



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION NO 149 OF 2002**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MINISTER FOR LOCAL GOVERNMENT.....1ST RESPONDENT**

**TOWN CLERK.....2ND RESPONDENT**

**MOMBASA MUNICIPAL COUNCIL.....3RD RESPONDENT**

**ABDULLATIFF ALI UBWA.....4TH RESPONDENT**

***EX-PARTE* MAYOR COUNCILLOR MWALIMU MASOUD MWAHIMA**

**RULING**

The application before the court is a Notice of Motion dated 9.5.2002 brought by Councilor Mwalimu Masoud Mwahima, former Mayor of Mombasa City. It is brought under Order 53 of the Civil Procedure Act and the Law Reform Act, Cap 26 of the laws of Kenya. He seeks that this court issues, upon the grounds therein stated, the orders of Certiorari, Prohibition and Mandamus against the Minister of the Local Government, and the Town Clerk of Mombasa Municipality and the Interested Party, respectively.

The facts upon which the *ex parte* applicant based his application are, to the extent I understand them, as follows: - The *ex parte* applicant was elected a Councilor to the Municipality of Mombasa in 1997, in which year he was also elected the Deputy Mayor of the Council. In February 1999, he was elected full mayor with a majority vote of the Councilors in accordance with the provisions of Section 13, 14 and 18 of the Local Government Act, Cap 265 of the Laws of Kenya.

He was once more elected Mayor in August, 2001 and continued serving as such Mayor until 30.4.2002. On 27.4.2002, he submits, he was without good cause arrested by the police and detained in police custody until 29.4.2002 when he was arraigned in court for the offence of abuse of office, contrary to section 101(2) of the Penal Code in Criminal Case No.1073 of 2002. He entered a plea of not guilty and was released on bond by 12.30 pm. That the court was unable to fix a hearing date since the prosecution of the said alleged offence mandatorily needed the sanction of the Attorney General before the institution thereof, which sanction had not been granted.

The *ex parte* applicant depones further that after being so released he went to his Mayoral Office and stayed therein discussing the incident until 5.00 pm when he left for his home to rest. That in the morning of 30.4.2002 he reported at his Mayoral Office and as he continued working the notice herein marked as "MMM-4" was brought to his attention. That through that notice and at that late hour, he learnt that a full council meeting had been convened of all the councilors by the Town Clerk, to remove him from the

office of Mayor and replace him with his deputy who would act as Mayor. It is the *ex parte* applicant's case, that the meeting called to remove him as Mayor was to carry out the instructions of the Minister for Local government contained in his letter marked herein as annexure 'MMM-5'.

The full thrust of the applicant's case therefore is that:-

- (a) The process by the Minister of Local Government to form a decision to suspend, draw a letter to do so and effectuate the said letter marked "MMM5" was null and void for failing to observe the rules of natural justice.
- (b) The act was *ultra vires* the Minister's powers or authority under the Local Government's Act Cap 265 of the Laws of Kenya or under the provisions of any other Kenyan Law.
- (c) The process of convening a meeting on 30.4.2002, by the Town Clerk of Mombasa Municipality which meeting purported to suspend him as Mayor, was unlawful and null and void for being against legal procedures laid down in the Local Government Act aforementioned and also for failure to observe the rules of natural justice.

The applicant explained why he believed the Minister's action of suspending him and also the Town Clerk's process of convening the meeting that eventually suspended him, were unlawful and/or null and void and/or *ultra vires* their lawful authority. He stated that:-

- (a) The Minister had no powers or authority under the Local Government Act to suspend a Mayor.
- (b) That the Town Clerk convened the material meeting without giving a notice of 24 hours or more as provided by law.
- (c) That the Town Clerk deliberately failed to serve the applicant with the required notice as provided under S. 76 of the Act.
- (d) That the decision and/or process of suspending him as such mayor, whether administrative or statutory required that he should have been given an opportunity by the Minister or the Council convened by the Town Clerk, to explain the situation or raise his possible defence before he was condemned.
- (e) That in any case, the charge upon which he was arraigned in court in Criminal Case No.1073 of 2002 was a nullity in so far as the institution of the prosecution thereof was without the prior sanction of the Attorney General.
- (f) That both the minister and the Mombasa Municipal Council unlawfully presumed him guilty before the trial.

