REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 307 of 2012

EX-CHIEF PETER ODOYO OGADA.....…1ST APPELLANT

JOSHUA OWUOR AMISI.....2ND APPELLANT

PETER ODEDE OUMA.....3RD APPELLANT

NICHOLAS OUMA AJWANG.....4TH APPELLANT

OBADIA OTIENO WASONGA.....5TH APPELLANT

COUNCILLOR MAURICE ONYANGO KIRONGE.....6TH APPELLANT

MICHAEL OWINO OORO.....7TH APPELLANT

EMMAMS OOKO OTADO.....8TH APPELLANT

RUSINGA AND MFANGANO ISLANDS COUNCIL OF SUBA ELDERS.....9TH APPELLANT

SUBA ELDERS DEVELOPMENT AND CULTURAL COUNCIL.....10TH APPELLANT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION OF KENYA & 14 OTHERS.....RESPONDENTS

(An appeal from the Judgment and Orders of the High Court of Kenya at Nairobi, Milimani Law Courts (Warsame, Sitati, Omondi, Nyamweya & Majanja, JJ) dated 9th July, 2012

in

H. C. C. C. 13 of 2012 (JR)

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JUDGMENT OF THE COURT

The appeal arises from the decision of five judges of the High Court (Warsame, Sitati, Omondi, Nyamweya & Majanja, JJ) after hearing Kisii HCC Suit No. 13/12 (JR), which was delivered on 9th July,

2012 at Nairobi in Nairobi JR No. 94 of 2012. The decision encompassed several other judicial review applications which parties filed from all over the country, seeking various orders regarding the decisions of the Independent Electoral & Boundaries Commission (IEBC) contained in Legal Notice No. 14 of 2012, dated 6th March, 2012 on the electoral boundaries regarding, inter alia names of constituencies and wards. The complaints were raised against IEBC, sued as the 1st respondent, together with various other bodies and parties. The High Court, as borne out by the record, entertained over one hundred applications, and therefore had to consolidate those with more or less similar characteristics, and determine them together. It is also worth noting that it was not only the large volume of applications that presented a challenge to the High Court, but also the time frame within which to determine the applications and render decisions in anticipation of the general elections due on 4th March, 2013. The High Court also travelled to various venues when hearing the applications.

In its judgment and while appreciating what the IEBC had done when carrying out what was called the First Review of the delimitation of boundaries, the exercise had been partially done by the Interim Independent Boundaries Review Commission better known as the "Ligale" Commission, the High Court remarked:

"Our work is an incident of the rule of law and it is intended to complement the IEBC in the performance of its Constitutional and statutory mandate …..

Our responsibility is to evaluate what the IEBC has done and see whether it complies with the Constitution. This judgment, which signals the end of the delimitation process, is a product of the evaluation."

The High Court, after noting that boundary delimitation was a contentious and sensitive matter, proceeded to determine the various judicial review applications but not before commenting on the well-known ***Kriegler*** and ***Waki*** Commissions. It needs repeating that these two Commissions were appointed following the 2007 – 2008 post-election violence that erupted following a dispute over the outcome of the presidential election at that time. The two Commissions proposed various recommendations, and particularly on elections, did recommend strong, effective and independent electoral and boundaries commissions to replace the Electoral Commission of Kenya (ECK).

Without going into the detail of sequence of legislation, suffice it to say that under the now repealed Constitution of Kenya, ***section 41 B***, two Commissions were constituted – the Interim Independent Electoral Commission (IIEC) and the Interim Independent Boundaries Review Commission (IIBRC). Focus here is on the IIBRC whose mandate was saved under ***section 27*** of the Transitional and Consequential Provisions, in the Sixth Schedule of the Constitution 2010. Then the IEBC was established by ***Article 88 (1)*** under the current Constitution, followed by the IEBC Act, with duties, among others, to delimit constituencies and wards. In sum, the IEBC was mandated to continue and finish the delimitation of boundaries of constituencies and wards, an exercise that the Ligale Commission had started; resolve any disputes/issues that were there during the exercise by IIBRC and publish the names accordingly within four (4) months (see ***section 36*** IEBC Act). We will revert to the mandate of IEBC presently - what it did and what gave rise to the judicial review applications in question. Under its Act, IEBC was required among other duties, to prepare and publish a preliminary report outlining the proposed boundaries of constituencies and wards. To do so, IEBC was required by law to involve public participation by adopting a consultative process.

