REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.147 OF 2012

BETWEEN

INTERNATIONAL CENTRE FOR CONSTITUTIONAL RESEARCH & GOVERNANCE…..……PETITIONER/APPLICANT

AND

THE HON. ATTORNEY GENERAL……..……1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.……..…….2ND RESPONDENT

KENYA NATIONAL BUREAU OF STATISTICS……...…….3RD RESPONDENT

R U L I N G

1. The Application dated 24th April, 2012 seeks the following ***Orders;***

"(3) That the Court be pleased to order the 1st Respondent to furnish the Petitioner/Applicant with certified results of the Population and Housing Census conducted in the year 2009.

(4) That the 1st and 2nd Respondents be ordered to furnish the Petitioner/Applicant with certified population of all the 290 Constituencies and 1,450 Wards contained in Legal Notice No.14 published on 6th March, 2012 by the Respondent in a special issue of the Kenya Gazette.

(5) That the Court be pleased to order the 1st Respondent to furnish the Petitioner with the population of the following Wards of Municipality of Eldoret;

(i) Eldoret North Constituency – Market, Stadium/Industrial, Eldoret North and Shauri Yako Wards.

(ii) Eldoret East Constituency – Kapsoya, Kimumu/Sergoit and Hospital Wards.

(iii) Eldoret South Constituency – Pioneer, Eldon View, Race Course, Langas and Kipenyo Wards."

2. The Grounds in support are the following;

"(a) Under Article 89(11) of the Constitution this Petition must be heard and determine within three (3) months with effect from 10th April, 2012 that is by 10th July, 2012.

(b) The petitioner requires certified results of the Population ad Housing Census of Kenya conducted in the year 2009 in order to effectively and efficaciously prosecute the Petition herein.

(c) this petition raised substantial questions of Law, inter-alia, because some of the Prayers sought include the annulment/invalidation of Legal Notice No.14 dated 6th march, 2012 and other orders that, if granted, will substantially and fundamentally affect the content and character of the said Legal Notice country-wide.

(d) Given the reliefs sought in this Petition, it is fair, just and prudent that the hearing and determination of this Petition be fast tracked in order that a decision thereon is made before other cases are determined,

(e) It is fair and just that this Application be allowed."

3. In his Submissions in support of the Application Mr. Kibe Mungai has urged the point that the details of the exact figure forming the number of inhabitants in Kenya is a right provided for under **Article 35** of the **Constitution**. Further, that the said information is required for purposes of proceedings under **Article 89(3)** and **(12)** of the **Constitution** which proceedings are due to begin in a few days before a bench of five (5) judges set up by the Hon. The Chief Justice under **Article 165(4)** of the **Constitution**.

4. Mr. Omosa for the 3rd Respondent and Mr. Nyamodi for the 2nd Respondent and Miss Munyi for the 1st Respondent all took the position that the 3rd Respondent had the necessary information, has supplied it vide annextures to a Replying Affidavit sworn by one Anthony Kilele on 10th May 2012 and if further details are required, they can be supplied if the Court so ordered. However, Mr. Omosa stated further that the only difficulty his client had was that in J.R. Misc. Appl. No.309/2010 Warsame J. had issued certain orders which effectively barred his client form releasing that information to any person save the 2nd Respondent.

5. I should note that Mr. C. N. Kihara advocate for the Interested Party as well as Miss Wakoli, for another party, all supported the Application as argued by Mr. Mungai.

6. Miss Munyi said one more thing; that this Court is not bound to follow the Orders of Warsame J. and can make its own Orders if it deems it appropriate to do so.

7. I reserved this Ruling to enable me read and appreciate the contents of the Ruling by Warsame J. as well as the document titled *"2009 Kenya Population and Housing Census"* annexed to the Affidavit of Anthony Kilele aforesaid. I have now done so and for avoidance of doubt what was before Warsame J. was a Petition filed by a group of Pastoralists and upon hearing them, he granted the following Orders;

"(i) That an order of Certiorari be and is hereby granted to move 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, Madera East Mandera Central, Mandera West, Wajir East, Turkana North, Turkana South and Turkana Central Constituencies (the Eight Constituencies).

(ii) That an order of Prohibition be and is hereby granted prohibiting the 1st and 2nd Respondents from publishing, issuing, or gazetting projected results of Lagdera, Madera 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, Constitution commission, offices or organizations.

(iii) That an order of Prohibition be and is hereby granted prohibiting the 3rd Respondent, whether through its Commissioners, Secretariat, Officers, agents, employees or howsoever from acting on any other census data relating to Lagdera, Madera 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 determination of new boundaries.

