



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc. Civ Appli. 158 of 2006

TAIB A. TAIB.....
.....APPLICANT

VERSUS

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

THE PS FOR LOCAL GOVERNMENT.....2ND RESPNDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

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

RULING

Taib A. Taib, the Ex-parte applicant herein was until the 17th February 2006 a nominated councillor and elected mayor of the Municipal Council of Mombasa. By a Gazette Notice of that date the Minister for Local Government revoked his nomination. Aggrieved by that decision he seeks in this application leave to commence judicial review proceedings for orders of certiorari to quash that decision and prohibition to prohibit the Respondents from interfering with “the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as nominated councillor in the Municipal Council of Mombasa.” He also seeks leave to apply for a further order of prohibition to prohibit the fourth Respondent from calling or holding elections for the office of Mayor of Mombasa to replace him. Lastly he seeks an order that the leave granted do operate as a stay.

The application is brought under the provisions of Order 53 Rule 1(1) and (3) of the Civil Procedure Rules, Section 8(2) of the Law Reform Act and Section 60 of the Constitution. It is based on 13 grounds which, when considered conjunctively with Mr. Orengo’s submissions, can be summarized to three, namely: -

1. That the Minister’s decision is ultra vires the provisions of the constitution and the Local Government Act in that Section 27(2) of the latter under which the Minister purported to act is inconsistent with Section 33 of the Constitution and therefore null and void to the extent of the inconsistency.
2. That even if Section 27(2) of the Local Government Act is not in conflict with Section 33 of the Constitution the Minister’s decision is nonetheless illegal for failure to serve the Ex-parte Applicant with the requisite notice.

3. That the Minister's decision is an infraction of the rules of natural justice for condemning the Ex-parte Applicant unheard.

The application is supported by the verifying affidavit of the Ex-parte Applicant and the accompanying statement. Having read the application together with the verifying affidavit and the annexures thereto as well as the accompanying statement and having considered the submissions made by Mr. Orengo, counsel for the Ex-parte Applicant as well as the authorities cited I am satisfied that the Ex-parte Applicant has made out a case for grant of leave. I accordingly grant him leave to apply for the judicial review orders of certiorari and prohibition as prayed.

The Ex-parte Applicant has also sought an order that the leave granted do operate as a stay. It is this limb of the application that caused me to adjourn this ruling from yesterday afternoon to this morning to give me time to read the authorities cited by Mr. Orengo and consider the circumstances under which the stay orders were made in those cases. Before I comment on those authorities as the Ex-parte Applicant's prayer for stay seeks an order as it were reinstating him to his office, I need to say something about the order of stay in such cases.

I wish to state that, as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction. It is the non-availability of injunctions against the Government that Glidewell LJ had in mind when in the case of **Republic – Vs – Secretary of State for Education and Science, Ex-parte Avon County Council (No2) CA(1991)1 ALL ER 282**, he said: -

“An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay.”

That this court has jurisdiction to grant orders of stay has never been in issue given the provisions of Order 53 Rule 1(4). What is always in issue is whether, in the circumstances of any particular case, a stay order is efficacious.

I also want to state that in judicial review applications like this one the court should always ensure that the Ex-parte applicant's application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore where the order of stay is efficacious the court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction?

The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act.

With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex-parte Applicant's case is deserving of a stay order.

The Ex-parte Applicant seeks: -

“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 in the Municipal Council of Mombasa.”

Can I grant this prayer in view of the scope and purpose of the stay order as stated above? I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte

Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case.

As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councilor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined.

Given the urgency of this matter I order that the main application be filed and served within 15 days and thereafter be fixed for hearing on priority basis.

Orders accordingly.

DATED and delivered this 22nd day of February 2006.

D. K. MARAGA

JUDGE