REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION 309 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF STATISTICS ACT, THE STATISTICS (CENSUS OF POPULATION ORDER 2008 AND THE 2009 KENYA POPULATION AND HOUSING CENSUS

NOOR MAALIM HUSSEIN

ABDI BUUHOW ABDI

HASSAN HUSSEIN MOHAMED

ABDULLAHI ABDI HUSSEIN

GEOFFREY AKATUKON LOBOKOT…….....……APPLICANTS

VERSUS

THE MINISTER OF STATE FOR PLANNING, NATIONAL DEVELOPMENT AND

VISION 2030 ……....……..….1ST RESPONDENT

KENYA NATIONAL BUREAU OF STATISTICS ....…..…..…2ND RESPONDENT

THE INTERIM INDEPENDENT

BOUNDARIES REVIEW COMMISSION……..…..3RD RESPONDENT

RULING

This world is a strange place. It is strange because this court has been called upon to decide upon a serious and fundamental question raised by a group of pastoralists aggrieved by the decision made by a government minister, strange because pastoralists are not known to engage in litigation. They hardly rush to court despite the grievances and shortcomings they may confront. They are known for their deep seated spirituality and profound sense of God, close attachment to their animals and land, their vindictiveness and sense of inter-clan conflicts and cattle rustling. The exposure to public law litigation

must be a humbling and startling experience.

It is unique and peculiar for the people of Northern Kenya to challenge the decision of the Government, however grave and far reaching the implications may be. May be, it is as a result of our new constitution and open democracy, maybe it is because of our independent Judiciary. The independent Judiciary is a power of strength for all particularly for the poor, the downtrodden and average person confronting the wrath of the Government.

As a result of the new constitution there is a remarkable increase in litigation perhaps because of the new found freedom and space which is inevitably attractive to indigent pastoralists who know very little about public law and protection of private rights. Now people at large including pastoralists whenever in difficult situation turn more and more to the Judiciary to solve their grievances. Courts are now looked upon as the lightening arrestor of many complicated and serious issues, thus judicial responsibility must expand correspondingly to the expansion of the scope of governmental activities in general. An increase of new kind of litigation involving unheard of challenge to executive decision is being mounted even by people who had no idea of what they were entitled to.

This litigation explosions stares us in the face unless, it is dealt with by adopting radical measures, the situation is likely to go out of hand. It also creates a new environment where judges are called upon to determine intricate and sensitive matters between the government and its citizens. **Sir Wilson Churchill** said in 1954;

"The judge has not only to do justice between man and woman. <u>He also and this is one of the most important functions considered incomprehensible in some large parts of the world has to do justice between the citizens and the State.</u> He has to ensure that the administration conforms with the law and to adjudicate upon the legality of the exercise by the Executive of its powers." ***(Emphasis mine)***

It is clear therefore that the primary purpose of the law is to keep the powers of the government within the legal bounds so as to protect citizens against its abuse. The powerful engines of the government must be prevented from running amok. It is usually the judges who sit between the government and its citizens. The judges check the transgressions of the citizen and that of the government in equal measures. It is a balancing exercise. The tools available to the judges is the contractual documents in place, namely the Constitution, statutes and judge made rules, in all in the name of the Rule of Law and respect for human values and dignity.

At the heart of this dispute is what the applicants call administrative injustices committed by the 1st respondent. It is also the position of the government that it has the powers to take administrative decisions in order to address problems and irregularities committed in exercise of a statutory function. It was practically impossible a few years ago for a pastoralist to challenge a ministerial decision. May be they were inspired and uplifted by the gains found in our new constitution. May be they were uplifted and inspired by the decisions of the High Court. Such a dilemma, such as the present one, calls for a sober determination of the dispute in order to resolve the issues by the aggrieved party. The exposure of the applicants to public law litigation is a humbling experience that must be kept alive by the High Court so that the hopes and aspirations of the people they represent can be determined or seen to be determined in accordance with the rule of the law.

In **Civil case No.1303 of 1987 Supreme Court of India** had this to say;

"We are all human beings with our own likes and dislikes, our own predilections and prejudices and our mind is not so comprehensive as to be able to take in all aspects of a question at one time and moreover sometimes, the information on which we base our judgments may be incorrect or inadequate and our judgment may be also sometimes be imperceptibly influenced by extraneous or irrelevant considerations. It is unwise to entrust power in any significant or sensitive area to a single individual howsoever high or important may be the office which he is occupying."

Be that as it may, the application for my determination is the one dated 11th October 2010 and seeks the

following orders:-

(a) An order of certiorari to remove to the High Court and quash the decision of the 1st Respondent of 31st August 2010 cancelling the 2009 Population and Housing Census Results for Lagdera, Mandera East, Mandera Central, Mandera West, Wajir East, Turkana North, Turkana South and Turkana Central Constituencies ('the Eight Constituencies').

(b) An order of prohibition prohibiting the 1st and 2nd Respondents from publishing, issuing or gazetting Projected Results for Lagdera, Mandera East, Mandera Central, Mandera West, Wajir East, Turkana North, Turkana south and Turkana Central Constituencies, from circulating any other figures other than the published 2009 Population and Housing Census Results to any other organ of the Government, Constitutional Commissions, offices or organizations.

(c) An Order of Prohibition prohibiting the 3rd Respondent, whether through its Commissioners, Secretariat, officers, agents, employees or howsoever from acting on any other Census data relating to Lagdera, Mandera East, Mandera Central, Mandera West, Wajir East, Turkana North, Turkana South and Turkana Central Constituencies other than the published 2009 Population and Housing Census Results in the determination of boundaries review and/or delimitation of new boundaries.

