REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NAIROBI

Civil Appeal 107 of 2006

TAIB A. TAIB ……...……....……APPELLANT

AND

THE MINISTER FOR LOCAL GOVERNMENT …..... 1ST RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF LOCAL GOVERNMENT ……....….... 2ND RESPONDENT

THE ATTORNEY GENERAL ……....…….. 3RD RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA ….....…… 4TH RESPONDENT

COUNCILLOR SHARIFF SHEKUE ……..…..... 5TH RESPONDENT

(*An appeal from a Ruling and an Order derived therefrom of the High Court of Kenya*

mbasa (Sergon, J) dated 28th April 2006

In

H. C. Misc. Civil Application No. 158 of 2006 – original Nairobi H.C. Misc. Application 94 of 2006)

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JUDGMENT OF OMOLO, J.A

I must start this judgment by stating that I personally found the issues raised in this appeal to be of very absorbing interest as those issues appear to me to be largely of law and founded on the current and topical questions such as good governance and the rule of law. The facts which were placed before Sergon, J. from whose decision the appeal is brought were virtually uncontested. The Appellant before us is Taib Ali Taib; I shall hereinafter refer to him as the Appellant. The Respondents are the Minister for Local Government (1st Respondent), the Permanent Secretary, Ministry of Local Government, (the 2nd Respondent), The Hon. The Attorney-General, (3rd Respondent), the Municipal Council of Mombasa (the 4th Respondent) and Councillor Shariff Shekue (the 5th Respondent). Following the general elections held in Kenya on 27th December, 2002, the Appellant was recommended by the victorious NARC Party for nomination as a Councillor in the Mombasa Municipal Council (the 4th Respondent). The Appellant's name was duly forwarded by the NARC Party to the Electoral Commission of Kenya (the ECK

hereinafter) which in turn forwarded his name to the 1st Respondent who, under the Local Government Act, Chapter 265 Laws of Kenya, hereinafter "the Act," is the appointing authority for nominated Councillors. All this was done pursuant to the provisions of *section 26* of the Act which sets out the number of councillors to be elected in each council or local authority (*section 26(1)(a)*), and those to be nominated by the Minister (*section 26(1)(b)*). The councillors to be nominated by the 1st Respondent are:-

"***to represent the Government, or any special interests, as the Minister may, by order, determine."***

How are such councillors to be nominated? ***Section 26(2)*** of the Act provides:-

"***The criteria and principles for appointment of nominated members of the National Assembly under section 33 of the Constitution shall* mutatis mutandis*, apply to the nomination of councillors under this section."***

The NARC Party forwarded to the ECK the name of the Appellant for nomination as a councillor; that was in accordance with ***section 33(3)*** of the Constitution of Kenya which provides that:-

"***The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly taking into account the principle of gender equality."***

The ECK then forwarded the name of the Appellant to the 1st Respondent for appointment. That was also in consonance with the principle and criterium set out in ***section 33(5)*** of the Constitution. Of course ***section 33*** of the Constitution deals with the nomination of members of the National Assembly, but the principles and criteria set down in that section are to apply, *mutatis mutandis*, to the nomination of councillors, the only difference being that while the appointing authority under ***section 33*** of the Constitution is the President, the appointing authority under the Act is the Minister. The ECK did forward the name of the Appellant to the 1st Respondent. That is how it came to pass that by Gazette Notice No. 864 dated 11th February, 2003, the then Minister appointed the Appellant as a nominated councillor in the 4th Respondent. The Appellant was, after his nomination, elected by his fellow councillors to be the mayor of the 4th Respondent and at the time when the events forming the basis of the dispute herein took place, the Appellant was still serving as the mayor of the 4th Respondent.

Section 27 of the Act provides as follows:-

"***27 (1) The term of office of the elected councillors specified in section 26(a) shall be five years.***

(2) The term of office of every councillor nominated under section 26(b) shall be five years or such shorter period as the Minister may, at the time of nomination, specify.

Provided that the Minister may at any time in his discretion terminate the nomination of a councillor by notice in writing delivered to the councillor, and thereupon his office shall become vacant.

(3) ……..
……...."

These provisions generally show that in ordinary circumstances, the terms of office elected councillors and nominated councillors are five years but in respect of the nominated councillors, the Minister can, at the time of appointing a nominated councillor, specify a term shorter than five years and when the specification is done, the councillor shall serve for that specified time. But the Minister, I think would have no jurisdiction to specify that a nominated councillor can serve for more than five years; the Minister can only specify a term shorter than five years. In respect of this Appellant, the Minister did not, at the time of the appointment, specify any term, so the Appellant was supposed to serve as a nominated councillor for five years.

But we have set out the proviso to ***section 27(2)*** of the Act which gives the Minister the discretion to at any time, terminate the nomination of a councillor by notice in writing which is to be delivered to the councillor and upon the delivery thereof, the office of the councillor shall become vacant. By Gazette Notice No. 1013 dated 16th February, 2006 but published on 17th February, 2006, the 1st Respondent ……

"***IN EXERCISE of the powers conferred by section 27 (2) of the Local Government Act ……. revokes the nomination of -***

TAIB ALI TAIB as a councillor for the Municipal Council of Mombasa."

The Appellant said he saw that notice and read the 1st Respondent's order in the daily press. On the same date 17th February, 2006 he was in the High Court at Nairobi pursuant to the provisions of ***Order 53*** of the Civil Procedure Rules. He gave a notice to the Registrar to bring judicial review proceedings and at the same time as he gave the notice, he also filed a chamber summons under ***Order 53 Rule 1 (1)*** and ***(3)*** and sought orders for, among other things dispensation with the requirement for giving to Registrar the statutory notice one day before filing the application for leave to apply for an order of judicial review, leave to apply for an order of certiorari to remove into the High Court and quash the 1st Respondent's decision revoking the appointment of the Appellant as a councillor, leave to apply for an order of prohibition barring or prohibiting each and all the Respondents from stopping and restraining the Appellant from exercising his office functions, duties and powers as the mayor of Mombasa, and as nominated councillor in the 4th Respondent and also prohibiting the 4th Respondent from electing any other person as a mayor of the 4th Respondent. There was also a prayer that the grant of leave sought ought to act as a stay, stopping each and all the Respondents from restraining the Appellant from exercising his office functions, duties and powers as the mayor of Mombasa and as a nominated councillor in the 4th Respondent. The application by way of chamber summons came before Nyamu, J. on 20th February, 2006 and after hearing Mr. Orengo, learned counsel for the Appellant, the learned Judge directed that the summons be taken to the High Court in Mombasa and heard there. On 21st February, 2006, the matter was before Maraga, J at Mombasa; he heard Mr. Orengo on the summons for leave and on 22nd February, 2006 Maraga, J. in a considered ruling, granted to the Appellant leave to apply for the orders sought; the learned Judge also ordered that the leave he granted would operate as a stay on certain conditions which I need not concern myself with in this judgment.

Pursuant to the leave granted, the substantive motion was filed on 27th February, 2006. It was eventually heard by Sergon, J on 22nd March, 2006 and the learned Judge then reserved his judgment to 21st April, 2006. Judgment was eventually delivered on 28th April, 2006 and for my part, I must commend the learned trial Judge for the firmness and resolve with which he dealt with the preliminary issues raised before him and what I can only term as deliberate attempts to delay the hearing of the main dispute before him. The judgment itself was well reasoned and ran into some thirty three typed pages and if in the end I disagree with that judgment, such disagreement must not be treated as reflecting disrespect for the learned Judge's efforts. The Appellant lost his motion before Sergon, J and hence the appeal by him to this Court. The Appellant's memorandum of Appeal contains a total of thirty-two grounds of appeal. For my part, I will not deal with each and everyone of those grounds. Rather I will deal with the broad principles raised in those grounds and which were argued before Sergon, J and in this Court. The first such broad principle has always been: -

1. Does the 1st Respondent have jurisdiction or power to revoke or terminate the appointment of a nominated councillor? That question was fiercely agitated before Sergon, J and it had also been agitated before LENAOLA, J. "In the matter of an application by Hon. Otieno Karan, for Judicial Review" in the case of **REPUBLIC VS. EMMANUEL KARISA MAITHA**, Minister for Local Government, Ex Parte Hon. Otieno Karan, H.C.C. Application no. 75 of 2004, (unreported). The question was also agitated before Mohammed Ibrahim, J in the case of **REPUBLIC VS. MINISTER FOR LOCAL GOVERNMENT & THE MUNICIPAL COUNCIL OF MOMBASA**, Ex Parte Benedict John Kamanzyu & 6 others, Misc. Civil Application No. 917 of

2004 (unreported). Both Lenaola, J and Mohammed Ibrahim, J. held separately that the Minister for Local Government does not have the power to revoke the nomination of a councillor. Sergon, J., however, held that the Minister has the power to do so. What stand do I take on that issue?

On the face of it, there could be no language clearer than what is in the proviso to ***section 27(2)*** of the Act.

