



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

JUDICIAL REVIEW NO. 1 OF 2021

IN THE MATTER OF

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

ORDERS IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS IN THE

NATURE OF PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF

ARTICLES 23, 27, 28, 29, 38, 39, 40, 43, 47, 50(1), 89 & 165 OF

THE CONSTITUTION

AND

IN THE MATTER OF

SECTIONS 4, 5, 7(1) & (2) a, c, d, e, f, h, i, j, k, l, m, n & o) & 11 OF THE FAIR

ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTIONS 4, 6, 8 & 13 OF THE CHIEFS ACT

CAP 128 OF THE LAWS OF KENYA

BETWEEN

MOHAMED ABEY MOHAMED.....1ST APPLICANT

HON. ALI ABDULLAHI GURE,

MCA MODOGASHE WARD.....2ND APPLICANT

VERSUS

CABINET SECRETARY FOR MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

REGIONAL COMMISSIONER,

NORTH EASTERN REGION.....2ND RESPONDENT

THE COUNTY COMMISSIONER,

GARISSA COUNTY.....3RD RESPONDENT

THE DEPUTY COUNTY COMMISSIONER,

LAGDERA SUB-COUNTY.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. The Constitution 2010 opened various avenues for litigants or aggrieved persons to move the court seeking for remedies to situations that hitherto saw litigants and courts turn to the common law for recourse. The Constitution 2010 filled historical vacuums that saw courts and litigants referencing common law principles.

2. The Applicants in this matter, **Mohamed Abey Mohamed** and **Hon. Ali Abdullahi Gure**, an MCA Modagashe Ward describe themselves as ordinary residents of Lagdera Sub-County within Lagdera Constituency. They state further that having widely consulted with the residences, elected and spiritual leaders of the area, they moved the court.

3. Their grievance lies with the administrative decision of the 3rd Respondent to move seven (7) chiefs from the areas they currently occupy to other units which they submit is illegal, ultra vires, made without consultation and involvement of citizens, and which decision will disenfranchise the residents of the said areas and will expose them to insecurity, poor and limited access to public service.

4. In moving the court, the Applicants relied on Articles 23, 27, 28, 29, 38, 39, 40, 43, 47, 50(1), 89 & 165 of the Constitution of Kenya, Sections 4, 5, 7(1) & (2) a, c, d, e, f, h, i, j, k, l, m, n & o & 11 of the Fair Administration Actions Act and Section 4, 6, 8 & 13 of the Chiefs Act.

5. And on the 2nd of February 2021 the court granted leave to the Applicants to move the court for orders of Certiorari, Prohibition and Mandamus.

6. The issue now pending for determination before court is whether or not leave so granted should operate as a stay pending hearing and determination of the matter.

7. Counsel for the Applicants submitted that there is need to stay the directive as issued as the same will expose the applicants and other residents of the affected areas to insecurity, and will deny them essential government services. In propounding his case counsel for the applicants went further to say that the said directive is yet to be implemented. Further he argued a stay will give the court an opportunity to ventilate and make a fair decision.

8. In opposing the application, the State relied on three grounds; firstly, that the application offends Order 53 rule 2 of the Civil Procedure rules 2014, secondly, the administrative decision being complaint of has already been implemented and thirdly, the prayers being sought offend public interest.

9. In as much as **Order 53 rule 2 deals** with prerogative orders and requires that an application challenging such orders be filed within a given time. The application before court is brought under the Constitution of Kenya 2010 in particular Articles 23, 27, 29, 38, 39, 40, 47, 50(1), 89 and 165 and as held by courts severally. The remedies being sought for are now under the realm of the Constitution 2010 and are no longer Common Law remedies as we knew them before the incoming of the new Constitution.

In this regard this court aligns itself with **Mativo J** in the case of **Republic vs Firearms Licensing Board & Another Exparte Boniface Mwaura [2019] eKLR** where he stated as follows:

“.....all that a litigant is required to do is to demonstrate that the impugned decision whether it is oral, a letter or an order or proceedings violate or threatens to violate the bill of rights or violation of the constitution. No matter how noble and worthy of admiration the Common Law principles are, if they are simply irreconcilable with the constitution parameters, then the Constitution prevails.”

10. Order 53 rule 2 of the Civil Procedure rules was anchored on Common Law. The said order though still in our books, I must say that the same is certainly subservient to the Constitution and cannot be used to override that which the constitution mandates.

11. None of the 5 Respondents named has filed a statement on oath in support of the submission by their counsel that the decision

complained of has been implemented. Before the court is the averment by one of the applicants that as late as the 21st of January 2021, a meeting was called to discuss the modalities of implementing the said directive and which directive is yet to take effect, and therefore in the absence of any evidence to the contrary the court will for now rely on the information on record.

12. Where does public interest lie in this matter?

The Applicants decry the likely insecurity and lack of government services if the seven (7) administrative units are moved.

In the case of **Munir Sheikh Ahmed vs Capital Market Authority [2018] eKLR** Lady Justice R. Nyamweya in quoting two other cases had this to say as relates to public interest:

“The second factor that comes to play in the exercise of discretion whether or not to grant a stay in judicial review proceedings is that of the public interest. The public interest as an overriding factor when determining; whether or not to grant stay orders was explained by Majanja J in *R vs Capital Market Authority Ex Parte Joseph Mumo Kivai & Anor (supra)*, where the learned judge held that judicial review proceedings are public law proceeding for predication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders.

The public interest element in the grant of a stay was also the subject of the decision in *R (H) vs Ashworth Special Hospital Authority (supra)*, where Dyson LJ held that where there is a public interest element involved, the court strikes a balance between the rights of an individual and the public interest, and in striking a balance, the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a tribunal’s decision was unlawful. Lastly, the public interest as a relevant factor was also considered by Nyamu J (as he then was) in *Re Birac International SA/Bureau Veritas [2005] 2 EA 42*, wherein the learned judge cited the decision in *R vs Monopolies and Mergers Commission Ex Parte Argyll Group Plc [1986] 1 WLR 763* that the court can refuse to order that leave granted for order of judicial review does operate as a stay where such would violate the needs of good administration.”

13. The Applicants claim that citizens of the affected areas will be exposed to insecurity and government services. Further in violation of the constitution and further there was lack of participation. This has not been controverted in evidence by the Respondents to demonstrate to court the public interest alluded to in the grounds of opposition. The court has taken cognizance of the cross-border dispute mentioned in the impugned letter dated 6th March 2020, however no further details were availed.

14. In this court’s view therefore, for now public interest tilts in favour of the Applicants and therefore leave will operate as stay of the directive issued vide the letter of 6th March 2020 or any other order or directive arising from the said letter pending hearing and determination of this suit.

15. Costs in the cause.

DELIVERED AND SIGNED AT GARISSA THIS 25TH DAY OF FEBRUARY, 2021.

.....

ALI ARONI

JUDGE