



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Petition 41 of 2012**

**IN THE MATTER OF: ARTICLES 20, 21, 22, 23(3), 27(1), 38(2), 47 & 89(9) OF THE  
CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT ON THE PETITIONERS'  
CONSTITUTIONAL RIGHTS**

**AND**

**IN THE MATTER OF: REGISTRATION OF VOTERS**

**AND**

**IN THE MATTER OF: TOWNSHIP/MWAMOSIOMA SUB LOCATIONS**

**AND**

**IN THE MATTER OF: KISII PRIMARY SCHOOL, JOGOO PRIMARY SCHOOL, KISII  
MUNICIPAL HALL AND GUSII COUNTY COUNCIL HALL, REGISTRATION CENTRES**

**AND**

**IN THE MATTER OF: KITUTU CHACHE SOUTH CONSTITUENCY**

**AND**

**IN THE MATTER OF: FAIR AND JUST ADMINISTRATIVE DECISIONS**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION &  
PROTECTION OF FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL) HIGH  
COURT PRACTICE AND PROCEDURE RULES, 2006**

**AND**

**IN THE MATTER OF: SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION, 2010**

**BETWEEN**

SAMWEL ONDIEKI MAKORI..... 1<sup>ST</sup> PETITIONER/APPLICANT

YUVENALIS MOKAYA OBUKI..... 2<sup>ND</sup> PETITIONER/APPLICANT

MORURI EDWIN SAMWEL..... 3<sup>RD</sup> PETITIONER/APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARY COMMISSION .....1<sup>ST</sup> RESPONDENT

THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT  
AND

HON. RICHARD M. ONYONKA ..... 1<sup>ST</sup> INTERESTED PARTY

HON. ROBERT MONDA ..... 2<sup>ND</sup> INTERESTED PARTY

## **RULING**

### **Introduction**

1. The Petitioners herein, Samwel Ondieki Makori, Yuvenalis Mokaya Obuki and Moruri Edwin Samwel commenced these proceedings by way of a petition dated 20<sup>th</sup> November 2012 and filed in court on the same date. The petition was filed pursuant to the provisions of **Articles 20,21,22,23(3), 27(1), 38(2), 47and89 (9)** of the **Constitution of Kenya 2010**(hereinafter referred to as the Constitution). The petition was brought under certificate of urgency on the following ten (10) grounds:-

a) *The Voter Registration exercise, commenced on the 19<sup>th</sup> day of November 2012, whereby various and eligible persons, who have attained the age of majority, are eligible to register as voters within the various constituencies of residents and/or occupations.*

b) *Pursuant to the commencement of the voter registration exercise, the Petitioners/Applicants herein, who are residents of Township and Mwamosioma Sub locations, situate within Kitutu Chache South Constituency, sought to be registered at the various Polling/*

*Registration Centres, situate within the said Constituency.*

c) *However to the surprise and consternation of the Petitioners/*

*Applicants, when same visited the Polling/Registration Centres situate within Township/Mwamosioma Sub-Locations, which fall within Kitutu Chache South Constituency, same were issued with Voters' Cards/Acknowledgment Slips for Nyaribari Chache Constituency.*

d) *The issuance of Voters Cards, for Nyaribari Chache Constituency, at Polling/Registration Centres within Kitutu Chache South Constituency, is aimed and/or calculated at creating an Island of Nyaribari Chache Constituency, within the territory of Kitutu Chache South Constituency.*

e) *Besides, the acts and/or activities complained of, are calculated to annex, excise and transfer the areas served by specified polling/registration centres, namely, Kisii Primary School, Jogoo Primary School, Gusii County Council Hall and Kisii Municipal Council Hall, to Nyaribari Chache Constituency.*

f) *The actions complained of herein are **illegal and unconstitutional** and same are meant to defeat the provisions of the National Assemblies Constituencies and County Assembly Wards Order, 2012, published on the 6<sup>th</sup> day of March 2012, which delineated the Constituencies Boundaries.*

g) Besides, the acts and/or actions complained of shall occasion undue loss and/or prejudice to the Petitioners/Applicants and the residents, occupants and inhabitants of **Township and Mwamosioma Sub-Locations**, who are bound to be forcibly transferred to **Nyaribari Chache Constituency** for political expediency and confer undue mileage to the 2<sup>nd</sup> Interested Party.

h) Unless the instant Application is **certified urgent** and heard on priority basis, the Petitioners/Applicants are bound to be uprooted from their places of residents and transferred as potential voters to a **foreign Constituency**, where same have no attachment and/or connection, whatsoever.

i) Besides, the actions complained of are bound to affect and prejudice the Petitioners/Applicants political rights and thereby compromise the Petitioners'/Applicants' rights to elect persons and parties of choice, during the forthcoming General/Election.

j) In view of the foregoing, the instant application raises pertinent Constitutional issues.

