ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

JR MISC. NO. 387 OF 2009

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARY, PROHINITION AND MANDAMUS

AND

IN THE MATTER OF THE DISTRICTS & PROVINCES ACT 1992 (N0.4)

WILBERFORCE ODHIAMBO MWOGA & 13 OTHERS.....APPLICANTS

VERSUS

THE MINISTER FOR PROVINCIAL ADMINISTRATION & INTERNAL SECURITY.....RESPONDENT

AND

GWASSI PROGRESSIVE SOCIETY (EA).....INTERESTED PARTY

J U D G M E N T

By their notice of motion dated 17-12-2009 the applicants are praying for the following orders:-

1. **An order of cetiorari to quash the decision of the 2nd respondent made vide a letter dated 27-1-2009 to the effect that the District Headquarters of Suba District be relocated from Gingo to Magunga.**
2. **An order of prohibition to restrain the 1st and 2nd respondent from transferring the District Commissioner and other District Public Officials from Gingo to Magunga and from erecting building or otherwise establish the headquarter of Suba District at Magunga.**
3. **An order of mandamus be issued directed to the 1st and 2nd respondents compelling them to give proper accounts of all government funds that have been allocated to Suba District for development of Gingo and the expenditure thereof.**
4. **Costs of this application.**

The application is supported by the annexed affidavit of Wilberforce Odhiambo Muoga and the attached statements. The brief facts of this matter as it can be deduced from the applicants applications are that in the year 1995 the former president **Daniel Arap Moi** vide a presidential decree established Suba District which was created from the larger Homa Bay district.

In the year 2005 vide gazette notice No. 9143 of 16-11-2005 president **Mwai Kibaki** gazetted the said district.

It was after the said gazettement that there arose a disagreement between the residents of the Suba district on where to locate the new headquarters. On the one side were those wishing that the district headquarter be at Gingo and who were predominantly were the applicants. On the other hand those represented by the interested party argued that the head quarters be Magunga.

In the course of time the government created Mbita district which was an offshoot of Suba District. This was in the year 2009.

The issue of the headquarters greatly intensified and the interested party proposed Magunga whereas the applicants rooted for Gingo.

There was no agreement between the two rival parties and from the pleadings on record it appears that there were several correspondences between them and the provincial administration which culminated in a meeting held on 14-7-2009. The parties during this occasion were split in the middle and they referred the matter to the 2nd respondent for final determination.

The applicants case therefore is that the decision by the 2nd respondent to determine Magunga and not Gingo as the District Headquarters was unilateral and went against the principles of natural justice for they were not constituted and if they were their views were ignored by the 2nd respondent.

The respondent on its part through one Francis Mutie has opposed the application. He deponed in a nutshell that the applicants herein after failing to settle on where to set up the District headquarters with the interested parties and other stake holders, drew the ball to its quarters. The 2nd respondent therefore had to make a decision based on several factors and which culminated in choosing Magunga as the venue or the headquarters.

The interested party vide the replying affidavit of one Thomas Okanga Asango associated himself with the views of the 2nd respondent. According to him the choice of Magunga as the headquarters was necessary as it had all the infrastructural amenities and that it was more central in terms of location from all sides of the district as opposed to Gingo.

The basic issue to determine is whether or not the 2nd respondent breached the cardinal rules of natural justice, namely that before arriving at the decision and therefore writing the impugned letter dated 27-11-2009 the 2nd respondent gave an opportunity of being heard to the parties, more so the applicants herein.

From the affidavit of Wilberforce Odhiambo Muoga it does appear that there have been correspondences as earlier on alluded above between the parties and the 2nd respondent. As early as 16-7-2001 and 21-8-2001 there were letters addressed to several parties from the provincial administration advising their to collect them cheques for the land compensation.

Equally, there were minutes of the hansard of April 2008 where this issue was raised in parliament. The affidavit of Asango equally attaches several memorandum to the District Commissioner Suba in respect to the new district headquarters.

However, of great significance are the minutes of the Task Force dated 14-7-2009. From the said meeting, 5 people from two rival sides, that is those proposing Gingo and those proposing Magunga were chosen. Their finding is worth reproducing here:-

“1. Because members could not agree on a particular place to be decided upon as District headquarters the chairman for the meeting then put members to vote. When the vote was taken, the votes count went to a draw, i.e. five members voted for Gingo and five members voted for Magunga.

2. **The members asked the D.C Suba district to allow them to revisit their minutes of the meeting; he refused and asked the members to sign a statement that the meeting ended without any agreement at all.**
3. **The members then asked the government to decide on their behalf based on the facts given for every centre i.e. Gingo and Magunga".**

I also note that the applicants did memorandum to the 2nd respondent

and in particular annexture **WOM3** states in the last part.

"We are aware that Office of the president is keen to have the matter resolved at your level and we sincerely hope that your office will resolve".

The same though undated was written before the joint meeting earlier on quoted. The impugned letter dated 27-11-2009 states in part:-

"You are aware of the memorandum received on the location of the headquarter for new Suba district. Local leaders have said their bit and we have also made our recommendation on the basis of guidelines developed and perfected over the years by the Ministry of Provincial Administration and Internal Security".

It further concludes by stating:-

"N.B. Since the task force could not agree due to sub clan differences, we have decided to go with the better option and decided that Magunga should be the new district headquarters. You will recall that the leaders agreed that I should make a decision for them which I have done".

The province of Judicial Review proceedings is basically to do with the process. The court is not enjoined to inquire into the merits or the demerits of the decision.

This portion is clearly demonstrated by the Supreme Court Practice (W153/1-14/16) which states:-

"The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made but the decisions making process itself. The court will not however on a judicial review application act as a court of appeal for the body concerned. No will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body unless it has been exercised in a way which is not within that body's jurisdiction or the decision is unreasonable".

It would appear that there is no clear cut rules and regulations or for that matter a specific Act of Parliament which regulates the process by which a new district headquarters is to be determined. From the proceedings and the submissions of the parties, the residence of the location or the district are left to reach a settlement.

The parties have in particular the applicant as well as the interested party and the people they were representing failed to reach a settlement and consequently left the matter to the 2nd respondent to decide. The second respondent chose Magunga after analyzing several factors.

This court is not entrusted to look into why the 2nd respondent decided Magunga and not Gingo. But were the applicants aware of these exercises? Absolutely yes. The correspondences and the minutes from the various meeting say as much.

Are they therefore entitled to the orders sought? I do not think so. The process adjudicated although it took several years was open and transparent. They fully participated and the fact that Gingo which they preferred was not chosen, they fully knew what the 2nd respondent was doing.

As a matter of fact when they failed to reach a compromise they gave a blank cheque to the 2nd respondent who filled it with the words **“Magunga”.**

Neither do I find the process bias in any way. Looking at the said decision it is evidently clear that the 2nd respondent considered all the necessary factors including why he refused to choose Gingo and instead chose Magunga.

My finding therefore is that the orders of certiorari being asked by the applicant cannot be issued. Neither can the writs of prohibition and mandamus.

I am therefore satisfied that the 2nd respondent did not breach any rules of natural justice and that the applicants fully participated in the entire proceedings.

Second respondent's decision was not biased at all, and neither did he act beyond the mandate given by the warring parties.

The application is therefore dismissed with costs.

Dated, signed and delivered at Kisumu this 4th day of July.2013.

H.K. CHEMITEI
JUDGE

In the presence of:

….....for applicants

….....for respondents

HKC/va