

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

IN THE CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 9 OF 2018

IDDI ONIALLAH MUYONGA.....1ST PETITIONER

AGGREY KASEMBELI CHELEKESI.....2ND PETITIONER

EZEKIEL ODEOH.....3RD PETITIONER

VERSUS

ELIZABETH WANYONYI, SECRETARY COUNTY

PUBLIC SERVICE BOARD.....1ST RESPONDENT

GIDEON SIRAL BOIYO, CHAIRMAN COUNTY

PUBLIC SERVICE BOARD.....2ND RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

THE COUNTY SECRETARY & HEAD OF PUBLIC SERVICE...4TH RESPONDENT

GOVERNOR OF COUNTY GOVERNMENT OF BUNGOMA.....5TH RESPONDENT

JUDGMENT

The Petitioner Iddi Oniallah Muyonga (1st Petitioner) Aggrey Kasembeli Chekekesi (2nd Petitioner) and Ezekiel Odeoh (3rd Peitioner) are residents of Malakisi Division within Bungoma County. They have filed this Petition on their own behalf and on behalf of Residents of Malakisi Division seeking orders;

- 1). **THAT** this Honourable Court finds that the process of delineating village units and advertisement of recruitment, employment and deployment of village administrators by the respondents was unconstitutional, illegal, irregular and exclusive to the disadvantage of petitioners and other residents of Malakisi Division.
- 2). **THAT** this Honourable Court finds that the entire process of delimitation of village units, advertisement, shortlisting, recruitment and deployment of village administrators was unconstitutional, illegal, irregular, unfair and discriminative against the residents of Malakisi Division and therefore null and void.
- 3). **THAT** the respondents be compelled to pay the costs of the Application, Petition and compensates residents of Malakisi Division for the injustice meted against them.

The Petition is supported by the affidavits of the Petitioners which are identical in substance in which they depone that the County Government of Bungoma enacted the Bungoma County (Decentralized Units) Administration Act 2015 which started a process of delimitation and recruitment of village administration which discriminated against the residents of Malakisi Division;

a). That the identification, naming and establishment of village units in Lwandanyi Ward and Malakisi/South Kulusiru Ward did not take into consideration the principles of public participation and deliberately ignored the aspirations, needs, interests and views of the residents of Malakisi Division.

b). The criteria and procedure of the delimitation of village units in Lwandanyi and Malakisi/South Kulusiru Wards by the Respondents and/or their agents was NOT participatory, representative and consultative. The said process was not transparent, accountable and did adhere to the principle of rule of law and the due process. It was therefore unconstitutional, illegal, irregular, unfair and discriminative against the residents of Malakisi Division. We wish to state here that there is no single provision in the Constitution of Kenya, 2010 and enabling legislations on devolution that authorizes a County Government or any of its organs to illegally, irregularly and unfairly delineate village units. In this regard, your Petitioners call upon this Honourable court to rise to the occasion and protect the rule of law.

c). *The Respondents herein grossly violated the Constitution of Kenya, 2010 and failed to adhere to the rule of law and due process.*

The Respondents opposed the application and filed grounds of opposition:

1. THAT the Petitioners have not demonstrated a prima facie case with a likelihood of success to enable them deserve Injunctory orders sought.
2. THAT the entire application is defective bad in law and contrary to public policy and public interest as the Respondents cannot be restrained from performing duties and Responsibilities the constitution and the statutes demands them to perform.
3. THAT the Petitioners herein are guilty of non disclosure of material particulars and hence does not deserve conservatory and equitable orders sought.
4. THAT the application the Petition has been made from the point of ignorance and misinterpretation of the law.
5. THAT the interest of Justice dictates that the application should be dismissed with costs.
6. THAT the 4th & 5th Respondents duly complied with provisions of Article 232 of the Constitution to wit:-
 - (a) *Did not victimize or discriminate against Malakisi Division on creation of village awards.*
 - (b) *Followed due process of law.*
 - (c) *Afforded adequate and equal opportunity to Malakisi division.*
 - (d) *Shall shortlist people on merit, integrity and on fair competition and is in the process of bringing Administration closer to the people.*
 - (e) *Shall adhere to high standards of Professional Ethics.*

By Consent of both parties, the application and Petition were to be heard together and canvassed by way of written submissions. Both parties filed their respective submissions.

The Petitioners in their submissions submitted that the Bungoma County (Decentralized Units) Administration Act No. 6 of 2015 which has been used to delineate the village units upon which advertisement for recruitment was done does not have a commencement date and no regulations have been made to operationalize it. Petition submit that Sec. 33 Part III requires enactment of Regulations which has not been done.

The Petitioners submit that although they were invited for public participation on 11th September 2018 at KIE Bungoma Town their views were not considered and the Respondent went a head to advertise for recruitment of village administration. Finally the Petitioners submit that Malakisi Division has been given only one administrative unit while the neighbouring Lwandanyi has been given 6 village Administrative Units.