It is clear the 1st respondent authorized the 2nd respondent to undertake a national census and enumeration from the nights of 24th/25th Midnight until 31st August 2009. The minister was exercising his statutory power under section 17 of the Statistics Act. Section 17 states;

"The Minister may on the advice of the Board or by order published in the gazette direct that a population and housing census be taken for Kenya or for any part thereof or in respect of any class of inhabitants thereof and any such directions may notify;

(a) The date or dates on or between which the census is to be taken.

(b) The person by whom the returns for purposes of the census are to be made, and

(c) The information to be obtained in the census.

The 1st respondent released the 2009 Kenya Population and housing census on 31st August 2010 in four volumes.

(1) Population distribution by administrative units.

(2) Population distribution by age, sex and administrative units.

(3) Population and household distribution by socio-economic characteristics.

On the same day, the 1st respondent issued a statement to the media and confirmed in Parliament in aministerial statement that he had cancelled the results for Lagdera, Mandera East, Mandera Central, Mandera West, Wajir East, Turkana North, Turkana South and Turkana Central Constituencies. It is the contention of the applicants that the 1st respondent had no powers under the Statistics Act to cancel the results of any census after publication. In cancelling the results for the eight constituencies, the 1st respondent exceeded his jurisdiction and statutory mandate. It is clear the 1st respondent gave five reasons for the cancellation of the results in respect of eight constituencies;

(1) The rate of increase is higher than the documented population dynamics considering the births and deaths rates as well as the immigration trends.

(2) The rate of increase was inconsistent with what obtains for the rest of the country including neighbouring countries.

(3) The enumerated figures fall way above the projected ones based on the previous census.

(4) The age and sex profile deviate from the norm, with an overall substantial excess of men observed as opposed to expected slight excess of females.

(5) That the residents in the affected constituencies took and filled in the questionnaire with inaccurate information.

It is the contention of the applicants that the reasons given by the minister are not only invalid and unreasonable but also intentionally ignored previous census results with respect to the eight affected constituencies. It is further submitted on behalf of the applicants that the 1st and 2nd respondents ignored the very crucial fact that this was the first census in the history of this country that was conducted and enumerated over a period of five days, which gave the nomadic communities in the eight constituencies an opportunity to participate and show their true and accurate population.

Mr. Kilukumi learned counsel for applicants, submitted that the results are a true reflection of demographic trend in the eight constituencies. He also submitted that the population dynamics for the eight constituencies are distinct and quite different from the rest of the country. **Mr. Kilukumi** also submitted that the population distribution for North Eastern Province for the period 1969 to 2009 is very illuminating;

(a) In 1969 the population was 245957
(b) In 1979 it went up to 373,787
(c) In 1989 it dropped to 371391
(d) In 1999 it increased to 962,143
(e) In year 2009 it increased to 2,310,757

Mr. Kilukumi therefore submitted that the published 2009 census report established that the population distribution numbers were in tandem with the trends in growth rates for household as published by the Minister. He also stated that the rates between 1989 and 1999 and the rate between 1999 and 2009 were constant at 7.48. He further argued that the intercensal growth rate confirms that the population growth rate between 1989 and 1999 was 9.5 but it dropped to 8.8 in the year 2009. Hence there was no basis upon which the 1st respondent could have declared the growth rate in the affected area as irregular.

It is the contention of the applicants that population statistics and results are critical in determining subdivision of constituencies and determination of constituencies boundaries countrywide by the 3rd respondent. It was submitted on behalf of the applicants that the cancellation of 2009 census results with respect to the eight constituencies by the respondents was ill motivated, calculated and designed to disadvantage the inhabitants of the eight constituencies eight constituencies through the use of projected results rather than the use of the actual results.

Mr. Kilukumi further submitted that the enumerators employed and deployed by the 1st and 2nd respondents to the eight constituencies were well trained and used the same procedures as in the rest of the country in carrying out the enumeration exercise. He contended that there is no evidence that the enumeration was carried out in a manner contrary with the instructions of the 2nd respondent. **Mr. Kilukumi** further submitted that it is irrational, discriminatory and unreasonable that irregularities were allegedly only detected in the eight constituencies which are located in Northern Kenya. He therefore submitted that there was no statutory provisions allowing the minister to cancel the results of the eight constituencies and that the Minister acted without legal authority and that his decision was without jurisdiction and amenable to judicial review.

The application was opposed by the 1st and 2nd respondents and the interested parties who supported the

decision of the Minister. The respondents filed two replying affidavits sworn by the director general Kenya National Bureau of Statistics and one by the Minister for State for Planning National Development and Vision 2030. The Minister alleges that it is within the mandate of the Kenya National Bureau of Statistics to carry out the 2009 Kenya Population and Housing census. He avers that in carrying out the census in the whole country, the Kenya National Bureau of Statistics applied the same methodology in data collection. The Minister also confirms that his ministry was well prepared for the exercise and had even done pre-census survey and strategized with its partners, the media, locals and government representatives on the ground to make the exercise a success.

The Minister also states that he was informed by the Director General Kenya National Bureau of Statistics that, the census results were undertaken through various scientific justifications. And that the Ministry used tested census systems which are internationally accepted and which is based strictly on professional considerations. The minister also contends that the cancellation of the results was based on professional considerations and that there is no danger that the results would be used to the prejudice of the applicants.

The Director General of Kenya National Bureau of Statistics supported the position taken by the Minister and states as follows: that it is within his knowledge that census taking is a national undertaking and that at the beginning of the exercise the entire nation is mobilized with targeted messages to inform everyone of the importance of the exercise and their role towards its exercise. The preparation was necessary because the nature and magnitude of the census dictates that it is conducted through other people namely the local leaders who have a responsibility to ensure that the exercise is successful.

That owing to gigantic nature and magnitude of the exercise, occasional errors and omissions of the population for one reason or another is not uncommon worldwide even in the developed countries. As a consequences census data are evaluated as a standard procedure to understand the nature and magnitude of the errors to facilitate a proper utilization of the data by stakeholders upon release. The Director General also contended that census implementation is a highly methodical process with various checks and balances and that before giving provisional opinion, the Kenya National Bureau of Statistics often examines various dimensions of the problems, viewing it through different professionally accepted standards, informed by theory and practice, as well as by lessons and/or similarities drawn from other areas within the country or other countries with similar population and geographical dynamics.

