



Olonkishu & 650 others v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 others (Petition 1 of 2022) [2022] KEHC 14446 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
PETITION 1 OF 2022
F GIKONYO, J
OCTOBER 31, 2022**

BETWEEN

JACKSON OLONKISHU & 650 OTHERS & 650 OTHERS & 650 OTHERS PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

TRANSMARA WEST SUB-COUNTY COMMISSIONER 3RD RESPONDENT

Residents of sub-locations requiring relocation to new sub-counties were to be offered reasons for the decision for relocation and they were to be involved in public participation.

Reported by John Ribia

Devolution – administrative units - sub-locations - relocation of sub-locations - decision to move Ildolisho Sub-Location and Kiikat Sub-Location of Transmara West Sub-County to newly created Transmara South Sub-County – procedure – what legal procedure was to be followed in relocating a sub-location to a new sub-county

Constitutional Law - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to fair administrative action - decision to move a sub-location to a newly created sub-county – where no reasons were offered for such a decision – whether such a decision violated the right to fair administrative action of the residents of the sub-location – Constitution of Kenya, 2010, article 47

Constitutional law – national values and principles of governance – public participation - decision to move a sub-location to a newly created sub-county – where no reasons were offered for such a decision - whether the decision to move Ildolisho Sub-Location and Kiikat Sub-Location of Transmara West Sub-County to newly created Transmara South Sub-County was unconstitutional for want of public participation - Constitution of Kenya, 2010, article 10



Brief facts

Through a gazette notice vol CXXII No 241 dated December 31, 2020, the respondents purportedly moved Ildolisho Sub Location and Kiikat Sub Location of Transmara West Sub County to newly created Transmara South Sub County. Aggrieved the petitioner filed the instant petition on the grounds that the decision was done without public participation.

Issues

- i. What legal procedure was to be followed before relocating a sub-location to a new sub-county?
- ii. Whether the decision to move Ildolisho sub-location and Kiikat sub-location of Transmara West Sub-county to newly created Transmara South sub-county was unconstitutional for want of public participation.
- iii. Whether a decision to move a sub-location to a newly created sub-county without informing the residents of the sub-location of the reasons for moving the sub-location to the new sub-county was a violation of the right to fair administrative action of the residents.

Held

1. Public participation was one of the fundamental values and principles of governance, which guided *inter alia* the exercise of public power by State officers and institutions. It was provided for under article 10 of the Constitution.
2. A person whose right or fundamental freedom had been or was likely to be adversely affected by an administrative action taken by the Government or State organ, had the right to be given written reasons for the action. The right to fair administrative action, as espoused under article 47 of the Constitution occupied a place further up in the order of justification of exercise of public power. Article 47 spoke of the legality of actions in exercise of public power not to depend on a State officer or institution of authority having taken and conveyed an executive decision, but on whether the values and principles laid down in the Constitution for the taking of such action had been complied with.
3. It was ominous to attempt to defend a less austere version of the model sculptured in the Constitution, *inter alia*, in the national values and principles of governance, and the right to fair administrative action. Doing so not only weakened the notion of legality of actions by State officers or institutions in the exercise of public power, but also violated the Constitution.
4. The command dispatch of the Constitution was strict compliance with the values and principles of governance by all State organs, State officers, public officers and all persons whenever any of them; applied or interpreted the Constitution; enacted, applied, or interpreted any law; or made / implemented public policy decisions. No lesser measure was expected of implementing institutions or persons in the enforcement, promotion and protection of the Constitution.
5. Public participation during public policy decision-making process including legislation, was a mandatory constitutional requirement, from inception and formulation, through dissemination of the programme or proposed legislation and content thereto to actual discussion and consideration by the promoters, the public and stakeholders to the fine and formal processes of validation and enactment of the policy and the legislation in question, respectively. Yet, no single test or particular mechanism for public participation that may be formulated for all situations. The nature of the policy decision or legislation should determine the type of effective and reliable mechanism and method to be employed to elicit, enlist, and ensure public participation in the entire process.
6. The alteration or establishment of administrative boundaries by the Minister was not an internal operational decision; it was an executive decision in exercise of executive powers which were regulated by law and the Constitution.
7. The disputed decision *inter alia* purported to relocate Ildolisho sub-location and Kiikat sub-location from Transmara West sub-county to the newly created Transmara South sub-county. The relocation



- of the sub-locations was a public venture and involved the residents of the affected areas. The decision affected the public and, more particularly, those residing in the affected sub-locations.
8. There was nothing which showed that public participation was undertaken in the decision therein. The petitioners had proved that there was no public participation in the decision to relocate Ildolisho Sub-Location and Kiikat Sub-Location from Transmara West sub county to the newly created Transmara South Sub-County. The decision was made by the 1st respondent in total violation of article 10 of the Constitution, particularly for want of public participation and/or stakeholder consultations.
 9. The impugned decision was a violation of article 47 of the Constitution. The respondents had intimated to the court that they would and resolve the matter according to the law, but nothing was forthcoming despite the Attorney General having been allowed time to pursue the proposed settlement.

