



THE SUPREME COURT OF KENYA

**MEMBER OF PARLIAMENT BALAMBALA CONSTITUENCY v. ABDI AHMED
ABDI & 7 OTHERS**

SC PETITION NO. 21 (E023) OF 2020

DATE OF JUDGMENT: 16TH JUNE 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court allows this appeal.

Background

On 15th May 2015, the Cabinet Secretary for International and Co-ordination of National Government (the 2nd respondent) issued two advertisements. The first advertisement was for the position of Chief Grade II Job Group 'H' for Abdisamit Location in Central Division and the second advertisement was for the position of two Assistant Chiefs II positions for two sub-locations, Auliya sublocation within Abdisamit location, Sankuri division and the other position for Laago sub-location, Modika location in Central Division. The 1st respondent then filed a petition before the High Court seeking to have the advertisements declared erroneous on the claim that the 2nd respondent had purportedly created new administrative units through the advertisement and that this was done without public participation. Upon determination, the High Court found the 2nd respondent had purportedly created the administrative units in violation of the provisions of Articles 10, 189, 201(d), 232, 47 and 159 of the Constitution and the guiding principles in Section 4 of the National Government Coordination Act No. 1 of 2013. On appeal, the Court of Appeal also upheld this finding.

In the appeal before the Supreme Court, the Court listed the following five (5) issues 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.*

Upon consideration of the appeal, the Supreme Court has allowed the appeal by holding that;

- i. The appeal is properly before this Court as the contested issues in this appeal were issues of constitutional controversy and involved the interpretation and application of the Constitution.**
- ii. The grounds in support of the petition filed by the 1st respondent challenged the two advertisements on the grounds that the advertisement had geographically moved Abdisamit location and Auliya and Laago sub-locations. Therefore, the issues before the High Court did not relate to constituencies, but to administrative units.**
- iii. The High Court and Court of Appeal failed to properly interrogate the proper question before them which was on the legality of the advertisements and not on the delimitation of constituency boundaries, with the Court further noting that an advertisement for administrative positions cannot create constituencies.**
- iv. Orders issued in a judgment *in personam* are personal in nature and do not affect third parties and are only binding to the parties in it.**
- v. Administrative units are different from electoral units in relation to the manner in which they are created. The establishment of administrative units is a preserve of the national government and is done by the Cabinet Secretary through the procedure found under Section 14 of the National Government Coordination Act while the creation of electoral units is done by the IEBC as mandated under Article 88(4)(c) of the Constitution.**
- vi. The provisions of Section 4 of the National Government Coordination Act 2013 do not apply in this dispute since the delimitation of boundaries and creation of administrative units in Garissa was done in 2010, and therefore, the Act cannot apply retrospectively.**
- vii. There is no requirement for public participation before issuing advertisements for the recruitment and appointment of national government administrative officers.**