



**Mugo & 14 others v Matiang’i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Party) (Constitutional Petition 4 of 2019) [2022] KEHC 158 (KLR) (12 January 2022) (Judgment)**

*Isaac Mugo & 14 others v Fred Okengo Matiang’i, the Cabinet Secretary, Ministry of Interior and Coordination of National Government & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Parties) [2022] eKLR*

Neutral citation: [2022] KEHC 158 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CONSTITUTIONAL PETITION 4 OF 2019**

**RK LIMO, J**

**JANUARY 12, 2022**

**IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION AND IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1(1) (B), 1(4) (B), 2(1), 3(1), 10, 19, 20, 21 (1) 22, 23, 27, 28, 40, 47, 232 (1) (D) (E) AND 258 OF THE CONSTITUTION OF KENYA 2020**

**AND**

**IN THE MATTER OF: BREACH OF THE RIGHT TO FAIR ADMINISTRATION ACTION**

**AND**

**IN THE MATTER OF: BREACH OF THE RIGHT TO FAIR ADMINISTRATION ACTION**

**AND**

**IN THE MATTER OF: NATIONAL GOVERNMENT COORDINATION ACT 2013**

**AND**

**IN THE MATTER OF: COUNTY GOVERNMENT ACT 2012**

**BETWEEN**

**ISAAC MUGO & 14 OTHERS ..... PETITIONER**

**AND**

**FRED OKENGO MATIANG’I ..... 1<sup>ST</sup> RESPONDENT**

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

**AND**



**INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION OF KENYA &  
19 OTHERS & 19 OTHERS ..... INTERESTED PARTY**

**A list of attendees of a meeting by itself would not meet the required threshold for public participation**

Reported by Ribia John

***Constitutional Law** – devolution – devolved units – administrative units - sub counties – body mandated to create sub counties - which body had the mandate and duty to create an administrative unit in Kenya - whether the Ministry of Interior and Coordination of National Government had a role or a mandate in establishment of an administrative unit - Constitution of Kenya, 2010, articles 89 and 176(2); County Government Act, 2012, section 48(1)(b); National Government Coordination Act, 2013, section 14(3); Independent Electoral and Boundaries Commission Act, 2011 fifth schedule, section 3.*

***Constitutional Law** – public participation – scope of public participation – threshold required to prove public participation – public participation requirement in the creation of sub counties - factors to be considered by courts when determining whether the threshold for public participation had been met - whether a list of attendees of a meeting by itself met the required threshold to prove that public participation had taken place - whether there was public participation in the creation of Igambang’ombe Sub-County – Constitution of Kenya, 2010, articles 10 and 28; National Government Coordination Act, 2013, section 14(2); County Government Act, 2012, section 48(2).*

**Brief facts**

**Brief Facts**

The main grievance of the petitioners was that the 1<sup>st</sup> respondent acting under powers conferred to him under section 14(1) of the National Government Coordination Act, 2013 established a sub-county namely Igambang’ombe with headquarters at Kathwana *vide* Kenya Gazette Vol. CXIX No. 80 dated 21st June 2017 without participation of people of Chuka sub-tribe. That the creation of the new administrative unit was done without the input and participation of the people from the sub-tribe whom they claimed occupied Chuka Igambang’ombe Constituency.

The respondents objected the petition on grounds that the establishment of Igambang’ombe sub-county was lawful and that it was done after public participation and with the authority of the president of Kenya as stipulated under article 131(1)(b) and 132(3)(b). They contended that section 14(1) of the National Government Coordination Act expressly authorized the 1<sup>st</sup> respondent with the approval of the President and through a notice in the Kenya Gazette to establish a national government service delivery unit.

**Issues**

- i. Which body had the mandate and duty to create administrative units in Kenya?
- ii. Whether the Ministry of Interior and Coordination of National Government had a role or a mandate in establishment of an administrative unit.
- iii. Whether there was public participation in the creation of Igambang’ombe Sub-County.
- iv. What was the significance or the importance of public participation?
- v. What factors should be considered by courts when determining whether the threshold for public participation had been met?
- vi. Whether a list of attendees of a meeting by itself would meet the required threshold to prove that public participation had taken place.

**Relevant provisions of the Law**

**National Government Coordination Act, Act No. 1 of 2013**

**Section 14(2)**

**14. 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 decentralised units established under section 48 of the County Government Act (No. 17 of 2012).*

## **County Government Act, Act No. 17 of 2012**

### **Section 48 (1) and (2).**

#### **48. Decentralized units**

(1) *Subject to subsection (3), the functions and provision of services of each county government shall be decentralized to—*

(a) *the urban areas and cities within the county established in accordance with the Urban Areas and Cities Act (No. 13 of 2011);*

(b) *the sub-counties equivalent to the constituencies within the county established under Article 89 of the Constitution;*

(c) *the Wards within the county established under Article 89 of the Constitution and section 26;*

(d) *such number of village units in each county as may be determined by the county assembly of the respective county; and*

(e) *such other or further units as a county government may determine.*

(2) *If the constituency or part of a constituency falls under urban areas or cities, that constituency or part of the constituency, as the case may be, shall be considered as falling under subsection (1)(a).*

#### **Held**

1. Public participation was the centrepiece of every decision made by state agencies and even non state agencies in Kenya. The Constitution required that every decision whether administrative, regulatory or statutory in so far as it affected the lives of the people, had to have key component of public participation.
2. One of the pillars of the Constitution of Kenya, 2010, was the concept of devolution or decentralization of government services from the capital of Kenya. A Sub-County was a creature of the Constitution under article 176(2) of the Constitution and section 48(1)(b) of the County Government Act 2012, through which a county government performed their functions and provided services. The national government, as noted in the Sixth Schedule to the Constitution were required to align and structure its systems of administration to accord and respect the system of devolved government.
3. The 1<sup>st</sup> respondent was required to ensure that the creation of Igambang'ombe Sub-County was in tandem with decentralized units established by the county government and defined by the 1<sup>st</sup> interested party pursuant to article 89 of the Constitution as read together with section 48(1)(b) of the County Government Act, 2012. The Cabinet Secretary in charge of coordination of national government functions was given a window under section 14(3) of the National Government Coordination Act to establish a coordination unit where a county government had not done its part in the creation of decentralized unit. In the instant matter the 1<sup>st</sup> respondent had not been faulted for breaching the provisions of section 48 of the County Government Act, 2012.
4. The establishment of Igambang'ombe Sub-County was done by the 1<sup>st</sup> respondent whose competency under section 2 of the National Government Coordination Act was not challenged in the instant petition. The establishment was done through a notice in the Gazette No. 5853 published on June 21, 2017 as provided under section 14(1) of the National Government Coordination Act. The 1<sup>st</sup> respondent was expressly authorized with the approval of the President of the Republic of Kenya to establish National Government Service Delivery Units. In the instant matter, it was not contested that the 1<sup>st</sup> respondent acted on the President's authority in establishing the subject sub-county. He acted with the requisite legal mandate and duty to create the subject administrative unit.