"***Provided that the Minister may at any time in his discretion terminate the nomination of a councillor ……"***

If that was all that was to be considered, I imagine that even lawyers, garrulous and argumentative as they are, would find nothing to quarrel about. But the proviso to ***section 27(2)*** does not stand all alone. There is also ***section 26(2)*** of the Act which precedes ***section 27***. That first section sets out the criteria and principles for appointment of nominated councillors and the criteria and principles to be followed in nominating councillors are the same as those to be followed in nominating members of the National Assembly. The criteria and principles for nominating members to the National Assembly, as we have seen are contained in ***section 33*** of the Constitution which is the supreme law in our land. Under the Constitution, H.E. The President appoints nominated members but H.E. The President does not have the power to initiate the process of nomination. The process is to be initiated by the ECK who has to inform the various parliamentary parties the number or numbers of places available to each of such parties. Each parliamentary party which is entitled to a seat then nominates a person bearing in mind the principle of gender equality. The name of the person or persons nominated by each parliamentary party is then forwarded to the ECK which must then check if the person or persons whose names have been thus forwarded are qualified to be members of the National Assembly and whether the parliamentary political parties have complied with the issue of gender equality. In the case of local authorities the ECK would inquire into the issue of whether the persons whose names have been forwarded are otherwise qualified to be councillors and also the issue of whether the requirement of gender equality has been complied with. Having satisfied itself on these issues the ECK would then forward the names to H.E The President in the case of members of the National Assembly and to the 1st Respondent in the case of the councillors. Once H.E. The President has appointed a person to the National Assembly, the President has no power to revoke such an appointment and in the case of **KIPKALYA KIPRONO KONES VS. REP & ECK**, Civil Appeal No. 94 of 2005 (unreported), this Court held that the only way of removing a nominated member of the National Assembly is through a petition as provided for in the Constitution. In the case of nominated councillors, however, the ECK forwards the names to the 1st Respondent who then appoints the councillor to a particular local authority. ***Section 33*** of the Constitution does not have a criterium or principle for revoking or terminating an appointment. The proviso to ***section 27(2)***, however, has that provision while ***section 26(2)*** of the Act says the same criteria and principles set out in ***section 33*** of the Constitution must apply to the nomination of councillors. Mr. Okello, learned counsel for the 1st, 2nd & 3rd Respondents, told us that a nomination is different from the process of revoking the nomination. In my view, the two things are intertwined; there cannot be a revocation of a nomination or appointment if there has not been an appointment in the first place. Under the Constitution the process of removing a nominated member of the National Assembly is clearly set out and the President plays no role there. Yet those same principles must apply to the nomination of councillors and the proviso to ***section 27(2)*** purports to confer upon the Minister the power to revoke a nomination, a principle which is totally lacking in ***section 33*** of the Constitution. ***Section 26(2)*** of the Act, does not, for example, start with any qualification such as:-

"***Subject to the provisions herein after contained ……"***

If such a qualification had been contained, then, in my view, ***section 27(2)*** proviso, would have been valid, for the application of the principles contained in ***section 33*** of the Constitution would have been qualified to that extent. In my view, I cannot see how the principle of nomination can be separated from the principle of revocation of the nomination. Sergon, J repeatedly says in his judgment that there was an apparent conflict between section 33 of the Constitution and ***section 27(2)*** of the Act, but the learned Judge then goes on to resolve that apparent conflict by saying that Parliament must have intended to retain ***section 27 (2)*** of the Act as an exception to:-

"…… ***the domesticated section 33 of the Constitution."***

I personally do not quite understand how or why an ordinary Act of Parliament would domesticate the provisions of the Constitution but whatever that may mean if Parliament, despite having enacted ***section 26(2)*** of the Act had still intended to retain the revocation provisions in ***section 27(2)***, one would have expected Parliament to have in some way qualified the provisions of ***section 26(2)*** of the Act.

It must be remembered that the provisions contained in ***section 33*** of the Constitution were brought in by amendments in 1997 [the IPPG Amendments] and the object of the amendments was clearly to deprive the President of the power to be in sole charge of the process of nomination. In other words the unbridled power of the President to nominate was taken out of his hands and given to the parliamentary political parties, so that the President would only be entitled to influence the nomination of the number of persons which his own parliamentary political party would be entitled to nominate. ***Section 26 (2)*** of the Act was brought in to reflect the amended ***section 33*** of the Constitution. If the powers of the President to nominate were being and were successfully challenged and the challenge written in the Constitution, then I do not myself understand how it can be said that the unbridled powers of the Minister to revoke the nominations would remain wholly untouched. If those powers remained untouched by the amended ***section 26(2)*** of the Act, then it would mean that the 1st Respondent can simply nullify the provisions of ***section 26 (2)*** of the Act by revoking the nominations of persons from other parliamentary political parties and replacing them with persons from parliamentary parties approved by him. It is not to be forgotten that in the various revocations carried out by the 1st Respondent or his predecessor, there is not a single piece of evidence on the record before the Court to show that after the revocation was carried out the Minister asked the ECK to initiate the process of nomination so that the parliamentary political party that had lost its slot due to the revocation was asked to nominate another person to replace its lost candidate. This is why I started this judgment by saying that the issues of law raised touch on topical subjects like good governance and the rule of law. For my part, I have no doubt at all, and I entirely agree with Lenaola and Ibrahim, JJ that the proviso to ***section 27(2)*** of the Act which still gives the 1st Respondent unbridled discreation to at any time terminate the tenure of a nominated councillor is in clear conflict with the criteria and principles set out in ***section 33*** of the Constitution and to the extent of that conflict and in terms of ***section 3*** of the Constitution which provides:-

"***This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void,"***

The proviso to ***section 27(2)*** of the Act in so far as it is inconsistent with the criteria and principles set out in ***section 33*** is void. It does not really matter that ***section 26(2)*** of the Act is not a constitutional provision. By that section, Parliament brought in the application and operation of ***section 33*** of the Constitution and having done so, Parliament must have known or ought to have known that the application and operation of principles in that section of the Constitution must of necessity over-ride any subsequent section of the Act in conflict with ***section 33***. Accordingly I am myself prepared to and would allow the appeal on this ground alone, and I would hold that the 1st Respondent does not have the power to revoke the appointment of a nominated councillor.

Despite what I have said above, other grounds were also argued both in this Court and in the superior court. First is the issue of whether, even if the 1st Respondent had authority to revoke the nomination of a councillor, he had exercised that power within the provisions of the section itself, i.e. the proviso to ***section 27(2)*** of the Act. I once again set out that provision:-

"***Provided that the Minister may at any time in his discretion terminate the nomination of a councillor BY NOTICE IN WRITING DELIVERED TO THE COUNCILLOR, AND THEREUPON HIS OFFICE SHALL BECOME VACANT."***

So that the process by which a councillor's nomination is to be terminated by the Minister is set out in the Act itself. The process is:-

(a) the termination is to be done by a notice which has to be in writing;

(b) the notice in writing has to be delivered to the councillor; and

(c) the termination of the nomination takes effect upon the written notice being delivered to the councillor.

What I gather from the judgment of the learned trial Judge and what Mr. Okello told us is that the written notice was delivered to the Appellant by its being published in the Kenya Gazette. Even in ordinary use of the English language it must be strange to tell someone that -

"***I delivered the notice to you by publishing it in the Kenya Gazette."***

In ordinary parlance and according to the Oxford Concise Dictionary, "**deliver**" is defined as:-

"***distribute (letters, parcels, ordered goods, etc.) to the addressee or the purchaser; hand over (delivered the boy safely to his teacher) ……"***

Clearly, it would be a very strange thing for anyone to say in ordinary use of the English language that -

"***I distributed the letters, parcels etc by publishing them in the Gazette, or that I handed the boy safely to his teacher through a Gazette notice."***

But the Act itself defines the word "**deliver**" and according to ***section 267*** of the Act:-

"***Any notice , order or other document required or authorized by this Act or by any by-law made under this Act to be served on any person (whether the expression "serve" or "give" or "send" or "deliver," or any other expression is used), then, unless a contrary intention appears therein, such notice, order or other document may be served, and shall be deemed to have been effectively served if served –***

(a) personally upon the person on whom it is required or authorized to be served, or if such person cannot reasonably be found, personally upon any agent of such person empowered to accept service on his behalf or personally upon any adult member of the family of such person who is residing with him; or

(b) by post; or

(c) by affing a copy of the same on some conspicuous part of any premises or land to which it relates or in connection with which it is required or authorized to be served; or

(d) where from any cause whatsoever, it is not possible to effect service of the notice, order or other document in any of the manners specified in paragraphs (a), (b) and (c) by publication of a copy thereof in the Gazette and in at least one newspaper circulating in the area of the local authority."

It was agreed on the recorded evidence that the 1st Respondent did not deliver the notice to the Appellant as provided for in paragraphs (a), (b) and (c) of ***section 267*** of the Act. It was equally agreed that the 1st Respondent purported to deliver the written notice to the Appellant by publishing it in the Kenya Gazette i.e. in compliance with ***section 267 (d)*** of the Act. But paragraph (d) of ***section 267*** is only to be resorted to where, from whatever cause, it is not possible to comply with paragraphs (a), (b) & (c) of the Act. There was absolutely no evidence to show that for one reason or the other, the 1st Respondent was unable to comply with paragraphs (a), (b) and (c) and what the reason for that impossibility was. Secondly, if it was not possible for the 1st Respondent to comply with paragraphs (a), (b) and (c), then apart from publishing the notice in the Kenya Gazette, he was also required to publish it in at least one newspaper circulating in the area of operation of the 4th Respondent, i.e. the Mombasa Municipal Council; the 1st Respondent could have, for example, published the notice in the Daily Nation Newspaper or the Standard

Newspaper or the Kenya Times Newspaper or the People Newspaper, all of which circulate in Mombasa, of course, apart from the publication in the Kenya Gazette. It was agreed before the learned Judge and also in this Court that the 1st Respondent, apart from publishing the notice in the Kenya Gazette, did not publish it in any newspaper. Paragraph (d) of the section does not say that the publication is to be either in the Kenya Gazette or in a local newspaper; publication has to be in both.

I agree with the learned trial Judge and with Mr. Okello that the purpose of any service is to bring to the attention of the person being served the existence of the matter. But surely to move from that principle to the other principle that once a matter has been brought to the attention of the concerned party, then the provisions of any legislation setting out the manner of service become irrelevant seems to me to be wholly contrary to the principle of the rule of law and cannot engender respect for parliamentary enactments. In the circumstances of this case, it must not be forgotten that the seat of a nominated councillor only becomes vacant upon the notice of termination being delivered to the councillor concerned. So that in respect of this Appellant, there was, first, no evidence at all that for some cause, it was impossible for the 1st Respondent to deliver to the Appellant the notice of termination in any of the three ways set out in paragraphs (a), (b) and (c) of ***section 267*** of the Act and secondly, that because it was impossible for the 1st Respondent to use any of those methods, the 1st Respondent complied with paragraph (d) of ***section 267*** of the Act. Even the attempt to comply with paragraph (d) of ***section 267*** was itself a failure because apart from publishing the notice in the Gazette, there was no similar publication in any of the local newspapers. The result of all these matters must be that the 1st Respondent failed to comply with the statutory requirements relating to the termination of the tenure of the Appellant as a nominated councillor and, therefore, the purported termination was, *ipso facto*, null and void. I would so find and hold contrary to the findings of the learned trial Judge.