(iv) That cost of the Application be and are hereby awarded to the Applicant against the 1st and 2nd Respondents.

(v) That the Interest parties shall bear their own costs."

8. In the document titled *"2009 Kenya Population and Housing Census"*, the Minister for Planning and Development wrote as follows at page IV and page 17; *that the data contained in that census report are generally accurate but data from 8 Districts involved in the decision of Warsame J. are anomalous*

9. Reading the Orders of Warsame J., the Minister's Statement and the Application before me, I wish to opine as follows;

10. Firstly, **Article 35** of the **Constitution** provides as follows;

"(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation."

11. I agree with Mr. Kihara that the above provisions are golden if looked at in the context of our history as a Nation. The secrecy of the Single Party State is still fresh in our minds and the fact that information held by the State was only spoken of in hushed whispers and in fear of informants cannot be forgotten. With the insertion of **Article 35**, the Courts must rise to the occasion and robustly give real meaning to that **Article**. Granted, it is not one of the rights that is covered by **Article 24(5)** of the **Constitution** and may be limited in certain instances. However, a party seeking the limitation of the right must abide by the provisions of **Article 24(1)(a)-(e)** which provide as follows;

"***(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

12. In Submissions before me, none of the Respondents pointed me to any of the above provisions and so the only issue to address is the import of the Orders of Warsame J.

13. Secondly, therefore, I also agreed with Miss Munyi that when a Court of concurrent jurisdiction

makes a decision, the reasoning and final orders of that court can only be persuasive to another Court of the same jurisdiction. This was the case in Taib vs. Minister for Local Government and Anor. H.C. Misc. Appl. No.94/2006 (Mombasa) where in a dispute involving the denomination of Councillors, Sergon J. sitting in Mombasa, refused to follow the reasoning of Ibrahim J. *(as he then was)* and this Court in previous decisions on the same issue. The Court of Appeal had to resolve the matter on a majority when Taib Ali Taib filed an Appeal against the decision of Sergon J. – see C.A. No.107/2006 (Nairobi)

14. Thirdly and in that regard, I have considered the matter before me and I see no serious opposition to the Prayers being granted and my view is that since the information is needed for purposes of **Article 89(12)** of the **Constitution**, it would be unfair to deny a diligent party information necessary to advance its case. I am aware that in the proceedings consolidated under Petition No.91 of 2012, the first issue for determination is that of the *"population quota"* defined in **Article 89(12)** of the Constitution as follows;

"(1) …

(2) …

(3) …

(4) …

(5) …

(6) …

(7) …

(8) …

(9) …

(10) …

(11) …

(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."***

15. The Population Quota cannot be determined if an exact number of the *"inhabitants of Kenya"* has been ascertained. Two figures were placed before me by Mr. Mungai viz;

(i) Slightly over 38,600,000 as reported in the 2009 census.

(ii) 37,724,850 as recorded by the Kenya National Bureau of Statistics.

16. Since the 3rd Respondent has stated through Counsel that the information is available and if ordered to do so, they will avail it, then I see no bar, including by the Orders of Warsame J. for the necessary Orders to issue. In any event, it is up to the 5-judges in Petition No.91/2012 as consolidated who will determine whether the information required by the Applicant will assist that Court in reaching a fair decision.

17. In the event, I will exercise discretion and grant the following Orders;

"(3) That the Court be pleased to order the 1st Respondent to furnish the Petitioner/Applicant with certified results of the Population and Housing Census conducted in the year 2009.

(4) That the 1st and 2nd Respondents be ordered to furnish the Petitioner/Applicant with certified population of all the 290 Constituencies and 1,450 Wards contained in Legal Notice No.14 published on 6th March, 2012 by the Respondent in a special issue of the Kenya Gazette.

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(ii) Eldoret East Constituency – Kapsoya, Kimumu/Sergoit and Hospital Wards.

(iii) Eldoret South Constituency – Pioneer, Eldon View, Race Course, Langas and Kipenyo Wards."

18. I shall make no orders as to costs in view of the nature of the Application.

19. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 21ST DAY OF MAY, 2012

ISAAC LENAOLA

JUDGE

In the presence of:

LENAOLA – JUDGE

Irene – court clerk

Mr. Kibe Mungai for Applicant

Mr. Omusa for 3rd Respondent and hold brief for Mr. Nyamodi for 2nd Respondent

Miss Munyi for 1st Respondent

Miss Kilonzo for petitioner in Petition No.97/2012 and

Mr. Kihava for Petitioner in petition No.166/2012

Order

Ruling duly delivered. Copies to be supplied to parties.

ISAAC LENAOLA

JUDGE