



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
PETITION NO 1 OF 2016
(FORMERLY NAIROBI HC PETITION NO 67 OF 2016)

RICHARD NJOROGE MBUTHIA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....RESPONDENT

R U L I N G

1. The Petitioner in this petition, **Richard Njoroje Mbugia**, has complained about the delimitation of boundaries of sub-locations and wards in Gatundu North Constituency in 2012 by the Respondent, the **Independent Electoral Boundaries Commission (IEBC)**. That delimitation was part of a country-wide exercise by the Respondent under **Article 89 of the Constitution of Kenya, 2010** in setting electoral boundaries in the entire country.

2. The specific complaint in the petition is that the Respondent placed Igegania Sub-location in Chania Ward instead of letting it remain in Mang'u Ward where it "naturally and geographically" belonged.

3. The specific reliefs sought in the petition are –

(i) A declaration that the decision of the Respondent to delimit Igegania as part of Chania Ward rather than Mang'u Ward was unreasonable and in breach of Article 89 of the Constitution of Kenya, 2010 and also in breach of the Petitioner's and other community members' constitutional rights and fundamental freedoms.

(ii) An order directing the Respondent to return Igegania Polling Station to Mang'u Ward and gazette it as belonging in Mang'u Ward before the next general elections scheduled for August 2017.

(iii) An order directing the Respondent to register residents of Igegania as voters in Mang'u Ward during the voter registration scheduled for early 2017.

4. The Respondent responded to the petition by filing **notice of motion dated 11/04/2016** in which it sought the main order that the petition be struck out with costs. The grounds for the application include –

(i) That there existed a petition, **Nairobi HC Judicial Review Application No 99 of 2012**, concerning the delimitation of electoral boundaries in Gatundu North Constituency.

(ii) That Nairobi HC Judicial Review Application No 99 of 2012 was consolidated with other proceedings challenging delimitation of electoral boundaries gazetted by the Respondent in 2012.

(iii) That the consolidated proceedings were heard as **Nairobi HC Misc. Application No. 94 of 2012, Republic -vs- IEBC and Another Ex Parte Councilor Eliot Lidubwi Kihara & 5 Others [2012] eKLR**

(iv) That in the consolidated proceedings Nairobi HC Judicial Review Application No 99 of 2012 was heard and dismissed for lack of merit.

(v) That the issues raised in the present petition and the facts and pleadings involved are similar to those raised in Nairobi HC Judicial Review Application No 99 of 2012, and that therefore the present petition is *res judicata*.

(vi) That in any event, the electoral boundaries having been gazetted on or about 10/03/2012, any challenge to any of those electoral boundaries should have been mounted within 30 days of that date. The present petition is thus hopelessly out of time, and this court would have no jurisdiction to entertain it.

(vii) That the petition is otherwise scandalous, frivolous, vexatious and an abuse of the process of the court.

That application is the subject of this ruling.

5. The Petitioner belatedly filed a replying affidavit on 12/05/2016. He denies that the petition is *re judicata*.

6. The application was canvassed by way of written submissions. Those of the Respondent/Applicant were filed on 17/08/2016 while those of the Petitioner/Respondent were filed on 30/08/2016. I have considered those submissions as well as the authorities cited.

7. The broad issue in this application is whether this court has jurisdiction to hear and determine the petition. The Respondent says the court does not have jurisdiction on two counts –

(a) That the petition has been filed way out of the time stipulated in Article 89(10) of the Constitution.

(b) That in any event the petition is *res judicata*.

The Petitioner's position is that the court has jurisdiction and the petition is not *res judicata*.

8. As already seen, the petition is essentially challenging the Respondent's delimitation under Article 89(3) of two wards – Mang'u and Chania – within Gatundu North Constituency. That delimitation took place in the year 2012 and was published on 14/03/2012 vide **Legal Notice No14 of 2012** and the **National Assembly Constituencies and County Assembly Wards Order, 2012**.

9. Under Article 89(10) of the Constitution a person may apply to the High Court for review of a decision of the Commission in respect to such delimitation, etc. However, application for such review must be filed within thirty days of the publication of the decision of the Respondent on such delimitation in the Gazette, and must be heard and determined within three months of the date of filing.

10. It is then clear that the petition herein, which is essentially an application under Article 89(10) of the Constitution for review of the Respondent's decision regarding the delimitation of the boundaries of Mang'u and Chania Wards within Gatundu Constituency, has been filed nearly five (5) years outside the period decreed by Article 89(11) of the Constitution. The petition is filed way out of time, and I so hold. This court therefore has no jurisdiction to hear and determine the petition.

11. Regarding the plea of *res judicata*, it cannot be in dispute that the same issues raised in the present petition were raised in Nairobi HC Judicial Review Application No 99 of 2012. A cursory perusal of both pleadings readily discloses this.

12. Nairobi HC Judicial Review Application No 99 of 2012 was consolidated together with other similar proceedings and heard as one by a High Court Bench of five judges in Nairobi HC Misc. Application No 94 of 2012. That bench delivered judgement in respect of each consolidated matter before it, including Nairobi HC Judicial Review Application No 99 of 2012. The court dismissed the same.

13. The Petitioner herein may not have been a direct party in Nairobi HC Judicial Review Application No 99 of 2012. But he is a resident of Gatundu North Constituency, and the judicial review application had been brought on behalf of the residents of Gatundu North Constituency.

14. The High Court is the High Court with the same jurisdiction whether constituted by a single judge or a number of judges.

15. The issues in the present petition were directly and substantially in issue in Nairobi HC Judicial Review Application No 99 of 2012. That former suit was between the Respondent herein and applicants under whom the Petitioner now claims, under the same title, that is, as a resident of Gatundu North Constituency.

16. The former suit was tried and determined by a court competent to try it, that is the High Court. This present court too is the High Court.

17. I therefore have no hesitation in holding that the present petition offends section 7 of the Civil Procedure Act, Cap 21 and is *res judicata*.

18. In the event I will allow the notice of motion dated 11/04/2016. The petition herein is struck out with costs to the Respondent. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 23RD DAY OF FEBRUARY 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 24TH DAY OF FEBRUARY 2017