2. Contemporaneously with the petition, the Petitioners filed a chamber summons pursuant to **Rules 20 and 21 of the Constitution of Kenya** (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) **High Court Practice and Procedure Rules, 2006** and **Articles 20, 21, 22, 23(3), 27(1), 38(2), 47 and 89(9)** of the **Constitution, Section 19** of the **Sixth Schedule** of the **Constitution** and all enabling provisions of the law seeking the following orders:-

1. The Application herein be **certified urgent** and the same be heard *Ex-parte* in the first instance.

2. **Pending the hearing and determination of the instant Application**, the Honourable Court be pleased to grant an **Interim Conservatory Order of Injunction** restraining the 1<sup>st</sup> Respondent either by herself, agents, servants, employees and/or anyone claiming under the said 1<sup>st</sup> Respondent, from conducting and/or carrying on registration of voters for **Nyaribari Chache Constituency at Kisii Primary School, Jogoo Primary School, Gusii County Council Hall and Kisii Municipal Council Hall, Polling/Registration Centres, which fall and/or are situate within Kitutu Chache South Constituency.**

3. The Honourable Court be pleased to grant an Order of **Temporary Conservatory Order of Injunction** restraining the 1<sup>st</sup> Respondent either by herself, agents, servants, employees and/or anyone claiming under the said 1<sup>st</sup> Respondent, from conducting and/or carrying on registration of voters for **Nyaribari Chache Constituency at Kisii Primary School, Jogoo Primary School, Gusii County Council Hall and Kisii Municipal Council Hall, Polling/Registration Centres, which fall and/or are situate within Kitutu Chache South Constituency, pending the hearing and determination of this Petition.**

4. Costs of this Application be borne by the Respondents and 2<sup>nd</sup> Interested Party jointly and/or severally.

5. Such further and/or other orders be made as the court may deem fit and expedient.

3. The chamber summons is supported by the grounds set out on the face thereof, numbered (a)-(cc) and by the 30 paragraph affidavit sworn by Samwel Ondieki Makori on 20<sup>th</sup> November 2012. The matter was certified urgent on 20<sup>th</sup> November 2012. The Petitioners were directed to effect service upon all the affected parties for inter partes hearing of the chamber summons on 23<sup>rd</sup> November 2012.

#### **Prayer sought in the Petition**

4. The humble petition of the Petitioners herein prays for the following reliefs:-

(a) Declaration that the **National Assemblies Constituencies and County Assembly Wards Order, 2012**, published on the 6<sup>th</sup> day of March 2012 and concerning **Kitutu Chache South and Nyaribari**

Chache Constituencies, was never affected and/or reviewed.

(b) Declaration that Township and Mwamosioma Sub-Locations, wherein the Polling/Registration Centres, that is, Kisii Primary School, Jogoo Primary School, Gusii County Council Hall and Kisii Municipal Council Hall, are situated forms and falls within Kitutu Chache South Constituency.

(c) Declaration that the registration of the Petitioners and other potential voters in the said Polling/Registration Centres, to vote in Nyaribari Chache Constituency, are irregular, illegal and unconstitutional.

(d) An Order of Judicial Review, in the nature of Certiorari to issue to bring to Court the Decision of the 1<sup>st</sup> Respondent, whereby same register voters for Nyaribari Chache Constituency albeit within the Gazetted Boundaries of Kitutu Chache South Constituency, unto this Honourable Court and same be quashed.

(e) An Order of Judicial Review, in the nature of Prohibition, to issue to prohibit the 1<sup>st</sup> Respondent either by herself, agents, servants and/or employees from conducting and/or carry on registration of voters for Nyaribari Chache Constituency at Kisii Primary School, Jogoo Primary School, Gusii County Council Hall and Kisii Municipal Council Hall, Polling/Registration Centres, which are situate within Kitutu Chache South Constituency.

(f) Costs of the Petition be borne by the Respondents and the 2<sup>nd</sup> Interested Party jointly and/or severally.

(g) The Honourable Court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.

