



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 82 OF 2011**

**AS CONSOLIDATED WITH PETITION NO.s 74/2010, 199 of 2011, 5/2012, 58/2012 & 101/2012**

**MOHAMED ABDILLE**

**AHMED JELLE**

**EPHRAIM MAINA**

**JOHNSTON MUTHAMA**

**WILLIAM KABOGO**

**SAID MUSILA**

**CECILY MBARIRE**

**FERDINAND WAITITU**

**JEREMIAH KIONI**

**PETER KENNETH**

**MWANGI KIUNJURI**

**SIMON MBUGUA**

**NJOROGE BAIYA**

**KIIRU MWANGI**

**THOMAS MATUNDURA NYAKWAMA**

**SILAS GUANTAI MARETE**

**DENNIS OKARO OGETO.....PETITIONERS**

AND

ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC).....2<sup>ND</sup>  
RESPONDENT

AND

HAJI IBRAHIM ALI

HUSSEIN

HAJI RASHID ADAN

HUSSEIN

HAJI BULLE AHMED

BILLOW BUKUT

SENEY DAISO GANURE.....INTERESTED  
PARTIES

JUDGMENT

**A) Introduction and Background**

1. These Petitions relate to the delimitation of boundaries in the respective counties across the country carried out by the 2<sup>nd</sup> Respondent, the Independent Electoral and Boundaries Commission (“the IEBC”), a body established under **Article 88** of the Constitution and successor to the then Interim Independent Electoral Commission (IIEC) established under **Section 41** of the former Constitution as amended by the **Constitution of Kenya (Amendment) Act, Act No. 10 of 2008**. The same constitutional amendment also introduced **section 41B** which established the *Interim Independent Boundaries Review Commission* (IBRC) with the mandate to *inter alia*,

**“(a) making recommendations to Parliament on the delimitation of constituencies and local authority electoral units and the optimal number of constituencies on the basis of equality of votes...”**

2. **Article 89** of the Constitution of Kenya, 2010 which deals with the delimitation of boundaries provides that;

**89. (1) There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97 (1) (a).**

**(2) The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.**

**(3) The Commission shall review the number, names and boundaries of wards periodically.**

**(4) If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election.**

**(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a**

*constituency may be greater or lesser than the population quota in the manner mentioned in clause (6) to take account of—*

*(a) geographical features and urban centres;*

*(b) community of interest, historical, economic and cultural ties; and*

*(c) means of communication.*

*(6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than—*

*(a) forty per cent for cities and sparsely populated areas; and*

*(b) thirty per cent for the other areas.*

*(7) In reviewing constituency and ward boundaries the Commission shall—*

*(a) consult all interested parties; and*

*(b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.*

*(8) If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.*

*(9) Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette, and shall come into effect on the dissolution of Parliament first following their publication.*

*(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.*

*(11) An application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.*

*(12) For the purposes of this Article, “population quota” means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards, as applicable, into which Kenya is divided under this Article.*

3. By consent of the Parties, the Petitions were consolidated on 19<sup>th</sup> March 2012 with the exception of Petition No. 101 of 2012 which was subsequently consolidated with the present Petition pursuant to this court’s orders of 1<sup>st</sup> August, 2012 and 11<sup>th</sup> October, 2012.

4. The IEBC through its counsel filed grounds of opposition dated 16<sup>th</sup> March, 2012. Among the grounds advanced was a Preliminary Objection that the Petition as consolidated was an abuse of the court process and that the Petitioners had not exhausted the avenues available under **Article 89(9),(10) and (11)** of the Constitution. This court ordered that the Preliminary Objection would be argued together with the main Petition.

5. By order of this Court dated 19<sup>th</sup> March, 2012, the Parties in the consolidated Petition drafted and filed, several issues for our determination.

6. After examining the issues as drafted, a single judge of this Court ruled that the issues raised

substantial constitutional issues and referred the matter to the Hon. Chief Justice to appoint a bench of three Judges under **Article 165(4)** to hear and determine the Petitions as consolidated.

