REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO 975 OF 2001

JOHN N MICHUKI .....APPLICANT

ONESMUS KIHARA MWANGI.....APPLICANT

VERSUS

ATORNEY GENERAL.....RESPONDENT

ELECTORAL COMMISSION.....RESPONDENT

CONSTITUTION OF KENYA REVIEW COMMISSION.....RESPONDENT

RULING

The second applicant Hon. Onesmus Kihara Mwangi having withdrawn from these proceedings we shall only concern ourselves with the case advanced by the first applicant Hon. John N. Michuki, hereinafter called the applicant.

By dint of an Originating Motion dated and filed on 4th September, 2001, the applicant moved the court for several declarations and /or orders on the basis that the respondents by their actions and/or omissions had breached or were about to breach his constitutional rights.

The Originating Motion is said to be under Sections 1,42, 78, 80, 82, 84, and 123 of the Constitution, Section 3 of the Judicature Act, The Constitution of Kenya Review Act and Section 3A of the Civil procedure Rules. It is supported by an affidavit sworn by the applicant on the same day, that is, 4th September, 2001 and annextures thereto.

The applicant has listed a total of 27 prayers but the salient ones that appear in our view, to be the backborne of all the others are:

(a) A declaration that Kenya has only 40 Districts.

(b) A declaration that the Districts and Provinces Act, 1992 is *ultra vires* the Constitution and therefore null and void.

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

(d) A declaration that the existing 210 Constituencies are *ultra vires* the Constitution.

(e) An order that the second respondent (The Electoral Commission) do re-draw the constituency

boundaries to give effect to the one-person one-vote principle in every part of the country.

(f) A declaration that under section 27 of the Constitution of Kenya Review Act, only the 40 districts named should supply three representatives to participate in the national constitutional conference.

We hereby point out from the outset that, the identification of the above prayers is intended to narrow down the issues, which in most cases overlap, and should not, in any way, be construed that the other prayers are wanting in substance.

Following preliminary objections raised by the three respondents, we held that the applicant has no cause of action against the third respondent and reserved our order on costs. We shall revisit the same at the end of this ruling.

We have deemed it necessary to set out the relevant provisions of law in relation to the orders sought by the applicant and the breach of which, is alleged to have infringed upon his constitutional rights.

Section 27 of the 1963 Independence Constitution provided in subsections (1) and (2) as follows:-

"27 (1) Kenya shall be divided into 40 districts and the Nairobi area; and each District and the Nairobi area shall elect one Senator in such manner as, subject to the provisions of this Constitution, may be prescribed by or under any law.

(2) The boundaries of the Nairobi area shall be those that are specified in Part II of schedule I of this Constitution and, subject to the provisions of section 227 of this Constitution, the districts shall be those that are specified in part III of that schedule and that have the respective boundaries that are there specified."

Several amendments to the Constitution were effected but at no time were the above provisions affected. Significantly, The Constitution of Kenya (Amendment) Act No.16 of 1968 provided:

"4. Notwithstanding the repeal by this Act of subsections (1) and (2) of section 36, section 91 and Schedule II of the Constitution, those provisions shall, except as may be otherwise provided by or under an Act of Parliament, continue in force as if they had been re-enacted as part of this Act". (Emphasis added)

For the avoidance of any doubt, reference to sections 39, 91 and schedule 11 of the Constitution in the above extract is drawn from Legal Notice No. 718 of 1963 whose wording is a replica of those in section 27 earlier referred to.

Matters seemed to have rested there until the enactment of The Districts and Provinces Act No.5 of 1992, the preamble of which provides as follows:-

"An Act of Parliament to prescribe the districts and provinces into which Kenya is divided."

The said Act provided in section 5 that:

"5. Section 4 of the Constitution of Kenya (Amendment) Act 1968 is amended"

The thrust of the applicant's case is that, going by the constitutional provisions which have never been amended, there are only 40 districts in Kenya. To that extent therefore, in purporting to create any more districts, the Districts and Provinces Act, 1992 is *ultra vires* the Constitution. Having overstepped the Constitution, the said Act is in itself null and void.