Petition partly allowed.

Orders

- i. *Declaration issued that the respondents' decision of relocating Ildolisho Sub-Location and Kiikat Sub-County from Transmara West Sub-County to newly created Transmara South Sub-County was unconstitutional and in violation of articles 1(1)(b), 1(4) (b), 2(1), 3(1), 6(2) 6(3), 10(1), (s), 2(a) (b), 9 (c), 19(1), 20, 21(1) 22(1)(2), 23, 27, 28, 47(1) (2), 73(1), 174(a)(c)(d), 232(1), (d) (e) and 258 of the Constitution.*
- ii. *The court quashed only that part of the Kenya Gazette Notice vol CXXII No 241 issued on December 31, 2020 by the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government which relocated Ildolisho Sub-Location and Kiikat Sub-Location from Transmara West Sub-County to newly created Transmara South Sub-County. For the avoidance of doubt as the instant proceedings related only to the areas stated, the entire gazette notice was not quashed.*
- iii. *Although it was sought in the petition and the Attorney General had intimated willingness to settle the matter among the parties, the court declined a declaration to compel the Government representatives from the Ministry of Interior and National Coordination to physically visit the two sub locations and ascertain from the people on the ground the complaints in the petition.*
- iv. *No order as to costs as the petition was public interest litigation.*
- v. *Any order sought which had not been specifically granted was deemed to have been refused.*

Citations

Cases

Kenya

1. *Cabinet Secretary Ministry of Labour National Social Security and Services v Central Organisation of Trade Unions (K) & 2 others* Civil Application 252 of 2014; [2015] KECA 123 (KLR) - (Applied)
2. *Centre for Rights Education and Awareness (CREAW) & 8 others v Attorney General & another* Petitions 208 & 207 of 2012; [2012] KEHC 2894 (KLR) - (Mentioned)
3. *Gakuru, Robert N & others v Governor Kiambu County & 3 others* Petition 532 of 2014; [2014] KEHC 7516 (KLR) - (Applied)
4. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR) - (Explained)
5. *Kaps Parking Limited & another v County Government of Nairobi & another* Petition 104 of 2020; [2021] KEHC 5819 (KLR) - (Explained)
6. *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* Constitutional Petition 86 of 2017; [2018] KEHC 7494 (KLR) - (Applied)
7. *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* Civil Appeal 46 of 2017; [2018] KECA 381 (KLR) - (Explained)



8. *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* Constitutional Petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014; [2015] eKLR - (Explained)
9. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019; [2020] eKLR (Consolidated) - (Explained)
10. *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others ex-parte George Saitoti* Miscellaneous Civil Application 102 of 2006; [2006] KEHC 1412 (KLR) - (Applied)
11. *Robert N Gakuru & others vs Governor Kiambu County & 3 others* Petition 532 of 2013 & 12, 35, 36, 42, & 72 of 2014 & Judicial Review Miscellaneous Application 61 of 2014; [2014] eKLR (Consolidated) - (Explained)
12. *Wambora, Martin Nyaga v County Assembly of Embu & 6 others* Civil Application 46 of 2015; [2015] KECA 513 (KLR) - (Applied)

South Africa

1. *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006(6) SA 416 (CC) - (Explained)
2. *Matatiele Municipality and others v President of the Republic of South Africa and others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) - (Explained)
3. *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others* CCT 86/08 [2010] ZACC 5 - (Explained)

Texts

Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul Minnesota: Thomson Reuters 10th Edn

Statutes

Kenya

1. Constitution of Kenya, articles 1(1)(b)(4) (b); 2(1); 3(1); 6(2)(3); 10(1)(2)(a)(b); 9(c); 19(1); 20; 21(1); 22(1)(2); 23; 27; 28; 47(1)(2); 73(1); 174(a)(c)(d); 232(1)(d)(e); 258 - (Interpreted)
2. County Government Act (cap 265) section 48(1)(e) - (Interpreted)
3. Fair Administrative Action Act (cap 7L) In general - (Cited)
4. National Government Co-ordination Act (cap 127) section 14(1)(3) - (Interpreted)

