



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS JUDICIAL REVIEW CASE NO. 1 OF 2017 AND NO. 2 OF 2017  
(CONSOLIDATED)**

**LATHAN MAALIM MOHAMMED.....1<sup>ST</sup> APPLICANT**

**AND**

**MATHOBEE AHMED OSMANN.....2<sup>ND</sup> APPLICANT**

**VS**

**THE PRINCIPAL SECRETARY MINISTRY OF INTERIOR & COORDINATION**

**OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE REGIONAL COORDINATOR NORTH EASTERN REGION.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY COMMISSIONER MANDERA COUNTY.....3<sup>RD</sup> RESPONDENT**

**MOHAMMED BARE KAHIA.....4<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**AND**

**1. MOHAMED YUSUF MOHAMUD.....INTERESTED PARTY**

**JUDGEMENT**

These two judicial review applications were consolidated and heard together by consent of advocates for the parties. In judicial review application No. 1 of 2017 Lathan Maalim Mohammed and Mathobee Ahmed Osman filed a notice of motion dated 27th March 2017 naming the Principal Secretary Ministry of Interior and Coordination of National Government, the Regional Coordinator North Eastern Region, The county commissioner Mander County, Mohammed Bare Kahia and the Hon. Attorney General as the respondents. Mohammed Yussuf Mohamud is named as the interested party. The applicants have sought the following orders:-

- 1. “That the applicants Lathan Maalim Muhamed and Mathobee Ahmed Osman do apply for an order of certiorari be issued to bring into this honourable court for purposes of being quashed the decision made on 7th February 2017 by the first respondent appointing the 2<sup>nd</sup> respondent as the chief of Karo location, Mander County.**

**2. That the applicants Lathan Maalim Muhamed and Mathobee Ahmed Osman do apply for an order of mandamus be issued to compel first respondent to appoint the interested party herein as the chief of Karo location, Mandera County.**

**3. That the applicants Lathan Maalim Muhamed and Mathobee Ahmed Osman do apply for an order of prohibition be issued to prohibit the 1<sup>st</sup> respondent restraining him from unilaterally and unjustly interfering with the operations of the interested party once appointed as chief Karo Location, Mandera County.**

**4. That costs of this application be provided for.”**

In judicial review case No. 2 of 2017, the applicants are Mohammed Idriss Muslim and Hassan Ali Abdille. The respondents are named as the Principal Secretary Ministry of Interior and Coordination of National Government, Regional Coordinator Northern Eastern Region, County commissioner Mandera County, Adan Ibrahim Elmi, and the Hon. Attorney General. The interested party is Abdinassir Ali Mohamud. The prayers in the Notice of Motion dated 27th March 2017 are as follows:-

**1. “The applicants Hassan Ali Abdille and Mohammed Idriss Muslim do apply for an order of certiorari be issued to bring into this honourable court for purposes of being quashed the decision made on 7th February, 2017 by the 1<sup>st</sup> respondent appointing the 2<sup>nd</sup> respondent as the chief of Gadudia Location, Mandera County.**

**2. That the applicants Hassan Ali Abdille and Mohammed Idriss Muslim do apply for an order of Mandamus be issued to compel 1<sup>st</sup> respondent to appoint the interested party herein as the chief of Gadudia Location, Mandera County.**

**3. That the applicants Hassan Ali Abdille and Mohammed Idriss Muslim do apply for an order of prohibition be issued to prohibit the 1<sup>st</sup> respondent restraining him from unilaterally and unjustly interfering with the operations of the interested party once appointed as Chief, Gadudia Location, Mandera County.**

**4. That costs of this application be provided for.”**

Both applications were brought under 53 rule 1(2) and (4) of the Civil Procedure Rules 2010. Articles 10, 47 and 165 of the Constitution of Kenya 2010 were also mentioned in the heading of the applications, above the names of the parties. The applications proceeded through the filing of written submissions. It was agreed that the file in application number 2 of 2017 would be the leading file. The submissions were thus filed in application No. 2 of 2017.

In the submissions, counsel for the applicants listed down issues for considerations. Counsel submitted that the actions of the 1<sup>st</sup> respondent in directing the 2<sup>nd</sup> respondent to appoint the 4<sup>th</sup> respondent as the chief of Karo Location in Mandera County did not meet the requirements set down under Article 10 of the Constitution which lists the national values and principles of governance in Kenya. Counsel submitted further that a chief as an administrator, required to be close to the people. His appointment thus ought to have involved the input from members of the public. Counsel submitted that occurred in these particular matters did not comply with the requirement of fair administrative action as the respondent did not give the residents of Gadudia Location an opportunity to say why the candidate who was finally chosen was not suitable to take up the job. Counsel also stated that section 15(2) of the National Government Coordination Act No. 1 of 2013 which conferred powers on the Public Service Commission to appoint various officials including chiefs was not complied with as there was no evidence that the Public Service Commission had directed the 1st respondent to take the steps he took in the matter.