The Director General therefore concluded that it is on the strength of this methodological process supported by scientific drawing from internationally accepted methods and procedures of data evaluation and assessment that they advised the Government to undertake further evaluation and analysis of the census results from the eight constituencies. Consequently, the results were cancelled so that a repeat exercise could be undertaken. The Director General contended that there are no ulterior motives in cancelling the results and that it is meant to give the government an opportunity to get the best information out of the eight constituencies.

It is the position of the interested parties that the crux of the matter is the national population census conducted in 2009 in respect of North Eastern Province and Turkana district. The interested parties supported the position taken by the 1st and 2nd respondents saying that there were anomalies in the census, and the remedy lies in a repeat census for the entire North Eastern Province.

Ms Kilonzo learned counsel for the interested parties submitted that it is for the interest for the whole country to conduct a repeat census in the whole of North Eastern Province to determine the exact population residing in that area. **Ms Kilonzo** submitted that the exercise was vital and significant since it would affect sharing of national resources, infrastructure, county governance and other important issues. She also submitted that constituencies would be divided in equal population and to seek and/or achieve equality of votes among various constituencies within Northern Kenya.

Ms Kilonzo also submitted that enhanced population if not corrected would disentitle another population of a right to representation by failure to sub-divide another deserving constituency. **Ms Kilonzo** also submitted that there had been attempts to conduct a repeat census but in view of this case, the minister

could carry out a repeat census in order to correct the anomalies and irregularities committed. **Ms Kilonzo** also submitted that the interested parties were affected by the anomalies in the enumeration carried out and the remedy lies not in prohibiting the report but carrying out a repeat census. In short it is the position of the interested parties that the decision of the census of 2009 gravely affected them and that it is necessary to order a repeat census in the affected areas to give all parties an opportunity to present the correct picture prevailing at the ground.

I have considered the application, the arguments by the respective parties and it is time to determine the dispute in accordance with the law and the facts as presented by the parties. The Government of Kenya conducted census since 1948 as recommended by the United Nations principles and recommendations for census taking worldwide. Kenya has been hailed as a model for successful census taking in sub-Saharan African region. The 2009 Kenya population and housing census was the 7th census to be conducted since 1948 and the 5th since independence. It was conducted from the night of 24th/25th to 31st August 2009.

The planning and the execution of the 2009 Kenya Population and housing census was spearheaded by the Kenya national Bureau of Stations on behalf of the Government of Kenya in accordance of Statistics Act 2006. The theme for the census was **"counting our people for implementation of the visions 2030"**. It is contended that the theme was to respond to the greater demands for the statistical information for monitoring the implementation of Kenya's current development goals and other global initiatives such as the Millennium Development Goals. It costed an estimated figure of 8.4 billion. Thereby demonstrating the government commitment to improving statistical data collection, analysis and dissemination for informed decision making.

Census being a massive operation and an important national exercise the Government ensured that its implementation incorporated the participation of all stake holders either directly or indirectly through various census committees. Indeed an effective communication campaign was mounted by the government to create public awareness and mobilize national support for the exercise. As a mark of its importance, our President declared 25th August 2009 as a census public holiday thereby demonstrating his commitment to the process.

According to a report released by the 1st respondent the preliminary analysis of the data for the 2009 Kenya Population and Housing census was deemed to be complete and accurate, save for the eight constituencies that were found to have anomalies and growth rates that deviates significantly from the patters portrayed not only by the rest of the country but by the neighbouring districts as well.

The Government then decided to release the results as enumerated with a rider that the data will be assessed further using internationally accepted procedures and suitable remedial measures. It was also acknowledged that the census was successfully conducted and that owing to the complexity and extensiveness, it was methodically executed in phases to ensure logical sequences and effective implementation of activities. It was also the position of the Government that the activities resulting in the final report were classified into three phases namely; **pre-enumeration**, **enumeration** and **post enumeration**.

The first phase started with the preparation of the project document followed by sustained resource mobilization in 2006. There was also cartographic mapping, pilot census, development, finalization and printing of instruments and sensitization of key stakeholders. The second phase started in July 2009 with the recruitment and training of field personnel including working out complex logistical arrangement for the actual enumeration, intense sensitization campaign and the undertaking of the actual census. The last phase includes processing the data and tabulation, compilation of thematic reports, further analysis and dissemination of the report.

Population census is a complete count of the country's population, United Nations recommends that countries conduct census every ten years. As stated earlier Kenya is one of the few sub-Saharan countries that strictly adhere to the ten year rule. It is also important to note that population and housing census are important statistical operations undertaken to provide information needed for a variety of purposes.

The fundamental objective is to provide information on the size, distribution, composition and other social and economic characteristic of the population in a given area. Such information is necessary for monitoring the implementation of the national and global development agenda. It is also clear that the census was conducted and implemented in accordance with the United Nations principles and recommendations for modern census.

The main objectives of the 2009 Kenya Population and Housing census was to provide the government and other stakeholders with essential information and to ascertain the following;

(1) Size, composition and the distribution of the population in the country.

(2) Levels of fertility, mortality and migration rates.

(3) Rate and pattern of urbanization.

(4) Level of education attained by the population

(5) Size and deployment of labour force.

(6) Size, types and distribution of persons with disabilities.

(7) Housing conditions and viability of household amenities.