It is on the above grounds, upon the arguments and on the legal authorities put forward by Mr. Madzayo and Mr. Kinyanjui who represented the *ex parte* applicant, that the latter asked this court to find that the Minister and the Town Clerk of Mombasa, acted beyond their powers and/or authority or acted against the provisions of the relevant legal provisions. They accordingly sought for the reliefs of Certiorari, Prohibition and Mandamus, each as and where it would be relevant and applicable.

However, that is not how Miss Mbiyu for the Minister and Mr. Kibaara and Mr. Swaleh for the Town Clerk and the Interested Party, the acting Mayor, saw it. On her part, Miss Mbiyu supported the Minister's action stating that the Minister took the action after receiving a report under S. 245 and that he had adequate powers and authority under S. 248 of the Local Government Act, Cap 265, to suspend the Mayor after considering the alleged report. She claimed that the report was drawn up after investigations under S. 245 of the Act although no such report nor the directions given under S.245 as alleged, were exhibited during the arguments. She argued that the Minister's powers under S. 248 are very wide, so that suspending the Mayor was within his powers. She admits that the investigations done under S. 245 were

quasi-judicial and that rules of natural justice needed to be observed. But she added, strangely, that it was not necessary for the public officer appointed under S. 245 aforesaid, to require the *ex parte* applicant to attend or defend himself before him orally or otherwise. She argued that the Minister's action was not only statutory but also a matter of public policy. She further argued that the fact that the applicant held an elective post did not prevent the Minister exercising his administrative or policy related powers. She however admitted that S.252(1) of the Act did not refer to individual persons such as the applicant, but to local authorities. She stated that the charge upon which the applicant was suspended may have been substituted with a charge of a different nature but she argued that there was no supplementary affidavit to that effect. She concluded that there are no good grounds upon which this court should issue a Certiorari.

Mr. Swaleh for the Town Clerk, the 2nd Respondent, recorded only a few but important points. He stated that the Notice Exhibit MMM-4 which was issued by his client to convene the meeting was lawful and proper and in accordance with the Local Government Act S. 76. He argued that the proviso under the section, excuses the failure to serve the notice on any member of the council of whom the applicant was one. That it was not necessary to serve the applicant as mayor with notice to attend and show cause why the council should not suspend him since the council was merely carrying out the directions of the Minister. He also stated that the proceedings of the council were conducted in a normal and lawful manner. He concluded that since the Town Clerk is not the one who suspended the *ex parte* applicant, no prerogative orders should be directed at him.

Then came Mr. Kibaara for the Interested Party. According to him the *ex parte* applicant's application is incompetent, and null and void. He raised the following points: -

- 1) That the Registrar's notice required to be served under Order 53 rule 1(3) was supposed to be served a day before the filing of the application. That the notice was not so served since the application was filed on 2.5.2002 and was heard on 3.5.2002. He argued that the notice should have been served on 1.5.2002 which was not possible since 1.5.2002 was a labour day holiday. That such prior service being mandatory, default thereof was therefore incurable.
- 2) That the verifying affidavit and statement of facts were required to be served upon the registrar although the notice was served late and wrongly, on 2.5.2002.
- 3) That this court may have power to extend time within O. 53, Rule 3 proviso, but only upon application, which application, has not been made herein. That the situation here then, is that the applicant failed to serve the necessary notice and documents in respect of which the court has no power or authority to excuse. That once the court finds as it should that the said notice was not served at all or was not served exactly as provided in the said Order 53, then the whole application becomes incompetent.

