REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 954 OF 2004

IN THE MATTER OF NOTICE OF ANNUAL MEETING OF THE

CITY COUNCIL OF NAIROBI DATED 6TH JULY, 2004

AND

IN THE MATER OF THE LOCAL GOVERNMENT ACT, CHAPTER

265 OF THE LAWS OF KENYA

AND

IN THE MATTR OF THE PURPOTED MAYORAL ELELCTIONS OF

THE CITY COUNCIL HELD ON 15TH JULY, 2004

AND

IN THE MATTER OF THE REPUBLIC

VERSUS

FRANCIS R. MAGAJU ……..…….....… 1ST RESPONDENT

CITY COUNCIL OF NAIROBI ……..……..…… 2ND RESPONDENT

EXPARTE

LAWRENCE NGACHA ……..……..……..……APPLICANT

JUDGMENT

This is a Notice of Motion seeking an Order of Certiorari to bring into this Court and quash the Notice dated 6th July, 2004, and the consequential proceedings of 15th July, 2004 relating to the Mayoral elections of the 2nd Respondent and the decisions made therefrom. The Applicant also seeks the costs of the Application. The Application is said to be pegged on Order LII Rule 3 of the Civil Procedure Rules, and as routine nowadays "*and all other enabling provisions of the Law.*"

The Application is premised on six grounds which may be summarized in four as hereunder.

> **(a). THAT the Notice dated 6th July, 2004 calling for the 2nd Respondent's Annual Meeting is defective in that it does not comply with the provisions of Section 76 of the Local Government Act, hereinafter referred to as LGA and that the said Notice was in any event**

not served on the Applicant.

(b). THAT at the time of holding the proceedings of 15th July, 2004 and specifically the purported Mayoral elections, the 2nd Respondent was by law incapable of holding such elections as its composition was in excess of the number required by law. Any purported election of the Mayor of the 2nd Respondent on 15th July, 2004 was in those circumstances a nullity.

(c). THAT by reason of the irregularities aforesaid, the Applicant was unprocedurally locked out of the 2nd Respondent's Mayoral Elections and was not accorded the right to participate thereat.

(d). THAT by reason of the matters aforesaid the Respondents jointly and or severally have acted contrary to the rules of Natural Justice and unreasonably in relation to the Applicant.

In furtherance of his case, the Applicant also filed a supporting Affidavit, a verifying Affidavit and statutory statement whose salient averments are that:-

(i). The Applicant is an elected Councilor in the City of Nairobi representing Uhuru Ward in the City of Nairobi.

(ii). The Applicant had prior to 15. 7. 2004 expressed his interest to contest for the seat of Mayor of the 2nd Respondent. (iii). That on 12. 7. 2004 the Applicant received in his pigeon hole, a Notice dated 6th July, 2004 purporting to call for the 2nd Respondent's annual meeting on 15th July, 2004. Upon perusal of the said Notice, he discovered that it did not have the agenda nor particulars of business to be transacted at the said meeting.

(iv). That the Applicant duly protested at the lack of time and ambush to the 1st Respondent to no avail. In consequence thereof the Applicant and his supporters opted to boycott the meeting of 15th July, 2004. It is the Applicants case that he was never served with any Notice as required by Law.

(v). Section 76 (1) LGA specifically confers on the 1st Respondent the duty to convene the annual meeting, issue and serve Notices prior to such meetings.

(vi). Contrary to the aforesaid provision, the 1st Respondent did not issue nor serve the Applicant with the Notice for the meeting of 15. 7. 2004. In further breach of the provisions of LGA, the purported Notice issued by the 1st Respondent did not contain particulars to be transacted at the meeting.

(vii). Finally, the Applicant contended that the total number of nominated Councilors exceeded what is provided for in Law. By reason of the excess number of nominated Councilors, the 2nd Respondent could not either on 15th July, 2004 or now hold any Lawful Mayoral election. Accordingly any business transacted and the decisions arrived at on the strength of the aforesaid purported elections were a nullity in Law.