Another important factor or objective for census is monitoring national development programs, allocation of national resources, review of administrative and electoral boundaries, locating social infrastructure such as schools and hospitals. A participatory approach was adapted in the development of the 2009 Kenya Population Housing Census instruments such as questionnaires and manuals, in order to taken into account the views of various stakeholders. The instruments were piloted in August 2008 and then shared with key stakeholders. The development of the census questionnaires was guided by the United Nations Principles and recommendations for 2010 round of population and housing censuses. The United Nations recommends a dress rehearsal of the census enumeration plan a year before the enumeration in order to prepare adequately to undertake the main census enumeration.

The census secretariat conducted a pilot census from 24th/25th August 2008 to 31st August 2008 in 16 districts to test the preparedness to undertake the 2009 Kenya Population Housing and Census. During the pilot census, a complete enumeration of the population in the sampled sub-location was carried out. The results provided important information on the adequacy of field organization and logistics, census instruments, training programmes and data processing plan. The findings of the pilot project helped to finalize the arrangements and preparedness for the main enumeration.

As far as manpower is concerned, a competitive and transparent recruitment process was mounted in order to hire personnel capable of undertaking key concepts and who were required to follow instructions satisfactorily to ensure successful enumeration. The Government then advertised census positions on the print media and radio and through provincial administration offices. Applications from interested and qualified persons were received by the secretariat and interviews were conducted on the scheduled dates nationally for all the census personnel. Other than the minimum academic qualifications, candidates were also considered based on their geographic residences. All applicants were screened in accordance with the criteria set. Supervisors and enumerators recruited had to be conversant with the language of the area in which they were deployed. Both supervisors and enumerators were trained for seven days each and training activities ended two days before the census enumeration date.

Enumeration of the population is a critical phase of the census process and involves the actual collection and recording of the information. During the enumeration the target population were all persons who spent the night of 24th/25th August 2009 in households, institutions, malls and outdoor locations within the administrative boundaries in Kenya. The unit of enumeration for housing characteristic was the main dwelling unit. Coordinators, senior supervisors and supervisors worked closely with enumerators to

ensure quality data was collected. There was a supervisor in-charge of five enumerators and there was a senior supervisor in charge of four supervisors. Each enumerator was accompanied by a village elder and security personnel to ensure that the information gathered was correct and accurate. According to the report by the 1st and 2nd respondents the 2009 Kenya Population Housing and Census enumeration was a resounding success. It was a success because the Government put in place certain measures;

(i) Management structures - an effective management structure was put in place which benefited from Government participation and political commitment at the highest level.

(ii) Census profile raised - the census profile was raised considerably by linking its theme to the achievement of national and global development goals. This helped grow political leadership and commitment at highest level and highlights its national stature and importance.

(iii) Communication strategy – the Government employed an effective communication strategy which was implemented through a private media consulting firm.

(iv) Census holiday - The President of the Republic of Kenya declared a Census/public holiday on the 1st day of the census on 25th August 2009 when the Minister for internal security encouraged limited social activities and travel on census night so that people could stay home to be enumerated.

(v) Competitive recruitment, effective training and attractive remuneration – the Government recruited qualified personnel through a transparent and credible process. An effective training programme was also mounted for all personnel and an attractive remuneration offered.

(vi) The Government also put in place a comprehensive security operation to ensure the safety of both the household and census personnel during the enumeration period.

(vii) The Government also made a decision to have the census enumeration externally and independently monitored by a team of experts to encourage transparency and effective supervision and implementation.

No doubt this is the first time, independent monitors were involved in the census process.

Among the challenges and constraints that faced the process was the enumeration of nomadic/pastoralist population, due to prolonged drought preceding the enumeration and difficult terrains which also complicated logistics. The reason why the minister cancelled the results of the eight districts is because;

(i) Rate of increase is higher than the population dynamics (birth and death rates would support.

(ii) Age and sex profiles deviates from the norm.

(iii) Significant growth observed in household size without accompanying growth in number of households.

As a result, the government decided to release the results as enumerated with a caution that the data will be assessed further using international accepted procedures and suitable remedial measures to be undertaken.

I have deliberately laid out the above background information in order to determine whether the Minister acted within his powers. In determining whether the decision by the Minister was conducted in accordance with the law, this court will ascertain and interrogate if there was a failure by the minister to act fairly towards the applicants. The invocation of a ministerial power in unsuitable circumstances or for wrong end/purposes must always be stopped by the court. Where there is an abuse of power, the court should invoke its judicial review jurisdiction to prevent such an abuse, thus even assuming that the

minister is in law entitled to cancel the results the court has to investigate and determine whether he can cancel the results of applicants. In examining the powers of the minister it is desirable to start with section 17, the said section states that the minister on advise of the board may direct that a population and housing census be taken for Kenya or for any part thereof or in respect of any class of inhabitants thereof.

It was submitted on behalf of the 1st and 2nd respondents that the Minister has residual power to correct mistakes, errors and inaccuracies. The Minister informed the public that the census report for the year 2009 was dogged with errors and inaccuracies and the same was not proper for public reference. After performing routine data evaluation and assessment, the Minister found that the results of the eight districts were irregular as the population of Lagdera seemed to be understated while the population of the rest seemed overstated.

It is the contention of the 1st and 2nd respondent that section 23 of the Statistics Act requires the director general to give information after ascertaining accuracy to the public. It was submitted by **Mr. Onyiso** learned counsel for the 1st and 2nd respondents that the Minister had the power to cancel the results in accordance with section 23 of the Statistics Act. **Mr. Onyiso** submitted that it is in the spirit of section 23, that, only accurate information is given to the public. He also submitted that inaccurate information is a nullity and that the minister had residual powers to cancel inaccurate data and information.

Section 23 states as follows:

(1) The Director General may at the request of any person or agency and upon payment of such fee, if any, as may be prescribed by the Board provide to that person or agency, any special information or report concerning, or carry out for that person or agency any special investigation into, any of the matters specified in the First Schedule;

Provided that the person requesting for information shall undertake in writing to the satisfaction of the Director General-

(a) To use the information so obtained only for research purposes; and

(b) Not to release such information to any other person except with the prior written consent of the Director-General.