The other issue I want to briefly deal with is the application of the rules of natural justice to a situation such as this. It is of course, now trite law and I need cite no authorities for the proposition, that unless an Act of Parliament expressly or by necessary implication excludes the application of the principles of natural justice, those principles apply. For my part, I can find absolutely nothing in the Act which would exclude the application of the principles of natural justice.

Starting on that basis, I must then point out that while Ministers such as the 1st Respondent who serve in the Cabinet of Ministers can only do so at the pleasure of H.E The President – see for example ***section 16(3)(a)*** of the Constitution – nominated councillors do not serve their tenure as nominated councillors at the pleasure of the Minister for Local Government such as the 1st Respondent, just as nominated members of the National Assembly do not serve their tenure as nominated members at the pleasure of H.E. The President. The practical effect of the proviso to ***section 27(2)*** of the Act appears to me to place the tenure of nominated councillors to be at the pleasure of the Minister, and this can only go to strengthen my view that the proviso is contrary to the principles set out in ***section 33*** of the Constitution. If nominated councillors do not serve at the pleasure of the 1st Respondent then as a matter of common sense, it must follow and I so find and hold, that before the 1st Respondent can terminate their nomination, he must comply with the rules of natural justice, namely give to the affected nominated councillor the charge which he (1st Respondent) considers is serious enough to warrant the termination of the nomination, invite the comments of the concerned councillor and then thereafter take whatever action he deems appropriate. Decisions taken after following due process are more likely to be well grounded and better informed than those made in violation of the requirements of the rules of natural justice. Other considerations might apply if and when the 1st Respondent has dissolved a whole local authority as he is entitled to do under ***section 152*** of the Act, and as was the position in **DURAYAPPAH VS. FERNANDO & OTHERS [1967] 2ALL E.R. 152**. But even in this case, the court held that the principle of *audi alteram partem* was applicable to the decision of a Minister to dissolve a whole council. The mayor of the dissolved council lost not because the rules of natural justice did not apply but because he at that stage had no *locus standi* to speak for the dissolved council. In the present appeal, the Appellant is complaining about what was done to him as an individual councillor, not on behalf of the 4th Respondent. The 4th Respondent was itself sued by the Appellant. Even on this score, I would once again find and hold that the 1st Respondent's purported revocation of the Appellant's nomination was null

and void.

I have said enough, I believe, to show that I am for allowing the appeal. I would accordingly allow the appeal, set aside all the orders made by Sergon, J and in their place substitute an order allowing only prayer (a) in the Appellant's notice of motion dated 24th February, 2006 and lodged in the High Court at Mombasa on 27th February, 2006. I see no reason for granting the orders for prohibition prayed for in paragraphs (b) and (c) of the said motion as there is no further need for any such order.

On costs I would award to the Appellant the costs of the appeal and those in the High Court and I would order that those costs be paid to the Appellant by the 1st Respondent. The other parties shall bear their own costs of the proceedings both here and in the superior court.

Waki, JA agrees that the 1st Respondent did not comply with ***section 27(2)*** of the Act and accordingly the majority judgment of the Court shall be that this appeal be and is hereby allowed on the terms proposed herein.

Dated and delivered at Nairobi this 4th day of May, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

JUDGMENT OF GITHINJI, J.A.

The appellant who was a Nominated Councillor and an elected Mayor of the Municipal Council of Mombasa is aggrieved by the decision of the superior court (Sergon J) dated 28th April, 2006 dismissing his judicial review application for, *inter alia*, an order of *certiorari* to quash the revocation of his nomination as a councillor of the Municipal Council of Mombasa.

The background facts as derived from the documents filed by the appellant in the superior court are as follows. The appellant was nominated by National Rainbow Coalition (NARC) – a parliamentary party as a councillor in the Municipal Council of Mombasa following the General Elections held on 27th December, 2002. The nominating parliamentary party (NARC) forwarded his name, amongst other names, to the Electoral Commission of Kenya (ECK) for verification and confirmation of his qualification as a councillor and to determine whether his nomination complied with the criteria and principles established under ***section 33*** of the Constitution and ***section 26 (2)*** of the Local Government Act. The ECK thereafter forwarded his name to the Minister for Local Government for his appointment as a nominated councilor. Thereafter, he was duly appointed as nominated councillor alongside other councilors on 11th February, 2003 under *Gazette Notice No. 864* which states in part:

"***NOMINATION OF COUNCILLORS:***

IN EXERCISE of the powers conferred by section 26 (2) and 39 of the Local Government Act, the Minister for Local Government nominates the persons whose names are indicated in the first column of the schedule to be councillors for the respective local authorities in the second schedule hereof ……".

The appellant was subsequently elected the Mayor of the Municipal Council for Mombasa on or about 13th February, 2003. By ***section 13 (1)*** of the Act the statutory term of a Mayor is 2 years while by

section 27 of the Act the statutory term of a councillor is 5 years.

By *Gazettee Notice No. 1013 of 17th February, 2006* the nomination of the appellant as a nominated councillor was revoked by the Minister for Local Government. The Gazette Notice stated in part:

"***REVOCATION OF NOMINATION OF A COUNCILLOR***

IN EXERCISE of the powers conferred by section 27 (2) of the Local Government Act, the Minister for Local Government revokes the nomination of TAIB A. TAIB as a councilor for Municipal Council of Mombasa.

Dated the 16th February, 2006.

MUSIKARI KOMBO

Minister for Local Government".

On 20th February, 2006, the appellant filed an ex parte Chamber Summons dated 17th February, 2006 for leave to apply for orders of *certiorari*, and prohibition relating to the revocation of his nomination as a councillor and for an order that the grant of leave do operate as a stay:

"***stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councilor of the Municipal Council of Mombasa".***

On 22nd February, 2006, the superior court granted leave and an order of stay in terms of the application. The judicial review application was subsequently filed on 24th February, 2006 seeking an order of *certiorari* to quash the decision of the Minister for Local Government contained in the *Kenya Gazette Notice No. 1013 of the 17th February, 2006* revoking the nomination of the appellant as a councillor and for orders of prohibition firstly, prohibiting the respondent from stopping and restraining the appellant from exercising his office, functions and duties of a Mayor and secondly, an order for prohibition barring or stopping the Municipal Council of Mombasa from electing any other person or for calling for elections of the Mayor for Mombasa in place of the appellant.

The judicial review application was based on several grounds including the grounds that, the Minister had acted in excess and without jurisdiction and authority; that the Minister had not delivered a notice in writing of the revocation to the appellant; that the Minister had acted arbitrarily, unreasonably and capriciously; that the appellant was condemned unheard and that the Minister's decision is unjust, unfair, irrational and whimsical.

It is convenient at this stage to set out the statutory provisions of the Local Government Act (Act) which govern both the nomination and revocation of nomination of councillors.

Firstly, ***section 26*** of the Act provides:

"***26. The number of councillors of a municipal council shall be as follows –***

(a) such number of councillors as the Minister may, by order determine, elected for each electoral area by the electorate thereof; and

(b) such number of councillors nominated by the Minister to represent the Government, or any special interests, as the Minister may, by order determine; and

(c) where the municipal council in its discretion so agrees with the council of any contiguous county, one councilor from amongst the councilors of each such county council, to be appointed by the county

council:

(1) Provided that the total number of councillors nominated or appointed under paragraphs (b) and (c) shall not exceed one-third of the number of elected councilors under paragraph (a) or where the number of elected councillors is not divisible by three the next lowest number so divisible.

(2) The criteria and principles for appointment of nominated members of the National Assembly under section 33 of the Constitution shall *mutatis mutandis****, apply to the nomination of councilors under this section.***

Secondly, ***section 27*** of the Act provides:

"***27. (1) The term of office of the elected councillors specified in section 26 (a) shall be five years.***

(2) The term of office of every councillor nominated under section 26 (b) shall be five years or such shorter period as the Minister may, at the time of nomination, specify.

Provided that the Minister may at any time in his discretion terminate the nomination of a councillor by notice in writing delivered to the councillor, and thereupon his office shall become vacant.

(3) The term of office of every councillor appointed under section 26 (c) shall be five years or such shorter period as may, at the time of appointment, be specified by the council which appoints such councillors:

Provided that where the councillor ceases to be a councillor of the county council which appointed him he shall forthwith cease to be a councilor of the municipal council".

Section 33 of the Constitution referred to in ***section 26 (2)*** of the Act provides:

"***33. (1) Subject to this section, there shall be twelve***

nominated members of the National Assembly appointed by the President following a general election, to represent special interests.

(2) The persons to be appointed shall be persons who, if they had been nominated for a parliamentary election, would be qualified to be elected as members of the National Assembly.

(3) The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality.

(4) The proportions under subsection (3) shall be determined by the Electoral Commission after every general election and shall be signified by the chairman of the Commission to the leaders of the concerned parliamentary parties, the President and the Speaker.

(5) The names of the nominees of parliamentary parties shall be forwarded to the President through the Electoral Commission who shall ensure observance of the principle of gender equality in the nominations".

