



**THE REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

**PETITION NO. 21 (E023) OF 2020**

**MEMBER OF PARLIAMENT**

**BALAMBALA CONSTITUENCY.....APPELLANT**

**-AND-**

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

**CABINET SECRETARY FOR INTERIOR & CO-ORDINATION**

**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**

**DADAAB CONSTITUENCY.....6<sup>TH</sup> RESPONDENT**

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

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....8<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment of the Court of Appeal at Nairobi  
(Makhandia, Kiage, & Murgor, J.J.A.) dated 20<sup>th</sup> November 2020 in Civil Appeal  
No. 424 of 2017)*

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Representation:

Mr. Ongoya for the Appellant

(Ongoya & Wambola Advocates)

Mr. Mokuia Ndubi for the 1<sup>st</sup> respondent

(Musyoki Mogaka & Co. Advocates)

Mr. Thande Kuria for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents

(The Hon. Attorney General)

Mr. Otieno for the 5<sup>th</sup> respondent

(Sagana & Biriq Co. Advocates)

The 6<sup>th</sup> and 7<sup>th</sup> Respondents did not appear and were not represented

Mr. Kipkogei for the 8<sup>th</sup> respondent

(G & A Advocates LLP)

## **JUDGMENT OF THE COURT**

### **A. INTRODUCTION**

**[1]** Before the Court is a Petition dated 16<sup>th</sup> December 2020 and filed on 21<sup>st</sup> December 2020. The appeal is filed pursuant to Article 163(4)(a) of the Constitution and is anchored on the interpretation and application of Articles 10, 189, 201(d) and 232

of the Constitution. It revolves around the purported creation of new administrative units by the 2<sup>nd</sup> respondent (Cabinet Secretary for Interior and Coordination of National Government) within Garissa County and challenges the decision of the Court of Appeal which upheld the decision of the High Court (*Mativo, J.*), in ***Constitutional & Human Rights, Petition No 238 of 2015*** delivered on 4<sup>th</sup> October 2017.

## **B. FACTUAL BACKGROUND**

### **i) Proceedings at the High Court**

- [2] On 15<sup>th</sup> May 2015, the 2<sup>nd</sup> respondent issued two advertisements in the form of notices, Ref Nos. DC/HR/1/30/105 and DC/HR/1/30/106 respectively, advertising for the position of Chief Grade II Job Group ‘H’ and Assistant Chief II, Job Group ‘F’ in Garissa sub-county. In the advertisements, the position for Chief was for the area known as *Abdisamit* Location in Central division and the Assistant Chiefs position was for two sub-locations. The first Assistant Chief position was for ‘*Auliya*’ sub-location within *Abdisamit* Location, *Sankuri* division while the other position was for *Laago* sub-location, *Modika* location in Central division. All the areas advertised fell within Garissa County.
- [3] After the advertisement was issued, the 1<sup>st</sup> respondent, a resident of Garissa County, filed before the High Court, ***Constitutional Petition No. 238 of 2015***, claiming that the advertisements were erroneous contending firstly, that in the advertisement for the Chief Position, it purported to show that *Abdisamit* Location is in Central Division of Garissa sub-county yet it was in *Dertu* Division, *Dertu* Ward in *Daadab* Constituency. Secondly, for the position of Assistant Chief, the advertisement erroneously indicated that *Auliya* sub-location was in *Abdisamit* Location of *Sankuri* Division yet it was in *Laago* sub-location in *Modika* Location.
- [4] The 1<sup>st</sup> respondent contended that by issuing these advertisements, the 2<sup>nd</sup> respondent had ‘*purportedly created*’ new administrative units namely, *Auliya*

and Laago sublocations without participation from the citizens either directly or through their elected leaders. He also alleged that the advertisements restricted those interested in applying for the positions to only residents of the mentioned location and sub-location.

- [5] The 1<sup>st</sup> respondent therefore challenged the creation of the administrative units on two grounds. First, he claimed that there was no public participation and secondly, that there had already been a determination on those elective/administrative boundaries by the High Court in ***Nairobi Judicial Review Application No. 120 of 2012*** that was heard and consolidated with ***Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others, Judicial Review Misc. Application No. 94 of 2012 [2012] eKLR*** which case involved several consolidated Judicial Review applications among them ***Nairobi Judicial Review Application No. 120 of 2012*** where the dispute involved the delimitation of boundaries of *Balambala* and *Dujis* Constituencies of Garissa County.
- [6] The 1<sup>st</sup> respondent maintained that this decision had never been reviewed, appealed against or varied yet the 2<sup>nd</sup> respondent, in total disregard of those orders, 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. He alleged that Auliya and Abdisamit geographically fall within Dertu location of Daadab Constituency and that the intended creation of these new sub-locations into Balambala Constituency would relocate Daadab residents to seek services at Balambala which would in turn, subject them to unnecessary hardship and would therefore be a violation of their right to fair administrative action under Article 47 of the Constitution as well as Article 10 on the national values and principles of governance, Article 88 that mandates IEBC, the 8<sup>th</sup> respondent to delimit constituencies as well as Article 159 of the Constitution.

- [7] The 2<sup>nd</sup> and 3<sup>rd</sup> respondents on their part, denied the alleged violations of the Constitution and the law and the violation of existing court orders. They maintained that it was within their mandate to create administrative units and that the issues before the trial court differed from those in the previous suit. They further maintained that their decision was in conformity with the provisions of the Districts and Provinces Act, 1992 (*repealed*). They furthermore pleaded that the units were created in response to an urgent need to bring services closer to the people, to aid in the maintenance of security along the Kenya- Somali border and, to aid in the provision of relief food. It was also their case that the judgment in ***Republic v Independent Electoral and Boundaries Commission and another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others***; Nairobi Judicial Review No. 94 of 2012 [2012] eKLR which included the Judicial Review application filed by one ***Peter Odoyo Ogada*** in respect of Suba South and Suba North Constituencies (hereinafter referred to as “***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012***) only dealt with electoral boundaries and not administrative boundaries.
- [8] The 8<sup>th</sup> respondent, also opposing the petition, claimed that its constitutional mandate did not include the creation of administrative units, a function vested in the 2<sup>nd</sup> respondent, and therefore the petition was misguided and ought to be dismissed.
- [9] In its Judgment delivered on 4<sup>th</sup> October 2017, the High Court *Mativo, J* (as he then was) found that the decision rendered by the High Court in ***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012*** that also made orders with respect to ***Nairobi Judicial Review Application No. 120 of 2012*** related to the issues raised in the present petition and that the judgment still stands. It was therefore the learned Judge’s finding that the 2<sup>nd</sup> respondent’s decision to create the said administrative units violated the

decision in ***Nairobi Judicial Review Miscellaneous Application No. 120 of 2012.***

[10] On the issue of whether the 2<sup>nd</sup> respondent acted within the confines of the law while creating the said administrative units, it was the trial court's finding that the provisions of Section 4 of the National Government Coordination Act as well as the provisions of Articles 10 and 189 of the Constitution offer the guiding principles in the creation of such units. More fundamentally, the trial court observed that there was no proper public participation or any serious engagement with the public as expressly provided for under Article 10 of the Constitution which lists 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 trial court, in addition, found that there was a violation of the provisions of Article 47 on the right to fair administrative action as the decision by the 2<sup>nd</sup> respondent complained of was illegal or *ultra vires* as it was undertaken in violation of a court decision and hence, not grounded on the law.

