



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 MIN OF MIN. OF INTERIOR &

CO-ORDINATION OF NATIONAL GOVERNMENT..... 1ST RESPONDENT

2. ATTORNEY GENERAL 2ND RESPONDENT

3. INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION..... 3RD RESPONDENT

RULING

Before me is an application brought by way of Notice of Motion dated 13th July 2016 filed under certificate of urgency.

The application was filed under Article 1,2,3,10,22,23,88,89,159,160,165(3)(d) and 262(27) of the Constitution, section 3 of the Judicature Act (CAP.8) and Rules 2,3,4 and 5 of the Constitution of Kenya Supervisory Jurisdiction (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, and seeks the following orders:-

1. This application be and is hereby certified as urgent and service be dispensed with in the first instance.
2. Pending inter parties hearing of this application a conservatory order be and is hereby issued restraining 1st respondent from recruiting, posting or in anyway whatsoever assigning staff to the newly created ward, locations and sub-locations by the 1st respondent as created in the Kenya Gazette Notice No. 366 of 22nd January 2016.
3. Pending the hearing and determination of this application a conservatory order be and is hereby issued restraining 1st respondent from recruiting, posting or anyway whatsoever assigning staff to the newly created ward, location and sub-location by the 1st respondent as created in the Kenya Gazette Notice No. 366 of 22nd January 2016.
4. Pending the hearing and determination of the petition herein a conservatory order be and is hereby issued restraining 1st respondent from recruiting , posting or anyway whatsoever assigning

staff to the newly created ward, location and sub-location by the 1st respondent as created in the Kenya Gazette Notice No. 366 of 22nd January 2016.

5. Pending inter parties hearing of this application a conservatory order be and is hereby issued restraining 3rd respondent from recruiting, posting or in anyway whatsoever assigning staff to the said newly created ward “Athibolol” and registering voters in the said ward created in the Kenya Gazette Notice No. 366 of 22nd Janury 2016.

6. Pending hearing and determination of this application a conservatory order be and is hereby issued restraining 3rd respondent from recruiting, posting or anyway whatsoever assigning staff to the newly created ward “Athibolol” and registering voters in the said ward as created in Kenya Gazette Notice No. 366 of 22nd January 2016.

7. Pending hearing and determination of the petition herein a conservatory order be and is hereby issued restraining 3rd respondent from recruiting, posting or anyway whatsoever assigning staff to the said ward as created in the Kenya Gazette Notice No. 366 of 22nd January 2016.

8. An order that the 1st respondent issues for the purposes of service delivery the sub locations and locations that existed prior to Gazette Notice No. 366 of 2016 pending hearing and determination of the application herein interparties.

9. An order that the 1st respondent issues for the purposes of service delivery, the sub-locations and locations that existed prior to Gazette Notice No. 366 of 2016 pending hearing and determination of the petition herein.

10. Costs of this application be awarded to the applicant in any event.

Some of these prayers have already been spent.

The application has grounds on the face of the Notice of Motion. The grounds are that the 1st respondent invoked section 14(1) and (3) of the National Government Coordination Act 2013 in creating the locations, of Jagahir, Baaji, Sankary, Bagalla, Deyagar and Bula Rasmi in Eldars Constituency but purportedly created for Wajir Sub County which was a separate constituency, and that the 1st respondent purportedly created Samatar Sub location in Kanjara location in Ade Masajida Division in Wajir West Constituency, but which was moved in the same Gazette Notice to Athibolol Constituency, Secondly, that Garwen location created under the Gazette Notice was a fallency since it was under Adado South location in Ademasajida Division inhabited by Ajuran clan. That the creation of wards was the work of the 3rd respondent, and that the geographical locations of the units created overlapped other locations and constituencies and had created high tension which was likely to bring clashes between the clans of Degodia and Ajuran – similar to what previously exploded into the infamous Wagalla massacre.

That the decision of the 1st respondent ignored the popular views of the people and communities affected and was contrary to Article 88(4) which reserved power of determination of Electoral Boundaries to IEBC, and also contrary to Article 89(7) which required that in reviewing constituency and ward boundaries all interested parties must be consulted. It was also a ground that the political leadership had severally written to the 1st respondent objecting to the creation of the locations, ward and sub location but their views ignored. That Anthibolol was the birth place of the Governor of Wajir County and the creation of Athibolol ward suspected by the resident to be engineered by the Governor behind the curtain to attract votes in the coming 2017 elections.

A supporting affidavit sworn by the petitioner Mohamed Abikar on 13th July 2016 was filed, which applied the grounds. The affidavit annexed a letter dated 1st July 2014 to the 1st respondent from Hon. Abdikadir Ahmed-MP Wajir West constituency, minutes of a meeting held on 27th January 2015 between

leaders of the North Eastern Region and Tana River County on the one hand, and the 1st respondent and other Government officials on the other. Lastly, was annexed the Gazette Notice in question.

