REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

PETITION NO. 65 OF 2011

HUSSEIN ABDI OMAR.....1ST PETITIONER

MOHAMED BILLOW ISMAIL.....2ND PETITIONER

AHMED MOHAMED DIRIYE.....3RD PETITIONER

MOHAMED SHEIKH ABDULLAH.....4TH PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1ST RESPONDENT

MINISTER FOR INTERNAL SECURITY AND

PROVINCIAL ADMINISTRATION.....2ND RESPONDENT

THE PERMANENT SECRETARY, MINISTRY OF INTERNAL

SECURITY AND PROVINCIAL ADMINISTRATION.....3RD RESPONDENT

THE PROVINCIAL COMMISSIONER,
NORTH EASTERN PROVINCE.....4TH RESPONDENT

THE DISTRICT COMMISSIONER,

HABASWEIN DISTRICT.....5TH RESPONDENT

JUDGMENT

Introduction

1. The petitioners filed this petition challenging the creation of Administrative units within Habaswein and Wajir Districts. The petitioners allege that the creation of the locations and sub-locations is unlawful and contravenes their rights under Articles 2, 10, 27, 35, 47 and 50 of the Constitution.

2. The petition dated 3rd August 2012 was supported by the affidavit of the 1st petitioner, Hussein Abdi Omar, sworn on 3rd August 2011. On 5th August, 2011, interim orders in favour of the petitioners were granted, and on 6th August 2011, the Interested Party who is the Member of Parliament for Wajir South

was allowed to participate in the proceedings.

3. Following the filing of replying affidavits by the respondents and the Interested Party, the petitioners sought and were granted leave to file an amended petition. The Amended Petition is dated 2nd November 2011 and seeks thirteen declarations or orders set out therein.

4. The original petition was supported by an affidavit sworn by **Hussein Abdi Omar** on the 3rd of August 2011. Two further affidavits were filed in response to the affidavits sworn by the Interested Party and the 5th respondent. The first was sworn by **Abdiwefi Isaack Noor**, the sixth petitioner, on the 25th of November 2011 while the other was sworn by **Abdullahi Abdi Farah and Sahal Mohamed Farah** on the 10th of November 2011. A supplementary affidavit in support of the Amended Petition sworn by the 1st petitioner, **Hussein Abdi Omar** on the 2nd of November was also filed.

5. The petition is opposed by the respondents and the Interested Party.

The Interested Party filed an affidavit sworn on the 3rd of October 2011. A replying affidavit sworn on 3rd October 2011 by **Daniel Munywoki Nduti**, the 5th respondent, was filed in court on 4th October 2011

6. All the parties filed written submissions which were highlighted before me on the 28th of November 2011. Mr. Kibe appeared for the petitioners, Mr. Siro for the respondents while Ms. Kilonzo appeared for the Interested Party.

7. After the presentation of the respondents' and Interested Party's respective cases, Mr. Kibe for the petitioners indicated that he would file his response to the oral submissions by the respondents and the Interested Party by the 5th of December 2011 but did not do so.

The Petitioners' Case

8. Mr. Kibe in presenting the case for the petitioners submitted that the petition raised three main issues as follows:

i) In view of the new Constitution from 27th August 2010, what is the status of districts and provinces under Kenyan law?

ii) Assuming that new administrative units are to be created after 27th August 2010, what is the procedure for creating them?

iii) Whether the specific administrative units that are the subject of this petition were created in accordance with the Constitution and the Districts and Provinces Act, Act No. 5 of 1992.

9. The petitioners allege that sometime in July, 2011, they became aware of a notice by the District Commissioner, Habaswein District dated 13th July 2011 calling upon qualified candidates to fill vacant positions of Chiefs and Assistant Chiefs for the locations indicated on the notice. They wrote a complaint letter dated 22nd July, 2011 to the District Commissioner complaining about the manner of creation of the units and alleging that the manner of creation was not appropriate and that the procedure was discriminatory and not in accordance with the law.

10. When they did not receive a response to their letter, they filed this petition on 4th August, 2011 and were granted interim orders. They complained that the letter of 13th July 2011 required applications to reach the DC on or before 27th July, 2011. They claim that by the time they became aware of the application, there were less than 7 days before the deadline, but most importantly, they knew for the first time that such locations and sub locations had been created.