[11] For the above reasons, the trial court proceeded to conclude 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 No. 1 of 2013 by purporting to create new administrative units in violation of the law and disregarding the court decision rendered in ***Nairobi Judicial Review Application No. 120 of 2012*** and made a declaration to that effect. The trial court further granted 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 and an order of *mandamus* directing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to comply with the decision rendered in ***Nairobi Judicial Review Application No. 120 of 2012.***

**ii) Proceedings at the Court of Appeal**

**[12]** Aggrieved by the decision of the High Court, the appellant filed an appeal, **Nairobi Civil Appeal No. 424 of 2017**, on six grounds, claiming that the learned Judge erred in law by:

- a) *Failing to determine whether the appellant was properly suited in the High Court in HC Constitutional Petition No. 238 of 2015.*
- b) *Failing to find that the proceedings and consequential declarations in Peter Odoyo were in rem and consequently applied to the subject matter of the proceedings in HC Constitutional Petition No. 238 of 2015;*
- c) *Finding that the judgment in Peter Odoyo was limited to that appeal and did not apply to other consolidated causes in JR No. 94 of 2012;*
- d) *Failing to 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 been created on 15<sup>th</sup> May 2015 vide the disputed advertisements;*
- e) *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.*
- f) *Applying the provisions of the National Government and Coordination Act to administrative units created way back in 2010.*

**[13]** The Court of Appeal (*Makhandia, Kiage & Murgor, JJA*) identified one main issue for determination: *whether the trial court had a basis or was justified in arriving at its conclusion.*

**[14]** On the issue raised by the appellant that he was wrongly joined as a party to the petition on grounds that a Member of Parliament is not a juristic person capable of suing or being sued, the Court of Appeal noted that the appellant had participated in the proceedings before the trial court by opposing the petition and could not go on to claim that he had not been properly joined in the petition.

Further, the Court of Appeal held that there were other remedies available to the appellant if he was aggrieved as a party and that by choosing to participate in the proceedings and seek costs, he denied himself the remedy of being struck off the petition. The appellate Court thus dismissed the said allegation.

[15] While addressing the issue of whether the advertisements made by the 2<sup>nd</sup> respondent that led to the creation of administrative units were done without public participation, the Court of Appeal in agreeing with the High Court, held that there was no public participation in the creation of the new administrative units as required by Articles 1, 2, 10 of the Constitution as well as Section 4 of the National Government Coordination Act. The appellate court noted that the creation or alteration of administrative units is very sensitive, emotional and weighty as the public has a stake in it. For this reason, the appellate court agreed with the trial court's finding that the provisions of Section 4 of the National Government Coordination Act 2013 were not complied with.

[16] On the issue as to whether the petition before the trial court was *res judicata*, the Court of Appeal held that the appeal filed against the orders issued in ***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012*** in the filed appeal of ***Peter Odoyo Ogada & 9 Others v Interim Independent and Electoral Boundaries Commission & 14 Others***; Civil Appeal No. 307 of 2012 [2013] eKLR (hereinafter referred to as "***Civil Appeal No. 307 of 2012; Peter Odoyo Ogada v. IEBC & 14 others***") only set aside the decision regarding two constituencies, Suba North and Suba South Constituencies, hence the said decision was independent and distinct to the said constituencies. It was thus the appellate court's finding that the judgment was in *personam* and was therefore not applicable to the petition filed before the trial Court. In that regard, the appellate court found that the learned Judge was right in finding that the 2<sup>nd</sup> respondent had no authority to interfere with the boundaries or to create new administrative units outside Legal

Notice No. 14 of 2012, which was the legal notice that led to the filing of the Judicial Review cases before the High Court on the issue of constituencies and wards, and that doing so amounted to undermining the court orders issued in ***Nairobi Judicial Review Application No. 120 of 2012*** and also contravened the provisions of Section 4 of the National Government Coordination Act as well as Articles 10, 189, 201(d) and 232 of the Constitution.

[17] On the issue raised on retrospective application of the provisions of the National Government Co-ordination Act, 2013 to administrative units created in the year 2010, the Court of Appeal, while agreeing with the High Court, held that the National Government Co-ordination Act, having come into force in 2013 and the disputed advertisements having been made in 2015, then the trial court was right in reaching the conclusion it did on the issue of retrospective application of the Act. It was therefore the appellate court's finding that the High Court was right in holding that the 2<sup>nd</sup> respondent had contravened Section 4 of the Act as well as Articles 10, 189, 201 (d) & 232 of the Constitution. In conclusion, the Court of Appeal agreed with the finding of the trial court and with that finding, dismissed the appeal.

### ***iii) Proceedings at the Supreme Court***

[18] Aggrieved by the decision of the appellate court, the appellant has filed the present appeal reiterating the six grounds that he raised before the Court of Appeal as follows; That the learned Judges erred:

*a) In failing to determine whether the appellant was properly suited in High Court Constitutional Petition No. 238 of 2015;*

*b) In failing to find that the proceedings in Peter Odoyo Ogada & 9 Others v. IEBC & 14 Others [2013] eKLR were in rem and consequently applied to the subject matter of the proceedings in HC Constitutional Petition No. 238 of 2015;*

- c) *In finding that the holding by the Court of Appeal in Peter Odoyo Ogada & 9 Others v. IEBC & 14 Others [2013] eKLR were limited to that appeal and did not apply to other consolidated cases in Judicial Review Misc. Application No. 120 of 2012, Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 Others [2012] eKLR;*
- d) *In failing to determine the material question whether Abdisamit location as well as Laago and Auliya sub- locations have always been in Garissa District and in Dujis constituency prior to the delimitation of boundaries which created Balambala and Daadab constituencies or whether the same had been created on 15/5/2015 vide advertisement reference number DC/HR/1/30/105;*
- e) *In finding that Judicial Review Misc. Application No. 120 of 2012 as consolidated with Judicial Review Misc. Application No. 94 of 2012, in any event had made any orders in respect of Abdisamit Location, Laago sub-location and Auliya sub-location; and*
- f) *In applying the provisions of the National Government Coordination Act, 2013 to administrative units created way back in the year 2010.*

**[19]** The appellant raises the following issues for determination:

- i) *Whether the appellant was properly suited in the High Court in Constitutional Petition No. 238 of 2015;*
- ii) *Whether the proceedings and consequential declarations in Peter Odoyo Ogada & 9 Others v. IEBC & 14 Others [2013] eKLR are in rem and consequently applied to the subject matter of the proceedings in HC Constitutional Petition No. 238 of 2015;*
- iii) *Whether the findings and determinations of the Court of Appeal in particular in Peter Odoyo Ogada & 9 Others v. IEBC & 14 Others [2013]*