The history of the whole process is that the Preliminary Report on the First Review relating to the Delimitation of Boundaries of Constituencies and Wards was published on 9th January, 2012 and its Revised Preliminary Report followed on 9th February, 2012. The same was presented to the Justice and Legal Affairs Committee of Parliament on the same date. IEBC received Parliament's recommendation on that report on 2nd March, 2012. That was what was published on 6th March, 2012 in Gazette Notice No. 14 of 2012 titled the National Assembly Constituencies and County Assembly Wards Order, 2012 (creating 80 constituencies and 1450 County Wards). This is the publication that gave rise to various complaints about the distribution, names, boundaries, areas covering various electoral units and or how

wards were grouped or dispersed. There were also grievances about population, geographical factors as well as clan or ethnic considerations. All these came before the High Court to evaluate and determine. As stated earlier, the complaints came from all over Kenya.

Some causes were filed as petitions under ***Article 22*** of the Constitution while others came in the form of judicial review applications under ***Order 53*** Civil Procedure Rules. These causes were consolidated and heard in Nairobi Petition No. 91 of 2012 and Nairobi JR Misc. No. 94 of 2012. After interlocutory proceedings of one type or another, the High Court proceeded to hear the causes which invariably touched on ***Article 89*** of the Constitution.

As we stated earlier, the subject of the present appeal is the part of the decision of the High Court touching on Kisii HCCC No. 13 of 2012 which was consolidated in Nairobi JR No. 94 of 2012. That decision was made when the present respondents filed a notice of motion dated 19th March, 2012 in the stated Civil Suit at Kisii via the firm of M/s Kajwang & Kajwang Advocates of Nairobi. The respondents invoked the powers donated by ***Articles 47, 89 (7) (a), iv, 11, 159*** of the Constitution, ***section 36*** of the IEBC Act 2011, paragraphs 1, 2, 4, 5 of the Fifth Schedule of the same Act, ***section 1A, 1B, 3A*** of the Civil Procedure Act and ***Order 53*** of the Civil Procedure Rules. The motion sought two substantive orders premised on three grounds, namely, that the High Court do issue:

(i) ***an order of certiorari to remove for quashing the decision of IEBC contained in LN no. 14/12 renaming constituencies no. 251, 252 Mbita and Gwasi to Suba North and Suba South respectively.***

(ii) ***an order of mandamus compelling the IEBC to proceed with the delimitation of boundaries and wards in the First Review without effecting any change of names of Mbita and Gwasi constituencies.***

In the grounds it was contended that the IEBC exceeded its jurisdiction in considering change of names with respect to the two constituencies and that it considered extraneous and irrelevant issues to change those names. The new names "***Suba North***" and "***Suba South***" were termed unreasonable and repugnant to the values and the spirit of the Constitution, and likely to promote sectoral tension in the area. Ex-Chief Calvins Ariko Lukio and Clr Hezron Okeyo Matiku swore two affidavits in support of the motion. Clr Matiku annexed several documents to his affidavit including memorandum.

In reply there were two affidavits by Mohammed Jabane Mahmud, Manager (Legal Services) of the IEBC. They were dated 4th April, 2012 and 21st May, 2012 respectively. To oppose the motion and also controvert the depositions by ex-Chief Lukio and Clr Matiku, he referred to the population of the Suba and the Luo inhabiting the subject area, showing a large preponderance of the Suba over the Luo. He appended the memoranda that were presented to IEBC at various meetings concluding that the two constituencies were properly named Suba South and Suba North.

We were told that after receiving submissions from all counsel, perusing all the relevant material placed before them and taking in regard highlights, from some not all of the counsel, the learned judges restated the prayers in the motion, the grounds in support, alongside them the opposition by the respondents namely the IEBC plus the interested parties, and then delivered themselves, *inter alia* thus:

"8. After considering all the pleadings, evidence, submissions by parties we appreciate the fact that Mbita and Gwasi constituencies are inhabited by Subas and Luos. We also appreciate the fact that each group has historical, economic, social and cultural attachment to the two names. We further note that most of the inhabitants of Mbita Constituency are Luos and this explains the passion with which the applicants' case was put to court.