5. Section 48(1) of the County Government Act, 2012 provided that the functions and provisions of services of each county government was to be decentralized to units such as the sub county which was specifically defined to be equivalent to constituencies within the county established under article 89 of the Constitution of Kenya, 2010. The provisions of article 89 expressly gave the mandate of delimitation and delineation of electoral units such as a constituency to the Independent Electoral and Boundaries Commission. In carrying out that mandate, the Electoral and Boundaries Commission (IEBC) was required to carry out meticulous process well stipulated under the fifth schedule to the Independent Electoral and Boundaries Commission Act, 2011 under section 3. The central theme in the process was public participation. The process of delimitation of boundaries could not be legitimate without the elaborative process of public participation of all the stakeholders.
6. Public participation formed part of the core values and principles of the Constitution of Kenya, 2010. Public participation as a principle though important had not been coded comprehensively through legislation. The Constitution was silent on what constitutes public participation. There was also no national legislation as yet that provided a comprehensive definition and parameters on what constitutes public participation.
7. Public participation was a core value and one of the cornerstones of the Constitution of Kenya, 2010 principally, engagement with the public was an essential feature that enabled people to participate and own not only the final product but the process. Public participation kept the public informed on what was expected. It allowed a community of people or stakeholders to express their concerns, fears and demands to cater for their interests. It was an important tool in any democratic state.
8. Giving people the right to participate in decision making on matters affecting them not only inspired confidence but made them feel that they were respected and that was stipulated under article 28 of the Constitution of Kenya, 2010, where it stated that every person had a right to dignity and the right to have that dignity respected and protected.
9. Consultations or stakeholder's engagement tended to give more latitude to key stakeholders in a given field to take part in the process towards making laws or formulations of administrative decisions which to a large extent impacted on them. Such key stakeholders were mostly affected by the law, policy or decisions in a profound way. Therefore, in appropriate instance a Government agency or a Public Officer undertaking public participation could have to consider incorporating the aspect of consultation or stakeholder's engagement.
10. There was need for legislative intervention to give guidelines on how public participation should be conducted to meet the demands and aspirations of the people of Kenya as stipulated in the Constitution 2010. Parliament made attempts to codify that principle *vide* enactment of County Government Act (section 3 and 87) where the law provided that the principles of citizens participation in counties included, timely access to information, data, documents and other information relevant or related to policy formulation.
11. According to their plain and ordinary meaning, the words public involvement or public participation referred to the process by which the public participated in something. It was impossible to define the forms of facilitating appropriate degree of public participation. So long as members of the public were accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it was possible to say that there was public participation.
12. To attain the principle of public participation in a decision making process, the following parameters are required;
  1. there had to be evidence of inclusivity that was to say that all stakeholders or those affected by an administrative policy, or law had to be given an opportunity to express or ventilate their views well aware of what was at stake.
  2. The affected people had to be given sufficient notice of the nature of the decision to be made and when the consultations will be held. The information had to be disseminated through



- public barazas, churches, mosques, print and electronic media and other avenues to ensure that the information reached the targeted audience.
3. The government agency or a public officer in charge of the programme of public participation had to of essence take into account the participation of the governed in quantitative as well as qualitative way. In other words, the engagement had to be meaningful and done in good faith rather than a mere formality.
  4. Public participation called for innovation and some level of malleability depending on the nature of subject matter for example culture, geographical issues, logistical constraints. The test to be applied was effectiveness and efficiency. The question to be asked was, was the mechanism effective in achieving sufficient public participation.
  5. Public participation did not mean that everyone had to give their views on the issue at hand as to attain such a standard at times could be impractical. A public participation exercise had to however show intentional inclusivity and diversity. A programme of public participation could not disregard *bona fide* major stakeholders otherwise the program would be ineffective and illegal. Those mostly affected by the policy were expected to have a bigger say in that policy, legislation or action and their views had to be sought, taken into account. The view of the major stakeholders had to be captured through minutes or any other proof that showed that their views were captured and had a bearing in the final decision.
  6. Public participation was not a public relations exercise. It had to be meaningful and done in good faith.
13. A letter dated April 18, 2016 accompanied by minutes of a meeting held at the same date lend credence to what the County Commissioner had averred in her affidavit that there was adequate public participation. However, a closer look at the list of the attendees of the meeting did not reveal how they were picked to attend the meeting and whether the attendees were representatives of all the residents of the subject area. The list was also unclear because while the list was headed ‘minutes of the leaders meeting held at Deputy Commissioner Office-Meru South on April 19 at 9 a.m. The list showed that administrators and opinion leaders attended but how they were picked was not clear. Furthermore, those who attended did not give their particulars like identification card or signed against their names to show that they actually attended the meeting. It was also not indicated whether the attendees were representatives picked from every part of the subject area and whether they were well informed beforehand that such a meeting would be held and the subject of discussion would be creation of a new sub-county. The petitioners claimed they were excluded as a community from expressing their view and looking at the documents placed before me by the respondent, their grievances were legitimate because they had not been responded to adequately.
  14. The other meeting held on April 15, 2014 where the respondents claimed that public participation was conducted on the creation of the subject sub-county, showed that the agenda of the said meeting was a change of name from Meru South to Igambang’ombe sub-county in line with the Igambang’ombe constituency.
  15. There was no way the respondents could claim that there was adequate public participation on the creation of a new sub-county when, the minutes purporting to prove that there was public participation indicated that the agenda of the consultation in the first place was change of name of a sub-county. There were many people who attended and appended their signature but again the same fell short of the required standard. How was the meeting convened? Were all the stakeholders invited? Were the attendees fully briefed about the agenda of the meeting? To reach the required threshold of public participation, those questions had to be answered in affirmative. It was not enough to rely on a list of attendees.
  16. The agenda of the meeting held on April 15, 2014 was not the impugned creation or establishment of the subject sub-county. That was a fundamental flaw to the establishment of the said sub-county.



17. The meeting held on April 15, 2014 at Chief's Office Kathwana appeared to have taken place concurrently with the meeting referred to above held at Deputy County Commissioner's Office at Meru South. The meeting was held at Kathwana Location, which the court took judicial notice of the fact that it was situated at the lower part of IgambaNg'ombe (Meru South) was not a venue convenient for other residents residing on the upper part of Meru South. Public participation was not conducted in all the locations comprising the subject sub-county. The county commissioner and indeed the respondents could not truly claim that there was wide public participation where all the residents and that other stakeholders like the county assembly and county government were invited and given opportunity to give their views.
18. There was no evidence that the meeting was inclusive enough and the meeting was held prior to the promulgation of the new constitution. The question of creation of a unit known as sub-county obviously had not crystalized them. The level of participation of the majority stakeholders alluded to by the respondents did not reach the requisite threshold.
19. What was important at the end of the day was not how the formula of public participation was applied, but to accord the public and stakeholders some reasonable level of participation. The forms of facilitating an appropriate degree of participation in the law making process were indeed capable of infinite variation. What was of importance was that at the end of the day a reasonable opportunity was offered to members of the public and all interested parties to know about the issue and have an adequate say. What amounted to a reasonable opportunity would depend on the circumstances of each case. It could not be expected of the law maker that a proposal hearing would be given to every individual who claimed to be affected.
20. The principle of public participation covered all whether in the minority or the majority. If it was true or factual that 2<sup>nd</sup> to 19<sup>th</sup> interested parties were consulted, though they had not tabled any evidence of public participation, the grievance of exclusion even one sub-location if proven, would be sufficient to find that the process was not inclusive.
21. The level of engagement that the 1<sup>st</sup> respondent did in respect to county government pursuant to the provisions of section 14(2) of the National Government Coordination Act, 2013 were wanting in some respects. The 1<sup>st</sup> respondent was required by the Act to accord and respect the county government decentralized units established under section 48 of the County Government Act, 2012. The member of County Assembly Igambang'ombe Ward was of the opinion that two sub-counties namely Igambang'ombe Sub-County and Chuka Sub-County be created or established. If the view of the member of county assembly represented the view of his electorates, then it appeared that the view of some segments of the community at least represented by Member of County Assembly Igambang'ombe Ward was not factored in. The 1<sup>st</sup> respondent had not shown that the views were considered alongside other views from the other residents.
22. There was no evidence that the view of the County Government of Tharaka Nithi through its executive and the county assembly were sought in line with section 14(2) of the National Government Coordination Act, 2013 . There was no evidence that the 1<sup>st</sup> interested party was involved pursuant to the provisions of section 48 of the County Government Act as read together with article 89 of the Constitution. That was to ensure that the created sub-county did not traverse more than one constituency as provided Under section 48(ii) of the County Government Act, 2012.
23. The respondents had a discretion to determine the process of public participation but it was important to ensure that degree of public participation met the threshold. To attain the constitutional threshold, the engagement had to be real, meaningful and effective.
24. Public participation was not a public relations exercise. Public participation meant that any decision making on any matter affecting the public, views had to be taken serious as a constitutional imperative. Any decision made by a government agency, state officer or a public officer should be viewed and contentionalized.



