



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Miscellaneous Civil Application 23 of 2009

**REPUBLIC.....APPLICANT
=VERSUS
DISTRICT COMMISSIONER MARAKWET WEST DISTRICT.....RESPONDENT
AND
HON. LINAH JEBII KILIMO.....1ST INTERESTED PARTY
PAUL SULTER.....2ND INTERESTED PARTY
SAMUEL KIPTANUI.....2ND INTERESTED PARTY
MICHAEL KIPLIMO.....3RD INTERESTED PARTY
JOHN GILBERT CHEBET.....4TH INTERESTED PARTY
JOHN KIPCHESOLE.....5TH INTERESTED PARTY**

EXPARTE APPLICANTS

- 1). **RICHARD KIPSERET**
- 2). **JULIUS CHEBOI**
- 3). **JOHN KIPTAI**

RULING

I. Introduction

1. The Government of Kenya had given a notification of intention to establish new Districts within the Republic by their notice in the Kenya Gazette Legal notice 4553/2009. The Constitution of Kenya; The District Provinces Act 1992.
2. The Respondent herein, the District Commissioner called a meeting for the Marakwet District which was now to be divided into two; the East and West Marakwet proposed districts. The West Marakwet would inherit the already established district headquarters within its area. The East Marakwet had no headquarters. A proposed meeting to determine where the new headquarters would be established was called, involving fourteen locations. Each sent a representative to the meeting held on 9th June 2009. After a twelve hour deliberations, the meeting concluded that the headquarters would be at a place known as Chesoi trading centre.
3. Some of those at the meeting objected to this. Through three applicants, Richard Kipserer, Julius Cheboi and John Kiptai, they filed for Judicial Review proceedings to quash the decision arrived at and to instead have the existing sub-headquarter of the Original district TOT trading centre be declared the new headquarters.

II. Procedure

4. Leave was applied for on 23rd June 2009 and granted on the same day (Mwilu J). The leave operated as a stay. Within the 21 days a notice of motion dated 13th July 2009 was filed. The notice of motion was to be heard on 27/10/2009, 15/12/2009 before Osiemo j. Skeleton submissions were put in and heard on the 19th January 2010.

III. Delay

5. The Hon. Judge reserved the ruling of this matter. Thereafter the Hon. Judge was not available to deliver or write the ruling.
6. The law provides under Order XVII rule 10 civil procedure rules, where this occurs, the following applies:

“ 10(1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, any may proceed with the suit or application from the stage at which his predecessor left it”

(2) _____”

7. I therefore took over this file from where it had left off under Order XVII rule 10 civil procedure rules giving opportunity to the parties to address me further, if need be.

IV. Representation

- 8.1 The exparte applicants
 - (i) Richard Kipseret
 - (ii) Julius Cheboi
 - (iii) John KiptaiRepresented by **M/s C.D. Nyamweya and Co. Advocates** but was later replaced by **M/s Manani Lilani & Co. Advocates** on 26th October 2009.
- 8.2 The Respondent District Commissioner Marakwet West District was represented by the **Hon. The Attorney General.**
- 8.3 The Interested parties were represented as follows:
 - 8.3 (a) Hon. Linah Jebii Kilimo
M/s Gicheru and Co. Advocates
 - 8.3 (b) (i) Paul Suter 2nd Interested Party
 - (ii) Samuel Kiptanui 2nd Interested Party
 - (iii) Michael Kiplimo 3rd Interested party
 - (iv) John Gilbert Chebet 4th Interested party
 - (iv) John Kipchesole 5th Interested partyRepresented by **M/s R.M. Wafula & Co. Advocates.**

V. **Arguments**

9. The arguments put forward by the exparte applicant was that whereas the fourteen locations representatives were called to a meeting to decide where the headquarters for the proposed district would be chosen, the procedure of arriving at that decision was biased and that process was manipulated. The District Commissioner was not fair.
10. According to the exparte applicants submissions the Respondent admitted he was mandated by the government to facilitate the choice of a new Marakwet East District headquarters. In order to do this the residents were to participate in the said process. The concern was that in order to arrive at this decision the said District Commissioner used excess and unreasonable process to reach their decision. The case law of **Musa Kingori Gaita =vrs= Kenya Wildlife Society 2006 KLR** was arrived at by stating that Court is not concerned with reviewing merits of the decision but the decision making process.
11. The Respondent had already made up its mind on the outcome of the decision thus between him and the interested parties several rounds was arrived at of voting. The Respondents **“literally forced up the hands of the representatives in order to skew the voting process”**.
12. The minutes of the said decision of 9th June 2009 was not prepared until the 22nd June 2009 when the applicants were in Court. These arguments would be referred to later below:

(i) Arguments by the Respondents

13. In reply, Respondents stated he was charged with the implementation of the government policy. A strategic plan was in place to revise existing structures of administrative limits in the country. That by the said Kenya gazette Notice 4553/2009 the government intention was to sub-divide Marakwet East District in order to determine the headquarters.
14. The Procedure coming to the decision was arrived at when Chesoi trading Centre, TOT Trading Centre and Kapchesoi Centre were selected after 12 hours deliberations. Chesoi and TOT Centre were chosen but the parties failed to agree on a vote as per the location. On the final vote where one vote was per the location, 8 votes went to Chesoi and 6 votes went to TOT Centre.
15. The decision arrived at was fair.

(ii) Argument by the Interested Party No.1

16. The Advocate for the 1st Interested party argued that whereas the remedy for Judicial Review was basically concerned with the decision making process the said decision did not lie with the 1st Interested party. This meeting was attended by members of public, just as the interested party.

17. A replying affidavit by one Julius Cheboi, the 2nd ex parte applicant stated that the 1st Interested party, as the area member of parliament imposed herself on the meeting, the first round of votes being seven representatives for TOT Centre, five representative for Chesoi and two for Kapchelia. A break was taken and the convened meeting saw the former two centres being voted for again, whilst the latter being dropped. This brought a tie of seven to seven votes for the two former centre.
18. The 1st Interested party used her influence to have the vote to be in favour of Chesoi Centre.
19. The Advocate for the 1st Interested party took issues as to the format of the original Judicial Review notice of motion filed. This failed to disclose the Republic[8]. The failure to do this rendered the application incurably defective[9], the statement failed to set out the name and description of the applicants, the relief sought[10], a statement therefore that contains facts and not grounds for an application is not valid and incompetent. The applicants further failed to annex the decision intended to be quashed[11]. This would render the notice of motion void and make it a nullity.[12]
20. The date the decision therefore sought to be quashed is not set out.
21. The 2nd to 5th interested parties relied on order LIII rule 4 Civil Procedure Rules that states **4(1)“Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavit accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided be relied upon on any relief sought at the hearing of the motion except the grounds and relief set out in the said statement”**
22. The arguments raised by the 2-5 interested party is that the rule under Order LIII rule 4 civil procedure rules makes it mandatory that the grounds relied upon be the same as previously relied on as at the time the leave was sought. The statement and affidavit of 13th July 2009 was incorrect therefore in the case law of **Republic –vrs Municipal Council of Eldoret Ex parte Patrick Nalianya Wanyonyi and Phinas Ngaria Misc. 205/2004 Gacheche J.**
23. The ex parte applicant failed to disclose material facts to court, namely that several test had been taken into account in determining the headquarters at Chesoi. Fair and frank disclosure was required.

24. A voting exercise took place. Judicial Review is therefore not available. Further the notice under Order III rule 7 being the Mandatory accounts namely that the Respondent denied the applicants accounts/minutes of the meeting of 9th June 2009 was not correct.
25. The interested party asked that the application be dismissed.

VI. **Opinion**

26. This is a Public Law matter. Clive Lewis, , in the text book **Judicial Remedies in Public Law** states that **“Public Law concerns the law governing the relations between the individual (Legal or natural persons) and the public bodies (and or) different bodies such as central and local government”**
27. The Courts have therefore **“developed a body of substantive principles of public law to ensure that public bodies do not exceed or abuse their powers and that they perform their duties”**

1. Republic –vrs- Lurambi Land Disputes Tribunal (Kakamega HC. Misc. 183/2003)
2. Abedare Fright Services Limited and 2 others (2004) 2 KLR 530
3. Judicial Remedies in Public Law 3rd edition (Clive Lewis), Thomson, Sweet & Maxwell 2004.

29. **Musa Kingori Gaita –vrs Kenya Wildlife Services that held inter alia.**
“ the remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial review is made, but the decision making process itself”

The Lewis text confirms this by stating:

“The Courts will review an exercise of power to ensure that the public body:

- (a) *“ has made an error of law*
- (b) *has considered all relevant factors, and not taken*

into account any irrelevant factors

- (c) has acted for a purpose expressly or impliedly authorized by statute*
- (d) has not acted in a way that is so unreasonable that no reasonable public body would act in that way and*
- (e) that the public bodies has observed statutory procedural requirements and the common law principles of natural justice or procedural fairness”*

30. The question therefore arises herein whether the decision arrived at by the District Commissioner in choosing the location of the new head quarters was a fair decision as to the process used when arriving to the same.