9. The interested parties put up spirited and passionate arguments in support of the IEBC position.

10. Notwithstanding the passion, the case on both sides was argued on legal principles and factual matters. The Luo and the Suba people have always lived in harmony for generations and we do not think it is right to disturb the harmonious relationship. We think it is appropriate and prudent to allow the residents of Mbita to define their identity by retaining the names of the constituency. We also

recognize the need for the people of Gwasi to define their identity by changing the name of their constituency to reflect their identity.

11. Accordingly and in order to balance the interests of the residents of Gwasi and Mbita constituencies we order as follows:

(a) The proposed Suba North Constituency is renamed Mbita Constituency.

(b) The proposed Suba South is named Suba Constituency.

(c) Legal Notice No. 14 of 2012 is hereby amended to reflect these changes.

(d) The maps for the proposed Suba North and Suba South constituencies in Volume III of the Final Report shall be amended to reflect these changes.

(e) There shall be no order as to costs."

On delivery of the above decision on 9th July, 2012, we were told, the 1st respondent duly complied and proceeded to do all that appertains to preparing for elections namely registering voters, verifying the voter register, ready for the general elections called on 4th March, 2013.

Being aggrieved by the above decision the appellants lodged this appeal citing, in all, seventeen grounds.

At this stage we should note that the firm of M/s Kajwang & Kajwang Advocates acting for the 2nd to 15th respondents in this appeal, was duly served with the hearing notice but did not appear. So we proceeded to hear the other parties in the absence of M/S Kajwang & Kajwang Advocates and the Hon. the Attorney General whom we were told participated in the proceedings in the High Court, who were served but did not appear, leaving the contest to the actual contestants in the cause – the appellants and the 1st respondent (IEBC) represented by Mr. Mwenesi and Mr. Murugu respectively.

Mr. Mwenesi, learned counsel for the appellants argued the appeal in what appeared as a global approach, basically urging us to appreciate that the powers of review granted to the High Court in ***article 89*** – on delimitation of electoral boundaries – constituencies, wards, their names, locations and all that, did not mean supplanting the mandate of IEBC. That the court's powers to review should be read to mean that in the event it comes across an anomaly, defect or default on the part of the IEBC when it is delimiting the electoral areas, the High Court ought only to direct the IEBC to go back and rectify the same. The High Court should not substitute its own finding/opinion for that of the IEBC.

Mr. Mwenesi told us that the High Court found in its decision that Gwasi was mostly populated by Luos without evidence being adduced. He told us that that opinion was advanced by Mr. Kajwang in his submissions in court. Learned counsel referred to the memorandum dated 30th January, 2012 which the Suba Community, quoting from the Kenya Population Census 2009 (Vol. 1A Table 2) presented to the IEBC at one of the sittings. That it indicated the dominant Suba population in both Mbita and Gwasi constituencies, a fact the respondents did not controvert. That in all, seventeen memoranda were presented to the IEBC. And while the appellants appeared before the IEBC, the respondents did not, yet they filed the notice of motion before the High Court and proceeded to argue it.

Mr. Mwenesi submitted that Parliament had a role in the delimitation of boundaries. It discussed the "Ligale" Commission's report. It also discussed the IEBC report and made recommendations on it. Parliament returned the Report to the IEBC vide its letter dated 1st March, 2012 whereupon the IEBC proceeded to publish the disputed Legal Notice No. 14/12. That all in all the IEBC fulfilled its statutory mandate of delimiting the boundaries of constituencies in issue, according to the law and procedure, yet the High Court in its decision changed all that to put in place the contentious constituencies of Suba and Gwasi. It was argued that the names the appellants presented to the IEBC – Suba North and Suba South, which names Parliament endorsed ought not to have been changed by the High Court. It had no mandate

or power to do so under the IEBC Act or ***Article 89*** of the Constitution. It did not consult with the people of the area in order to come up with its order yet consultative and public participation was central to delimiting of electoral boundaries. Mr. Mwenesi urged us to allow the appeal but let the elections, which were due a few days after hearing the appeal, to go on as per the orders of the High Court.

