



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. APPLICATION NO. 975 OF 2001**

**HON JOHN N. MICHUKI**

**HON ONESMUS KIHARA MWANGI.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL**

**AND 2 OTHERS.....DEFENDANT**

**RULING**

The Applicant, Hon. JOHN MICHUKI brought this Originating Motion against the Attorney General, The Electoral Commission and the Constitution of Kenya Review Commission for declarations, among others, that:-

1 a declaration that Kenya has only forty(40) districts.

2 A declaration that the Districts and Provinces Act (1992) is ultra vires the Constitution and is null and void.

3 A declaration that the creation of districts under the Districts and Provinces Act (1992) is unconstitutional, null and void

4 A declaration that the existing 210 constituencies are ultra vires the Constitution.

5 An order that the 2nd respondent do re-draw the constituency boundaries to give effect to the one-person one-vote principle in every part of the country.

6 A declaration that under section 27 of the Constitution of the Kenya Review Act, only the 40 districts named should supply three representatives to participate in the National Constitutional Conference.

When the Application came up for hearing, all the three respondents raised one preliminary objection that

the Applicant lacks locus standi and as such the application should be struck out.

It was argued on behalf of the Attorney general that the application does not show how the Applicant's rights have been violated. Applicant has no locus standi since his personal interest are not affected. If there is any breach by the government then the attorney general is the right person to represent the interest of the public.

It was argued on behalf of the 2nd respondent that the application does not disclose any cause of action. If applicant is concerned with the rights of others then it is a representative suit and the proper procedure for bringing a representative suit should have been followed. The applicant as a member of Parliament has not shown how his rights have been violated.

On behalf of the 3rd respondent it was argued that the applicant has not sought the consent of the people he purports to represent before bringing this suit. Relying on the High court decision in RAILA ODINGA –vs –ABDUL COCKAR Civil application No.58 of 1997 it is argued that a party must show that he is more prejudiced than others. He cannot exert a public right, only the Attorney General can.

The applicant is seeking 27 reliefs but we have only set out 6 of them for the purpose of this preliminary objection.

It has to be borne in mind that the Applicant is moving the court that the Constitution of Kenya is being breached. As a citizen of Kenya and as a member of Parliament is he barred from complaining about the breach? The respondents have argued that if there is a breach then the Attorney general should be the one to represent the interest of the public. What the respondents have carefully avoided is to answer the question, what, if as in this case, it is alleged that the attorney general has played a part in the breaching of the Constitution will he institute proceedings against himself?

The applicant is challenging the validity of the Districts and Provinces Act (1992) and the validity of the districts created thereunder. In doing this must he show his selfish nature that he has suffered more than other ordinary Kenyans? With respect, we disagree with such pronouncements. Where one challenges the validity of an act of Parliament, one is free to come to court and present his case. One need not prove his special loss as a result of such an Act of Parliament. Assuming one does not show the particular loss and the Attorney General does not take any action, does it therefore follow that the Act will continue to be in our statute books however invalid it might be? Surely no.

[We agree with our brothers Justice Mbaluto and Justice Kuloba in the "DONDE CASE" Misc. Civil Application 908 of 2001 when they held that any person who genuinely and in good faith moves to defend the constitution of Kenya is free to come to court and he does not have suffered personally. The respondents have not shown any prejudice they will suffer by the applicant proceedings with his application. We hold that the issue of locus standi does not arise where one is challenging the validity of an Act of Parliament.

The Court has its machinery for dealing with busy bodies. Having said that we now turn to the issue of the 3rd respondent, Constitution of Kenya Review Commission. We note from the application that the Applicant is challenging an Act of Parliament that was passed in 1992. The 3rd respondent came into existence in 2000. It cannot therefore be said that the 3rd respondent had a hand in the said Act of Parliament. On the face of the pleadings the case against the 3rd respondent cannot stand.

The upshot is that the preliminary objection by the 1st and 2nd respondents is dismissed with costs. The suit against the 3rd respondent is struck out. Costs of the 3rd respondent to await the outcome of the applicant's main application.

It is so ordered.

Dated this 12th day of March 2002

A. MBOGHOLI MSAGHA

JUDGE

J.V.O. JUMA

JUDGE