(2) The Director-General may, with the approval of the Board, cause statistical data collected by the Bureau to be disseminated to the public after ascertaining its accuracy and safeguarding the confidentiality with respect to the information."

The law is that a provision of a statute shall be construed so as to include cases which are within the mischief which the statute was intended to remedy. On the other hand where the intention of the legislature is doubtful the inclination of the court will always be against a construction which imposes a burden or a duty on the subject. In my view a penalty must be imposed by clear words of the statute. If the meaning of the provisions is reasonably clear, the courts have no jurisdiction to import an intention that was not intended by the drafters. The court should not give too wide and fanciful construction or interpretation which is not found within the statutes.

It is also important to understand that the court's task is not to impede the executive activities but to reconcile its continued need to initiate or respond to the change or expectation of citizens or strangers who have relied and have been justified in relying on a current policy or promise. A clear reading of section 23 does not show or demonstrate the Minister could exercise any power in respect of a census results. The section defines the powers of the Director General of Kenya Bureau of Statistics. The section talks of the powers of the Director General to grant, permit, restrict and/or prohibit requests or information under his custody.

In this case, what is questioned is the power of the minister to cancel the results of the 8 constituencies

after the whole exercise was completed. And secondly the rights of the inhabitants in so far as the purported cancellation is concerned. The critical question is by what standard the court is to resolve such conflicts? It is when one examines the implications of the decision making process that this court can intervene. It is also clear that the very concept of administrative discretion involves a right to choose between more than one possible cause of action upon which there is room for reasonable people to hold deferring opinions as to which is to be preferred. In my view there is no space for intervention by the court on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The application is based on five grounds namely;

(1) Want of jurisdiction and ultra vires

(2) Legality

(3) Unreasonableness

(4) Frustrating legislative purpose

(5) Legitimate expectations.

(6) Abuse of power

On the issue of want of jurisdiction, it has been submitted that the 1st respondent released the 2009 Kenya Population and Housing Census on 31st August 2010 which had been prepared and published by the 2nd respondent. The 1st respondent having released the official census results on the same day issued a statement cancelling the results of the 8 constituencies on the ground that the results were irregular. It was submitted by **Mr. Kilukumi** that the 1st respondent had no statutory power to cancel the results after their publication. The cancellation of 2009 Kenya Population and Housing Census in respect of 8 constituencies is also patently unlawful. **Lord Parker** in **R vs Criminal injuries compensation board exparte Lain 1967 2QB 864** it was held;

"so long as orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions and in view of the changing concepts of good governance which demand transparency by anybody of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions."

This therefore implies that the limits of judicial review shall not be curtailed but should be nurtured and extended in order to meet the changing conditions and demands affecting the decision making process in the contemporary society. We must expand this expansiveness. We must develop the law to cover and cater for new situations and matters which were not in existence in old days. In other words the frontiers for judicial review must be expansive, innovating and appropriate to cover new areas.

It is clear in my mind that the principle of fairness has an important place in the role of judicial review and it is a ground upon which the court can intervene to quash a decision made by a public authority in a purported exercise of a power conferred by law. Equally judicial review is available where decision making authority exceeds its power, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers. Abuse of power can sometimes take the form of want of jurisdiction in that the authority did exercise a power without jurisdiction and adapted a practice towards a limited number of individuals or persons.

It is the case of the applicants that the decision of the 1st respondent made on 31st August 2010 cancelling the results should be brought and quashed as the same was made ultra vires and an abuse of statutory power, the decision was unreasonable, it was meant to frustrate legislative purposes and lastly it frustrated legitimate expectation and consistency. It was contended that the Statistics Act and Statistics order 2008

do not donate any power to the 1st respondent to cancel any part of census report. And that the 1st respondent in cancelling part of 2009 Population and Housing Census results was acting without jurisdiction and therefore his decision was ultra vires the Statistics Act. In the case of **Kenya National Examination council vs Republic Exparte Geoffrey Gathenji Njoroge & 9 others Nairobi Civil appeal No.266 of 1996** it was held;

"Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction.

In the case of **R v Commission of Racial Equality *exparte* Hillingdon [1982] QB 276** it was held;

"Now it goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or power to abuse its powers. When the court says it will intervene if particular body acted in bad faith, it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament."

In my view, a statutory power will be construed as impliedly authorizing everything which can be fairly regarded as incidental or consequential to the power itself. It is also clear in my mind that acts of Parliament conferring power on public authorities, very commonly impose conditions about procedure, for example, by requiring that a notice shall be served or that action shall be taken within a specified time or that the decision shall state reasons. If the authority fails to observe such a condition, it is ultra vires.

My understanding of the law is that non-observance of mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose. In other words, it is not every omission or defect which entails the drastic penalty of invalidity. Sometimes the legislation makes it plain what the effect of nonobservance is to be but more often it does not and then the court must determine the question. This the court does by weighing the inconveniences of holding the condition ineffective against the inconvenience of insisting upon it rigidly. It is a question of construction to be settled by looking at the whole scheme and the purpose of the Act and by weighing the importance of the condition, the prejudice and the claims of public interest.

It is also important to understand that the discretion of a statutory body is never unfettered, it is a discretion which is to be exercised according to law. The statutory body must be guided by relevant consideration and not by irrelevances. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter it may have acted in good faith, nevertheless, the decision will be set aside. It means the powers of public authorities are subordinated to the law and they are subject to legal limitations. There is no such thing as absolute or unfettered administrative power.

Secondly it is always possible for any power to be abused. Government Ministers may misunderstand their legal position as easily as many other people and the law which they have to administer is frequently complex and uncertain, abuse is therefore inevitable and it is all the more necessary that the law should provide means to check it. It is a common occurrence that a Minister's decision is set aside by the court as unlawful. The courts are constantly occupied with cases of this nature which are nothing more than practical application of the rule of law. In essence, a Government minister must have the legal warrant for what he does and that if he acts unlawfully, the citizens have an effective legal remedy. On this elementary foundation has been erected an intricate and sophisticated structure of rules which are basically judge made rules.

