



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 39 OF 2015

(ARTICLES 10,22,23 & 47 OF THE CONSTITUTION

AND

IN THE MATTER OF IBENCHO DIVISION OF GUCHA DISTRICT

(BOMACHOGE CHACHE SUB-COUNTY)

AND

IN THE MATTER OF SECTION 19(6TH SCHEDULE) OF THE CONSTITUTION OF KENYA

BETWEEN

JOHN MOSINGI MARUBE.....PETITIONER

-VERSUS-

COUNTY COMMISSIONER KISII COUNTY.....1ST RESPONDENT

CABINET SECRETARY INTERIOR &

COORDINATION OF GOVERNMENT.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. This petition dated **14th August 2015** is made by **John Mosingi Marube**, a Kenyan citizen resident within **Ibencho location** who comes to this court pursuant to **Articles 10, 22, 23 and 47** of the Constitution of Kenya 2010, and **Section 19** of the Sixth (6th) schedule of the Constitution of Kenya, 2010. He seeks orders against the three respondents viz County Commissioner **Kisii County**, Cabinet Secretary Interior and Coordination of Government and the Hon. The Attorney General of the Republic of Kenya to the effect that:-

- a. An order of judicial review do issue to quash the advertisement of the county commissioner **Kisii County** dated **25th May 2015**, advertizing vacancies in the posts of chief **Bosoti location**, assistant chief **Nyabioto sub-location** and assistant chief **Mogambi sub-location** respectively.

- b. An order of injunction do issue to restrain the first and third respondents either by themselves, servants, agents and/or officers working under them and/or whoever working under their authority and/or command from interfering with the boundaries of Gucha District (Bonachoge Chache Sub-county) as established by the Independent Electoral & Boundaries Commission.
- c. A declaration that **Ibencha Bosoti location** and **Nyabioto sub-location** and **Mogambi sub-location** are within the administrative boundaries of **Bomachoge Chache** sub county (**Gucha District**).

2. The facts giving rise to the petition are simply that on the **25th May 2015**, the first respondent advertized a vacancy for the position of chief of **Bosoti Location** purportedly of **Kenyanya District** of **Kisii County** and two vacancies for the positions of assistant chief for **Nyabioto sub-location** of **Ibencho location** and **Mogambi sub-location** of **Ibencho location**, all of **Ibencho Division** purportedly of **Kenyanya District**, whereas an earlier advertisement dated **7th March 2012**, the District Commissioner **Gucha District** had advertized vacancies for chief, **Bosoti location** of **Sengera Divison** of **Gucha District** and Assistant Chiefs **Mogambi Sub-location** of **Ibencho location** and **Nyabioto Sub-location** of **Bosoti location**, both of **Sengera Division** of **Gucha District**. Consequently, a material contradiction arose in the two advertisements regarding the administrative location in terms of sub counties to which **Bosoti location** and **Mogambi and Nyabioto Sub-locations** belong.

3. It is therefore the petitioner's contention that his legitimate expectation to a fair administrative action and service delivery by government institutions in his area of abode has been undermined and that the exercise of authority by the first respondent in making the advertisement aforementioned falls within the realm of the expectations under **Article 2** of the Constitution of Kenya and therefore a violation of the supreme law. The Petitioner further contends that the decision of the first respondent is contrary to the law and offends the petitioner's right to a fair administrative action enshrined under **Article 47** of the Constitution of Kenya in that '*inter-alia*' the residents of the affected administrative boundaries were not consulted.

4. It is also the petitioner's contention that the decision of the first respondent is arbitrary, unjust, unreasonable and unjustified and equally un procedural in a democratic society and contrary to national values espoused under Article 10 of the Constitution. That, the decision offends the administrative structures agreed by the people affected by it and also offends the values and principles of the Constitution and particularly **Article 1** of the Constitution on the sovereignty of the people. That, the decision is self serving, politically motivated, contradicts government policy and a recipe for chaos and should therefore be quashed for being illegal, void and contrary to the law. That, the second respondent failed to give sound advice to the first respondent to undo and/or reverse the disputed advertisement despite several demands made to do so.

It is for all the foregoing reasons that the petitioner moved the court.