25. The position by the 1<sup>st</sup> respondent that public resources had been expended in the creation of the subject sub-county but that was akin to saying the end justified the means which was untenable in law. The end product ought to always have been as good as the process. Both had to be lawful and should have met the Constitution threshold.
26. Public participation was a key component in any legitimate process that led to making of decision, policy or law that affected the people. The action of establishing the subject administrative unit fell short of the Constitutional dictates under article 10 of the Constitution and statutory obligations under section 48 of the County Government Act 2012. The 1<sup>st</sup> respondent was well aware that he was bound by the national values and principles of governance including meaningful public participation, transparency and accountability to involve, engage and hear the view of all the citizens, their leaders and the county government before impugned establishment of the subject sub-county. Kenya was a democratic Country where citizens had a right to determine how they would wish to be governed and obtain services from the two levels of governments and that was why the two levels should always consult and involve the people in the affairs affecting them.
27. While it was true that some level of consultation was carried out by the 1<sup>st</sup> respondent as alluded above, the public participation carried out in the establishment of Igambang'ombe sub-county was not effective. It fell short of the constitutional and statutory requirements. There was no evidence that the petitioners as residents of the subject sub-county were given a reasonable opportunity to express or ventilate their views regarding the establishment of the administrative unit and yet they were part of the stakeholders of the sub-county.

*Petition allowed.*

#### **Orders**

- i. *Declaration that the creation/establishment of Igambang'ombe Sub-County by the respondent was illegal, unconstitutional and a nullity. The same was declared void ab initio because the said sub-county was created without constitutional principles of public participation and inclusiveness.*
- ii. *A declaration was made that the creation of Igambang'ombe Sub-County violated the petitioners constitutional rights under article 10 and 28 of the Constitution and violated the section 14(2) of the National Government Coordination Act, 2013 and section 48(2) of the County Government Act, 2012.*
- iii. *An order of certiorari was issued to quash the gazette notice Vol. CXIX No. 5853 published on June 21, 2021.*
- iv. *An Order was issued compelling the respondents to take all such measures and steps as provided by the Constitution and the relevant statutes to create such administrative unit(s) as they deemed necessary in compliance with section 14(1) of the National Government Coordination Act, 2013.*
- v. *Each party was to pay their own costs.*
- vi. *In order to avoid disruption of normal services of the national government to the residents, the respondents were given 90 days to comply. The instant judgement would take effect after a period of 90 days.*

#### **Citations**

##### **Cases**

##### **East Africa;**

1. *Anarita Karimi Njeru v Republic* [1979] 1 KLR 154 — (Mentioned)
2. *Mboha, Joseph v Speaker, County Assembly of Siaya & another* Constitutional Petition 19 of 2019; [2020] eKLR — (Mentioned)
3. *Khelef, Khalifa & 2 others v Independent Electoral and Boundaries Commission & another* Constitutional Petition 168 of 2017; [2017] eKLR — (Explained)
4. *Wambora, Martin Nyaga & 30 others v County Assembly of Embu & 4 others* Constitutional Petition 7 & 8 of 2014; [2015] eKLR — (Mentioned)



5. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] eKLR — (Mentioned)
6. *Nairobi Metropolitan PSV Saccos Union Limited & 25 others v County Of Nairobi Government & 3 others* Petition 486 of 2013; [2013] eKLR — (Followed)
7. *Omutatab, Okiya v Kenya Revenue Authority* Petition 532 of 2017; [2018] eKLR — (Explained)
8. *Musyoka, Peter Makau & Award of Mining Concessionary Rights to Mui Coal Basin Deposits* Constitutional Petition 305 of 2012; [2015] eKLR — (Explained)
9. *Republic v County Government of Kiambu Ex parte Robert Gakuru & another* Judicial Review Case 434 of 2015; [2016] eKLR — (Mentioned)
10. *Republic v Independent Electoral and Boundaries Commission ex parte Khelef Khalifa & another* Miscellaneous Application 628 of 2017; [2017] eKLR — (Mentioned)
11. *Republic v Ministry for Finance & another ex parte Nyong'o & 2 others* Miscellaneous Civil Application 1078 of 2007; [2007] eKLR — (Followed)
12. *Owuor, Richard & 2 others (suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 others* Petition E263 of 2020; [2020] eKLR — (Explained)
13. *Gakuru, Robert & others v Governor Kiambu County & 3 others* Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014 (Consolidated); [2014] eKLR — (Explained)
14. *Ojiayo, Samson Owimba v Independent Electoral and Boundaries Commission (IEBC) & another* Petition 104 of 2013; [2013] eKLR — (Mentioned)

### **South Africa**

1. *Doctors for Life International v Speaker of the National Assembly & others* 2006 (12) BCLR 1399 (CC) — (Explained)
2. *Minister of Health v New Chicks South Africa PTY Ltd* — (Explained)

### **Statutes**

#### **East Africa;**

1. Constitution of Kenya, 2010 articles 1, 1(1)(b)(4)(b); 2(1)(d)(e); 3(1); 10; 19; 20; 21(1); 22; 23; 27; 28; 29(c)(d); 40; 40(1); 47; 48(1)(b); 56; 89; 89(2); 129(1)(2); 131(1)(a)(b)(e); 132(3)(b); 174(a); 176(2); 258 — (Interpreted)
2. County Governments Act, 2012 (No 17 of 2012) sections 3, 87 — (Interpreted)
3. Independent Electoral And Boundaries Commission Act, 2011 (Act No 9 of 2011) section 3 — (Interpreted)
4. National Government Coordination Act, 2013 (Act No 1 of 2013) sections 1(1); 4; 14(2) — (Interpreted)

### **Advocates**

1. Kariuki for 2<sup>nd</sup> to 19<sup>th</sup> interested parties
2. Kungu for 1<sup>st</sup> and 2<sup>nd</sup> respondent

## **JUDGMENT**

1. Public participation is now the centerpiece of every decision made by state agencies and even non state agencies in Kenya. The new Constitutional dispensation now requires that every decision whether administrative, regulatory or statutory in so far as it affects the lives of the people, must have key component of public participation.



2. In this petition, Isaack Mugo the 1<sup>st</sup> petitioner and thirteen others (who shall henceforth be referred to as the petitioners for ease of reference) have sued Dr Fred Okengo Matiang'i, the Cabinet Secretary Ministry of Interior and Co-ordination of National Government, the 1<sup>st</sup> respondent, The Hon Attorney General of Kenya, the 3<sup>rd</sup> respondent, and the Independent Electoral and Boundary Commission of Kenya named as interested party in this petition.
3. The main grievance of the petitioners in this matter is that the first Respondent acting under powers conferred to him under section 14(1) of the National Government Coordination Act, 2013 established a sub-county namely Igambang'ombe with headquarters at Kathwana *vide* Kenya Gazette Vol CXIX No 80 dated 21<sup>st</sup> June 2017. The petitioners claim that the creation of the sub-county was done without participation of people of Chuka sub-tribe and that the creation of the new administrative unit was done without the input and participation of the people from the said sub-tribe whom they claim occupy Chuka Igambang'ombe Constituency.