Mr. Kibaara concluded by saying that this application was incompetent and a non-starter for reasons enumerated above.

Mr. Kinyanjui responded to the Respondent's various points above. He took point by point and tried to negate each one of them.

It is my duty now to consider these facts and submissions and make a finding on each of them as facts before I turn to consider the law.

It is common ground that the Minister of Local Government by his letter dated 29.4.2002 and addressed to the *ex parte* applicant, suspended the *ex parte* applicant from his official duties and position as Mayor of Mombasa. The said letter which is herein marked "MMM-5" was dispatched from the Minister's office in Nairobi apparently by fax, at 5.03 pm on the above date. It will be assumed that it was received instantly at the Town Clerk's office in Mombasa City since on it, it was marked as forwarded, most probably to the *ex parte* applicant. The *ex parte* applicant categorically states herein that he was not notified of the contents of the letter until the next day. In the meantime, the Town Clerk appears to have moved fast. He most likely drew up a convening notice herein marked as "MMM-4" notifying the Municipal Councilors

of a full Council meeting to take place the next day on 30.4.2002 at 3.00 pm. The notice was issued under S.76 of the Local Government Act, aforementioned and it gave notice of the 538th meeting of the council. It was signed by one Enos L.G. Kidai on behalf of the Town Clerk. Among the agenda of the Notice was one to consider the suspension of the *ex parte* applicant herein from his position and duties as mayor as per the letter "MM-5". The *ex parte* applicant denies being notified of this notice until the next day. The 2nd Respondent, the Town Clerk did not directly in this court claim that he served the notice on the *ex parte* applicant but stated that non-service is not fatal to the proceedings that took place on 30.4.2002.

The factual issues here are whether or not the applicant was physically otherwise served with the Minister's letter and the notice of the meeting which was to take place on the 30.4.2002 to consider his suspension. I have considered the material before the court. There is no denial from the respondents that the Minister's letter was faxed at 5.03 pm on 29.4.2002. The said time can be read on the letter itself. Logically and in the natural course of things, the Town Clerk must have started working on it or effectuating its contents only after it was received at 5.03 pm. Some time would naturally be needed to consult over it until or up to the moment of drawing the notice exhibited as "MMM-4". More time would be needed to serve the same notice upon the councilors. It can only be assumed then that the councilors must have been served with it some hours after 5.03 pm, which would suggest that service happened during the night of 29.4.2002, or most probably, during the morning of 30.4.2002. In my view, whether the notice was served upon the councilors immediately after 5.03 p.m. on 29.4.2002 or during the morning of 30.4.2002, it will be very difficult to accept the claim that any councilor, let alone the applicant was served with copy of the Minister's letter or the said meeting's convening notice for a duration of longer than 23 hours before the time of the meeting. The earliest time that the council's meeting would have taken place to cover a notice of 24 hours, assuming that the notice was available exactly at 5.03 pm when the Minister's letter was received, would be 5.02 p.m. on 30.4.02. But as per the record before me the meeting took place at 3.00 pm; almost two hours before 24 hours ended. I accordingly find that the applicant, even if he were served with the notice of the meeting as assumed, was not given a notice of more than 23 hours. The *ex parte* applicant averred that he got notice of the meeting by coming across the Notice in the morning of 30.4.2002. The Respondents do not claim or show that he was served with the same earlier than he claimed. In my view the burden of proof lay on them. But they failed to even try to shift it. In addition, as I have found hereinabove, even if the Town Clerk's office would have served the notice immediately the Minister's letter was received, he could not still have managed to beat the 24 hour period, as long as the meeting was deliberately or otherwise, fixed at 3.00 pm.

We are not told from either side whether the *ex parte* applicant attended the meeting or not. Since however the respondents did not aver that the *ex parte* applicant despite lack of service of notice attended it, as this might have been interpreted in their favour, the court will assume that the applicant did not, due to the default in service, attend it.