Mr. Orengo, learned counsel for the appellant asked the superior court to construe ***sections 26 (2)*** and ***27 (2)*** of the Act and ***section 33*** of the Constitution in conformity with previous decisions of the superior court. Mr. Orengo particularly referred to four decisions, including ***Exparte Joseph Okoth Waudi*** – High Court at *Nairobi Miscellaneous Application No. 802 of 2003* (unreported). In that case, the superior court (Lenaola Ag. J) (as he then was) considered the amendments introduced to the Constitution (including ***section 33***) and to the Local Government Act (including ***section 26 (2)*** by the Inter – Parties

Parliamentary Group (IPPG) vide *Acts Nos. 7 of 1997* and *10 of 1997* respectively and concluded in effect that since ***section 33*** of the Constitution does not give the President power to revoke the nomination of a member of Parliament so also the Minister for Local Government should not have power to revoke the nomination of a councillor and hence ***section 27 (2)*** of the Act was inconsistent with ***section 33*** of the Constitution and therefore void. That was in January 2004. The learned Judge was later to crystallise his construction of ***sections 26 (2)***; ***27 (2)*** of the Act and ***section 33*** of the Constitution in ***Exparte Hon. Otieno Karan***, High Court of Kenya at Nairobi *Miscellaneous Civil Application No. 75 of 2004* (unreported) thus:

"***I am now saying for clarity that the intention as far as I can see of the drafter of section 26 (2) was to elevate the principles of nomination to a constitutional level. I am also saying that since section 33 of the Constitution or infact any part of it does not have a revocation clause in the nature of section 27 (2) and the proviso therefore my mind is unchanged that the Minister should not have that power which even the President is denied by the Constitution in the case of nomination of Members of Parliament".***

Mr. Orengo, also relied on the case of ***Republic vs. Minister for Local Government & Another*** – High Court of Kenya at *Nairobi – Miscellaneous Civil Application No. 917 of 2004* (unreported) where the superior court (Mohamed Ibrahim J) construed ***sections 26 (2)***, ***27 (2)*** and ***section 33*** of the Constitution in a similar manner as Lenaola, Ag. J. saying in part:

"***There is a clear conflict between the provisions section 33 of the Constitution and section 27 (2) of the Act.***

……

……

In discharging the function of this court in interpreting the inter-play between the aforesaid provisions, I do hereby hold that section 33 of the constitution does not provide for or contemplate the termination of the nomination of a councillor. Due to the aforesaid conflict and/or inconsistency the provisions of section 33 must prevail. I hold that section 27 (2) of the Local Government Act is void to the extent of the aforesaid inconsistency".

Nevertheless, Sergon J held divergent views as to the legal meaning of the provisions of the Act and ***section 33*** of the Constitution under consideration and said:

"***The view I take is that the mere fact of applying the criteria and principles of nominating members of Parliament under section 33 of the Constitution pursuant to section 26 (2) of the Local Government Act, did not elevate the nomination to a constitutional level. What Parliament did is to borrow the criteria and principles under section 33 of the Constitution to apply under section 26 (2) of the Local Government Act. That is the point of departure I have with my learned brothers Justices Ibrahim and Lenaola. The problem is not over, because it is apparent that there is a conflict between section 33 of the Constitution and section 27 (2) of the Local Government Act.***

I will take it to mean that section 33 of the Constitution has been domesticated with the necessary amendments to conform with the Local Government Act".

The learned Judge then concluded, thus:

"***I have carefully perused section 26 (2) of the Local Government Act and it is quite explicit that the legislature only intended to borrow the principles and criteria applied in nominating members of the National Assembly. If parliament intended to take away the power conferred to the Minister under Section 27 (2) of the Local Government Act, then it would have stated so. The amendment took away the Minister's absolute power to pick candidates to be nominated as councillors but retained the power to denominate infact. I hold the view that the office of a nominated councillor is not statutorily***

underpinned. It is a paradox, but courts of law cannot play the role of Parliament ……".

It is convenient to consider the appeal against the construction given to ***section 26 (2)*** and ***section 27 (2)*** of the Act and ***section 33*** of the Constitution by Sergon J. at this stage and deal with the other aspects of the appeal later.

There is a cluster of seven grounds of appeal, namely, grounds Nos. 7, 12, 13, 14, 15, 16 and 17 which deal with the issue of the interpretation and which were argued together. Those grounds fault the construction adopted by the superior court and advance the construction which was rejected. Grounds 13 of the Memorandum of Appeal aptly summarizes the appellant's complaint, thus:

"***The learned Judge erred in law and fact by failing to appreciate that section 26 (2) of the Local Government Act has domesticated the principles for appointment of nominated members of National Assembly under section 33 of the Constitution and that the same principles therefore apply to the appointment, nominations and termination of office of the nominated councillors notwithstanding the provisions of section 27 of the Local Government Act".***

Mr. Orengo urged us to apply a purposeful approach to construction of ***section 27 (1)***; ***26 (2)*** and ***section 33*** of the Constitution and contended that ***section 27 (1)*** of the Act is inconsistent with ***section 33*** of the Constitution. He contended further that the power under ***section 26*** is limited and that it would defeat the purpose of ***section 26 (2)*** if the Minister had power to revoke the nomination without consultation.

Mr. Okello, learned counsel for the 1st, 2nd and 3rd respondents on his part, contended, among other things, that the mere fact that ***section 27 (2)*** borrows the principles in ***section 33*** of the Constitution does not raise the section to a Constitutional status; that section 33 of the Constitution is not part of the Local Government Act; that the appellant has not proved beyond all reasonable doubt that there is a conflict between ***section 27 (2)*** and the provisions of the Constitution; that ***section 26*** and ***section 27*** deal with two different things and should be interpreted as such and that there is a distinction between ***section 33*** of the Constitution and ***section 26*** of the Act in that whereas ***section 26*** provides for ***nomination*** of councillors by the Minister ***section 33*** provides for ***appointment*** of the nominated members by the President.

By ***section 30*** of the Constitution, the legislative power of the Republic is vested in the Parliament. The object of construing a statute by the court is purely to ascertain the intention of the Parliament as expressed in the Act. The courts exercise their function of the interpretation of statutes by applying the established interpretative criteria or guides to legislative intention such as the rules of construction and principles derived from judicial decisions. It is recognized that, generally speaking, the Constitution is to be construed by the application of the same rules that are applicable to the construction of other laws (see ***Karanja vs. Kabugi*** [1981] KLR 270 at page 289, paragraph 15). It is an established principle that in the construction of the statutes, the court cannot legislate under the guise of interpretation by, for example, importing into a statute words which are not there or by filing gaps. The duty of the court is limited to interpreting the words used by the legislature and has no power to fill in any gaps disclosed, otherwise the court would be usurping the function of the legislature (see ***Mago and St. Mellons Rural District Council vs. New Port Corporation*** [1952] AC 198; ***Thompson vs. Goold & Co.*** [1910] AC 409, ***Ngobit Estate Ltd. Vs. Carnegie*** [1982] KLR 437 at page 447 paragraph 30).

Mr. Orengo referred us to the legislative history of ***section 33*** of the Constitution and ***section 26 (2)*** of the Act and contended that Parliament could not have intended to give the Minister power to revoke nomination of a councillor without consulting the sponsoring parliamentary party. Although it is perfectly legitimate for the court to take into account the state of the law at the time the new law was introduced the true construction of the statute would nevertheless be dependent on the actual language used by the Parliament. The following passage from the speech of Lord Reid in ***Attorney General for Northern Ireland vs. Gallagher*** [1963] AC 349 at page 366 is relevant:

"***In my judgment, the change of language can properly be regarded as indicating an intention to make***

some alteration; but the question remains; what was the alteration which was intended? In deciding that well – settled principles require us to go to the words of the new Act. We can have in mind the circumstances when the Act was passed and the mischief which then existed so far as there are common knowledge, but we can only use these matters as an aid to construction. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but which cannot be inferred from the words of the Act".

Applying all the above principles to this appeal, it is clear that the proviso to ***section 27 (2)*** of the Act expressly gives the Minister power to terminate the nomination of a councillor. It is argued that the Minister should not have that power. The court is required to proceed on the assumption that the legislature does not make mistakes. The power of the minister to terminate the nomination of a councillor is not inconsistent with the other provisions of the Local Government Act. Indeed, it is clear that the Act gives the Minister very wide executive powers to control the local authorities.

The power to terminate the nomination of a councillor is given in plain and an unambiguous terms and it behoves the court to give effect to it as an expression of legislative intention.

Inasmuch as the statute expressly gives the Minister power to terminate the nomination, the complaint that the Minister had no jurisdiction to revoke the nomination of the appellant has no legal basis.

It is however, contended that ***section 27 (2)*** of the Act is inconsistent with ***section 33*** of the Constitution and therefore void. Firstly, there is no specific provision in ***section 33*** of the Constitution or in the entire Constitution either providing that the term of a nominated councillor cannot be abridged or that the Minister has no power to terminate the nomination. Had the Constitution provided so, then, it would have been easy to understand the appellant's case. The alleged inconsistency only arises from the construction put to ***section 26 (2)*** of the Act by the appellant. I would respectfully agree with the construction of ***section 26 (2)*** of the Act by the learned Judge in his lucid and well reasoned judgment. ***Section 26 (2)*** incorporates by reference , the criteria and principles for appointment of nominated members of National Assembly under ***section 33*** of the Constitution to the nomination of councillors under ***section 26*** of the Act.

In that case, the legal effect is that the provisions of ***section 33*** of the Constitution so incorporated must be generally construed as if they were set out in full in ***section 27 (2)*** of the Act. In ***Re Wood's Estate - Ex parte Her Majesty's Commissioners of works and Buildings*** [1886] 31 Ch 607 Lord Esher MR said at page 615 last paragraph:

"***If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all".***

The criteria, principles and method of nomination of members of Parliament in ***section 33*** of the Constitution having been transplanted into ***section 26 (2)*** of the Act, they apply to the nomination of councillors and ***section 33*** of the Constitution becomes inoperative as a constitutional provision with respect to the nomination of councillors under the Local Government Act.