When the motion was served on the Respondent and the interested parties, they too filed replying Affidavits. One Frankline Magaju, a former Town Clerk of the 2nd Respondent swore a Replying Affidavit on behalf of the Respondents. In the Affidavit he deponed that the Application was fatally defective since the Applicant did not plead for an Order of Certiorari in his statutory statement and further that the said Notice of Motion was supported by an incompetent document being the "supporting Affidavit of Lawrence Ngacha."

The Respondents further deponed that the Applicant was being less than candid when he states that he was not aware of the annual meeting. Indeed the deponent accused the Applicant of lying under oath.

The Respondents deponed that not only was the Applicant aware of the meeting and consequent elections but actually unsuccessfully sought to halt the same with the assistance of his colleague vide H.C. Misc. Civil Application No. 896 of 2004 at Nair obi. It is further the case of the Respondents that the Applicant was duly served with the Notice dated 2. 7. 2004 which was further supplemented by the "Reminder Notice" dated 6. 7. 2004 that is sought to be quashed. As further proof that the Applicant was seized of the Notices dated 2nd and 6th July, 2004 respectively, the Respondents referred the Court to the proceedings of the Board of Directors of Nairobi City Water and Sewerage Company Limited held on 8. 7. 2004 in which the Applicant participated and a resolution was differed to the next Board meeting due to Mayoral Elections scheduled to be held on 15th July, 2004. Indeed it was not lost on the Respondents that the Applicant vigorously campaigned for Mayoral seat within the precincts of the City Hall for days preceding 15th July, 2004 as his campaigns were extensively covered in both print and electronic media.

The Respondents further deponed that it was not necessary to have the agenda on the Notice as claimed by the Applicant. Finally on the issue of over nomination, it was the contention of the Respondents that, that fact alone could not nullify the elections but could be a factor in the invalidation of the "excess votes". That in any event the Applicant was well aware of the alleged over nomination of Councillors and opted to do nothing about it. He cannot now be heard to complain.

As regards the interested parties, their case was stated by one, Mutunga Mutungi vide his Replying Affidavit dated 28th October, 2004. He depones that the Affidavit sworn by the Applicant is not accurate nor candid but is full of half truths and therefore unreliable. That the Applicant had not disclosed the fact that the 2nd Respondent issued and served a Notice of the Annual meeting dated 2. 7. 2004 which clearly showed the time and place and the intended business to be transacted at the meeting. He further depones that he is also aware that a further Notice dated 6. 7. 2004 was issued but this was taken as a reminder of the earlier Notice of 2. 7. 2004 as is customary.

The interested parties went on to depone that even if it was to be assumed that the only Notice issued was that dated 6. 7. 2004 the same would in any event still be valid by virtue of Sections 14 (1), 15 (a), 74 (2) and 76 (2) of the LGA. That the general allegations that the Applicant was not served with any Notice calling for Mayoral elections and that the Applicant was not given any time to prepare for the same are totally misplaced and unfounded in Law as there is no specific Notice known under LGA as "Notice of Mayoral Elections" and that the time frame within which Annual meetings are to be held are specifically provided for by Section 74 (2) of the LG A

As regards the over nomination of Councilors, the interested parties' depone that the power to nominate Councilors rests squarely with the Minister for Local Government. LGA does not provide that the Constitution of a Council and all acts conducted by it including elections are illegal by reasons only of a breach of a Section of the LGA by a Minister. That in any event the Applicant had acquiesced on the issue of the alleged over nomination and continue so to do as he is currently serving as a Councilor of the 2nd Respondent and that he has previously served as a Deputy Mayor of the 2nd Respondent. He has done absolutely nothing to have the anomaly rectified.

There was a further Replying Affidavit sworn by Dick Wathika, also an interested party who reiterated the contents of the Affidavit sworn by Mutunga Mutungi aforesaid. He however added that prior to the meeting of 15. 7. 2004, the Applicant was hosted on a radio talk show at "Kiss FM" when the issue of pending elections was discussed and both the Applicant and the deponent contributed. To the deponent therefore, the Applicant was not being truthful when he depones that he was not aware of the pending elections and that he was not given time to prepare and offer himself for the post.

