



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)

PETITION 30 OF 2011

AHMED JELLE

MADEY.....PETITIONER

V E R S U S

THE ATTORNEY

GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner, Mr. Ahmed Jelle Madey, has filed this petition alleging violation of his rights resulting from the creation of Tarbaj District. In the petition dated 21st February 2011, he seeks the following orders:
 - (a) The Honourable Court do issue a declaration that the decision to select Tarbaj as a District Headquarters was done without consultations.
 - (b) The Honourable Court do order the Respondent from engaging in further disbursement of funds to develop Tarbaj as a District Headquarters and/or posting of Government Officers and other Departmental Heads to Tarbaj as the District Headquarters.
 - (c) The Honourable Court be pleased to issue a declaration that the Residents of Mandera, Wajir and Garissa are entitled to the services of a Resident Judge (s).
 - (d) A declaration that the right to life and livelihood is not just a paper aspiration, it is a reality.
 - (e) Costs.
2. The petition is supported by an affidavit sworn by the petitioner on the 21st February, 2011 and a supplementary affidavit sworn on the 4th of August 2011.
3. The respondent is the Attorney General who opposes the petition on the following grounds:-
 1. That the application is bad in law and an abuse of the court process.

2. That there is no material of evidential value to support the application.
3. That the application offends the provisions of Order 52 Rules of the Supreme Court of England and Order 5 Rules 8 & 9 of the Civil Procedure Rules, Cap. 21 Laws of Kenya.
4. A replying affidavit sworn on behalf of the respondent by Mr. **Kennedy Nyaiyo**, the District Commissioner, Wajir East District was filed in opposition to the petition.
5. The parties filed written submissions dated 15th November, 2011 and the 5th November, respectively. The respondent also filed supplementary submissions dated 2nd February, 2012.
6. The matter was argued before me on the 6th of February 2012.

The Petitioner's Case

7. Mr. Ondieki presented the case for the petitioner. He submitted that the basic value of the Kenya Constitution is consultation participation, inclusiveness, equity and non-discrimination and referred the court to the provisions of the Preamble to the Constitution and Article 10(2) (a) which contains the constitutional principles. He also referred the court to Article 89(5) which he submitted sets out the matters to be taken into consideration when delineating boundaries and Article 118 which he submitted contemplates public participation in formulating and implementing of policies.
8. The petitioner's contention was that the people of Kutulo were discriminated against in the setting up of the district headquarters for Tarbaj District as the representatives at the meeting for setting up the headquarters were only from Tarbaj. He referred to Annexure 1 in the affidavit of Kennedy Nyaiyo and argued that the minutes of 27.9.2010 took place at Tarbaj Hall and that the meeting was subsequent to the creation of Tarbaj District.
9. Mr. Ondieki submitted that gazetting the district before consulting the residents breaches all the values of the Constitution with regard to public participation and referred the court to Articles 73-79 which he submitted provide for the manner in which leadership should be exercised. He submitted that the minutes of the meeting annexed to the replying affidavit of Kennedy Nyaiyo did not have any representative from Kutulo Community and that therefore the minutes do not conform with the Constitutional threshold for constitutional representation.
10. Mr. Ondieki submitted that the process of creating Tarbaj District by the Gazette Notice of 10th August 2010 was prior to the purported meetings and that the Gazette Notice creating the District should be declared null and void for breach of constitutional principles.
11. He submitted that the minutes recognise the existence of Kutulo but the people of Kutulo were marginalised and urged the court to allow the petition and find that the Gazette Notice was invalid for there not being public participation in the process.
12. In response to the submissions of the respondent, Mr. Ondieki argued that the decision to select Tarbaj as the Headquarters was a political decision and did not involve the community. The petitioner's basic contention, according to Mr. Ondieki, was that there was no public consultation or public participation and no explanation why the local MP should represent the people of Kutulo.
13. He submitted further that paragraph 6-18 of the petition set out the rights violated but that in any event the decision in *Anarita Karimi Njeru –v- Rep(1979) KLR 154* referred to by the respondent was bad law.
14. With regard to the issue of costs, he submitted that Article 22(3) of the Constitution says no fees should be charged.

The Respondent's Case

15. Ms. Lunyolo presented the case for the respondents and relied on the replying affidavit sworn by Kennedy Nyaiyo and the submissions and supplementary submissions filed on behalf of the respondent.

16. She submitted that the main issue in this petition is not establishment of Tarbaj District but the location of the District Headquarters. She referred to paragraph 4 of the petition and submitted that the petitioner states that he has no problem with the District but with the District Headquarters; that the headquarters should have been Kutulo; that Tarbaj is not suitable as Kutulo is more developed and submitted that no evidence of this has been tendered.

17. Ms. Lunyolo submitted further that the government in bringing services close to the people creates districts hence the Gazette Notice creating Tarbaj District. The meeting of 21.9.2010 was for creating the district headquarters not the district. She contended that the residents of Tarbaj met and by a majority decided to have Tarbaj as the headquarters, and the residents of Wajir East were represented by their Member of Parliament.

18. Ms. Lunyolo submitted further that the petitioner had not established the allegations of violation of Article 28 and 27 of the Constitution. She referred the court to the case of **Anarita Karimi Njeru-v-Rep (supra)** and submitted that the requirements of the case had not been met in this case as the petition is vague and ambiguous.