31. Looking at the statutory statement of 22nd June 2009, the exparte applicant stated that it was the 1st Interested party who invited seven representative from each fourteen locations. The result of the meeting was that there were seven location in favour of TOT township, five locations in favour of Chesoi and two in favour of Kapchebao.

32. When the Respondent made reply it was seen that 14 locations are called upon by the District Commissioner to participate in the deliberations. These were seven representatives from each of the 14 administrative locations namely:

- (i) Kaptich
- (ii) Kipkerer
- (iii) Koibirir
- (iv) Kabarmwa
- (v) Sambirir
- (vi) Kaben
- (vii) Murkatwo
- (viii) Koibatek
- (ix) Embobut
- (x) Mokoro
- (xi) Kapyego
- (xii) Embolot
- (xiii) Endo
- (xiv) Mon

33. An affidavit by Respondent clearly disclosed the process that began with identifying persons

from the location who would represent the Community at the meeting. The two members of parliament of the region were also notified. The respondents therefore confirmed at no time did the sitting and or former member of parliament actively participated in the deliberations.

34. The participants identified three centres Chesoi trading Centre, TOT Trading Centre and Kapchebao trading centre. As the latter trading centre was within the forest region, it was left out and after a 12 hour deliberations when no consensus was reached as to which of the two centres would be suitable for the headquarters, a voting exercise was undertaken with 14 votes. The vote disclosed 8 votes preferred Chesoi trading Centre while 6 votes preferred ToT trading centre.

35. This was a majority decision. The exparte applicant No.2 did not agree to this, as stated earlier, namely that the member of parliament interfered. That the votes having been seven (7), six (6) and two (2) for the three centres but later when it was for the two centres and a tie occurred, the member of parliament then interfered to have the majority be for Chesoi Centre.

36. It is at this point that I pause to ask which of the two version of story I should take into account? To do this I rely on the arguments put forward by the interested parties. The pleadings filed by the exparte applicant must be as stated in the statement. The exparte applicant failed to notify this court of material facts that are emerging from the respondents affidavit in reply. Material non disclosure is a hindrance to apply for judicial review proceedings.

37. Looking at the decision making process there is indeed no anomaly. The fact the exparte applicant stated in a further affidavit that the area member of parliament used her influence to intimidate the participation to vote for Chesoi trading centre should have indeed been stated in the very first statement to illustrate the flaws of the decision making proceedings.

38. I would further taken into account the submissions made by the 1st interested party that the pleadings filed herein was a nullity. I thought to deal with this issue last but outlined what was intended to have occurred at the meeting due to the public interest in this matter.

39. The issue of the proceedings was in itself wanting. This Court ought not to appropriately allowed the application for leave on grounds that the proceedings were never brought in the name of the Republic. In this specialized proceedings this amounts to a nullity from the very beginning.

40. Nonetheless, on the merits of the application, the said decision making process required to have been made with “an error of the law” to require this Court,

inter alia, to quash it. I find that the law indeed was followed. That all the “**relevant factors**” in reaching the decision was made, namely, whether the Chesoi and Tot centre was suitable as

to the “**demographic pattern of the area, the geographical and physical features, internal harmony of the population, security demands, infrastructure, social cultural affermites, land for future expansion of the headquarters, equity in distribution of resources, distance and accessibility by the citizen to the proposed headquarters**”, was applied to both centres

41. A decision was reached.

42. The process of first choosing the representatives, the process of giving all concerned ample time to give their views (see the minute of 9th June 2009 schedule of which each presenter gave their opinion and the location). The procedural requirement was therefore met.

4. Conclusion

43. I find that the decision making process was acted upon reasonably. The Judicial Review Proceedings has no merits in itself. The same is dismissed.

44. The costs is herein awarded to the Respondent. The 1st, 2nd – 5th interested party are not awarded costs due to their advocate’s absence in these proceedings.

Dated this 24th day of June 2010 at Eldoret.

M.A. ANG’AWA
JUDGE.

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1. Abdulrahman A perera –vrs- Isish County Council (HCCC 129/1999) Meru
 2. Ndete –vrs The Chairman Land Disptues Tribunal and another (2002) KLR 392
 3. James Kega Kangau and another –vrs- Electrol Commissioner of Kenya (Nairobi 1570/2005)
 - 4 Kisumu Commissioner General Kenya Revenue Authority –vrs- Silvano Onema Owaki t/a Marenga filling Station
 - 5 Samson Kireral M. Ruchu –vrs- The Minister for Lands and Settlement and Oathers (c.a. 21/1999)