Advocates

Miruka for the petitioner

Ms Betty Mwanza for the respondent

JUDGMENT

1. The petitioners *vide* the petition dated March 30, 2021 sought the following reliefs that;
 - i. A declaration that the respondents' decision of relocating Ildolisho sub-location and Kiikat sub-location from Transmara west sub county to newly created Transmara south sub-county is unconstitutional and in violation of articles 1(1)(b), 1(4)(b), 2(1), 3(1), 6(2) 6(3), 10(1), (s), 2(a)(b), 9(c), 19(1), 20, 21(1) 22(1)(2), 23, 27, 28, 47(1)(2), 73(1), 174(a)(c)(d), 232(1), (d)(e) and 258 of the Constitution.
 - ii. A declaration be issued that Ildolisho sub-location to move to Isampin location and not Nkararo location where it is whereas Kiikat sublocation to remain at Ndonyo location in Keyian division where it belonged before the Kenya Gazette Notice Vol 241 issued on December 31, 2020.



- iii. A declaration be issued to intervene and reverse the decision of the respondents regarding the relocating of Ildolisho sub location and Kiikat sub location from Transmara west sub county to transmara south sub county as per the Kenya Gazette Notice Vol CXXII No 241 issued on December 31, 2020.
 - iv. A declaration be issued to stop the respondents from implementing the Kenya Gazette Notice No CXXII No 241 issued on December 31, 2020, in respect of Ildolisho sub location and Kiikat sub location of Transmara West sub county being part of Transmara South sub county.
 - v. A declaration that the constitutional provisions which provides for public participation and fair administration action was violated.
 - vi. A declaration that government representatives from the ministry of interior and national coordination do physically visit the two sub locations and ascertain from the people on the ground the complaints in this petition.
 - vii. That the respondents bear the cost of this petitioners in the alternative each party bears their own costs.
 - viii. Any other reliefs that this honourable court may deem just and fair to order.
2. The petition is expressed to be brought under articles 1(1)(b), 1(4) (b), 2(1), 3(1), 6(2) 6(3), 10(1), (s), 2(a)(b), 9(c), 19(1), 20, 21(1) 22(1) (2), 23, 27, 28, 47(1) (2), 73(1), 174(a) (c)(d), 232(1), (d)(e) and 258 of the Constitution, Fair Administrative Action Act No 4 of 2015, National Government Coordination Act, 2013, and the Kenya Gazette Notice of December 31, 2020.
 3. The petition is supported by an affidavit sworn by Jackson Olonkishu. it is premised on the decision by the respondents' decision to move Ildolisho sub location and Kiikat sub location of Transmara West Sub County to newly created Transmara South sub county which is justified, unlawful and unconstitutional and against the wishes of the petitioners and community at large.
 4. According to the petitioners, through a Gazette Notice Vol CXXII No 241 dated December 31, 2020, the respondents purportedly moved Ildolisho sub location and Kiikat sub location of Transmara West Sub County to newly created Transmara South sub county without;
 - a. consulting the residents of the said sub locations and location
 - b. without conducting public participation and seeking the views of the residents of the said sub locations as to their willingness to be moved to Transmara South sub county.
 - c. without taking into account that the people of these sub locations seek government services from Kilgoris in Tranmara West Sub County which is very near to their sub locations.
 - d. without taking into account that the people of this sub locations co-exist so well and they even share common interest together ie, socially and economically. hence moving them to Transmara South Sub County is an infringement of their economic and cultural rights.
 - e. the roads to the newly created sub locations are impassable and more badly, the route is infested with bandits who attack people usually in the mornings and evenings and especially from a different clan hence relocation is not safe for the residents of the said sub locations.
 5. The respondents did not file any replies.
 6. Mr. Meingati filed an application dated May 11, 2021 seeking joinder of parties. The petitioners filed a replying affidavit dated August 30, 2021 in opposition thereof. The application stands unprosecuted.



7. Ms Betty Mwanza for the respondents on May 5, 2022 indicated to this court that she had instructions to settle the matter out of court. Up to now, the outcome of the intended out of court negotiations have not been communicated to this court.

Submissions

8. The petition was canvassed by way of written submissions. The petitioners complied but the respondents did not.
9. The Petition is unopposed.