Mr. Murugu, learned counsel for IEBC (the 1st respondent) who did not appear to seriously oppose the appeal, fell back on ***Article 89 (2),*** arguing that if any review of boundaries had to be done, that ought to be some 12 months before elections, yet it was only a week (at the time of hearing the appeal) before the elections due on 4th March, 2013. So in the event we allowed the appeal there would be great disruption in the election process in the subject area. That ballot papers had been printed, polling stations registered and published at great public expense. Thus ordering a fresh delimitation would cause more harm and will not advance public interest in the two constituencies rather than benefit the appellants. To Mr. Murugu, in the event this appeal is allowed, the review sought could be considered in the future boundary delimitation, adding that the appellants would not be prejudiced. Finally, counsel submitted that the 1st respondent should not be condemned in costs because the complaint that resulted into this appeal followed orders of the court.

To the above, Mr. Mwenesi posited that ***Article 89 (2)*** ought to be read alongside ***section 27 (3)*** of the Sixth Schedule of the Constitution of Kenya 2010, which exempted the first elections under it from the requirements of that Article – ie any review to be carried out 12 months before elections. Counsel however repeated that his clients would accept the review in future if we order it but that that would be a case of stale juice. Mr. Mwenesi agreed that the 1st respondent should not be burdened with costs. However, he reiterated ground no. 12 in the memorandum of appeal which we reproduce below. We do so because arguments for and against this appeal were mainly on points and principles of law, mostly centered on ***Article 89*** of the Constitution.

The said ground no. 12 reads:

"12. The learned judges of the High Court erred in law and exceeded their powers and jurisdiction in the orders that they made concerning Suba North Constituency and Suba South Constituency and purported to directly exercise the constitutional powers of the 1st respondent the IEBC to alter the names of the two affected constituencies and to amend the Legal Notice No. 14 of 2012 published in the Gazette by the IEBC and without any prayer from the 2nd – 15th respondents herein who (were) only granted leave to seek mandamus "compelling the Independent Electoral Commission to proceed with the Demolition (sic) of the Boundaries of constituencies and wards in the First Review without effecting any changes of names of Mbita and Gwasi Constituencies."

The much canvassed ***Article 89***, under the subtitle Delimitation of Electoral Units reads as follows:

"89. (1) 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).

(2) The Independent Electoral and Boundaries Commission shall review the 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) 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.***

(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 of 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.

(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 the 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.

(12) For the purposes of this Article "population quota" means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards, as applicable, into which Kenya is divided under this Article." (underlining added).

It is not in doubt and neither was it in dispute that the IEBC, the 1st respondent, has been conferred under the Constitution with the mandate to take the stated factors in ***Article 89*** in regard while delimiting the boundaries of constituencies and wards. It has also to give those electoral units names, numbers and thereafter publish the same in the Gazette, for the delimiting exercise to take effect. If such an exercise takes place in less than 12 months before the next election, then the result of the exercise does not impact on that election. And as we so reiterate, we are alive to ***section 27 (3)*** of the Sixth Schedule in the Constitution exempting the elections scheduled to take place on 4th March, 2013 from the provisions of ***Article 89 (2)***.

Still on the contents of ***Article 89***, we may, even at this early stage, begin to sort out some aspects before we delve into the pith of the arguments. First in the notice of motion before the High Court, the present respondents invoked the powers donated by ***Article 89 (7) (a)*** (above) - on the requirements of the IEBC to consult all interested parties when delimiting boundaries. It was not stated in the grounds that the IEBC failed, refused or ignored to take the views of the respondents in its sittings in the area. They stated in their affidavits that such sittings took place and they presented their memoranda. The appellants claimed that the respondents did not appear at the public sittings. However, Clr. Hezron Mutuku in his affidavit in support of the notice of motion sworn on 15th March, 2012 admitted that he attended the IEBC public hearing which took place at ICIPE Guesthouse Auditorium in Mbita Town. With that, perhaps the

respondents should not have included that provision of law in their notice of motion as a basis why LN No. 14/12 had to be quashed. But be that as it may, that is not a point in this appeal.