### **The Petitioners' Case**

4. The petitioners have sued the first respondent in his capacity as the Cabinet Secretary, Ministry of Interior and Coordination of National Government.
5. The 2<sup>nd</sup> respondent, a State Officer created under article 56 of *the Constitution* is being sued in his capacity as a representative of National Government, while the Interested Party (IEBC) has been enjoined in this suit by the Petitioners by virtue of their mandate under article 89 which inter alia includes delimitation of boundaries.
6. The petitioners claim that the first respondent on 21<sup>st</sup> June, 2017 through the above cited Gazette Notice established Igambang'ombe sub-county with its headquarters at Kathwana without involving stakeholders and in particular the people from Chuka sub-tribe who they claim inhabit Karingani and Magumoni Locations and have done so since pre-colonial era to the present day independent Kenya.
7. It is the petitioners case that the people from Chuka sub-tribe were never invited to participate in the discussions or deliberations in respect to creation of the said new administrative unit before the same was established. They fault 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent for failure to exercise due diligence by consulting the Chuka people through Public participation to ensure inclusiveness in their decision.
8. The petitioners argue that in establishing the Igambang'ombe sub county, the 1<sup>st</sup> respondent sought to impose a decision against the People from Chuka sub-tribe which in turn would create deeper inter communal and inter-tribal animosities amongst the Chuka, the Mbeere and the Tharaka people who allegedly have had historical attempts to occupy land occupied by the Chuka sub-tribe.
9. The petitioners submit that the establishment of the said sub county was in blatant violation of *the Constitution* and without consultation or participation of the people from Chuka sub-tribe who have been directly affected by the creation of the new administrative unit.
10. In view of the foregoing, the petitioners home *vide* this petition sought for the following reliefs namely;
  - a) An order declaring that Igambang'ombe sub-county created by the 1<sup>st</sup> respondent and superimposed on the geographical boundaries of Chuka is illegal and unconstitutional and therefore null and *void ab initio*.
  - b) A declaration that the superimposition of administrative boundaries of Chuka in ways that impose administrators from neighbouring counties upon the people of Chuka Igambang'ombe or in ways that compel the people of Chuka sub-tribe to participate in the election of leaders from the neighbouring sub-



counties violate the integrity of the Chuka Igambang'ombe sub-county besides violating the right of the petitioners herein to participate in the political life of their sub-county.

- c) A declaration that the creation and establishment of the Igambang'ombe sub-county without the constitutional principles of public participation and inclusiveness violate the Petitioners' right to fair administration contrary to article 47 of *the Constitution*.
- d) A declaration that the respondents violated the provisions of articles 1,2, 10, 22, 47 and 258 of *the Constitution*, the guiding principles in section 4 and 14(2) of the *National Government Co-ordination Act* (2013) and section 48 of the County Government Act by purporting to create a new administrative unit in violation of the law.
- e) An order of *certiorari* to issue to bring into the honourable court for purposes of being quashed the Gazette Notice Vol CXIX-No 80 establishing Igambang'ombe sub-county published on 21/06/2017.
- f) A permanent injunction precluding the 1<sup>st</sup> interested party either by their servants, agents, contractors and/or employees and all persons claiming under them from proceeding with the reviewing/delimitation contrary to the spirit and fundamental rights and freedoms as guaranteed in *the Constitution*.
- g) A mandatory injunction against the 1<sup>st</sup> and 2<sup>nd</sup> respondents compelling them to take all such measures as are reasonably practicable by observing the Rule of Law and abiding by the Constitutional values and principles in creating or establishing a new administrative unit within Chuka, to prevent the violation of the fundamental rights and freedoms of the petitioners as illustrated hereinabove. h) A declaration that any review/delimitation of boundaries conducted or set to be conducted by the 1<sup>st</sup> Interested party arising out of the illegally created Igambang'ombe constituency is null and void ab initio.
- h) An order of damages directed at the 1<sup>st</sup> and 2<sup>nd</sup> respondents requiring the said 1<sup>st</sup> and 2<sup>nd</sup> Respondents to compensate each of the petitioners herein for the various violations of their fundamental rights and freedoms as outlined hereinabove, with respect to each of them by paying each of the petitioners herein sums of money as this honourable court will deem appropriate.
- i) A declaration that the fundamental rights and freedoms guaranteed to the petitioners especially under articles 1(1)(b), 1(4)(b), 2(1), 3(1), 10, 19, 20, 21(1) 22, 23, 27, 28, 40, 47, 23 2(1)(d)(e) & 258 of *the Constitution* have been contravened and/or are threatened by the respondents.
- j) Costs of the Petition.
- k) That this honourable court be pleased to make any further orders as it may deem just and fit to grant.

### The Respondents Case

11. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents through the Senior Principal State Counsel have opposed this petition via grounds of opposition dated 8<sup>th</sup> July 2019 and a replying affidavit sworn on 15<sup>th</sup> July, 2019 by Beverly K



Opwora, the County Commissioner Tharaka Nithi County. They have also filed written submissions in opposition to this petition.

12. The respondents aver that this petition is based on sectarian interests of Chuka sub-tribe which they submit, are contrary to articles 1, 10 and 40(1) of *the Constitution* of Kenya 2010.
13. They further aver that as a National Government, they have a measure of discretion on to achieve the objective of Public participation and that their duty is to facilitate some appropriate degree of the people in decision making process.
14. They insist that establishment of Igambang'ombe sub-county was lawful and that it was done after public participation and with the authority of the president of Kenya as stipulated under article 131(1) (b) and 132(3)b. They submit that Section 14(1) of the National Government Coordination Act expressly authorizes the 1<sup>st</sup> respondent with the approval of the President and through a notice in the Kenya Gazette to establish national government service delivery unit.
15. The respondents have faulted the petitioners' apprehensions about possible clashes as alarmist and unfounded.
16. They submit that the petitioners have not laid any constitutional and/or legal basis for this court to intervene because in their view, the issues raised are administrative in nature insisting that their intention was to take services closer to the people. It is their contention that the allegations made by the petitioners are not supported by any evidence. They insist that the creation of new administrative unit does not entail any form of relocation or movement of any population contrary to the petitioners' claims.
17. They aver that the residents of Igamba-Ng'ombe have for several years requested the Ministry of Interior to create, locations, Divisions and sub-county in Igambang'ombe (Meru South) in order to enable them access government services such as relied food and water.
18. It is the Respondent's case that the 1<sup>st</sup> respondent received a proposal from political, religious and business community for a change of name from "Meru South" sub-county to "Igambang'ombe" sub-county. They insist that they did not usurp the Constitutional Powers of the County Government of Tharaka Nithi.
19. It is their position that the creation of Igambang'ombe sub-county followed a leaders meeting that resolved the same. They have exhibited the minutes of the leaders meeting held on 15<sup>th</sup> April 2014 at Teachers Sacco hall as proof of the meeting.
20. The first respondent through the County Commissioner further avers that the proposals by the leaders meeting informed the following activities it carried out namely: -
  - a) A nation-wide audit to establish the total number of locations and sub-locations.
  - b) Subsequent validation of the report in all the 47 counties
  - c) Aligning of Administrative Boundaries (Districts) to Electoral Boundaries (Constituencies).
  - d) Authorized establishment of locations and sub locations.
  - e) Standardization of codes and names of Administrative units.