5. The petition is supported by the facts and averments contained in a supporting affidavit deponed by the petitioner dated **14th August 2015**.

A Notice of Motion dated **14th August 2015**, was contemporaneously filed with the petition seeking conservatory orders by way of a temporary injunction restraining the respondents either by themselves, servants, agents and/or any officer, working under them and/or under their directions from processing and filling the position of chief **Bosoti location** and assistant chiefs, **Nyabioto** and **Mogambi sub-location** of the alleged **Kenyanya District** pending firstly, the hearing and determination of the application and secondly, the hearing and determination of the petition.

Prayers one and two of the application were granted by this court on **18th August 2015** ex-parte the respondents. We are at this juncture concerned with prayer three (3) only which is for a conservatory order pending the hearing and final determination of the petition.

There are for (4) grounds upon which the application is made. These are that the disputed decision and/or action is firstly, contrary to the law and offends **Article 47** of the Constitution. Secondly, arbitrary, unjust, unreasonable, unjustified and also un-procedural in a democratic society. Thirdly, offends governments policy, the existing administrative and political boundaries, values, objects and principles of the Constitution and fourthly, illegal, void and contrary to the letter and spirit of the law.

6. The grounds are fortified by the averments and annexures contained in the supporting affidavit dated **14th August 2015** and a further supporting affidavit dated **5th November 2015**.

The respondents filed a replying affidavit dated **21st October 2015**, deponed by **Chege Mwangi**, in opposition to the application. **Philip Omwanicha**, entered appearance in this matter as an interested party. He also filed a replying affidavit in opposition to the application. It is dated **26th October 2015**. The application was essentially argued by way of written submissions and in that regard, submissions were filed on behalf of the petitioner on the **8th December 2015** by the firm of **Aboki Begi & Co. Advocates** and on behalf of the respondents on the **14th January 2016** by **the Attorney General** and on behalf of the interested party on 20th January 2016, by the firm of **J.O. Soire & Co. Advocates**.

7. This court has given due consideration to the rival submissions as well as the grounds in support of the application and those in opposition thereto. It is abundantly clear that the petitioner feels most aggrieved with the arrangement or structuring of the administrative districts or sub-counties within the county of Kisii and more so, with regard to **Gucha and Kenyenia Districts** either which is said to comprise the disputed Bosoti location and the disputed **Nyabioto and Mogambi sub-location**.

The advertisements on which this petition is essentially anchored seem to have aggrieved the petitioner by their contradictory nature in suggesting that the aforementioned disputed location and sub-location are in **Kenyenia District** rather than **Gucha District** and also in suggesting that initially the locations were classified as part of **Gucha District** but later they were transferred to and classified as part of **Kenyenia District** without necessary public participation nor consultation.

8. Be that as it may, all sovereign power belongs to the people of Kenya exercisable only in accordance with the constitution through delegated authority donated to state organs such as the executive, the legislature and the judiciary. Being the Supreme Law, the constitution binds all persons and all state organs at both levels of government (see, **Article 1** and **2** of the Constitution).

Therefore, if any state organ does or purports to do an act in a manner which does not fall within the constitutional prescription, then that action would be unlawful and/or unconstitutional. In that event, any person would be at liberty to move a court for necessary remedy which may include a declaration of rights, an injunction or even a conservatory order “*inter-alia*”. (see, **Article 23** of the Constitution). The petitioner has thus brought this petition citing **Article 10** and **47** of the Constitution together with **Section 19** of the Sixth (6th) schedule of the Constitution.

9. Under **Article 10** of the Constitution, the national values and principles of governance include devolution of power, the rule of law, participation of the people, good governance, integrity, transparency and accountability “*inter alia*” These values and principles bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

Article 47 of the Constitution provides for fair administrative action in that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

10. In his supporting affidavit dated **14th August 2015**, the petitioner implies that the respondents have violated or are in the process of violating **Articles 10** and **47** of the Constitution in their alleged attempt to shift administrative units from **Gucha District** to **Kenyenia District** without consultation or public participation and without keeping to defined administrative structures or values and principles of good governance or adhering to the set government policy. It is the petitioner’s contention that the alleged

violation is manifested by way of the disputed advertisements. He therefore seeks remedy in the form of junction review to quash the advertisement dated **25th May 2015**, injunction to restrain the first and third respondents from interfering with the boundaries of **Gucha District (Bomachoge Chache Sub-county)** as established by the Independent Electoral Commission [I.E.B.C.] and a declaration that the disputed location are within the administrative boundaries of **Gucha District** or **Bomachoge Chache sub-county**.