11. The petitioners say that they learnt for the first time from the replying affidavits filed on behalf of the 5th respondent and the Interested Party **Mahamud Muhumed Sirat**, that by a letter dated 27th May 2011 to the Provincial Commissioner, North Eastern Province, the creation of administrative units within Habaswein District had been proposed. The Permanent Secretary for Internal Security, Mr. Francis Kimemia, had given authority for the creation of four named locations in a letter dated 28th June 2011. By a letter dated 25th July 2011, the PS had given authority for the creation of 2 additional divisions and 2 locations.

12. It is from the information in these affidavits that the petitioners became aware of the manner and circumstances in which the locations and sub-locations had been created. All the letters annexed to the affidavits preceded the invitation for applications so there was absence of information on how the units had been created.

13. Mr. Kibe contended for the petitioners that the Districts and Provinces Act 1992 is inconsistent with Articles 10 and 174 of the Constitution. Article 6(1) provides that Kenya is divided into the counties specified in the First Schedule. The counties are the 47 districts created by the Districts and Provinces Act 1992. Article 10 gives the value and principles of governance and requires compliance with these principles.

14. He therefore submitted that when the PS gave authority for creation

of the units, he should have considered the applicable constitutional provisions, one of which was the principle of participation of the people in Article 10(2). It was necessary that the people of the area are aware of the creation of the districts but there was no public participation or consultation in this case. He argued that while the District Commissioner avers in his affidavit that there was consultation, he does not say with whom and where the consultation took place.

15. Mr. Kibe referred the court to Article 174 of the constitution which talks of devolution and argued that for the purpose of devolution it was the county that counted, and in this case the county was Wajir. It was the petitioners' contention that existing administrative units within Wajir must be understood as administrative units of that county and that new administrative units cannot be created after 27th August 2010 until the national government has dealt with the requirements of s 17 of the Sixth Schedule which deals with the Provincial Administration.

16. Mr. Kibe submitted in the alternative that even if such units can be created, there should be consultation and participation. The petitioners were aggrieved by the creation of the new units as they would be a factor in the creation of new constituencies and wards for resource allocation.

17. The petitioners also complained about the legality of the letters annexed to the amended petition and asked the court to bear in mind the provisions of Article 27 on equal benefit of the law. Mr. Kibe submitted that parties close to the local MP would have been at an advantage as they were aware of the creation of the units. He referred to Article 35 which deals with the right to information and submitted that information on the units should have been given in advance. He also referred to Article 47 on fair administrative action and submitted that the Article requires that the local people should be aware of actions affecting them.

18. Mr. Kibe referred to the letter dated 13th July 2011 annexed to the Interested Party's affidavit as annexure C which gave the date for receipt of applications for positions of chiefs and assistant chiefs as 15th August 2011. He submitted that the letter was not signed by the District Commissioner and was a forgery. He argued that the Interested Party was a beneficiary of the new units and wanted the court to find that the petitioners had no basis for complaint.

19. With regard to annexure D to the Interested Party's affidavit which is said to be a report on a trip by elders together with some minutes on page 27, he asked the court to note that the trip took place between 9th – 13th July, 2011 and therefore had nothing to do with the administrative units. He also referred to the

minutes of 14th August 2011 which are supposed to show that the units were sanctioned by the elders and pointed out that they were made 5 days after the filing and service of the petition.

20. The petitioners also questioned the census figures given in the letters annexed to the 5th respondent's affidavit and argued that the figures given were different from the figures given in the population census of 2009 for the area known as Dadajabulla which were lower than those contained in the letter of the PS being 8,693 and 15,000 respectively. The population figures for the area known as Burder as indicated in the letter from the PS was much higher than what was contained in the population census 2009.

21. The petitioners submitted that there was clearly no consultation with the people in the creation of the units and no indication of the provision of law under which the units were created. Without these, the acts of the respondent were arbitrary and should be quashed.

The Respondents' Case

22. Mr. Siro presented the case for the respondents and relied on the affidavit sworn by **Daniel Munywoki Nduti**, the 5th respondent, and the written submissions filed on behalf of the respondents on the 25th of November 2011.

23. The position taken by the respondents is that there is no constitutional issue raised by the petitioners. The petitioners were raising issues that were administrative in nature in a situation in which the government had created districts and locations in order to bring services closer to the people. According to the respondents, the petitioners may have personal issues but no fundamental rights have been violated. By referring to Dadajabulla, the petitioners have shown that the issue precipitating this petition is a fight between the current MP and others as the MP comes from Dadajabulla.