5. The petition is also supported by a 28-paragraph affidavit sworn by Samwel Ondieki Makori on 20<sup>th</sup> November 2012. The deponent has annexed to his affidavit “**authority to plead, act and/or swear Affidavit on Behalf of Co-Petitioners.**” The authority which is dated 20<sup>th</sup> November 2012 is issued by Yuvenalis Mokaya Obuki and Moruri Edwin Samwel, the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners respectively. Also annexed to the Supporting Affidavit is a copy of Kenya Gazette Legal Notice Number 14 of 6<sup>th</sup> March 2012, being “**The National Assembly Constituencies and County Assembly Wards Order, 2012,**” issued pursuant to the **Independent Electoral and Boundaries Commission Act (the IEBC Act) No.9 of 2011, Article 89** of the **Constitution** and the **Fifth Schedule** to the **IEBC Act**. The said Legal Notice is hereinafter referred to as “**Legal Notice NO.14 of 2012.**” Copies of the respective national identity cards of the Petitioners are also duly marked and annexed to the affidavit, as is a copy of a letter dated 19<sup>th</sup> November 2012 written by the 2<sup>nd</sup> Interested Party herein, Hon. Richard M. Onyonka, EBS, the sitting Member of Parliament for Kitutu Chache Constituency and Assistant Minister for Foreign Affairs. The complaint in the said letter which was addressed to the 1<sup>st</sup> Respondent (herein referred to as the IEBC) was to the effect that IEBC had annexed parts of Kitutu Chache South Constituency, and in particular, areas of Townships/

Mwamosioma sub locations, namely voter registration centres at Kisii Primary School, Jogoo Primary School, Gusii County Council Hall and Kisii Municipal Council Building to form part of Nyaribari Chache Constituency without any lawful authority and in contravention of **Article 89 (9)** of the **Constitution**. This complaint shall become apparent from the submissions that are highlighted in the following pages of this ruling.

6. Both respondents entered appearance and filed their relevant replying papers. The IEBC is represented by the firm of Murugu, Rigoro & Co. Advocates while the Attorney General was represented by Mr. J.E.N. Maroro, Deputy Litigation Counsel of the Attorney General’s chambers, Kisumu. The 1<sup>st</sup> Interested Party though served did not enter appearance and was not present when the matter came up for hearing on 23<sup>rd</sup> November 2012. The 2<sup>nd</sup> Interested Party was represented by M/s Kerosi Ondieki & Co.

Advocates together with M/s Minda & Co. Advocates.

**The Replying Papers to the Petition and Chamber Summons.**

7. The IEB filed a Replying Affidavit sworn by Praxedes Tororey on 22<sup>nd</sup> November 2012. The gist of the said Replying Affidavit is that the instant application as well as the Petition herein are irregular, ill-considered and ill-advised and an attempt to have this honourable court conduct on illegal delimitation exercise over Nyaribari Chache Constituency to amalgamate part thereof of Kitutu Chache South Constituency which act would be inherently unconstitutional and patently illegal. The deponent asks the court to dismiss the chamber summons with costs to the IEBC.

8. The 2<sup>nd</sup> Interested Party filed Grounds of Opposition to the Chamber Summons stating that:-

1. *The application is bad in law as it offends the provisions of **Article 89 (11)** of the **Constitution of Kenya 2010**.*

2. *The application and petition are **Res Judicata** the ruling of the 5 Judge Bench which made determination on disputes arising from boundary delimitations. The issues raised herein ought to have been raised therein for the court to make a determination on them.*

3. *The present application is an abuse of the Court process and a mere after thought. The petitioners/applicants did not within the period prescribed by the Constitution of Kenya 2010 apply to review the 1<sup>st</sup> respondent's decision made under Article 89 of the Constitution of Kenya 2010.*

4. *An injunction cannot issue as sought to restrain the registration of voters which exercise has a preset timetable. The petitioners/applicants had opportunity to seek to review the decision of the 1<sup>st</sup> respondent within the time prescribed by the Constitution of Kenya but squandered the opportunity.*

5. *The application and petition seeking to review the decision made by the 1<sup>st</sup> respondent on electoral boundaries is filed out of time and thereby time barred.*

6. *The National Assemblies Constituencies and County Assembly wards Order 2012 set out the sub locations comprised in each County Assembly ward but did not explicitly name the polling stations in each ward. The registration centres impugned in the application fall within Nyaribari Chache Constituency as per delimitation done by the 1<sup>st</sup> respondent. The application is therefore incompetent and an abuse of court process.*