That being my view, it follows that ***section 27 (2)*** of the Act cannot be inconsistent with ***section 33*** of the Constitution. Moreover, ***section 27 (2)*** of the Act unlike ***section 33*** of the Constitution does not deal with the criteria and principles for the nomination of councillors.

Lastly, it is inappropriate to equate the tenure of a nominated Member of Parliament with the tenure of a nominated councilor. Firstly, a nominated Member of Parliament is ***nominated*** by a parliamentary party and ***appointed*** as a nominated member by the President (***section 33 (3)*** and ***33 (1)*** of the Constitution) while a ***nominated*** councillor is ***proposed*** by a parliamentary party and nominated by the Minister (***section 26 (b)*** of the Local Government Act). Secondly, according to the prevailing constitutional order, the Parliament is an independent institution from the Presidency. In contrast, upon

nomination by a Minister, a councillor joins a Local Authority which is directly under the supervision of the Minister. It is therefore a convoluted reasoning to contend that since the President has no power to revoke the appointment of a nominated member of parliament, the Minister for Local government should not have such power and therefore ***section 27 (2)*** of the Act which gives the Minister such power is unconstitutional.

The judicial review application was also based on grounds of procedural irregularity – that is, failure by the Minister to deliver a notice of termination of the nomination to the appellant under ***section 26 (2)*** of the Act, denying the appellant an opportunity to be heard, failure to give reasons for the decision and irrationality. The learned Judge was of the view, that the failure by the Minister to personally deliver a notice of his decision as to denomination would not render his decision invalid so long as the decision is officially communicated in a manner that the affected party will be sufficiently informed. He concluded that the decision was published in the Kenya Gazette; and that the appellant became aware of it on the day it was made. The learned Judge further concluded there was no statutory duty on the Minister to hear the appellant or to give reasons for his decision.

On the question of the delivery of the notice the proviso to ***section 27 (2)*** of the Act states:

"***Provided that the Minister may at any time in his discretion terminate the nomination of a councillor by notice in writing delivered to the councillor and there upon his office shall become vacant".***

Mr. Orengo contended that the discretion of the Minister is fettered by the requirement that he should give a notice in writing which should be delivered to the councillor. He further contended that the issuance of the notice is part of the process of decision making.

Section 267 of the Local Government Act deals with the service of documents.

It provides:

"***267. Any notice, order or other document required or authorized by this Act or by any by-law made under this Act or any other written law to be served on any person (whether the expression "serve" or "give" or "send" or "deliver" or any other expression is used), then, unless a contrary intention appears therein, such notice, order or other document may be served, and shall be deemed to have been effectively served if served –***

(a) personally upon the person on whom it is required or authorized to be served, or, if such person cannot reasonably be found, personally upon any agent of such person empowered to accept service on his behalf or personally upon any adult member of the family of such person who is residing with him; or

(b) by post; or

(c) by affixing a copy of the same on some conspicuous part of any premises or land to which it relates or in connection with which it is required or authorized to be served; or

(d) where from any cause whatsoever, it is not possible to effect service of the notice, order or other document in any of the manners specified in paragraphs (a), (b) and (c) by publication of a copy thereof in the Gazette and in at least one newspaper circulating in the area of the local authority".

Mr. Okello on the other hand contended that the decision is different from the delivery of the Notice and that there has been substantial compliance with the law.

The issue is whether the *Gazette Notice No. 1013* can be construed to be a "*Notice in writing delivered to the councilor"*.

By ***section 69*** of the Interpretation and General Provisions Act, the copy of the Gazette containing the

notice is, *inter alia*, *prima facie* evidence in all courts and for all purposes whatsoever of the due making and tenor of the notice. When ***section 267*** of the Local Government Act is read together with ***section 69*** aforesaid, it is clear to me that the Gazette Notice is a sufficient compliance with the law. ***Section 267*** indeed authorizes the service of Notice by publication in the Gazette only that, that, mode of service is adopted when it is not possible to serve either by personal service or by post or by fixing a notice on the premises. I do not think that service of the appellant by publication in the Gazette which mode of service is authorized by section 267 of the Act renders the service void by the mere fact that the other specified modes of service was not attempted. I am further of the opinion that the wrong mode of service of the notice does not render the decision of the Minister, already made, revoking the nomination, a nullity. The appellant deposes in his verifying affidavit that he became aware of the revocation of his nomination on the same day of the publication. The ***Deminimis*** principle – to the effect that the law does not concern itself with trifling matters is applicable to the construction of statutes. By that principle, it is my view that where there has been substantial compliance with the statute and where the alleged breach of the statute is minor and has no appreciable impact, the court will ignore the breach. The court is also required by common law to construe statutes in a commonsense manner and to avoid a construction which will produce an absurd or irrational result. In the circumstances of this case the ***Deminimis*** principle applies. It would be contrary to common sense and indeed lead to an absurd result to hold that the appellant who became aware of the revocation of his nomination on the same day the notice was published in the Kenya Gazette and who swiftly moved to court to have the decision quashed still requires at this stage further notification of and personal service of the Minister's decision. I reject such an artificial and irrational construction of the proviso to ***section 27 (2)*** of the Act.

Lastly, I am satisfied that from the nature of the office of the appellant – both councillor and the Mayor and the scheme of the Local Government Act, and the nature of the Ministers decision (quasi – political) there was no statutory duty on the Minister to either give the appellant a hearing or to give reasons for his decision.

The term of office of the appellant as a Mayor expired by operation of law in about June 2006. It would therefore offend the provisions of the Local Government Act to allow the appellant to continue holding the office of a Mayor by granting the orders of prohibition which were intended to preserve his office as a Mayor before the term expired.

For the foregoing reasons, I find no merit in the appeal. I would dismiss the appeal with costs to the respondents.

Dated and delivered at Nairobi this 4th day of May, 2007.

E. M. GITHINJI

……

JUDGE OF APPEAL

JUDGMENT OF WAKI, J.A

Background

……

On the 27th day of December, 2002, this country successfully went through an historic General election

for a new President, new members of the National Assembly (hereinafter "*MPs*") and new Councillors for Local Authorities. The political party that won the majority seats in the National Assembly and therefore had the right to form the Government of the day was the **National Rainbow Coalition Party** (hereinafter "*NARC*"). Following the General election, and in accordance with procedures which I will examine a little later, nominations were carried out for full compliment of the National Assembly and the various Local Authorities spread throughout the Republic. We are concerned here with nominations for the Mombasa Municipal Council (hereinafter"*the Council"*) and a nominated Councillor who was subsequently and lawfully elected Mayor of that Council, one ***Taib Ali Taib*** (hereinafter "*Taib*").

Taib is an Advocate of the High Court of Kenya-turned-politician. No issue arises as to whether he was qualified and was procedurally and validly nominated as a Councillor in the Council. His name was put forward by **NARC** and his credentials were verified by the Electoral Commission of Kenya (hereinafter "*ECK*") before it was forwarded to the Minister for Local Government (hereinafter "the Minister") for gazettment, thus completing the formality of appointment as a nominated councillor. The Gazette Notice carrying his nomination was published as ***No. 864*** on 11th February, 2003. Ordinarily his tenure as a councillor should have lasted five years from that date since there was no specified shorter period at the time of his nomination as provided under section 27 of the Local Government Act (hereinafter "*Cap 265*" or "*the Act"*). When the Mayoral elections were called, he offered himself for election and was duly elected as the Mayor of the Council.

He was enjoying those two public offices when on Friday, 17th February, 2006 he saw in the local dailies the shocking news that his nomination as a Councillor had been revoked by the Minister. He also saw a **Gazette Notice No. 1013** published on the same day carrying the same information. The unfolding events caught him by surprise. He enquired from his party NARC, and was informed that the party had not withdrawn his nomination or requested for revocation of his nomination and was not consulted. He consulted his advocates and was advised that the Minister had acted in an arbitrary, unjust, capricious, irrational and unfair manner and was thus in breach of the Constitution, ***Cap 265***, and the principles of natural justice. The same day he served the Registrar of the superior court with the requisite notice and proceeded to take out judicial review proceedings under ***section 8 (2)*** of the Law Reform Act and ***Order 53 r 3 (1)*** of the Civil Procedure Rules.

The Minister, his Permanent Secretary, the Attorney General and the Council were all joined as respondents when leave of the court was sought and obtained on the 20th February, 2006 and with it an order of stay on terms that all the respondents, jointly and severally, were restrained from nominating or causing to be nominated another councillor or to hold the elections or elect the Mayor of Mombasa until the matter was heard and determined. The substantive motion was then filed on 27th February, 2007 seeking the following orders: -

"*a) An order of certiorari to remove to the Honourable Court and quash the decision of the First Respondent contained in the Kenya Gazette of the 17th February, 2006 and appearing therein as Gazette Notice Number 1013 revoking the nomination of the Applicant as a councillor in the Municipal Council of Mombasa.*

b) An order of prohibition barring or prohibiting each and all the Respondents from stopping and restraining the applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as nominated councillor in the Municipal Council of Mombasa.

c) An order of prohibition barring or stopping the fourth Respondent from electing any other person as the Mayor of Mombasa in place or instead of the Applicant and/or calling for the elections or issuing notice for the holding of elections for the office of Mayor of Mombasa."

Upon service of the motion on the respondents, the Council filed an affidavit in reply and grounds of opposition, and one ***Councillor Shariff Shekue***, who contended that he had been elected as Mayor of the Council before leave was granted, joined the fray as an interested party. That contention was disputed on the ground that he had not been sworn in before the orders were issued. Neither the Minister, his

Permanent Secretary nor the Attorney General filed any affidavits in reply and their subsequent attempt to seek an adjournment to do so was rejected. The superior court (Sergon J.) heard the application fully and in a considered ruling made on 28th April, 2006, dismissed it. Aggrieved by that decision Taib immediately expressed his intention to appeal to this Court and he obtained a temporary order of stay to the extent that no other councillor would be nominated by the Minister and the Mayoral elections would not be held until 30th June, 2006. The appeal was subsequently filed and an order was made by this Court for stay of the superior court's orders made on 28th April, 2006 until the hearing and determination of the appeal.

