



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

JUDICIAL REVIEW APPLICATION NO.2 OF 2016

CONSOLIDATED WITH CONSTITUTIONAL PETITION NO.108 OF 2017

ANDREW KIPKOSKEI TOO.....1ST APPLICANT
 JOSEPHAT KIPKIRUI TEIGUTWO.....2ND APPLICANT
 WILLY KIPNGETICH.....3RD APPLICANT
 JOSEAH KIPKEMOI LETTING.....4TH APPLICANT
 DAVID KIPKEMOI RONO.....5TH APPLICANT
 ANDREW KIPNGETICH MWEL.....6TH APPLICANT
 JOSHWA KIPKETER NGENY.....7TH APPLICANT

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF DEVOLUTION
 AND PLANNING.....1ST RESPONDENT
 PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION
 OF NATIONAL GOVERNMENT.....2ND RESPONDENT
 THE COUNTY COMMISSIONER.....3RD RESPONDENT
 THE DEPUTY-COUNTY COMMISSIONER.....4TH RESPONDENT
 THE CHAIRMAN, CDF BOARD OF SIGOWET/SOIN
 CONSTITUENCY.....5TH RESPONDENT
 THE MEMBER OF PARLIAMENT SIGOWET/SOIN
 CONSTITUENCY.....6TH RESPONDENT
 THE ATTORNEY GENERAL.....7TH RESPONDENT
 THE INDEPENDENT ELECTORAL AND BOUNDARIES
 COMMISSION.....8TH RESPONDENT

JUDGMENT

1. The Judicial Review Cause herein was consolidated with Constitutional Petition No.108 of 2017 and this decision thus covers both.
2. On 11th October 2016, leave was granted by this court to commence Judicial Review proceedings and a Notice of Motion dated 3rd November 2016 was filed seeking the following orders –
 - a. That the Honourable court may be pleased to grant leave to the applicants to file a motion of Judicial Review for orders of Certiorari, prohibition and mandamus to remove into this Honourable court for purpose of being quashed forthwith the decision of the 2nd to 7th respondents dated 30th June 2016 and all prior letters and reports which are subject of the decision and further prohibit the respondents from gazetting Chepkemel as the Sub - County headquarters.
 - b. That leave so granted operate as a stay of the decision till this court further orders or directs.
 - c. That the costs of the application be in the cause.
3. Since leave had already been granted by this court before filing of the Notice of Motion, the application is thus merely asking this court for orders of certiorari, mandamus and prohibition, and costs.
4. Thereafter, a Constitutional Petition was filed on 19th September 2017 on the same issue of the Sub-County headquarters seeking the following orders –
 - a. An order do issue directing the respondents to establish the administrative headquarters of Sigowet/Soin sub county at Kamasega or any other geographically central location in the sub-county.
 - b. Costs of this petition.
 - c. Such other orders as this honourable court shall deem just.
5. The constitutional petition therefore asks this court to determine the location of the Sub-County headquarter. As already stated in this judgment above, these two causes were consolidated. In response, the respondents opposed the grant of the prayers sought on various reasons, through responses filed herein.
6. By consent, the matter proceeded by way of filing written submissions and counsel elected to rely on the written submissions filed without highlighting the same. I have perused and considered the pleadings and written submissions filed. I will hereafter highlight the gist of the submissions.
7. Ms Kipkorir Tele & Kitur advocates for the petitioners filed written submissions on 4th April 2018. The main thrust of counsels submissions was that the 3rd respondent, the Deputy County Commissioner Sigowet/Soin Sub-county and the then member of Parliament in June 2016 secretly called a meeting without consulting the established committee of 24 members on the issue, and passed a resolution that the sub-county headquarters be at Chepkemel, which was not a suitable location for the residents. This, according to counsel violated the constitutional requirement for public participation in making such decisions. Counsel thus urged this court to grant the orders sought in the petition.
8. Ms Motanya & Co. Advocates for the applicants in the Judicial Review Application that is Andrew Kipkoskei Too, Josephat Kipkirui Teigutwo and Andrew Willy Kipnetich filed submissions contending that the Principal Secretary for Devolution and National Planning, Principal Secretary Ministry of Interior & Coordination of National Government, the County Commissioner, the Deputy County Commissioner, The Chairman, CDF Board of Sigowet/Soin Constituency, the member of parliament Sigowet/Soin Constituency, the Attorney-General, and the Independent Electoral and Boundaries Commission ignored the decision of the established 24 member committee by secretly establishing the sub-county headquarters at Chepkemel, which was an unsuitable place, in violation of the Constitutional requirements of public participation.
9. M/s Orina & Co. Advocates for the County Government of Kericho on their part filed written submissions on 7th June 2018, The crux of which is that under Article 187(3) of the Constitution of Kenya 2010, the County Government of Kericho did not have any role or function in identifying a sub-county headquarters, as that was a function of the National Government. Counsel asked that the claim against the County Government of Kericho be dismissed.
10. The 1st, 2nd, 3rd, and 7th respondents relied on a replying affidavit sworn by Dr. Engineer Karanja Kibicho, the Principal Secretary State Department of Interior on 27th September 2016, in which it was deponed that after the leaders of Soin/Sigowet Constituency tried and failed to agree on the headquarters of the sub-county, there followed a series of meetings until November 2014 when a meeting was convened at Kaplelartet Secondary School by two sub-county Commissioners wherein a committee of 24 members was appointed to discuss the matter.
11. It was deponed that though several proposals were made, the people from Soin area insisted on the Sub – County Headquarters being established at Kipsitet and those from Sigowet area stuck to Sigowet Centre, and that as a result, the County Commissioner on 17th and 18th May 2016 held public meetings in which he introduced the new Deputy County Commissioner and temporarily identified Chepkemel