## **B) The Petitions**

### ***Petition No. 74 of 2010***

7. The Petitioners' allegations in this case were general in nature in which they generally challenged the delimitation process by the IEBC arguing that the Respondents had failed to observe the basic principle of delimitation of constituencies as provided for in the Constitution and had subdivided the constituencies discriminately, arbitrarily and unconstitutionally and failed to comply with its constitutional mandate of reviewing the boundaries including adherence to the population quota.

8. The Petitioners further contended that the Respondent had failed to consult all interested parties in the delimitation exercise. They also took issue with the Respondent's usage of the IIBRC Report as the primary reference material arguing that the Report was illegal and in breach of the Petitioners' constitutional rights.

9. Further, it is the Petitioners' case that **section 2** of the **Independent Electoral and Boundaries Commission Act(IEBC Act), No. 9 of 2011** and **section 2** of the *Fifth Schedule* to IEBC Act are void for being inconsistent with or in violation of **Articles 88 and 89** of the Constitution read with **Section 27** of the Sixth Schedule to the Constitution.

10. The Petitioners also took issue with the exercise of mandate by the Interim Independent Boundaries Review Commission (IIBRC) urging that the IIBRC was on a mission to deliberately usurp the constitutional role of the IEBC.

11. By the *Amended Petition* dated **29<sup>th</sup> February, 2012**, supported by the affidavit of Hon. Ephraim Maina, the Member of Parliament for Mathira Constituency, the Petitioners sought *inter alia* the following orders:

**(e) A declaration be issued to declare that the Interim Independent Boundaries Review Commission had no power to carry out the first review of the constituencies and wards envisaged under Section 27(4) of the Sixth Schedule to the Constitution.**

**(f) A declaration be issued to declare that the delimitation of constituencies and wards by the Interim Independent Boundaries Review Commission contained in the Report of the former boundaries commission adopted by the National Assembly does not constitute the first review of constituencies envisaged under section 27(4) of the Sixth Schedule to the constitution.**

**[i] A declaration that section 32 of the Independent Electoral and Boundaries Commission Act and the fifth schedule of the Independent Electoral and Boundaries Commission Act are unconstitutional in so far as they seek to rely upon as its primary reference material the report of the former Boundaries Commission on its first review as adopted by the National Assembly...**

**[l] An injunction precluding the 1<sup>st</sup> Respondent from publishing in the Kenya Gazette the delimitation of boundaries o constituencies and wards pending the determination by this court of the legality of any such determination.**

**[n] That a permanent injunction be issued to restrain the 1<sup>st</sup> Respondent-the Interim Independent Boundary Commission from usurping the role of the Independent Electoral and Boundaries Commission.**

### ***Petition No. 82/2011(Wajir East Constituency)***

12. This matter concerns the delimitation of wards in Wajir East constituency. The Petitioners' case is as

set out in the Petition dated 23<sup>rd</sup> May, 2011 supported by the affidavit of Ahmed Jelle Madey, a resident of Wajir East Constituency and a Petitioner in the matter. The Petitioners' case is as follows;

- a) That the population figures employed by the IEBC in delimitation of boundaries in the Wajir East Constituency were erroneous as the population results used had been cancelled and that therefore, the demarcation of the constituency was based on erroneous population results.
- b) The Petitioners are aggrieved by the IEBC's action of placing *Wajir-Bor* and *Khorof Harar* wards in *Wajir East* constituency instead of *Tarbaj* Constituency, arguing that the delimitation failed to take into account the historical, cultural ties and community interests of the inhabitants of *Wajir-Bor* and *Khorof Harar* wards who are predominantly nomads. It is their case that the move will deprive them of the available grazing land, water dams and other natural resources.
- c) The Petitioners further contend that the demarcation of Wajir East Constituency as proposed by the IIBRC did not take into account the criteria of population, urban areas, community of interest, customary ties and means of communication as set out under **Article 89(5)** of the new Constitution. Further, that the IEBC did not take into account geographical considerations as required under **Article 89** of the Constitution in sub-dividing the constituency.