When the matter was called out for hearing, the Applicant who was represented by Mr. Odera Esq. Learned Counsel submitted orally in amplification of what was stated in the pleadings in support of the Application. He reiterated that the proceedings conducted on 15. 7. 2004 were illegal for want of Notice or proper Notice convening the annual meeting of the 2nd Respondent pursuant to Section 76 of LGA. It was the Applicants case that he merely stumbled upon a Notice dated 6. 7. 2004 in his pigeon hole at the City Hall. The said Notice did to meet the fundamental essentials of such Notice as contemplated by section 76 of LGA, since it was not served on him nor did it have the agenda for the business to be

transacted. It was his case that service of the Notice entails personal service. Similarly the second Notice which come to his attention just before the meeting and which was dated 2. 7. 2004 was not proper as envisaged by Sections 74 and 76 of LGA. It was not served on him within the time specified in the LGA. There is only one Notice contemplated in the LGA and there is no provision for reminders he submitted. On service Counsel for the Applicant referred the Court to the shorter English Dictionary by William Little, 3rd Edition in which the word *"Serve"* is defined as "*to make legal delivery of a process or writ on or upon a person.*" In his view service of the Notice convening the meeting ought to have been effected on the Applicant personally. In the same dictionary, the word "p*ublish*" is defined as "*to make publicly or generally known, or declare openly*." It was the Counsel's contention that Notice under Section 76 of LGA ought to be published and served. Counsel for the Applicant further referred the Court to Halisbury's Laws of England, 4th Edition, Volume 1 at page 90 where the right to Notice and opportunity to be heard is analysed. He argued that there is an obligation cast upon the 1st Respondent to issue and serve the Notice. As both Notices dated 2. 7. 2004 and 6. 7. 2004 respectively failed to comply with the provisions of Section 76 of LGA, the Applicant was denied an opportunity or fair opportunity to be heard.

On over-nomination of the Councilors of the 2nd Respondent, Counsel for the Applicant argued that the composition of the 2nd Respondent as at 15. 7. 2004 was illegal, as the number of nominated Councilors exceeded a 1/3 of the elected Councilors contrary to Law. The excess Councilors nominated pursuant to Section 26 (b) of LGA rendered incompetent the electoral body of the 2nd Respondent for purposes of conducting Mayoral elections. That the Applicant was not aware of the over nomination and that even if he knew that would not render competent or valid the results of any transaction in breach of Section 26 of LGA.

As regards the replying Affidavits filed herein by the interested parties it was the contention of Counsel for the Applicant that the same was defective as it did not meet the requirements of Cap 15 of the Laws of Kenya. According to the Counsel, all the 51 interested parties ought to have appended their signatures on the Affidavit. Having failed to do so the Affidavit was therefore defective and incompetent having only been executed by one of them. As regards the statutory statement Counsel for the Applicant took the position that it was properly drawn. That the specific Judicial Review relief sought ought to be prayed for in the substantive Motion and not the statutory statement. Finally Counsel for the Applicant submitted that since Judicial Review remedies are discretionary, the discretion ought to be exercised on fair legal principles. Obvious breaches of mandatory provision of the Law ought to be an important consideration.

In his oral submissions on behalf of the Respondents, Mr. Njagi Learned Counsel stated that there was no proper Motion before the Court as required by Order 53, as the statutory statement before Court does not contain a substantive prayer for an Order of Certiorari. The statutory statement only contained a preliminary prayer for leave to apply for an Order of Certiorari as contemplated by Rules 1 and 4 of Orders 53. To the extent that there is no substantive prayer for Certiorari in the statutory statement, the Application ought to fail. Counsel further drew the attention of the Court to what was stated to be a supporting Affidavit sworn by the Applicant and submitted that Order 53 only contemplates that an Application for Judicial Review should be founded on a statutory statement verifying Affidavit and ventilated by the Notice of Motion. There is no provision for a supporting Affidavit. Consequently the supporting Affidavit of the Applicant is an invalid document which ought to be struck out.