9. In addition to the Grounds of Opposition the 2<sup>nd</sup> Interested Party filed a Notice of Preliminary Objection dated 23<sup>rd</sup> November 2012 on the grounds *inter alia* that:-

1. *The application is bad in law as it offends the provisions of **Article 89 (II)** of the **Constitution of Kenya 2010**.*

2. *The application and petition are **Res Judicata** the ruling of the 5 Judge Bench which made determination on disputes arising from boundary delimitations. The issues raised herein ought to have been raised therein for the court to make a determination on them.*

3. *The application and petition seeking to review the decision made by the 1<sup>st</sup> respondent on electoral boundaries is filed out of time and therefore time barred.*

10. When this matter came up for hearing on 23<sup>rd</sup> November 2012, counsel appearing agreed first to have the matter heard and determined by this Honourable Court and two to have the 2<sup>nd</sup> Interested Party's Preliminary Objection argued first. This ruling is on the said Preliminary Objection.

## **Facts Averred in Support of the Chamber Summons and the Petition.**

11. The facts averred in support of the chamber summons and the petition are found in the Grounds on the face of the Chamber Summons as already set out hereinabove. From the Petition, the following facts emerge. During the delimitation of the National Assembly and Constituencies and County Assembly Wards which took place from 2010 and culminated in Legal Notice No.14 of 2012, Township and Mwamosioma Sub Locations were delineated to form part and parcel of Kitutu Chache South Constituency. Upon the publication of LN No.14 of 2012, any person, bodies and/or citizens were granted 30 days within which to challenge and/or impeach the delineated constituencies and County Assembly Wards boundaries. The residents and/or members of Nyaribari Chache Constituency were satisfied with the boundary delimitation and thereby no application and/or review was mounted to challenge Legal Notice NO.14 of 2012. The residents and occupants of Kitutu Chache Constituency were equally satisfied with the delimitation and preferred no application and/or review against the delimitation which placed Township and Mwamosioma sub locations within Kitutu Chache Constituency. By reason of the residents of both constituencies being satisfied with the delimitation results, Legal Notice NO.14 of 2012 was not challenged in respect of the two (2) constituencies.

12. Consequent upon publication of Legal Notice NO.14 of 2012, the IEBC has since published polling or registration centres at Kisii Primary School, Jogoo Primary School, Gusii County Council Hall and Kisii Municipal Council Hall among other centres within the two constituencies. The Petitioners aver that though the above centres were created within Kitutu Chache South Constituency, the same have been converted to serve and register voters for Nyaribari Chache Constituency, a situation which the Petitioners contend has resulted in fraudulent transfer of residents, occupants and/or inhabitants of Township and Mwamosioma sub locations to be potential voters for Nyaribari Chache Constituency while defrauding Kitutu Chache South Constituency in an attempt to confer undue political mileage and/or advantage to the 2<sup>nd</sup> Interested Party. All these actions, the petitioners contend, have been undertaken without due regard to the provisions of **Article 89 (9) of the Constitution**; and further that the said actions are irregular, illegal and fraudulent, beside the actions constituting and/or amounting to flagrant impunity and abuse of office on the part of the IEBC. The petitioners also refer to the actions of the IEBC in allegedly transferring and/or excising Township and Mwamosioma Sub locations from Kitutu Chache South Constituency to Nyaribari Chache Constituency as a constitutional coup against the residents, occupants and inhabitants of the two sub locations who are being forced to move and vote within Nyaribari Chache Constituency.

13. In summary, the Petitioners contend that they are on the verge of being disenfranchised and denied and/or deprived of their constitutional rights under the provisions of **Article 38 of the Constitution**, hence the instant application and the petition.