In the superiour court

…….

Taib raised several issues which were argued before the superior court but I do not propose to review all of them. My focus will be on two weighty issues of law which were re-agitated on appeal and which are sufficient, in my view, whichever way one looks at them, to determine the appeal before this Court.

(A) Constitutional primacy …….

The first relates to the interpretation and the interplay between ***section 33*** of the Constitution of Kenya and ***sections 26*** and ***27*** of the Local Government Act (Cap 265 Laws of Kenya). Those sections may be reproduced in relevant parts for full appreciation: -

Section 33:

"*(1) Subject to this section, there shall be twelve nominated members of the National Assembly appointed by the President following a general election, to represent special interests.*

(2) ……

(3) The persons to be appointed shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality.

(4) The proportions under sub-section (3) shall be determined by the Electoral Commission after every general election and shall be signified by the Chairman of the Commission to the leaders of the concerned parliamentary parties, the President and the Speaker.

(5) The names of the nominees of parliamentary parties shall be forwarded to the President through the Electoral Commission who shall ensure observance of the principle of gender equality in the nominations."

Section 26*:*

"*The number of councillors of a municipal council shall be as follows:*

(a) ……

(b) Such number of councilors nominated by the Minister to represent the Government, or any special interests, as the Minister may, by order determine:

(c) ……

(1) ……

(2) The criteria and principles for appointment of nominated members of the National Assembly under section 33 of the Constitution shall mutatis mutandis apply to the nomination of councilors under this section."

Section 27:

"(1) ……..

(2) The term of office of every nominated councilor nominated under section 26(b) shall be five years or such shorter period as the Minister may, at the time of nomination, specify:

Provided that the Miniser may at any time in his discretion terminate the nomination of a councilor by notice in writing delivered to the councilor, and thereupon his office shall become vacant.

(3) ……."

No less than four Advocates appeared for Taib in the superior court but their arguments on that issue were put forward by lead counsel Mr. James Orengo as follows:-

The nomination of Councillors is circumscribed in ***section 26(2)*** of ***Cap 265*** and it is a requirement of that section that the criteria and principles applicable shall be those contained in ***section 33*** of the Constitution. In effect therefore, ***section 26 (2)*** was elevated to constitutional level or alternatively ***section 33*** was "domesticated" under ***section 26 (2)***. The combined effect is that the appointment of members of the National Assembly as well as Councillors shall henceforth be a shared responsibility between the President in the case of MPs or the Minister in case of Councillors; the relevant political parties; and ECK. Each of those stakeholders had a role to play. Matters of proportionality and gender issues were given prominence under the Constitutional provision. Once the nominations were conducted under that procedure, there was no provision under the Constitution that the President, the parties or ECK could deregister or denominate an MP. It follows, in Mr. Orengo's view therefore, that there could not be a provision in ***Cap 265*** allowing for denomination of a Councillor by the Minister or at all. A nominated Councillor's term must run the full term of five years unless a shorter term is specified upon nomination. To the extent therefore that a provision existed in form of ***section 27(2)*** of ***Cap 265*** for termination of a councillor's nomination, such provision would be contrary to the Constitution and would be a nullity to that extent. In his submission, the nomination, tenure and termination of the tenure of a councillor must be considered together as they all relate to the exercise of discretion, and the intention of Parliament was to control the arbitrary exercise of discretion. There were precedents in the submissions made by Mr. Orengo and he urged the court to follow the emerging trend in such matters where the proviso to ***section 27 (2)*** was declared as void. The precedents cited were these: -

1) **H.C.Misc. App. No. 802/2003 R v Hon. E.K. Maitha & 2 others Ex parte Joseph Okoth Waudi,** decided by Lenaola Ag J. (as he then was) on 26th January 2004;

2) **H.C. Misc. Civil Appl. No. 75/2004 R. v. Hon. E.K. Maitha & Another Ex parte Hon. Otieno Karan,** decided by Lenaola Ag J. (as he then was) on 12th March 2004;

3) **H.C. Misc. App. No. 669/04 Antony Musila Mumangi vs. Emanuel Karisa Maitha & 2 others** decided by Ibrahim J. on 10th August 2004;

4) **H.C. Misc. Appl. No. 917/2004 R vs. Minister for Local Government & Anor.** decided by Ibrahim J. on 17th June, 2005.

In those decisions, the two learned Judges formed the view that the applicability of the three sections was a matter of interpretation of statute and they went ahead to do so. Lenaola Ag. J. (as he then was) in Ex Parte ***Joseph Okoth Waudi*** case called in aid the history of the legislative amendments to the Constitution and ***Cap 265***, and traced them to the 1997, Inter-Parties Parliamentary Group (IPPG) negotiations which

were tailored at reducing, and in some cases taking away, the powers of the President, and the Minister which were hitherto perceived as draconian. That is why the consultative process was introduced in the Constitution under ***section 33*** by ***Act No. 7*** of ***1997*** and ***section 26(2)*** was subsequently introduced by ***Act No. 10*** of ***1997*** to apply the same principles. He concluded: -

"**I am to my mind convinced that it would be against the spirit of section 33 of the constitution to allow consultations up to the point of appointment and then allow the Minister to revoke the appointment without the same process of consultation. The President cannot do that under section 33 and mutatis mutandis the Minister should not do that under statute in spite of the express provisions of section 27(2) of the Act. Without belabouring the point, the proviso to Section 27(2) in as far as it purports to contradict Section 33 of the Constitution is inconsistent and I so declare. I am fortified in this finding by the fact that Section 27(2) was itself a creation of Act No. 11 of 1984** (sic) **and yet Section 33 of the Constitution and Section 26(2) of the Act all came into being vide Act No. 7 and Act No. 10 of 1997 respectively. The last amendment should prevail in any event, and in this case a Constitutional amendment subsequent to a statutory amendment is always superior. Where a law is inconsistent with the Constitution, then the Constitution shall prevail. (Section 3 of the Constitution)."**

The learned Judge followed the same reasoning in **Ex Parte**

Hon. Otieno Karan case before concluding:

"**Counsel says that the principles applied to Section 26(2) do not apply to Section 27 (2). He is saying that nomination and the revocation are two unrelated matters. But I have said at page 18 paragraph 8 of this Ruling that nomination and the term of office are related to revocation. I am now saying for clarity that the intention as far as I can see of the drafters of Section 26(2) was to elevate the principles of nomination to a constitutional level. I am also saying that since Section 33 of the constitution or in fact any part of it does not have a revocation clause in the nature of Section 27 (2) and the proviso thereto, my mind is unchanged that the Minister should not have that power which even the President is denied by the Constitution, in the case of nomination of Members of the Parliament."**

In that reasoning, Lenaola Ag. J. (as he then was) had support from Ibrahim J. in the other two cases decided later in time. Ibrahim J. said in **Misc. Civil App. 917/04** where he applied the ***Antony Mumangi*** case (supra) that:

"……. **There is no doubt to this court that the provisions of section 33 of the Constitution which is superior law has been legislated to apply directly within the ambits of the Local Government Act. There are those who see this aspect as having the effect of elevating the principles of nomination of councillors in a county council to a Constitutional level. Others would look at it as "domestication" of the constitutional principles into the Act. Whichever way one may look at it, the effect is the same. When it comes to interpretation of construction of the provisions of the Act, if there is any inconsistency, ambiguity or doubt then the provisions of Section 33 would prevail and override those in the Act"…..……..……**

"**There is a clear conflict between the provisions of Section 33 of the Constitution and Section 27(2) of the Act. If the provisions of Section 33 of the Constitution and Section 33** (sic) **of the Constitution** (sic) **is to apply "Mutatis Mutandis" to nomination, then I do not see why the said provisions should not apply when it comes to revocation or termination of the said very nomination. The process of nomination and revocation or termination are inter-linked dual process and one cannot de-link the two. For instance if the objectives of the nomination e.g. to serve the particular special interests is not diligently and competently pursued by the nominated councillor and if he embarks on tangent** (sic) **purposes then surely termination would follow? If there was an intention by Parliament to exclude the application of Section 33 wholly and with its full intent and effect, from any aspect of nomination of a councilor, it would have said so.**

In discharging the function of this court in interpretating the inter-play between the aforesaid provisions, I do hereby hold that section 33 of the Constitution does not provide for or contemplate the termination of the nomination of a councilor. Due to the aforesaid conflict and/or inconsistency, the provisions of Section 33 must prevail. I hold that section 27 (2) of the Local Government Act is void to the extent of the aforesaid inconsistency."

For their part, the Minister, the Permanent Secretary and the Attorney General, through the Deputy Solicitor General Ms. Muthoni Kimani, submitted that there was no unanimity in the High Court about the four decisions cited and that they were decided *per incurium.* She submitted in the first place that the provisions relating to nomination of MPs and Councillors were separate and distinct and must be treated as such. For one, the nomination of MPs is not gazetted while that of councillors is. The purpose and reasons for nomination of MPs was contained in ***section 33*** of the Constitution. That section cannot be "domesticated" in local legislation as it is not a Treaty. On the other hand, the nomination of councillors under ***section 26***, either to represent the Government or special interests, rests with the Minister. Similarly the powers to revoke the nomination were given to the Minister under ***section 27(2)***. The latter section was not *ultra vires* the Constitution because it does not interfere with the process of nominations under ***section 33*** of the Constitution. She concluded that the rules of interpretation of statutes as expounded in "*Maxwell on Interpretation of Statutes"* by J. Langan were not followed by the two Judges. She referred to the decision of Visram J. in **Mumbi Ngaru v Social Development Party HCCC 1152/00 (ur)** where the learned Judge upheld the revocation of appointment of a nominated councillor by the Minister to underscore the divergent views in the High Court on the issue.

What did Sergon J. have to say on the issue?