Mr. Njagi also objected to the Motion on the ground that the 1st Respondent was sued in his personal capacity and yet what was being attacked was his actions as a Town Clerk of the 2nd Respondent. It was his submission that the office and not the occupant ought to have been impleaded. It was also the contention of the Respondents that for the Applicant to be entitled to the discretionary relief sought, the Applicant must satisfy the Court that his coming to Court was bonafide. The Applicant has not satisfied this criteria as he has gone out of his way to mislead the Court by claiming that he was never served with the Notice convening the Annual meeting of the 2nd Respondent when there is overwhelming and ample evidence that he was so served. Both Notices were specific as to the business to be transacted. He further contended that under LGA, there is no prescribed format of the Notice. In any event even if there was a format and it was deviated from Section, 72 of interpretation and general provisions Act would come in handy. In support of the fact that the Applicant was all along aware of the Annual meeting, Counsel for

the Respondent referred to the Minutes of the Board of Directors of Nairobi City Water and Sewerage Company Limited meeting held at the Stanley Hotel on 8. 7. 2004 in which the Applicant participated and in which the issue of Mayoral elections on 15. 7. 2004 somehow featured. On the issue of whether or not there is a provision in LGA for a reminder Notice Counsel submitted that even if there was no such provision no prejudice was occasioned to the Application being served with such a Notice. On the over nomination of Councilors, it was the submission of the Respondent that the composition of the Council is legally at the direction of the Minister for Local Government. If there was over nomination, then the same can only be blamed on the Minister and cannot be visited upon Respondents. In any event, he further submitted, that the over nomination cannot invalidate the proceedings of 15. 7. 2004. For this submission he relied on Halisbury's Laws of England, 4th Edition, Volume 2 page 523 where the Learned Author states that the proceedings of a Local Authority are not invalidated by any vacancy amongst its number or by defect in elections e. t. c. The Complaint by the Applicant could have been addressed by the invalidation of the excess votes. In essence the Applicant should not have backed out of the elections but should have sought the 1st Respondent's intervention at an appropriate time.

On service, it was the Respondents position that there was no requirement for personal service. In any event the proviso to 76 of LGA state that failure to serve the Notice cannot affect the validity of a meeting. All that is required is to demonstrate that the Notices were brought to the attention of the Applicant. It was also not practicable for the 1st Respondent to personally serve the Notices on all the Councilors. It could not have been the intention of the provision, the Learned Counsel for the Respondents concluded his submissions.

On his part, Mr. Nderitu Learned Counsel who appeared for the interested parties was contend with adopting in full the submissions of Counsel for the Respondents. He however added that the Motion was wrongly intituled and therefore ought to be struck out. He relied on the decision of F*ARMERS BUS SERVICE & OTHERS –VS- THE TRANPSORT LICENCING APPEAL TRIBUNAL (1959) E.A.* 779 for this submission.

It is clear from the foregoing that the issues that call for determination by this Court are as follows:-

(i). Whether or not a Notice and or a valid Notice convening the annual meeting was issued and published by the 1st Respondent.

(ii). Whether or not the said Notice was served on the Applicant.

(iii). Whether or not there was over nomination of the Councilors.

(iv). The effect and impact of such over nomination on the meeting and or proceedings held on the 15th July, 2004.