Another point of fact that the court has to decide is whether or not the Minister or the Council gave the *ex parte* applicant, as a matter of fact, an opportunity to defend himself before the Minister suspended him or before the Council as well suspended him respectively. Miss Mbiyu stated that the Minister suspended the Mayor when a report made by one of his officers appointed to investigate Mombasa Municipality under Section 245, persuaded the Minister to suspend him. She did not produce the report claimed to be relied upon to assist the court, even after that issue was raised during the arguments. No letter of appointment of such investigating officer was adduced in evidence either. Indeed apart from averments of the fact in the replying affidavit, little was done to prove that such an appointment of an officer was made and that his report was filed with the Minister's office before the Minister acted to suspend the *ex parte* applicant. I have considered the issue. It is my finding that there was no such investigation conducted or report made under section 245 as claimed by the 1st Respondent. Accordingly it is my further finding of fact that the Minister's decision and action to suspend the *ex parte* applicant was based on other reasons and not on any such alleged report. I also examined the material before the court and I find that, as a matter of fact, the Minister, whether by his own decision or by the advise of his officers or others, failed to invite the *ex parte* applicant to explain away the allegation or accusation against him, if there was any, in his own defence. Nor indeed did I hear or understand Miss Mbiyu to be stating otherwise. What she clearly stated is that it was not necessary for the investigating officer, if there was one, nor for the

Minister, to give the applicant an opportunity to make any kind of statement in his defence or to explain any issue that was being held against him. She stressed this position despite the fact that she admitted that the investigating officer's or the Minister's acts were either administrative or statutory and amounted to be quasi-judicial.

I must now turn to other facts of this application which must be clarified and decided before I examine the legal provisions applicable. The first one is immediate cause of the Minister's action to suspend the *ex parte* applicant herein. Immediate reason was the fact that the applicant had on the same day been arraigned with the offence of Abuse of Office, contrary to Section 101(2) of the Penal Code. This was in Mombasa Chief Magistrate's Court Criminal Case No.1073 of 2002. As the charge exhibit No. MMM-2 confirm, the charge was based on the fact that the applicant, the Mayor of Mombasa Municipality had issued a cheque No.000059 as payment of rates in respect to a certain piece of land in Mombasa Municipality which cheque was dishonoured because the account had apparently been closed to the knowledge of the *ex parte* applicant. The instituting of the charge and prosecution thereof required prior Attorney-General's sanction which sanction was not available when the *ex parte* applicant was arraigned in the Chief Magistrate's Court on 29.4.2002. The Attorney-General's consent was apparently never given and it was indicated during the prosecution of this application that the charge was withdrawn and the *ex parte* applicant charged with a totally different offence. No explanation was offered as to why the applicant was pushed into court without the Attorney-General's sanction or why it was not forthcoming. This suggested that the original charge was hastily instituted to enable the Minister to bungle out the applicant from his mayoral position. Indeed this was the thrust of one of Mr. Madzayo's arguments which he supported by some newspaper cuttings annexed and marked as exhibit "MMM-1", indicating that the *ex parte* applicant had one or two days earlier been publicly warned to resign from his mayoral seat or he would be driven out. Such argument however is neither here nor there. The relevant point is whether or not the Minister for Local Government had legal powers or authority to suspend the *ex parte* applicant as mayor, as he did.

The next matter to clear is whether the Municipal Council in its meeting that purported to effectuate the Minister's action of suspending the *ex parte* applicant as a matter of fact, invited the applicant to defend himself before they went ahead to vote to remove him from the seat of mayor. The respondents and the Interested Party did not give an answer to this question. Mr. Kibaara and Mr. Swaleh simply argued that they had orders to suspend the *ex parte* applicant and that their clients proceeded to carry out the instructions of the Minister. The court understood this argument to mean that so long as the Respondents were carrying out the Minister's instructions, which they did, they were not to blame and cannot be questioned. The blame if any, should be directed elsewhere, they appeared to argue. They therefore, did not deny the alleged action or process culminating in removing the *ex parte* applicant from his office as mayor.