The 1st respondent gave five reasons for the cancellation of the part of the 2009 Population and Housing Census;

(1) The rate of increase is higher than the documentation population dynamics considering the birth and death rates as well immigration trends.

To support that contention it was incumbent upon the 1st and 2nd respondent to produce relevant

documentary evidence showing that the rate of increase is higher than the documented population dynamics in so far as the birth and death rates are concerned. The 1st respondent did not attach any birth or death record to show the pattern of increase or decrease of population in a particular manner. It was submitted by **Mr. Kilukumi** learned counsel for the applicants that most births in Northern Kenya are conducted outside hospitals as coverage of health facilities is very low in those districts. It is clear in my mind that due to the nature of terrain and the nomadic nature of the inhabitants of the affected areas, that most births are conducted outside hospitals and the dead are hardly reported. Dead bodies are buried immediately for cultural and religious reasons. There is also a tremendous practice of polygamy and early marriages which encourages the inhabitants to have large families.

(2) The rate of increase was inconsistent with what obtains for the rest of the country including neighbouring districts.

Mr. Kilukumi submitted that while the national average for the sex ratio is 50:50 it is normal to see variations for various districts from 55:45. In the eight districts cancelled the sex ratio ranges from 53:47 to 55:45. There is no evidence to show that the disparity was caused by any particular factor in so far as the ratio discrepancies are concerned.

Having gone through the reports released by the 1st and 2nd respondents, it is clear the trend is reflected in various parts of the country and it is also consistent with the figures of the past census. See Pokot Central, Trans Nzoia, Ijara etc.

(3) *Significant growth in household size.*

It has been contended by the State that the enumerated figures fall weigh above the projected ones based on previous census and that there is a significant growth in household size. It was submitted by **Mr. Kilukumi** that it is reasonable to expect that in the eight districts with sprawling poverty, the inhabitants are not able to build more homes to match the increased population. It is known that that most inhabitants of the eight districts are dependent on relief food due to persistent drought in recent years that disseminated their livestock. This fact is acknowledged by the 2nd respondent in its report. Growth of household numbers has remained at 7.48% in the year 1999 to 2009 census periods which is consistent with the period 1989 to1999 when household grew by the same rate. This is also supported by the intercensal growth rate in the eight districts which was 8.78% down from 9.5% in the period 1989 to1999.

It is important to appreciate that this was the first time in the history of this country where enumeration was done for a period of five days giving the residents of the eight districts a golden opportunity to participate in the exercise at their convenience. It was a rare occasion or opportunity which entitled the 8 affected areas to show their true and actual population. The 1st respondent ignored and failed to consider that there has never been a growth rate that was similar or comparable to other parts of the country due to the culture, traditions and nomadic lifestyle of the 8 affected areas.

It is not the case of the 1st and 2nd respondents that the inhabitants of the eight districts participated in a process that may have led to the alleged irregularities or that they played a role in a manner to defeat the objectives of the census. All preparations, actual enumeration, assessment and evaluation of the process were done by the 1st and 2nd respondents or by their lawful agents. The government made adequate and thorough preparation from 2006 to conduct the census. Training of enumerators was done to international standards as confirmed in the report released after the exercise was completed. The 2nd respondent also confirms that it adopted best practices in the enumeration exercise and that the enumeration was a resounding success.

The 2nd respondent acknowledged that qualified census personnel were recruited through transparent and credible process. The 2nd respondent also confirmed that the census enumeration was externally and independently monitored by a team of experts which gave real time feedbacks to the national secretariat. It is my view that statutory power can be exercised validly if it can be exercised reasonably and in accordance with the law. No statute allows anyone a power to exercise such power arbitrary,

capriciously or in bad faith.

Section 4 of the Statistics Act vests the duty and responsibility of collecting, analyzing and disseminating statistical data on the 2nd respondent and in particular the power to conduct population and housing census every ten years. It is essential therefore to say that the procedure prescribed by the law for depriving a citizen a matured right drive must conform to the norms of justice and fair play. Procedure which is unjust or unfair attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently the action taken under it. In my opinion action taken by a public authority which is invested with statutory power, has therefore to be tested by an application of two standards;

(1) The action must be within the scope of the authority conferred by the law.

(2) It must be reasonable.

If any action within the scope of authority conferred by law is found to be unreasonable it must be that the procedure established by law and which that action is taken is itself unreasonable. The point, I am, making is that the substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it.

From the point of view of the ordinary citizen it is the procedure that will most strongly weigh with him. He will tend to form his judgment of excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work. He that takes the procedural sword shall perish with the sword. The procedure to be used in the exercise was formulated by the 2nd respondent and its agents implemented the procedure and the law as defined by them. It is not within the powers of the inhabitants to influence the actions and the omissions of the 1st and 2nd respondents. It was the duty of the 1st and 2nd respondent that the utilization and invocation of its process is not misused or abused by any party. Equally it was the duty of the 1st and 2nd respondent to ensure that it maintains its integrity and that justice is done to all citizens of this country as far as giving a credible and clean process.

Lord Diplock in R v Electricity Commissions [1924] 1KB 171

"Whenever any person or body has legal authority by legislation to make decisions in public law which affect the common law or statutory rights of other persons as individuals, it is amenable to the remedy of judicial review of its decision either for error of law in so acting or for failure to act fairly towards the person who will be adversely affected viz by not affording him a reasonable opportunity of hearing what is alleged against him and of putting his own case in answer and to the absence of personal bias against him on the part of the person by whom the decision falls to be made."

In my view statutory powers can only be exercised if they are exercised reasonably and for the intention it was donated or given in the first instance. If it is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making process or where they take irrelevant considerations or act contrary to legitimate expectations.