However, before I deal with the framed issued aforesaid, let me first dispose off the technical objections raised by the parties herein in the course of hearing of this matter. The first objection was by Counsel for the Applicant with regard to the replying Affidavit sworn by one Mutunga Mutungi on behalf of the interested parties. His objection was to the effect that the Affidavit does not meet the requirements of the oaths and Statutory Declarations Act, Cap 15 of the Laws of Kenya in that all the 51 interested parties did into append their signatures on the Replying Affidavit. I have meticulously gone through the said Act and the rules made thereunder, and have not come across any such requirement. In any event in paragraph 1 of the said replying Affidavit, Mutunga Mutungi depones "th*at I am an interested party joined herein and have the authority of the other 50 to swear this Affidavit ….*" This averment is sufficient to dispose off the Applicant's objection. The deponent had the authority of the other interested parties to swear the Affidavit on their behalf. His signature alone was required to bind the others. The objection is therefore overruled as lacking in merit.

The first objection taken by the Respondents was to the effect that since the statutory statement did not have a substantive prayer for Judicial Review by way of Certiorari, the Notice of Motion before Court was fatally defective. Order 53 Rule 1 (2) of the Civil Procedure Rules provide as follows:-

> "A***n Application for such leave as aforesaid shall be made ex-parte to a judge in Chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought and by Affidavits verifying the facts relied on. The judge may, in gra nting leave, impose such terms as to costs and as to giving security as he thinks fit."***

The statement of facts or statutory statement accompanying the Application in short must have these elements:-

(**1). Name of the Applicant**

(2). Description of the Applicant

(3). Relief sought

(4). Grounds on which it is sought.

In the instant case the statement of facts would appear to meet the above requirements for in paragraph 16 of the said statement the Applicant specifically states "*That the Applicant prays for leave to apply for Judicial Review by way of Certiorari to quash the Notice and the consequential proceedings and or decisions*." The Applicant may not have been systematic in his pleadings in terms of the aforesaid rule, but a careful reading of the statutory statement leaves no doubt at all in one's mind that he has sought an Order of Certiorari as a relief. To me how and where the relief sought is placed is really a matter of form. I would in the circumstances hold that the objection has no merit and must of necessity fail as well.

The second objection taken by Counsel for the Respondents is that in Order 53 of the Civil Procedure Rules, there is no provision for supporting Affidavit. Yet in the pleadings filed in Court on 22nd July, 2004, there is what is referred to as a supporting Affidavit by the Applicant besides the verifying Affidavit. Order 53 Rule 1 (2) talks of"***…… by Affidavits verifying the facts relied on ……"***

It is important to note that the rule does not talk of an Affidavit but Affidavits verifying the facts relied on. In the instant case, the Applicant apart from filing the verifying Affidavit also filed a supporting Affidavit. The two Affidavits are all sworn in support of and in verification of the facts relied on. I do not see anything wrong with that. It matters not that both Affidavits are differently described. The objection is therefore overruled.

The third objection taken up by Counsel for the Respondents was that the 1st Respondent was sued in his personal capacity and yet what was being attacked in these proceedings was the manner in which he conducted his public duty as the Town Clerk of the 2nd Respondent. In paragraph 2 of the Statutory Statement accompanying the Application, the 1st Respondent is described as "t*he Tow n Clerk of the City Council of Nairobi appointed as such pursuant to the provisions of the Local Government Act*."

In the same statutory statement the Applicant goes further to detail what the 1st Respondent is supposed to do pursuant to his position as the Town Clerk as regards the annual meeting. It cannot therefore be said that although the name of the Applicant appears in the intitulement, then he must have been sued in his personal capacity. All the pleadings herein relating to the 1st Respondent refer to his actions as the Town Clerk and nothing else. In the circumstances I am reluctant to hold in the light of the foregoing that he 1st Respondent has been sued in his personal capacity.

On the part of the interested parties, their Counsel raised objection as regards the intitulement of the Application. He did not specifically point out to the Court what was wrong with the intitulement. He was contend with referring the Court to the celebrated case of *FARMERS BUS SERVICE & ANOR – VSTRANSPORT LICENSIN G APPEAL TRIBUNAL (Supra). It is stated in the said Authority at page 781 at letter C that* "……..leave having been granted the Notice of Motion should have been intituled……."