21. The respondents aver that in June 2017 vide Gazette Notice number 5853 published on 21<sup>st</sup> June 2017, the 1<sup>st</sup> respondent in exercise of powers conferred upon him under section 14 (1) of the National Government Coordination Act, 2013 and in an effort to enhance the functions of the national government and service delivery, they created Igambang'ombe sub-county in Tharaka Nithi County.
22. The respondents contend that the 1<sup>st</sup> respondent in creating Igambang'ombe sub-county exercised the powers donated to the office pursuant to article 129(1)(2) and article 131(1)(a)(b)(e), 29c) and (d) read together with section 14(1) of the National Government Coordination Act, 2013 and in fulfillment of Constitutional requirement.
23. They further aver that the 1<sup>st</sup> respondent as a Ministry has expended a substantial amount of Public funds, time, labour and other resources in the creation of Igambang'ombe sub-county which they claim has been in operation since 2017. They have exhibited documents showing tendering process and other activities carried out in the creation of the said sub-county.
24. The respondents faults the petitioners for seeking preferential treatment when *the Constitution* provides for equal treatment of all residents of Tharaka Nithi County.
25. They contend that the petitioners' claim on land rights and other historical rights should be directed to the National Land Commission who are well placed to address community land rights.
26. They also fault the petitioners grievances claiming that the same are borne of malice, ill will and negative ethnicity to other tribes' resident in the sub-county. They assert that Igambang'ombe is a cosmopolitan area occupied by diverse ethnic communities numbering around 46,000 people.
27. They submit that under article 40 of *the Constitution* of Kenya, Kenyans have a right to acquire and own property in any part of Kenya and that it was wrong for the petitioners to have a sense of land entitlement and labelling others "immigrants" asserting that the same is dangerous to peaceful coexistence of all residents of Tharaka Nithi.
28. The respondents deny that the created Igambang'ombe sub county cuts across constituencies insisting that it is within a Constituency and its headquarters is at Kathwana Town.
29. They submit that due process was followed in the creation of the sub-county and have relied on the decision in the case of *Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others [2015] eKLR*.

### **The 1<sup>st</sup> Interested Party's Case**

30. The 1<sup>st</sup> interested party filed a replying affidavit to oppose this petition albeit out of time and the attempts to rely on it was overruled by this court. The Interested party subsequently filed written submissions placing reliance on its grounds of opposition dated May 7, 2020.
31. It contends that it is a Constitutional body duly mandated to carry out various functions which include delimitation of Constituencies and wards in accordance with *the Constitution*. The 1<sup>st</sup> interested party further submits that in carrying out its mandate it is not subject to control by anyone and that they rely only on legal factors in their duties. They have relied on the case of *Samson Owimba Ojiako v Independent Electoral and Boundaries Commission (IEBC) & another [2013] eKLR*.
32. The 1<sup>st</sup> interested party contends that this is Petition merely speculative as the IEBC is obligated under section 3 of the 5<sup>th</sup> Schedule of IEBC Act 2011 to comply with the Principles of Public Participation. They have relied on the decision of *Khelef Khalifa & 2 others v IEBC & another [2017] eKLR* where the



court pronounced itself on the elements of public participation and the required threshold required in ensuring that there is public participation.

33. The 1<sup>st</sup> interested party contends that this petition is not ripe as against it because it has not yet begun the process of delimitation of constituencies and wards in Tharaka Nithi County. They aver that this petition is pre-emptive in nature and must not be granted on that ground. To buttress its assertion, it relies on the case of *Joseph Mboya v Speaker County Assembly of Siaya & another* [2020] eKLR.

#### The 2<sup>nd</sup> to 19<sup>th</sup> Interested Party's Case

34. The 2<sup>nd</sup> to 19<sup>th</sup> interested parties threw their weight behind the respondents in opposition of this petition they contend that they are residents of Igambatundu, Mariani, Kajuki and Igambang'ombe. They claim that they represent 17 out of 18 sublocations in Igambang'ombe sub-county with the exception of Karongoni sub-location.
35. The 2<sup>nd</sup> to 19<sup>th</sup> interested parties claim that the creation of Igambang'ombe sub-county was a culmination of a sustained clamor by residents of Igambang'ombe and Mariani wards so as to bring government services closer to the people.
36. They claim that those consultative meetings were held both within and outside Igambang'ombe divisions and that the residents fully supported the elevation of Igambang'ombe division to a sub county. It is their case that they fully participated in the process.
37. They contend that Igambang'ombe sub-county has already been gazetted, issued with a code and that the office of Deputy County Commissioner has already been set up at Kathwana with departmental heads already deployed there. To them the prayers sought in the petition have already been overtaken by events.
38. They submit that the petitioners have failed to demonstrate the manner in which the various Constitutional provisions cited in the petition were violated by the respondents. They contend that it is not enough to simply "throw" Constitutional provisions to this court alleging infringements without precision on the infringement. On this score they rely on the case of *Anarita Karimi Njeru v R* (1979) eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
39. They have further cited various meetings held on 14/5/2019, 15/4/2014, 26/11/2014 and 18/4/2016 where they claim that stakeholders attended and supported the creation of the new sub county. They claim that public participation was done directly and through elected representatives as envisaged in article 1 of *the Constitution*. They argue that it was practically impossible for every person in the County to be heard and that is why it was sufficient to consult the people through elected representatives as envisaged under article 2 of *the Constitution* of Kenya 2010.
40. The 2<sup>nd</sup> to 19<sup>th</sup> interested parties' position is that the yardstick for public participation in creation of Igambang'ombe was reasonable and have relied on the decision in *Republic v County Government of Kiambu ex parte Robert Gakuru & another* [2016] eKLR where the court held *inter alia* that the yardstick for public participation is a reasonable opportunity for the members of public and Interested parties to know the issues at hand and have an adequate say on them. They have also cited the decision in *Nairobi Metropolitan PSV Sacco Union Ltd & 25 others v County of Nairobi Government & 3 others* [2013] eKLR, where Hon Lenaola Judge also held similar view that what matters in public participation is that a reasonable opportunity is offered to members of public and Interested persons to have a say on the issue at hand.
41. The 2<sup>nd</sup> to 19<sup>th</sup> interested parties also fault the petitioners for trying to create a wedge between them and other communities terming the move unfortunate and only intended to cause ethnic tensions. They



contend that Lake Mikaine is a natural resource and the petitioners cannot claim it to the exclusion of other residents.

42. They further contend that the petitioners only seek to rely on technicalities because of lack of substance in the petition.

### **Analysis and Determination**

43. This court has considered this petition, and the responses made by the respondents and the interested parties. In my considered view, the following issues have cropped up for determination namely: -

- (i) Who has the mandate and duty to create an administrative unit in Kenya.
- (ii) Whether the 1<sup>st</sup> interested party has a role.
- (iii) Whether the establishment of Igambang’ombe sub county violated the provisions of *the Constitution* of Kenya 2010.

44. One of the pillars of *the Constitution* of Kenya 2010 is the concept of devolution or decentralization of government services from the capital of Kenya. This clearly spelt out under article 174 (a) of *the Constitution* of Kenya 2010. The objects of the devolution of government are listed inter alia as

“to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya....”

45. A further reading of the sixth schedule of *the Constitution* of Kenya 2010 under part 4 section 17 stipulates as follows: -

“Within five years after the effective date, the national government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under this Constitution.”

46. *The Constitution* of Kenya 2010 was promulgated on August 27, 2010 and that is the effective date. That means that from the said date any action taken by anyone be it administrative, political, policy etc. whether by public, State Officers or private persons must accord with the new Constitution. It is in that light that decentralization of services or devolution must be viewed.

47. The creation of administrative units and specifically sub-county level of administration is provided to under section 48 of the County Government Act, 2012 which state;

“Decentralized Units,

- 1) subject to subsection (3), the functions and provisions of services of each County Government shall be decentralized to-

.....

- (b) the sub-counties equivalent to the Constituencies within the County established under article 89 of *the Constitution*.....”

48. A Sub-County is therefore a creature of *the Constitution* under article 176(2) of *the Constitution* and section 48(1)(b) of the County Government Act 2012, through which the County Government perform their functions and provide services. The National Government, as noted in the 6<sup>th</sup> Schedule



of *the Constitution* were required to align and structure its systems of administration to accord and respect the system of devolved government.

