



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1349 OF 1999

1. VICTOR MAGERIA MUGAKI)

2. GLADYS N. GITHARA) **APPLICANTS**

AND

MINISTER FOR LOCAL GOVERNMENT) **RESPONDENT**

JUDGMENT

These are proceedings for judicial review under order 53 of the Civil Procedure Rules.

Orders of *certiorari* is sought to move to the High Court quash a decision of the Minister for Local Authorities to degazette the 1st applicant, Victor Mageria Mugaki, nomination as councillor and in his place nominate one James Munge Rimui published on 30.7.99 *vide* Kenya Gazette No 4244 and 4245.

A brief background of this matter is as follows:

Victor Mageria Mugaki and Gladys N Githaria were nominated as councillors by their political party namely the Democratic Party of Kenya. Under the new rules of the Constitution it permits the respective parties to nominate Members of Parliament and councillors. Their names are submitted to the President/Minister through the Chairman of the Electoral Commission. (see the Constitution section 33(3) as read with the Local Government Act Cap 265 section 28(2A).

In this instance the Minister gazetted the name of Victor Mageria Mugaki and Gladys N Githaria.

For some unclear reasons the Secretary General of the Democratic Party wrote to the Electoral Commission of Kenya revoking of the two councillors. He recommended that Mr James Munge Rimui replace Mr Victor Mageria Mugaki and Mrs Jacinta Wangui Njuguna replace Gladys Nyawira Githare.

The Chairman of the Electoral Commission at once took the matter up with the Permanent Secretary, Ministry of Local Government on the 23.7.99. On the 30.7.99 only the degazettement of Victor Magerai Mugaki was effected.

Long after this matter came to Court the Secretary General of the Democratic Party of Kenya wrote to the new Minister of Local Government insisting that the degazettment of Gladys Nyamira Githae be effected and that she be replaced by Mrs Jacinta Wangui Njuguna or else appropriate action will be taken against the Minister.

In the Kenya Gazette of 14th April 2000 Gladys Nyawira Githare was officially degazetted.

A meeting of the National Executive Committee of the Democratic Party of Kenya was held on 11.5.99 at 10.00 am. It discussed in their Min/Nec/ 27/5/99 the issue of revocation of nominated councillors in Thika and Naivasha.

The chairman of the meeting was surprised that some councillors were sacked from their council. He asked for an explanation. "The Secretary General explained that he wrote to the Chairman of [the] Electoral Commission the letter to revoke the nominations of two councillors in Thika and two in Naivasha."

The two councillors from Naivasha are the subject of this judicial review.

The said meeting resolved *inter alia* that there be:

"a) _____

b) Withdrawal of secretary General's letter.

c) _____

The Secretary General declined to sign the letter of withdrawal of his letter. It was instead dated the 18th of May 1999 and signed by the National Organizing Secretary. It was addressed to the Chairman of the Electoral Commission requesting him to withdraw the revocation of nomination of the 4 councillors.

To this effect in Naivasha the party requested that Mr Victor Mageria Mugaki and Gladys Nyawira Githare continue to be the nominated councillors.

In order to safe guard their interest the two councillors filed a civil suit in Naivasha RMCC No (69 of 1999 on the 27.7.99). They sought for orders of injunction restraining the Minister for Local Government from degazetting them. The magistrate granted *ex parte* injunction orders (which he called interlocutory injunction) on the same day. It is said to have been served on the Minister on the 28th of July 1999. The fact though is that it was not served on the Minister but on the Secretary.

The magistrate set the date of 11.8.99 for the inter parties hearing.

On the 30.7.99 the Minister degazetted Victor Mageria Mugaki by notice 4245.

Both the councillor rushed to this High Court and filed for leave to apply for orders of *certiorari* quashing the Minister's orders. They cited the Magistrates Court case as having been disobeyed by the Minister and as such he was in contempt of court.

When they appeared before Hon Justice Aganyanya certain facts were not disclosed.

The first being that Gladys N Githare had not yet been degazetted.

The second being that it is not the Minister who chooses the councilors but their respective political parties.

Thirdly, that the Secretary General of the Democratic Party of Kenya had in fact written to the Electoral Commissions seeking for the revocation of their names.

Leave was granted to bring the prayers of judicial review for orders of *certiorari* to quash the Ministers decision in degazetting the two councillors.

The hearing of the notice of motion, which was required to be filed 21 days after the leave was granted,

came before me. The arguments put forward by the advocate for the two councillors was that the Minister acted in bad faith. He should never had degazetted the two councilors without first giving them a hearing.