24. Mr. Siro referred the court to the provisions of Article 27 of the Constitution on equality and non-discrimination and in particular Article 27(4). He argued that at Article 27(6), the State is enjoined to take measures to redress disadvantages suffered because of past discrimination and submitted that the state is trying to rectify the disadvantages suffered by the people of Habaswein by giving them security and government services.

25. With regard to the provisions of section 17 of the Sixth Schedule to the Constitution and the argument that no new administrative units should be created until the provisions of that section are brought into effect within 5 years from the effective date, he submitted that the administrative organs cannot leave a vacuum. The state was therefore creating the units to bring services to the people of Habaswein District.

26. Mr. Siro referred to paragraph 11 of the Amended Petition, in particular paragraph 11(a) and (c), and submitted that it showed that the petition has been brought in bad faith as it seemed to imply that some other locations should have been elevated.

27. On the petitioners prayer that the court should declare the Districts and Provinces Act 1992 as unconstitutional for being inconsistent with Article 6, 10, 174 and s 27 of the 6th Schedule, Mr. Siro submitted that the Act had been saved by Section 17 of the Sixth Schedule, and it could therefore not be declared unconstitutional.

28. With regard to section 17 of the Sixth Schedule, Mr. Siro pointed out that it talks about the Provincial Administration. While the petitioners had argued that the country was now divided into counties, it was the respondents' position that it will take 5 years before counties are established, and while there was no county administration, the petitioners had no reason to complain.

29. On the argument that there had been no consultation and the reference to paragraph 5 of the respondents' replying affidavit, Mr, Siro submitted that the District Commissioner consulted widely as

the area MP and councillors are the representatives of the people.

30. With regard to the petitioners' prayer for compensation by way of damages, it was the respondents' case that the petitioners had not shown how they have suffered to warrant compensation. Further, the petitioners had not shown how creation of districts would affect the environment to justify prohibiting the creation of districts pending the carrying out of an environmental impact assessment.

The Interested Party's Case

31. Ms Kilonzzo presented the case for the Interested party. She relied on the Interested Party's replying affidavit sworn on the 3rd of October, 2011 and the written submissions dated 19th December 2011.

32. The Interested Party made four main points with regard to the petition. The first was that the creation of the four new locations and seven new sub-locations in Habaswein District, Wajir South was in accordance with the law. Secondly, the said creation did not contravene any provisions of the Constitution or the law and was in response to an urgent need for the distribution of relief and security services in Habaswein and Wajir South Districts. The creation of the new administrative units was inclusive and was carried out through a consultative process. Finally, the Interested Party argued that the petitioners had not demonstrated sufficient interest in the matter.

33. It was the Interested Party's position that the creation of the districts and divisions impugned in this petition was carried out in accordance with the Constitution and the law. Ms. Kilonzo referred the court to the case of **R-v- District Commissioner Marakwet District and 6 Others Eldoret High Court Misc. Civil Application NO. 23 of 2009.**in which the High Court had set out the factors that the Provincial Commissioner should take into account in creating a new district and submitted that the respondents took into account these factors. This was evidenced by the letter dated 31st May, 2011 written by the PC to the PS which was annexed to the Interested Party's affidavit at page 16a.

34. Ms Kilonzo argued that in that letter, the 4th respondent gives justification for every proposed division, location and sub-location. The fact that justification is given for the creation of the administrative units ruled out the contention that the districts were created for political reasons or that their creation was unreasonable.

35. Mr. Kilonzo submitted further that the process was consultative and referred to the letter of 31st May 2011 as evidence of such consultation. In particular, she pointed out that not all the administrative units were accepted by the Permanent Secretary who, after considering the proposed units and their justification, approved the creation of some units and not others.

36. Ms. Kilonzo submitted that this petition had not been brought in the interests of the residents of Habaswein but in the political interests of the petitioners. She argued that it was clear from the letter dated 31st May 2011 that the proposal was for creation of units for Habaswein and Wajir District, yet complaints had only been made with regard to Habaswein District, No resident of Wajir District had complained that the process was not consultative or that it was discriminatory.