The last issue of fact that I would wish to determine is the manner this application was actually filed, relying on the court's records. The *ex parte* applicant through Mr. Madzayo Advocate filed an *ex parte* miscellaneous chamber application No.149 of 2002 seeking for leave to be granted to him to file a Notice of Motion application for the Prerogative Orders of Certiorari, Prohibition and Mandamus against the Respondents. The date stamp on the application shows that it was received by this court on 2.5.2002. It was composed of the chamber summons to which were annexed statement of facts, a Verifying Affidavit, a Notice to the Deputy Registrar High Court of Kenya Mombasa and a Certificate of urgency.

At the back of the bundle whose last document was the said Notice, is the Deputy Registrar's received stamp with handwritten words indicating that the bundle was received on 2.5.2002 at 3.20 pm and below which is the signature of the Deputy Registrar. Under the signature there is his rubber stamp. The application was, from the record, put before me on 3.5.2002 when it was heard and determined, giving the applicant herein leave to apply as sought. On 9.5.2002, the *ex parte* applicant filed this Notice of Motion. He annexed to the Notice of Motion the statement of facts, the verifying affidavit and the Notice to the Registrar dated 2.5.2002. Mr. Kibaara for the Interested Party at one stage argued that the Registrar was only served with a copy of the required Notice without the other documents just mentioned above. This was denied by Mr. Madzayo and Mr. Kinyanjui who strongly submitted that the Registrar had been served with all the documents. The Registrar did not put in an affidavit denying being served with the

other documents together with the notice as claimed by the applicant's advocates. It does not sound convincing that the bundle served upon the Registrar would be left incomplete when service on him is known to be that critical while other bundles filed in court and served on other parties were found complete. I have considered this issue. I hold that there was proper personal service done on the Registrar on 2.5.2002 of the Notice, the verifying statement and the statement of facts.

Having accepted the facts as stated above, I now turn to examine the provisions of the law referred to me.

Mr. Kibaara argued that the application seeking leave to file the motion for Prerogative Orders sought herein was filed on 2.5.2002. The Notice under it was as I have found served on the same day. The *ex parte* application was heard the next day on 3.5.2002. It was this service which was null and void, according to Mr. Kibaara for the Interested Party, and the Respondents. His position is that proper and effective service in accordance with Order 53 Rule 1(3) should have been done a day earlier before the application was filed. That would have been on 1.5.2002 which he argued was a holiday. Order 53 Rule 1(2) and (3) states:-

- “(2) An application for such leave as aforesaid shall be made *ex parte* to a Judge in chambers...  
(3) The applicant shall give notice of the application for leave not later than the preceding day to the Registrar and shall at the same time lodge with the registrar copies of the statements and affidavits.

Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown.”

The way I understand the above rule is that the *ex parte* applicant will file his application in the court registry. It will include the *ex parte* application itself in the accepted form accompanied by the verifying affidavit, statement of facts and the Notice to be served with the application to the Registrar. After being received by the court and court-stamped to show the date of filing, a date of hearing before a Judge in chambers will be given. The notice of the application should then be served upon the Registrar so that the Registrar gets it at least a day before the application is placed before the Judge for a hearing. I understand this to mean that the service of the notice and the other documents must be served the latest on the preceding day.

In my view it is possible for the period after service of the notice to be more than a day, for example it is possible for it to be served two or three days before the application is fixed before a Judge for hearing. Can Mr. Kibaara's argument that service of the notice to the Registrar must at the latest be a day before the filing of the application make any legal sense? I think not. Of what will it be a notice of if the application has not been formally filed and does not legally exist? In my view his argument is logically and legally untenable as it does not appear to arise from or correctly interpret the express provisions of order 53 Rule 1(3) aforementioned.