It is the responsibility of the 1st & 2nd respondent as stated earlier to conduct and carry out a clean and credible census in a manner that meets international standards and requirements. The inhabitants of the eight districts do not enjoy or share collegial powers with the organizers of the exercise. They do not enjoy any power or leverage over the 1st and 2nd respondent.

There is no evidence to show that the inhabitants of the eight districts deliberately, intentionally and/or willingly distorted or changed the outcome of the census results in the eight districts. There is no

attempt to show that the inhabitants hijacked the exercise in a particular way to render favourable results contrary to the actual position. It is ridiculous to assume that agents of 2nd respondent were so naïve or inept that they disregarded all the basic and fundamental principles of undertaking the exercise in order to deceive or collude with the inhabitants of the area.

If the 1st respondent acknowledges the process was flawed or irregular and does not state the persons behind the flawed or irregular results, then he cannot be heard to shift the blame to the inhabitants of the either districts who have contributed or played no role in the alleged irregularities . A pertinent question is whether a party can benefit from its own admitted faults to the prejudice of another party. The inevitable answer is that to allow the respondents to cancel the results would be tantamount to allowing them to benefit from their own omissions or acts.

There is no evidence that the inhabitants of the eight districts colluded or corrupted the enumerators to achieve a desired goal or results. In essence there is no blame attributable to the inhabitants of the eight districts to warrant the cancellation of a lawful process which was subjected to them by the persons who want to cancel the results to their disadvantage. In law a party cannot be allowed to blow hot and cold at the same time. It is also clear that no liability can attach without fault. The negligence, deliberate and/or inadvertent omission of the 1st and 2nd respondents cannot be shifted to the inhabitants of the eight districts. The inhabitants cannot suffer for a fault which is not of their own making and which cannot be traced to them.

In my view there is no thread between the cancellation and role played by the inhabitants. It would be manifest absurdity or repugnant to justice for this court to allow the minister to impose a penalty without a fault committed by the inhabitants of the eight districts. I therefore accept **Mr. Kilukumi's** powerful argument that cancellation of the results of the eight districts can only be done on clear and deliberate error or omission linked to the inhabitants of the area.

The inhabitants of the eight districts had a legitimate expectation that the 1st and 2nd respondents would act fairly and consistently with respect to the enumeration, analysis and dissemination of the 2009 Population and Housing Census results as it had been done in the past.

In **R Vs North and East Devon Health Authority Ex Parte Coughan [2000] WLR 622** it was held that;

"If a public body exercising a statutory function made a promise on how it would behave in the future which induced a legitimate expectation of a benefit which was substantive, rather than merely procedural, **to frustrate that expectation could be so unfair that it would amount to an abuse of power**."

In **Judicial Review handbook, 5th Edition Michael Fordham QC** states as follows;

"Consistency is a principle of good administration. **Judicial Review may lie because treatment is unjustifiably unfavourable compared with action in relevantly like cases (or prior treatment in the same case) or because it unjustifiably fails to distinguish other unlike cases.** Consistency links with freedom from arbitrariness, each of which also links with (and is promoted by) adequate certainty of approach.)

It is now accepted in public law that statutory powers and duties must be exercised and performed reasonably, fairly and to the best interest of the persons likely to be affected by the decision. In the circumstances of this case there is nothing under section 17 and 23 of the Statistics Act which suggests even remotely that the minister had powers to cancel the results of the eight districts.

Mr. Onyiso learned counsel for the 1st and 2nd respondents submitted that the minister had residual powers to correct the anomalies created at the time the exercise was carried out in the eight districts. As rightly pointed out there is no direct or secondary evidence to support the basis for the cancellation of the

results in the eight districts. The assessment and evaluations as carried out by the 2nd respondent does not support the reasons and basis cited for the cancellation of the results in the eight districts. In my understanding a public authority cannot vary the scope of its statutory powers and duties to result in unfairness to a party. The cancellation of the 2009 Population and Housing Census with respect to the eight districts is a violation of the cardinal rule of fairness and the applicants' legitimate expectations that the 1st respondent will respect the law and statutory mechanism established to ensure due process and consistency in discharge of his statutory and administrative duties.

It was unreasonable for the 1st respondent to cancel the results of the affected areas before post census evaluation process and assessment had been completed. The respondents did not dispute at all the accuracy of the number of inhabitants enumerated in the affected area. Their concerns are that what they consider as unusual demographical patters, trends, dynamics and futures. In my view that cannot be a ground or excuse to cancel the census results for some selected areas but can be a basis to carry out a further demographic studies and assessment to determine the source of the variation or change in the trends, dynamics and futures of the affected areas.

It is after carrying out further demographical assessment with scientific and international accepted methods that the figures can be adjusted but it is not within the powers or authority of the minister to cancel the results of an exercise which they wholly owned and termed as successful.

Mr. Kilukumi learned counsel for the applicant submitted that the 1st and 2nd respondents should not be allowed to frustrate the legitimate expectation on the part of the inhabitants of the eight districts and the decision made on 31st August 2010 cancelling their results was thereof arbitrary and unlawful. I am, in total agreement with **Mr. Kilukumi** that the 1st and 2nd respondents promised and assured all citizens that they would conduct a fair and credible census. It would be unfair and unjust to allow them to breach their own undertakings and contracts which they entered with the citizens of this country. I reckon the public authority could be reasonably resile from such a promise where the overriding public interest demanded it. In my view the 1st and 2nd respondent failed to discharge the burden of establishing that there were compelling circumstances amounting to overriding public interest.

The 2nd respondent promised to conduct a proper census, the promise was undertaken and the verdict is that the process was resoundingly successful. It cannot be now be heard to say that the process was flawed or irregular in respect of the eight districts whose results the minister purportedly cancelled.

