



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & MURGOR, J.J.A)

CIVIL APPEAL NO. 424 OF 2017

BETWEEN

THE HON. MEMBER OF PARLIAMENT

BALAMBALA CONSTITUENCY .....APPELLANT

AND

ABDI AHMED ABDI..... 1<sup>ST</sup> RESPONDENT

CABINET SECRETARY FOR INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT .....2<sup>ND</sup> RESPONDENT

COUNTY COMMISSIONER, GARISSA COUNTY..... 3<sup>RD</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

MEMBER OF PARLIAMENT,

GARISSA TOWNSHIP CONSTITUENCY.....5<sup>TH</sup> RESPONDENT

MEMBER OF PARLIAMENT,

DAADAB CONSTITUENCY.....6<sup>TH</sup> RESPONDENT

THE GOVERNOR GARISSA COUNTY.....7<sup>TH</sup> RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION..... 8<sup>TH</sup> RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nairobi*

*(J.M. Mativo, J.) dated 4<sup>th</sup> October, 2017*

in

HC Petition No. 238 of 2015)

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JUDGMENT OF THE COURT

The appeal before us arises from the decision of the High Court, (J.M. Mativo, J.) dated 4<sup>th</sup> October, 2017 in which the 1<sup>st</sup> respondent's petition was allowed with no order as to costs.

A brief background of facts leading to this appeal are that the 1<sup>st</sup> respondent petitioned the High Court of Kenya at Nairobi challenging two advertisements dated 15<sup>th</sup> May, 2015 by the 2<sup>nd</sup> respondent for the positions of chief and assistant chief, alleging that the said advertisements contravened court orders and erroneously indicated that Abdisamit location was in Central division of Garissa sub-county yet it was in Dertu division, of Daadab constituency. Further, that the advertisement for assistant chief position incorrectly indicated that Auliya sub-location was in Abdisamit location of Sankuri division yet it was in Laago sub-location in Modika location and finally that the advertisements restricted those interested in the positions to residents of the above location and sub-location.

The 1<sup>st</sup> respondent also challenged the creation of the said administrative units for lack of or absence of public participation and that the electoral and administrative boundaries were determined in High Court Judicial Review Miscellaneous Application No. 120 of 2012, hereafter "JR 120 of 2012". He maintained that the said judgment had never been reviewed, appealed against or varied yet the 2<sup>nd</sup> respondent in total disregard of the same had unlawfully moved Abdisamit location from Dertu division to Central division of Garissa sub-county and Auliya sub-location, from Dertu ward of Daadab constituency to Abdisamit location of Sankuri division to Modika location. That Auliya and Abdisamit geographically fall within Dertu location, of Daadab constituency and thus the intended creation of new sub-locations would relocate Daadab residents and force them to seek services at Balambala which will subject them to unnecessary hardship and therefore a violation of their right to fair administrative action and other constitutional rights.

He therefore prayed for a declaration that the 2<sup>nd</sup> respondent's actions aforesaid had breached the provisions of Articles 10(a), (b) and (c), Article 47 and 159(1) of the Constitution, an order of certiorari to remove into the High Court for purposes of quashing the decision of the 2<sup>nd</sup> respondent contained in the advertisement, an order of prohibition prohibiting the 2<sup>nd</sup> respondent from any further advertising, shortlisting, conducting interviews or employing any candidate whatsoever to the advertised positions, an order of mandamus to issue directing the 2<sup>nd</sup> respondent to invite, involve and comply with the judgment of the court dated 9<sup>th</sup> July 2012 in the High Court Judicial Review Miscellaneous Application No. 120 of 2012.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their replying affidavit sworn by James Kianda, the acting county commissioner of Garissa County confirmed the advertisements. He swore that the creation of the said administrative units did not violate the provisions of the Constitution or any other law but rather it was a response to the urgent need to bring services closer to the people and aid in the maintenance of security along the volatile Kenya-Somali border as well as provide relief food and proper coordination between the government, private institutions and non-governmental organizations, and that the petition was filed four (4) years after the creation of the units. He maintained that Abdisamit, Laago and Auliye areas were administratively in Garissa District and had never formed part of Daadab District as claimed by the 1<sup>st</sup> respondent and that Sections 2, 17 & 31 of the 6<sup>th</sup> schedule of the Constitution confers the mandate of creating administrative structures upon the National Government and denied the alleged violation of court orders. He maintained that Alango Arba location was within Daadab district while Auliye and Abdisamat areas were in Garissa District. As a parting shot, the deponent stated that the impugned decision was in conformity with the provisions of the Districts and Provinces Act 1992. From the record it would appear that the 4<sup>th</sup> respondent did not file a response to the petition.