The next issue to determine is whether the Minister of Local Government has powers to suspend the Mayor of Mombasa under the provisions of the Local Government's Acts, Cap 265. There was no dispute between the parties herein that applicant was elected mayor, as earlier rehearsed herein, under the provisions of section 13 and other related sections of the Act. Mr. Madzayo pointed this out authoritatively. Miss Mbiyu did not deny it. The section states: -

“(1) The Mayor of the Municipal Council shall be elected by the Council from among the councilors at the first meeting of the council and subsequently at each second annual meeting of the council and, a mayor elected in the year 1968 or later shall hold office until the next annual meeting but one of the council.

(2) Subject to section 16, the mayor shall, unless he resigns or ceases to be qualified or becomes disqualified, continue in office until his successor is elected and assumes office.

(3) During his term of office, the mayor shall continue to be a member of the council

notwithstanding the provisions of this Act.....”

According to this section a mayor is elected from other councilors after the council first sits after a general election. Those elected as mayor after 1968 will be so elected each time for two years unless he resigns or ceases to be qualified or becomes disqualified. In my view therefore a person elected mayor for a period of two years remains a mayor until he completes his term. The only way he can cease to be mayor during the said two years period is if he resigns or ceases to be qualified or becomes disqualified. He can cease to be qualified if, he for example, ceases to be a councilor before the period of two years ends. In my view he becomes disqualified if it is discovered that he was not a councilor when he got elected as mayor in the first place. He can also be disqualified as mayor during the said period if he, after being so elected, for example, fails to make the relevant declaration within 7 days of such election under section 18 of the Act. There could be more examples.

In this case the *ex parte* applicant was lawfully elected mayor in August, 2001 for a period of at least 2 years. From the affidavit evidence before me he did not resign nor did he cease to be qualified or become disqualified in the manner described above, within section 13 or section 18 of the Local Government Act, Cap 265. Under these circumstances, he should continue being mayor until his term of office ends unless there is any other provision of the law under which his term of office could be brought to an end. Miss Mbiyu informed this court that the Minister has power to bring the *ex parte* applicant’s tenure as mayor to an end by suspending him under section 248 of the same Act. She argued that the Minister’s powers or authority under the said section are very wide. Section 248 provides: -

“The Minister may give to any Local Authority such directions as he thinks necessary as a result of investigations, researches or inquiries under section 245.”

To understand what the investigations, researches and inquiries referred to are, I must also quote section 245 to the extent which is relevant: -

“The Minister may at any time appoint any public officer to conduct such investigations, researches and inquiries as the Minister may deem necessary for the purpose of this Act or for assisting any Local Authority in carrying out its functions under this Act or any other written law and generally for promoting the efficiency of Local Government; .....

The rest of the section provides the manner such an officer will conduct his duties, the power he has of summoning other persons to give him any information he needs to make his report and present it finally to the Minister. He has power to summon and even cite for punishment those who will not obey. S.245 is in a group of provisions put under a part of arrangement of the Act called Reports, Returns and Inquiries. I understood it to be a part of the Act under which information needed to enable the Central Government through the Minister to decide what steps should be taken to help the councils perform their duties and functions can be gathered. The next part is part 19 which is described as ‘Powers Arising on Default of Local Authorities’. It covers ss 246 – 255. Marginal description states ‘Power to direct performance of duties and in default to perform same’. It provides for powers to the Minister to supervise the performance of the local authorities and in default either direct the Ministry to perform it or remove or replace the local authority by a commission. Nowhere in the provisions of this part of the Act, is the Minister given power to remove an elected mayor as a single councilor. Even under section 248 stressed as giving the Minister wide powers, nothing therein empowers the Minister to deal with the mayor as an individual. Indeed if the margin description next to section 248 is examined, it states ‘power to give directions to local authorities’. This cannot be read to include ‘to give directions to the mayor’. It is my view and I so hold therefore that the Minister’s wide powers under section 248 are directed to the local authorities and not a mayor or individual councilors. I also find that while the Minister under section 248 or 252 of the Act can remove or replace a local authority and he can appoint a commission to run the removed council, he has no such powers under the said sections to remove a mayor or even a councilor as an individual. It therefore would be misinterpreting the sections, particularly section 248, to read into it or give it the meaning that Miss Mbiyu urged this court to give it. The Minister therefore in my view and finding, had no power or authority to suspend the applicant as he did under the Local Government Act provisions. Since the Respondents failed to point out any other provisions of the Act or any other Law