- eKLR were limited to the said case and had no relevance to other boundary delimitation cases;*
- iv) Whether the National Government Coordination Act 2013 was applicable to establishment of new administrative units in the year 2010; and*
  - v) Whether the 5 Judge Bench in High Court Judicial Review No. 120 of 2012 as consolidated with Judicial Review No. 94 of 2012 made any orders in respect of Abdisamit location, Laago sub-location and Auliya sub-location.*

**[20]** Consequently, the appellant seeks the following orders:

- a) That this petition be allowed.*
- b) That the Judgment of the Court of Appeal dated 20/11/2020 in Civil Appeal Number 424 of 2017 and the Judgment of the High Court dated 4/10/2017 in Constitutional Petition Number 238 of 2015 be set aside.*
- c) That High Court Constitutional Petition Number 328 of 2015 dated 8/06/2015 be dismissed.*
- d) That the costs of this petition be provided for.*

### **C. PARTIES SUBMISSIONS**

#### **i) Appellant's submissions**

**[21]** The appellant's submissions are dated 2<sup>nd</sup> November 2022 and filed on even date. Therein, he submits that the appeal concerns the relationship between the three administrative units in question and the decision in ***Nairobi Judicial Review Application No. 120 of 2012***. He submits that the question of the three administrative units and the two High Court decisions and the Court of Appeal decision being ***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012*** as consolidated with ***Nairobi Judicial Review Application No. 120 of 2012*** and ***Civil Appeal No. 307***

**of 2012; Peter Odoyo Ogada v. IEBC & 14 others** ought to be determined firstly, by establishing the relationship that the administrative units have with each of the decisions and secondly, the relationship the three decisions have with each other.

[22] The appellant argues that the superior courts based their decisions on the ground that the issue of the administrative units had been dealt with in **Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012** which he submits, was not the case. He urged that the issue of the administrative units in the petition before the High Court and the subject of **Nairobi Judicial Review Application No. 120 of 2012** as was determined in **Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012** related to different entities.

[23] Further to this, the appellant submits that in **Nairobi Judicial Review Application No. 120 of 2012**, the administrative units addressed were in Medina sub-location and Alango-Arba sub-location while before the trial court, the administrative units in question were in Abdisamit location and Auliya and Laago sub-locations respectively. He contends that there was no mention of these three administrative units in **Nairobi Judicial Review Application No. 120 of 2012** and for this reason, urges that the appeal should succeed.

[24] Additionally, the appellant submits that the High Court in **Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012** only considered the question of delimitation of electoral units as provided for under Article 89 of the Constitution. That Article 89 of the Constitution only deals with electoral units as constituencies while the issue before the High Court dealt with administrative units- locations and sub-locations.

[25] In that regard, the appellant argues that the provisions of Article 89 of the Constitution do not apply to the decisions of the 2<sup>nd</sup> respondent while determining

boundaries and naming administrative units. Also, that Article 89 of the Constitution only applies to IEBC, the 8<sup>th</sup> respondent, and only when delimiting electoral units. It is therefore the appellant's argument that the decision in ***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012*** on the delimitation of electoral units cannot be said to have determined a petition before the High Court on boundaries of administrative units where the IEBC lacks power to delimit.

[26] Furthermore, the appellant argues that even when the IEBC refers to administrative units when describing an area covered by electoral units, the said description does not limit other state bodies from delimiting administrative units as long as the boundaries of electoral units are not moved. This, the appellant argues, is because Article 89 of the Constitution only gives IEBC power to determine the names and boundaries of an electoral unit and not the administrative units. The appellant thus submits that this is because IEBC is the only body mandated under Article 89 to alter boundaries of wards and constituencies and that the decision by the 2<sup>nd</sup> respondent on delimiting administrative units cannot be said to be inconsistent with the provisions of Article 89 of the Constitution.

[27] Regarding the Court of Appeal decision in ***Peter Oduyo Ogada v. IEBC & 14 others; Civil Appeal No. 307 of 2012*** he submits that the Court of Appeal declared that the decision of the High Court to delimit electoral units by itself on the ground that the IEBC had done it wrongly was unconstitutional. Therefore, in his opinion, though the Court of Appeal made these declarations while considering the case of Suba North and Suba South constituencies, the wording of the findings was clear that in every instance where the High Court arrogates itself the mandate of IEBC in delimitation, the same is unconstitutional. Consequently, it cannot be argued in his view, that the decision to delimit or name other electoral units apart from Suba North and Suba South remained constitutional simply

because the decisions were not appealed. For the reasons above, he prays that his appeal be allowed.

**ii) 1<sup>st</sup> Respondent's submissions**

[28] The 1<sup>st</sup> respondent's submissions are dated 26<sup>th</sup> October 2022. In opposing the appeal, he proceeds to respond to the five grounds in support of the appeal as framed by the appellant. On the first issue-whether the appellant was properly suited before the High Court- it is his submission that the Court of Appeal considered the issue of alleged misjoinder and found that the appellant participated in the proceedings before the trial court by opposing the Petition. Therefore he cannot claim that both superior courts below failed to determine whether the appellant was properly suited.

[29] On the second issue- whether the proceedings and consequential declarations in ***Peter Odoyo Ogada v. IEBC & 14 others; Civil Appeal No. 307 of 2012*** were *in rem*- the 1<sup>st</sup> respondent submits that both superior courts rightly found that the proceedings and finding were *in personam* and consequently, did not apply to the subject matter of the proceedings before the High Court; that the Court of Appeal correctly found that decision in ***Peter Odoyo Ogada v. IEBC & 14 others; Civil Appeal No. 307 of 2012*** only set aside the decision regarding Suba North and Suba South constituencies hence it was independent and distinct; and that the Petition before the trial court was therefore not *res judicata*.

[30] On the third ground- whether the decision in ***Peter Odoyo Ogada v. IEBC & 14 others; Civil Appeal No. 307 of 2012*** was only limited to that case and had no relevance to other boundary delimitation cases- the 1<sup>st</sup> respondent submits that the same is an issue of fact being raised on a second appeal and the appellant has not shown that both superior courts below considered matters they ought not to have considered or failed to consider matters they ought to have considered or that the entire decision is perverse.

[31] On the fourth ground-whether the National Government Coordination Act, 2013 was applicable in the establishment of new administrative units- the 1<sup>st</sup> respondent submits that both superior courts below did not err in finding that ***Nairobi Judicial Review Application No. 120 of 2012*** had made orders in respect of Abdisamit location, Laago and Auliya sub-locations.

[32] Lastly, on the fifth ground-whether the decision in ***Nairobi Judicial Review Application No. 120 of 2012*** made any orders with respect to Abdisamit location and Auliya and Laago sub-locations- the 1<sup>st</sup> respondent submits that the dispute at the High Court related to an advertisement dated 15<sup>th</sup> May, 2015. To him, the Court of Appeal correctly found that the National Government Coordination Act 2013 having come to force in 2013 and the advertisements having been made in 2015, then it was proper for the High Court to conclude that the 2<sup>nd</sup> respondent had contravened certain provisions of the Act.

