



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CONSTITUTIONAL PETITION NO. 4 OF 2016**

**MOHAMED ABIKAR ..... PETITIONER**

**V E R S U S**

- 1. CABINET SECRETARY MINISTER OF INTERIOR & CO-ORDINATION  
OF NATIONAL GOVERNMENT ..... 1ST RESPONDENT**
- 2. ATTORNEY GENERAL ..... 2ND RESPONDENT**
- 3. INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION ..... 3RD RESPONDENT**

**RULING**

The petitioner came to this court on 14th July 2016 and filed a Constitutional Petition dated 13<sup>th</sup> July 2016, through his advocate Nchogu, Omwanza and Nyasimi Advocates. The Respondents were named as Cabinet Secretary of Interior and Co-ordination of National Government as 1<sup>st</sup> respondent, Attorney General as 2<sup>nd</sup> respondent, Independent Electoral & Boundaries Commission as 3<sup>rd</sup> respondent.

On the same day, the petitioner filed a Notice of Motion application for Conservatory and Restraining orders against the respondents respectively.

The court on 14<sup>th</sup> July 2016, certified the application as urgent and directed it be heard inter-partes and later the Deputy Registrar fixed a hearing date for 26<sup>th</sup> July 2016. On the hearing date, Mr. Begi appeared for the petitioner while Mr. Omiti appeared for the 3<sup>rd</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not attend court, but the court was informed by Mr. Begi that the Attorney General on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, had written to them a letter saying that the hearing date was inconvenient to them.

Faced with the above scenario, I heard submissions from the two counsels present regarding the grant of restraining or conservatory before inter-parties hearing of the application.

Mr. Begi urged this court to grant prayer 3 and 6 of the application in the interim while Mr. Omiti urged

that the Independent Electoral Boundaries & Commission (3<sup>rd</sup> respondent) be removed from the list of respondents with costs.

With regard to request for removal of the 3<sup>rd</sup> respondent as a party, Mr. Omiti relied on their grounds of opposition which, are in the following terms:-

1. ***“The application as presented discloses no reasonable cause of action against the 3<sup>rd</sup> respondent.***
2. ***The application as present is bad in law and therefore an abuse of the due process of court and should be dismissed in limine.”***

Mr. Omiti argued that the complaints of the petitioner relating to creation of administrative units, including wards by the Cabinet Secretary (1<sup>st</sup> respondent) had nothing to do with the 3<sup>rd</sup> respondent. Such was a function conferred on the 1<sup>st</sup> respondent in consultation with the President, under Statute. According to counsel the creation of such administrative units did not impose an obligation or duty on the 3<sup>rd</sup> respondent to register voters for that administrative unit, even if the unit was described as a ward.

Counsel emphasized that the 3<sup>rd</sup> respondent operated as an Independent Commission under the Constitution and had its own programs of registering voters. Counsel stated that in the past the 3<sup>rd</sup> respondent had been wrongly enjoined as a party in court proceedings and ended up incurring huge costs, which it could not recover. As such, counsel urged the court to drop the 3<sup>rd</sup> Respondent from the list of parties in the present proceedings.

Mr. Begi for the petitioner felt that the request by counsel for the 3<sup>rd</sup> respondent was premature, as they had not filed any replying affidavit to the application. Additionally, it could not be said for certain that the 3<sup>rd</sup> respondent would not register voters as they had not made such a written commitment.

With regard to the Interim Orders sought, the counsel for the petitioner submitted that at this point, they would be satisfied with the grant of prayer 3 and 6 of the Notice of Motion. The said request was not opposed by counsel for the 3<sup>rd</sup> respondent.

I have considered the arguments by counsel for the petitioner and counsel for the 3<sup>rd</sup> respondent.

In my view, though the 3<sup>rd</sup> respondent has a genuine point in saying that they had in the past been made to incur costs, they are not completely without relief in the present case. As a public institution also and since in this country it is known that the administrative units have a relation to the electoral units, it is proper in my view for them to give their input in these proceedings to enable the court make a considered decision on the issues raised. The petitioner is justifiably apprehensive that the creation of the administrative units could have effects on the creation of electoral units.

In my view if the 3<sup>rd</sup> respondent wishes, they can at the appropriate time ask for costs which the court can grant. In my view it is premature presently to remove the 3<sup>rd</sup> respondent from the list of parties in these proceedings.

With regard to prayer 3 and prayer 6 of the application, the request of the petitioners counsel for Interim Orders is not opposed, as the Attorney General who represents the Cabinet Secretary who gazetted the administrative units, was not present in court nor did he file documents in opposition the same. The said prayers are with respect to orders restraining the 1<sup>st</sup> respondent and 3<sup>rd</sup> respondent from posting staff to carry out functions in the area concerned pending the hearing and determination of the application. The 3<sup>rd</sup> respondent does not seem to have an issue with this. I will thus allow the request by counsel for the petitioner.

Consequently, I decline to strike out or remove the 3<sup>rd</sup> respondent as a party in this proceedings at

this stage. I also grant prayer 3 and prayer 6 of the application (Notice of Motion) dated 13<sup>th</sup> July 2016. I will thus proceed to fix a hearing date for the application on which hopefully the Attorney General will attend court. The petitioner's counsel will serve hearing notice on the parties who are not present in court today.

**Dated and delivered at Garissa this 29th day of July 2016.**

**GEORGE DULU**

**JUDGE**