11. These are the ultimate remedies being sought by the petitioner. The remedy being sought at this juncture by way of the present application is a conservatory order by way of a temporary injunction to restrain the respondents from processing and filling the positions of chief of **Bosoti location** and assistant chief of **Nyabioto** and **Mogambi sub-location** (i.e the disputed locations).

It is pre-supposed that the filling of the said positions as advertized on **25th May 2015** rather than on the **7th March 2012**, would translate to a transfer of the disputed locations from **Gucha** to **Kenya Districts** without following lawful procedure. The big question is whether the petitioner is entitled to a temporary injunction order pending full hearing and final determination of the petition.

12. The primary task of any court is basically to provide a full scale and impartial hearing of a case before determining its final decree and order. This process is normally conducted through evidence and submissions and leads towards an ascertainment of the justice of the case which emerges from the main cause by which the court has been moved in the first place. It is this principle which would guide any court in the discharge of its constitutional mandate of dispute resolution. Temporary or interim or interlocutory orders are legally permissible within the parameters available under the civil law. What is being sought herein is a temporary injunction order which is provided for under **Order 40** of the **Civil Procedure Rules, 2010** and has the effect of affording a party a preliminary relief before a full trial.

13. By definition, a temporary injunction is a provisional order to restrain the doing of a particular act or to require a certain state of affairs to be altered for the time being, either until the trial of the suit, or until further order. (see, **Principles of injunctions by Richard Kuloba**).

The grant of such injunction is discretionary and since it has the potential to bear a permanent effect, the court must be extremely careful in exercising its discretion to ensure that the justice of the case is not compromised at an interlocutory stage. It is for this reason that guidelines for grant of such injunctions were set out in cases such as **American Cyanamid Co. .vs. Ethicon Ltd [1975] A.C. 396** and **Giella - vs- Cassman Brown & Co. Ltd. [1973] EA 358**.

In our context, the law applicable is as set in the case of **Giella .vs. Cassman Brown**. This is the threshold case on interlocutory injunctions in East Africa. It was therein held by the East African Court of Appeal that:-

“The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a “prima-facie” case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is doubt, it will decide an application on the balance of convenience.”

14. These conditions have somehow been extended in areas of public law such as the present petition where the “*conservatory order*” notion exists. Such an order is essentially an injunctive or stay order aimed at non private parties who are in the cause of discharging their own respective mandates based on the Constitution or on Statute law.

The petitioner has thus moved this court on an interlocutory basis seeking a suspension of such discharge of mandate pending full hearing of the main petition. Here, we are concerned with public bodies which have public interest based mandates traceable to the sovereignty of the people stipulated under **Article 1** of the Constitution. In the case of **Flemish Investments ltd .vs. Town Council of Mariakani MSA HCCC No. 459 of 2010**, the High Court (**Ojwang J.**) (**as he then was**), brought in the aspect of public interest in determining whether or not a temporary injunction ought to be granted.

15. It was thus observed in *Flemish Investments Ltd (supra)*, that the court must be guided by two considerations, as it applies the standard tests set out in **Giella .vs. Cassman Brown** (*supra*) for the grant of equitable injunctions. These two considerations are:-

- a. The main cause entails a sharp and lively contest, with “*prima-facie*” well matched stamina.
- b. The presence of any special factor which may call for judicial notice and in this regard the special favor is the nature and standing of the public or community interest.

The court also observed that the existence of a meritorious community interest is a factor to take into account in determining whether an interlocutory injunction should be granted in favour of a “*private*” party and where “*prima facie*” such a public or community interest is a weighty one, it is undesirable for the court to pre-determine the question by granting an interlocutory injunction that re-arranges the position on the ground. The case, *Flemish Investments*, did therefore underline the vital principle that public interest is to be treated with deference before granting an interlocutory injunction.

