



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL PETITION NO. 16 OF 2016
(Formerly Malindi Petition No. 9/2016)

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FRFREEDOMS UNDER ARTICLE 88(4) AND 89(3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED VIOLATION OF ARTICLE 1, 10, 12, 258 AND 260 OF
THE CONSTITUTION OF KENYA

AND

BETWEEN

1. RISHAD HAMID AHMED

2. ALI BAKARI MOHAMED.....PETITIONERS

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

IN CROSS PETITION

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....PETITIONER

AND

1. RISHAD HAMID AHMED

2. ALI BAKARI MOHAMED.....INTERESTED PARTIES

JUDGMENT

Introduction

1. This Judgment relates to –

(1) the Petition dated and filed on 13th April, 2016 and in which Rishad Hamid Ahmed and Ali Bakari Mohamed (the Petitioners), against the Independent Electoral and Boundaries Commission (the Respondent); and

(2) the Cross-Petition filed on 26th April, 2016, but undated by the Independent Electoral and Boundaries Commission against the Attorney-General as Respondent, and Rishad Hamid Ahmed First Interested Party and Ali Bakari Mohamed, Second Interested Party (the Cross-Petition).

The Petition

2. The Petition is grounded upon the averments in the face thereof, and which averments were affirmed by the Affidavit in support of the Petition sworn on 13th April, 2016 by Ali Bakari Mohamed, the Second Petitioner. The principal grounds of the Petition are set out in paragraphs 11 – 17 of the Petition, and concern alleged breaches by the Respondent of Articles 8(4)©, 89(3), 22, 38, 47, 55 and 56 of the Constitution of Kenya 2010, and ultimately claims the reliefs following –

(1) a declaration that the Respondent violated the constitution and the law in delimiting the wards in [Lamu County];

(2) a conservatory order to restrain the Respondent from carrying out voter registration pending the hearing and determination of the Petition;

(3) an order directing the Respondent to conduct a review of the wards in Lamu County urgently before August, 2016, or within a reasonable period;

(4) costs of the Petition;

(5) any other relief the court shall deem fit to grant.

The Cross-Petition

3. In answer to the Petition, the Respondent did not only file a Replying Affidavit sworn by Moses Kipkosgei, the Respondent's Senior Legal Officer on 19th April, 2016, but the Respondent also filed on 26th April, 2016 and stated that the Respondent opposed the Petition on the ground that the Petition was based on Section 26 of the County Governments Act, which (section) is unconstitutional because it violates Articles 88, 89, 90 and 249 of the Constitution of Kenya 2010. That was the basis of a sole prayer in Cross-Petition, a declaration that Section 26 of the County Governments Act is unconstitutional and therefore null and void.

4. In addition to the Grounds of Opposition dated 25th April, 2016 and filed on 26th April, 2016, the Respondent also filed a Replying Affidavit sworn on 19th April, 2016 by Moses Kipkosgei, its Senior Legal Officer both opposing the Petition.

The Issue

5. The sole issue for determination in both the Petition and the Cross-Petition is whether Section 26 of the County Governments Act violates provisions of Articles 88, 89, 90 and 249 of the Constitution of Kenya 2010, and is therefore unconstitutional null and void. To answer this question, I set out in the paragraphs following the arguments and/or submissions by respective counsel for the Petitioner and the Respondent/Cross-Petitioner.

The Petitioners' Case

6. The Petitioners' case in the Petition, and Cross-Petition was urged by Mr. Aboubakar and Mr. Nyandi. Counsel submitted that there were two issues for determination. I have already stated the first issue, a declaration that the Respondent, the Independent Electoral and Boundaries Commission, violated the constitution. The second prayer is for an order directing the Respondent to review the number of Electoral Wards in Lamu County.

7. The Petitioners' case, counsel submitted is focused upon the provisions of Article 38(2) of the Constitution which guarantees **every citizen** the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for –

(a) any elective public body or office established under the Constitution;

(b) any office of any political party of which the citizen is a member.

8. Counsel submitted that the definition of **“free, fair and regular”** elections is wide, and that to give true meaning to the expression Section 38(2) must be read together with the principles of an electoral system set out in Article 81 and which are –

(a) freedom of citizens to exercise their political rights

under Article 38;

(b) not more than two thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities;

(d) **universal suffrage based on the aspirations for fair representation and equality of vote;**
and

(e) administering an impartial, neutral, efficient, accurate and accountable manner.

