



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CONSTITUTION PETITION NO. 8 OF 2016**

**IN THE MATTER OF RULE 23 OF THE CONSTITUTION OF KENYA  
(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PRACTICE  
AND PROCEDURE) RULES, 2010**

**AND**

**IN THE MATTER OF ARTICLES 22, 23 (1) & 165 (3) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION  
ACT, 2011**

**AND**

**IN THE MATTER OF THE MATTER OF ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 21, 22, 23, 27, 35, 47, 89 &  
232 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE NATIONAL ASSEMBLY CONSTITUENCIES AND COUNTY  
ASSEMBLY WARDS ORDER, 2012 (LEGAL NOTICE NO. 14 OF 2012)**

**BETWEEN**

**AHMED ISMAEL ADAN.....1<sup>ST</sup> PETITIONER**

**AHMED IBRAHIM IDO.....2<sup>ND</sup> PETITIONER**

**ABDI RAHMAN HUSEIN TEBO.....3<sup>RD</sup> PETITIONER**

**IBRAHIM OMAR WARIO.....4<sup>TH</sup> PETITIONER**

**ABDILADIF ABDULAHI ALI.....5<sup>TH</sup> PETITIONER**

**ABDI IBRAHIM ABDI.....6<sup>TH</sup> PETITIONER**

ADAN AHMED IMARA.....7<sup>TH</sup> PETITIONER

SULEIMAN ABDULAHI GUDOW.....8<sup>TH</sup> PETITIONER

AHMED IBRAHIM MOHAMED.....9<sup>TH</sup> PETITIONER

OMAR HASAN MOHAMED.....10<sup>TH</sup> PETITIONER

AND

1. THE REGIONAL CO-COORDINATOR, NORTH EASTERN REGION (NER).....  
.....1<sup>ST</sup> RESPONDENT

2. THE COUNTY COMMISSIONER, WAJIR  
COUNTY.....2<sup>ND</sup> RESPONDENT

3. CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION OF  
GOVERNMENT...3<sup>RD</sup> RESPONDENT

4. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION  
.....4<sup>TH</sup> RESPONDENT

5. ATTORNEY GENERAL .....  
.....5<sup>TH</sup> RESPONDENT

#### RULING

Before me is an application by way of a Notice of Motion dated 9th of September 2016 filed by the petitioners. Before me also there is a Notice of Preliminary Objection dated 8th November 2016 filed by the 4th respondent the IEBC. This court decided to hear both the application for interlocutory orders and the notice of preliminary objection together.

The application dated 9th September seeks the following orders -

***1. That the application be certified as urgent and be heard forthwith ex parte in the first instance in order to meet the interests of substantive justice.***

***2. That this Honourable court be pleased to grant the applicants conservatory orders by way of injunction restraining the 1st and 4th respondents whether by themselves and or their agents, servants and all employees from releasing, publishing, gazetting and or adopting the boundary identification report of the boundary dispute between Wajir North Constituency and Eldas Constituency until interpartes hearing of this application and or until further orders of this court.***

***3. That this honourable court be pleased to grant the applicants conservatory orders by way of injunction restraining the 1st to 4th respondents whether by themselves or their agents, servants and or employees from releasing, publishing, gazetting and or adopting the boundary identification report of the boundary dispute between Wajir North constituency and Eldas Constituency until hearing and final determination of the petition herein.***

***4. That the applicants be at liberty to apply for further orders and or directions as this honorable court may deem fit and just to grant.***

***5. Costs of this application be provided for.***

The application has grounds on the face of the Notice of Motion. It was also filed with a supporting affidavit sworn by Ahmed Ismael Adan on 9th September 2016. Before the application was heard interpartes, this court granted prayer 2. As such prayer 1 and 2 of the application have already been spent and do not require determination by this court.

As said above in this ruling, before me is also a notice of preliminary objection filed by the 4th respondent the IEBC dated 8th of November 2016. The preliminary objections are in the following terms.

- 1. The petition herein is less judicata miscellaneous application No. 94 of 2012 Republic Vs. Independent Electoral and Boundaries Commission and another Exparte Councilor Eliot Midugwi Kihusa & 5 others [2012] eKLR and therefore contravenes the provisions of section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya and the Constitution.***
- 2. That the petition together with the application herein is time barred under Article 89 (11) of the Constitution.***
- 3. That this Honourable court lacks jurisdiction to hear this petition together with the application herein.***
- 4. That the petition together with the application herein as drawn and filed does not disclose any cause of action, is barred in law, incompetent, frivolous, vexatious, has no merits and is otherwise an abuse of court process and should be dismissed in demeanor with costs to the 4th respondent. “***

By consent of the counsel who appeared before me, counsel for the respondent submitted on the Notice of Preliminary Objection first and then counsel for the petitioners made submissions on the application followed by the other counsel. Counsel on all sides referred to several case authorities.

I will start with preliminary objection. The first item of the objection is that the matter is res judicata under the provisions of section 7 of the Civil Procedure Act. Indeed, section 7 of the Civil Procedure Act provides that where a matter has been heard and determined substantively by a court of competent jurisdiction, and the parties and subject matter is the same then such matter should not be brought back to any court for hearing and determination. This provision of the law is meant to avoid abuse of the process of the court and also meant to protect litigants or parties from being dragged to court over and over again on the same matter.