Trading Centre where a chief's office and police post were located, to serve as the Sub-County headquarters for the time being, while the Committee continued to discuss the matter.

12. It was also deponed that thereafter the Regional Coordinator of Rift Valley Region convened a public meeting attended by Members of Parliament to discuss the issue, but still no consensus was reached. The affidavit annexed a copy of the minutes of the said meeting. It was thus the contention that the 1st, 2nd, 3rd and 7th respondents were not to blame for the decision.

13. The 8th Respondent, the Independent Electoral and Boundaries Commission relied on grounds of opposition filed on 6th October 2016 in which they contended that in accordance with Article 89 of the Constitution of Kenya 2010, their mandate was limited to reviewing names and boundaries of constituencies as opposed to setting up headquarters in respect of sub-counties. They contended that their mandate did not cover the determination of administrative boundaries and location of administrative headquarters.

14. The 6th respondent Hon. Justus Kimei the Member of National the Assembly for Sigowet/Soin Constituency on the other hand relied on a replying affidavit he swore on 25th June 2016, in which he deponed that no leave to file Judicial Review Proceedings was obtained herein and that in any case he did not have a role in law relating to establishment a Sub-county headquarters, as the County Commissioner and the National Government under section 14 of the National Government Coordination Act of 2013 had such mandate.

15. He further deponed that he was aware that consultative meetings had been held in 2015 and 2016 regarding the establishment of the Sub County Headquarters and that the Deputy County Commissioner was stationed at a temporary office at Chepkemel because communities in the area had so far not agreed on the location of the said Sub-County headquarters.

16. Wilson Kipkorir Rugut also responded to the Judicial Review Notice of Motion claiming to be an interested party, through an affidavit sworn by him on 19th January 2016 (should be 2017), though he is not listed anywhere as a party. He deponed that the allegations by the exparte applicants that no consultations were held regarding establishment of the Sub-County headquarters were unfounded. He deponed that other interested parties supported the present location of the headquarters as established by the National Government and that the judicial review application was thus frivolous and not merited.

17. Having considered this consolidated matter, I note that from the pleadings filed through both the Notice of Motion and the Constitutional Petition herein, it is clear that the Notice of Motion challenges the setting up of the Sub-County headquarters of Sigowet/Soin Sub-County at Chepkemel Trading Centre and asks for certiorari, mandamus and prohibition orders, while the Petition seeks that the said Sub-County headquarters be ordered by this court to be established at Kamasega or any other geographically central location in the sub-county.

18. The first issue is whether there is a valid interested party in these proceedings. I find no record of any leave having been granted to join an interested party. As such it is this court's finding that there is no 3rd party herein; since for a party to be an interested party in court proceedings there is need for such party to be properly joined in the case.

19. The second issue is whether leave to file the Notice of Motion for Judicial Review orders was sought and granted. The way the Notice of Motion is worded appears to suggest that leave was not granted. Order 53 Rule 1(1) of the Civil Procedure Rules makes it mandatory that such leave be granted. From the record, however, leave was granted by Mumbi Ngugi J. on 11th October 2016 to file judicial review proceedings within 21 days, and the Notice of Motion was then filed, though the request for stay was declined. I dismiss that complaint, and find that leave was granted to file judicial review proceedings.

20. The third issue is whether all the parties joined as respondents in these proceedings were necessary parties. The County Government of Kericho contends that they were wrongly joined. I note that no complaint has been leveled against the County Government of Kericho in the pleadings herein with regard to the creation of the Sub-County headquarters. In my view also they neither have statutory or constitutional power over where the sub-county headquarters will be set up. With those two factors in mind in my view, they were wrongly or inappropriately joined as parties herein. I dismiss the case against them on that account.

21. Though the Independent Electoral and Boundaries Commission was joined as respondents in the Judicial Review application, no allegation was made against them in the pleadings with regard to the setting up of the Soin/Sigowet Sub-County headquarters herein. I appreciate that Article 89 of the Constitution of Kenya, 2010 confers on the Independent Electoral and Boundaries Commission the mandate to create and review boundaries of constituencies and wards which might be affected by the administrative boundaries. However, since no allegation was made against them in the pleadings, I find that they were wrongly joined as parties. I dismiss the case against them at this stage.