13. Amongst other prayers, the Petitioners ask that the court to make a declaration that the sub-division of Wajir East Constituency by IIBRC is unconstitutional in that it does not meet the criteria set out under Article 89 of the Constitution and that the court issues an order of *certiorari* to quash the decision of the IIBRC contained in the National Assembly Constituencies Order No. 2 of 2010 to the extent that it relates to Wajir East and Tarbaj constituencies.

#### ***Petition No. 199 of 2011***

14. This matter dates back to a Petition dated 14<sup>th</sup> October, 2011 as amended on the 23<sup>rd</sup> February, 2012 and seeks the following orders:

- a) A declaration that section 1(1)(c),(d) and (e) of the 1<sup>st</sup> schedule and section 2(1)(a) and (b) of the fifth schedule to the Independent Electoral and Boundaries Commission Act, 2011 unconstitutional, and a gross violation of the petitioners fundamental rights in enjoyment of all the rights and freedoms enshrined in the Constitution.
- b) That the Independent Electoral and Boundaries Commission be barred from using the report of the former Interim Independent Electoral and Boundaries Commission on the delimitation of boundaries as its primary reference material and the parliamentary committee report thereafter as its secondary material for the purposes of boundaries delimitation.
- c) An order directing the Respondent to seek amendments to the Independent Electoral and Boundaries Commission Act to comply with the express provisions of the constitution
- d) Costs of this petition.

#### ***Petition No. 5 of 2012***

15. The Petitioner's grievance is as set out in the Petition dated 2<sup>nd</sup> March, 2012 in which the Petitioner alleges that the IEBC failed to take into account the criteria set in reviewing constituency and ward boundaries as set under Article 89 of the Constitution. The Petitioner also took issue with the exercise of the mandate of the now defunct IIBRC arguing that the IIBRC stood dissolved with effect from the 27<sup>th</sup> August, 2010, before it had prepared and processed the report and delimitation of the 80 new constituencies and constituency and ward boundaries.

16. The Petition sought among other reliefs; *[f] a declaration be issued to declare that the aforesaid*

decision and/or the report published on 9<sup>th</sup> January 2012 by the 1<sup>st</sup> Respondent on the subject boundary delimitations is null and void ab initio for having been issued in contravention of the Constitutional provisions.

**Petition No. 58 of 2012**

17. In the petition dated 2<sup>nd</sup> March, 2012, the Petitioner generally challenged the mandate of the IIBRC and the legality of the *Ligale Report*. We see no need to duplicate the contents of this Petition herein.

**Petition No. 101 of 2012 (Wajir South Constituency)**

18. This matter concerns the delimitation of Wajir South Constituency in Wajir County and can be traced back to the Petition dated 27<sup>th</sup> March, 2012 supported by the Affidavit of one Aden Ali Muhumed; a resident of Wajir South Constituency. The Petitioners contended that the population used by the IEBC in delimitation of wards in the region was erroneous and that Wajir County was entitled to an extra constituency.

19. They further contend that none of the existing constituencies in Wajir County qualifies for division into two on its own in view of the population of the existing constituencies of Wajir County. According to the Petitioners, the additional constituency that Wajir County is entitled to should be carved out of Wajir East, Wajir West and Wajir South and the same named Wajir Central Constituency in accordance with the residents' views.

20. By an **Amended Petition** filed on 16th November, 2012, the Petitioners sought several orders from this Honourable Court including the following:

*(m1) That an order of certiorari be issued to bring into this Court for purposes of being quashed Legal notice No. 14 published by the Respondent in a Special Issue of the Kenya Gazette Supplement No. 13 dated 6<sup>th</sup> March 2012 to the extent of its application to delimitation of County Assemblies Wards in Wajir North, Eldas Tarbaj, Wajir East, Wajir West and Wajir South Constituencies in Wajir County.*

*(m2) That an order of mandamus be issued to compel the Respondent to amend L.N No. 14 published in a Special Issue of the Kenya Gazette Supplement No. 13 dated 6<sup>th</sup> March 2012 to specify that Constituencies in Wajir County shall be Wajir North, Wajir East, Wajir West, Wajir South and Wajir Central.*

