



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Constitutional Application 68 of 2009

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER SECTION 84 OF THE CONSTITUTION OF KENYA FOR
ENFORCEMENT OF THE FUNDAMENTAL RIGHTS AND FREEDOMS**

AND

**I N THE MATTER OF THE DISTRICTS AND PROVINCES ACT, NO. 5 OF 1992 AND
THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT, CAP 7 OF THE
LAWS OF KENYA**

BETWEEN

**JOB NYASIMI MOMANYI 1ST
APPLICANT**

**REV. TITUS OKODA 2ND
APPLICANT**

**PETER NYAMOTI NYAMEKENDO 3RD
APPLICANT**

VERSUS

**ATTORNEY-GENERAL1ST
RESPONDENT**

**THE INTERIM INDEPENDENT BOUNDARIES REVIEW COMMISSION.....2ND
RESPONDENT**

RULING

By way of an Originating Notice of Motion, the applicants sought the following orders:

“1. A declaration that, by virtue of Chapter V and section 82 of the Constitution, the Kenya citizenship has the same content for every citizen.

- 2. A declaration that under the Kenya Constitution, the district is a forum or unit for development and political participation.**
- 3. A declaration that the purported Nyamira North District, a portion of the former Kisii North (Nyamira) District, is not a district within the meaning of the Constitution.**
- 4. A declaration that the Nyamira North District is not a district within the meaning of the Constitution.**
- 5. A declaration that Kenya has only 46 districts as listed and defined in schedule II of The Districts and Provinces Act, Act No. 5 of 1992 Laws of Kenya namely ...”**
- 6. A declaration that the purported creation of districts without proper legislation process as per the constitution of Kenya is *ultra vires* the Constitution, null and void.**
- 7. A declaration that the purported districts were created *ultra vires* and are null and void;**
- 8. A declaration be made that all districts created subsequent to the Districts and Provinces Act 1992 are unconstitutional and therefore non-existent in law.**
- 9. A declaration that during the comprehensive review of the existing boundaries of the legislated districts, every individual in Kenya has a right to have his views in a democratic process.**
- 10. A declaration that in every given district in Kenya, a person, must have the same worth or weight.**
- 11. An order be made that the second respondent do review and vary the boundaries of districts and other units defined in the Districts and Provinces Act 1992 with a view of making recommendations to Parliament for amending the Act.**
- 12. An order that the 2nd respondent do re-draw the constituency and district boundaries to give effect to the one person one vote principal in every part of the country.**
- 13. An order that the first respondent do take all the necessary measure (sic) to secure a return to the administration of the country on the back of the country legislated Districts as per the District and Provinces Act, Act No. 5 of 1992 Laws of Kenya. (sic)**
- 14. A declaration that the creation of districts other than the legislated Districts as per paragraph 5 above under the District and Provinces Act, Act No. 5 of 1992 laws of Kenya contravenes the applicants Freedom of Association and of Assembly.**
- 15. A declaration that the creation of districts in manner other than the one mandated by the Constitution contravened the applicants’ freedoms of association and assembly under section 80 of the Constitution.**
- 16. A declaration that Executive arm of Governance (sic) has no authority to decree the creation of Administrative boundaries without approval of parliament, the legislator through the advise of the 2nd Respondent.**
- 17. A declaration be made that under section 2 of the Districts and Provinces Act 1992 only 46 districts named under schedule II of the Districts and Provinces Act should be recognized and be allocated resources under the National budget.**
- 18. The cost of this originating Notice of Motion be provided for.”**

Together with the Originating Notice of Motion, the applicants filed an application under certificate of

urgency seeking conservative orders as follows:

“1 ...

2. **That the court be pleased to make such orders,**

Issue such writs and give such directions as it may consider appropriate and necessary for purposes of enforcement and the preservation of the subject matter under section 65 and 84 of the Constitution.

3. **That the court be pleased to restrain the first Respondent from continuing to operationalise by disbursing funds and by posting the District Commissioners and other District Officials of the purported created districts and in particular Nyamira North.” (Emphasis supplied).**

The aforesaid application was certified as urgent and the applicants ordered to serve the Chief Litigation Counsel, Attorney-General’s Chambers, within three days from 30th June, 2009. The applicants were also ordered to advertise the Constitutional application in the “**Daily Nation**” and “**the Standard**” newspapers so that the people of the proposed Nyamira North District, in particular, are notified accordingly. The matter was to be mentioned on 7th July, 2009 to fix a hearing date. Service of the application was effected upon the two respondents on 2nd July, 2009. When the application was mentioned on 7th July, 2009 none of the respondents had entered appearance. The application was set to be heard on 20th July, 2009 and the court directed that hearing notices be served upon the respondents. They were duly served on 10th July, 2009.

On 14th July, 2009, Hon. Andrew N. Ligale, the Chairman of the second respondent, wrote to the Hon. Amos Wako, the Attorney-General, requesting him, through his office, to represent the Interim Independent Boundaries Review Commission, hereinafter referred to as “**the I.I.B.R.C.**”

As at 20th July, 2009 when the application came up for hearing, none of the respondents had entered appearance. However, **Mr. Kemo, Senior Principal State Counsel**, informed the court that Miss Terry Gachagua, Senior Litigation Counsel, had just telephoned him requesting that he attends court to seek an adjournment on the ground that the Attorney-General had not yet received instructions on the matter. Mr. Kemo applied for the adjournment. The same was strenuously opposed by the applicants’ advocate, Mr. Begi, saying that the Attorney-General had since 2nd July, 2009 been aware of matter but had done nothing about it.

Since the Attorney-General had not demonstrated any keenness in defending the said application, the court declined to grant an adjournment. I may add that **rule 16** of the **Constitution of Kenya** (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, enjoin the Attorney-General or the respondent, as the case may be, to respond by way of a replying affidavit, within fourteen days of service.

Rule 19 further states that:

“Where the Attorney-General or the respondent, as the case may be, fails to respond within the time stipulated in rule 16, the petitioner may set down the matter for hearing and determination.”

Mr. Begi proceeded to argue the application after which Mr. Kemo prayed that the Attorney-General be granted an opportunity to file written submissions, which application was not opposed by the applicants’ counsel. The court granted leave to the respondents to file their written submissions within 10 days from 20th July, 2009. Upto 10th August, 2009, the respondents had not filed any papers.

The three applicants hail from Nyamira District. The first one is an Advocate of the High Court of

Kenya, the second one is a member of the clergy while the third one is a businessman. Their application was based on the following grounds:

- “1. That the government intends to post District Commissioners to such purported newly created districts by the end of July, 2009.**
- 2. That such intention may be actualized unless preservative orders sought herein are granted.**
- 3. The act by the state to create districts and other administrative boundaries through Executive prerogatives is devoid of merit and inconsistency (sic) with the Constitutional provisions.**
- 4. The acts of the Executive is usurpation of the role of the constitutional mandate of the Interim Independent Boundaries Review Commission established under section 41 of the Constitution which is supposed to recommend to parliament under guidelines set under the law and to that extent an infringement on the principal (sic) of separation of powers.**
- 5. The creation of the new administrative boundaries is a political gimmick which is intended to please certain clans, tribes and/or regions contrary to the provisions of the Law.**
- 6. This Honourable court has a supervisory role under section 65 (3) of the Constitution over the Executive in ensuring that the arms of the Government are left free to pursue their constitutional functions without overlaps.**
- 7. It is in the best interest of the public and a principal (sic) under democracy that this Honourable Court do act to protect the institutions established under the Constitution to perform their functions free from interference from the Executive.**
- 8. That the 2nd, the 3rd applicants and I are greatly troubled by the breach by government in which we serve as Officer of the High Court, clergy, and loyal citizens respectfully in that:**
 - (a) It has established uncountable additional districts in total disregard of constitution and the unique political nature of the district defined in the constitution.**
 - (b) The creation of the districts has gone in contravention of section 82 of the constitution which forbids discrimination; as a result created inter-clan tensions and enmity spoiling inter-clan co-existence and with the result that concept of democracy corrupted.” (sic)**

The applicants also sought to rely on the affidavit sworn by the first applicant for and on behalf of himself and his co-applicants in support of the Originating Notice of Motion. The applicants filed a list of authorities and Mr. Begi made able submissions in support of the application. I have carefully considered all the material on record.

This application was brought under the provisions of **sections 1,1a,41,42,65,80,82,84, and 123** of the **Constitution of Kenya, Section 3** of the **Judicature Act** and **section 3 A** of the **Civil Procedure Act**. It was also based on the provisions of **rules 20,21 and 32** of the **Constitution of Kenya** (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) **High Court Practice and Procedure Rules, 2006**.

From the outset, I should point out that under the provisions of **rule 12** of the **Constitution of Kenya** (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) **High Court Practice and Procedure Rules, 2006**, the main constitutional application ought to have been brought by way of a petition and not by an Originating Notice of motion. That *per se* cannot invalidate the application for conservatory or interim orders that was argued in terms of the Provisions of **rule 20** of the aforesaid Rules which empowers this court to grant conservatory or interim orders pending hearing and determination of a petition.

I will consider the application for the conservatory orders as sought in the background of the Originating Motion. **Section 123 (I) of the Constitution** defines a district to mean “**one of the districts into which Kenya is divided in the manner prescribed by an Act of Parliament.**”

The Districts and Provinces Act, 1992, is the one that prescribes the districts and provinces into which Kenya is divided. According to **Section 4** of the aforesaid Act, a district means:

“One of the districts referred to in section 2 of the Districts and Provinces Act, 1992 or the Nairobi Area, and a reference to a named district is a reference to the district of that name.”

The second schedule under the Districts and Provinces Act, 1992 names 46 districts only. The last district under the said schedule happens to be subject matter of this application, it is the Nyamira District. The boundaries of Nyamira District are explicitly set out as follows:

“Commencing at the confluence of the Nyatutu and Sondu rivers; thence generally southerly and up-stream by the centre of that river to confluence with the Kipsonoi River; thence generally south-westerly and up-stream by an un-named tributary of the Kipsonoi/Sondu rivers for a distance of approximately ½ a mile; thence continuing generally south-westerly by a straight line to the intersection of the eastern (or south-eastern) boundary of the Kericho-Sotik road reserve; thence generally southerly by that road reserve boundary to its intersection with the Kisii-Sotik road reserve; thence generally south-westerly by the north-western boundary of that road reserve to its intersection with the south-western boundary of L.R. NO. 5411; thence south-easterly by part of the latter boundary and by the south-western boundaries of L.R. Nos. 946/1 and 10099/2 to a beacon at the most easterly corner of L.R. NO. 5460/1; thence south-westerly by the south-eastern boundaries of L.R. Nos. 5460/1, 5460/3 and 3644/10 to a beacon at the most southerly corner of the last portion; thence north-westerly and westerly by the southern boundaries of L.R. No. 3644/10 to a beacon at its south-west corner; thence generally southerly, north-westerly and again generally, southerly by the Manga Hill Ridge to the trigonometrical point Gelegele at the most southerly corner of original L.R. No.8997; thence north-westerly by a straight line to its intersection with south-western boundary of East Kitutu Location; thence north-westerly by that boundary and continues with north-westerly, north-easterly, easterly by Central Kitutu Location boundary to its intersection with western boundary of Ekerubo Location; thence northerly by the western boundary of that location and continuing northerly by western boundary of Keera and West Mugirango Location to its intersection with common boundary between Homa Bay, Kisii and Nyamira Districts; thence north-easterly by northern boundary of West Mugirango, North Mugirango Chache to the point of Commencement.”

Parliament was very careful in setting out the Physical boundaries of the said district. It was not shown that the above boundaries have been reviewed by any lawful authority. This court would have benefited from the Attorney-General’s input on the issue but as earlier indicated, he did not participate in the hearing of the application, though he was aware of the same.

The people of Nyamira District know the general boundaries of their home district. According to Mr. Begi’s submissions, the **Districts and Provinces Act, 1992**, has not been amended. That being the case, it is unconstitutional and a violation of the express provisions of the said Act for any one to purport to alter in anyway the territorial boundaries of the Nyamira District, Parliament having so meticulously defined the boundaries.

Creation of any district has to be done in conformity with the Constitution of Kenya and the Districts and Provinces Act, 1992. Appropriate legislation must first be in place before any district is created. A district is an important administrative and political region to the extent that it is recognized by the Constitution and any variation of its boundaries must be done with total adherence to the relevant law.

Mr. Begi told the court that since the purported creation of North Nyamira District, which has not been actualized, there is tension and anxiety among the people of Nyamira District as to where the headquarters for the proposed district will be, some suggesting a place known as Nyamusii while others

prefer a different place known as Ekerenyo. There is also disagreement as regards the boundaries of the proposed district. My understanding of this kind of submission is that the applicants and/or the people of Nyamira District may not be opposed to the proposed split of Nyamira District to create Nyamira North District. What they are not satisfied with is the manner in which the executive is trying to bring about the proposed district.

I agree with the applicants that **section 41 C (b)** of the **Constitution of Kenya** gives the **I.I.B.R.C.** the mandate of making recommendations to parliament on administrative boundaries, including the fixing, reviewing and variation of boundaries of districts and other units. If there is need to split Nyamira District, the **I.I.B.R.C.** will tour the district, consult the people as to where the district headquarters ought to be, consider the issue of its boundaries and then make its recommendations to Parliament. Parliament will thereafter consider the recommendations and may accept the same with or without amendments or even reject them altogether.

The power to create districts, review or vary boundaries of districts is exclusively vested in parliament. **Section 41 C (b)** of the **Constitution of Kenya** is clear on the issue. The chairman and members of the **I.I.B.R.C.** were, in accordance with the provisions of **section 41 B (2)** of the **Constitution of Kenya**, duly appointed and gazetted vide **Gazette Notice No. 4796** which was published on 12th May, 2009. That body should be left alone to do its work. **Section 41 B (8)** of the **Constitution** provides that:

“In the exercise of its functions under this Constitution, the Commission shall not be subject to the direction or control of any other person or authority.”

It would be a mockery of our country’s Constitution for the executive to sidestep the **I.I.B.R.C.** and **Parliament** to create any new district. In our nascent democracy, the Constitutional concept of separation of powers must be respected so that all the arms of Government operate and function in accordance with the law.

The applicants have sufficiently demonstrated that their main constitutional application is not frivolous and that some conservatory orders ought to be issued in the interim. Consequently, I direct that pending hearing and determination of the Originating Notice of motion dated 29th June, 2009 the boundaries of the Nyamira District as spelt out in the second schedule of the **Districts and Provinces Act, 1992** should not be interfered with by carving out of the district the proposed Nyamira North District or any other district. The first respondent shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT KISII THIS 4TH DAY OF SEPTEMBER, 2009.

D. MUSINGA

JUDGE.

4/9/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Begi for the applicants

Miss Natome for the respondents

Court: Ruling delivered in open court on 4th September, 2009.

D. MUSINGA

JUDGE.