## **Arguments in Favour of the Objection**

### **(a) Submissions of the 2<sup>nd</sup> Interested Party**

14. Counsel for the 2<sup>nd</sup> Interested Party submitted that this court is devoid of jurisdiction to hear and determine the petition that is before it. First and foremost, it was contended that the IEBC has already undertaken the duty placed upon its shoulders of delimiting constituencies and wards as provided under **Article 89 of the Constitution**. That the results of the delimitation were duly gazetted vide **LN NO.14 OF 2012**; that any party who may have been aggrieved by the delimitation results as published vide the **LN NO.14 of 2012** had

30 days from 06<sup>th</sup> March 2012 to challenge the IEBC decision. That since the 30 day window for lodging challenges/applications for review lapsed way back on 10<sup>th</sup> April 2012, there is no way the period could be re-opened or extended, and that therefore the instant application together with the petition cannot be entertained by this court, especially in view of the decision in **Nairobi HC Misc. Application NO.94 of 2012 – Republic –vs- Interim Independent Electoral and Boundaries Commission & another ex parte Eliot Lidubwi Kihusa & 5 others**. In the case and in the more than 200 petitions and applications,

complaints were raised regarding the manner in which 80 new constituencies and 1450 County Assembly Wards had been created and distributed and how the Constituencies and County Assembly Wards had been given their names. Another complaint that was raised in the above case concerned the movement of sub locations hitherto falling in one constituency to a different constituency of the proposed constituencies. There were other grievances too raised in the same case such as the number of County Assembly given to a particular Constituency based on population, geographical, ethnic, clan, community, marginalized groups, minorities and other interests as stipulated in the Constitution. The adequacy of the wards allocated was also a bone of contention in the case.

15. Two major issues arose for determination in the above cited cases:- **(a)** the jurisdiction and the powers of the High Court to “review” a decision on the delimitation of electoral units under Article 89 (II) of the Constitution and **(b)** the constitutionality and legality of the criteria for delimitation applied by the IEBC. The court was also asked to determine who of the parties would bear costs of the litigation. The court ruled that it had the jurisdiction and power to review a decision on the delimitation of electoral units under **Article 89 (II)** of the **Constitution** and proceeded to hear and determine Misc. Application No.94 of 2012. The court also considered and determined the constitutionality and legality of the criteria for delimitation applied by IEBC. The question of costs was also settled.

16. It was therefore submitted on behalf of the 2<sup>nd</sup> Interested Party that the court having decided the Misc. Application 94 of 2012, the instant suit is res judicata the ruling in the said application, especially when the Petitioners seek, vide the prayers in the Petition, to move certain registration centres from one constituency to another. That if the court were to accede to the Petitioners’ request, it would find itself delimiting boundary constituencies afresh.

17. Counsel also submitted that since a registration centre must fall within a specific constituency as stipulated by the Registration of Voters’ Rules 2012, the registration centres complained of in these proceedings namely Kisii Primary School, Jogoo Primary School, Gusii County Council Hall and Kisii Municipal Council Hall, were gazetted as registration centres within Nyaribari Chache Constituency vide Gazette Notice No.16727 of 16<sup>th</sup> November 2012. Counsel further submitted that even if the prayers sought in the Petition were to be granted, the fact of Gazette Notice No.16727 of 16<sup>th</sup> November 2012 would not change since the Petition does not contain a prayer seeking cancellation of the said Gazette Notice. Counsel therefore urged this court to uphold the Preliminary Objection and to strike out both the Petition and the Chamber Summons both of which pleading are dated 20<sup>th</sup> November 2012.

#### **(b) Submissions by the IEBC**

18. Counsel for the IEBC submitted that this court is devoid of jurisdiction to grant the prayers sought by the Petitioners for reasons that the delimitation exercise has already been undertaken and completed as provided by **Articles 82, 88** and **89** of the **Constitution** as read with **section 36** of and the **Fifth Schedule** to the IEBC Act together with **section 27** of the **Sixth Schedule** to the Constitution. That once the delimitation was complete, the IEBC published LN No.14 of 2012, so that whoever was dissatisfied with the results of the delimitation exercise as contained in LN NO.14 OF 2012 had a window of 30 days within which to challenge those results as provided under **Article 89 (10)** of the **Constitution**. Counsel submitted that since the Petitioner were admittedly satisfied with LN No.14 of 2012 and did not therefore apply for review thereunder, it is now not open to them to bring this petition and the accompanying application to challenge the delimitation of the two constituencies the subject of this petition.

19. It was further submitted that if the Petitioners at all intended to challenge LN No.14 of 2012, they should have done so on or before 10<sup>th</sup> April 2012 as was the position in Nairobi HC Misc. Application NO. 94 of 2012 (above). That following the court decision in Nairobi HC Misc. Application NO. 94 of 2012, the IEBC, exercising powers donated to it by **section 109** of the **Elections Act** did on 16<sup>th</sup> November 2012 publish LN No.16727 which was a publication of country-wide registration centres among them the centres now in dispute. It was contended that if this court were to bow to the Petitioners’ pressure and grant the orders sought, such action would amount to this court conducting an act of delimitation in an irregular and unconstitutional manner. The court was urged not to be persuaded by the

Petitioners' arguments in this regard and to find and hold that it has no jurisdiction to grant the orders sought.