49. The respondents have maintained that in creating the impugned sub-county, the first respondent acted on the powers donated to that office under section 14 of the National Government Coordination Act, section 14 of the National Government Coordination Act 2013 provides as follows: -

“Service delivery coordination Units,

- 1) The Cabinet Secretary may with the approval of the president and by a notice in the Gazette, establish national government service delivery coordination units.”

Under subsection 2 of the same section, the spirit and letter of article 176 (2) of *the Constitution* and Section 48 of the County Government Act 2012 is well captured. The subsection reads; -

“In establishing the National Government service delivery units, the Cabinet Secretary shall accord and respect the County Government decentralized units established under section 48 of the County Government Act.”

50. The first respondent was required therefore to ensure that the creation of Igambang’ombe sub-county was in tandem with decentralized units established by the County Government and defined by the 1<sup>st</sup> interested party pursuant to article 89 of *the Constitution* as read together with section 48(1)(b) of the County Government Act, 2012 as cited above. The Cabinet Secretary in charge of coordination of national government functions is given a window under subsection 3 of section 14 of the National Government Coordination Act to establish a coordination unit where a County Government has not done its part in the creation of decentralized unit.

The section stipulates;

“Where a County Government has not decentralized its units pursuant to section 48(1) (a) 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.”

51. In this matter the 1<sup>st</sup> respondent has not been faulted for breaching the provisions of section 48 of the County Government Act, 2012.

This court has perused the pleading filed and in particular the affidavit of Beverly K Opwora sworn on July 15, 2019 and finds that the establishment of Igambang’ombe sub-county was done by the first respondent whose competency under section 2 of the National Government Coordination Act is not challenged in this petition. The establishment was done through a notice in the Gazette No 5853 published on June 21, 2017 as provided under section 14 (1) of the National Government Coordination Act. The 1<sup>st</sup> respondent is therefore expressly authorized with the approval of the President of the Republic of Kenya to establish National Government Service Delivery Units. In this matter, it is not contested that the 1<sup>st</sup> respondent acted on the President’s authority in establishing the subject sub-county. He acted with the requisite legal mandate and duty to create the subject administrative unit. The big question which is the elephant in the room is whether he followed due process. Before I delve into that I will address the 2<sup>nd</sup> issue for determination in this petition.

**Whether the 1<sup>st</sup> Respondent has a role or a mandate in establishment of an administrative unit.**



52. The analysis above has brought out clearly the mandate of the 1<sup>st</sup> respondent in creation or establishment of an administrative unit. Section 48(1) of the County Government Act 2012 provides that the functions and provisions of services of each County Government shall be decentralized to units such as the Sub County which is specifically defined to be equivalent to Constituencies within the County established under article 89 of *the Constitution* of Kenya 2010.

The provisions of article 89 expressly give the mandate of delimitation and delineation of electoral units such as a Constituency to the Independent Electoral and Boundaries Commission. Article 89(2) provides as follows: -

“The Independent electoral and Boundaries Commission shall review the names and boundaries of Constituencies at intervals of not less than 8 years and not more than 12 years.....”.

In carrying out that mandate, the Electoral and Boundaries Commission (IEBC) is required to carry out meticulous process well stipulated under the fifth schedule of the *Independent Electoral and Boundaries Commission Act*, 2011 under section 3. The 1<sup>st</sup> Interested Party in its written submissions dated 23<sup>rd</sup> September 2020 captured the process well. This court will not go into the details but the central theme in the process is public participation. The process of delimitation of boundaries cannot be legitimate without elaborative process of public participation of all the stakeholders.

53. In this petition, the petitioners have not raised an issue against the 1<sup>st</sup> interested party on the question of the process of delimitation of the boundaries in regard to Igambang’ombe Constituency where the subject sub-county lies. They have however faulted the creation of Igambang’ombe sub-county and the central theme of their grievance is lack of public participation which is next issue of determination.

**Whether the establishment of Igambang’ombe sub-county violated *the Constitution* of Kenya 2010.**

54. This court has carefully considered this petition and the response made in respect to this crucial issue of Public participation. The petitioners have attacked the creation of Igambang’ombe Sub-County on grounds that the same did not involve the major stakeholders and they consider themselves as major stakeholders. The respondents and the 2<sup>nd</sup> to 19<sup>th</sup> interested parties on the other hand have insisted that there was public participation.

55. There is no contest therefore, that public participation forms part of the core values and principles of *the Constitution* of Kenya 2010. Article 10 of *the Constitution* of Kenya provides that one of the National values and principles of governance in Kenya is Public participation.

Article 10(2) provides that;

“The National values and principles of governance include: -

(a) Patriotism, national unity sharing and devolution of power, the rule of law democracy and participation of the people.....”

The above values and principles bind all state organs, state officers and all other persons in applying or interpreting *the constitution*, enacting or applying any law or implementing policy decisions. The importance of public participation in all spheres of life is now a must and a reality in Kenya.



56. It is important to note that, public participation as a principle though important has not been coded comprehensively through legislation. *The Constitution* is silent on what constitutes Public participation. There is also no national legislation as yet that provides a comprehensive definition and parameters on what constitutes public participation. Be that as it may the essential features of public participation has been developed overtime through case law.
57. I will begin with the significance or the importance of Public Participation before I look at the threshold required with a view to disposing the third issue for determination in this matter.
58. As observed above, public participation is a core value and one of the cornerstone of *the Constitution* of Kenya 2010 principally, engagement with the public is an essential feature that enable people to participate and own not only the final product but the process. Public participation keeps the public informed and know what is expected. It allows a community of people or stakeholders to express their concerns, fears and demands to cater for their interests. It is an important tool in any democratic state. In a South African decision in the case of *Matatiele Municipality v President of the Republic of South Africa* (2) (CCT 73/05A) the South African Constitutional Court expressed the significance of Public participation when it observed as follows in part;

“A commitment to a right to ..... Public participation in government decision making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of their story but also from our sense that participation is necessary to preserve human dignity and self-respect .....

The above observations show that giving people the right to participate in decision making on matters affecting them not only inspires confidence but makes them feel that they are respected and this is clearly stipulated under article 28 of *the Constitution* of Kenya 2010 where it states that every person has a right to dignity and the right to have that dignity respected and protected.

59. In the case of *Richard Owuor & 2 others (Suing on behalf of Busia Sugarcane Importers Association versus Cabinet Secretary, Ministry of Agriculture Livestock, Fisheries and Cooperatives & 8 others* [2020] eKLR, Justice Mrima made the following observations: -

“Consultations or stakeholder’s engagement tends to give more latitude to key stakeholders in a given field to take part in the process towards making laws or formulations of administrative decisions which to a large extent impacts on them. That is because such key stakeholders are mostly affected by the law, policy or decisions in a profound way. Therefore, in appropriate instance a Government agency or a Public Officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholder’s engagement.....”

60. In the matter of *Peter Makau Musyoka and Award of Mining Concessionary Rights to Mui Coal Basin Deposits* [2015] eKLR, the court also made the following observations regarding the significance of public participation;

“ We will begin, happily, by stating what is not contested by the parties: They all agree that the precepts of article 10 of our Constitution are established rights which are justiciable in Kenya.

Hence, if any of the allegations made by the Petitioners is factually proven, it would lead to an appropriate relief by the court.



88. As our case law has now established, public participation is a national value that is an expression of the sovereignty of the people as articulated under article 1 of *the Constitution*. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence, public participation is an established right in Kenya; a justiciable one—indeed one of the corner stones of our new democracy.”