9. In order to ensure fair representation and equality of votes, counsel submitted the delimitation of electoral units is central and that Article 89 of the Constitution was critical.

10. In this regard counsel argued, Article 89(3) mandates the Respondent **“to review the number, names and boundaries of wards periodically”** and Article 89(8) mandates the Respondent to carry out the delimitation of boundaries whenever necessary and this was done in March, 2012, when the results of the delimitation of boundaries was gazetted on 9th February, 2012. Counsel submitted that the Petitioners have come to court in exercise of their rights under Article 89(10 & 11), seeking orders to compel the Respondents to review delimitation of boundaries. This has become necessary because of the enactment of the County Governments Act, 2012, Section 26(2) of which grants each county a minimum of fifteen Wards.

11. The County of Lamu, counsel submitted was granted ten and not fifteen Wards so that when the general elections were conducted in March, 2013, only ten Wards were in existence, and therefore held elections. Counsel concluded that because the Respondent failed to conduct a review in accordance with the provisions of Section 26(2) of the County Governments Act, 2012, it violated the Petitioners' rights to fair and free elections in terms of Articles 38, 81 and 87, which when read together constitute fair and free elections.

12. It is for this reason, counsel urged the court to grant the order for review in accord with the principles of the Constitution regarding fair and free elections.

13. In answer to the Cross-Petition counsel submitted that the Petition was not **res judicata**. Counsel

submitted that Section 26(1) of the County Governments Act is not unconstitutional. The Section is not, counsel submitted, made under Article 89 of the Constitution which limits the numbers of constituencies. There is no limitation, counsel submitted to the number of Wards. Article 82(1), counsel urged, allows Parliament to enact legislation for delimitation of boundaries for national and county assemblies. Section 26(2) was enacted pursuant to the said provision and is not inconsistent with the Constitution, and therefore not void under Article 2(4) of the Constitution.

14. The **second** issue connected with the question of constitutionality of Section 26(2) of the County Governments Act, is the question of the formula to be used in delimitation of boundaries. The formula and principles for delimitation of boundaries set out in Article 89(5) and (6) must be considered together with the general principles for the electoral system set out in Article 81 as fair representation on equality of votes alone would not allow for free and fair delimitation of boundaries, hence the need for consideration of geographical features, and urban centres, community of interest, historical, economic and cultural ties, and means of communications, as set out in Article 89(5). Section 26 of the County Government Act was specific, that it was to apply before the elections of 2013, and was not one of those provisions whose application was suspended under the Second Schedule to the Constitution.

15. On the Cross-Petition counsel submitted that the Cross-Petition be dismissed. The Respondent/Cross-Petitioner has invoked Articles 38, 81 and 89 of the Constitution, and on matters jurisdiction, this is the proper court under Articles 22, 23 and 165 of the Constitution and urged the court to allow the Petition.

The Respondent's Case

16. Miss Nyamoti urged the case against the Petition, on behalf of the Respondent, and the Cross-Petition on behalf of the Respondent/Petitioner. In this regard, counsel relied upon Replying Affidavit of Mohameed Jabane, its Manager, Legal Services, sworn on 29th April, 2016 and filed on 3rd May, 2016. Counsel also relied upon the Respondent's Cross-Petitioner's submissions and Grounds of Opposition dated and filed on 25th April, 2016, and the Respondents/Cross-Petitioners submissions dated 17th June, 2016, and filed on 21st June, 2016. Counsel urged the court upon considering those grounds and the authorities cited, to dismiss the Petition.

Cross-Petition

17. On the Cross-Petition, Miss Nyamoti urged the court to construe Article 88(4) (e) and 89 of the Constitution together with Sections 27 of the Sixth Schedule to the Constitution. On the facts counsel submitted that the Respondent/Cross-Petitioner published Legal Notice Number 14 of 2012, the National Assembly Constituencies and County Assemblies Wards and which contained the Commission (Respondents) decision on the delimitation.

18. The publication of the Legal Notice marked the end of the first delimitation process, and thus led to the coming into force or effect of the time lines set out in the Legal Notice.