*(m3) That an order directing that the delimitation of the electoral boundaries of constituencies in Wajir County contained in the National Assembly constituencies and County Assembly Wards order 2012 published by the respondent in the Kenya Gazette vide Legal Notice No. 14 dated 6<sup>th</sup> March 2012 be and is hereby reviewed by transferring the following administrative areas to form a new constituency known as Wajir Central Constituency.*

*(i) Kulaley Location from Wajir South Constituency.*

*(ii) Alnur, Wagalla, Ganyure, Kukala and Bojiheri Locations from Wajir West Constituency*

*(iii) Central Division from Wajir East Constituency.*

**c) The Submissions**

22. During the oral submissions, Mr. Kibe and Mr Kihara argued the matter on behalf of the Petitioners. Mr Kibe contended that the mode of delimitation of wards as carried out by the IEBC was contrary to the law as they were not created as electoral units but sub-units of the constituency. He further argued that the **County Governments Act** is unconstitutional as the 1450 wards are illegal. Regarding the population quota, Mr Kibe submitted that the IEBC allocated constituencies on the basis of a census that was wrong,

arguing that some counties got more constituencies than they deserved and that Wajir South should have got an extra constituency.

23. Mr. Kihara submitted that the existing demarcation of constituencies was wrong and occasioned injustice reiterating that the issue of the official Kenyan population was not settled to date. Counsel further submitted that **Section 36** and the **Fifth Schedule** to the IEBC Act are unconstitutional in that they depart from the principle of equality and the one man one vote principle. He urged the court to grant the prayers as prayed or in the alternative, to find that the next elections shall not be deemed to be the first elections under the Constitution.

24. The Interested Parties, through their counsel Ms Muigai contended that as the Ajuran community, they have suffered historical injustices. Their case is that the Eldas Ranch Ltd which owned 3,600 hectares of land engineered the creation of Wajir West constituency. They claim that they will be affected if they are “ruled” by a private company and urge that Wajir West be delimited to give the people in that area lawful representatives. It should be noted that even though the Interested Parties made submissions in this matter, their issues are not addressed in this judgment as Petition No. 323 of 2011 which deals substantively with the matters that they raise was deconsolidated from this Petition and directions given that it be heard separately.

### **The Respondent's Case**

25. The Petition is opposed by the Respondents. The IEBC relies on the Principal Replying Affidavit of its Director, Legal and Public Affairs; Praxedes Tororey, sworn on 11th May, 2012 (“***the Principal Replying Affidavit***”), the Supplementary Replying Affidavit of Decimah M'mayi, the Director, Research and Development of the Commission sworn on 25th May, 2012; (“***the Supplementary Replying Affidavit***”). The IEBC also relies on the Principal Submissions filed in Court in the Consolidated Petitions under Petition No. 91 of 2012 and the Consolidated Judicial Review Applications under JR No. 94 of 2012, the Submissions filed on 28th May, 2012 and the most recent Further Submissions dated 7th December, 2012.

26. We have perused these documents and we shall not lay out in detail their contents. The IEBC’s case is straight forward-that it acted within the constitutional and statutory provisions in delimiting the boundaries across the country.

27. Mr. Muhoro, Mr. Sisule and Mr Nyamodi who argued the case on behalf of the IEBC opposed the Petition. It is their case that all the advocates in the present Petition were before the five-judge bench in **Petition No. 91/2012** and **JR 94 of 2012** where all the issues raised were litigated and resolved. They contended that the issues relating to County Wards and Constituencies delimitation have been settled and that the present matters were an attempt to review the earlier orders of the court.

28. Their position was supported by the Attorney General, the 1<sup>st</sup> Respondent who, through Mr. Bitta, State Counsel, took the position that the issues raised in the Petitions had already been dealt with by the court in **Petition No. 91 of 2012** and **JR 94 of 2012**. Counsel also submitted that public interest and policy should dictate that there should be no disturbance of the *status quo*. Mr. Bitta further contended that the Constitution gave a specific mandate to the IEBC and the court should not enter into that mandate and purport to take it over.