Mr. Makokha for the 4th and 5th Respondent submitted that the Petition is not properly before this court as the Respondent in the presence of the provisions of Sec. 16 of the Act established a Task Force with specific mandate to make recommendation on delineation, and names of village units and that such Task Force is to take into account, population, size, geographical features, community of interest, historical economic and cultural ties and means of communication. Further Counsel submits that the Petition is not supported by a supporting affidavit and which is fatal and makes the petition incomplete.

This court appreciates that the petitioners are unrepresented, but from the pleadings and submissions this court can discern that the petition is premised on one main ground. ***(1) That the delineation of village units in Bungoma County as it relates to Malakisi Division was unfair, discriminatory and against constitutional principle of fairness and equity.***

The issues for determination by this court can be summarized as follows;

- (1). *Was there discrimination in the delineation of village administrative units in relation to Malakisi?*

In ***Rose Wangui Mambo & 2 others Vs. Limuru County Club & 17 others [2014] eKLR*** addressed itself to this aspect and in borrowing from the case of ***Peter K. Waweru Vs. Republic [2006] eKLR*** defined discrimination as follows:-

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions bysex whereby persons of one such description are subjected to.....restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.....Discrimination also means unfair treatment or denial or normal privileges to persons because of their race, age, sex.....a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”

Article 27 of the Constitution is grounded on the UN Declaration of Human Rights which provides for the principle on non-discrimination. *The Principle of equal and non-discrimination has its underpinnings in various International conventions which now form part of our laws by dint of Article 2(5) and (2)(6). The United Nations Universal Declaration on Human Rights (UDHR) provides at Article 1 that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”*

Discrimination of any nature is abhorred by not only by our Constitution but also by UN declaration of Human Rights. For the petitioner to demonstrate that he has been discriminated against he must show;

- 1) That he was afforded different treatment.
- 2) That the treatment is attributable wholly or substantially done to his tribe or location, or class.
- 3) That such treatment was not afforded to other people or class of people.
- 4) On that he was denied privileges or opportunity available to others on the basis of this race or tribe.

The criteria for delineation of boundaries and village units is provided for in Section 14, 15, of the Act. Bungoma County (Decentralized Units) Administration Act, Act No. 60 of 2015.

Section 14 (1) *The County executive shall, subject to subsection (2), and the approval of the County Assembly, delineate and establish village units of administration for the purposes of this Act. Section 14 (2)* A village unit shall be delineated or established except in accordance with the recommendation of the Task Force Committee established in accordance with Section 16 of this Act.

Section 15 (1) The administrative boundary of every devolved unit shall be defined-

- (a) In the case of a sub-county along the constituency boundary existing in the county on the date of commencement of this Act;
 - (b) In the case of award, boundary existing in the sub-county on the date of commencement of this Act;
 - (c) In the case of a village, along a sub-location boundary existing in the ward under the national government structure of administration on the first day of January of the year 2002.
 - (d) In the case of Milango, the boundary of a village existing in the sub-location under the national government structure of administration on the date of commencement of this Act; and
 - (e) In any other case, as may be determined by the Task Force Committee in accordance with this Act.
- (2) Despite subsection (10), the sub-counties, wards, villages and Milango recognized for the purpose of this act on the date of commencement shall be those specified in the Third Schedule.
- (3) The boundaries of devolved units shall not be varied to exceed one third of the existing administrative units in the county in a period of ten years.
- (4) The devolved units created under this Act shall not become effective without the approval of the County Assembly.

The Petitioners in their Petition claim discrimination in delineation of village Administrative Units. The Respondent in their response submitted that the delineation exercise was fair and have annexed the population as hereunder.

Bungoma County (Decentralized Units) Administration.

THE THIRD SCHEDULE.

Name of Sub-County	Name of Ward	Approx pop of Ward	No. of villages	Village Units
1. MT. ELGON	Cheptais	33,373	6	Kipsis Ngachi Chebwek Kimaswa/Kisongo

				Walanga Chepkube
	Chesikaki	27,894	5	Chemondi Chesikaki Sasur Toroso Kimabole
	Chepyuk	29,494	6	Cheyuk Kaimagul Korng'otuny Kubura Chepkurkur Emia
	Kapkateny	33,234	5	Kamneru Masaek Chelebei Sinoko Sacho
	Kaptama	42,563	6	Kaboywo Kaptama Chepkitale Kongit Chemoge Kaborom
	Elgon	36,937	6	Namorio/Kipyeto Kapsokwony Elgon Chemwesus Sambocho/Koshok Kipchiria/Masindet
2. SIRISIA	Namwela	31,941	5	Kikai/Central Namwela