The 5<sup>th</sup> respondent in a replying affidavit sworn by Hon. Aden Duale deposed that the petition was premised on false facts given that on 3<sup>rd</sup> November, 2010, Abdisamit location comprising Auliya and Laago were created by the Office of the President, that Dujis constituency which he represented in the National Assembly was carved out of Garissa Township and Balambala constituencies while Daadab constituency was created by splitting Lagdera constituency thus extending the electoral and administrative boundaries of their mother constituencies of Dujis and Lagdera respectively, that Sankuri division of Balambala constituency was always administratively under Garissa district and the chief of Abdisamit always exercised administrative functions over Auliye and Laago areas from Modika location and that the challenged recruitment was meant to staff existing administrative locations and that the judgment in JR no 120 of 2012 only dealt with electoral boundaries and not administrative units and that in any event the said judgment only affected Alango Arba location which was moved to Daadab constituency and Medina location which was moved to Garissa Township constituency.

The appellant who was the 5<sup>th</sup> respondent in the petition, in a replying affidavit deposed that no remedies had been sought against him. He insisted that Abdisamit location and Laago and Auliya sub-locations had always been in Garissa and Dujis constituencies respectively prior to the delimitation which created Balambala and Daadab constituencies.

The 6<sup>th</sup> respondent in a replying affidavit sworn by Hon. Dr. Mohamed D. Duale supported the petition and deposed that the impugned administrative units had ignited conflict and had claimed 3 lives and property destroyed, and that the issues in the petition had already been determined and settled in JR 120 of 2012. The 7<sup>th</sup> respondent did not file a response to the petition.

The 8<sup>th</sup> respondent in a replying affidavit sworn by Moses Kipkosgei deposed that its mandate did not include creation of administrative units as the same was vested upon the 2<sup>nd</sup> respondent. It maintained that the dispute was *Res judicata* having been determined in Petition No. 94 of 2012.

The court rendered itself as follows in the impugned judgment; that as to whether the petition was *Res judicata*, the court while relying on the case of **Greenhalgh v Mallard (1) (1947) 2 All ER 257** examined the facts and decision in JR No. 120 of 2012 as well as the appeal and held that the Court of Appeal did not annul the entire judgment but rather it only set aside the decision of the High Court in the said case relating to the 8<sup>th</sup> respondent naming Suba North and Suba South constituencies as published in Legal Notice No. 14 of 2012 on 6<sup>th</sup> March, 2012. Hence the appeal did not concern the finding relating to the constituencies the subject of the Petition. The effect of the High Court decision relating to the issues in the petition was still in force. Subsequently, the court held that since no appeal was filed against the decision in JR No. 120 of 2012 it followed that the decision still stood and the petition was therefore not *res judicata*. Based on the foregoing, the court was of the view that the 2<sup>nd</sup> respondent's decision to create the said administrative units violated the said court decision.

As to whether the 2<sup>nd</sup> respondent acted within the confines of the law while creating the disputed administrative units, the court held that Section 4 of the National Government Coordination Act offers the guiding principles as to how creation of administrative units should be undertaken. Relying also on Articles 10(1) & (2) (a) (c) and 189(1) of the Constitution, the court found that there was no proper public

participation in the creation of the units hence the constitutional and statutory provisions were not complied with Article 10 expressly provides for public participation as one of the values and principles of governance that bind all state organs, 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. (The court relied on the case of: **In the Matter of the Principle of Gender Representation in the National Assembly and Senate Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** for this proposition). The court was not persuaded that there was any meaningful engagement with the public as required and accordingly, it held that there was no public participation.

On the basis of the foregoing, the trial court allowed the petition and granted a declaration that the 2<sup>nd</sup> respondent violated the provisions of Articles 10, 189, 201(d), 232, 47 and 159 of the Constitution, the guiding principles in Section 4 of the National Government Coordination Act by purporting to create new administrative units in violation of the law and disregarding the court decision rendered in JR No. 120 of 2012; an order of Certiorari quashing the decision of the 2<sup>nd</sup> respondent contained in the advertisement dated 15<sup>th</sup> May, 2015; an order of Mandamus directing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to comply with the decision rendered in JR No. 120 of 2012.