37. Ms. Kilonzo referred to the first paragraph of the original and the Amended Petition in which the petitioners describe themselves as persons carrying out business in Wajir County and residents of Wajir County. None of the petitioners has shown any nexus with Habaswein District or the proposed locations. The letter dated 22nd July, 2011 (Annexture 2 of the affidavit in support of the original petition sworn on 3rd August, 2011) was signed only by the 1st petitioner and the gist of it was that the District Commissioner should have created an administrative unit from Madhalibah settlement. She submitted that most of the complaints in this petition were not in that letter.

38. On the allegation that there had been no consultation, the Interested Party pointed out that in the affidavit sworn by **Mr. Abdullahi Abdi Farah** and **Sahal Mohammed Farah** in support of the petition on the 10th November, 2011, the deponents did not deny that the DC consulted before the creation of the

administrative units. **Article 1(2)** of the Constitution provides that the people of Kenya may exercise power directly or indirectly through their democratically elected representatives, and participation and consultation can be direct or indirect as provided in the Constitution.

39. With regard to the argument by the petitioner that the creation of the new districts is not authorised by the Constitution until section 17 is put into effect, Ms. Kilonzo submitted that this was an improper interpretation of the Constitution. All laws in force before the enactment of the Constitution were saved by Section 7 of the Sixth Schedule subject to such qualifications as were necessary to bring them in conformity with the Constitution. She submitted that a reading of sections 2(2) and 17 of the Sixth Schedule make it clear that the Provincial Administration is not abolished by the Constitution but is preserved under s 2, 17 and 31 of the Sixth Schedule.

40. The petitioners' claim that the boundaries of administrative units will affect the boundaries of constituencies was dismissed by the Interested Parties as untrue. Ms. Kilonzo submitted that Article 89 is clear on the criteria for creation of constituencies which was the population quota.

41. With regard to the question of participation, Ms. Kilonzo submitted that while it is true that the people of Kenya should be involved in their governance, the right of participation in governance must be counter-balanced with the obligations of the State under Article 43 to ensure that every citizen has economic and social rights and Article 6 which requires every state organ to ensure reasonable access to services. She contended that any prejudice that the petitioners say they have suffered in not being individually consulted must be balanced with the benefits the residents stand to obtain by the government bringing its services closer.

Issues for determination

42. In his submissions before the court, Counsel for the petitioners suggested three main issues for determination. These issues relate to the status of districts and provinces under Kenyan law in view of the new Constitution, the procedure for creation of new administrative units following the promulgation of a new constitution, and whether the administrative units the subject matter of this petition were created in accordance with the Constitution and the Districts and Provinces Act, Act No. 5 of 1992.

43. This is a petition for the enforcement of fundamental rights and freedoms. In order to find for the petitioners and grant the prayers sought, the court must be satisfied that there has been a breach of the Constitution, and that such breach has violated or threatened to violate the petitioners' fundamental rights and freedoms. For the court to do this, the petitioners must show the provisions of the constitution which have been violated and how they have been violated with reference to them. The High Court stated in the case of ***Anarita Karimi Njeru –v- Rep(1979) KLR 154*** at page 156 that:-

"We would however again stress that if a person is seeking redress from the High court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

44. The petitioners allege violation or contravention of the provisions of Articles 2, 10. 27, 35, 47, and 50 of the Constitution. In weighing the facts and circumstances surrounding the creation of the administrative units which form the basis of the petitioners complaint in this petition, and while bearing in mind the issues proposed by the petitioners, I will do so against the yardstick of whether or not the acts complained of have violated such of the constitutional rights of the petitioners as are set out in the said Articles 2, 10. 27, 35, 47, and 50, or whether the Constitution is being violated as provided under Article 258.

Were the Administrative Units Created in Accordance with the Law

45. Section 7 of the Sixth Schedule preserves all laws in force prior to the coming into force of the Constitution by providing that

'All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.'

46. The Districts and Boundaries Act was therefore preserved by this section subject to such modification as is necessary to bring it into conformity with the Constitution.

47. Section 17 of the Sixth Schedule provides that

'Within five years after the effective date, the national government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under this Constitution.'

48. I cannot find anything in this provision that prohibits the creation of new administrative units. What would be required is that the creation of such units should be in conformity with the Constitution. Thus, if the administrative units in this case were created in accordance with the provisions of the Districts and Provinces Act 1992 and the provisions of the Act were applied in such a way as to conform to the Constitution, then there would be no basis for impugning them.

49. The Districts and Boundaries Act 1992 provides for the districts and provinces into which Kenya is divided. Various other districts have been created since the enactment of that Act, and the districts within which the administrative units the subject matter of this suit are deemed to be districts within the meaning of that Act.