He reviewed the authorities cited and appreciated the time- honoured principles of *stare decisis* for the sake of certainty in the law. He was nevertheless of the view that he was not bound by the decisions of his brothers in the High Court, and he could therefore depart from them when there was good reason to do so. He expressed himself thus:

"**The view I take is that the mere fact of applying the criteria and principles of nominating Members of Parliament under S. 33 of the constitution pursuant to S.26 of the Local Government Act, did not elevate the nomination to a constitutional level. What parliament did is to borrow the criteria and principles under S.33 of the constitution to apply under S.26(2) of the Local Government Act. This is the point of departure I have with my learned brothers, Justice Ibrahim and Lenaola. The problem is not over, because it is apparent that there is a conflict between S.33 of the constitution and S.27(2) of the Local Government Act"……**

"**I think the solution to this dispute may be resolved by referring to Maxwell on interpretation of statutes 12th Edition by P.St. J Langan. P. 187:**

"***If two sections of the same stature "are repugnant, the known rule is that the last must prevail." But, on the general principle that an author must be supposed not to have intended to contradict himself, the court will endeavour to construe the language of the legislature in such a way as to avoid having to apply the rule.***

……

One way in which repugnancy clause can be avoided is by regarding two apparently conflicting provisions as dealing with distinct matters or situations……

Collision may also be avoided by holding that one section, which is ex-facie in conflict with another, merely provides for an exception from the general rule contained in that other."

When parliament, through Section 26(2) of the Local Government Act directed the Minister for Local Government to nominate councillors by applying the criteria and principles set out under S.33 of the constitution, did parliament intend to take away the Minister's powers to revoke the

nomination? In order to get the true intention of the legislature, I think the best rule of interpretation is to avoid the repugnancy clause by deeming the two provisions to co-exist so that Section 33 of the constitution would be domesticated under the Local Government Act to be applied to process of nomination and that Section 27(2) of the Local Government Act would be retained to take care of denomination of nominated councillors.

In my view I am convinced that parliament intended to retain Section 27(2) of the Local Government Act as an exception to the domesticated Section 33 of the constitution. I respectively depart from the view taken by my learned brothers Justices Ibrahim and Lenaola and hold that parliament conferred to the Minister for Local Government the power to revoke the nomination of councillors.

I have carefully perused section 26(2) of the Local Government Act and it is quite explicit that the legislature only intended to borrow the principles and criteria applied in nominating members of the National Assembly. If parliament intended to take away the power conferred to the Minister under Section 27(2) of the Local Government Act, then it would have stated so. The amendment took away the Minister's absolute power to pick the candidates to be nominated as councillors but retained the power to denominate intact. I hold the view that the Office of a nominated councillor is not statutorily underpinned. It is a paradox, but courts of law cannot play the role of parliament. Let me buttress my view by referring to Maxwell on the Interpretation of Statutes, 12th Edition by P. St. J. Langan at P.47 – 48

"**In the interpretation of statutes, the interpreter may call to his aid all those external or historical facts which are necessary for comprehension of the subject matter, and may also consider whether a statute was intended to alter the law or leave it exactly where it stood before. But although "we can have in mind the circumstances when the Act was passed and the mischief which then existed so far as these are common knowledge …… we can only use these matters as an aid to construction of the words which parliament has used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended but which cannot be inferred from the words of the Act."**

(B) Legality of de-nomination

…….

The second issue was the legality of the termination of nomination under ***section 27 (2)***. Mr. Orengo submitted, in the first place, that the term of a nominated councilor was fixed at five years unless there was a specified shorter term at the point of nomination which there was not in the case of Taib. Secondly, even if it was open to the Minister to terminate the nomination, the stringent terms of the proviso to ***section 27 (2)*** were not complied with. There must not only be a notice to the councillor, but a written notice. The written notice must also be delivered to the councilor before the de-nomination takes effect. In this case, on the facts which were not controverted, the Minister merely published the revocation of nomination in the Kenya Gazette. Again, Mr. Orengo relied for support on the decisions referred to earlier made by Lenaola Ag. J. (as he then was) and Ibrahim J. In the *Ex Parte* ***Hon. Otieno Karan case***, Lenaola Ag. J. (as he then was) appreciated that the proviso to section 27 (2) did not allow for consultations and that the Minister acts "*in his discretion*" "*at any time*". As regards delivery of the written notice however, the learned Judge stated: -

"**The Minister ought to deliver a notice in writing to the affected Councillor(s). Counsel for the Respondent had a rather curious argument regarding the meaning of "delivery". To him, it was delivery of notice when the Minister gazetted Hon. Karan's nomination. I think not. As I said in my recent ruling in *Republic vs. Hon. E.K. Maitha & Another Ex-parte Joseph Okoth Waudi Misc. Civil Appl. No. 802/2003*, "an advertisement or notice to the world in the nature of a Kenya Gazette Notice is not in my view such notice as is required by section 27(2)."**

Delivery is defined in the Concise oxford English Dictionary, 10th Edition to mean to "*bring and*

hand over (a letter or goods to the appropriate recipient").

This is a physical act that is personal to the recipient. In this case, the Notice ought to be personally served on Hon. Karan. This was not done and it is a pointer to the illegality of the Minister's actions."

Ibrahim J. was even more emphatic in his construction. He stated:

"**My interpretation of Section 27 (2) is that the termination of the nomination takes effect only upon delivery or service of the notice on the councillor concerned. It is only then that the said office becomes vacant.**

It is my interpretation of this Section that in the absence of any other provision relating to the mode of "delivery" of the notice, the provision requires delivery on the person or personal service. It is only "thereupon his office shall become vacant". I hold that delivery of the notice is mandatory and a condition precedent before termination takes effect. It follows therefore that the purported termination or revocation of the nomination of Gazette Notice Number 3889 was improper, irregular and ultra vires the provisions of Section 27 (2) of the Act.

Since delivery of the notices was mandatory the gazettment of the revocation was premature and without or in excess of jurisdiction. I therefore hold that the termination/revocation herein was invalid and illegal on this ground."

See **Misc. Appl. 917/04 (supra).**

What did Sergon J. make of the proviso? It was this: -

"**A critical look at Section 27(2) will reveal that the Minister is required to communicate a decision already made to terminate the nomination. It is intended to make the affected councillor know that his nomination has been revoked. In this case it is admitted by the ex parte applicant that he came to know through the press and through the Kenya gazette notice of 17th February, 2006 that his fate as a nominated councillor had been sealed by revocation. The notice published in the Kenya Gazette of 17.2.2006 basically communicated to the rest of the world that the nomination of Taib Ali Taib has been revoked. Whether the notice was personally delivered to Mr. Taib Ali Taib or alternatively published through the Kenya Gazette notice, the effect is the same in my view, that is to say that the nominated Councillor has been denominated.**

The cardinal point is that the affected person be made aware that he is no longer a nominated councillor. In this respect and with the greatest respect I have for my learned brother Mr. Justice Lenaola, I am of the view that the failure by the minister to personally deliver a notice of his decision as to denomination will not be rendered invalid so long as the decision is officially communicated in a manner that the affected party will be sufficiently informed."

<u>The Appeal</u>

…….

As stated earlier, there were more than the two issues raised before the superior court which the appellant intended to challenge on appeal. The memorandum of appeal listed 32 grounds but these were argued by Mr. Orengo in five clusters.

(A) <u>The constitution threshold</u>

……..

The cluster of grounds of appeal relating to interpretation and the interplay of the three provisions of the

law reproduced above were 7, 12, 13, 14, 15, 16 and 17 which state:

"*7. The learned Judge failed in law and fact to appreciate that the First Respondent had no powers to revoke the nomination of the Appellant as a councillor in the purported exercise of his powers, authority or discretion under Section 27 (2) of the Local Government Act.*

12. The Learned Judge erred in law by failing to determine that the Frist Respondent did not fulfill the conditions precedent contained in Sections 27 (2) of the Local Government Act regarding the termination of the nomination of a councillor and the terms of office of councillors.

13. The learned Judge erred in law and fact by failing to appreciate that Section 26(2) of the Local Government has domesticated the principles for the appointment of nominated members of the National Assembly under Section 33 of the Constitution and that the same principles therefore apply to the appointment, nomination and termination of office of nominated councillors notwithstanding the provisions of Section 27 of the Local Government Act.

14. The learned Judge erred in law by ignoring without reason and justification the principles propounded and embraced by Section 26 (2) of the Local Government Act, which include the principles of gender equality; shared mandate, power and responsibility between the Minister, the Electoral Commission and political parties; protected and uninterrupted tenure of office; special interests and constituencies; and the values and principles of the Constitution.

15. The Learned Judge erred in law and fact by failing to appreciate that the constitutional arrangement under Section 33 of the Constitution and Section 26(2) of the Local Government Act is intended to check the abuse of the power; give nominated members of parliament and nominated councillors a secure and protected term of tenure of office; provide a governance infrastructure based on multi-party democracy; and to check or eradicate nepotism, tribalism, favouritism and cronyism in the management of public affairs.

16. The Learned Judge erred in law by failing to apply the correct and established principles, doctrines and canons of the interpretations of the law and the construction of statutes.

17. The Learned Judge misdirected himself by failing to appreciate that Section 27 (2) of the Local Government Act is inconsistent with Section 33 of the Constitution and is therefore null and void to the extent of the inconsistency."

The submissions of both learned counsel on those grounds was basically a rehash of the submissions made before the superior court. Mr. Orengo, for emphasis, urged us to give a purposive interpretation to matters relating to the Constitution and governance and to avoid the frustration of the policy for which the enactments were made. And the policy, in his view, was to trim the powers of the Minister which were imperial. That was evident from the amendments introduced by ***Acts 7*** and ***10*** of 1***997***, he submitted.

