



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CONSTITUTIONAL PETITION NO. 14 OF 2012**

**JAVAN OSCAR**  
**BULEEMI**  
**(Suing as Secretary General Tiriki Union (EA) ..... PETITIONER**

**AND**

**THE PERMANENT**  
**SECRETARY,**  
**MINISTRY OF INTERNAL SECURITY AND PROVINCIAL ADMINISTRATION..... 1<sup>ST</sup>**  
**RESPONDENT**

**POSTAL CORPORATION OF KENYA .....2<sup>ND</sup>**  
**RESPONDENT**

**THE HON. ATTORNEY GENERAL .....3<sup>RD</sup>**  
**RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Petition dated 14/09/2012 and duly filed in Court, **JAVAN OSCAR BULEEMI**, suing on his own behalf and on behalf of **TIRIKI UNION (E.A.)**, a Society duly registered under the Societies Act, challenged the naming of the now **HAMISI DISTRICT** and **KAIMOSI POST OFFICE**. He also contended that the process towards the naming of the Hamisi District and Kaimosi Post Office was in breach of the Constitution and hence prayer for several remedial orders.
2. Both the Hamisi District and Kaimosi Post Office are within the Vihiga County of the Republic of Kenya.

**The Petitioner's Case:**

3. The Petitioner's case is two-fold. One limb is on the naming of the now Hamisi District and the other limb is on the naming of the now Kaimosi Post Office.

4. The Petition was supported by an Affidavit sworn on 14/09/2012 and duly filed in Court. On 03/01/1962, the Tiriki Union (East Africa) was registered as a Society and issued with a Certificate of Registration No. 2127 which was annexed as exhibit JOB-1. I however did not find a copy of the Society's Constitution in this matter. The Petitioner deponed that he is aware that during the time of His Excellencies retired Presidents Daniel Arap Moi and Mwai Kibaki five districts were created out of the then larger Vihiga District. They are Vihiga, Sabatia, Emuhaya, Hamisi and Luanda Districts. The Petitioner who hails from the Tiriki Division in Vihiga County had his Tiriki Division converted into the new Hamisi District.
5. It is contended that due to popular demand by the people living within the said Hamisi District and other stakeholders to rename the said district to Tiriki District, the then District Commissioner in response to the people's demand convened a public meeting on 29/01/2009 where the matter was discussed and eventually, in a majority vote, it was resolved that the name Hamisi be replaced with "**TIRIKI**" so that the new district would instead be known as "**TIRIKI DISTRICT.**"
6. The deponent further contends that in a surprise move and contrary to the people's wishes, the then District Commissioner instead of actualizing the desires of the people of the Hamisi District instead disregarded their popular decision and unilaterally convened a Committee to look into the already settled issue of the name. It is said that the composition, operations and all workings of the said Committee were all shrouded in secrecy and that the wishes of the people remain unimplemented to date. The Society then and in protest lodged complaints including that one to the Chairman of the Public Complaints Standing Committee vide its letter dated 18/09/2012, but again no positive results were realized. The Petitioner remain deeply wounded by the use of the name '**Hamisi**' as to them it is associated with colonialism and slave trade and is likely to affect their cultural identity and language and as such the Tiriki community is faced with possible extinction.
7. There is then the other issue of the naming of the former Tiriki Post Office to the now Kaimosi Post Office. It is deponed that when the predecessors of the Postal Corporation of Kenya, the second Respondent herein, established a Post Office at Kaimosi Mission the same was named TIRIKI POST OFFICE in keeping with the fact that the name "TIRIKI" has historical and cultural connotation having existed for such a long period of time and refers to the local indigenous people within the area who are the consumers of the services.

Again and in a surprise move, the consumers of the postal services who are mostly the local people who are also the members of the Society received notices issued on 26/04/2012 by the second Respondent informing them of the change of name of the local Post Office from TIRIKI POST OFFICE to KAIMOSI POST OFFICE. The second Respondent also changed the name of KAIMOSI POST OFFICE situated at SIRWA to SIRWA POST OFFICE. It remains in contention that the second Respondent never involved the local consumers of the services in arriving at the decision to change the name of the Tiriki Post Office to Kaimosi Post Office. The unilateral change of the name remain an injury to the identity of the Tiriki people and is also causing a lot of confusion since there has all along been in existence a Post Office in the name of KAIMOSI POST OFFICE in Sirwa within Vihiga County.