This is not the first time the applicant has questioned the creation of new districts outside the provisions of the Constitution. He has had occasion to raise this in parliament and we deem it necessary to set out the

relevant extract of the Parliamentary Debates of 4th July, 2001. The following is what transpired:

> "**C R E A T I O N O F D I S T R I C T S**
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> Mr Michuki: Mr. Speaker, Sir, I beg to ask the Attorney- General the following Question by private Notice.
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> (a) Is the Minister aware that in contravention of section 123(1) of the Constitution of Kenya, the Government has created districts in various parts of the country?
>
> (b) Does the Districts and Provinces Act (Act No.5 of 1992), prescribe all the districts as required by the Constitution?

The Attorney-General (Mr Wako): Mr. Speaker, Sir, I beg to reply.

> (a) The Attorney General is aware that some districts have not been prescribed by an Act of Parliament.
>
> (b) The Districts and Provinces Act No.5 of 1992, does not prescribe all the districts."

There then followed interventions and contributions on the oath of office to uphold the Constitution of Kenya as by law established and questions as to why the same has been flouted since 1992. The Hon. Attorney General is reported to have confirmed that the Constitution of Kenya will not be deliberately violated. The debate then continued thus:

> "Mr. Wamae: Mr Speaker, Sir, you must have heard the Attorney-General admit that 28 districts have been created illegally and contrary to the Constitution and the Government has continued employing District Officers, Officers Commanding Police Divisions (OCPDs) and other district officers contrary to the law.
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> What is the Attorney-General going to do to have this matter rectified, and has he not been negligent in not advising the government that the creation of these extra districts was an illegality and unconstitutional?
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> Mr Wako: Mr Speaker, Sir, as I stated in my Answer, I acted and advised the Government correctly and in time. That is why they immediately embarked on this exercise which you will agree that the progress made is quite fast. This is because if the boundaries of 28 districts have already been finalized and 12 more are about to be finalized and only six or eight have some boundaries which are about to be settled, you will agree that the government is proceeding very fast on the advise of the Attorney General.
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> Mr. Michuki: Mr. Speaker, Sir, could the Attorney General tell this House, the country and the world too, because it is listening whether it was in order for which ever authority, whether it was the president of the Republic of Kenya or the Attorney General himself, to create districts before the law had been passed to establish those districts, through what must be a commission to establish the wishes of the people whether they should be divided into two districts? Could the Attorney-General explain this matter because it is highly unconstitutional and it is against the oath of office, and the government ought to resign because of that?
>
> Mr Wako: Mr Speaker, sir, I believe that the announcement of the intention to create new districts was made in good faith and in response to the needs and requirements of the people of these areas."

The applicant through counsel agrees that the creation of additional districts was in good faith but that the Constitution should have been respected and upheld. To safeguard any future breaches thereof, the declarations sought should be made to ensure that the law is upheld.

We have given the issues raised considerable thought. We agree that the Independence Constitution set out the number of districts and that the 1968 amendment saved that provision. We also agree that an Act of Parliament cannot amend the constitution which requires 65% or more members of the Assembly so to do.

With profound respect therefore, section 5 of the District and Province Act that purported to amend/repeal section 4 of the Constitution of Kenya (Amendment) Act, 1968 is null and void. We must express our surprise at how such a provision could sail through the glaring eyes of the Hon members including the presenter.

Be that as it may, we are not in agreement with the applicant and the Attorney General that the creation of the additional districts under the 1992 Act was necessarily illegal. The said Act as we have observed hereinabove, was unconstitutional to the extent of its provision purporting to amend the Constitution, but not so in the creation of the disputed districts.

We say so because whereas Section 4 of the 1968 amendment repealed the provisions relating to the number and boundaries of districts as set out in the Independence Constitution, the said provisions were to continue in force as if they had been re-enacted as part of the said Act " except as may, be otherwise provided by or under an Act of Parliament" (emphasis added).

The Districts and Provinces Act, 1992 came into operation on 26th June, 1992 and provided for divisions of Districts and Provinces. This cannot be said to be *ultra vires* the Constitution because, it is the Constitution itself which in 1968, conferred the said powers upon an Act of Parliament, of which the 1992 Act is one, to otherwise provide. We are not concerned about the administrative formalities here but in our respectful view, the creation thereof was lawful and within the ambit of the said Act.

Having so found, any breaches founded thereon cannot be sustained and any declarations related thereto cannot be issued.