				Kolani Mutonyi Menu Toloso
	Malakisi/South Kulisiru	40,652	6	Ndakaru Bukokholo/Butonge Sirisia Township Wekekha Chebukutumi Chongoi
	Lwandanyi	46,141	6	Machakha Mayekwe Chepkuyi Wamono Sitabicha/Mwalie/Tamulega Kapkara
3. KABUCHAI	Kabuchai/Chwele	41,566	6	Nairumbi Sikusi Namilama Busakala Wabukhonyi Mukhweya
	West Nalondo	38,407	5	Kisiwa Sirare/Nalondo Nangwe Luucho Kasosi
	Bwake/Luuya	39,378	6	Nangili Nasaka Mabanga Khalitaba

				Luanda Mabwi
	Mukuyuni	44,039	6	Kuywa Sikulu Kibichori Sichei Milembe Lukhome
4. BUMULA	South Bukusu	26,820	4	Muanda Lumboka Mateka Kimatuni
	Bumula	37,008	5	Lunao Bumula Kimatuni Mabusi Syekumulo
	Khasoko	16,270	4	Namatotoa Namusasi Mungore Khasoko
	Kabula	24,062	4	Mukhuma Syoya Malinda Wamunyiri
	Kimaeti	42,359	6	Tulukui/Siyombe Nakhwana Khasolo Bitobo Kimaeti Kamurumba

	West Bukusu	23,188	4	Lwanja Ng'oli Kibuke Mayanja
	Siboti	37,685	5	Musakasa East – Siboti Kisawayi Mukwa Masielo
5. KANDUYI	Bukembe West	23,546	4	Nalutiri Kisuluni Khaoya/Muyayi Ekitale
	Bukembe East	31,009	5	Misanga Bukembe Tembelela Kongoli Sudi
	Township	22,150	3	Lower Township Central Township Upper Township
	Khalaba	28,343	3	Namuyemba Bondeni Khalaba
	Musikoma	43,975	6	Siritanyi Namasanda Namamuka Musikoma Siyo Samoya
	East sang'alo	37,420	6	Mwikhupo

				Mwibale Khaweli Lutungu Mechimeru Kimugui
	Marakaru/Tuuti	41,480	6	Mungeti/Mayanja Nabukhisa Kimukung' Makutano Kibabii Bukananachi
	West Sang'alo	38,399	5	Sang'alo Namwacha Bulondo Samulia Ranje
6. WEBUYE EAST	Mihuu	43,830	6	Mihuu Chetambe Mitukuyu Magemo Misimo Nabuyoli
	Ndivisi	46,048	6	Lutacho Wabukhonyi/Misemo Makuselwa Marinda Sinoko Sitabicha
	Maraka	41,124	6	Nang'eni Township East Lukhoba

				Lurare Muchi Lufwindiri/Khamoto
7. WEBUYE EAST	Misikhu	49,031	6	Mukhe Sirende Misikhu Nambami Kituni Makhese
	Sitikho	43,554	6	Sitikho Kuywa Khalumuli Milo Namutali Kamimanyi
	Matulo	26,492	6	Upper Malaha Lower Malaha Lower Matulo Hospital village Township West
	Bokoli	29,418	4	Bokoli Mahanga Miendo Matisi
8. KIMILILI	Kibingei	39,946	6	Daraja-Mungu Siuna Kibunde Kitoyi Lutonyi Khwiroro
	Kimilili	42,043	6	Chelekei

				Bahai Matily Lwanda Township Sitabicha
	Maeni	28,065	4	Nasusi Nameme Kamasielo Sikhendu
	Kamukuywa	43,923	6	Mbongi Makhonge Mapera Kimakwa Musembe Nabikoto
9. TONGAREN	Mabakalo	37,362	6	Makutano/Nzoia Musembe Makunga Mbakalo Karima Kibisi
	Naitiri/Kabuyefwe	44,079	6	Makhanga Naitiri Sango Siumbwa Pwani lungai
	Milima	38,664	4	Mukuyuni Nabing'eng'e Milima Maliki

	Ndalu	24,516	4	Muliro Tabani Ndalu Mulembe
	Tongaren	39,308	5	Binyenya Kakamwe Mabusi Tongaren Lukhuna
	Soysambu	33,409	5	Mitua Soysambu Narati Misanga Nalondo

From the table above it is clear that *Malakisi/South Kulisiru* with a population of **40,652**, was given 6 administrative units just like *Lwandanyi* with a Population of **46,141**. Indeed from a clear perusal of the table it is evident that the ward was given the highest number of administrative units in the County.

From the above table I am not persuaded that the petitioners or their ward was denied any privilege or right which was available to all the other wards in the County when delineating the village units. I therefore do not find any act of discrimination on the part of the Respondents. Consequently this petition and the application filed by the Petitioners is found without merit and is dismissed. Each party to bear its own costs.

Dated and Delivered at Bungoma this 21st day of May, 2019.

S.N. RIECHI

JUDGE