Dissatisfied with the impugned judgment, the appellant lodged the instant appeal in which he raised six (6) grounds to wit, that the learned Judge erred in law in failing to: determine whether the appellant was properly suited in the impugned petition: finding that the proceedings and consequential declarations in the Court of Appeal in the case of **Peter Odoyo Ogada & 9 Others v IEBC & 14 Others [2013] eKLR** were in rem, finding that the Court of Appeal judgment in the above case was limited to that appeal and did not apply to the other consolidated causes in Judicial Review No. 94 of 2012; not determine the material question whether Abdisamit location and Laago and Auliya sub-locations were always in Garissa district and in Dujis constituency prior to the delimitation of boundaries which created Balambala and Daadab constituencies or that the same had just been created on 15<sup>th</sup> May, 2015 vide the disputed advertisement; finding that JR No. 120 of 2012 in any event had made any orders in respect of Abdisamit location and Laago and Auliya sub-locations; and that the learned Judge erred in applying the provisions of the National Government Coordination Act to administrative units created way back in 2010.

When the appeal came up for hearing **Mr. Ongoya, Mr. Mokua, Ms. Sharon and Mr. Malenya**, learned counsel appeared for appellant, 1<sup>st</sup> respondent, 6<sup>th</sup> respondent and 8<sup>th</sup> respondent respectively. There was no appearance by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 7<sup>th</sup> respondents despite being served with the hearing notice. Parties present relied on their written submissions and opted not to highlight.

Mr. Ongoya contended that not a single grievance was raised or remedy sought against the appellant in the petition. Therefore, the court should have made a finding that the appellant was improperly joined in the petition, and that the joinder of the appellant when the office of Member of Parliament is not a juristic person capable of suing and being sued in its corporate name was also improper. Counsel further submitted that the Court of Appeal judgment in **Peter Odoyo Ogada & Others (Supra) vs I.E.B.C & 14 others [2013] eKLR** was a judgment in rem as it addressed itself to the powers and jurisdiction of the 8<sup>th</sup> respondent on the one hand and the High Court on the other regarding the issue of resolution of disputes on delimitation of boundaries of electoral units. He therefore, faulted the court for holding that the Court of Appeal decision did not apply to the issues in the petition. Counsel was of the view that the decision by the court to hold that the decision of the 2<sup>nd</sup> respondent to create the said administrative units violated the decision in JR No. 120 of 2012 was premised on a factual error as to when the administrative units were created. There was no order in JR No. 120 of 2012 regarding Abdisamit location, Laago and Auliya sub-locations, and that the order of Mandamus as issued was misplaced as was the order of Certiorari which counsel stated had no evidentiary basis. Lastly, counsel submitted that the National Government Coordination Act was enacted in 2013 hence it was a misdirection on the part of the court to rely on Section 4 of the said Act considering that statutes do not ordinarily have a retrospective reach in their application.

On his part, Mr. Mokua submitted that the appellant had not made out a case for the grant of the reliefs he is seeking in this appeal. If the appellant felt that he was not a necessary party in the petition he had the option to apply to be disjoined, opt not to participate in the proceedings or participate in the proceedings and seek costs. Indeed, the appellant participated in the proceedings by opposing the petition. Rule 5 of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules could not be defeated by reason of misjoinder. Counsel submitted that the appellant opposed the appeal and sought costs. Counsel took the view that the Court of Appeal judgment was in *personam* as opposed to being in rem. Lastly, counsel was in agreement with the court's finding that Section 4 of the National Government Coordination Act offers guiding principles for the national government to act in accordance with national values and principles of the Constitution as set out in Articles 10, 189, 201(d) and 232. That since the impugned advertisements were made on 15<sup>th</sup> May, 2015 and the Act came into force in 2013, there was no retrospective application of the statute.