The next point we wish to address is the mode by which the notice of motion dated 23rd March, 2012 was brought. It was brought as per ***Article 10*** of the Constitution as well as ***Order 53*** of Civil Procedure Rules. One would take the view that to do justice without undue technicalities to procedural matters, this "mixed grill" be entertained without much fuss. But in the present cause, it does not appear that simple. This we say because in accordance with ***Order 53*** of Civil Procedure Rules, the respondents prayed for orders of *certiorari* and *mandamus* only. In our practice, when the High Court grants those orders, that is it. The court can quash the decision questioned like the LN No. 14/12. However, to issue an order of mandamus, the applicants would be obliged to demonstrate that IEBC was bound to effect a statutory duty to delimit boundaries of the two constituencies, yet it had ignored or failed to do just that – hence an order of the court was required to compel it to perform that duty. (See ***Republic vs the Kenya National Examination Council Ex parte Geoffrey Githinji & Others C.A No.266/96***). In this matter, we were told that IEBC did the delimitation except that the respondents were not satisfied with the outcome regarding the names of the subject constituencies and so they applied to the High Court.

In our view where a person is dissatisfied with a decision of IEBC under ***Article 89*** and desires for a review, that person need not go by way of judicial review procedure under ***Order 53*** Civil Procedure Rules. He/she does not have to file a civil suit either. One needs to file a petition or application (notice of motion or other) invoking the powers under ***Article 89 (10)*** of the Constitution. By doing so, a party may even pray for a declaration or direction of the court directed to any party or thing, which cannot be sought in judicial review proceedings. Perhaps it is time ***Order 53*** Civil Procedure Rules was expanded regarding the scope of reliefs to be sought under it.

Now that the centre of the proceedings herein was ***Article 89*** of the Constitution, how was the High Court to move when asked to review a decision of the IEBC on delimitation of electoral boundaries? The respondents in their motion prayed that the IEBC should proceed with the delimitation exercise but that it should not change the names of Mbita and Gwasi (or Gwassi) constituencies. On the other hand, the appellants urged the High Court to maintain Suba North and Suba South names as per the LN No. 14/12. In exercising powers donated to it by ***Article 89 (10)*** of the Constitution, the High Court ordered the 2 constituencies to bear the names Mbita and Suba. In essence, neither side got what it wanted. The High Court did that by citing its powers to review the decision of the IEBC in that context, when giving names to electoral areas. It needs no repeating that in order to review a decision, an error, omission or default should be demonstrated to have been incorporated in that decision, or that an extraneous issue was considered which ought not to have been. That is the general principle governing the exercise of powers of review.

In this matter, the High Court did not find and apparently the respondents did not demonstrate in any way that the decision of the IEBC was faulty so as to warrant a review. According to the **Oxford Concise English** Dictionary (9th Edition) several definitions of the word "review" appear, the most pertinent to our subject being:

"(2) a retrospect or survey of the past;

(3) revision or reconsideration;

(4) a second view."

The dictionary adds that a review is a survey or to look back on, reconsider or revise, to view again. And that is what ***Article 89 (10)*** imposes on the High Court. Seen in the context of boundaries delimitation, the High Court had the power to look back on what IEBC had done regarding the boundaries of these 2 constituencies. The course taken by the IEBC via public and consultative meetings, the representations made whether orally or by memoranda in respect of historical, geographical, economical, cultural, logistic and such other aspects the IEBC took to arrive at its decision, appreciating that it alone had the resources, time, expertise and the mandate to decide and give the names of the 2 electoral areas. And if an error,

fault or omission was found by the court in the whole process, then it could render an order that the decision was faulty and therefore not in accord with the mandate given to IEBC under ***Article 89***. Alternatively, the High Court could as well find no merit in the application to review and say so by dismissing the matter. If a fault was found by the High Court and we have already said that it did not so find in its judgment, then the correct course to take was so to advise the IEBC and direct it to go back and do the exercise afresh or take such other action as directed by the court.