With regard to breach of rules of natural justice, counsel relied on Nairobi Civil Appeal Number 52 of 2014- the Judicial Service Commission versus Hon. Mr. Justice Mbalu Mutava and the Attorney General. Counsel also relied on the English House of Lords Case of Ridge Vs Baldwin (1964) AC40 which

emphasized the right to be heard.

Counsel submitted further that the applicants legitimate expectations were not honoured in the present case. Counsel relied on case of Keroche Industries Vs Kenya Revenue Authority- Nairobi High Court Misc Civil Application No. 743 of 2016 and emphasized the fact that residents of Gadudia Location had a legitimate expectation that public officers appointed under the Constitution to serve them, would be appointed in compliance with due process.

On ultravires, counsel relied on Nairobi Civil Appeal No. 50 of 2014- Judicial Service Commission Vs Gladys Boss Shollei and Another, where the court stated that a decision tainted with illegality, irrationality and procedural impropriety can be quashed by the court.

Counsel lastly Mr. Anyoka for the applicants submitted that on the facts of the present case, the documents and correspondences filed, the Principal Secretary in the Ministry of Interior and Coordination of National Government had written to the Regional Coordinator to carry out investigations but the investigations do not appear to have been carried out before the appointment of the chief. As a consequence, this court should granted the prayers sought by the applicants.

Counsel for the respondents the Attorney General in his submissions stated that indeed chiefs had retired and that new appointments had been done in December 2016.

Counsel submitted that the judicial review jurisdiction of this court under section 8 of the Law Reform Act requires that the court is guided by the powers exercised by the High Court in the United Kingdom under Section 7 of the Administration of Justice Act of 1938.

Counsel submitted that the criteria for grant judicial review orders is illegality, impropriety of procedure and irrationality and relied on the case of Pastoli Vs Kabale District Local Government Council and others (2008) 2EA300.

Counsel also relied in the case of Republic Vs Kenya Revenue Authority-Experte Yaya Tower Limited (2008) EKLR as well as the case of Seventh Day Adventist Church(EA) Vs Permanent Secretary Ministry of Nairobi Metropolitan Development and another (2014) EKLR.

Counsel submitted the prayer for certiorari should not be granted as the prayer is confusing as section 15(1) of the National Government Coordination Act 2013 clearly states that the Public Service Commission will appoint chiefs in consultation with the Cabinet Secretary.

Counsel submitted also that public participation was done as the position was advertised and applicants made their applications and were called for interview.

With respect to mandamus the counsel submitted that the prayer as drafted could not be issued as this court would convert itself to an employment bureau. In any event the interested party had not attached any document to show that he had applied for the post of chief.

With regard to the prayer for prohibition, counsel submitted that it was wishful thinking as the interested party had not been appointed as the chief of the location.

Counsel went on to submit on the basis under which a Constitutional petition would succeed and relied on a number of cases including the case of Mannaseh Guyo and 260 Others Vs Kenya Forest Services (2016) EKLR.

These submissions in application number two of 2 of 2017,were by consent also applied to application number 1 of 2017, as the facts were similar.

I have considered the two applications, the documents filed, and the submissions on both sides. I have also considered the authorities cited to me. In my view, the issues for determination are as follows:-

1. Whether the application is a proper application for judicial review.
2. Whether the applicants have locus standi to bring the applications.
3. Whether the prayers certiorari for can be granted.
4. Whether the prayers for mandamus can be granted.
5. Whether the prayers for prohibition can be granted.
6. What should be the order as to costs.

The two applications herein are judicial review applications brought under Order 53 rule 1(2) and (4) of the Civil Procedure Rules. They have been brought through a Notice of Motion after leave was granted by the court through a Chamber Summons dated 8th March 2017. The Notice of Motion procedure read herein is the correct procedure under Order 53 rule 3 (1) of the Civil Procedure Rules which states as follows:-

**“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by notice of motion to the High Court, and there shall unless the judge granting leave has otherwise directed be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.”**

Though the Notices of Motion herein have been brought in accordance with the rule, they depart from the requirement in judicial review proceedings that the State or Republic in the case of Kenya, is the applicant. Courts have held that where there is a departure from this requirement the application is defective and can be struck out or dismissed. In view of the provisions of article 159(2) d of the Constitution of Kenya 2010 however, I will not strike out the application on this technicality.

Do the applicants locus standi to bring these applications? Locus Standi is defined in Black’s Law Dictionary 9th Edition, as place of standing or the right to bring an action or to be heard in a given forum.

