



**Chairman Duol Mar Nyalunya (Greater Nyalunya) Self Help Group & another v Principal Secretary Ministry of Interior & Co-ordination of National Government & another (Constitutional Petition E008 of 2022) [2023] KEHC 19396 (KLR) (28 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19396 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CONSTITUTIONAL PETITION E008 OF 2022**

**RE ABURILI, J**

**JUNE 28, 2023**

**BETWEEN**

**THE CHAIRMAN DUOL MAR NYALUNYA (GREATER NYALUNYA) SELF HELP GROUP ..... 1<sup>ST</sup> PETITIONER**

**KABODHO COMMUNITY BASED ORGANIZATION COUNCIL .... 2<sup>ND</sup> PETITIONER**

**AND**

**PRINCIPAL SECRETARY MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners herein filed their petition dated 6<sup>th</sup> April 2022 in which they sought the following orders:
  - i. A declaration do issue that the acts by the respondents in the splitting up the clans be held as unlawful, illegal, unreasonable, null and void.
  - ii. A declaration that the respondents act of enlarging/delineating new boundaries of New Central Division are unwarranted.
  - iii. A declaration that the Lower Nyakach people have a right to their boundaries as they are because they have historical significance.
  - iv. An order of cancellation of Gazette Notice No. 5853 Vol. CXIX No. 80 of 2017 dated 21<sup>st</sup> June 2017.



- v. The cost of this suit
  - vi. Any other reliefs this Honourable Court may deem fit.
2. The petition was supported by the affidavit sworn by Henry Okwiri, the Chair of the 1<sup>st</sup> petitioner.
  3. It was the petitioners' case that the new administrative divisions created pursuant to Gazette Notice No. 5853 dated 21<sup>st</sup> June 2017 being Central Nyakach division that was formed by splitting Lower Nyakach Division into two resulted in the splitting up of the sub clans of Kotiang, Kamgwa, Kayano, Kabol, Kagwel, Koyiegi and Karabuor into different administrative regions even though they were the same family.
  4. The petitioners averred that as a result of the split they were disenfranchised from the greater Nyalunya and from their former division. It was their case that the sub-clans were not involved and neither were their inputs sought or given consideration yet they were the main stakeholders.
  5. The petitioners averred that there were no serious engagements with the public yet the public had previously expressed their concerns regarding the demarcation of the new boundaries and that the divisions did not account for demographic and area coverage of the two divisions.
  6. It was the petitioners' case that public participation in line with section 4 of the *National Government Co-ordination Act* and articles 10 (1) & (2) (a) (c) and 189 (1) of *the Constitution* were not factored in when creating the new administrative units and that unless the matter was determined, the respondents would continue to violate *the constitution* and statutory laws.
  7. In response the respondents through the Attorney General, the 2<sup>nd</sup> respondent herein, filed Grounds of Opposition dated 15th September 2022 opposing the petition as follows:
    - i. That the petition has not laid any constitutional and/or legal basis for this court to intervene in the creation of the administrative units vide gazette no. 5853 dated 21<sup>st</sup> June 2017.
    - ii. That section 14 (1) of the *National Government Coordination Act, 2013* expressly authorizes the respondents with the approval of the President and through a notice in the Kenya Gazette to establish national government service delivery unit.
    - iii. That under section 14(3) of the *National Government Coordination Act, 2013*, and where a County Government has not decentralized 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 coordinating units for purposes of coordination of National Government functions.
    - iv. That the 1st respondent herein complied with section 4 of the *National Government Coordination Act 2013* in establishing the impugned National Government Service delivery co-ordination units established under section 14(1) and (3) of the *National Government Coordination Act, 2013*.
    - v. That the Kenya Gazette Notice No. 5853 of 21st June 2017 being challenged by the Petitioners herein established the National Government service delivery Coordinating Units and not Electoral units as the petitioners erroneously seem to allege. The issue of disenfranchisement therefore doesn't arise.



