, which is more detailed and verifies the basic facts as stated. I would add that, being explanatory, the affidavit is more of an accounting document regarding the facts stated in general, but more particularly shedding light on the* ***reliefs sought and the grounds upon which those reliefs are sought.***

(c) that, the Applicant had reversed the order of detail, and whereas her Statement of Facts was a lengthy one, her Verifying Affidavit was brief and appeared to have been put in merely as a technical formality;

(d) that, the significance of an affidavit is that, to adopt the language of ***Mulla's Code of Civil Procedure****, 16th ed, Vol.2, page 2349, "****an affidavit is a mode of placing evidence before the Court****";*

(e) *that, the term "verification" as defined in the law dictionary means: "****an affidavit, attachment to a statement affirming the truth of that statement",*** *or "confirmation of correctness, truth or authenticity of pleading";*

(f) that, on the basis of all the authorities, "the clear message is that evidence in an application under Order LIII should be ***in the affidavit and not in the Statement of Facts****";*

(g) *that,* ***"too many applications for Judicial Review seem to heap all the evidence in the Statement of Facts and not the Affidavit";***

(h) *that, the Applicant has not properly presented her evidence because "to exhibit the decision which is sought to be quashed as part of the Statement of Facts is … untenable within the meaning and interpretation ascribed to Order LIII rule 2*".

Mr. Justice Lenaola, at the leave stage, had then asked himself the question: "Having stated as I have, the next question would then be, is the defect so serious as to warrant setting aside the leave granted?" Relying on the decision in ***R v. Secretary of State for the Home Department,*** *ex parte* ***Begum*** [1989] 1 Admin. L.R. 110, the learned Judge ruled, and I agree, that the jurisdiction to set aside leave for Judicial Review application should be exercised only ***very sparingly***. On that principle I will also hold here, that the discretion to dismiss the main motion for Judicial Review such as the instant one, on grounds pertaining to the form in which the supporting papers have been filed, should be exercised only very sparingly.

I am constrained not to accept counsel for the Respondent's submission that the present application be dismissed on the technicality that the Applicant has mixed up the respective sequencing of the Statement of Facts and the Verifying Affidavit. I am inclined to this position for the following reasons:

(a) I am taking judicial notice of an observation made by ***Mr. Justice Lenaola*** as already noted, and also made by myself over time, that most Advocates representing parties in Judicial Review matters, have in practice confused the modes in which they should present the Statement of Facts and the Verifying Affidavit, so that the correct procedure has not been generally recognized. I think the benefit of this uncertainty, at least in the short term, should go to the Applicant who has presented herself before the Court with a grievance.

(b) The Respondents had made formal challenge of the grant of leave preceding the current application before the Honourable ***Mr. Justice Lenaola,*** who had given careful consideration to the matter before dismissing the argument now being re-submitted before me. The learned Judge in that case remarked:

"It is not denied that the … [Applicant] sought Orders of Certiorari within time as the decision

sought to be quashed is dated 13th February, 2004. I did consider the substance of the application for leave and granted leave. There is nothing so compelling to warrant setting aside, in spite of the shortcomings which I have attempted to articulate … Those are not such as to force my hand in [applying] that sparingly – used power".

(c) Apart from the impugned Verifying Affidavit by the Applicant dated 23rd February, 2004 she does have other affidavits on file – a Further Affidavit of 25th March, 2004 and an affidavit of 2nd July, 2004 to which the impugned ministerial ***Gazette Notice*** is attached.

(c) I think the Applicant has generally attempted, if not impeccably, to place her case before the court asking for Judicial Review, to deal with irregularities among public officials that have caused prejudice to her. The ends of justice would dictate, I believe, that the application be heard on the merits.

4 Decision and Final Orders

It is clear from my analysis of documentation, evidence and submissions that Section 27 (2) of the Local Government Act (Cap.265) by virtue of which the Minister purported to revoke the status of the Applicant as a Nominated Councillor, is in conflict with the Constitution in general and with Section 33 thereof in particular. It follows that the said provision of the Local Government Act is a nullity in law, and thus it could not authorize a lawful act of revocation of the Applicant's status as a Nominated Councillor. The logical consequence is that the purported revocation of the Applicant's status as Nominated Councillor is null and void ***ab initio***.

I should note that this Ruling, being the second one within the last nine months (the first one being ***Republic v. Hon. E.K. Maitha & The Hon. Attorney – General,*** *ex parte* ***J.O. Waudi, Misc. Civil Application No.802 of 2003, dated 26th January, 2004)*** declaring unambiguously that Section 27 (2) of the Local Government Act (Cap.265) is inconsistent with the Constitution, would require, as contemplated by Section 3 of the Constitution, that it be brought to the attention of the Honourable the Attorney – General, to enable him to initiate procedures of compliance with the Constitution through necessary legislation. I will, therefore, include this point in my final Orders.

I will make the following Orders:

1. An Order of Certiorari is hereby issued, removing into the Court and quashing the decision of the first Respondent contained in the ***Kenya Gazette*** of 13th February, 2004 and appearing therein as ***Gazette Notice No. 1094*** revoking the nomination of ***Dorothy Nduku Nzioka*** as a Councillor in the Machakos Municipal Council.

2. An Order of Certiorari is hereby issued, removing into the Court and quashing the decision of the first Respondent contained in the ***Kenya Gazette*** of 13th February, 2004 and appearing therein as ***Gazette Notice*** No.1093 nominating a Councillor for the Machakos Municipal Council.

3. An Order of Mandamus is hereby issued compelling the First Respondent to reinstate ***Dorothy Nduku Nzioka*** to her position as a Nominated Councillor in the Machakos Municipal Council;

4. The Respondents shall pay the costs of the Applicant in these proceedings.

5. The Deputy Registrar, with the authority of His Lordship the Chief Justice, shall arrange for a copy of this Judgement to be brought to the attention of the Hon. The Attorney-General, for the purpose of initiating the process of amendment of Section 27 (2) of the Local Government Act (Cap.265), to comply with the requirements of Section 3 of the Constitution of Kenya.

DATED at Nairobi this 30th day of September, 2004.

J.B. OJWANG

Ag. JUDGE

DELIVERED at Nairobi this 1st October, 2004.

S. A. MAKHANDIA

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Applicant: Mr. Kauma Mussilli, instructed by M/s Mussilli & Mussilli, Advocates

For the Respondents, Mr. Meso, instructed by the Hon. Attorney-General