



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO. 9 OF 2016**

**IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 88 (4) (C) AND 89 (3) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED VIOLATIONS OF THE CONSTITUTION PARTICULARLY ARTICLE 1, 10, 12, 258, 259 AND 260**

**AND**

**IN THE MATTER OF ALLEGED VIOLATIONS OF THE COUNTY GOVERNMENT ACT, 2012 PARTICULARLY SECTION 26 THEREOF**

**BETWEEN**

**1. RISHAD HAMID AHMED ..... PETITIONER**

**2. ALI BAKARI MOHAMED ..... PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION ..... RESPONDENT**

**RULING**

The petition dated 13<sup>th</sup> April, 2016 seeks the following orders: -

- 1. A declaration that the respondent violated the Constitution and the law is delimiting the wards in.**
- 2. A conservatory order that restrains the respondent from carrying out voter registration pending the hearing and determination of the petition.**

3. **An order directing the respondent to conduct a review of the wards in Lamu County urgently before August, 2016 or with reasonable period.**
4. **Costs of this petition.**

The petition is supported by the affidavit of Rishad Hamid Ahmed sworn on 13<sup>th</sup> April, 2016. The petitioners also filed a notice of motion seeking conservatory orders restraining the respondents from carrying out voter registration exercise in Lamu County pending the hearing and determination of this petition. The respondent have filed a replying affidavit sworn by Moses Kipkoge on 19<sup>th</sup> April, 2016.

The notice of motion was fixed for interpartes hearing today. Mr. Ogeto, counsel for the respondent informed the court that he has an application to make before the matter proceeds. Counsel submitted that he has instructions from his client to kindly request me to recuse myself from hearing this matter. The main basis of the request is that this court heard petition number 4 of 2015 whereby observations were made by the court in relation to the provisions of Section 26 of the County Governments Act. The current petition is grounded on the provisions of that section. Counsel maintains that the respondent is of the view that there might be some appearance of bias on the part of the court. The respondents did not make submissions on their position relating to Section 26 of the County Government Act.

Mr. Ogeto further submitted that according to the respondents, Section 26 of the County Governments Act is unconstitutional. The respondents did carry out delimitation of boundaries and the next exercise can only be done after eight years. The County Governments Act came into force after the delimitation had been carried out. The respondent is of the view that the court made its opinion on this issue.

Mr. Aboubakar, counsel for the petitioners has objected to the application. Counsel maintains that a formal application ought to have been made. That the fact that the court declared its opinion cannot be a ground for a Judge to recuse himself. Petition number 4 of 2015 was decided against Mr. Aboubakar's clients. The respondent was party to that petition but did not appeal. The mere fact that the court made interpretation of Section 26 cannot amount to bias. Mr. Aboubakar submit that the respondent has a mindset and has already concluded that Section 26 is unconstitutional as it is in conflict with Articles 88 and 89 of the Constitution. The respondent cannot challenge that Section through this petition. Counsel maintains that the voter registration exercise is on-going in Lamu County and this might complicate the status of the wards.

It is true that I heard Malindi petition number 4 of 2015 and delivered a ruling on 10<sup>th</sup> December, 2015 upholding a preliminary objection. It is also clear from my ruling that I asked the respondent herein to ensure that during the next general elections, Lamu ward should have at least 15 electoral wards as per Section 26 of the County Government Act. Unfortunately, the respondent did not appeal that decision. It is evident that the respondent has a fixed position on the issue of delimitation of electoral boundaries. My view is that there is a difference between a review of names and boundaries of a Constituency and those of wards. Article 89 (2) of the Constitution specifically deals with constituencies and gives the eight year period while Article 89 (3) deals with names and boundaries of wards and the operating word is **“Periodically”**. There is also the issue of the number of wards. It is Section 26 of the County Governments Act which gives the total number of electoral wards 1450. It is the same section which gives the minimum wards for each county to be fifteen. The Act came into force after the final announcement of the results of the 2013 elections. However, the respondent exactly used that number and did not exceed it. It would have been prudent for the respondent to have approached any court or parliament and discuss the issue of the number of wards in Lamu County.

Turning back to the main issue, it is the duty of a judicial officer to ensure that the litigants have faith in the court in determining the dispute between the parties. The respondents have politely asked me to recuse myself. I entirely agree with that request as the same is made in good faith. It is not meant to intimidate the court or purposely made so that the file can be sent to a Judge of the respondent's choice. As Judges, we should be ready and willing to recuse ourselves wherever a party feels that the judicial officer has a pre-determined opinion on a specific legal/issue. It is true that the court does not have a

fixed mind. However, a party should not have a feeling that a decision will be made against him/her as the court's position is known. Even if the Judge will not be biased, such remote feeling by the litigant should be avoided by having the matter heard by a different judicial officer.

I did make my views known on the issue of Section 26 of the County Governments Act. It would be prudent and fair if the dispute herein can be handled by a different judicial officer. That is the only way we can promote fairness, independence, competence, integrity as well as confidence in the courts as per our oath of office.

I wish to thank Mr. Ogeto and the respondents for raising the issue of my recusal at the earliest stage. No formal application was required. Justice must not only be done but must be seen to be done. I entirely agree with the application for my recusal and I do hereby recuse myself from hearing this petition.

With regard to conservatory orders, I note that the exercise to register voters in Lamu has already started. Stopping the exercise may not be for the best interest of our nation. Whoever will handle this matter will be able to give directions on the way forward. The respondent is able to move voters from one ward to another ward within a reasonable period should extra wards be delimited in Lamu County.

The end result is that the application for my recusal is merited and is hereby allowed. This file is transferred to the Mombasa High Court for hearing and determination. In view of the urgency, the matter shall be immediately transferred to the Mombasa High Court and placed before the Resident Judge for further directions.

**Dated and delivered this 20<sup>th</sup> day of April, 2016.**

**S.J. CHITEMBWE**

**JUDGE**