



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Miscellaneous Civil Application 76 of 2009**

**IN THE MATTER OF: AN APPLICATION BY JAMES MAOBE MANYISA FOR JUDICIAL REVIEW (PROHIBITION)**

**AND**

**IN THE MATTER OF: LOCAL GOVERNMENT ACT, CAP 265 LAWS OF KENYA,**

**AND**

**IN THE MATTER OF: SECTION 33 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: SECTION 26 (B) AND 27 (2) OF THE LOCAL GOVERNMENT ACT, CAP 265**

**AND**

**IN THE MATTER OF: EXTENSION OF THE PERIOD OF NOMINATION**

**AND**

**IN THE MATTER OF: MUNICIPAL COUNCIL OF KISII**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE DEPUTY PRIME MINISTER &**

**MINISTER FOR LOCAL GOVERNMENT .... FIRST RESPONDEN**

**THE PERMANENT SECRETARY,**

**MINISTRY OF LOCAL GOVERNMENT ..... SECOND RESPONDENT**

**THE INTERIM INDEPENDENT**

**ELECTORAL COMMISSION ..... THIRD RESPONDENT**

**THE ATTORNEY GENERAL ..... FOURTH RESPONDENT**

**MUNICIPAL COUNCIL OF KISII ..... FIFTH RESPONDENT**

**AND**

**MAZINGIRA GREENS PARTY OF KENYA .....FIRST INTERESTED PARTY**

**PETER OMURWA ARASA ..... SECOND INTERESTED PARTY**

**AND**

**EX-PARTE**

**JAMES MAOBE MANYISA**

**RULING**

The ex-parte applicant filed his application dated 10<sup>th</sup> July, 2009 and sought the following orders:

- (a) An order of judicial review in the nature of prohibition  
to prohibit the respondents herein and more  
particularly the first respondent, from degazetting  
and/or denominating him as a nominated councillor  
within the municipal council of Kisii without complying  
with the provisions of **section 27 (2)** of the **Local  
Government Act** asread together with **section 33** of  
the **Constitution of Kenya**.
  
- (b) An order of judicial review in the nature of prohibition  
to prohibit the third respondent from approving and/or  
forwarding the name of **Peter Omurwa Arasa**, the  
second interested party, to the first respondent for  
gazettelement and/or nomination.
  
- (c) Costs of the application be borne by the respondents  
and the interested parties jointly and severally.

In the affidavit in support of the said application, the ex-parte applicant deposed that he was proposed by the first interested party as a councillor in the municipal council of Kisii and was consequently gazetted and nominated as a councillor on 11<sup>th</sup> April, 2008. The nomination was for a period not exceeding sixteen months with effect from April 2008. He was renominated and gazetted on 22<sup>nd</sup> June 2009.

Sometimes in June/July, 2009, he learnt that the first interested party, without due notice to him, had proposed to substitute his nomination with that of the second interested party. He annexed a copy of a letter dated 9<sup>th</sup> June, 2009 addressed to the Minister for Local Government by the Secretary General of the first interested party. The letter read as follows:

**“REF: NOMINATION OF COUNCILLOR OF**

**MAZINGIRA GREENS PARTY**

**The following is the name proposed by**

**Mazingira Greens Party to the Interim**

**Electoral Commission for the nomination of**

**the Municipal Council of Kisii, Peter Omurwa**

**Arasa Id/No. 20032194, electoral card**

**2007/005/0441546015 to replace James Maobe**

**Manyisa Id/No. 2672187, electoral card**

**2007/003/0439908886, whose term of**

**nomination is ending.”**

The ex-parte applicant stated that prior to the issuance and forwarding of the said letter, the first interested party had not convened and/or held any party meeting where the issue of the substitution was discussed. In his view, the proposed substitution was done without complying with the rules of natural justice and the decision was therefore unilateral and *ultra vires*.

Although the first respondent had renominated and gazetted his name, the ex-parte applicant was apprehensive that the interested party was likely to influence the first respondent with a view to degazetting his name. He argued that the first respondent has no jurisdiction to degazette the name of already nominated and gazetted councillors.

The first, second and fourth respondents did not file any affidavit in response to the ex-parte applicant's affidavit. They however filed grounds of opposition and written submissions. They were represented by Mr. Nguyo Wachira, a Litigation Counsel, Attorney-General's office. The third and fifth respondents did not file any papers at all and neither were they represented by counsel.

The second interested party filed a replying affidavit through M/s Minda and Company Advocates. He deposed that he was aware of the letter dated 9<sup>th</sup> June, 2009, addressed to the first respondent by the Mazingira Greens Party of Kenya. He stated that the first respondent has power under **section 27 (2)** of the **Local Government Act** to appoint a nominated councillor whose name has been presented by a party and at any time terminate such nomination upon request from the party that presented the name. He added that it was within the mandate of the first interested party to present a person to the third respondent for nomination by the first respondent. The first respondent was and is not under any duty to afford the ex-parte applicant a hearing before making his recommendation. Such decision is governed by individual party's constitution and/or regulations, the deponent asserted. He further stated that it had not been demonstrated how the intended gazettelement of his name as a nominated councillor and the degazettelement of the ex-parte applicant had contravened **section 27 (2)** of the **Local Government Act** as read with **section 33** of the **Constitution**. He urged the court to dismiss the application.

The first, second and fourth respondents filed the following grounds of opposition:

**“1. A case for issuance of prohibition has not**

**been set out.**

**2. The Minister has the authority to revoke**

**the nomination of a councillor.**

**3. The court cannot stop a legitimate process**

**from taking place.**

**4. The applicant's case is against the**

**interested parties and not the**

**respondents.**

Mr. Oguttu, learned counsel for the ex-parte applicant, filed written submissions which I have perused and duly considered.