Petitioners' Submissions.

10. The petitioners submitted that they were never consulted before undertaking of the impugned actions of the respondents and they were negatively affected by those acts.
11. The petitioners submitted that the respondents violated the Constitution by infringing on the rights of the people of Ildolisho and Kiikat sub locations.
12. The petitioners submitted that costs of follow the event.
13. The petitioners pray that Ildolisho sub location be moved to Isampin location and not Nkararo location that falls under the newly created Transmara South sub county whereas Kiikat Sub location to remain at Ndoinyo location in Keyian division within Transmara Sub County where they belonged before.
14. The petitioners have relied on the following authorities;
- i. Robert W Gakuro & others v Governor of Kiambu County & 3 others Petition No 532 of 2013 (Consolidated with Petition Nos 12, 35, 36, 42 and 74 of 2014.
 - ii. Article 47 of the Constitution.
 - iii. Center for Rights Education and Awareness & 8 others v Attorney General & another [2012] eKLR.
 - iv. Republic v Judicial Commission of Enquiry into The Golden Berg Affair & 3 others ex parte Mwalulu & 8 others [2004]
 - v. Central Organization of Trade Unions (K) v Cabinet Secretary, Ministry of Labour Social Securities and Services & 2 others [2014] eKLR.
 - vi. Martin Wambora v County Assembly & others.
 - vii. Kenya Human Rights Commission v Attorney General & another [2018] eKLR.

Analysis and Determination

15. I have considered the petition and the petitioners' written submissions. The main issues for determination by this court are;
- i. Whether there was any public participation towards the decision and gazettelement of alteration of administrative boundaries subject of this petition.
 - ii. Whether the petitioners' rights under the Constitution were breached.
 - iii. Who should bear costs of this suit.



Constitutional context

8 Participation of the people (now commonly referred to as public participation) is one of the fundamental values and principles of governance which guide *inter alia* exercise of public power by state officers and institutions. See article 10 of the [Constitution](#) which provides as follows: -

10. National values and principles of governance

1 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—

- a applies or interprets this Constitution;
- b enacts, applies or interprets any law; or
- c makes or implements public policy decisions.

2 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; [Underlining mine]
- b human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- c good governance, integrity, transparency and accountability; and
- d sustainable development.

9 Similarly, it is a requirement of law and the the [Constitution](#) that, a person whose right or fundamental freedom has been or is likely to be adversely affected by an administrative action taken by the government or state organ, has the right to be given written reasons for the action. See article 47 of the [Constitution](#) which provides: -

47. Fair administrative action

1 Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2 If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

3 Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

- a provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- b promote efficient administration.



- 10 These provisions occupy a place further up in the order of justification of exercise of public power. They are always speaking of legality of actions in exercise of public power not to depend on a state officer or institution of authority having taken and conveyed an executive decision, but on whether the values and principles laid down in the *Constitution* for the taking of such action have been complied with. Thus, it is ominous attempt to defend a less austere version to the model sculptured in the *Constitution, inter alia*, in the National Values and Principles of Governance, and the right to fair administrative action - article 10 and 47 of the , respectively-; doing so, not only weakens the notion of legality of actions by state officers or institutions in exercise of public power, but thoroughly violates the *Constitution*. The command dispatch of the *Constitution* is strict compliance with these values and principles of governance by all State organs, State officers, public officers and all persons whenever any of them—
- a applies or interprets the *Constitution*;
 - b enacts, applies or interprets any law; or
 - c makes or implements public policy decisions.
- 11 No lesser measure is expected of implementing institutions or persons in the enforcement, promotion and protection of the *Constitution*. Within the raging current debate on judicialization of politics, I firmly believe, that, when posterity will pronounce its calm and impartial decision; it will be a decision, that will place persons who anchor their actions, and jurisprudence on the *Constitution*, in the eminent chairs of Galileo, and Locke et al- as persons who found jurisprudence a gibberish and left it a science.

Understanding Public Participation

16. Understanding public participation as a principle of governance under article 10 of the *Constitution* may seem quite straight forward. Nevertheless, at conceptual level, there might not be profound difficulties- but much difficulties arise in its application in real life situations- something that is seen in the robust discourse already taking place in courts.
17. Not for plagiarism, but see the extensive and robust discussion on public participation and consultation under article 10 of the by a Five-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & others* [2020] eKLR. that: -
115. The starting point is the *Constitution*. Article 2 *inter alia* declares the *Constitution* as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the *Constitution* is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the *Constitution* is invalid. Article 3 places an obligation upon every person to respect, uphold and defend the *Constitution*.
116. Article 10 provides for the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies or interprets any law or makes or implements any public policy decisions.



117. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the sixth schedule states as follows: -

Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

118. Expounding on article 10 of the Constitution, the Court of Appeal in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others, Civil Appeal No 224 of 2017; [2017] eKLR held that:

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that article 10(2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by article 259(1) (a) which enjoins all persons to interpret Constitution in a manner that promotes its values and principles.

Consequently, in this appeal, we make a firm determination that article 10(2) of the Constitution is justiciable and enforceable and violation of the article can found a cause of action either on its own or in conjunction with other Constitutional articles or Statutes as appropriate.

119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in Robert N Gakuru & others v Governor Kiambu County & 3 Others [2014] eKLR while referring to the South African decision in Doctors for Life International v Speaker of the National Assembly & others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10th Edition defines 'consultation' as follows: -

The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.



121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality and others v President of the Republic of South Africa & others (2)* (CCT73/05A) [2006] ZACC 12; 2007(1) BCLR 47 (CC) as follows: -

.....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....

122. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR the Court addressed the concept of consultation in the following manner: -

.... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account (Emphasis added)

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.
124. The importance of public participation cannot be gainsaid. The Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others (supra)* while dealing with the aspect of public participation in lawmaking process stated as followed: -

The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

125. In *Matatiele Municipality v President of the Republic of South Africa (2)* (CCT73/05A), the South African Constitutional Court stated as follows: -

A commitment to a right to...public participation in governmental 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 the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...

126. The South African Constitutional Court in *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5 discussed the importance of public participation as follows: -

...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (supra) referred to *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR stated as follows: -

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as long as it ensures the widest reach to the members of public and/or interested party.

128. In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (supra) the court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

- a First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or public official who is to craft the modalities of public participation but in so doing the government agency or public official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the courts will not use any litmus test to determine if public participation has been achieved or not. The only test the courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.
- c Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic v Attorney General &*



another ex parte Hon Francis Chachu Ganya (JR Misc App No 374 of 2012. In relevant portion, the Court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

- d Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or public official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.
 - e Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or public official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or public official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.
 - f Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.
18. Doubtless, much judicial work has gone into understanding the concept of public participation and its application. Of importance is that; public participation in public policy decision-making process including legislation, is a mandatory constitutional requirement, from inception and formulation, through dissemination of the programme or proposed legislation and content thereto to actual discussion and consideration by the promoters, the public and stakeholders to the fine and formal processes of validation and enactment of the policy and the legislation in question, respectively. Yet, no single test or particular mechanism for public participation that may be formulated for all situations. The nature of the policy decision or legislation should determine the type of effective and reliable mechanism and method to be employed to elicit, enlist and ensure public participation in the entire process.
19. I am particularly impressed by the summary on the process postulated in the case of *Kaps Parking Limited & another v County Government of Nairobi & another* [2021] eKLR as follows;
137. The manner in which public participation is carried out depends on the matter at hand. There is no straight-jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must factor, in the minimum, the following basic four parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on. In other words, the mode of conveying the information to the public reigns. Second, the people



be sensitized or be made to understand what they are called upon to consider and give their views on. In this case, the language used in conveying the information to the public becomes of paramount importance. For instance, if those affected by the intended decisions or the legislation are mostly illiterate, then such realities must be factored in deciding the mode and manner of conveying the information. Third, once the public is granted reasonable access to the information and is made to understand it, the public must then be accorded reasonable time to interrogate the information and to come up with its views. Fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter.

138. The effect of the above constitutional and statutory parameters is to ensure that public participation is realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affects them. In that way, the dictates of the Constitution and the law will be achieved. (See *Robert M Gakuru's* case (*supra*) among others).”
20. Was there consultation or stakeholders’ engagement in or any reasonable reference to the people in the decision to alter administrative boundaries herein?