50. The matters to be taken into account in the creation of districts, locations and sub-locations were considered in the case of **R-v-District Commissioner Marakwet West District and 6 Others Eldoret High Court Misc. Civil Application NO. 23 of 2009.** The court in that case enumerated the factors toinclude the demographic pattern of the area, the geographical and physical features, the internal harmony of the population, infrastructure, security demands and land for expansion.

51. In the present case, the 5th respondent sets out in his proposal for creation of the locations and sub-locations the factors he considered.He depones at paragraph 2 of his affidavit as follows:

'THAT these administrative units were needed for the purposes of:-

i) Bringing the services closer to the people;

(ii) Aid the maintenance of security along the Kenya-Somali border;

(iii) Aid in the distribution of government relief food, especially in times of drought.

(iv) Proper co-ordination between the government, private institutions and non-governmental organizations.

52. These considerations are, in my view, in keeping with the factors to be taken into account as set out in the **R-v- Marakwet West District Commissioner** case (supra).

Was the Creation of the New Units Done in Conformity with the Constitution?

53. Article 1 of the Constitution vests all sovereign power in the people of Kenya, such power to be exercised directly or through democratically elected representatives.

54. At Article 10,(2) the Constitution sets out the national values and principles.

'The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;'

55. The petitioners allege that the creation of the locations and sub-locations did not involve the participation of the people and was not consultative as required under the Constitution. However, it is clear from the averments in the affidavits filed in this matter that there were consultations held with various people. The 5th respondent avers that there were consultations with stakeholders including the area Member of Parliament and Councillors and the security committee of Habaswein District, a fact confirmed by the Interested Party.

56. The petitioners also tacitly concede that consultation took place: The sixth petitioner, **Abdiwefi Issack Noor** swears at paragraph 4 of his affidavit sworn on 25th November 2011 as follows: '***THAT the depositions in paragraph 5 of Munyoki's affidavit confirms that the proposals to create new administrative units came from the Fifth respondent and he only consulted a few select persons as opposed to the affected residents of Habaswein District.' (Emphasis added)***

57. The question that arises is whether it was in contravention of the Constitution for the 5th respondent to consult with and invite participation from local leaders and the Member of Parliament of the area in the process of creating the new sub-locations, and whether consultation and participation require that every citizen must be consulted before a decision is made on an issue such as the creation of divisions and locations. The constitution talks about direct participation or through elected representatives. It does not require consultation of every single citizen in every single case where a decision has to be made. If those who were consulted in the creation of the locations include the democratically elected leaders, as in this case, there can be no basis for complaint. I therefore find and hold that the creation of the administrative units in this case was in conformity with the law and the Constitution.

Has there been a Violation of the Constitution or infringement of the Petitioners Rights?

58. The petitioners have alleged violation of their rights under Articles 2, 10, 27 35, 47, and 50 of the Constitution.

59. I have considered their complaint as set out in their various affidavits in support of the petition and the amended petition. In their letter dated 22nd July 2011 annexed to the affidavit in support of the original petition, the petitioners complain that a division was not created out of Madhalibah Settlement. They also complain that the letter inviting applications for the posts of chiefs and assistant chiefs dated 13th July 2011 was posted on the Notice Board on the 21st of July 2011, thus denying those who may have been interested in applying for the posts an opportunity to apply.

I set out below the opening parts of the said letter:

To
The District Commissioner
Habaswein District

Dear Sir

RE: COMPLAIN T ON THE RECENT VACANCIES FOR THE POSTS OF CHIEFS AND ASSISTANT CHIEFS

Your advertisement REF: CON. ADM. 15/4/ VOL 1 (123) dated 13th July, 2011 refers.

We the undersigned elders and community members of Madhalibah settlement wish to register our

profound regret in the manner and criteria your office used in the creation of four (4) locations and seven (7) sub-locations within Habaswein District. It amounts to discrimination by a public officer against a cohort of citizens that are entitled to his services without an iota of prejudice, fear or favour. While it is within the mandate of your office to recommend such administrative units to deserving settlements; it is unfortunate that your judgments were blurred by other consideration rather than merit. Madhalibah by all standards deserved that status of a location given the number of years it existed as a settlement and the amount of resources the government pumped into the area. The most intriguing thing that casts the whole process clandestine is the official date of the letter as the 13th of July, 2011. The million dollar question is why keeping this information secret for 8 days when it is meant for public consumption? Why disadvantage potential applicants? Why shouldn't one assume that the chosen few have already submitted their application to your office and not being subjected to competitive bidding? These are not necessarily true but are very possible scenario. (Emphasis added.)