20. It was also submitted that this court ought to remember that it is a court of law and that in the circumstances, its power is derived from the constitution and various statutes. Reference was made to **Article 10** of the **Constitution** which behoves the court to uphold the rule of law. Counsel contends that to proceed to grant the prayers sought by the Petitioners herein would be far from upholding the rule of law since it would mean the court engaging in the exercise of delimitation which is outside its province. Secondly, that even if the court were to find that it has the jurisdiction to grant the prayers in the petition, it cannot do so because all petitions and applications challenging LN No.14 of 2012 were to be filed by 10<sup>th</sup> April 2012 and not any later, and that therefore the instant petition was filed hopelessly out of time. Counsel urged the court to strike out the petition with costs.

(c) **Submissions on behalf of the 2<sup>nd</sup> Respondent**

21. Counsel appearing for the 2<sup>nd</sup> Respondent maintained a neutral stand with regard to the Preliminary Objection but submitted that the petition herein raises important public interest issues. He also submitted that whatever decision is reached by this court, so long as the same is based on the provisions of the law will be observed by the 2<sup>nd</sup> Respondent. On the issue of costs, counsel submitted that since this is a matter of great public interest, the same does not qualify for costs.

**Arguments Against the Preliminary Objection**

22. Counsel for the Petitioner submitted that what is being touted as a Preliminary Objection by the 2<sup>nd</sup> Interested Party and supported by the IEBC does not qualify as a Preliminary Objection in terms of the principle set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd.[1969] EA 696** in which Sir Charles Newbold, P expressed himself as follows at page 701 on the meaning of a Preliminary Objection:-

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

23. It was counsel's contention that in the instant case, there is a contest on the factual situation surrounding the suit registration centres all of which are situate within the boundary delimitation of Kitutu Chache South and Nyaribari Chache Constituencies.

24. Secondly, counsel contended that the suit registration centres which were delimited in Kitutu Chache South Constituency have been fraudulently moved to Nyaribari Chache Constituency. In counsel's view, the issue of fraud is a matter of fact which needs to be proved and for that reason the purported preliminary objection cannot stand.

25. Thirdly, counsel drew the attention of the court to the provisions of **Article 89 (9)** of the **Constitution** and pointed out that the petitioner's complaint relates neither to the delimitation of national constituency boundaries as gazetted nor to the County Assembly Wards boundaries, but concerns the movement of what the petitioner considers as a taking away of registration centres from one Constituency to a different constituency. It was submitted that the provisions of **Article 89 (9)** of the **Constitution** are therefore not applicable to this case.

26. The fourth issue raised by the petitioner concerns the applicability of **section 109** of the **Elections Act No.24 of 2011**, which section empowers the IEBC to make regulations generally for the better carrying out of the purposes and provisions of the Act, among them the manner and procedure for registration of voters and the division of constituencies into units for the purpose of registration of voters. While it was conceded that a registration centre must of necessity fall within a particular

constituency, it was submitted that such a registration centre cannot be made to serve a different constituency. Counsel contended that all that the petitioners are asking for in this case is not a redrawing of boundaries but an assurance by way of a declaration that the suit registration centres remain within the constituency where they are delimited and serve the people of that constituency.

27. Regarding the jurisdiction of this court to deal with the instant petition, counsel referred to **articles 22, 23 and 38** of the **Constitution** the latter of which protects political rights of all Kenyan Citizens among them the Petitioner, and submitted that this court is seized of the jurisdiction to hear and determine this matter.

28. On the issue of res judicata, counsel submitted that the issue does not arise in this case since Nairobi HC Misc. Application NO.94 of 2012 did not decide any dispute concerning the two constituencies the subject of the instant petition.

29. For the reasons above given, counsel for the Petitioners urged this court to find and to hold that the Preliminary Objection as canvassed does not have any merit and that the same is calculated merely to cause delay and confuse issues; and that the same should be dismissed so that the petition can proceed to hearing and final determination.

### **Reply to the Petitioners' submissions**

#### **a) Reply by the 2<sup>nd</sup> Interested Party**

30. It was reiterated that what the Petitioners are seeking from this court is to move the suit registration centres from one constituency to another and that such a move can only mean redrawing and delimiting the boundaries.