***iii) 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' submissions***

[33] The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents' written submissions are dated 7<sup>th</sup> November 2022. They address two issues, namely; (a) *the applicability of Article 89 of the Constitution; and (b) orders of certiorari issued for decisions that are more than 6 months old.*

[34] On the applicability of Article 89 of the Constitution, they submit that under Article 6(3) of the Constitution, the national government is empowered to create administrative units for purposes of service delivery and execution of its functions. In contrast, Article 89 grants the IEBC power to delimit electoral units. In that regard, they urge that both superior courts below made a fundamental error in arriving at the impugned decision on the creation of administrative units based on ***Nairobi Judicial Review Application No. 120 of 2012*** that was heard and consolidated with ***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012***. They argue that the two High Court cases dealt with the creation of electoral units in terms of wards

and constituencies, whose mandate lies with the IEBC as provided for under the provisions of Articles 89(2) and (3) of the Constitution. They thus submit that the provisions of Article 89 do not deal with the creation of administrative units in terms of locations and sub-locations. This mandate, they maintain, is of the 2<sup>nd</sup> respondent and the provisions of Article 89(2) do not deal with the creation of administrative units which is the mandate of the IEBC, the 8<sup>th</sup> respondent.

**[35]** Further, it is their submission that both superior courts below made a mistake in finding that there was no public participation in the creation of Abdisamit location, Laago and Auliya sub-locations in 2015. That both superior courts below also failed to appreciate that the administrative units in question were created on 3<sup>rd</sup> November 2010 despite sufficient evidence demonstrating the same. Consequently, they fault both superior courts below for retrospectively applying the provisions of the National Government Coordination Act to administrative units created in 2010 whereas the Act was enacted in 2013.

**[36]** They further urge that both superior courts below failed to appreciate that even in instances where the High Court is called upon to review the question of how the IEBC has exercised its power under Article 89, the court cannot substitute the decision of the IEBC with that of its own. Therefore, they contend that even assuming that the decision of the 2<sup>nd</sup> respondent was wrong, the High Court erred in making a decision that had the effect of creating administrative units and boundaries. In their view, the court could only have quashed the decision of the 2<sup>nd</sup> respondent and ordered for a fresh exercise in such circumstances.

**[37]** On the issue of *orders of certiorari for decisions that are more than 6 months*, they submit that Section 9(3) of the Law Reform Act as read with Order 53 Rule 2 of the Civil Procedure Rules, impose a mandatory 6-month limitation period for seeking orders of *certiorari* for purposes of quashing an administrative decision. For this proposition they rely on the decisions in ***Nakumatt Holdings Limited v. Commissioner of VAT***, Civil Appeal No, NAI 200 of 2003; [2011] eKLR and

***Kenya Association of Air Operators v. Kenya Airports Authority & Another***, Civil Appeal No. NAI 285 of 2013 [2018] eKLR, where the Court of Appeal held that an order of *certiorari* must be applied for within 6 months from the date of the impugned decision. It is on this basis that they submit that the administrative units in question, having been created in 2010, which was 5 years before the filing of the suit before the High Court, could not be legally overturned by an order of *certiorari* in the circumstances since the statutory period of 6 months had lapsed. In view of the foregoing, they urge this Court to grant the orders sought by the appellant in this appeal.

**iv) 8<sup>th</sup> Respondent's**

[38] The 8<sup>th</sup> respondent's submissions are dated and filed on 4<sup>th</sup> November 2022. Therein, IEBC, the 8<sup>th</sup> respondent, begins by clarifying that when it embarked on the delimitation of electoral boundaries for constituencies and wards, the administrative units of Abdisamit location, Auliya sub-location and Laago sub-location were not in existence and hence did not form part of the boundary descriptions published vide Legal Notice No. 14 of 2012. IEBC contends that in that case two issues arise. Firstly, whether the decision in ***Peter Odoyo Ogada v. IEBC & 14 others; Civil Appeal No. 307 of 2012*** was *in rem* and secondly, whether there is a nexus between the delimitation of electoral boundaries by the IEBC and the creation of administrative boundaries.

[39] With regard to the first issue, IEBC submits that the decision of the Court of Appeal in ***Peter Odoyo Ogada v. IEBC & 14 others; Civil Appeal No. 307 of 2012*** was a decision *in rem* therefore binding not only to both the parties but to every other person and remained as the legal position on the subject from the date of its making and that the decision was to be applied progressively rather than retrospectively since if it were to apply retrospectively, it would lead to uncertainty in the law on the question on boundaries. However, IEBC has added

that the decision is only in *rem* as far as the creation of electoral units is concerned.

**[40]** On the issue of whether there is a nexus between the delimitation of electoral and administrative boundaries, IEBC submits that Article 89 of the Constitution and the IEBC Act stipulate the mandate of IEBC to be the delimitation and review of electoral units. IEBC contends that this mandate does not include the creation or delimitation of administrative boundaries and; that it is the 2<sup>nd</sup> respondent who is vested with such powers under Section 14(1) of the National Government Coordination Act to establish administrative units as national government service delivery units which are headed by national government administrative officers appointed under Section 15 of the Act with the approval of the President and by a notice in the Gazette.

**[41]** Further to the above, they argue that there is a general nexus between electoral boundaries and administrative units as sub-locations form the basic units for the delimitation of ward and constituency boundaries. IEBC however submits that the 2<sup>nd</sup> respondent's power to create sub-locations as administrative units is under-regulated and under the discretion of the national government which then implies that the parameters used by IEBC to delimit electoral boundaries change with the national government's service delivery agenda and would have the effect of indirectly hampering with IEBC's mandate to delimit boundaries. Further, that this unregulated discretion avails avenues for indirect gerrymandering by actors in the national government executive which in effect compromises the principles of our electoral system enshrined in Article 81 of the Constitution.

**[42]** To curb this, IEBC argues that the 2<sup>nd</sup> respondent, while exercising its power to create administrative units as provided for under Section 14(1) of the National Government Coordination Act, should ensure that the establishment of administrative units and their boundaries should conform or align with electoral

boundaries to avoid confusion of IEBC's mandate on the delimitation of electoral units to the public.

[43] For these reasons, the 8<sup>th</sup> respondent urges this Court **to partially allow the appeal** to the extent that the Court of Appeal erred in finding that the decision in ***Peter Odoyo Ogada v. IEBC & 14 others; Civil Appeal No. 307 of 2012*** was not a decision *in personam* but a decision *in rem* and therefore applied to the proceedings before the trial court and to find that this decision applied only to issues that arose after its determination and not retrospectively so as to nullify acts undertaken by IEBC in obeying the orders issued in ***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012***.