19. It was counsel's submission that on 9th March, 2013 the date of the announcement of results of the first elections under the Constitution, the County Governments Act 2012 came into operation. The County Government Act 2012 set out the number of Wards in each County and an additional criteria for delimitation of boundaries, and this is the basis of the Cross-Petition herein. Section 286 of the County Governments Act imposes a figure of the minimum number of Wards in any constituency, and this is what the Cross-Petition is all about. As provided by the Constitution, the mandate to create Wards and delimitate boundaries is dealt with at the constituency level. And Article 89(2) requires the Commission to progressively work towards realization of equality between the Wards. In accord with paragraphs 109, 110 and 111 of the Commission's written submissions, counsel submitted that Wards existing in Lamu County are adequate. Counsel agreed with submissions of counsel for the Petitioners that review is periodic and regular but that the County Governments Act did not apply to the election prior to its coming into effect after the general elections.

20. Counsel submitted that the views and comments of these Petitioners can only be considered during the

next delimitation process, and the court is not in a position to provide an answer to these Petitioners' prayers. The County Governments Act is subordinate legislation to the Constitution and the court cannot give directions or orders contrary to the Constitution.

21. Further, counsel submitted the Petition herein is **Res Judicata**, the issues raised were directly and substantially canvassed in the case of **REPUBLIC vs. INDEPENDENT ELECTORAL BOUNDARIES COMMISSION, ex parte Councillor Elliot Lidumbwi and 5 others [2012]eKLR**.

22. On matters of jurisdiction, counsel submitted that the court lacked jurisdiction under Article 89(1) of the Constitution, and that Section 26 of the County Governments Act, is not unconstitutional and urged the court to dismiss the Petition and allow the Cross-Petition.

Submissions by Attorney-General on the Petition

23. Though not a party in the Petition, but a Respondent in the Cross-Petition, I allowed the representative of the Attorney-General to submit on the Petition (as a friend of the court- *amicus curiae*) as well as the Respondent in the Cross-Petition. Mr. Makuto, Litigation Counsel submitted on the Petition while Mr. Mutinda, Senior Principal Counsel submitted on the Cross-Petition.

24. Counsel submitted that in terms of Article 89(11) of the Constitution, a challenge upon a decision of the Respondent on the names and number of boundaries published under Article 89(a) shall be made within thirty days of the publication of the decision in the Gazette and is required to be heard and determined within three months of the date on which it is filed.

25. Article 89(11), counsel submitted, has strict timelines, and that the Petition herein having been filed after four years is time-barred.

26. Counsel also noted that the Petitioner admits that Nairobi Petition Number 84 of 2012, where the Petitioner was listed at paragraph 304, and was determined in Petition Number 28 of 2012. The court found that the delimitation of Ward boundaries in Lamu constituency has already been determined, and that as such the Petition herein is **Res Judicata**.

27. While admitting that Section 26(2) of the County Governments Act permitted Lamu County to have fifteen Wards, that Act was however amended by the Statute Law (Miscellaneous Amendments) Act, which was assented to on 22nd April, 2016 and commenced on 10th May, 2016. Counsel therefore submitted that in the circumstances, the Petition was overtaken by events that leaves the County of Lamu with ten Wards. The County Governments Act, came into effect after the first General Elections under the new Constitution. Counsel relied on the Gazette Notice Number 3155-3160 which indicate also final results of the First General Elections held on 4th March, 2013.

28. Under Section 1 the County Governments Act, counsel submitted, came into operation on 13th March, 2013, and that at the time the Act came into effect, the delimitation process had already been done, elections had been held, and results announced. Section 26(2) which came into force on 13th March, 2013, did not guide or apply to the delimitation process, it was already spent by the time it came into force. In summary, counsel submitted, the County of Lamu qualified to have ten Wards.

29. Counsel submitted that the procedure for review is set out under Article 89(2) of the Constitution, and Section 26(1) of the County Governments Act, and population is the critical factor in the process of review. So that if the figures prevailing in the year 2012 were used today, the result would be the same. Counsel consequently concluded that the Petitioner had not proved its case.

30. On Article 89(8) which empowers the Respondent to alter the names and boundaries of constituencies, and number, names and boundaries of Wards, counsel submitted that this provision only comes into effect following a regular and periodic review contemplated in Article 89(3) of the Constitution. Once again, the Petition fails on this ground again.

