



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NUMBER 38 OF 2016

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHTS OR FUNDAMENTAL FREEDOMS UNDER
ARTICLES 27 AND 56 OF THE CONSTITUTION**

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

FILAX K. SEMBUI & 8 OTHERS.....PETITIONERS

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Parties

1. The petitioners are members of the Ogiek community. They describe themselves as an indigenous minority and marginalized people originally resident within the Mau Forest Complex in the larger Nakuru County.
2. The 1st Respondent, the Independent Electoral and Boundaries Commission (IEBC), is a Constitutional Commission established under Article 88 of the Constitution of Kenya (2010).
3. The 2nd Respondent, the Attorney General is a state office established under Article 156 of the Constitution of Kenya (2010).

Pleadings

4. The Petitioners filed a petition against the Respondents on the 18th August, 2016 seeking orders that:-
 - a. A declaration that the failure by the Respondents, jointly and severally, to put in place legislative, policy and other measures that effectively secure and safeguard election of a member of the Ogiek community in elective public bodies at any level of representation violates Articles 10, 27, and 56 of the Constitution of the Republic of Kenya.
 - b. An order of mandamus to compel the Respondents to put in place legislative, policy and other measures within such a time as this court shall set to secure and guarantee representation of Ogiek community in elective public bodies at any level of representation.
 - c. Costs of and incidental to this petition
 - d. Such other and further orders, directions that the court may deem just and expedient.
5. On the 25th November, 2016, the 1st Respondent in response to the petition, filed a Notice of Preliminary Objection dated the 20th November, 2016 on the grounds that:
 - a. This Honourable court lacks jurisdiction to entertain the petition as filed as the court's jurisdiction for similar prayers can only be

invoked in terms of Article 89 (10) of the Constitution of Kenya 2010.

b. The prayer of mandamus sought by the petitioner offends the ardent principle of separation of powers the bench mark of the Constitution of Kenya 2010

c. The prayers sought by the petitioners cannot be obtained as they offend provisions of Article 100 of the Constitution of Kenya.

6. The 2nd Respondent on their part only filed a memorandum of appearance on 8th September, 2016 and at the hearing of the petition, their counsel associated himself with the 1st Respondent's submissions.

Submissions

7. In compliance with the directions of the court, parties filed submissions on the Preliminary Objection raised by the 1st Respondent and subsequently highlighted the same. From my perusal of the Petition and the respective submissions of the parties, the main issue for determination is whether the Preliminary Objection should be upheld. Other issues as outlined by the parties are: whether the court has jurisdiction to entertain the petition or grant the orders sought, and; whether the prayers sought offend the principle of separation of powers.

1. Whether the court has jurisdiction to entertain the petition or grant the orders sought.

I must as required by law, first address the issue of jurisdiction. In the case of **Owners Of Motor Vessel ' Lillian S' Vs Caltex Oil (Kenya) Ltd 1989 KLR 1**. Hon Justice Nyarangi Judge of Appeal (as he then was) held as follows:-

“..... Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence”.

8. In the present petition, learned counsel for the 1st Respondent, Mr. Aim, submitted that the petitioners were urging the court to direct the 1st Respondent to delimit the boundaries so that the Ogiek had their own constituency. He submitted that the court lacked jurisdiction to determine the petition as powers to delimit boundaries was vested in the 1st Respondent under Article 89 of the Constitution of Kenya, 2010.

9. Counsel further submitted that according to Article 89 (10) of the Constitution, the court could only review the decision to delimit boundaries made by the 1st Respondent within a period of 30days from the date of the review. According to the 1st Respondent the last review of boundaries was carried out in the year 2012 by its predecessor, the Interim Independent Boundaries Review Commission at which time the petitioners should have approached the court if they felt aggrieved. Counsel further submitted that the 1st Respondent was obliged to review boundaries within a period of 8 to 12 years since the last review and that the 1st Respondent was still within time to carry out delimitation of boundaries. He submitted that the court had no jurisdiction to make an order to the contrary.