Ms. Sharon supported the findings of the court. She relied on the case of **Telkom Kenya Limited v John Ochanda [2014] eKLR** in distinguishing a judgment in *personam* and *in-rem*. The Court of Appeal confirmed that its findings were not intended to be in rem when it stated that "as we stated earlier, the subject of the present appeal is the part of the decision of the High Court touching Kisii HCCC No. 13 of 2012 which was consolidated in Nairobi JR No. 94 of 2012". She concluded therefore that the decision of the Court of Appeal was not in rem as was the petition. Counsel further agreed with the finding of the court that the issue of the administrative units had been dealt with in JR No. 120 of 2012 and the same having not been appealed against, still stood. Legal Notice No. 14 of 2012 was challenged in JR No. 94 of 2012 by various counties including Garissa County and a decision was made which resulted in the amendment of the said legal notice and therefore the 2<sup>nd</sup> respondent in seeking to recruit administrative officers ought to have done so within the confines of the boundaries as contained in the amended legal notice. In the premise the 2<sup>nd</sup> respondent had no mandate or authority to review or interfere with the boundaries in the creation of new locations. In purporting to create new administrative units, the 2<sup>nd</sup> respondent was subverting the Constitution while interfering with the independence of 8<sup>th</sup> respondent. Counsel relied on the case of: **Job Nyasimi Momanyi & 2 Others v Attorney General [2009] eKLR** for this proposition. Lastly, counsel submitted that the court correctly applied the provisions of the National Government Coordination Act since the advertisements were made in 2015 and the Act came into force in 2013 thus there was no retrospective application of the act.

There were no written submissions by the other parties to this appeal.

This is a first appeal. It is now settled that the duty of the first appellate court is to re-evaluate the evidence tendered in the trial court and

come up with its own findings and conclusions. In the case of **Kamau v Mungai [2006] 1 KLR 15**, this court rendered itself thus on the issue:

***“Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that.”***

We have carefully considered the record and grounds of appeal, the impugned judgment, the rival written submissions by counsel and the law. The main issue for determination is whether the court had a basis or was justified in arriving at the conclusions it made in the impugned judgment.

The appellant contends that it was wrong for it to be joined as a party to the petition. The appellant’s argument is that as a member of parliament, it was not a juristic person capable of suing or being sued. Even though that is unquestioningly the correct interpretation of the law, this issue was not raised before the trial court. The appellant’s contention before the trial court was simply that no remedies had been sought against it. Nonetheless it participated in the proceedings by opposing the petition. That being the case the appellant cannot now be heard to claim that it had not been properly joined in the petition. We agree with the submissions by counsel for the 1<sup>st</sup> respondent that if indeed the appellant was aggrieved by being made a party to the petition, he had other remedies available to him, such as to apply to be disjoined from the proceedings, not to participate in the proceedings or participate and seek costs. He opted for the latter. We also note that, Rule 5 (b) is categorical that a petition shall not be defeated by reason of the misjoinder or non-joinder of parties. Accordingly, there is no substance in this ground of appeal and it must therefore fail.

The substance of the petition before the trial court was that the 1<sup>st</sup> respondent was aggrieved by the advertisements made by the 2<sup>nd</sup> respondent on 15<sup>th</sup> May, 2015 which he claimed contravened court orders and erroneously indicated that Abdisamit location was in Central division of Garissa sub-county yet it was in Dertu division, of Daadab constituency and that the advertisement for the position of assistant chief incorrectly indicated that Auliya sub-location was in Abdisamit location of Sankuri division yet is in Laago sub-location of Modika location. The 1<sup>st</sup> respondent further challenged the creation of the said administrative units for lack of or absence of public participation and finally that the electoral and or administrative boundaries had been determined in JR No. 120 of 2012.

Articles 1 and 2 of the Constitution states that 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. It follows therefore that 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.

Whereas Article 10 of the Constitution provides for national values and principles of governance such as devolution of power, the rule of law, **participation of the people**, good governance, integrity, transparency and accountability, Article 47 provides for fair administrative action, in that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In the replying affidavit, the 2<sup>st</sup> respondent stated that it acted on authority from the then Provincial Commissioner in the creation of the disputed administrative units. The learned Judge while relying on the guiding principles in Section 4 of the National Government Coordination Act and Articles 10(1) & (2) (a) (c) and 189(1) of the Constitution was not satisfied that there was proper public participation and held that *“there wasn’t any serious engagement with the public as the public had previously expressed their concerns in JR No. 120 of 2012 and the court made a determination which was never reviewed, set aside or appealed against.”* Consequently, the court found that the constitutional and statutory provisions were not complied with in the creation of the administrative units. The creation or alternation of administrative units is very sensitive, emotional and weighty matter. It is something in which the public as a whole has a stake in, especially an interest that justifies governmental regulation. It is clear from the record that public participation was not factored in when creating the new administrative units.