under which the Minister could have exercised his authority to suspend the applicant, and since the court is not aware of any, I hereby hold that such exercise was *ultra vires* his powers under the Local Government's Act Cap 265 and therefore amenable or liable to quashing by an order of Certiorari.

The alternative aspect of the Minister's action which was raised by the *ex parte* applicant is that in exercising such power or authority that he did to remove the mayor, the Minister should have considered the fact that he was exercising power of a quasi-judicial nature which required and obliged him to observe rules of natural justice. I agree that it was indeed necessary for the Minister to do so. In this case for example, the Minister's action was definitely going to adversely affect the *ex parte* applicant herein in that he was going to lose his mayoral office together with all that goes with it. It is in evidence that the Minister consulted with various persons related to the mayor's seat including the Town Clerk of Mombasa Municipality. Indeed it was even argued, although unsuccessfully, that a researched report was obtained concerning Mombasa Municipal Council under S.245 of the Act in respect of which the *ex parte* applicant was not consulted, questioned or given a chance to contribute, in his own favour or defence. Miss Mbiyu termed the process statutory although she also admitted that it was quasi-judicial. She argued that what happened was a matter of public policy and concluded that it was not necessary to give the *ex parte* applicant a chance to speak in his defence. I have considered all these arguments. I am of the view and I also hold that whether these transactions were related to public policy or were administrative or amounted to an exercise of statutory power, authority or discretion they were all ending up in adversely affecting the legal rights of the *ex parte* applicant. The exercise, therefore, was in my view, of a judicial or quasijudicial nature and the *ex parte* applicant was in respect thereof entitled to be given a fair hearing before the Minister could suspend him in the manner he did. As the purpose of the Order of Certiorari is to ensure that an individual is given a fair treatment by the authority to which he was subjected and since such fair treatment was not given here, I hold that this is a case amenable to quashing by this court.

I now turn to what proceeded on in the Mombasa Municipal Council on 29.4.2002 from 5.03 pm until the *ex parte* applicant was suspended. This court had earlier come to the conclusion that the Notice required to be given to the council members to attend the council meeting was to be 24 hours or more. Here it was at the most 23 hours as earlier found. Section 76 of the Local Government Act was not therefore observed. The implication of the section is clearly that if the notice given is less than 24 hours the proceedings of the meeting would be of no effect unless the default is excused under the *proviso* of the section. The default can be excusable only if the omission to serve the notice as provided was accidental. The word 'accidental' is not defined in section 2 of the Act. *Collins English Dictionary* defines the word as "occurring by chance; unexpectedly; or unintentionally". I understand this to mean that if the Town Clerk of Mombasa Municipality failed to serve the notice to the applicant herein, the failure has to be unintentional or unexpected, or by mere chance for it to be excusable. Such assertion could only have come from the 2nd Respondent in his replying affidavit or even from Mr. Swaleh during his arguments. The 2nd respondent could for example, have submitted that a notice was sent to the *ex parte* applicant and may not have reached him by accident or chance. Indeed, even when the applicant submitted that he came across the notice by chance in the morning of 30.4.2002, he was not controverted. However, what clearly is shown by the applicant in this case is that the 2nd respondent did not attempt to serve him with the notice convening the council meeting intended to suspend him. Nor did the 2nd respondent nor the Deputy Mayor, or the Chairman of that meeting by law, inform him to attend the meeting until the council suspended him. It is my view therefore and I so hold that the failure to serve the *ex parte* applicant was not accidental and is accordingly not excusable under S.76, proviso. The upshot is that the meeting of the council that suspended the *ex parte* applicant was unlawful for being convened without adequate notice, contrary to the provisions of S.76. Proceedings which are not conducted according to the law are null and void and amenable to be recalled to this court for quashing.