Our reading of ***Article 89*** does not yield or point to authority or jurisdiction of the High Court, while exercising the power of review under that Article to substitute the decision of the IEBC with its own. With due respect to the High Court, we hold that it was in error to substitute its own opinion, as a decision to supplant the decision of the IEBC, which had been lawfully and procedurally arrived at following the public hearings, consideration and adoption by Parliament, all the way to the publication in the Gazette. All that lies within the province of IEBC and no other organ. It has been given that mandate by the Constitution as other organs like the High Court has been given under ***Article 165, e***xcept that the High Court has also been given the power to review a decision of the IEBC. That power of review, according to us, is limited to the prayers in the application under ***Article 89 (10),*** if the applicants demonstrate that indeed a fault featured in the manner IEBC went about delimiting electoral boundaries. And as we have stated earlier, in the event the High Court should so find, it should direct the IEBC to go back and do the correct and proper thing.

If the applicant is unable to satisfactorily demonstrate the basis of his/her complaint against the IEBC then of course the application should be dismissed. ***Article 89 (10)*** does not give room for the High Court to put its own decision on delimitation of electoral boundaries in place of that made by the IEBC. It can only find fault with it and order a fresh exercise. This we say because the High Court cannot and is not mandated to go, meet and consult residents of a given area, take their views on various aspects which go into delimitation before deciding accordingly, be it on boundaries or names that is the mandate of IEBC. The time to do that, the resources, sources of expertise required to carry out that exercise is within the constitutional mandate of IEBC and IEBC alone.

The other reason we wish to advance to support our position that in the event the High Court found fault with the naming of the two constituencies above, which it did not, it should have directed the IEBC to do the exercise afresh, is to do with respecting each others areas of operation and particularly where the areas have been "delimited" by law. It is good practice intended to foster public confidence and trust to let each organ perform its mandate. But this performance should only be within the limits of the law, good faith and integrity.

And a quotation from the judgment in the consolidated ***Constitutional Petitions no. 373 of 2012 and 426 of 2012***, ***John Waweru Wanjohi & Others vs the Attorney General & Others***, ***Kipngetich Maiyo & Others vs the Kenya Land Commission Selection Panel*** when the High Court was determining challenges to appointments to the National Land Commission is apt here:

"The court must of course be careful not to usurp the powers and functions of the various constitutional and statutory bodies involved in appointments. The role of the court is to ensure that the fidelity of the Constitution is maintained."

In this regard, we are not oblivious to the fact that the body or organ performing statutory duties has discretion when handling matters falling in its sphere. There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself. Where a body like the IEBC applied its mind to the constitutional and statutory requirements, regarding delimitation, reaching a rational conclusion, the courts should not review that decision. It will have passed the test of reasonableness, because a constitutional review is not for error but for legality. And here the High Court found neither error nor illegality.

In performing their respective duties, it is only fair to assume that errors may occur. And when they do

occur and it is satisfactorily demonstrated that they occurred and thus constituted a legitimate grievance, there should be a redress or relief forthcoming from the courts. Such a relief could be for instance to find the whole exercise involved as void. And that is the end of it. Or as in the present case, order that the exercise be undertaken afresh if an error or illegality was detected by the High Court, which was not the case here.

In sum we find that the decision of the High Court in the matter of the two constituencies herein was not according to the intendment of ***Article 89 (10)*** of the Constitution and so we set it aside.

In doing so, we are aware, as stated earlier above, of the legal provision that the first general election under the Constitution of Kenya 2010 was exempted from the 12 month time limit in the event of a review. However, our setting aside of the High Court decision does not mean that the two constituencies resume their gazetted names of Suba North and Suba South in the elections due on 4th March, 2013. Such a move is practically impossible. It can only be put in place in the future. We were assured that the boundaries delimitation is a continuing process and that no actual prejudice would befall the appellants in the event the review is not done now.

In sum this appeal is allowed. The decision of the High Court is set aside with the result that the determination of IEBC naming Suba North and Suba South Constituencies as published in LN No.14 of 2012 on 6th March, 2012 is upheld. Each party to bear its own costs.

Dated and delivered at Nairobi this 19th day of April, 2013.

M. K. KOOME

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/jkc