Cross-Petition

31. Mr. Mutinda argued the Cross-Petition by the Independent Electoral Boundaries Commission. The main point counsel submitted is fair representation and equality of votes in terms of Article 81(d) of the Constitution but that this Article has to be read together with Article 89(9) and 89(4) and subject to Article 89(2) that review of constitutional and Ward electoral boundaries, at intervals of not less than eight years and not more than twelve years, and any review shall be completed at least twelve months before a general election of Members of Parliament. The Cross-Petition therefore raises three grounds –

(1) that Section 26(1) of the County Governments Act is part of the law of Kenya;

(2) Article 27(4) is not a fetter upon the Respondent, but must be applied in the course of any review and delimitation of boundaries;

(3) Section 26 of the County Governments Act, must be applied progressively to achieve fair representation, but would not therefore apply to the first general election under the new constitution;

(4) both the Petition and Cross-Petition cannot be granted because the 2013 General Elections will be the first elections under the County Governments Act, and will therefore trigger the application of Section 20(2) of the said Act;

(5) one cannot therefore say that Section 26(2) is unconstitutional and both the Petition and the Cross-Petition should be dismissed.

Analysis and Determination

32. The essential point raised by both the Petition and the Cross-Petition is whether Section 26 of the County Governments Act 2012, on delimitation of electoral units is inconsistent with the provisions of Article 89 of the Constitution. The collateral issues which are also important are **firstly**, whether the Petition and Cross-Petition are time-barred, and **secondly** whether both the Petition and Cross-Petition are **res judicata**.

33. I will commence with the collateral issues, whether the Petition and the Cross-Petition are time-barred, and whether the Petition and Cross-Petition are **res judicata**.

34. To answer these questions requires a consideration of the relevant provisions of the Constitution relating to delimitation of electoral units. Article 89(1), (2), (3), (4), (5), (6), (7) and (8) provide for procedures and principles for delimitation of electoral units and for resolution of disputes. In this regard Article 89(a) of the Constitution provides –

“89 (1) – (8)

(9) Subject to clauses (1), (2), (3) and (4), the names and details of the boundaries of constituencies and wards determined by the Commission shall be published in the Gazette, and shall come into effect on the dissolution of Parliament first following their publication.

(10) A person may apply to the High Court for review of a decision of the Commission made under this Article.

(11) An application for the review of a decision made under this Article shall be filed within thirty days of the publication of the decision in the Gazette and shall be heard and determined within three months of the date on which it is filed.”

35. The review and delimitation of constituencies and electoral was crystalized and published in the Gazette on 6th March, 2012 as Legal Notice Number 14 of 2012. Any challenge to the said delimitation is required to be brought within thirty days of publication. This means that any Petition challenging the

delimitation as published in the said Gazette ought to have been filed on or before 3rd April, 2012, and determined within three months thereafter, that is on, or before July 5, 2012. Consequently any challenge mounted after the expiry of the said time line of thirty days is **time-barred** and what the statute has debarred cannot be opened by judicial fiat. The Petition herein is like that mounted in High Court Malindi Petition Number 4 of 2015 which is equally time-barred. It is incompetent. It fails on the ground alone.

36. It also fails on another ground. The ground of **res judicata**. The matters raised in this Petition were raised in Petition Number 28 of 2012 in which the question of Wards in Lamu East were considered and found no merit. The same question was raised in the case of **RISHAD HAMID AHMED & 3 OTHERS vs. IEBC & 3 OTHERS (High Court at Malindi Petition No. 9 of 2016)**, which was correctly dismissed on both grounds of **res judicata** and being time-barred. The same principles apply herein. The Petition is both time-barred and **res judicata** and this court has no jurisdiction to entertain cases which are **res judicata**, and time-barred.

37. On the main question on the constitutionality of Section 26 of the County Governments Act, 2012, it is necessary to look at the provisions of Article 89 of the Constitution which relate to the delimitation of boundaries, and in this instance Section 89(2), (4), (5), (6) and (7).

Section 89 –

“(1) provides for 290 constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97(1)(a);

(2) provides for review of names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament;

(3) the Commission shall review the number, names and boundaries of wards periodically;

(4) If a general election is to be held within twelve months after the completion of a review by the Commission, the new boundaries shall not take effect for purposes of that election;

(5) [provide for number of inhabitants in a constituency];

(6) the number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than —

(a) forty per cent for cities and sparsely populated areas; and

(b) thirty per cent for the other areas.

(7) in reviewing constituency and ward boundaries the Commission shall —

(a) consult all interested parties; and

(b) progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota;

(8) if necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.”