31. It was also submitted that there is no contest whatsoever as regards the actual location of the suit registration centres and that in the absence of such contest, the preliminary objection is well founded.

32. Thirdly, counsel for the 2<sup>nd</sup> Interested Party submitted that the doctrine of res judicata applies in this case because all cases that were filed or which ought to have been filed following publication of LN No.14 of 2012 ought to have been brought in Nairobi HC Misc. Application No.94 of 2012 in which all pertinent issues arising from LN NO.14 of 2012 were raised canvassed and determined. The court was urged to find that this petition is res judicata the judgment in Nairobi HC Misc. Application No. 94 of 2012 and to uphold the preliminary objection.

#### **b) Reply by the IEBC**

33. Counsel submitted that all that the **Mukisa Biscuit case** (above) says is that where there are contests on the facts, then a preliminary objection cannot sit. Counsel also referred the court to **Order 51 Rule 14** of the **Civil Procedure Rules** and submitted that in cases where facts are perceived to be contested, a preliminary objection should be filed and upheld. It was also submitted that in the instant case, there is no dispute on any facts, and particularly the fact of the publication of LN No.16727 of 16<sup>th</sup> November 2012 which clearly sets out the suit registration centres as forming part of Nyaribari Chache Constituency. That these facts are not challenged by the Petitioners. Counsel also discounted the allegations of fraud against the IEBC, for if it were so, counsel submits, the Petitioners would have contested the said Gazette Notice and asked for its cancellation in the prayers in the Petition. Counsel urged this court to dismiss both the application and the petition with costs to the IEBC.

### **Issues and Findings**

34. Having set out the pleadings, and the submissions made by all counsel, and after carefully considering the relevant provisions of the law as cited to me, the issues that arise for determination are the following:-

- i) *Does the Preliminary objection herein meet the threshold of a preliminary objection as stated in the Mukisa Biscuit Case?*
- ii) *Is this petition time barred by virtue of the decision in Nairobi HC Misc. Application No.94 of 2012?*
- iii) *Is the instant petition res judicata the judgment in Nairobi HC Misc. Application No.94 of 2012; and*
- iv) *Who is to bear the costs of these proceedings?*

35. With regard to the first issue, it is agreed by both parties that a preliminary objection will not lie unless it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. Whereas the 2<sup>nd</sup> Interested Party and the IEBC contend that the facts as pleaded by the petitioners are correct, the petitioners contend that the fact of fraud not being admitted by the IEBC has given rise to a dispute that needs proof at the hearing of the petition.

36. After carefully considering the opposing views in this matter, I am persuaded that there is no contest as to the facts pleaded by the Petitioner in this case. There is no dispute that the suit registration centres, as published vide Gazette Notice No.16727 of 16<sup>th</sup> November 2012 are situate in Nyaribari Chache Constituency. There is also no dispute that the Petitioners did not contest LN No.14 of 2012 as did others like the applicants in Nairobi HC Misc. Application No. 94 of 2012. There is also no dispute that anyone who was dissatisfied with the IEBC decision as contained in LN No.14 of 2012 had to challenge such decision by latest 10<sup>th</sup> April 2012. The Petitioner confirm vide the supporting affidavit to the petition that the residents of Nyaribari Chache Constituency and those of Kitutu Chache Constituency were all satisfied with the delimitation of the two constituencies and the delimitation of the suit registration centres which position was duly captured and underlined by the relevant maps published by the IEBC.

37. On the basis of the above, I find the position taken by counsel for the Petitioners that there are contested facts in this case to be untenable. I also find that the issue of alleged fraud by IEBC does not hold water it having been admitted that the Petitioners had no issue with the delimitation of the two constituencies as contained in LN No.14 of 2012. The arguments by the Petitioners on the first issue are therefore rejected by this court.

38. As concerns the second issue, it is admitted by both sides that any applications and/or petitions challenging LN NO.14 of 2012 were to be filed on or before 10<sup>th</sup> April 2012. In a ruling dated 30<sup>th</sup> May 2012, the court in Nairobi HC Misc. Application No.94 of 2012 ruled that the last day for filing any applications challenging LN No.14 of 2012 was 10<sup>th</sup> April 2012. Counsel for the Petitioners herein has made a strenuous attempt to distinguish the reliefs sought by the Petitioners herein from the reliefs sought in Nairobi HC Misc. Application No.94 of 2012 by saying that the petitioners' concern herein is the movement of the suit registration centres from one constituency to another and that such movement does not involve the marking of new boundaries. With greatest respect to counsel, there is no such distinction. What is clear to me is that if the court were to entertain this petition, it would indeed end up delimiting new boundaries for the two constituencies. Such is not the mandate of this court. Accordingly, I find and hold that this petition which raises issues similar to those raised in Nairobi HC Misc. Application No.94 of 2012 was filed hopelessly out of time and the same cannot be entertained by this Honourable Court.