### **C. Determination**

29. The parties in this case identified several issues for determination which we have condensed for the purpose of determining this matter as follows:

- a) ***Whether the court has jurisdiction to determine the matter;***
- b) ***Whether the IIBRC had the mandate to delimit the constituencies and wards as it did;***

- c) *Whether the IEBC acted within the law in delimiting the constituencies and wards as it did;*
- d) *Whether the provision requiring IEBC to use the Ligale Report as primary reference was unconstitutional;*
- e) *Whether Sections 32, 36 of the IEBC Act and paragraph 2 of the Fifth Schedule to the Constitution are unconstitutional;*
- f) *What Reliefs to issue.*

In framing the above issues, we have tried to remain within the ambit of the rather too many issues that were framed by the parties. We shall now proceed to address each of these issues as follows.

**(i) *Whether the Court has Jurisdiction to determine the matter***

30. The Respondents have raised the question of jurisdiction of the court to hear this matter. While determining this issue, we are alive to the fact that jurisdiction is everything and as was stated by the Supreme court in **Re The Matter of the Interim Independent Electoral Commission (Application No. 2 of 2011 (Unreported))**:

***“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”*** (Emphasis added)

In line with the above edict, does the court have jurisdiction to hear and determine the present Petitions?

31. **Article 89 (10)** gives a right to any person to apply to the High Court for review of a decision made by the IEBC under Article 89. The Article reads as follows:

***“(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.”***

These provisions are further echoed in the Fifth Schedule to the **IEBC Act, Section 4** of which provides that any person dissatisfied with the outcome of the decision of the IEBC under the **Fifth Schedule** may apply to the High Court for review of the decision.

32. One of the cardinal principles of constitutional interpretation is that it has to be given a wholesome interpretation (See **Olum & Another v Attorney-General of Uganda [2002] 2 EA 508, Tinyefuza v The Attorney General Constitutional Appeal No. 1 of 1997**).

33. **Article 89** must be read and interpreted together with the other provisions of the Constitution in order to derive the object and purpose of the said Article. **Article 89(11)** is what gives a person a right to apply for relief in respect of the decision of the electoral body in matters of delimitation. This however does not defer nor oust the jurisdiction of the High Court which is specifically donated under **Article 165**. The upshot of this is that this court has jurisdiction to entertain the consolidated Petitions and which must be determined on their merits

**(ii) *Whether the IIBRC had the Mandate to Delimit the Constituencies and Wards***

34. The Petitioners in the various matters before us have challenged the mandate of the IIBRC, arguing that the body lacked the requisite mandate to delimit constituencies and wards as it did.

35. The IIBRC was established under **Section 41B** of the former Constitution. This section sets out the mandate of the IIBRC as follows:

*(a) Making recommendations to Parliament on delimitation of constituencies and local authority electoral units and optimal number of constituencies on the basis of equality of votes taking into account—*

*i. Density of population and in particular the need to ensure adequate representation of urban and sparsely populated rural areas;*

*ii. Population trends;*

*iii. Means of communication;*

*iv. Geographical features and*

*v. Community interests*

*(b) Making recommendations to Parliament on administrative boundaries, including the fixing, reviewing and variation of boundaries and other units; and*

*(c) The performance of such other function as may be prescribed by Parliament.*

36. The IIBRC was preserved by **sections 27** of the Sixth Schedule, under the Transitional and Consequential Provisions, which provides as follows;

*27. (1) The Boundaries Commission established under the former Constitution shall continue to function as constituted under that Constitution and in terms of sections 41B and 41C but—*

*(a) it shall not determine the boundaries of counties established under the Constitution.*

*(b) it shall determine the boundaries of constituencies and wards using the criteria set out in the Constitution; and*

*(c) members of the Commission shall be subject to Chapter Seven of this Constitution.*

*(2) The requirement in Article 89(2) that a review of constituency and ward boundaries shall be completed at least twelve months before a general election does not apply to the review of boundaries preceding the first election under this Constitution.*