For his part, lead counsel for the State Mr. Ousa Okello, thought it would be absurd to conclude that the mere fact that the principles of ***section 33*** of the Constitution are appied in ***section 26(2)*** would elevate that section to constitutional status as if it was an amendmend made under ***section 47*** of the Constitution. It cannot also be the case that ***section 33*** of the Constitution became part of the **Local Government Act**. Only the criteria and principles were borrowed for application to nominated councilors. Nothing is said in ***sections 33*** of the Constitution and ***section 26*** of ***Cap 265*** about ***section 27***. There can therefore be no conflict or inconsistency between the three sections of the law. In Mr. Okello's view, it must have been the intention of Parliament to leave executive power to the Minister to deal with matters under ***section 27*** and therefore ***sections 26*** and ***27*** must be read disjunctively as they address different events.

My findings

……

I have anxiously considered the provisions of the law on this first issue, the submissions of counsel, and the opinions expressed by the superior court on it.

I must say I have tremendous respect for Lenaola, Ag. J. (as he then was) and Ibrahim, J. for their gallant exposition of a fairly novel issue of law, and the conclusions they reached in that process. Speaking for myself however, I think the intentions of Parliament were not correctly identified in this particular issue and I am one with Sergon, J. when he disagrees with those earlier decisions on the point.

As a daily menu, judicial officers inevitably have to grapple with interpretation of statutes, regulations and procedural rules as they make their decisions. The objective in this task is to discover and therefore enforce the intention of Parliament or the makers of such regulations or rules. There are mechanics for carrying out the task which are expressed in numerous court decisions and treatises by learned scholars and I do not propose to examine them in any detail. Suffice it to say that where the language used in statute is clear and unambiguous, the task of interpretation can hardly arise. Where it becomes necessary to carry out such interpretation however, various tools may be called in aid to eliminate manifest absurdity or repugnance. The various cases cited before the superior court employed some of those tools, and I think correctly so, in an attempt to discover what Parliament intended.

In this case, Parliament did intend as far back as 1967, which is forty years ago, that executive power be given to the Minister for termination of nomination of a councilor. That was in ***section 2*** of ***Act No. 11*** of ***1967*** which introduced the proviso in ***section 27(2)*** of the current ***Cap 265***. It was not introduced by ***Act No. 11*** of ***1984*** as erroneously stated by Lenaola, Ag. J (as he then was) in *Ex Parte* ***Joseph Okoth Waudi***. In the course of the history of ***Cap 265***, Parliament has on many occasions revisited various sections and altered them in various ways. ***Section 26*** itself has been re-visited on no less than seven times since 1963 and five times for ***section 27***. The latest was in ***Act No. 10/97*** which added ***section 26(2)*** but the side note still remained "*Number of councillors*." Some powers of the Minister were severely restricted and some were taken away, while others were left intact when those amendments were made. Unlike the President who cannot control Members of Parliament in view of the principle of separation of powers, the Minister, under the Act has been given executive functions for control of Local Authorities. The measure of control can only be discerned from the provisions of the Act. In those circumstances, I think, with respect, that it would be unfair to compare what the President can do under the Constitution with respect to nominated MPs with what the Minister can do with nominated councillors. ***Section 27*** which is about "*Terms of office of Councilors*" remained intact when ***section 26*** was amended. Can it be said that Parliament was oblivious of that section when ***Act No. 10/97*** was passed? I do not think so. In my view, the powers of the Minister were deliberately retained under that section and it will take a clear amendment of the law to eliminate that perception.

Section 33 of the Constitution and ***Section 26*** of ***Cap 265*** provide for the process of nomination. They make no provision for removal which is found elsewhere. As I stated earlier, no issue arises out of the nomination process of the Appellant as he was validly nominated. I agree with Sergon J. in the circumstances that the provisions of ***section 26*** and ***27*** of ***Cap 265*** are mutually exclusive and ***s.27 (2)*** is neither inconsistent nor repugnant to ***section 33*** of the Constitution. I so find.

(B) <u>Legality of de-nomination</u>…….

This ground was covered in the cluster covering grounds 1, 2, 3, 4, 5, 6, 8, 10 and 11 of the appeal which may be reproduced:

"*1. The provisions of Section 27(2) of the Local Government Act requiring a notice to be delivered to a councillor for the Minister to exercise his discretion to terminate the nomination of a councillor are mandatory.*

2. The learned Judge erred in fact and law by failing to appreciate that the appellant's office as a nominated councillor could not become vacant without delivery to him or a notice in writing. The revocation was therefore null and void.

3. The Learned Judge erred in fact and law by failing to appreciate that the Appellant's office as a nominated councillor was not vacant notwithstanding the Gazette Notice published by the First respondent revoking the nomination of the Appellant as a councillor.

4. the Learned Judge erred in fact and law by failing to appreciate that the first respondent could not revoke the nomination of the Appellant as a councillor and therefore acted in excess of and without jurisdiction.

5. The learned Judge erred in law and fact by ignoring the provisions of Section 267 of the Local Government Act which makes provisions for the service of documents including notices.

6. The notice in writing provided for in Section 27(2) of the Local Government Act was not served on the Appellant in accordance with the law including Section 27(2) and 267 of the Local Government Act.

8. The learned Judge failed in law and fact to appreciate that the First Respondent had no powers to revoke the nomination of the Appellant as a councillor in the purported exercise of his powers, authority or discretion under Section 27(2) of the Local Government Act.

10. The Learned Judge failed to give effect to the intentions of parliament and the statutory policy of the Local Government Act by failing to give the words contained in the provisions their ordinary and natural meaning based on a true and grammatical construction of the statute.

11. The Learned Judge erred in law by failing to appreciate that the words of a statute are not used in vain nor does parliament use the words contained in a statute in vain and the superior court could not go on a fishing expedition to speculate on what the legislature meant without collecting or gathering the meaning from the words used in the statute."

Once again, there was before us rehash, of the submissions made before the superior court and I need not therefore repeat them. The issue is whether the Minister in invoking ***section 27(2)*** of the Act to terminate the nomination of the Appellant followed the law.

My findings

……..

I have considered the provisions of that section together with the submissions of counsel and the construction placed on it by the superior court. In the end, I am in no doubt that the superior court was in error on that issue. The powers donated to the Minister under the proviso are fairly weighty and must therefore be used in the best interests of the local authority or the country at large. There cannot be unfettered discretion on the Minister to simply terminate the nomination without assigning any reason for it or complying with the principles of natural justice. It is axiomatic that statutory powers can only be exercised if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith. That was said by this Court in **R v Commissioner of Cooperatives**, **Ex Parte Co-operative Savings Credit Society Ltd**, **Civil Appeal No. 39/97(ur).** It is in part compliance with the rules of natural justice that the proviso in ***section 27(2)*** requires of the Minister that he shall deliver a written notice to the Councillor and until that is done, the office of the Councillor would not become vacant. The wording of the section is clear and does not admit the construction that a publication in the Kenya Gazette would communicate the decision of the Minister, as Sergon J., with respect, erroneously construed it. The decision cannot be made in the mind of the Minister and then be communicated later. It cannot also be made "*before the notice"* but *"in the notice"* to be delivered to the Councillor. It is not a decision if it is not manifested in the notice delivered or to be delivered to the Councillor. It is apparent that Sergon J. did not seek the benefit of ***section 267*** of the Act which provides for service of documents and lists in order of priority how "*service*" or "*delivery*" should be made. The section states:

"**267. Any notice, order or other document required or authorized by this Act or by any by-law**

made under this Act or any other written law to be served on any person (whether the expression "*service*"or "*give*"or "*send*"or "*deliver*" or any other expression is sued), then, unless a contrary intention appears therein, such notice, order or other document may be served, and shall be deemed to have been effectively served if served –

(a) personally upon the person on whom it is required or authorized to be served, or, if such person cannot reasonably be found, personally upon any agent of such person empowered to accept service on his behalf or personally upon any adult member of the family of such person who is residing with him; or

(b) by post; or

(c) by affixing a copy of the same on some conspicuous part of any premises or land to which it relates or in connexion with which it is required or authorized to be served; or

(d) where from any cause whatsoever, it is not possible to effect service of the notice, order or other document in any of the manner specified in paragraphs (a), (b) and (c) by publication of a copy thereof in the Gazette and in at least one newspaper circulating in the area of local authority."

Emphasis supplied.

Those provisions are clear that publications in the Gazette or newspapers may only be resorted to when the best methods of service, in descending order, are not possible. It is common ground in this matter that there was no attempt made by the Minister to serve any notice in any of the modes prescribed under ***subsections (a) (b)*** and ***(c)*** of ***section 267***. As such, resorting to the Kenya Gazette publication was premature and of no legal effect. The construction of that provision of the law as made by Ibrahim J. and Lenaola Ag. J. (as he then was) in the decisions referred to above was, with respect, a correct interpretation of the law. In my judgment, the Minister failed or neglected to act in accordance with the law or acted in disregard of it, when he purported to terminate the nomination of the appellant, Taib Ali Taib as a Councillor in Mombasa Municipal Council. His actions and omissions are therefore amenable to Judicial Review remedies.

Conclusion

……..

In the result, I would allow the appeal on this ground alone. I would set aside the orders of Sergon J. made on 28th April, 2006 and substitute therefor an order granting prayer (a) in the notice of motion dated 24th February, 2006. Should I make orders of prohibition as prayed in (b) and (c) of that application? I think they are unnecessary in view of the interim orders made by the court pending the hearing and determination of the appeal. I also note the order made by Maraga J. on 22nd February, 2006, when he granted leave to the applicant, in relation to reinstatement of the appellant as a Councillor and the Mayor of the Council. That order was not challenged and I think it was made on sound basis in law.

As for costs I would award the costs of the notice of motion in the Superior Court and also the costs of this appeal to the appellant as against the 1st Respondent only. The rest of the respondents appear to have been joined in the proceedings as a matter of formality and because the procedures so require. They bear their own costs of proceedings.

That is my judgment.

Dated and delivered at Nairobi this 4th day of May, 2007.

P.N. WAKI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR