



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Civil Misc. Appli. 253 of 2008**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE D.C. MBOONI DISTRICT ..... RESPONDENT**

**FREDRICK MULINGE KALULU ..... EX PARTE**

**RULING**

1. Before me is a Chamber Summons under Order LIII Rule 1 of the Civil Procedure Rules and the ex-parte Applicant, one Fredrick Mulinge Kalulu seeks the following orders:

1. “THAT this Honourable Court be pleased to grant leave to the applicant to apply for orders of judicial review in terms of prayers 2, 3 and 4 below.
2. THAT an order of certiorari do issue removing to the High Court to be quashed the decision of the Mbooni District Commissioner made on and contained in his letter dated 29<sup>th</sup> October 2008 directing that the Headquarters of the newly established Mbooni district be moved from Kikima market to Mbumbuni market.
3. THAT an order of prohibition to prohibit the Mbooni District Commissioner from ordering the moving of the Mbooni district headquarters from Kikima market to Mbumbuni market.
4. Costs of this application.”

2. I have read the Statement of Facts and the Verifying Affidavit together with its annexures. Of note is the letter dated 29/10/2008 from the Respondent addressed to all District Departmental Heads, Mbooni District and because of its significance, I deem it appropriate to reproduce it in full as follows:-

**“RE: RELOCATION OF THE DISTRICT HQS**

I wish to formally inform you that you arrange to relocate to Mbumbuni as this has been decided to be the new headquarters. I am aware there will be a number of challenges in the beginning but with time things will settle down to normalcy.

Those of you with working tools/equipment that require electricity are advised to programme shifting in phases while we make the arrangements to electrify the new headquarters soonest possible.

Please oblige and where you run into serious difficulties, consult me in person.”

3. I have also seen a letter dated 11/7/2008 which one Tom G Macheneri, then District Commissioner, Mbooni District, wrote to the Provincial Commissioner, Eastern Province stating in part that:-

“Although the wish of the people of Kisau and Kalama was to have the District HQS located at Mbumbuni – Kisau, the following may clearly appear a challenge immediately:-

1. There is limitation of land for expansion of the District HQS at Mbumbuni against Kikima with 76 acres of government land.
2. Currently there is no piped water near Mbumbuni center whereas at Kikima there is piped water.
3. There is no ready accommodation for the government staff in terms of offices and Residential at Mbumbuni as compared to Kikima.
4. There is an existing District Hospital and Police station at Kikima that can be of immediate use for the government staff which are lacking in Mbumbuni.
5. There is existing District stadium at Kikima as against Mbumbuni.
6. There is power supply in the whole Kikima township and in the existing government offices whereas at Mbumbuni power has not reached the proposed HQS.
7. There are Banking services of Barclays Bank and K-rep in Kikima whereas in Mbumbuni there are none.
8. Most of the Government ministries have already settled comfortably in Kikima and established working structures.

Technically, these factors put together, will clearly show that setting up a District HQS at Kikima will be less costly and will enable the government staff settle much faster as opposed to Mbumbuni. These views are purely technical from the Heads of departments. They can be used for further decision making on this issue.”

4. In another document, titled, “minutes of the Mbooni District Leaders Meeting held at the Catholic, Multipurpose Hall (Wote) on the 11<sup>th</sup> July 2008”, it was noted inter alia as follows:-

“On observation, the views of delegates of each division were as follows:

- a. “Kalawa Delegates – All 20 were of the view to have Mbumbuni the District headquarters.
- b. Kisau Delegates – All the 20 supported the idea of having Mbumbuni the District headquarters.
- c. Mbooni delegates – The 20 delegates from Mbooni opted not to stand up as their counterparts of Kisau and Kalama. Instead they maintained their stand in Kikima as district headquarters where the DC is currently hosted.
- d. Tulimani Delegates – Delegates from this division were 18 present and 2 absent with apology.

However they had mixed reactions on whether Kikima or Mbumbuni should be the district headquarters. However 8 of the delegates present voiced their support on Mbumbuni while 10 of them stuck to Kikima as the most preferable headquarters.

At the end of the meeting the delegates from Mbooni Division stood to their guns by maintaining that they show their views the same way the delegates from other Divisions did. They maintained that Kikima is already the headquarters of the New District.”

5. The above background is important because in challenging the decision to move the Mbooni District Headquarters to Mbumbuni Market, the ex-parte Applicant’s case is that the decision is ill-advised and not in the best interests of the people of Mbooni. He attached Affidavits sworn by other residents who have expressed reservations as to the proposed action aforesaid. At paragraphs 23 and 24 of his Affidavit he firmly depones as follows:-

“23. THAT relocating the District Commissioner’s offices to Mbumbuni would also require the relocating of all the other Government offices located at Kikima or having residents commute between Kikima and Mbumbuni for services since most Government services go hand in hand. Any of the two options is not only inconveniencing but costly.

24. THAT clearly the decision of the District Commissioner, Mbooni District to relocate the District headquarters from Kikima market is therefore not only against the express wishes of the residents of Mbooni district but also against the advice given by the Permanent Secretary, Provincial Administration and Internal Security, Office of the President, to Honourable Mutula Kilonzo, M.P, in his aforementioned letter dated 11/4/2008.”

6. I am aware that the ex-parte Applicant has explained his interest in the matter by deponing that he was a former Member of Parliament for Mbooni Constituency and therefore had sufficient interest in the matter of where the Mbooni District Headquarters would be located. In Constitutional and Administrative Law, 8<sup>th</sup> Ed. by Paul Jackson and Patricia Leopold at page 725, it is stated as follows:-

“The meaning of “*sufficient interest*” was considered by the House of Lords in *R.v.Inland Revenue Commissioners ex p. National Federation of Self Employed and Small Businesses Ltd.* In line with the current judicial approach to judicial review sufficient interest was given the widest possible meaning while reserving to the court a discretion in particular cases to refuse a hearing or deny a remedy. The House of Lords was reluctant to separate locus standi from the facts and merits of an application. The requirement of standing should, it seems, be looked at twice: first when the applicant applies for leave to seek judicial review. At that stage the court is concerned to do no more than “*prevent abuse by busybodies, cranks, and other mischief-makers.*” If leave is granted, the court may, when the merits of the case are clear to it, revise its initial judgment and conclude that the applicant lacks the necessary interest. The application before the House had been made by an association of taxpayers who wished to challenge the legality of a compromise which the Inland Revenue had made with a group of print-workers who had been defrauding the revenue. The House of Lords held that while it had been correct to grant leave to apply for review, the applicants, on the facts, lacked sufficient interest to challenge the legality of the compromise. The assessment of one taxpayer is no concern of another; indeed, each individual’s tax liability is a confidential matter. The Inland Revenue was reasonably trying to carry out its duty to collect taxes. Dicta did envisage the possibility of cases of sufficient gravity where taxpayers might have *locus standi*. The House distinguished the position of the taxpayer from that of the ratepayer. In the latter case assessments of property are a public matter and there is a common fund so that each ratepayer’s contribution is affected by the assessment of his neighbour. An individual taxpayer, by contrast, seeking to challenge decisions of the revenue authorities in relation to his own affairs has, without doubt, sufficient interest. In *R. v. H.M Treasury ex p. Smedley* a taxpayer challenged the legality of a draft Order in Council laid by the Treasury before Parliament. The Court of Appeal decided the substantive question against Smedley and therefore did not have to express a concluded view on whether he has a sufficient interest to apply for judicial review. Slade L.J. emphasized the width of the test laid down in the *Inland Revenue case, supra* and indicated that the court would hear an application provided it was satisfied that it was not “*of a frivolous nature.*”

This wide approach to the meaning of sufficient interest has been followed in subsequent cases and, in particular, the courts have recognized that pressure and organizations of various kinds may have sufficient interest to elucidate the law.”

7. I will take the liberal view that the ex-parte Applicant prima facie has an interest in the matter because creation of Districts and their headquarters is a matter intended to bring the services of central government closer to each individual resident and the ex-parte Applicant is one such person.

8. It matters not that he may at some point had the mantle of leadership in the area. Right now he is like all others, merely a resident of Mbooni affected by Executive decisions taken by the Respondent and his superiors.

9. Having then established that the ex-parte Applicant is properly before me, I need to determine whether he is entitled to the prayers for leave to apply for the judicial review orders of certiorari and prohibition. As I understand it, all that he is required to do at this stage is as was stated in Njuguna vs Minister for Agriculture (2000) 1 E.A. 185 at 186, that;

“It cannot be denied that leave should be granted, if, on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court to the judge who granted leave, to set aside such leave. See Halsbury’s Laws of England (4<sup>th</sup> edition) Volume 1 (1) paragraph 167 at page 1276.”

10. I have carefully considered the matter and I note that the reasons why the Respondent’s decision is challenged are set out in the specific grounds set out viz:-

a. “There is no justification for moving the district headquarters from Kikima market to Mbumbuni market.

b. Kikima market where the headquarters had been a sub-district headquarters with all Government officials based there and moving the new district’s headquarters would disrupt the Provision of services which the residents have been getting at Kikima.

c. There is adequate land at Kikima market, 101 acres, for Government offices and a total of 76 acres has not been utilized whereas there is no land available at Mbumbuni market.

d. The residents and leaders of Mbooni district are against the moving of the headquarters from Kikima market to Mbumbuni market.

e. The moving of the headquarters is not done in good faith as the Provincial administration is already aware that the residents of Mbooni district demonstrated against the moving of the district and even served several memoranda on the Provincial Commissioner requesting that the headquarters be not moved.”

11. Are these grounds arguable? I think so. They are so because government and especially the executive arm of it does not operate in its own crown neither does it act in vacuum. It acts with, and to the interest of the people of the area in which it so operates. It also must generally act in consultation with and for their benefit and if not, then government would be alien and would serve only its alien purposes. I do not think that the administration in Mbooni is one such entity hence its attempts reproduced elsewhere above to be inclusive in the decision on where to set up its headquarters.

12. P.L.O. Lumumba in “An Outline of Judicial Review in Kenya” states at page 10 that:

“Courts of law may therefore intervene through judicial review in any of the following circumstances:

a. when a body acts ultra vires.

- b. when there is jurisdictional error.
- c. when there is an error of law.
- d. where there is an error of fact.
- e. when there is an abuse of power.
- f. when irrelevant considerations governed the making of a decision.
- g. when there is bias.
- h. when there is an unfair hearing.
- i. when there is a procedural flaw.
- j. when there is irrationality.
- k. when there is bad faith.”

13. From what I have stated above, it seems to me that the decision of the Respondent is said to be irrational because Mbumbuni has no amenities or land to cater for the headquarters and that irrelevant considerations were taken into account in making the decision. It is not for me to say whether that is so or not without hearing all parties on the issue. Further, I note that the residents of Mbooni District are divided on the headquarters and the District Commissioner has in one letter taken one position and in another, he has reversed that position. All parties including him need to be heard and a decision on the merits given.

14. In the event, I am satisfied that prima facie the ex-parte Applicant is entitled to leave as is sought in prayers 2 and 3 of the summons under consideration.

15. Rule 1 (4) of Order LIII of the Civil Procedure Rules provides as follows:-

- “1. (1) .....
- (2) .....
- (3) .....

(4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”

16. No stay order was specifically sought in the summons and no basis was laid in it or in submissions for me to grant it. That is all I have to say on the issue.

17. Prayers 2 and 3 of the Application is granted. The Notice of Motion shall be filed and served within 14 days and parties will then appear before me to fix the earliest date for hearing thereof.

18. Orders accordingly.

Dated and delivered at Machakos this 27<sup>th</sup> day of November 2008.

**ISAAC LENAOLA**

**JUDGE**

In presence of: Mr Makundi for Applicant

**ISAAC LENAOLA**

**JUDGE**