61. Having laid out the significance of Public participation, the next question to address is the threshold. What are the parameters or what practical steps must be undertaken to ensure that this Constitutional principle is attained? As I have observed, there was need for legislative intervention to give guidelines on how public participation should be conducted to meet the demands and aspirations of the people of Kenya as stipulated in *the Constitution* 2010. Parliament made attempts to codify this principle vide enactment of *County Government Act* (section 3 and 87) where the law provides that the principles of citizens participation in counties include, timely access to information, data, documents and other information relevant or related to policy formulation.

62. The courts in Kenya have delved on this question in a number of decisions. In the case of *Doctors for Life International v Speaker of the National Assembly & others* [2015]eKLR they held as follows:-

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law making process. The key words in this are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier” “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as (a) taking part with others (in an action or matter); .....the active involvement of members of a community or organization in decisions which affect them.”

According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something...it is clear and I must state so, that it is impossible to define the forms of facilitating appropriate degree of public participation. To my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation.”

63. In *Robert N Gakuru and Others v County Government of Kiambu County [2014] eKLR* Odunga-Judge, made the following relevant observations in respect to standards required to facilitate public participation in a legislative process;

“Facilitations of Public involvement in the legislative process therefore means taking steps to ensure the public participate in the legislative process..... parliament and the provincial legislature must be given a significant discretion in determining how best to fulfill their duty to facilitate public participation. This discretion will apply in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes. Yet however great leeway given to the legislature, court can, and in appropriate cases will, determine whether there has been the degree of involvement that is required by *the constitution*. What is required will no doubt vary from one case to case .....

64. It is apparent, going by the above decision and other decisions cited by the parties in this matter and in particular the decision in *Khelef Khalifa & 2 others versus Independent Electoral and Boundaries*



Commission and another [2017] eKLR, that to attain the principle of public participation in a decision making process, the following parameters are required;

- a) There must be evidence of inclusivity that is to say that all stakeholders or those affected by an administrative policy, or law must be given an opportunity to express or ventilate their view well aware of what is at stake.
- b) The affected people must be given sufficient notice of the nature of the decision to be made and when the consultations will be held. The information must be disseminated through public barazas, churches, mosques, print and electronic media and other avenues to ensure that the information reaches the targeted audience.
- c) The government agency or a public officer in charge of the programme of public participation must of essence take into account the participation of the governed in quantitative as well as qualitative way. In other words, the engagement must be meaningful and done in good faith rather than a mere formality.
- d) Public participation calls for innovation and some level of malleability depending on the nature of subject matter for example culture, geographical issues, logistical constraints etc. The test to be applied is effectiveness and efficiency. The question to be asked is, is the mechanism effective in achieving sufficient public participation.
- e) Public participation does not mean that everyone must give their views on the issue at hand as to attain such a standard at times can be impractical.

A public participation exercise must however show intentional inclusivity and diversity. A programme of public participation cannot disregard bona fide major stakeholders otherwise the program would be ineffective and illegal. Those mostly affected by the policy must have a bigger say in that policy, legislation or action and their views must be sought, taken into account. In other words, the view of the major stakeholders must be captured through minutes or any other proof that shows that their view were captured and had a bearing in the final decision.

- f) Public participation is not a public relations exercise. It must be meaningful and done in good faith.

65. Having set out the law on public participation, I will now address the grievance raised by the petitioners and the evidence in rebuttal laid before me by the respondents and interested parties. As I have observed above, the main dispute in this matter revolves around whether or not there was public participation in the creation of Igambang'ombe sub-county.

66. In response to the petitioners grievance that there was lack of public participation involving the Chuka community, the first respondent *vide* the County Commissioner Tharaka Nithi, has sworn a fairly lengthy affidavit detailing what it contends was adequate public participation and what is termed as "factual foundation of the creation of Igambang'ombe Sub-County." The County Commissioner, madam Beverly K Opwora in her replying affidavit depones that the creation of the subject sub-county was a result of glamour for the same by the residents of Igambang'ombe or Meru South as it was formerly referred to.



67. This court has perused through the bundle of documents exhibited by the 1<sup>st</sup> respondent via the said County Commissioner and I have noted a letter dated April 18, 2016 accompanied by minutes of a meeting held at the same date which seem to lend credence to what the County Commissioner has averred in her affidavit.
68. However, a closer look at the list of the attendees of the meeting does not reveal how they were picked to attend the said meeting and whether the said attendees were representatives of all the residents of the subject area. The list marked BK016 is also unclear because while the list is headed “minutes of the leaders meeting held at Deputy Commissioner Office-Meru South on 19<sup>th</sup> April at 9am” the list shows that administrators and “opinion” leaders attended but how they were picked is not clear. Furthermore, those who attended did not give their particulars like identification card or signed against their names to show that they actually attended the meeting. It is also not indicated whether the attendees were representatives picked from every part of the subject area and whether they were well informed beforehand that such a meeting would be held and the subject of discussion would be creation of a new sub-county. The petitioners claim they were excluded as a community from expressing their view and looking at the documents placed before me by the respondent, I find that their grievances are legitimate because they have not been responded to adequately.
69. Apart from the above, the other meeting held on 15<sup>th</sup> April, 2014 where the respondents claim that public participation was conducted on the creation of the subject sub-county, shows that the agenda of the said meeting was a change of name from Meru South to Igambang’ombe sub-county in line with the Igambang’ombe constituency.

I have perused through the letter dated April 15, 2014 authored by one George O Otieno, a Deputy County Commissioner Meru South Sub-county and minutes of the meeting held on same day and exhibited as exhibit “BKOIC”.

Looking at the exhibits, it is patently clear that the agenda of the meeting was “change of name” and not creation or delimitation of the boundary of Igambang’ombe sub-county.

70. There is no way the respondents can claim that there was adequate public participation on the creation of a new sub-county when, the minutes purporting to prove that there was public participation indicates that the agenda of the consultation in the first place was change of name of a sub-county. I note that from the list of those who attended the meeting, there were many people who attended and appended their signature but again the same falls short of the required standard illustrated above. How was the meeting convened? Were all the stakeholders invited? Were the attendees fully briefed about the agenda of the meeting? To reach the required threshold of public participation, those questions must be answered in affirmative. It is not enough to rely on a list of attendees. In the case of *Okinyo Omtata v Kenya Revenue Authority* [2018] eKLR, Mativo –Judge held in part as follows:-

“It is not enough to rely on attendees sheets for two meetings attended by a few persons with no supporting document to help the court to appreciate the nature of the decisions. More fundamentally it the fact that the alleged meeting took place in Nairobi, yet the impugned legislation affects the citizens of Kenya. In crafting a meaningful Public Participation, the decision matter should deliberately as much as possible design a programme to reach a reasonable wide population in the Country.”

71. In this instance, as I have observed above, the agenda of the meeting held on April 15, 2014 was not the impugned creation or establishment of the subject sub-county. That in my view is a fundamental flaw to the establishment of the said Sub-County.