The Minister had been served with the orders of injunction – argued the advocate, despite this, he proceeded to degazette the councillors.

He prayed that the degazettement be quashed and the councillors be reinstated as councillors.

In reply, the advocate for the Attorney General dealt with several issues raised by this application. These are the pleading; failure to disclose material fact, service of the orders in the lower court trial and order 53 r 3 CPR.

What the advocate for the State argued is that if the advocate for the councillor wishes to rely on the aspect of "bad faith" order 6 r 8 (1) CPR requires that the particulars of that bad faith be particularized. This is so held in the case of *Cannock Chase District Council v Kelly* [1978] All ER157 If "bad faith" is to be relied on it must be particularized.

The other aspect is that material facts was not disclosed. The advocate ought to have informed the Court that the law changed in 1997. This is where under section 33(3) of the Constitution as read with the Local Authority Act, it is the political parties who nominate the candidates and not the Minister as is in this case. The issue of revocation had first emanated from the councillors' political parties.

On the issue of service, this should have been done on the Attorney General or the Minister personally. Instead service was effected on a secretary. This service is in respect of orders from the lower court.

I wish to just state at this juncture that the two councillors should not have gone to the Magistrate Court to seek an injunction. I believe the said magistrate had no jurisdiction to issue an injunction against the Minister.

When a suit is filed against a government officer, it is the Attorney General who is sued. Before the suit is instituted the party suing must first give a notice to the Government of his intention to sue. Thereafter he must wait for period of 30 days before filing the suit.

See the case of:-

Hudson Raise Walimbwa vs Attorney General

Where a suit was struck out in the High Court for non compliance of filing a suit before the 30 days were up.

This was contrary to section 13A of the Government Proceedings Act.

The advocate for the State in prosecution this case implied that the Naivasha case was instituted contrary to the law. As such it was in itself illegal. The magistrate having no jurisdiction to hear it.

Another case is that of:-

Matalinga & others vs Attorney General [1972] EA 518 Simpson J.

This is a case where it was held that the Court had no powers to issue mandatory injunction against a government officer:

"Section 16 of the Government Proceedings Act Cap 40 restricts the Courts to making declaration only in proceeding against the Government where it might otherwise grant injunction as prohibits the Court from granting any injunction or making any order against any officer of the government, the effect of which would be to give any relief against the government which could not be obtained in proceeding against the

government."

The argument therefore by the advocate that the Minister is in contempt of the lower court's proceedings cannot stand. This is because the proceeding in the Magistrates Court was an illegality and lacked jurisdiction. The orders cannot be enforced because of the said reasons.

If the orders were correctly made in other circumstances contempt proceedings are to be filed in the High Court only. In this instance an illegal proceedings cannot be enforced by the High Court.

I find in this matter, that there was non disclosure of material facts. I am satisfied that the two councillors failed to inform this Court at the first instance that it was their own political party which degazetted them. The minutes of the party reflected that they should be reinstated and indeed there is a letter to this effect by the organizing secretary

Nonetheless, the General Secretary of the Democratic Party of Kenya wrote a subsequent letter this year contradicting the former letter and insisted that the Minister degazette Gladys Githara. This was done in April 2000 long after this matter had been filed.

The Ministers role under the Constitution, section 33 (3) is to accepted the names given to him by the political parties through the Electoral Commissioner. He cannot refuse the said names. He is under the obligation to gazette them if so requested and degazete them also if so requested.

The request to degazette both councillors have now been effected and done. The Secretary General of Democratic Party of Kenya, the political party, has effected this. The Organising Secretary's letter seems not to have been acted on.

I hold that the relief sought should not be granted. The Minister's decision to revoke the nomination of Victor M Magaki was not irregular, nor *ultra vires* the power he holds. It was not done in bad faith. The magistrates suit in the lower court was an illegality as the said magistrate lacked jurisdiction.

One last aspect of this application must be noted. In any judicial review it is the Republic who is named as the one who brings the case to Court. The heading of this matter reads:-

1. Victor Mageria Mugaki)
2. Gladys N. Githara) applicants

and

Minister for Local Government) respondent

What it should have read is:-

The Republicapplicant

Versus

The Minister for local Governmentrespondent

Ex parte applicant

1. Victor Mageria Mugaku
2. Gladys N Githara

I hope that in future the correct format would be used.

As to this notice of motion I dismiss it with costs to the Attorney General.

Dated and Delivered at Nairobi this 29th day of June 2000.

M.A.ANG,AWA

JUDGE