What is the court's role when a member of public as a result of a promise or other conduct says that he has a legitimate expectation that he will be treated or expects to be treated in one way and the public body treats him in a different way than he expected or was induced. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. What was the legitimate expectation. Where there is a dispute, as to his expectation the dispute has to be determined by the court. This can involve a detailed examination of the precise terms of the promise or the representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

Having analyzed the case of the applicants, the respondents and the interested parties, it is my findings that the 1st and 2nd respondents were required to bear in mind its previous policy and other representations. If the 1st and 2nd respondents wanted to change course in a manner contrary to its previous policies, representations assurances and statutory obligations, it was required to base its decision within the confines and parameters of the law. By cancelling the results of the 8 areas, without any justification and without any statutory underpinning its decision, then it acted in excess of its jurisdiction and without authority. In essence the minister exceeded the limits and the confines of the law, thereby trespassing on the rights and the interests of the eight districts.

There is no power donated to the minister under section 17 of and/or 23 of the Statistics Act to enable him to cancel the results of the eight districts. In my view therefore the minister had no statutory power or authority to cancel the results of the eight districts. Consequently he crossed the boundary and he must be

shown a red card for exceeding the limit of his powers. Secondly it is clear that the 1st and 2nd respondents made a promise and/or a practice that induced a legitimate expectation that they would carry out a credible exercise to the satisfaction of all citizens of this country. It was mandatory for them to keep their promise or assurance. To do otherwise would amount to discrimination and violation of the fundamental principle of equality and fairness.

I have considered the adequacy of the reasons advanced for the cancellation of the results and it is my determination that the same amounts to an illegality in all aspects of 'Wednesbury standard' which applies to the generality of executive decisions. The respondents cannot be allowed to frustrate the expectations of the inhabitants of the eight districts. They can also not be allowed to take a new and different course for that would amount to an abuse of power.

There is nothing to justify a departure from what has been previously promised or induced. Whether to frustrate a legitimate expectation can amount to an abuse of power is the question which was posed by the **House of Lords in R v Inland Revenue Commissioners exparte Preston [1985] AC 835** and addressed more recently in **R v Inland Revenue Commissioners, exparte Unilever PLC [1996] S.T.C. 681**. In each case, it was in relation to a decision by a public authority to resile from a representation and how it could treat a member of the public.

In **Hanke v Minister of Housing and Local Government [1963] QB 999** it was held;

"if it be shown that an authority expressing a power has taken into account as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power then the exercise of the power, normally at least is bad. Similarly if the authority fails to take into account something which is relevant and which ought to be known to it and which it ought to have taken into account, the exercise of that power is normally bad."

The question is whether the applicants have made the test for the grant of the orders sought. It is clear in my mind that the application was vehemently opposed by the interested parties whose main concern was that there is a possibility that the eight affected areas would get extra constituencies as a result of their population.

Ms Kilonzo learned counsel for the interested parties submitted that the crux of the matter is the national population census report. The learned counsel submitted that the report had anomalies and the remedy lies with a repeat census for the entire North Eastern Province. The learned counsel also submitted that if a repeat census is carried out the results will not prejudice the applicants. With the greatest respect to the learned counsel for the interested parties, judicial review is concerned with the process undertaken in reaching an impugned decision and not the correctness or soundness of the decision.

In my understanding judicial review is concerned with reviewing not the merits of the decision but the decision making process. It is also clear in my mind that this application is not about who was to get an extra constituency or not. The application **was simply questioning the decision of the minister in cancelling the results of the eight affected areas. The duty of this court is to confine itself to the question of the legality of the minister's decision. It is not the concern of this court to distribute or assign what the applicants or the interested parties were to benefit from the outcome of this decision. The concern of this court is whether the minister exceeded his powers, committed an error of a law, committed a breach of the rule of natural justice, reached a decision which no reasonable tribunal could have reached or abused his powers**.

It was not within the jurisdiction of the interested parties to say that a repeat census is necessary because they were disadvantaged by the population census as enumerated and announced by the minister in respect of the eight affected areas. There is no evidence to show that Wajir South was excluded from the census. Equally there s no evidence to show at the time of the enumeration, a pertinent, important and/or essential factor concerning Wajir south was not taken into account. I do not understand what a repeat census would achieve for the interested parties. I think, they misconceived and misconstrued the dispute between the applicants and respondents.

I have read and reread with increasing admiration the submissions of the learned counsel for the interested parties and I intend to discourtesy to say that the interested parties have no legal right to support the decision of the minister which was outrightly unlawful and in excess of jurisdiction. In my view powers excisable by the executive authority on behalf of the public are not shared by private citizens who think that they are aggrieved by the outcome of the decision. It does not appear to me that there is any significant relationship between the decision of the minister and the grievances advanced by the interested parties.

Ms Kilonzo learned counsel for the interested parties made forensic and skillful submissions on behalf of the interested parties but I think there is no correlation and/or relationship between the disability, grievances, cause of action and sufferings of the interested parties and the decision challenged by the applicants. It is therefore my decision that the interested parties have not established a case to warrant me to say that there is justification to make them Siamese twins with applicants. They were born separately, they have different/separate cause of action which can be addressed in different way without attaching themselves to the case of the applicants. Their parents are different so they cannot be borne together or attached to the case or claim of the applicants. They must seek and direct their compass to the relevant authority.

I am not saying that they are not deserving of an extra constituency. It is not the role of this court to determine the merits of whether they are entitled to an extra constituency. If, I were, I would, consider the relevant facts and circumstances. For now my powers are limited to what I have determined.

Consequently and having addressed my mind to all the issues, I am satisfied that the applicants are entitled to the orders sought in the application dated 11th October 2010 which I so grant with costs against the 1st and 2nd respondents. The interested parties shall bear their own costs. Orders accordingly.

Dated, signed and delivered at Nairobi this 7th day of February 2012.

M. WARSAME
JUDGE