Mr. Nguyo and Mr. Minda made brief responses to the said submissions.

The first issue which I need to determine that the court was asked to determine was whether or not the provisions of **section 27 (2)** of the **Local Government Act** are effective and operational. The court was also asked to determine the constitutional effect of that section as avis the provisions of **section 33** of the **Constitution**.

**Section 27 of the Local Government 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 nominations,  
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

councillor 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.”

**Section 26** of the **Local Government Act** deals with the number of councillors in a municipal council. **Subsection (2)**

thereof provides as hereunder:

“**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.**”

Mr. Oguttu submitted that **section 27 (2)** of the **Local Government Act** is inconsistent with **section 33** of the **Constitution** and to the extent of its inconsistency it is therefore void. He cited the decisions of the Ibrahim, J. in **REPUBLIC –VS- HON. E.K. MAITHA & 2 OTHERS, EX-PARTE ANTONY MUSILA MWAMANGI**, Miscellaneous



Application No. 669 of 2004 at Nairobi and **REPUBLIC –VS- MINISTER FOR LOCAL GOVERNMENT & ANOTHER**, Miscellaneous Application No. 917 of 2004 at Nairobi as well as the decisions by Lenaola, J. in **REPUBLIC –VS- HON. E.K. MAITHA & 2 OTHERS, EX-PARTE JOSEPH OKOTH WAUDI**, Miscellaneous No. 802 of 2003 at Nairobi and **REPUBLIC –VS- HON. E.K. MAITHA & 2 OTHERS EX-PARTE OTIENO KARAN**, Misc. Application No. 75 of 2004 at Nairobi.

All the above decisions were cited before Serгон, J. in **TAIB A.**

**TAIB –VS- THE MINISTER FOR LOCAL GOVERNMENT & OTHERS**, Misc. Civil Application No. 158 of 2006 at Mombasa.

Sergon, J. did not agree with the views of Ibrahim & Lenaola, JJ that **section 27 (2)** of the **Location Government Act** was inconsistent with **section 33** of the **Constitution**. He delivered himself thus:

**“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 power 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 the 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 denomination of councillors.”**

The ex-parte applicant, Taib A. Taib, whose nomination as a councillor in the municipal council of Mombasa had been revoked by the Minister for Local Government, was not satisfied by the decision of Serгон, J. and preferred an appeal against the same. In the appeal, **TAIB A. TAIB –VS- THE MINISTER FOR LOCAL GOVERNMENT AND OTHERS**, Civil Appeal No. 107 of 2006, the majority decision of Githinji and Waki, JJ.A, agreed with Serгон, J. in so far as the provisions of **section 27 (2)** of the **Local Government Act** and **section 33** of the **Constitution** are concerned.

Githinji, J.A., stated, *inter alia*:

**“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) by the learned Judge in his lucid and well reasoned judgment. Section 26 (2) incorporates by reference, the criteria and principles of 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.**

.....

.....

**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.”**

Waki, J.A, having reviewed the import of all the amendments that had been done to the Local Government Act since 1967, was of the view that parliament, in retaining the provisions of **section 27** intact, having amended **section 26** by adding **subsection (2)** thereof, intended to give the Minister for Local Government executive functions for control of Local Authorities.

The learned judge held as follows:

**“Section 26 itself has been revisited 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.**

.....

.....

Section 27 **which is about** "Terms of Office of Councillors"

**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 have 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 section 27 (2) is**

**neither inconsistent nor repugnant to section 33 of the**

**Constitution. I so find."**

In view of the emphatic findings by the two learned Judges of the Court of Appeal, I cannot agree with the submissions of Mr. Oguttu that the provisions of **section 27 (2)** of the **Local Government** are inconsistent with the provisions of **section 33** of the **Constitution**. I further reject the submission that the Minister for Local Government, the

first respondent herein, has no power to denominate a councillor. In TAIB'S case, the Court of Appeal found that the Minister has such power but in exercising the same the proviso to **section 27 (2)** of **Cap. 265** requires him to serve a notice in writing to a councillor whose nomination is sought to be terminated. Until the law is amended to state otherwise, the Minister is still vested with the aforesaid power. Ideally, once a councillor has been nominated he should be allowed to serve for a period of five years or such other period before the next civic elections are held but that is not what the current law provides.

Turning to the other issues raised in this application, having found that the Minister did not contravene the provisions of **section 27 (2)** of the **Local Government Act** as read with **section 33** of the **Constitution**, the relief sought against him and the Permanent Secretary, Ministry of Local Government must fail. I say the same of the third respondent. In any event, none of them had taken any action against the ex parte applicant. The latter was merely apprehensive that his nomination was about to be revoked.

As regards the first interested party, I do not know what its constitution and/or regulations provide regarding the procedure of picking any of its members and recommending him/her for nomination. Suffice to say that the party acted within its mandate to pick the second interested party. The party also had power to request the first respondent to nominate the interested party when the term of nomination of the ex-parte applicant ended. I do not think that the said party can be faulted for so doing.

In view of the foregoing, I find no merit in this application  
and dismiss the same with costs to the respondents and the  
interested parties.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF DECEMBER, 2009.**

**D. MUSINGA**

**JUDGE.**

**16/12/2006**

Before D. Musinga, J.

Mobisa – cc

Mr. Ochwangi for the applicant

Mr. Minda for the respondent

**Court:** Ruling delivered in open court on 16<sup>th</sup> December, 2009.

**D. MUSINGA**

**JUDGE.**



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