*(3) The Boundaries Commission shall ensure that the first review of constituencies undertaken in terms of this Constitution shall not result in the loss of a constituency existing on the effective date.*

37. The effect of these transitional provisions is that the advisory role which the IIBRC was to perform under **section 41C** of the former Constitution is carried over to the Constitution by the **Sixth Schedule**. Justice Musinga unequivocally held in *John Kimanthi Maingi v Andrew Ligale and Others Nairobi High Court Petition No. 72 of 2010 (Unreported)* when the eligibility to hold office of the Commissioners of the IIBRC was called to question in light of the provisions of section 27 (1) (c) of the Sixth Schedule;

*“A distinction must be drawn between the appointment of a member of the Independent Electoral Boundaries Commission and eligibility of the members of the IIBRC to continue serving until the expiry of their tenure.”*

The learned judge further added *that*:

***‘The Constitution must be interpreted in a manner that promotes its purposes and contributes to good governance.’***

38. We agree with the learned judge and would only add that it would be untenable to entertain a proposition that suggests that there would be a vacuum in the operation of the law or discharge of government’s duties. As this court has held in several decisions, law, like nature abhors a vacuum. (See ***Ruth Muganda v Kenya Anti-Corruption Commission and Director of Public Prosecutions Nairobi HC Misc. Crim. Appl. No. 288 of 2012, Royal Media Services Ltd v Attorney General & 2 others, Nairobi Petition No. 346 of 2012***).

39. Closely tied to this question is whether the Report of the Interim Independent Boundaries Review Commission (“*the Ligale Report*”) constitutes a first review. **Section 2** of the **IEBC Act** defines the term ‘first review’ as

***“the review conducted by the former Boundaries Commission taking into account any outstanding work of that Commission and issues arising from that review.”***

40. The ***Ligale Report*** was adopted by the National Assembly on 16<sup>th</sup> December 2010. The Report was the subject of challenge in the case of ***John Kimanathi Maingi v Andrew Ligale and Others (supra)*** in which the Hon. Justice Musinga held that the IIBRC had the exclusive mandate to determine issues relating to delimitation. The court also considered the issue as to whether the IIBRC could delimit the 80 additional constituencies created by the Constitution. The court held that this issue was put beyond doubt by the enactment of **section 27(1)(3)** of the **Sixth Schedule** to the Constitution which saved the sections of the former Constitution that established the IIBRC.

41. It was held in the case of ***Dennis Mong’are Mogambi v Attorney General Nairobi Petition No. 146 of 2011 (Unreported)*** that the schedules to the Constitution form part of the Constitution and must be given full effect. The court observed that

***“[54] The transitional provisions contained in the Sixth Schedule are intended to assist in the transition into the new order, but are limited in time and in operation and are to remain in force for the period provided in order to achieve the aspirations of Kenyans in moving into the new order. These transitional provisions are as much a part of the Constitution and as much an expression of the sovereign will of the people as the main body of the Constitution.”***

42. Citing the case of ***John Kimanathi Maingi v Andrew Ligale and Others (supra)***, this court in ***Republic v Interim Independent Electoral and Boundaries Commission & another ex parte Councillor Eliot Lidubwi Kihusa & 5 others, [2012]eKLR, Nairobi JR Misc. App. No. 94 of 2012 (“the Delimitation Case”)*** also went on to find that

***‘the requirement of Article 89(2) that the review of constituency and ward boundaries shall be completed at least twelve months before a general election does not apply to the review of boundaries preceding the first general elections under the Constitution. This leaves no doubt that it was intended that the first general elections under the Constitution be carried out based on the work done by the IIBRC. Therefore, the provisions of Legal Notice No. 14 of 2012 take effect and apply to the next general elections.’***

We agree with and adopt these sentiments.