38. On the other hand Section 26 of the County Governments Act, 2012 provides –

“26. (1) There shall be not more than one thousand four hundred and fifty electoral Wards for purposes of the election of county assembly members;

(2) For purposes of the first general elections under the Constitution, the Independent Electoral and Boundaries Commission (in this Part referred to as the ?Commission?) shall ensure that each county comprises at least fifteen Wards.”

39. And Section 26(3) provides –

“26. (3) The Commission shall review the names and boundaries of Wards at intervals of not less than eight years, and not more than twelve years, but any review shall —

(a) ensure that no county shall comprise less than twenty-five Wards; and

(b) be completed at least twelve months before a general election of county assembly members.

(4) The requirements under subsection (3) above shall not apply to the review of Ward boundaries preceding the first election under this Act.”

40. The accepted principle of law is that until the contrary is proved, legislation is presumed to be constitutional. In the Indian case of **HAMBARDA WAKHANA VS. UNION OF INDIA AIR [1960] AIR 554** the Judges said –

“In examining the constitutionality of a statute, it must be assumed the legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Prescription is therefore in favour of the constitutionality of the enactment.”

41. In the Tanzanian case of **Ndyanabo vs. Attorney-General [2001] 2 EA 485**, the court said -

...until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction. If possible, a legislation should receive such a construction as it will make it operative and not inoperative.”

41. Article 88(5) of the Constitution requires the Commission to exercise its powers and perform its functions in accordance with the Constitution and national legislation. **“National Legislation”** of course means an Act of Parliament, or a law made under authority conferred by the Constitution.

42. In opposition to the Cross-Petition, the Attorney-General argued that Section 26(1) of the County Government Act 2012 seeks to give effect to Article 10(national values and principles) and 27 (equality and freedom from discrimination) and in particular, Article 22(6) –

“(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”

43. Counsel argued that Section 26(2) of the County Government Act therefore provides for equity in the delimitation of Wards, and all this came from a Report of the Task Force on Devolved Government, whose purpose was to help the National Government think through the implementation of devolution, and that the number of Wards having thus been established at 1450, the Respondent cannot turn around and claim that Section 26(1) is unconstitutional.

44. In this regard, I agree with the Petitioners that the number of Wards having been established by the Task Force, and comprised in Legal Notice Number 14 of 2012, cannot now be challenged as being unconstitutional. I reject that aspect of the Cross-Petition.

45. I find a problem with Section 26(3)(a) of the County Governments Act. It purports to grant a blanket figure of twenty five Wards to every County. That provision takes away the discretion granted to the Commission under Article 89(6) (regarding the number of inhabitants in the constituency is to be nearly as possible, equal to the population quota, and taking into account, geographical features, community of interest, historical economic and cultural ties, and means of communication), the number of individuals of a constituency or ward may be greater or lesser than the population quota by a margin of not more than forty per cent for cities, and sparsely populated areas) and thirty per cent for other areas, and Article 89(7) the requirement for consultations, and to progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.

46. To the extent therefore that Section 26(3)(a) of the County Governments Act, 2012 purports to take away the discretion vested upon the Commission under Article 89, and in particular Article 89(5), (6) and (7) of the Constitution it is inconsistent with the constitution and therefore null and void to the extent of the inconsistency.

Determination

47. Having considered the analysis and conclusions reached, I find and hold that –

(a) the Petition is time-barred by the provisions of Article 89(9), (10) and (11) read together;

(b) the Petition is **res judicata**, by virtue of the fact that a similar matter was raised and determined in the case of **Lidumbwi & Others vs. IEBC Constitutional Petition Number 28 of 2012 at Nairobi and Rishad Hamid Ahmed & 3 others vs. IEBC & 2 others High Court at Malindi Petition No. 4 of 2015**);

(c) The Petition is therefore dismissed;

(d) The Cross-Petition is allowed to the extent that Section 26(3)(a) of the County Governments Act is inconsistent with Articles 89(5), (6) and (7) of the Constitution and is therefore null and void to the extent of inconsistency.

48. Each party shall bear its own costs with regard to both the Petition and Cross-Petition.

Dated, Signed and Delivered at Mombasa this 15th day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Aboubakar for Petitioners

Miss Lutta for Respondents

Mr. Kaunda Court Assistant