#### **D. ISSUES FOR DETERMINATION**

[44] From the above submissions, the following issues crystalize for determination:

- i) *Whether this Court has jurisdiction to determine the appeal;*
- ii) *The effect of the proceedings and consequential declarations by the High Court in Nairobi Judicial Review Application No. 120 of 2012 that was heard and consolidated with Republic v Independent Electoral and Boundaries Commission & another; Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others, Judicial Review Misc. Application No. 94 of 2012 [2012] eKLR as well as Peter Odoyo Ogada v. IEBC & 14 others; Civil Appeal No. 307 of 2012 [2013] eKLR;*
- iii) *The difference between electoral units and administrative units.*
- iv) *Whether there was need for Public participation in the creation of administrative units and if so;*

- v) *Whether the provisions of Section 4 of the National Government Coordination Act were applicable in the creation of administrative units;*

We shall determine each issue separately as here below.

## **E. ANALYSIS**

### **i) *Whether this Court has jurisdiction to determine the Appeal***

[45] The 1<sup>st</sup> respondent raised the issue of jurisdiction and was emphatic that this Court lacks jurisdiction to hear this matter. The question of this Court's jurisdiction to handle appeals filed as of right under Article 163(4)(a) is one that the Court embarks on before determining a matter on its merits. It thus has to be settled first, in any event, as the 1<sup>st</sup> respondent, a party before the Court, is opposed to this Court's jurisdiction to determine the present appeal.

[46] That being said, the question of whether this appeal is properly before this Court was answered and settled by this Court in a ruling delivered on 8<sup>th</sup> October 2021. In that ruling, we found that the contested issues in this appeal were issues of constitutional controversy that had been determined before the High Court and the Court of Appeal and involved the interpretation and application of the Constitution. It was our finding in that regard that:

***“From the above, it is evidently clear that though Section 4 of the National Government Coordination Act was the basis upon which the trial court adjudicated on whether the administrative actions of the 2nd respondent were done within the confines of the law. The provisions of Section 4 were founded on the provisions of Articles 10, 189, 201(d) & 232 of the Constitution, and it is these constitutional provisions that the 2nd respondent was found to be in breach of.”***

[47] The upshot therefore is that this matter is properly before us and we hold and find that we have jurisdiction under Article 163(4)(a) of the Constitution to determine it.

[48] We now proceed to interrogate the issues of constitutional interpretation or application that form the substratum of the appeal.

ii) ***The effect of the proceedings and consequential declarations in Nairobi Judicial Review Application No. 120 of 2012 that was consolidated and heard with Judicial Review Misc. Application No. 94 of 2012 [2012] eKLR and Peter Odoyo Ogada v. IEBC & 14 others; Civil Appeal No. 307 of 2012 [2013] eKLR.***

[49] The appellant contends that ***Nairobi Judicial Review Application No. 120 of 2012*** did not address the administrative units that were the subject of the petition before the High Court in this appeal. The appellant has thus urged this Court to appreciate that in ***Nairobi Judicial Review Application No. 120 of 2012***, the judgment delivered was in relation to the administrative units known as Medina and Alango-Arba sub-locations only and not the units in issue before us.

[50] Further to the above, the appellant contends strongly that since the administrative units in question before the trial court were Abdisamit location and Auliya and Laago sub-locations, there was therefore no relationship between the three administrative units in question before the trial court and the decision in ***Nairobi Judicial Review Application No. 120 of 2012*** that concerned Medina and Alango-Arba sub-locations. In light of this, he claims that the High Court and Court of Appeal erred in finding that the administrative units that were the question before the trial court were the same as those before the High Court in ***Nairobi Judicial Review Application No. 120 of 2012***. In the appellant's view, the Petition before the trial Court could not have been determined by relying on ***Nairobi Judicial Review Application No. 120 of 2012***.

[51] The 1<sup>st</sup> respondent in response submits that both superior courts below did not err in finding that ***Nairobi Judicial Review Application No. 120 of 2012*** had made orders in respect of Abdisamet location, Laago and Auliya sub-locations. Instead, he argues that the delimitation of these administrative units had already been settled and therefore, there was no need for judicial intervention.

[52] In the above context, whether there was a judgment issued with respect to the mentioned administrative units is one issue. What is more important from the outset and needs to be addressed are two issues. Firstly, what was the grievance before the High Court as presented in the Petition and secondly, what were the grounds raised in support of that grievance?

[53] We note, in that regard, that the 1<sup>st</sup> respondent had filed before the High Court, a petition challenging two advertisements; one for the position of Chief for Abdisamet location in Central Division of Garissa sub-county and one other for the position of two Assistant Chiefs with one position being for Auliya sub-location in Abdisamet location of Sankuri Division and the other for Laago sub-location in Modika location.

[54] The 1<sup>st</sup> respondent then sought before the High Court, orders to wit:

***“(i) A declaration that, by the 1<sup>st</sup> respondent purporting that Abdisamet Location is in Central Division of Garissa sub-county and that Auliya sub-location is in Abdisamet Location of Sankuri Division and that Laago sublocation is in Modika location and that the 1<sup>st</sup> respondent has breached the provisions of Article 10(2)(a), (b) and (c), Articles 47 and 159 of the Constitution by usurping himself powers not conferred by the Constitution and/or the law.***

***(ii) An order of Certiorari do issue moving to the High Court for purposes of quashing and to quash the decision of the Ministry of Interior and Coordination of National Government contained in an advertisement dated 15/5/2105 Ref: DC/HR/1/30/105 purporting to relocate;***

***(a) The newly created location of Abdisamit to the Central Division of Garissa Township Constituency from its proper and current domicile in Dertu Division within Garissa County.***

***(b) The newly created Auliya sub-location to a purported location referred to as Abdisamit in Sankuri Division of Balambala Constituency from its proper and/or current domicile in Dertu location of Dertu Division in Daadab Constituency of Garissa County.***

***(c) The newly created Laago sub-location to a purported Modika Location of Central Division from Alango Arba location of Derta Division/Ward of Daadab Constituency within Garissa County”.***

**[55]** From the submissions and the facts before the Court, a major focal point for both parties are the orders issued in ***Nairobi Judicial Review Application No. 120 of 2012*** as consolidated with ***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012***. It therefore warrants that the orders issued therein be interrogated. What exactly were the orders issued?