- vi. That the petitioners have not proved with reasonable precision how the 1st respondent has violated *the Constitution*.
- vii. That the petitioners have failed to sufficiently show this honourable court how they were excluded from the process of establishing the National Government service delivery units.
- viii. That the purpose, object and effect of the *National Government Coordination Act* 2013 would be defeated if the petition is allowed.
- ix. That it is draconian for the petitioners to ask for an order of cancellation of the impugned Kenya Gazette Notice No. 5853 of 21st June 2017 with the full knowledge that such an order would adversely affect the other National Government Service Delivery Coordinating Units established in various parts of the country yet residents of those units are not parties to this petition.
- x. That the petition is clearly an abuse of the process of this honourable court as it discloses no reasonable cause of action against the respondents.
- xi. That the petition offends the doctrine of separation of powers, thus the honourable court is devoid of jurisdiction to entertain this matter.
- xii. That the petitioners are guilty of laches in bringing the petition. A period of 5 years after the operationalization of the National Government service delivery Coordinating Units is quite inordinate and can only go to prove that the same is an afterthought. Coupled with being frivolous, that should be good reason to impel this honourable Court to dismiss the petition.
- xiii. That the petitioners have not pleaded with precision and have failed to specify the nature of the infringement and the alleged values and principles infringed, if any.
- xiv. That the petition is premised on generalized assertions, further the petitioners have not furnished the court with any material in support of their allegations.
- xv. That the petition is without any merit and an abuse of the court process.

8. The petitioner filed submissions in support of his case.

### **The Petitioner's Submissions**

- 9. It was submitted that the respondent had not set out factors that they considered in creating the new boundaries as was laid out in the case of *R v District Commissioner Marakwet West District & 6 Others* Eldoret High Court Misc. Civil Application No. 23 of 2009.
- 10. The petitioners submitted that the initial populace of Lower Nyakach Division was 58,789 as per the 2019 census and the New Central Nyakach Division holds a population of 10,792 leaving the old division with a 48,497 persons and thus the new division was too small to qualify as an administrative area.
- 11. The petitioners submitted that the creation of the locations and sub-locations did not involve the participation of the people and was not consultative as required under *the constitution* as provided article 10 (2) of *the constitution* and upheld in the cases of *Robert N. Gakuru & Others v Governor Kiambu County & 3 Others* [2014] eKLR and the Court of Appeal case of *Legal Advice Centre & 2*



*Others v County Government of Mombasa 7 4 Others* [2018] eKLR. It was their case that there was no evidence of public participation proffered by the respondents.

12. It was submitted that the failure by the respondents to involve the petitioners in decision making resulted in discrimination and did not accord the petitioners equal protection under the law.
13. The petitioners further submitted that the respondents owed them a legitimate expectation to ensure that they would be informed of decisions that affect them and failure by the respondents to do this resulted in disenfranchisement of the petitioners.

### **Analysis and Determination**

14. I have considered the pleadings by both parties, the submissions filed by the petitioners and the authorities relied on.
15. It is the respondents' contention that the instant petition is time statute barred as it has been filed 5 years after the operationalization of the National Government service delivery Coordinating Units.
16. In the instant case, the new divisions complained about by the petitioners were created/operationalized vide a gazette notice no. 5853 dated 21<sup>st</sup> June 2017 and the petitioners filed the instant petition on the 7<sup>th</sup> April 2022, 4 years and 10 months later.
17. The petitioners herein have not tried to explain this long delay in instituting the petition, in fact the petitioners are silent on why it took them so long to file the instant suit. No doubt, the claim is a constitutional petition and not a civil suit and whether it is couched as a constitutional petition when it is a civil suit will be determined at a later stage. Had it been brought as a civil suit, the same could have been statute barred as stipulate in section 3 (1) of the *Public Authorities Limitation Act*.
18. Therefore, as to whether the instant petition is time barred, the question of limitation of time in regard to allegations of breach of human rights and fundamental freedoms has in many cases been raised by the state and in the case of *Joan Akinyi Kaba Sellah and 2 others vs Attorney General*, Petition No. 41 of 2014, the learned judge observed inter alia that in a line of cases such as *Dominic Arony Amollo vs Attorney General*, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) 2010 eKLR, *Otieno Mak' Onyango vs Attorney General and another*, Nairobi HCCC No. 845 of 2003, (unreported), courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.
19. Further in *James Kanyiita Nderitu v Attorney General & another* [2013] eKLR, the court held that although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of *the constitution* is entitled to consider whether there has been inordinate delay in lodging the claim. The court further stated that the court is obliged to consider whether justice will be served by permitting a respondent whether an individual or the state, in any of its manifestations, should be vexed by an otherwise stale claim.
20. In the present case, as earlier herein stated, the petitioners did not address why the petition has been filed so late in the day. Further, from a glance at the prayers sought by the petitioners, specifically prayer 4, the petitioners seek a "an order of cancellation of Gazette Notice No. 5853 Vol. CXIX No. 80 of 2017 dated 21<sup>st</sup> June 2017".
21. The aforementioned gazette notice does not only deal with the creation of the new Central Nyakach division but with various other administrative units across the country.