I have considered the arguments on all sides and in my view the issue herein is not res judicata. What the petitioners are complaining about are specific actions being undertaken in Wajir and Eldas in 2016. It is not the same exercise that was done in 1989 or 2012. Res judicata will apply to those actions that were taken up to the time of that decision, it would also apply to directions of the court of what should thereafter happen. It has to be very clear what the determination was. The person who claims that something is Res judicata has to demonstrate what is covered by that Res judicata.

Same parties can litigate in court over various matters arising at various times, and a mere similarity does not create Res judicata. In my view, the 4th respondent has not demonstrated that this matter is Res judicata. I dismiss that objection.

The second preliminary objection is that the application is time barred under article 9 (11) of the Constitution. This article provides as follows:-

***“An application for the review of a decision made under this article shall be filed within 30 days of the publication of the decision in the gazette and shall be heard and determined within 3 months of the date on which it is filed.”***

Again on this point of objection, the 4th respondent has not specifically said which decision of the 4th respondent was published in the Kenya Gazette and when, in order to support their argument that this

application is a challenge to such publication of their decision and was filed more than 30 days after such publication to render the proceedings time barred. I dismiss this ground of objection.

The third preliminary objection is that this court lacks jurisdiction to hear the petition all together with the application herein. Counsel for the 4th respondent has argued strongly that jurisdiction is conferred on this court by the Constitution and written law. Counsel has argued that anything to do with limitation of Electoral boundaries is a function of the 4th respondent under Article 89 of the Constitution and the court cannot interfere with such an exercise nor stop it, and that the jurisdiction of this court arises only when a decision has already been made by the 4<sup>th</sup> respondent and published.

Indeed, where the 4th respondent is carrying out its own constitutional functions of determining and reviewing electoral boundaries this court cannot have jurisdiction to interfere with that exercise. However where there are other institutions operating as if they are carrying out the functions of the 4th respondent, in my view the court can enquire into the matter to determine whether the exercise is an independent exercise being done by the 4th respondent. To that extent the court will have jurisdiction to hear the matter.

In the circumstances of the present case, I find that this court has jurisdiction to inquire into this matter because there appears to have been initial steps taken by the executive arm of Government to initiate the action that are complained of. It is thus the function of the 4th respondent to clarify to the court what is actually happening to ensure that justice is done in accordance with the requirements of the law and Constitution. The Constitution of Kenya 2010 requires all institutions including the 4th respondent to comply with constitutional provisions. Where there is any dispute regarding such compliance with the Constitution, then the proper forum for determination of such dispute is obviously the courts. I dismiss the objection.

The fourth and last point of objection is that the petition and application do not disclose the cause of action, are incompetent, bad in law, frivolous and vexatious and an abuse of the process of the court. In my view, the petition herein and the application raise important issues requiring the court to interrogate them and reach a decision. The said issues cannot be said to be frivolous and vexatious. The mere fact that a suit is unlikely to succeed does not make it frivolous, provided it raises arguable points. I dismiss that objection.

Coming to the Notice of Motion, the applicants or petitioners are now seeking substantive prayer No. 3 for conservatory orders by way of injunction to restrain the 1st to 4th respondents from releasing, publishing, gazetting and or adopting a boundary identification report of the boundary dispute between Wajir North Constituency and Eldas Constituency until the determination of the petition. In the supporting affidavit, they have annexed minutes of a meeting held on 6th November 2015. The said minutes indicate boundary dispute between Wajir North and Wajir West.

The minutes appear to relate to administrative units of chiefs. They highlight the history on settlement of people and their movement. Those have nothing to do with involvement of the 4th respondent as is graphically put in the petition and in the application. In my understanding the creation of administrative units headed by chiefs and DO's is not a function of the IEBC. It is a function of the National Government for their own service delivery. Therefore any disputes that arise there from cannot and should not be translated into electoral disputes or constituency disputes.

The first requirement for an application for interlocutory conservatory orders is that the applicant should demonstrate a prima facie case with probability of success. With the facts presented before me at present, there seems to be a mix up between disputes of an administrative nature and disputes of election boundary nature. In this country, as provided by the Constitution people are free to move and live where they like for as long as they want to live there and they can continue moving to other parts. In short there is freedom of abode.

From the facts placed before me presently, there is no disclosure or demonstration of an election boundaries dispute or activity that would give the petitioners or applicants probability of success in this

matter. They have mixed up many issues and in my view they have not demonstrated that dispute herein has probability of success. On that account in my view the application will fail.

The other ground on which such an application is considered is whether the applicant and perhaps the broader public will suffer irreparable or substantial loss if the orders sought are not granted. In my view if the applicants had demonstrated a prima facie case with probability of success, the answer to this issue would have been in the affirmative. However since they have not demonstrated that they have a case with probability of success in the cause of action that they have brought, I find that they will not suffer irreparable or substantial loss if the orders are not granted.

On the balance of convenience, in my view the balance is in favour of the respondents. They are public institutions required to perform public duties, some of which are Constitutional, some of which are statutory, some of which are administrative, all for the broader benefit of the citizens or public. They can only be prevented from doing what they should do if there exist justifiable reasons. Preventing the release or publishing or gazzeting or adopting a boundary identification report in my view is illogical. Such report is better published so that if there are any disputes or grievances they can then be addressed by those who are adversely affected in order to correct mistakes or injustices if any.

To conclude, I find no merits in the application. I dismiss the Notice of Motion filed by the petitioners dated 9th September 2016 with costs to the respondents. In case any interim orders were issued herein, the same are hereby vacated. It is so ordered.

**Dated and delivered at Garissa this 13th day of January, 2017**

**GEORGE DULU**

**JUDGE**