**[56]** While the Judicial Review application aforesaid consolidated a number of applications relating to boundaries of electoral units, of relevance to the present appeal are the orders issued in ***Nairobi Judicial Review Application No. 120 of 2012***. The application was on the delimitation of Balambala and Dujis

Constituencies of Garissa County with the applicants claiming that the constituency and ward names and details of Garissa County had been altered without any demand and justification by creating the new Balambala Constituency and moving Alango-Arba and Medina Wards to that new constituency. The High Court allowed the application and made Orders which we have reproduced hereunder verbatim to wit;

***“a) That Dujis Constituency be renamed Garissa Township Constituency.***

***b) That Medina sub-location be and is hereby removed from Sankuri Ward in Balambala Constituency and transferred to Galbet Ward in Dujis Constituency.***

***c) Galbet Ward will now comprise the following sub-locations; Galbet and Medina sub-locations with a population of 43,244.***

***d) That Alango-Arba sub-location be and is hereby removed from Sankuri Ward in Balambala Constituency and transferred to Dertu Ward in Dadaab Constituency.***

***e) Dertu Ward will now comprise the following sub-locations; Alango-Arba and Dertu with a population of 15,013***

***f) Sankuri Ward will now comprise the following sub-locations; Balicha, Simbir, Sankuri, Raya, and Athleleyey with a population 10,719***

***g) Legal Notice Number 14 of 2012 be and is hereby amended to this extent.***

***h) The maps of Dujis, Balambala, and Dadaab Constituencies in Vol III of the IEBC Final Report be and is hereby altered and amended to reflect the above changes and position.”***

[57] In addressing the above orders, the High Court in the present matter stated thus;

***“29. The decision referred by the Respondents was rendered in R vs. Independent Electoral and Boundaries Commission & Another ex-parte Councillor Elliot Lidubwi Kihusa & 5 Other. It involved several consolidated Judicial Review Applications among them No. 120 of 2012 in which the dispute involved delimitation of boundaries of Balambala and Dujis constituencies of Garissa County. I find it useful to examine the facts in the said case, the decision rendered and the appeal decision to satisfy myself whether or not this case is indeed res judicata”.***

[58] The learned Judge examined the facts limiting himself to the delimitation of constituency boundaries-not locations or sub-locations- and rendered his decision as restated above. The Court of Appeal, while also affirming the finding by the High Court held:

***“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 Nairobi Judicial Review Application No. 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 Nairobi Judicial Review Application No. 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.”***

[59] From our reading of the orders issued in ***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012***, it clearly emerges that the learned Judge of the High Court and the learned Judges of Appeal completely misapprehended the case before them. The High Court specifically failed to interrogate the proper question before it, which was on the legality of the advertisements for the positions of Chief and Assistant Chiefs for the administrative units aforesaid which issue was completely different from the question of delimitation of constituency boundaries. Legal Notice No.14 of 2012 is headed; **“The National Assembly Constituencies County Assembly Wards Order,2012”** and was enacted to determine the number, names and delimitation of boundaries for constituencies and county assembly wards; and the specific geographical and demographical details relating to such determination. It had nothing to do with the question before the two courts below. Again, and in support of this finding, we reiterate that an advertisement for administrative positions cannot create constituencies, and the superior courts, by finding to the contrary, were misguided.

[60] In addition to the above, we note that the grounds in support of the 1<sup>st</sup> respondent’s petition before the High Court challenging the two advertisements were that the 2<sup>nd</sup> respondent had geographically moved Abdisamit location from Dertu Division to Central Division while Auliya and Laago sub-locations were moved from Dertu Ward in Daadab Constituency to Abdisamit location, situated within Sankuri Division in Modika location. These issues do not relate to constituencies but to administrative units- the former being the mandate of IEBC while the latter is the mandate of the 2<sup>nd</sup> respondent.

[61] It is our finding therefore that the superior courts ought to have limited themselves to addressing the main ground raised in the petition which was;

whether the 2<sup>nd</sup> respondent, by issuing the two advertisements, had moved the locations in dispute without any justification in law.

[62] Indeed, the Court of Appeal, quite incorrectly, captured the case raised by the 1<sup>st</sup> respondent when it held:

***“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 Nairobi Judicial Review Application No. 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 Nairobi Judicial Review Application No. 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.”***

[63] Falling into further error, the Court of Appeal went on to find that the 2<sup>nd</sup> respondent had no authority to interfere with or create new boundaries by finding:

***“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.”***

[64] This is with respect, an apparent misrepresentation of the grounds in the 1<sup>st</sup> respondent's petition before the High Court. The appellant strongly argued that there was no relationship between the three administrative units in question before the trial court and the decision in ***Republic v IEBC & 2 others; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012***. We are inclined to agree with this argument. The orders issued in ***Nairobi Judicial Review Application No. 120 of 2012*** were not interlinked and neither did they have any effect on the petition before the High Court. The petition before the High Court, quite simply, challenged the legality of the advertisements. It was therefore improper for the superior courts to make determinations that ***Nairobi Judicial Review Application No. 120 of 2012*** raised the same issues as the petition before the High Court. Although there was reference to alleged movement of locations from one constituency to another, that claim alone would not mutate the question before the superior courts to one of delimitation of constituency boundaries as opposed to the narrow issue of recruitment of a chief and assistant chief for a specific location and sub-locations.

[65] Additionally, we agree with the appellant's submission that the High Court in ***Nairobi Judicial Review Miscellaneous Application No. 94 of 2012*** only considered the question of delimitation of electoral units as provided for under Article 89 of the Constitution. Later in this judgment, we shall expound on the difference between electoral units and administrative units.

[66] What of the issue raised by the appellant that the Court of Appeal finding in ***Peter Odoyo Ogada & 9 Others v Interim Independent and Electoral Boundaries Commission & 14 Others; Civil Appeal No. 307 of 2012 [2013] eKLR***; was it *in rem* or *in personam*?

[67] The appellant contended that the Court of Appeal erred in finding that this decision was *in personam* and not *in rem*. They argue that the effect of the Court of Appeal decision was that it was binding not only to the parties before the Courts

but to every other person. For this reason, they argue that the decision was applicable before the proceedings at the trial Court.

[68] The Black's Law Dictionary, Ninth Edition, defines a judgment *in rem* to be:

***“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.”***

[69] It then defines a judgment *in personam* to be:

***“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.”***

[70] The general rule therefore is orders issued in a judgment *in personam* are personal in nature and do not affect third parties and are binding only to the parties in it. The decision by the Court of Appeal in ***Peter Odoyo Ogada & 9 Others v Interim Independent and Electoral Boundaries Commission & 14 Others***; Civil Appeal No. 307 of 2012 being an appeal from ***Republic v IEBC & 2 others***; ***Nairobi Judicial Review Miscellaneous Application No. 94 of 2012*** was with respect to only two electoral units being Suba North and Suba South constituencies.

[71] Therefore, in our view, the Court of Appeal judgment was one *in personam* as it only applied to parties in that appeal on matters that involved the delimitation of boundaries of Suba North and Suba South constituencies. The judgment had

completely no relation to any of the issues raised in the petition before the trial Court and in this regard, we agree with the submission by the 1<sup>st</sup> respondent that the finding was *in personam* and consequently, did not apply to the subject matter of the proceedings before the trial Court.

**iii) *Difference between electoral units and administrative units***

[72] It is the appellant's argument that the provisions of Article 89 of the Constitution that deal with the delimitation of electoral units only apply to the IEBC when it is performing its mandate as regards the delimitation of constituencies. That the provisions of Article 89 of the Constitution do not apply to the decisions of the 2<sup>nd</sup> respondent while determining boundaries and naming of administrative units.

[73] The appellant also strongly contends that even when the IEBC refers to administrative units when describing an area covered by electoral units, the said description does not limit other state bodies from creating administrative units as long as the boundaries of electoral units are not moved. This, the appellant argues, is because Article 89 of the Constitution only gives IEBC power to determine the names and boundaries of an electoral unit and not administrative units within an electoral unit.

