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Case Class:	Civil
Court:	High Court at Kisii
Case Action:	Ruling
Judge:	Daniel Kiio Musinga
Citation:	REPUBLIC v DEPUTY PRIME MINISTER & MINISTER FOR LOCAL GOVERNMENT & 4 others Ex-parte JAMES MAOBE MANYISA [2009] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
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Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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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 KENYAFIRST INTERESTED PARTY

PETER OMURWA ARASA SECOND INTERESTED PARTY

AND

EX-PARTE

JAMES MAOBE MANYISA

RULING

The ex-parte applicant filed his application dated 10th 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 11th April, 2008. The nomination was for a period not exceeding sixteen months with effect from April

2008. He was renominated and gazetted on 22nd 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 9th 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 9th 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 Sergon, 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 Sergon, 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 Serгон, 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 Act** 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 denominated 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 16TH 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 16th December, 2009.

D. MUSINGA

JUDGE.



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