Before I make the final orders, I must examine the prayers for the Order of Prohibition prayed against the 2nd respondent and the Interested Party; to stop the Interested Party from acting as mayor of Mombasa in the future, at least for the period still remaining and to be served by the *ex parte* applicant as such mayor; and to stop the 2nd Respondent who is the Town Clerk from continuing to obey the Minister's instructions in the letter marked as exh. 'MMM-4'. I must also examine the prayer for Mandamus against the 2nd Respondent to compel him to reinstate the *ex parte* applicant to the position of mayor.

The Order of Prohibition will issue from this court directed to an inferior tribunal or body to forbid the body, here the Town Clerk or Acting Mayor from continuing to act on the Minister's letter; or the Interested Party from acting as mayor contrary to the law or lawful orders. Prohibition, if issued will only prevent those parties acting irregularly or in contravention of the law or lawful decision but only in the future. In this matter, the 2nd respondent cannot in my view, be prohibited from acting on the Minister's letter since that was done once and was exhausted by 30th April, 2002. It is not certainly threatened to be repeated in the future. It is my view therefore that the Order of Prohibition does not lie against the 2nd respondent in these circumstances. As touches the Interested Party, however, unless he is stopped from acting as Mayor of Mombasa, he may continue to do so in the future. On the face of the intended quashing of the proceedings that made him mayor of Mombasa, he needs to be stopped from so acting in the future during the mayoral tenure of the applicant.

As touches the remedy of the Order of Mandamus, it is supposed to compel the performance of a public duty which is by law imposed on a person or body of persons and lies if the person or persons fail to perform the duty to the detriment of a party who has a legal right to expect such a duty to be performed. In the case before me, the 2nd Respondent who is the Town Clerk, has the duty to receive the *ex parte* Applicant back and usher him to his former office as Mayor. He has a duty of making sure that the *ex parte* applicant has been placed in his former position with all his benefits including mayoral car, chain of office, security and the others. It is my view and I so hold therefore, that the Order of Mandamus lies against the Town Clerk to compel him to perform his above mentioned lawful duties.

Having come to the several findings hereinabove, it is now my duty to make the orders that follow: -

### **ORDERS**

- a) An Order of Certiorari be and is hereby granted and issued to bring to this Honourable Court the decision of the Minister for Local Government contained in his letter dated 29.4.2002 suspending the *ex parte* Applicant as Mayor of Mombasa Municipal Council for the purpose of being quashed forthwith.
- b) An Order of Certiorari be and is hereby granted and issued to bring to this court the proceedings and decision of the Town Clerk of Mombasa Municipal Council of 30.4.2002 which were the proceedings that culminated in the suspension from office of Mayor of Mombasa Municipal Council, for the purpose of being quashed forthwith.
- c) An Order of Prohibition be and is hereby granted, issued and directed to the Interested Party, Councilor Abdullatiff Ali Ubwa, prohibiting him from continuing to act as Mayor of Mombasa Municipal Council.
- d) An Order of Mandamus be and is hereby granted, issued and directed at the Town Clerk of Mombasa Municipal Council to forthwith reinstate the *ex parte* Applicant into his office and position as the duly elected Mayor of Mombasa Municipal Council with all the full power and/or authority thereof and all other mayoral benefits that go with the said office.
- e) The costs of this application are to the *ex parte* Applicant to be agreed upon or taxed.

**Dated and delivered at Mombasa this 30th day of September 30, 2002**

**D.A ONYANCHA**

**JUDGE**