[74] The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents on their part, while also supporting the appellant's argument, urge the point that Article 6(3) of the Constitution empowers the national government to create administrative units for purposes of service delivery and execution of its functions. That Article 89 of the Constitution only grants IEBC power to delimit electoral units and that the two types of delimitation are fundamentally different.

[75] The 8<sup>th</sup> respondent also argues that Article 89 of the Constitution and the IEBC Act stipulate the mandate of IEBC to be the delimitation and review of electoral units. They contend that this mandate does not include the creation or delimitation of administrative boundaries and; that it is the 2<sup>nd</sup> respondent who

is vested with such powers under Section 14(1) of the National Government Co-ordination Act to establish administrative units as national government service delivery units with the approval of the President and by a notice in the Kenya Gazette.

[76] It is not in doubt that the IEBC is mandated under Article 89 of the Constitution to delimit boundaries and constituencies after which IEBC gives those electoral units names and numbers and thereafter, publishes the electoral units in the Gazette.

[77] The National Government Coordination Act 2013 was passed to establish an administrative and institutional framework for the coordination of national government functions at the national and county levels of governance and; to give effect to Articles 131(1)(b) and 132 (3) (b) of the Constitution. The procedure for the creation of administrative units is as provided for under Section 14 of the National Government Coordination Act which provides as follows:

***“Service delivery co-ordination units.***

***14. (1) The Cabinet Secretary may, with the approval of the President and by a notice in the Gazette, establish national government service delivery co-ordination units.***

***(2) In establishing the national government service delivery co-ordination units, the Cabinet Secretary shall accord and respect the county government decentralized units established under section 48 of the County Government Act, 2012 (No. 17 of 2012).***

***(3) Where a county government has not decentralised its units pursuant to section 48(1)(e) of the County Government Act, 2012, the national government may, where necessary, establish its own service delivery coordination units for purposes of coordination of national government functions.***

***(4) For purposes of this section, the locations and sublocations in existence immediately before the commencement of this Act shall continue to exist as national government service delivery units.***

***(5) The national government service delivery coordination units established under this section shall be headed by national government administrative officers appointed under section 15.”***

[78] Section 14 of the National Government Coordination Act therefore expressly authorizes the 2<sup>nd</sup> respondent with the approval of the President, and through a notice in the Kenya Gazette to establish national government service delivery coordination units. Section 14(4) specifically provides that locations and sublocations in existence before the commencement of the National Government Coordination Act shall continue to exist as national government service delivery units.

[79] We are therefore in agreement with the appellant’s submission that administrative units are different from electoral units in relation to the manner in which they are created. We say so because our reading of Article 89 of the Constitution and Section 14 of the National Government Coordination Act leads us to the conclusion that the establishment of the administrative units is a preserve of the national government and the same is done by the Cabinet Secretary as defined under Section 2 of the Act while the creation of electoral units is done by the IEBC as mandated under Article 88(4)(c) of the Constitution.

[80] In addition, the argument by the 8<sup>th</sup> respondent that electoral units need not conform to administrative units is borne out by the law. The Constitution is specifically clear about the considerations that the IEBC will take into account when delimiting boundaries. Article 89(5) provides:

***“(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.***

**[81]** Furthermore, when IEBC is delimiting constituency boundaries, administrative units are not one of the factors to be considered. The submission by the 8<sup>th</sup> respondent that it is good practice if the boundaries of administrative units conform to those of electoral units is attractive. Still, instances may arise where the two do not conform and that fact alone does not render the boundaries unlawful. We say so, having found that the creation of administrative units does not influence or affect constituency boundaries. Again, Article 89(7) of the Constitution provides in detail, the procedure for altering constituency and ward boundaries by stating:

***“(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.”***

[82] In that regard, having found that the creation of electoral units is fundamentally different from the creation of administrative units, what of the finding by the High Court and Court of Appeal that the decision in *Nairobi Judicial Review Application No. 120 of 2012* applies to this matter? Earlier in this judgment, we reproduced the orders that were made in *Nairobi Judicial Review Application No. 120 of 2012*. We reiterate that the orders made therein were made with respect to the delimitation of electoral units in Garissa County and not administrative boundaries.

[83] Having found as above, we reiterate that the High Court and Court of Appeal completely misunderstood the Orders issued in *Nairobi Judicial Review Application No. 120 of 2012* by finding that they apply to the present matter.

***iv) The applicability of Section 4 of the National Government Coordination Act 2013***

[84] Having found that there is a difference between the creation of electoral units and administrative units, what of the question of whether the provisions of Section 4 of the National Government Coordination Act were applicable to the present dispute?

[85] The appellant faults the superior courts for finding that Section 4 of the National Government Coordination Act applies arguing that the delimitation of boundaries was done in 2010 whereas the Act was enacted in 2013. He therefore argues that the superior courts erred in doing so as statutes do not apply retrospectively.

[86] The 1<sup>st</sup> respondent on the other hand urges that the superior courts were indeed correct in applying the provisions of Section 4 of the Act as the impugned advertisements were made in 2015 after the Act had been enacted in 2013 and that there was therefore no retrospective application of the same.

[87] The High Court, in finding that the provisions of Section 4 of the Act apply stated:

***“34. Regarding the issue whether or not the first Respondent acted within the confines of the law while creating the said administrative units, Section 4 of the National Government Coordination Act offers the guiding principles. It provides in clear terms 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.” [Emphasis added]***

**[88]** The Court of Appeal, in agreeing with the High Court that the provisions of Section 4 of the Act and while upholding the High Court’s judgment held:

***“ 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 Nairobi Judicial Review Application No. 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 Nairobi Judicial Review Application No. 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.”***

**[89]** Delimitation of boundaries and creation of administrative units in Garissa County was done in 2010, a fact that has not been challenged by the parties. This was done through a letter dated 3<sup>rd</sup> November 2010 signed by the Permanent Secretary, Provincial Administration and Internal Security creating Abdisamit Location and Auliya and Laago sub-locations. The Court of Appeal found that the 2<sup>nd</sup> respondent had contravened the decision of the Court in ***Nairobi Judicial Review Application No. 120 of 2012*** by interfering with the boundaries as set out in Legal Notice No. 14 of 2012. That for this reason, the provisions of the National Coordination Act 2013 applied because it is through issuing the disputed advertisements in 2015 that the 2<sup>nd</sup> respondent contravened the provisions of Section 4 of the National Government Coordination Act.

**[90]** While the Court of Appeal agreed with the High Court that there was no retrospective application of the Act, we find to the contrary. Having found that the issue before the High Court concerned the legality of the advertisements issued in 2015 and not the creation of administrative units, it is clear to us that the National Government Coordination Act cannot apply retrospectively in this case. We say so because the administrative units comprising Abdisamit Location and Auliya and Laago sub-locations were created in 2010 and an Act passed in 2013 cannot apply to matters that happened in 2010 before the enactment of the Act. We say so having found in ***Samuel Kamau Macharia & another v Kenya Commercial***

**Bank Limited & 2 others;** Application No. 2 of 2011 [2012] eKLR that statutes do not have retrospective application unless by express implication. We held that:

***“(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”***

**[91]** In the premises, we have no option than to hold that the Court of Appeal erred in upholding the finding by the High Court that the 2<sup>nd</sup> respondent had contravened the provisions of Section 4 of the National Government Coordination Act by creating new administrative units.