Accordingly, we cannot fault the trial court for so holding.

As to whether this Court’s decision in the **Peter Odoyo Ogada** case (Supra) was a judgment *in rem* or *personam*, the **Black’s Law Dictionary**, 9<sup>th</sup> Edition defines a judgment *in rem* as;

***“An action in rem is one in which the judgment of the Court determines the title to the property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated.”***

While it defines a judgment *in personam* as:

***“An action is said to be in personam when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgment in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action in personam.”***

In the instant appeal, the appellant took the view that the judgment was *in rem* as it addressed the powers and jurisdiction of the 8<sup>th</sup> respondent and the High Court’s role in resolution of disputes on delimitation of boundaries of electoral units. The 1<sup>st</sup> respondent on the other hand took the view that the judgment was *in personam* since it made an independent and distinct determination in relation to each and every petition and the judicial review application. The 6<sup>th</sup> respondent was also of the view that the judgment was *in personam* as the court was clear when it stated that the subject of the appeal was that part of the decision of the High Court touching Kisii HCCC No. 13 of 2012. Similarly, the trial court in finding that the judgment was *in personam* held that the Court of Appeal did not annul the entire judgment of the

High Court but rather only set aside the decision relating to the determination by the 8<sup>th</sup> respondent naming Suba North and Suba South constituencies and that the same did not relate to findings in relation to constituencies the subject of JR 120 of 2012 which had not been set aside. It is without doubt from the record that JR No. 94 of 2012 led to the amendment of Legal Notice No. 14 of 2012 with regard to the disputed administrative units. This decision was not appealed against nor was it reviewed or set aside. The judgment in the **Peter Odoyo Ogada** case (Supra) only set aside the decision regarding Suba North and Suba South constituencies. Hence the said decision was independent and distinct to the said constituencies and therefore the judgment was in *personam* and was not applicable to the petition leading to the present appeal. By parity of reasoning, the petition before the trial court was thus not *res judicata* as correctly held by the trial court.

We now turn to the application of Section 4 of the National Government Coordination Act by the court. The same provides *inter alia* that:

**“In fulfilling its mandate, the national government shall act in accordance with the national values and principles of the Constitution in particular, those set out in Articles 10, 189, 201(d) and 232.”**

The appellant’s position is that the Act was enacted in 2013 while delimitation of boundaries was carried out in 2010. He therefore faulted the court for relying on the said Act arguing that statutes do not have a retrospective reach. The 1<sup>st</sup> respondent on the other hand argued that the impugned advertisements were made in 2015 after the Act had been enacted in 2013 and thus there was no retrospective application of the same. The 6<sup>th</sup> respondent supported the 1<sup>st</sup> respondent’s position and submitted that since the advertisements were carried out in 2015, the decision of the court was within the ambit of the Act which was enacted in 2013. It is common ground that the petition leading to the present appeal was based on the advertisements dated 15<sup>th</sup> May, 2015. The advertisement was challenged because even though delimitation of boundaries had been carried out in 2010 and the same had been successfully challenged through JR 120 of 2012 as consolidated with JR No. 94 of 2012 and which led to the amendment of Legal Notice No. 14 of 2012, the 1<sup>st</sup> respondent moved the court on grounds that the 2<sup>nd</sup> respondent had contravened the decision of the court in making the advertisements and that it ran counter to the amended legal notice No. 14 of 2012. As stated elsewhere in this judgment, the decision in JR 120 of 2012 amending legal notice No. 14 of 2012 was not appealed against, set aside or reviewed and therefore the same was in force. In the premise the 2<sup>nd</sup> respondent ought to have acted within the confines of the boundaries as per the Amended Legal Notice No. 14 of 2012. It had no authority to interfere with the boundaries or create new administrative units outside the said legal notice as doing so amounted to undermining the court orders as well as the Constitution. The trial court was therefore right in holding that the 2<sup>nd</sup> respondent had contravened the provisions of Section 4 of the Act and Articles 10, 189, 201(d) & 232 of the Constitution. The Act having come into force in 2013 and the disputed advertisements having been made in 2015, the trial court was right in reaching the conclusion it did on the issue of retrospective application of the Act.

In the end, we find the present appeal lacking in merit. It must and is hereby dismissed accordingly with no order as to costs.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.**

**ASIKE- MAKHANDIA**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**