In the present case, the applicants are not the persons who are claimed to have been denied the appointment as chiefs. They do not claim to have been applicants for the position of chiefs. They claim that another person, an interested party was denied appointment as a chief.

In my view, the applicants have no locus standi to bring these judicial review applications. Though they were residents of Mandera County and presumably residents of the respective locations, they do not have locus standi to bring these judicial review proceedings on behalf of the interested parties.

I am aware that the Constitution of Kenya 2010 enlarges the concept of locus standi. However, in my view this enlargement of locus standi only applies to Constitutional petitions or litigation. The fact that the applicants referred to Article 10, 47 and 165 of the Constitution of Kenya 2010 did not make the present proceedings Constitutional proceedings. It is important to understand in all matters before courts, the Constitutional provisions have to be complied with and as such parties or litigants may refer to them.

The enlargement of the doctrine of locus standi only refers to enforcement of the Bill of Rights in Constitutional proceedings as envisaged under article 22(1) and (2) of the Constitution which provides as follows:-

**“22 (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened.**

**(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by -**

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member, or in the interest, of a group or class of persons;**
- (c) a person acting in the public interest;**
- (d) an association acting in the interest of one or more of its members.”**

The Article proceeds to provide that the Chief Justice shall make rules for court proceedings of a constitutional nature. This matter was not brought under the Constitutional rules made by the Chief Justice but was brought under Order 53 of the Civil Procedure Rules which existed long before the coming into effect of the Constitution of Kenya 2010. I thus hold that these being judicial review proceedings, the applicants who are not contestants for the chiefs' position cannot come to court on the issue of appointment of the chiefs. They thus lack locus standi. The applications will fail on that account.

If am wrong on the above, I will now go to consider whether any of the prayers sought can be granted. The first prayer is for grant of certiorari orders to quash the appointment of the 4<sup>th</sup> respondent in each of the two petitions as chief. Certiorari orders are granted to quash decisions that are made contrary to the law or which are irrational or which are made without observing the rules of natural justice. The applicants have claimed that there were irregularities in the appointments of the chiefs. Their complaint appears to be in relation to public participation rather than illegality and lack of due process.

The Chiefs are appointed as the applicants have clearly admitted by or on behalf of the Public Service Commission. The Public Service Commission has not come to court to complain. The applicants have not enjoined the Public Service Commission as a party so that they could give their side of the story. There is no argument that the jobs were advertised and applications received and interviews held. Though the applicants have annexed correspondence on who should be appointed as chief, there is no indication of any irregularity, illegality or irrationality in the appointment. Any member of the public has a right to complain about exercise of public power or discretion.

However, it does not mean that such complaint will be taken as overturning a decision that is made through official channels. In my view, the applicants have not established or proved on the balance of probabilities that any illegality, irregularity or irrationality was used to appoint the chiefs.

Though it might be preferable for chiefs to come from certain communities, I have not been referred to any law that says that a chief must come from such and such a clan or tribe. In my view therefore, each situation has to be considered on its own facts. The Public Service Commission and local administration in my view are the best suited institution to determine in each local area, who should be appointed as a chief. The prayer for certiorari will thus fail.

The prayer for mandamus will also fail. Mandamus is an order issued by the court to an administrative agency or office or even a subordinate court to act in accordance with the law. Judicial Review Proceedings are not meant to substitute the decision of the officer or inferior tribunal with that of the High Court. The prayer 2 herein asked the court to remove a chief and appoint another person as the chief. That is outside the mandate of the judicial review court. It is also outside the parameters of orders of mandamus. This prayer will therefore also fail.

I now go to the prayer of prohibition. This prayer assumes that the court has ordered the appointment of another chief and is prohibiting the respondents from interfering with the operations of that chief. This prayer is misconceived. It has no basis. It cannot stand as the person who is meant to be protected by that prayer is not in office. In addition, it is not implementable because a chief is under the supervision of other senior government officers, including the 1st respondent. This court cannot supervise the implementation of this prayer. The prayer has no basis and is not feasible and therefore will not succeed.

The last issue is who will bear the costs of the two applications? In my view the applicants herein will bear the costs of the proceedings not just because they have lost the cases, but mainly because they had no

locus standi from the beginning to file the present proceedings. The people they name as interested parties should have filed these proceedings. As it is, those interested parties have not even participated in these proceedings. As such, in my view, the applicants in application no 2 of 2017 will bear the cost of that application, and the applicants in application no. 1 of 2017 will also bear the respective cost of that application.

In conclusion, both applications are dismissed, with costs to the respondents.

**Dated and delivered at Garissa this on 7<sup>th</sup> June, 2017.**

**HON. GEORGE DULU**

**JUDGE**