"Republic

Versus

The Transport Licensing Appeal Tribunal

Ex-parte. (the Applic ants)"

A perusal of the Notice of Motion herein does reveal that the Applicant has substantially complied with the intitulement aforesaid. To my mind the Judicial Review Orders are issued in the name of the Republic. So that the intitulement at the Notice of Motion stage should have the Republic as the Applicant. Failure to do so or to name the affected party as the Applicant would in my view render the Application fatally defective liable to be struck out. This is not the case here. The Applicant here is the Republic. The Respondents are Francis R. Magaju and the City Council of Nairobi. The affected party here is ex-parte Lawrence Ngacha. This is as it should be. I do not think that the other introductory matters in the intitulement really count. I would in the premises reject this objection as well.

I now turn to consider the issues framed for purposes of determining this Application. Section 76 (1) of LGA provide as follows:-

> ***"Notice in writing of the time and place, and the business t o be transacted at every meeting of a Local Authority shall be published at the offices of the Local Authority and served by the Clerk of the Local Authority on every member thereof, and , in the case of an Urban Council, on such persons as the Minister ma y specify, either personally or by post or by leaving the same at his usual place of Residence or at his business address; and every such Notice shall be served in the case of a meeting of a municipal Council not less than twenty four hours before the meet ing and, in the case of a meeting of any other Local Authority, not less than seven days before the meeting: provided that the accidental omission to serve Notice of any meeting required to be served under this subsection shall not effect the validity of that meeting."***

It is the contention of the Applicant that no Notice or valid Notice convening the annual meeting of the 2nd Respondent was issued nor published. To publish according to the Applicant is *"to make publicly or generally know, to declare ope n."* (See shorter Oxford English Dictionary by William Little (Supra).) It is not denied that the Applicant received 2 Notices from the 1st Respondent, dated 2. 7. 2004 and 6. 7. 2004 respectively. One of the Notices dated 6. 7. 2004 the Court was informed was but a mere reminder of the Notice dated 2. 7. 2004. What is critical here is whether the said Notices complied with the provisions of Section 76 (1) of LGA. What is required in the said Notice is the time, place of meeting and of the business proposed to be transacted. The Notice has to be in writing and published at the offices of the Local Authority and be served on every member of the Local Authority.

Do the two Notices meet the requirement of Section 76 (1) of the LGA? Clearly the Notice dated 2. 7. 2004 meets those requirements. How about the Notice dated 6. 2. 2004? It is couched in the following words:-

> *"Pursuant to the provisions of Section 74 and 76 of Local Government Act, (Cap 265), I hereby give you Notice that the annual meeting of the City Council and the seven hundred and sixty fourth meeting will be held in the Conference Hall, City Hall, Nairobi on Thursday, 15 th July, 2004 at 10.00 hours."*

To my mind this Notice falls short of the expectation of Section 76 of LGA. I would have no hesitation in holding the same to be invalid and liable to being quashed as sought by the Applicant. However the Court was informed that the said Notice was but a reminder of the Notice dated 2. 7. 2004 which I have held to be valid and in accordance with Section 76 of L.G.A. Were the Notices published at the offices of the 2nd Respondent? On the material before me, I have no hesitation whatsoever in holding

that they were so published. After all the Applicant received all the Notices at the City hall. None of the parties herein apart from the Applicant have stated that the Notices were not made publicly or generally known by the 1st Respondent by being pinned on Notice boards within the City Hall. Indeed the 1st Respondent depone that the Applicant actively campaigned for the Mayoral seat having witnessed some of his activities within the City Hall. He must have known about the elections and that is why he was on campaign trail. It is safe to assume in the circumstances that the meeting was published. None of the other Councillors, both elected and nominated have deponed to the fact that the Notice was not published.