10. In further submissions, Counsel further urged the court to find that it lacked jurisdiction because the petitioners had failed to demonstrate the alleged violations by the 1st Petitioner in the Petition. He further submitted that the 1st Respondent did not have powers to make policies as per Section 3 and section 4 of the Independent and Electoral Boundaries Commission Act 9 of 2011 stating that a court cannot direct an independent commission to carry out functions not assigned to it.

11. The petitioners on the other hand held the view that the court had the requisite jurisdiction. Learned counsel for the Petitioner, Mr. Ongoya, submitted that the petition was based on Article 22 of the Constitution which gives the court jurisdiction to hear the petition. He further submitted that the orders sought in the petition were in tandem with Article 23 of the Constitution and that the Petitioner had not placed reliance on Article 89(10) of the Constitution as suggested by the Respondent.

12. The Petitioners urged the court that under Article 27 of the Constitution, the Respondents, being the State as defined in Article 260 of the Constitution, were to take legislative measures, including affirmative action programmes and policies to redress disadvantages suffered.

13. The principles to be applied in considering a preliminary objection were stated in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969]EA 696**. At page 700 Pr. D-F Law JA as he then was had this to say:-

“....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold, P.; on the other hand at pg.701 paragraph B-C added the following:

“A Preliminary objection is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion....”Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion....”

14. The 1st Respondent has challenged the jurisdiction of this court to entertain the petition on the basis of Article 89 (1) of the Constitution

and further on the ground that the petitioners have not specifically pleaded the violations suffered.

15. On the ground that the petitioners have not specifically pleaded the violations, it is this court's opinion that such a ground does not fully satisfy the principles of a preliminary objection as set out in the Mukisa biscuit case (*supra*) as this is not a pure point of law. The court would have to scrutinize the petition in order to determine whether the violation has been specifically pleaded and consider whether or not there is such a violation as alleged by the petitioner. Further the assertion by the 1st Respondent that the petition has not specifically pleaded the violations suffered does not oust the jurisdiction of the court but rather reveals a defect in the petition.

16. Secondly, on the issue of lack of jurisdiction on the basis of Article 89 (10) of the Constitution, the 1st Respondent has stated and correctly so that the court can only review the decision of the 1st Respondent on delimiting of boundaries after 30 days from the date of such review. It is my understanding however that the petition is not seeking a delineation of boundaries but rather enforcement of specified rights under the Constitution. The petition was brought under Articles 22, 27 and 56 of the Constitution seeking for a remedy for breach of rights enshrined in the Constitution. Whether the petitioners deserve the remedies sought or not is a matter to be determined if the petition goes to full hearing.

17. The jurisdiction of the court to hear and determine matters touching on the bill of rights is encompassed in Article 165 (3)(b) of the Constitution which provides:

Subject to clause (5), the High Court shall have—

(a)

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

18. Article 23(1) of the Constitution states:-

The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

19. The petitioners have brought their petition under Articles 10, 27 and 56 of the Constitution alleging that their rights have been breached by the failure of the Respondents to put in place legislative, policy and other measures, and they have come to this court seeking redress for alleged violation of their rights under the Bill of Rights. This being the case this court finds that it does have the jurisdiction to entertain this matter by virtue of Article 23 and 165 (3) (b) of the Constitution.

b). Whether the prayer for mandamus offends the principle of separation of powers

20. On the 2nd issue, whether an order of mandamus offends the principle of separation of powers, counsel for the 1st Respondent submitted that the 1st Respondent was an arm of the executive. That an order of mandamus could only be issued in judicial review where an authoritative body had failed to do what it was required to do. He further submitted that the petitioners had not shown how the 1st Respondent violated their rights and that if the court granted the orders it would be acting ultra vires to its mandate as per Article 165 of the Constitution.