Similarly, any contemplation of “*conservatory order*” touching on a duly empowered constitutional agency that is performing its normal task, ought to be sensitive to the respective mandates bestowed by the Constitution separately on each state agency (see, “**court process pending full trial**,” a paper presented at the judges’ forum on “**emerging issues in the interlocutory injunctions practice and jurisprudence**” at the Judiciary Training Institute – **14th March 2014**, by (**Hon. Justice (Prof) J.B. Ojwang, Judge of the Supreme Court of Kenya**).

16. In reference to conservatory orders, the Supreme Court of Kenya in **Petition No. 2 of 2014, Gatirau Peter Munya .vs. Dickson Mwenda Kithinji & two others**, held that:-

“Conservatory orders bear a decided public law commutation for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the courts, in the public interest. Conservatory orders therefore, are not unlike interlocutory injunctions linked to such private party issues as the prospects of irreparable harm occurring during the pendency of case or high probability of success in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant cases.”

17. Coming back to **Giella .vs. Cassaman Brown (supra)** and with regard to the first condition for grant of a temporary injunction the definition of a “*prima-facie*” case was given in the case of **Mrao Ltd .vs. first American Bank of Kenya Ltd & Others (2003) eKLR**, as follows:-

“A prima-facie” case in a civil application includes but is not confined to a “genuine and arguable case”, it is a case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter.”

Herein, the petitioner is aggrieved by the two contradictory advertisements placed by the respondents at different times and in particular the later advertisements dated **25th May, 2015**. His concern is that the advertisements have the effect of altering the administrative boundaries of **Gucha** and **Kenyenya**. However, he has not shown the interest or right which he has in the advertisements and their intended objective thereof. He cannot allege without proper evidence that the advertisements are a “**short cut**” taken by the respondents to alter the administrative boundaries and/or locations of the two districts. It is instructive to note that we are not herein talking about the electoral boundaries of the various constituencies situated within Kisii County but administrative boundaries and locations which are a preserve of the national government though the provisional administration system which was not abolished by the Constitution but was to be restructured within five years after the effective date to accord with and respect the system of devolved government established under the Constitution (see, **Section 17 of the sixth (6th) schedule of the Constitution**).

Whether the restructuring has been effected by the Executive or it is ongoing is another issue. It remains to be seen whether the disputed advertisements are part of the re-structuring process by way of creating new administrative units or altering the existing units or locations. In the circumstances, it is doubtful whether a “*prima-facie*” case with probability of success has been established.

18. In any event, and most important, any issue pertaining to the creation or, alternation of administrative locations is very weighty inasmuch as it is a matter of public interest which is defined as the general welfare of the public that warrants recognition and protection. It is something in which the public as a whole has a stake especially an interest that justifies governmental regulation (see, **Black’s law Dictionary, 8th edition**).

The Constitutional Principle of separation of powers would be comprised if one state organ were to stray into the core agenda of another or into the prescriptions of procedures and modalities for the discharge of functions in another.

Constitutional functions undertaken by various state organs are intended to serve the public interest, so that the due discharge of any public interest tasks merits special protection over the perceived private right of one individual.

It would therefore not be in the public interest nor would it be consistent with constitutional principle for the courts to readily issue conservatory orders such as would have the effect of staying due motions of core constitutional function or other functions for the facilitation of primary constitutional functions.

In sum, conservatory orders are not for granting where the effect is to stay the due discharge of a clear constitutional function.

19. Justice will not be seen to have been done if the court is to settle the case in one way or another, at this stage without fully interrogating all the issues raised by each of the parties.

The Constitutionality or otherwise of the disputed advertisements or the appointing processes which are a function of the national government or executive in which the respondents belong cannot be fully addressed without a full hearing of the petition. An informed decision of the court will result only if all the parties table their evidence at the hearing.

It is for all the foregoing reasons that this court must find that the present application is lacking in merit. It must and is hereby dismissed with costs to the respondents and interested parties.

Ordered accordingly.

J.R. KARANJA

JUDGE

[Delivered and signed this **10th** day of **March 2016**].