It should never be forgotten that the Applicant was a Deputy Mayor at the time and a long serving Councillor. It is heard to imagine that he would be unaware of the Notices convening such critical meeting at which he intended to contest for the seat of Mayor. Once again it is not lost to the Court that apart from the Applicant none of the other Councilors numbering over 60 have complained that the Notice was never published. In any event, Mayoral elections in Nairobi is such a big event that media houses both print and electronic in this country devote a lot of space and airtime to cover it. I would therefore hold that of the two Notices issued, only the one dated 2. 7. 2004 was valid and was duly published at the offices of the 2nd Respondent.

Was the Notice aforesaid served on the Applicant? On the materials before me and considering all the circumstances, I am persuaded that the Applicant was served with the Notice. I say so for the following reasons:-

(*a*). *There is a categorical statement by the 1st Respondent that the Applicant was served. Similarly there is also a categorical averment in the replying Affidavit of Mutunga Mutungi on behalf of the 50 interested parties that the Notice of the annual meeting dated 2. 7. 2004 was issued and served on all the Councilors. Other than the Applicant there is no other Councilor who has supported the Applicant's position that the Notice was not served. The Applicant has not complained or claimed that there was any conspiracy involving the Respondents to lock him out of the elections. Why then would the 1st Respondent not serve him with the requisite Notice? Between the Applicant, the interested parties and the Respondents dispositions, I choose to believe the latter two. The Applicant had supporters. None of those supporters have claimed or sworn any Affidavit claiming that they were never served with the Notice.*

(b). The Applicant was the Deputy Mayor and a Councilor of may years standing. It is very hard to belief that in those circumstances he would not be aware of the decision to call for Mayoral Elections and the Notice convening the said meeting. The Court is not oblivious of the fact that the Applicant was on the campaign trail for days leading to the annual meeting. Is it possible that he was campaigning without having received Notice and without knowing the date for the annual Meeting? I do not think so. I do not think as well that the Applicant is being candid when he claims that he only stumbled upon the Notice on the eve of the meeting. In the Affidavit of Dick Mwangi Wathika (Supra) he categorically depones at Paragraph 3 and 4 that prior to the annual meeting the Applicant was hosted in a radio talk show at "Kiss FM" popularly known as the "Peoples Parliament" in which the issue of impending elections was discussed. The averment has not been contraverted. It should be recalled that this was before the scheduled meeting. The Applicant could not have been talking about the elections that he knew nothing about. In any event the Applicant has not claimed that he came to know about the elections from some other quarters apart from the 1st Respondent.

(c). The Applicant has deponed in paragraph 7 of his verifying Affidavit that on 13. 7. 2004, "one of my colleagues filed proceedings in Court being Misc. No. 896/2004 seeking to stop the meeting of 15th July, 2004." However the Applicant does no state the basis of the suit, the prayers sought and the outcome thereof. Nor did he bother to annex the pleadings thereof to assist this Court.

One can only draw the inference that perhaps such information would not have been favourable to his case. However, what is important here is that as at 13th July, 2004, the Applicant was aware of the annual meeting of the 2nd Respondent to be held on 15th July, 2004. The Applicant also states that on 12th July, 2004, he received in his pigeon hole, a Notice dated 6. 7. 2004 purportedly

calling for the 2nd Respondent's annual meeting on 15th July, 2004. He perused the Notice and concluded that it was defective. He elected not to take any action on the Notice, for instance to confront the 1st Respondent and seek clarification, and yet he was a Deputy Mayor and a contestant of the forthcoming Mayoral Election.

(d). The Applicant on 8th July, 2004 participated in the proceedings of the board of Directors of Nairobi City Water and Sewerage Company Limited. Minute 2/8/2004 (ii) is in these terms:- "Considering that the City Council of Nairobi Mayoral Elections are scheduled for the 15th July, 2004 on Councilor Gichonio's proposal the Board resolved to defer the proposed resolution to the next Board meeting."

From the foregoing it is apparent that the Applicant was aware of the annual meeting long before the 12th July, 2004 when he stumbled on the alleged Notice.

All the foregoing considered, I find the Affidavits sworn by the Applicant in support of the Application to be less than candid, and therefore unreliable. If the Applicant can brazenly mislead the Court by stating on oath that he only came to know about the elections on 12. 7. 2004, when there is evidence to the contrary, what else can he not mislead the Court on?