72. I have also considered the other minutes of a meeting held on April 15, 2014 at Chief's Office Kathwana. The meeting appears to have taken place concurrently with the meeting referred to above held at Deputy County Commissioner's Office at Mery South and there is no problem with that but the only issue is if there was a meeting held at Kathwana Location, which I take judicial notice of the fact that it is situate at the lower part of IgambaNg'ombe (Meru South) having worked in Chuka Town for 3 years as a Resident Judge, was a venue convenient for other residents residing on the upper part of Meru South? Or put the other way was public participation conducted in all the locations comprising the subject sub-county? If not, can the County Commissioner and indeed the respondents truly claim that there was wide public participation where all the residents and that other stakeholders like the County Assembly and County Government were invited and given opportunity to give their views? In my considered view based on the evidence placed before me, the same was not done.
73. I have perused at the minutes of another meeting held on Kajuki's District Officer's Office on May 14, 2009 but again the agenda of the meeting was proposed of creations of various divisions within the present Tharaka Nithi County. There is no evidence that the meeting was inclusive enough and the meeting was held prior to the promulgation of the new constitution. The question of creation of a unit known as sub-county obviously had not crystalized them.
74. This court finds that the level of participation of the majority stakeholders alluded to by the respondents did not reach the requisite threshold exemplified in the cited decisions of *Khelef Khalifa & 2 others (supra)*, *Robert N Gakuru & others (supra)* or *Okiya Omtata Okoita versus County Government of Kiambu* [2018] eKLR.
75. It is true as held in *Nairobi Metropolitan PSV Saccos v County of Nairobi Government* [2014] eKLR that what is important at the end of the day is not how the formula of Public participation is applied, but to accord the public and stakeholders some reasonable level of participation. Justice Lenaola in the above decision cited with approval the sentiments expressed in the case of *Minister of Health v New Chicks South Africa (PTY Ltd)* where it was held that;
- “The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and have an adequate say. What amounts to a reasonable opportunity will depend on the circumstance of each case .....it cannot be expected of the law maker that a proposal hearing will be given to every individual who claims to be affected .....what is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law maker and taken into account in formulating the regulations.”
76. The 2<sup>nd</sup> to 19<sup>th</sup> interested parties claim that they represent 17 out of 18 sub-locations of the subject sub-county and though they seem to suggest that the petitioners are in the minority, it is important to note that the principle of public participation covers all whether in the minority or the majority. If it is true or factual that 2<sup>nd</sup> to 19<sup>th</sup> Interested parties were consulted, though they have not tabled any evidence of public participation, the grievance of exclusion even one sub-location if proven, will be sufficient to find that the process was not inclusive.



77. This court has considered the level of engagement the 1<sup>st</sup> respondent did in respect to County Government pursuant to the provisions of sections 14 (2) of the National Government Coordination Act, 2013 and I find that the engagement was also wanting in some respects.

- (i) In the first place, the 1<sup>st</sup> respondent is required by the Statute to accord and respect the County government decentralized units established under Section 48 of the County Government Act, 2012.

I have perused through a letter from the Minority Leader dated January 22, 2016, exhibited by the 1<sup>st</sup> respondent through the replying affidavit of Berverly Opwora, The County Commissioner and from the communication, it does appear that the member of County Assembly Igambang'ombe Ward was of the opinion that two sub-counties namely Igambang'ombe sub-county and Chuka sub-county be created or established. If the view of the said Member of County Assembly represented the view of his electorates, then it appears that the view of some segments of the community at least represented by Hon Albano Mugambi Kiania Member of County Assembly Igambang'ombe Ward was not factored in. The 1<sup>st</sup> respondent has not shown that the views were considered alongside other view from the other residents.

- (ii) Secondly, there is no evidence that the view of the County Government of Tharaka Nithi through its executive and the County Assembly were sought in line with the above cited provision in the statute.
- (iii) There is no evidence that the 1<sup>st</sup> interested party was involved pursuant to the provisions of section 48 of the County Government Act as read together with article 89 of *the Constitution*. This was to ensure that the created sub-county does not traverse more than one Constituency as provided Under section 48 (ii) of the County Government Act, 2012.

78. The respondents have submitted that they have a discretion to determine the process of public participation which is true given the authorities I have cited above but it is important to ensure that degree of public participation meets the threshold I have highlighted above. To attain the Constitutional threshold, the engagement must be real, meaningful and effective.

As I have stated above, the public participation is not a public relations exercise. Public participation means is in any decision- making on any matter affecting the public, veivs must be taken serious as a constitutional imperative. Article 10 of *the Constitution* highlights this as one of the cornerstones of our national values. Sub-article (1) States:

“The national values and principles of governance bind all State organs, State officers, public Officers and all persons wherever any of them

- a) Applies or interprets this Constitution.
- b) Enacts, applies or interprets any law; or
- (2) Makes or implements public policy decisions. Sub-article 2 goes further to provide;

“The national values and principles of governance include, patriotism, national unity, sharing and dedvolution of power, the rule of law, democracy,



participation of the people, good governance, integrity, transparency and accountability...”

It is in the above context that any decision made by a government agency, state officer or a public officer should be viewed and contentionalized.

79. The 1<sup>st</sup> respondent has made a strong case that public resources have been expended in the creation of the subject sub-county but that in my view is akin to saying the end justifies the means which I find to be untenable in law. The end product must always be as good as the process. Both must be lawful and should meet *the Constitution* threshold.
80. My final analysis is that Public participation is a key component in any legitimate process that leads to making of decision, policy or law that affects the people. The action of establishing the subject administrative unit fell short of the Constitutional dictates which I have cited above under article 10 of *the Constitution* and statutory obligations under section 48 of the County Government Act 2012. The 1<sup>st</sup> respondent was well aware that he was bound by the national values and principles of governance including meaningful public participation, transparency and accountability to involve, engage and hear the view of all the citizens, their leaders and the County Government before impugned establishment of the subject sub-county. Kenya is a democratic Country where citizens have a right to determine how they would wish to be governed and obtain services from the two levels of Governments and that is why the two levels should always consult and involve the people in the affairs affecting them. In *Republic v Ministry of Finance & another ex parte Nyong'o [2007] eKLR 299*, The court made the following observations which I find relevant in this matter;

“Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be core business of any responsible government to empower the people because the government holds power in trust of the people. Peoples participation will result in the advancement of the public interest. Good public administration requires consideration of legitimate interests.”

The above decision coming as it did even before the promulgation of the new Constitutional dispensation in Kenya, shows courts in Kenya have been progressive in their decisions and have been salt of the earth in so far as protecting the rights of the people and advancing public good is concerned. This court shall not shy away from that true calling.

81. While it is true that some level of consultation was carried out by the 1<sup>st</sup> respondent as alluded above, the public participation carried out in the establishment of Igambang'ombe sub-county was not effective. It fell short of the Constitutional and statutory requirements well illustrated above. There is no evidence that the petitioners as residents of the subject sub-county were given a reasonable opportunity to express or ventilate their views regarding the establishment of the administrative unit and yet they are part of the stakeholders of the said sub-county.
82. The long and short of this is that this court finds merit in this petition. The same is hereby allowed in the following terms: -
- (i) An Order is hereby given declaring that the creation/establishment of Igambang'ombe sub-county by the Respondent was illegal, unconstitutional and a nullity. The same is declared void ab initio because the said sub-county was created without Constitutional principles of Public participation and inclusiveness.



- (ii) A declaration is hereby made that the creation of Igambang'ombe sub-county violated the Petitioners constitutional rights under article 10 and 28 of the Constitution and violated the section 14 (2) of the National Government Coordination Act, 2013 and section 48(2) of the County Government Act, 2012.
- (iii) A Judicial Review Order of *certiorari* is hereby issued to quash the gazette notice Vol CXIX No 5853 published on 21<sup>st</sup> June 2021.
- (iv) An Order is hereby issued compelling the respondents to take all such measures and steps as provided by the Constitution and the relevant statutes to create such administrative unit(s) as they deem necessary in compliance with section 14(1) of the National Government Coordination Act, 2013.
- (v) Each party to pay own costs.
- (vi) In order to avoid disruption of normal services of the national government to the residents, the respondents are given 90 days to comply. This judgement shall therefore take effect after a period of 90 days.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 12<sup>TH</sup> DAY OF JANUARY, 2022.**

**HON. JUSTICE RK LIMO**

**JUDGE**

**13/1/2022**

Judgment signed, dated and delivered in the open court in the presence of Kariuki for 2<sup>nd</sup> to 19<sup>th</sup> interested parties, Kungu for 1<sup>st</sup> and 2<sup>nd</sup> respondent and 1<sup>st</sup> petitioner in person.

**HON JUSTICE RK LIMO**

**JUDGE**