19. She urged the court to dismiss the petition with costs.

Issues for Determination

20. The petitioner alleges violation of his rights under the Constitution arising out of the creation of Tarbaj District and the selection of Tarbaj as the District Headquarters.

21. This being a petition alleging violation of constitutional rights, the petitioner has an obligation to demonstrate which of his rights have been violated and the manner in which they have been violated. This is the import of the court's decision in the case of **Anarita Karimi Njeru-v-Rep (supra)** which the petitioner contends is bad law without indicating how so. In my view, the decision places a very reasonable duty on a party alleging a violation of a constitutional right when it states at page 156 of the judgment that:-

“We would however again stress that if a person is seeking redress from the High court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

22. The issues that I must determine therefore are whether there has been any violation of the rights of the petitioner, and if so, how. If there is a violation of his rights as alleged, I will need to address my mind to the appropriate remedies for the violation. Lastly, I would need to deal with the issue of costs of the petition.

Alleged Violation of the Petitioner's Rights

23. From the petitioner's pleadings and submissions, the core of his complaint pertains to the choice of Tarbaj as the district headquarters instead of Kutulo. He states at paragraph 4 of the petition as follows:

‘The Petitioner contends that he has no problem with the new Tarbaj district but Tarbaj as the district headquarters.’

24. He then sets out a number of reasons why Tarbaj is unsuitable as the district headquarters and why Kutulo would be a more appropriate location for the district headquarters at paragraph 5, 6, and 7 of his

affidavit. The basis on which these contentions are made is not shown.

25. The petitioner argues that the decision to locate the district headquarters at Tarbaj was a decision of the political class and that relocating it to Kutulo would not prejudice the rights and fundamental freedoms of the others. As the petitioner expressly states in his petition that he has no problem with the creation of Tarbaj District, I will not address myself to the arguments of his counsel with regard to the Gazette Notice creating Tarbaj District.

26. I must pause here to observe that the decision on where to locate an administrative unit is within the mandate of the executive. The only requirement would, in my view, be that the decision is made in line with constitutional principles such as consultation and participation of the people. An individual resident of an area cannot properly purport to second guess the decision to locate such a unit in one place instead of another unless such a decision was manifestly irrational and unconstitutional. In the instant case, apart from what the petitioner says about Kutulo without indicating what it is or where exactly it lies in relation to Tarbaj district, there is nothing before this court on the basis of which it can make a judgment on the rationality or otherwise of the decision to locate the district headquarters at Tarbaj. The petitioner concedes that there was consultation, complaining only that the area Member of Parliament was consulted. However, as this court observed in the case of **Hussein Abdi Omar & Others –v- The Attorney General & Others High Court Petition No. 130 of 2011**, the Constitution, when dealing with the issue of the exercise of sovereign power by the people provides at Article 1(2) that the people can do so directly or through democratically elected representatives. It does not require consultation of every single citizen in every single case where a decision has to be made. Where, as deponed by the respondent, community leaders and the elected Member of Parliament were consulted in the choice of Tarbaj as the district headquarters for Tarbaj district, there can be no legitimate basis for complaint.

27. The petitioner contends that his right to protection of the law and full benefit of the law as contemplated by article 27(1) of the Constitution is threatened and violated, and that the actions of the respondents cannot be justified under article 24 of the Constitution. He alleges violation of his rights under article 26(1) of the Constitution and **“his right to a clean and healthy, environment for current and future generations has been threatened.”**

28. At paragraph 13 of his affidavit, he depones that his

“economic and social rights as provided for under article 43(1) (a) (c) (d) (f) of the Constitution have been threatened, further the petitioner avers that his right to access, as per article 48 of the Constitution, to justice has been undermined as there is no High Court in Garissa, Wajir and Mandera. This means trials for murder, Judicial Review and Constitutional interpretation among other services are unavailable since 1963. No appeals can be heard in Garissa, Wajir or Mandera and citizens have to travel 1000 kilometers to access justice. Treating Garissa, Wajir and Mandera differently, by failing to send a Resident Judge, breaches article 27(1),(2),(4) of the Constitution.

29. The petitioner may have legitimate concerns about the rights of minorities, the elderly and the poor in the newly created district, which is laudable. However, he states that **his** rights have been violated. He does not bring this petition on behalf of the elderly, the poor, the marginalised, but on his own behalf. However, whether on his own behalf or on behalf of others, he has a responsibility to show how the location of Tarbaj District Headquarters in Tarbaj instead of Kutulo violates these rights. How, for instance, would location of the headquarters in Kutulo affect the right to access to justice if there was no High Court in Garissa? There is nothing before me that shows violation of any rights, whether of the petitioner or of any other party.

Remedies

30. In view of my findings set out above, this petition is totally without merit and I am therefore not called upon to determine what remedies, if any, are available to the petitioner.

Costs

31. The petitioner argues that the Constitution at Article 22 provides that no costs should be paid. However, a reading of the provisions of Article 22(3) (c) is clear that what the Constitution is concerned with is the payment of court fees for instituting a constitutional petition. The issue of costs remains within the court's jurisdiction. In the present case, I am of the view that the petitioner's complaint was without merit and in the circumstances, he should bear the costs of the petition.

Dated at Nairobi this 16TH day of March 2012

Mumbi Ngugi
Judge