We shall now address the issue of constituencies as raised by the applicant. This lies in the province of the Electoral Commission which is a creature of the Constitution, Section 41 thereof. Section 42 of the Constitution confers upon the Electoral Commission power to prescribe the boundaries and names of constituencies into which Kenya is divided. It is the Parliament that prescribes the minimum number of constituencies which now stand at a minimum of 188 and a maximum of 210.

Section 42(3) of the Constitution is instructive. It provides as follows:-

> "(3) All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable, but the Commission may depart from this principle to the extent that it considers expedient in order to take account of:
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> (a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely- populated rural areas;
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> (b) population trends;
>
> (c) the means of population trends;
>
> (d) geographical features
>
> (e) community of interest; and
>
> (f) the boundaries of existing administrative area; and, for the purposes of this subsection, the number of inhabitants of any part of Kenya shall be ascertained by reference to the latest census of the population held in pursuance of any law."

It is clear from these provisions that the constituency boundaries have no relationship with the administrative boundaries. It is the applicant's case that the second respondent, that is, the Electoral Commission, has no national criteria for determining the size of a constituency and no system of weighing the criteria set out in Section 42(3) of the Constitution.

As a result of the arbitrary exercise of its powers, the applicant contends, the 2nd respondent has infringed on his freedom of assembly and association and further that the principle of one person one vote has been compromised.

The learned counsel for the applicant took the court through the statistics of several constituencies across the country to justify his submission. He also referred to Sections 4 and 4A of the National Assembly and Presidential Elections Act Cap.7 Laws of Kenya as read with Section 32 of the Constitution and submitted that the former violates the latter.

Section 32 (2) of the Constitution provides for the capacity of a person registered in a constituency and entitled to vote in accordance with the law. The law is set out in The National Assembly and Presidential Elections Act Cap 7 afore said, section 4A thereof.

The requirements are that such a person must be a Kenya citizen who must have attained the age of majority as evidenced by either a national identity card or a Kenya Passport.

The above requirements merely re-enforce the provisions of the Constitution and we see no conflict in that regard.

We take this opportunity to mention at this stage that the learned counsel for the applicant cited several authorities in support of his propositions for which we are greatly indebted. We have considered all those and the fact we have not made any specific reference thereto should not be construed to be wanting in substance.

We have however noted with particular interest the *United States Supreme Court Reports,* Lawyers Edition, Second series volume 12. The principles of equal representation and the principles of one person one vote are well enunciated.

There are some constituencies in this country that have more than 100,000 voters and others with less than 10,000 voters. Yet in both cases, their representatives have the same or equal voice in Parliament. We agree with the learned counsel for the applicant that, as matters stand now there is some imbalance in representation.

At page 526 of the above reports it is stated:

> "It would defeat the principle solemnly embodied in the Great Compromise – equal representation in the House for equal numbers of people- for us to hold that, within the states, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a congressman than others ... Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and impaired fashion is a bedrock of our political system..... And, if a state should provide that the votes of citizens in one part of the state should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the state, it could hardly be contended that the right to vote of those residing in the disfavoured areas had not been effectively diluted ..... "

With profound respect, we subscribe to the foregoing and find that the applicant has faulted the 2nd respondent in that regard.

The foregoing notwithstanding, the order sought by the applicant, if granted can be devastating. The court

can only give an order that it is able to supervise in default thereof. That is not the case here. The best we can do with the material before us is that, the second respondent should now take it upon itself to address the issues raised by the applicant to avoid future litigation of this nature.

Having said as much, the answers to the basic issues canvassed by the applicant are that:

(a) The Districts and Provinces Act, 1992, section 5 thereof, is unconstitutional, null and void, in purporting to amend the Constitution of Kenya (Amendment) Act, 1968.

(b) The creation of districts under the Districts and Provinces Act, 1992 is not unconstitutional as the power is derived from the Constitution itself.

(c) The applicant has faulted The Electoral Commission sufficiently enough to require it (The Commission) to address the issues raised.

The end result is that the applicant has succeeded in part against both the first and second respondents. He would not have moved the court for the orders sought had both respondents exercised due diligence in the discharge of their dockets.

It follows therefore that, the applicant shall have half the costs of the suit against both respondents.

The applicant's action against the 3rd respondent was struck out. He shall pay the costs to the 3rd respondent.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of May , 2002

A.M.Msagha **J.V.O Juma**

JUDGE **JUDGE**