In response to the application, the Attorney General on behalf of the 1st and 2nd respondents filed grounds of opposition in the following terms:-

1. The application has not met the judicially settled criteria for the grant of the conservatory orders sought.
2. Under section 14(1) of the National Government Coordination Act 2013 the 1st respondent is empowered with the approval of the President and by a notice in the Gazette, to establish National Government service delivery coordinating units.
3. Under section 14(3) of the National Government Coordinating Act 2013, and where a County Government has not decentralized its units pursuant to section 48(1)(e) of the County Government Act 2012, the National Government may, where necessary, establish its own service delivery coordinating units for purposes of Coordination of National Government functions.
4. The 1st respondent herein complied with section 4 of the National Government Coordination Act 2013 in establishing the impugned National Government Service delivery co-ordination units established under section 14(1) and (3) of the National Government Coordination Act 2013 has not created an Electoral Units, as they have infact been created as service delivery coordination units only.
5. The petitioner has not proved with reasonable precision how the 1st respondent has violated the Constitution. In any event, the petition offends the doctrine of separation of powers.
6. The purpose, object, and effect of the National Government Coordination Act 2013 would be defeated if the application and petition are allowed.
7. The petitioner has not demonstrated with sufficient reason(s) how he has not been involved in the process of establishing of the improved National Government Service Delivery Coordination Units.
8. The application and petition are clearly an abuse of the process of this honourable court as it discloses no reasonable cause of action against the 1st and 2nd respondents.

The 3rd respondent also opposed the application through filing grounds of opposition in the following terms:-

- (a) Under section 14(1) of the National Government Coordination Act 2013, the 1st respondent is empowered to establish National Government Service delivery Coordinating Units.
- (b) The Kenya Gazette Notice No. 366 of 22nd January 2016 being challenged by the petitioner herein for the establishment of the National Government service delivery Coordinating Units under section 14 of the National Government Coordination Act 2013 and not Electoral Units as the petitioner erroneously seems to allege.
- (c) The application as drawn and presented and the orders sought by the petitioner in both the application and the petition offered the doctrine of separation of powers, thus the honourable court is devoid of jurisdiction to entertain this matter.
- (d) The petitioner has failed to sufficiently show this honourable court how they were excluded from the process of establishing the National Government service delivery Units.
- (e) That the application as presented is bad in law, frivolous, vexatious and raises no reasonable

cause of action, particularly as against the 3rd respondent and therefore an abuse of the due process of court and should be dismissed in limine with costs.

The applicant filed written submissions to the application and the 3rd respondent also filed written submissions to the application. Counsel for each party made oral submissions in court. Mr. Okubasu appeared for the petitioner/applicant. Mr. Ogosso appeared for the 1st and 2nd respondent, while Mr. Omiti appeared for the 3rd respondent. Several case authorities were relied upon by counsel.

This is an application for interlocutory orders pending the hearing and determination of the substantive petition. This court has already granted temporary orders pending the determination of the application.

The first issue is whether this court has jurisdiction to entertain the application and the petition. The counsel for the 3rd respondent has submitted strongly that this court has no jurisdiction to entertain this matter. According to counsel, entertaining the matter by the court will contravene the doctrine of separation of powers between the Court and the Executive, and also between the Court and an Independent Commission the IEBC the 3rd respondent.

As they say, jurisdiction is everything. Once a court finds that it has no jurisdiction it has to down its tools then and not proceed further with the matter.

In my view, this court has jurisdiction to entertain this matter. The issues raised herein do not relate to the court usurping or interfering with the functions, or the internal functions of the Executive or the IEBC. It relates to the interpretation of the Constitution and relevant statutes, and the purported implementation of the law in view of such interpretation by an institution or institutions of Government. When such is questioned, certainly the court has a right and obligation to hear and determine the dispute. That is what the rule of law requires.

I have not been informed of any provision of the law or of the Constitution which provides that a person who is aggrieved must complain directly to the respondents before coming to court. I find that this court has jurisdiction to entertain the matter and determine the same.

The 2nd issue is whether the applicant has shown that he has a prima facie claim. He says he came from the area in question. He has given background information about the creation of the locations, sub location and ward, including minute of leaders meetings. He has made allegations on clan animosity which he will have to prove on the balance of probabilities. Admittedly, he has come to court alone, but that perse does not mean that he does not have a prima facies claim. He is certainly not a stranger in Wajir. A prima facie case is one which has possibility of success. In my view the petitioner/applicant has demonstrated that he has a prima facie case.

Can he get the conservatory orders sought? Several cases have been relied upon on this aspect by the respondent's counsel regarding the criterion for grant of conservatory orders. Attempts have been made by courts to define conservatory orders which have neither been defined by the Constitution or the written law. In the case of *Garibaru Peter Muya –vs- Dickson Mwenda Kithinji & 2 Others 2014*, it was stated by the court as follows:-

“The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions in the proper sense, belong to the sphere of civil claims and are issued essentially on the basis of convenience as between the parties, and balance of probabilities ---- conservatory order has a more decided public law connotation for these are orders to facilitate the functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest”.

The third respondent has opposed the orders sought, though they do not contend they will suffer any prejudice. They say that they do not act under the direction of the Executive to declare electoral arrears, even though a ward is purported to be created by the Executive in the gazette.

The 1st and 2nd respondents are the parties who substantively oppose the interlocutory orders sought as they intend to render delivery of Government service. In my view, this is a matter of public importance.

In view of the need for peaceful co-existence that the applicant has raised, the issue is of public interest and as such in my view the interlocutory orders sought are justified. Therefore in my view, the applicant has made up a case for the grant conservatory orders sought. I take note of the fact that though the units were published in the Kenya Gazette on 22nd January 2016, by the time the petition and application were filed on 14th July 2016, about six (6) months later, the said officials to man the units had not been appointed by the Executive. In my view, they can await the substantive decision herein.

For the above reasons, I allow the application and grant prayer 4, 7 and 9 of the application pending hearing and determination of the petition. As the main petition is still to be heard, I order that costs of the application will be in the cause.

Dated and delivered at Garissa this 13th December 2016.

GEORGE DULU

JUDGE