22. The Member of the National Assembly Sogowet/Soin Constituency Hon. Justus Kimei has argued that he was inappropriately joined as a party in these proceedings. However, from the pleadings filed herein, he was said to have participated in the setting up of the Sub-County headquarters complained of. He was thus properly joined as a party. His complaint that he was wrongly joined as a party is thus dismissed.

23. The 4th issue is who has the constitutional and statutory mandate to establish and determine the location of sub county headquarters? The Constitution of Kenya 2010 does not specifically state the entity which has the responsibility for establishing such headquarters. However, under section 14 of the National Government Coordination Act No.1 of 2013, the function of establishing administrative units for coordination of National Government functions is a function of the National Government. It follows therefore, in my view, that the establishment of the County and Sub-County headquarters of such units is a function of the National Government. In the present case there is no dispute that Sigowet/Soin sub-county was established by the National Government under Gazette Notice No.54 of 2016 – Gazetted on 13th January 2016. Though the National Government might have involved other parties in the exercise of establishing the Sub-County headquarters, the decision was made by them. In my view therefore, the temporary headquarters of Soin/Sigowet Sub-County was made by the National Government, the right institution.

24. Was the requirement of public participation complied with in making the decision of the National Government to establish the headquarters at Chepkemel? This is the 5th issue for determination. The petitioners/applicants contend that there was no such public participation, while the respondents, especially the representatives of the National Government contend that there was such public participation in establishing the Sub-County headquarters.

25. Public participation in the making of decisions that affect the public is a constitutional imperative. Article 10 of the Constitution of Kenya 2010 highlights this as one of the national values. This requirement is not denied by the respondents. They however maintain that there was adequate public participation in establishing the Soin/Sigowet Sub-County headquarters, and that the present location was temporary and established merely to await further discussions and possible agreement by stakeholders.

26. The importance of adequate public was emphasized in the case of **Nairobi High Court Petition No.522 of 2017 OKIYA OMTATA – VS – KENYA REVENUE AUTHORITY [2018]eKLR** wherein Mativo J. stated as follows –

“65. It is not enough to rely on attendance sheets for two meetings attended by a few persons with no supporting minutes to help the court to appreciate the nature of the decisions. More fundamental is the fact that the alleged meetings took place in Nairobi, yet the impugned legislation affects the citizens of Kenya. In crafting a meaningful public participation programme, the decision maker should deliberately as much as possible design a programme to reach a reasonably wide population in the country.”

27. It follows from the above reasoning that for there to have been adequate and effective public participation herein, there should have been a programme which involved a reasonable involvement of a wide population of the people in the Soin/Sigowet sub county. From the documents filed, I note that several public meetings were held and a committee of 24 people appointed to resolve the issue amicably as early as 2014 but no agreement was reached on the location of the Sub-County headquarters. Even by 2016 that committee had failed to come up with an amicable or mutually agreed location for the headquarters. Subsequently therefore in the same 2016 the National Government set up the present Sub-County headquarters as a temporary measure at a chief’s camp.

28. In my view therefore, it cannot be said that public participation was not adequately enabled by the National Government in the circumstances. It is important to note that even now, there is no consensus among the greater public regarding the location of the said Sub-County headquarters. Though complaints have been raised herein about centrality, and access, and availability of land at the present headquarters, it is not disputed that the current temporary headquarters was set up at an existing chief’s headquarters. The chief was certainly already rendering service to the public from that location and thus access must have been there as no such complaint has been made. As for availability of land, the Government has various ways of acquiring land. There is also no complaint that the public in the sub county are being forced to pay for acquisition of land for the establishment of the Sub-County headquarters.

29. I thus hold that there was adequate public participation, and that the consultations are still going on to find a suitable permanent Sub-County headquarters for Soin/Sigowet Sub-County.

30. The 7th issue is whether this court can determine the location of the headquarters of Soin/Sigowet Sub-County as requested in the Constitutional Petition herein. In my view this court is ill equipped to make such a determination. Such a decision will amount to violation of the principle of separation of powers between the three organs of government, and will also contradict the requirement of public participation. That is a function of the executive arm of government and should remain there. In my view therefore this court can only make orders to correct violations of the law and irregularities by the executive, but it is not suited to perform the functions of the executive.

31. The 8th and last issue is who bears the costs of these proceedings? This being an issue of public interest and involving the public, I will order that parties bear their respective costs of the proceedings.

32. Consequently, I find no merits in both the Judicial Review application, and the Constitutional Petition herein. Both are hereby dismissed. Parties will bear their respective costs of the proceedings.

Dated this 23rd day of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat Court Assistant, Mr. Musyoka ICT Officer, Mr. Motanya for applicants, and Mr. Orina for the County Government of Kericho.