36. Thus the terms of the first review, not being the delimitation strictly contemplated by **Article 89**, is governed by the **Sixth Schedule** and the **IEBC Act**. Furthermore, the IEBC is in terms of **Article 88(5)** obligated to perform its functions in accordance with the Constitution and national legislation. It follows therefore that the terms of the first review, not being the delimitation strictly contemplated by **Article 89**, is governed by the **Sixth Schedule** and the **IEBC Act**.

***Population Census results***

43. The parties have argued that the Respondent used erroneous results as the basis of the delimitation exercise. They have stated that the results of the population census for the North Eastern province were later annulled, the figures used in delimitation of constituencies and wards found to be erroneous and lead to skewed delimitation in the affected area.

44. Section 2(2) of the Fifth Schedule to the IEBC Act lists the issues arising out of the first review as follows;

***(a) Re-distribution of such wards and administrative units in the affected constituencies as may be appropriate;***

***(b) Subject to the Constitution, addressing issues of new constituencies falling outside the population quota as provided for by Article 89(6) of the Constitution, but at the same time ensure that such a process shall-***

***(i) Take into account the provisions of Article 89(7)(b) of the Constitution that requires progressive efforts and not instant demographic equality of all towards attaining the population quota in each constituency and ward for purposes of the first review;***

***(ii) Not to be subject to new definitions of urban areas, cities or sparsely populated areas or to new population figures;***

***(iii) Be subject to the use of enumerated national census figures and not projected figures.***

***(c) Addressing the issue of progressively advancing towards the population quota in protected constituencies in relation to neighbouring constituencies where appropriate.***

[Emphasis added]

45. It is clear that under Section 2(2)(b)(iii) of the Fifth Schedule to the IEBC Act, the IEBC was bound to use the ‘enumerated’ population census as opposed to the projected figures.

46. According to material before the court, the IEBC used the **2009 Kenya Population and Housing Census Report** which was issued in August 2010 in which the Kenya National Bureau of Statistics had determined the population at 38,610,097. Therefore, the population of Kenya for purposes of the First Review under **Article 89** is that provided in the 2009 Population and Housing Census Report issued on August 2010 and which it is uncontested is what the IEBC used.

47. This issue is not new and was also subject of determination in the *Delimitation case* (above) wherein the learned Judges (Warsame, Sitati, Omondi, Nyamweya, Majanja(JJ)) observed thus,

***“[165]The issue for disposition then, is not what is the population of Kenya but what is the population of Kenya for purposes of the first review. The population of Kenya for purposes of the first review is that provided in the 2009 Kenya Population and Housing Census Report issued in August 2010. The IEBC acted in accordance with the law and Constitution in relying on the figures provided by a statutory body mandated to conduct the census. We are satisfied that the population figures used by the IEBC are legally recognized as containing enumerated figures in accordance with the Section 2(b)(ii) and (iii) of the Fifth Schedule to the IEBC Act.”***

We wholly agree with this reasoning and adopt it as if it were our own. Consequently, we find the Petitioners’ argument that the census figures used by IEBC were erroneous to hold no water and is hereby rejected.

***iii) Whether Use of Primary Reference Material Unconstitutional***

49. It was submitted that the provisions of the **IEBC Act** were unconstitutional in so far as they

compromised independence of the IEBC by providing that the electoral body should have reference to the primary and secondary material. In particular, the Petitioners took issue with **Section 2 of the Fifth Schedule** to the **IEBC Act** contending that the section effectively bars the lawful determination of the population quota besides the one adopted or determined by the *Ligale Commission*.

50. A reading of **section 2(1)** of the **Fifth Schedule** to the **IEBC Act** reveals that in addressing the issues arising out of the first review, IEBC was restricted to use the IIBRC Report as its primary reference material. The Section reads as follows;

**“2. (1) The Commission shall, in addressing the issues arising out of the first review –**

**(a) use as its primary reference material the report of the former Boundaries Commission on the first review as adopted by the National Assembly; and**

**(b) use as its secondary reference material the report of the Parliamentary Committee on the report of the former Boundaries Commission on the first review.”**

51. A similar issue was the subject of court decision in the **Delimitation case** (above) where the court in dismissing this line of argument observed that;