Nature of impugned decision

21. The impugned decision is contained in the gazette by the Cabinet Secretary for Interior and Co-ordination of National Government pursuant to powers conferred upon him by section 14(1) and (3) of the National Government Coordination Act. Section 14(1) and (3) of the Act provides: -
14. Service delivery Co-ordination units
- 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.
 - 3 Where a county government has not decentralised its units pursuant to section 48(1)(e) of the County Government Act, 2012, the national government may, where necessary, establish its own service delivery co-ordination units for purposes of co-ordination of national government functions.
22. See also the objects of the Act stated in section 3 as follows: -
3. Object of the Act
- The object of this Act is to—
- a facilitate the exercise of executive authority pursuant to articles 131(1)(b) and 132(3) (b) and (c) of the Constitution;
 - b provide for the effective co-ordination and administration of the national government functions prescribed in the Constitution, this Act or any other written law; and
 - c provide for the establishment of an administrative and institutional framework at the national, county and decentralized units to ensure access to national government services in all parts of the Republic.
23. Eminently important is that, exercise of the functions under the Act is subject to the National Values and Principles of Governance in article 10 of the Constitution. See express provision on this i.e, Section 4 of the said Act thus: -
4. Guiding principles



In fulfilling its mandate, the national government shall act in accordance with the national values and principles of the Constitution in particular, those set out in articles 10, 189, 201(d) and 232.

24. Accordingly, the alteration or establishment of administrative boundaries by the Minister is not an internal operational decision; it is an executive decision in exercise of executive powers which is regulated by law and the Constitution.

Applying the test

25. In this case, the disputed decision *inter alia* purports to relocate Ildolisho sub-location and Kiikat sub-location from Transmara west sub county to newly created Transmara south sub-county. The relocation of the sub locations is a public venture and involves the residents of the affected areas. The decision, therefore, affects the public and more particularly those residing in the affected sub locations.
26. By law, the decision made by the 1st respondent was, therefore, bound to ensure it is made with public participation or stakeholders' engagement at the very least.
27. There is nothing which shows that public participation was undertaken in the decision herein. The petitioners have proved that there was not any form of public participation in the decision to relocate Ildolisho sub-location and Kiikat sub-location from Transmara west sub county to newly created Transmara south sub-county. The decision was therefore made by the 1st respondent in total violation of article 10 of the Constitution particularly for want of public participation and/or stakeholder consultations.
28. The impugned decision is, also, for the same reasons, a violation of article 47 of the Constitution. The respondents had intimated to the court that they will engage the people of the affected areas and resolve the matter according to the law. But, nothing was forthcoming despite the AG having been allowed time to pursue the proposed settlement.
29. Going by the standard of law, the impugned decision falls short of the constitutional master. The decision did not conform to the requirements of article 47 of the Constitution and Fair Administrative Actions Act as well as public participation in article 10 of the Constitution, respectively.

Conclusions and appropriate remedies:

30. The petition succeeds on the ground of failure by the 1st respondent to, in the first instance, subject the impugned decision to public participation, stakeholder consultations and administratively fair procedures. Second, the decision did not comply with article 47 of the Constitution.
31. Therefore, the decision complained of was in violation of the Constitution, null and void.
32. In the upshot of the above findings and conclusions, the petition dated March 30 2021 is determined in the following specific orders: -
- i. A declaration is hereby issued that the respondents' decision of relocating Ildolisho sub-location and Kiikat sub-location from Transmara west sub county to newly created Transmara south sub-county is unconstitutional and in violation of articles 1(1)(b), 1(4)(b), 2(1), 3(1), 6(2) 6(3), 10(1), (s), 2(a)(b), 9(c), 19(1), 20, 21(1) 22(1)(2), 23, 27, 28, 47(1)(2), 73(1), 174(a) (c)(d), 232(1), (d) e) and 258 of the Constitution.
 - ii. I therefore, quash only that part of the Kenya gazette Notice vol CXXII No 241 issued on December 31, 2020 by the Cabinet Secretary, Ministry of Interior and Co-ordination of



National Government which relocates Ildolisho sub-location and Kiikat sub-location from Transmara west sub county to newly created Transmara south sub-county. For the avoidance of doubt as these proceedings related only to the areas I have stated, the entire gazette notice is not quashed.

- iii. Although it was sought in the petition and the AG had intimated willingness to settle this matter among the parties, I decline a declaration to compel the government representatives from the Ministry of Interior and National Coordination to physically visit the two sub locations and ascertain from the people on the ground the complaints in this petition.
 - iv. There shall be no order as to costs as the petition is a public interest litigation.
 - v. Any order sought which has not been specifically granted is deemed to have been refused.
33. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS
31ST DAY OF OCTOBER, 2022.**

F GIKONYO M

JUDGE

In the presence of:

1. Mr. Kasaso – CA
2. Miruka for Petitioner
3. M/s Mwanzao for Respondent