**v) *Public participation: was it a requirement?***

**[92]** Having found that the issue that was before the High Court was on the legality of the two advertisements and not the creation of administrative units, what do we make of the claim by the 1<sup>st</sup> respondent that the administrative units that the two advertisements purported to create was done without public participation?

**[93]** The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, while disputing this argument contend that the High Court and Court of Appeal erred in finding that there was no public participation in the creation of Abdisamit Location and Auliya and Laago sub-locations. It is their claim that the superior courts failed to appreciate that the administrative units in question were created on 3<sup>rd</sup> November 2010 despite there being sufficient evidence demonstrating this.

**[94]** The learned Judge of the High Court in addressing that issue found that there was no proper public participation in the creation of the three administrative units by stating:

***“I am not persuaded that there was any serious engagement with the public. The earlier Judicial Review proceedings shows the public expressed their concerns and the court made a determination on the matter. The matter was determined by the court. But clearly the decision of the court was disregarded.”***

[95] The Court of Appeal judges on their part also upheld the High Court’s finding, by stating that constitutional and statutory provisions were not complied with in the creation of the administrative units. The learned Judges held:

***“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.”***

[96] Earlier in this judgment, we set out in detail, the procedure for delimitation of administrative units. Again, and we reiterate, delimitation of administrative units cannot happen by way of advertisements issued by the Deputy County Commissioner. Also, Section 15 of the Act provides for the procedure of recruitment of administrative officers to coordinate national government functions, and most importantly for the purposes of this appeal, this applies to Chiefs and Assistant Chiefs.

[97] Section 15 of the Act provides that:

***“Recruitment and appointment of the national government administrative officers.***

***15. (1) In accordance with the national government functions under the Constitution, this Act or any other written law, the Public Service Commission shall, in consultation with the***

***Cabinet Secretary, recruit and appoint national government administrative officers to coordinate national government functions and to perform such other functions as may be assigned to them under this Act or any other law.***

***(2) Pursuant to subsection (1), the Public Service Commission shall appoint—***

***(a) ...***

***(b) ...***

***(c) ...***

***(d) a chief in respect of every location;***

***(e) an assistant chief in respect of every sub-location; and***

***(f) any other national government administrative officer in respect of a service delivery unit established under section 14.”***

**[98]** It is on the basis of this provision that the advertisements for the position of Chief of Abdisamit location and Assistant Chiefs for Auliya and Laago sub-locations were issued. In our view, Section 15 is clear on the procedure for the recruitment and appointment of national government administrative officers. A reading of this provision indicates that the Public Service Commission, in consultation with the 2<sup>nd</sup> respondent, have the authority to recruit administrative officers to coordinate government functions. There is no requirement for public participation because an application for employment is an individual affair that does not require the participation of the public. To require public participation in such an exercise would be an absurdity. Moreover, the advertisement announced to all and sundry the existence of the vacancy for general information and transparency.

[99] In finding as above, we take cognizance of our finding in ***British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)***, SC Petition No.5 of 2017; [2019] eKLR that:

***“[85] Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of the Constitution and is binding on all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.”***[emphasis added]

[100] Therefore, in the making or implementation of any public policy that touches on the interest of the public, public participation is mandatory. It is one of the national values and principles of governance provided for under Article 10 of the Constitution as participation of the people.

[101] The act of the 2<sup>nd</sup> respondent issuing an advertisement while acting within the provisions of Section 15 of the National Government Coordination Act cannot be said to be acts that involve ‘*making or implementing public policy decisions*’. Such an act is merely an administrative act to enable the proper day-to-day operations within a county. So where does Article 10 of the Constitution come in? At what point was public participation supposed to be undertaken? Was it at the point of issuing the advertisement or after the advertisement to the public was made?

[102] If saying that advertisements inviting applicants to fill in vacancies for all positions should be subjected to public participation would without a doubt, result in more harm than any intended good. This would mean that public bodies would

have to subject all their operative decisions to public participation. Therefore, decisions such as issuing advertisements inviting applicants to fill out vacancies, albeit involving administrative units, need not be subjected to public participation.

**[103]** Again, in the *BAT Case*, we gave guiding principles for public participation with one of the principles being that:

***“(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.”***

**[104]** From the record, it is clear that the High Court and Court of Appeal, while interrogating the evidence before them, failed to consider the peculiar circumstances of this case in determining whether it was one where lack of public participation would automatically vitiate the process of calling out for candidates for the positions advertised. To our minds, at no point were the superior courts called upon to determine any issue involving the lack of public participation in the creation of administrative units.

**[105]** Therefore, upon evaluation of the Court of Appeal judgment, we find that the Appellate Court failed to rightly appreciate the applicability of public participation as a principle in the Constitution. The Court of Appeal erred in endorsing the High Court’s analysis and finding on this issue, and we have explained why. We therefore find that the Court of Appeal erred in its findings on the meaning, scope and application of public participation.

## **F. CONCLUSION**

**[106]** In conclusion, the petition before the trial court was one for dismissal because it had no merit. In this judgment, we have demonstrated that the matter before the

trial court did not involve delimitation of constituencies and it is our finding that an advertisement cannot purport to create administrative units, as there is a procedure for both delimitation of boundaries as well as creation of administrative units, which we have explained above.

**[107]** In light of this finding, the orders issued by the High Court in the form of orders of *certiorari* quashing the advertisement dated 15<sup>th</sup> May 2015 and orders of *mandamus* order directing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to comply with the decision in ***Nairobi Judicial Review Application No. 120 of 2012*** cannot stand and are hereby set aside hereby lifted.

#### **G. RELIEFS**

**[108]** On reliefs, including costs, while the appeal is one for allowing, we are aware that costs ordinarily follow the event as we held in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** Petition No 4 of 2012; [2014] eKLR and that a court has the discretion in awarding costs in its decision. In the instant case, like the Court of Appeal, we deem it fit that each party should bear its costs of the present appeal which is anchored on matters affecting the people of Garissa County generally.

#### **H. ORDERS**

**[109]** Ultimately, upon our finding above, the final orders are that:

- a) *The Petition of Appeal dated 16<sup>th</sup> December, 2020 and filed on 21<sup>st</sup> December, 2020 is hereby allowed.***
- b) *The Judgment of the Court of Appeal dated 20<sup>th</sup> November, 2020 is hereby set aside.***
- c) *The Judgment of the High Court dated 4<sup>th</sup> October, 2017 is hereby set aside.***
- d) *The amount of Kshs. 6000/= deposited in Court as Security for Costs be and is hereby released to the appellant.***