22. The question this courts is faced with is whether justice would be served by ignoring the petitioners' delay in filing this suit especially when considering that if successful, the petition would have the effect of negating other administrative units not related with the one in issue before this court.
23. In Mombasa Civil Case No. 128 of 1962, *Rawal v Rawal* (1990) KLR 275 the learned judge stated thus:
- “The effect of any limitation enactment is to prevent a plaintiff from prosecuting state claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims”
24. The point was further successfully made in *Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services & Milano Investments Limited v Governor Central Bank of Kenya & 2 others* [2006] eKLR where the court observed:
- “In my view failure by a constitutional court to recognize general principles of law including, limitation expressed in *the constitution* would lead to legal awarding or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a ‘constitutional issue’ after the expiry of the prescribed limitation periods”.
25. From the evidence tabled before this court it is clear that the petitioners have been aware of the existence of Central Nyakach division since June 2017 when it was established. It is not clear why the petitioner’s sense of self determination only arose 4 years and 10 months after the said division was established.
26. In my view, the court would not be seen to do justice if it entertained the petitioner’s claim in light of the inordinate delay in instituting the petition and the ramifications of cancelling the Gazette Notice No. 5853 Vol. CXIX No. 80 of 2017 dated 21<sup>st</sup> June 2017 which similarly created other administrative units in different parts of the country.
27. This court notes that the thrust of the Petition is that there was no public participation as contemplated under article 10 of *the Constitution* and the court further acknowledges that article 10 is so sacrosanct that no state agency or organ can escape from it.
28. The respondents herein have not availed any evidence to show that indeed public participation was undertaken prior to the establishment of Central Nyakach division. Public participation remains a crucial pillar of the 2010 Constitution. It is the process of engagement in governance, in which ‘people participate together for deliberation and collective action within an array of interests, institutions and networks, developing civic identity, and involving people in governance processes.’
29. The Court in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR observed that Public Participation is an essential national value and principle that must be observed by all persons; state organs and public officers in the exercise of their responsibilities. In this regard, the Court noted that:
- “Article 10 (1) of *the constitution* states that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or makes or implements public policy decisions. .And according to Article 10 (2), the



national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and “participation of the people.”

30. The Court of Appeal in *Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR noted that:

“...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. *The Constitution* in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation,..”

31. Further, this court acknowledges that public participation requires that people be at the centre of decision-making processes however, in the instant case, it is not clear why the petitioners seek to allege breach of this fundamental right 4 years and 10 months after the operationalizing of the new administrative unit, a time when it is more likely than not that the petitioners have procured/enjoyed government services from the said unit.

32. It is also worth noting that contrary to the allegations by the petitioners that the creation of Central Nyakach division split the clans was unfounded as the creation did not entail the actual clan but the area. Further, Section 14 of the *National Government Coordination Act* No.1 of 2013 places the mandate of establishing administrative units in the National Government and in particular, the Cabinet Secretary responsible for matters relating to the co-ordination of national government functions. In particular, section 14 (1) 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”

33. It follows therefore that the establishment of the administrative units is a preserve of the national government and the same is done by the Cabinet Secretary defined under section 2 of the Act, with the approval of the President after which the establishment is gazetted.

34. In the circumstances, I find that the creation of Central Nyakach division vide Gazette Notice No. 5853 Vol. CXIX No. 80 of 2017 was lawful and legal. The petitioners herein took an inordinate delay to institute this petition contrary to the spirit and letter of article 159(2) (b) of *the Constitution* that justice shall not be delayed. The delay in bringing this petition is such that if this court was to grant the orders sought, it would disrupt the establishment of other administrative units throughout the country, which units were established by the impugned gazette notice yet there is no petition challenging the establishment of those units.

35. For the above reasons, I am not persuaded that the petitioners deserve the prayers sought in the petition. The petition dated April 6, 2022 is found to be devoid of any merit and is hereby declined and dismissed with no orders as to costs.

36. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE, 2023**



**R.E. ABURILI**  
**JUDGE**