39. The third issue for determination is whether this petition is res judicata Nairobi HC Misc. Application No.94 of 2012. **Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya** states the following on the issue of res judicata:-

**“No court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties whom they or any of them claim, litigating under the same title, in a court competent to try such**

**subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”**

40. BLACKS LAW DICTIONARY EIGHTH EDITION on the other hand defines the doctrine of res judicata in the following words:-

**“—‘Res Judicata’ has been used in this section as a general term referring to all of the ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two quite different effects of judgments. The first is the effect of foreclosing any litigation of matters that never have been litigated, because of the determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing relitigation of matters that have once been litigated and decided. The first of these, preclusion of matters that were never litigated has gone under the name “true res judicata”, or the names “merger” and “bar”. The second doctrine, preclusion of matters that have once been decided has usually been called “collateral estoppels.” Professor Allan Vestal has long argued for the use of the names “claim preclusion” and “issue preclusion” for these two doctrines -----“.**

41. Applying the above definitions to the instant case, and particularly applying the first definition as given by BLACKS LAW DICTIONARY I am persuaded that the instant petition and the attendant chamber summons are res judicata the judgment in Nairobi HC Misc. Application No.94 of 2012. Though this petition was not litigated therein, the issues raised herein are issues that ought to have been raised in the said petition and should have been so raised on or before 10<sup>th</sup> April 2012. The Petitioners are making a late attempt to be heard on issues that ought to have been heard and determined in Nairobi HC Misc. Application No. 94 of 2012 and having failed to file this petition on or before 10<sup>th</sup> April 2012, the petitioners lost the golden opportunity to ventilate their case. **Article 89 (II)** of the **Constitution** set tight timelines to be met by those who wished to challenge LN No.14 of 2012 and anybody who did not meet those timelines, and in particular, the 10<sup>th</sup> April 2012 for filing such applications, was shut out and remains shut out.

42. The final issue for determination is one of costs. Who should bear the costs of these proceedings? Both the 2<sup>nd</sup> Interested Party and the IEBC have asked the court to dismiss both the application and the petition with costs. The 2<sup>nd</sup> respondent holds the view that this being a public litigation matter no costs are payable. This issue of costs also arose in Nairobi HC Misc. Application NO.94 of 2012 where the applicants urged the court to follow the normal rule that costs follow the event. In considering the issue, the Court cited the case of **John Harun Mwau & others -vs- Attorney General & others Nairobi Petition NO.65 of 2011** (unreported) where the election date was in contention, the court therein stated:-

**“In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant. The court also retains its jurisdiction to impose costs as a sanction where the matter is frivolous, vexatious or an abuse of the court process.”**

43. In my considered view, and as agreed by all parties, this case is as unique as Nairobi HC Misc. Application NO.94 of 2012. The Petitioners have tried to pursue a right conferred upon them by the constitution, but they have done so belatedly and have therefore not succeeded. In the circumstances, and persuaded by the holding in the **John Harun Mwau case** (above) I think that the interests of justice demand that no costs be imposed on the loser.

### **Conclusion**

44. For the reasons hereinabove given, I am persuaded that the preliminary objection dated 23<sup>rd</sup>

November 2012 and filed in court on the same day is well founded. The same is upheld and accordingly the chamber summons and the petition herein both dated 20<sup>th</sup> November 2012 and filed in court on the same day be and are hereby dismissed.

45. Each party shall bear its own costs.

46. It is so ordered.

**Dated and delivered at Kisii this 28<sup>th</sup> day of November, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:-

Mr. Ochwangi (present) for Petitioners

Miss Osoro for Murugu (present) for 1<sup>st</sup> Respondent

Mr. Maroro (absent) for 2<sup>nd</sup> Respondent

Richard M. Onyonka (PIP) for 1<sup>st</sup> Interested Party

M/s Kerosi Ondieki, Minda & Ogari for 2<sup>nd</sup> Interested Party

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**