60. The petitioners then make various averments in their affidavits which illustrate their real concerns with the creation of the locations. **Hussein Abdi Omar** depones at paragraph 6 of his affidavit sworn on 25th November 2011 as follows:

THAT my co-Petitioners and I are apprehensive that the real purpose of the unlawful and unprocedural creation of new administrative units in Habaswein County is to facilitate gerrymandering in the demarcation of wards in Wajir County and to secure advantage of select groups and families in resource allocation under the devolved structure of Government.

61. At paragraph 10 of his affidavit sworn on 25TH November, 2011. the 6th petitioner, **Abdiwefi Issack Noor,** avers

'THAT the depositions in paragraph 20 and 21 of Sirat's affidavit are false as the reason for the creation of those new areas is political. Annexed hereto marked "AIN2" is an administrative map of Wajir South and Habaswein Districts that attests the political motivation behind the proposed administrative units.

62. Does the complaint in the letter and the averments in the affidavits set out above demonstrate a violation of the petitioners rights as set out in the various Articles they allege violation of?

63**.** **Article 2** with regard to the supremacy of the constitution and **Article 10** on the national values and principles are general provisions with regard to the application and interpretation of the Constitution and do not contain any specific right that can be violated.

64. **Article 35** guarantees to every citizen the right to seek and obtain information held by the state or another person necessary for the exercise or protection of a fundamental right or freedom. It provides as follows:

(1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

65. There is nothing before me that indicates that the petitioners sought any information from the state or from any other person that was necessary for the enjoyment of any of their rights and that such information had been denied. If that had been the case, then the remedy would have been for them to approach the court to enforce their right to information by compelling the state to release to them such information as was necessary and could reasonably be released for the enforcement of their rights and freedoms.

66. Article 47 guarantees the right to fair administrative action. It provides that

‘**47.** (1) ***Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

67. Has there been any violation of the rights of the petitioners under this Article? I believe not. The petitioners have not shown how the creation of the administrative units has been done in violation of their rights under Article 47.

68**.** **Article 50** has been cited as having been violated. However, it is clear from its provisions that the Article applies in the case of a trial process. Article 50 (1) provides that

“ Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

Clearly, it has no application in the circumstances before the court.

69. The petitioners allege violation of their rights under **Article 27**.

This Article prohibits discrimination and provides as follows:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) …….

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5)……

(6) To give full effect to the realisation 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.

70. It is clear that the petitioners perceive the failure by the 5th respondent to recommend the elevation of **Madhalibah** to the level of a location as discriminatory against the settlement. This concern, however, is motivated, in my view, from political considerations rather than any actual disadvantage or detriment that any of the petitioners individually or collectively as residents of Habaswein District is likely to suffer, for no such detriment or disadvantage has been shown.

71. This view is buttressed by the argument by the petitioners that the new administrative units will influence the creation of constituencies. However, the Constitution is clear about the considerations that the Independent Electoral and Boundaries Commission will take into account when fixing constituency Boundaries, and administrative units are not one of the factors to be taken into account. Article 89(1) provides that

‘There shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97 (1) (a).’

72. At Article 89(5), the Constitution provides that

'The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner mentioned in clause (6) to take account of—

(a) geographical features and urban centres;

***(b) community of interest, historical*, economic and cultural ties; and**

(c) means of communication.

73. The apprehensions expressed by the petitioners that the creation of administrative units will influence the constituency boundaries is thus, in the light of these clear constitutional provisions, clearly unfounded.

74. The petitioners have asked that the creation of the units should be stopped until an environmental impact assessment (EIA) is done. First, the issue of an EIA is not a constitutional issue, and there are appropriate forums and procedures for ensuring that one is carried out. Secondly, the creation of administrative units in and of itself does not have an impact on the environment. The argument that developments will take place in the new divisions and locations that will lead to environmental degradation and conflict is therefore purely speculative.

75. In light of the above matters, I find no merit in this petition and it is hereby dismissed. Each party shall bear its own costs.

76. I am grateful to the parties appearing before me for their well researched arguments.

Dated and Delivered at Nairobi this 2nd day of March 2012.

Mumbi Ngugi
Judge