***“The reference to primary and secondary material is a direct consequence of the nature of the first review. The IIBRC which was created under section 41C of the former Constitution was to make “recommendations to Parliament on delimitation of constituencies and local authority electoral units ....” After the recommendations came in the form of the IIBRC Report, Parliament was then to make a decision of what to do with the recommendation. The recommendations were acted upon by Parliament in the form of the report referred to as the Secondary material while the report of the IIBRC which was adopted by Parliament still remained the primary material for purposes of the first review.’***

52. We also do not find plausible the Petitioners’ notion that the use of the **Ligale Report** as primary source of reference to be unconstitutional. For the same reasons, we do not find as unconstitutional the provisions of the IEBC Act that provide for the use of the Report as primary reference. In any case, the word ‘reference’ does not mean that the IEBC is bound by the content or that it must necessarily adopt the contents of these materials. We therefore do not see how the provisions of the national legislation compromise the independence of the IEBC in the delimitation exercise. This issue was also the subject of disposition in the **Delimitation case** (supra) where the court observed that;

***“[100] The reference to primary and secondary material is a direct consequence of the nature of the first review. The IIBRC which was created under section 41C of the former Constitution was to make “recommendations to Parliament on delimitation of constituencies and local authority electoral units....” After the recommendations came in the form of the IIBRC Report, Parliament was then to make a decision of what to do with the recommendation. The recommendations were acted upon by Parliament in the form of the report referred to as the Secondary material while the report of the IIBRC which was adopted by Parliament still remained the primary material for purposes of the first review. The word ‘reference’ does not necessarily imply ‘adoption’ of the content of the documents as the IEBC, in law, still remains an independent Commission. We do not find this approach inconsistent with the independence of the IEBC as IEBC was to be guided by the Constitution in reaching its decision.”***

We also wholly agree with the finding and will say no more on the subject.

### **What Reliefs to issue?**

53. The Petitioners have raised the issue of creation of constituencies in the Wajir County and urged that the said County ought to have been allocated an extra constituency. This issue was disposed of in the **Delimitation Case** when the court observed that there were only 290 constituencies available for

delimitation across the country and that these were distributed in a fair manner across the country to give effect to the right of fair representation to every Kenyan citizen. The creation of additional constituencies by the IEBC was also constrained by the provisions of **section 27** of the **Sixth Schedule** to the Constitution which protect constituencies that fall below the population quota.

54. It is notable that the delimitation of wards and constituencies in Wajir County was subject of the Court's consideration in the JR No. 94/2011 and the court gave orders concerning their delimitation. We note in particular that the court in disposing of **Constitutional Petition No. 97 of 2012** (determined within the Delimitation case) concerning delimitation of Wajir South and Eldas constituencies gave specific orders as to the ordering of the wards in both Wajir West and Wajir South Constituencies. The arguments presented in this case with regard to the delimitation of Wajir East constituency was also considered in **Judicial Review Application No. 148 of 2012- Nairobi** and found to be without merit.

The orders have not been overturned by appellate process. We do not find any reason to disturb the orders by re-opening the matter as doing so would be tantamount to reviewing the orders granted by a competent court.

55. Furthermore, we note that the delimitation process is a periodical exercise that is subject to review from time to time as encapsulated under **Article 89(1), (2) and (3)** of the Constitution. Moreover, given the stage of the electoral process granting the orders sought will not be in line with the principles set out **Article 10** of the Constitution which includes good governance.

56. For the reasons given above, this matter as consolidated lacks merit and is hereby dismissed.

57. We have addressed our minds on the issue of costs. Costs remain in the court's discretion and like all forms of discretion, it must be exercised judicially. Given the circumstances of this particular case and the public interest involved, we find that it is in the interests of justice that each party should bear its own costs. It is so ordered.

**DATED at NAIROBI this 25<sup>th</sup> day of January 2013**

**I. LENAOLA**

**JUDGE**

**MUMBI NGUGI**

**JUDGE**

**C.W. GITHUA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of January 2013**

**MUMBI NGUGI**

**JUDGE**