21. Counsel further submitted that under Article 82 of the Constitution it was Parliament and not the 1st Respondent that was clothed with powers to enact legislation on the delimitation of boundaries. He further submitted that Article 94 of the Constitution vested the power to make provisions having the force of law in Kenya and urged the court to find that it cannot compel the 1st Respondent to formulate legislation. According to the 1st Respondent, the court would be rewriting the law in clear violation of the Constitution and in breach of the separation of powers if it issued an order of mandamus against the 1st Respondent.

22. On the issue whether an order of mandamus offends the principle of separation of powers, learned counsel for the petitioners submitted that the court had the authority to compel a legislative function to be done by public authorities.

23. The order of mandamus is one of judicial review orders as contemplated under Article 23(3)(f) of the Constitution which can be issued by the court to compel a public body or state body/officer to perform a specific duty imposed upon it by statute. On the issue of mandamus, the courts have severally cited with approval the Court of Appeal case of **Republic Vs Kenya National Examinations Council Exparte Gathenji CA 266/1996** which stated thus:-

“...The order of mandamus is the most extensive remedial nature, and is in form a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way. These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of person has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be

performed the duty. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same...”

24. As has been set out above, the petition is based on allegations of contravention of the rights of the petitioners under Articles 10, 27 and 56 of the Constitution. The court has found that it has the jurisdiction to deal with the petition brought before it and the issue is whether the court can issue an order of mandamus against another arm of government.

25. The reliefs that the court may grant a petitioner of on the grounds that their rights have been infringed are set out in **Article 23(3)** of the **Constitution** which provides:

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

a. a declaration of rights;

b. an injunction

c. a conservatory order

d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

e. an order for compensation; and

f. an order of judicial review.

26. It is the finding of this court that the court has powers under the Constitution to issue an order of mandamus where an arm of the government has failed or omitted to carry out its duties as imposed by statute and it shall not be interfering with the doctrine of separation of powers.

27. The 1st Respondent has further submitted that in granting an order of mandamus the court shall be interfering with the duties of the 1st Respondent in directing them when to delimit the boundaries of the constituencies and further that by virtue of Act No. 9 of 2011, the 1st Respondent does not have authority to formulate policies or legislation. However, as the court has earlier stated the issue for determination in the petition is not the delimitation of boundaries but rather that the rights of the petitioners with respect to political representation have been infringed.

28. Article 27(6) of the Constitution provides that:

“To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination”.

29. From the above provision it is clear that the Constitution imposes an obligation on the state to take all measures including affirmative action programmes and policies to ensure that the rights are not infringed.

30. Article 260 of the Constitution defines state as:

“when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution”

Further a state organ is defined as:

“a commission, office, agency or other body established under this Constitution”

29. From the foregoing it is clear that the Respondents herein are part of the state and fall within the ambit of Article 27

30. On the issue of whether the 1st Respondent has powers to formulate legislation, I am in agreement with the 1st Respondent that it does not have powers to legislate but rather the duty is imposed upon Parliament under Article 94 (5) of the Constitution. However, nothing has been shown to this court that the 1st Respondent cannot take other measures such as affirmative action programmes and formulation of policies. The extent to which the Respondents can respond in bringing to life the Constitutional rights cited by the petitioners can only be advanced during the hearing of the petition and cannot be canvassed by way of a preliminary objection. It might very well be that the petitioners may have left out of the petition a necessary party or parties who bear the responsibility of actualizing affirmative action policies, programmes or legislation. It is clear to the court however that a joinder or non – joinder of parties would not be sufficient ground to support the present preliminary objection.

31. In the result I find that the issues raised in the preliminary objection dated 20th November, 2016 have no merit and the same is hereby dismissed.

Ruling Signed

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R. LAGAT KORIR

JUDGE

Ruling Delivered, Dated and Signed at Nakuru this 19th Day of December, 2018

.....

JANET MULWA

JUDGE

In the presence of:-

.....**Court Assistant**

.....**For the Petitioner**

.....**For the 1st Respondent**

.....**For 2nd Respondent**