As regards, over nomination of Councilors, this fact is conceded to by the Respondents. It is the Applicant's case that the composition of the electoral body as at 15. 7. 2004 was illegal and contrary to the provisions of Section 26 of the LGA. What prejudice did the Applicant suffer as a result of the over nomination of the Councilors, one may ask? It is not pleaded that all the nominated Councilors voted for the current Mayor. Indeed it would appear that there was no contest for the seat of the Mayor once the Applicant on his own accord and free will opted not to participate in the elections and walked out with his supporters. I cannot see how the rules of Natural Justice were breached in the circumstances as claimed by the Applicant. Who among the nominated Councilors were supporters of the Applicant and walked out in solidarity with him? We are not told. Perhaps had the Applicant opted to participate in the elections and determination of the outcome of the said election turned on the number of votes cast, then the over nomination of Councillors would have become an issue.

The duty to nominate the Councilors is vested in the Minister for Local Government and not the Respondents and or interested parties. If the Minister over stepped his bounds the remedy does not lie in nullifying the elections as sought by the Applicant. As long as the Minister's decision remains unchallenged, it will amount to acting in vain if this Court was to accede to the Applicant's request to nullify the elections. Fresh elections could be called and the very Councillors would participate. In any event, the Minister has not been made a party to these proceedings to enable the Court to effectively adjudicate this matter once and for all.

In Halisbury's Laws of England, Volume 2, 4th edition at page 523, it is stated that "*The proceedings of a Local Authority are not invalidated by any vacancy among its members or by any defect in the election or qualifications of any of its members……*" similarly the proviso to Section 76 (1) of the LGA is couched in the following terms: "Provided that the accidental omission to serve Notice of any meeting required to be served under this subsection shall not effect the validity of that meeting." So that even if the Applicant had proved that the Notice convening the annual meeting dated 2. 7. 2004 had neither been published nor served on him personally, I would still have refused to quash the proceedings of 15th July, 2004 on the basis of the aforesaid exposition of the Law.

There have been claims that in bringing this action, the Applicant was not acting in good faith. This claim may appear to be true having regard to the fact that the Applicant all along knew about the over nomination of the Councilors and opted not to take necessary steps to correct the anomaly. Ordinarily one would have thought that the Applicant being a seasoned Councillor would have challenged the over nomination of Councilors in good time as to ensure their de-gazzetement. Is it possible perhaps that some of the over nominated Councilors were in his camp as well? The Applicant seems to me to have acquiesced to the over nomination. Judicial Review remedies are discretionary such that even if an Applicant makes out a case for the issuance of the same, the Court could still refuse to grant the same in

public interest. In other words

Judicial Review remedies could still be refused because of the wider public interest based on the principle of proportionality. The principle is that an appropriate balance must be maintained between the adverse effects which an administrative authority decision may have on the rights, liberties or interests of the person concerned and the purpose which the authority is seeking to pursue. This Application has not been brought for the benefit or interest of the inhabitants of the City of Nairobi but for the personal gain and interest of the Applicant. I do not think that the personal interest of the Applicant should supercede and override the interests of the Residents of Nairobi City. If the Application is successful and is allowed it will cause unnecessary disruption in the running and management of the affairs of the City Council. It may entail calling fresh elections, with added but unnecessary expense. This will not be in the public interest.

Finally, a careful reading of the pleadings shows that the Application is actually directed at the election of the Mayor. However, besides the Mayor, there were other persons who were elected to various offices during the said elections. It would appear therefore that if the Application was to be granted, the said elected persons would have been condemned unheard as the Order will have the effect of nullifying those elections. Those affected persons will not have been afforded an opportunity to defend the elections.

The upshot of the foregoing is that the Application is dismissed with costs.

Dated and delivered this 1st day of December 2004.

M. S. A. MAKHANDIA

Ag. JUDGE