8. Since the second Respondent is a State Corporation, the Society formally protested about the decision vide its letter dated 11/05/2012. The Kaimosi Friends Church also through its Advocates, J.J. Mukavale wrote a protest letter dated 21/06/2012. Further Hon. Aganyanya D. K. S. who is one of the consumers of the services formally protested vide his letter dated 15/08/2012. The second Respondent responded to the effect that the decision shall stand as it was meant to improve service delivery.
9. The Petitioner further contends that the naming of institutions or Districts in respect to their places or people is not new in Kenya and cited the examples of Maragoli Post Office, Kikuyu Post Office, Kisii Post Office and the Kisii District. Further the Petitioner holds that the Respondents being public in nature are constitutionally bound to exercise their power in public interest and are fully answerable to the public and ought to have accorded the public full participation prior to making the decisions. The Petitioner then invited the Court to determine five issues which it

framed in paragraph 26 of the Petition as follows:-

- a) Whether the 1<sup>st</sup> respondent should provide information on the process leading to renaming or naming of HAMISI DISTRICT.*
- b) Whether by failing to publish information concerning the process of renaming the said District and following the earlier majority vote the 1<sup>st</sup> respondent breached the provisions of Article 3, 6, 10, 35 and 73 of the Constitution.*
- c) Whether the continued use of the name Hamisi District is in the circumstances contrary to the wishes of the majority.*
- d) Whether the change of names of the said postal offices by the second respondent was contrary to the rules of natural justice and thereby infringed the fundamental rights of the communities living within its environs.*
- e) Whether the use of the new names in question should be suspended until there is full consultation and participation of concerned communities and/or this case is determined.*

10. The Petitioner further prayed for the following orders in the Petition:-

- a) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondent breached the provisions of Article 3, 6, 10, 35 and 73 of The Constitution.*
- b) That Hamisi District be renamed TIRIKI DISTRICT in accordance with the wishes of the majority.*
- c) The change of the name TIRIKI to KAIMOSI post office be suspended and the old name be retained.*

#### **The First and Third Respondents' Case:**

11. The first and third Respondents filed grounds duly dated 29/11/2012 in opposition to the Petition and raised the following issues:-

- a) That the Petition does not raise any constitutional question.*
- b) That there was no violation of any article of the Constitution.*
- c) That no communal rights were violated.*
- d) That the Petitioner has no right to bring this Petition.*

The foregoing was therefore a calling for the dismissal of the Petition.

#### **The Second Respondent's Case:**

12. The second Respondent opposed the Petition. It filed a Replying Affidavit by one SAMUEL M. MBURU, its Assistant Manager, Legal Services on 14/12/2012. The deponent indeed confirmed that the second Respondent truly changed the name of the Post Office and duly notified the renters of the change thereafter. He annexed copies of letters dated 16/04/2012 and 25/05/2012 as Exhibits SMM-1 and SMM-2 to that effect. He stated that the change was to reflect the name of the area as opposed to the name of the people who live there given that the relevant authorities had renamed the area. He adds that the change of the name was properly and adequately communicated to the renters and all residents in the area. The deponent therefore contends that the

allegation that the residents were not consulted is untrue given that the District Commissioner held the meeting aforesaid on 29/01/2009.

13. The second Respondent further states that the change was effected pursuant to the provisions of Section 27(1)(c) of the Postal Corporation Act, Cap 411 Laws of Kenya and hence it remains the duty of the renter to inform their contacts wherever they were of the change and hence it did not see the need of publishing the changes in a newspaper of daily circulation in the Country.

It is indeed contended that the Petitioner has not demonstrated how and what loss and damage the residents have suffered out of the change of name given that the rules of natural justice were not breached.

The deponent further contended that if the use of the current name is suspended then that will cause a lot of confusion and will lead to loss of business, goodwill and increase operational costs further to affecting innocent renters who have embraced the changes positively. It is its position that the Petition is but a blanket piece of allegation and in totality ought to be dismissed accordingly.

### **Petitioner's Submissions:**

14. The Petitioner filed its submissions on 13/11/2014 where it expounded on the issues and the law in great detail. It emphasized that under **Article 11 of the Constitution culture** is regarded as the foundation of the nation and cumulative actualization of the Kenyan people and nation and the state is enjoined to promote all forms of cultural expression. He reiterated the provisions of **Articles 2, 3, 10, 11, 20, 21, 22, 23, 35, 47, 165 and 259** in support of the Petition.
15. It is further submitted that the second Respondent being a Corporation duly established as a public entity is called upon by the Constitution to embrace national values and principles and to uphold the Constitution in all its undertakings. It is indeed enjoined to promote all forms of national and cultural expression and other cultural heritage. Likewise the first Respondent being a state officer is not an exception to the constitutional dictates. It was hotly submitted that the then District Commissioner concealed the genuine and correct voting results which were in favour of the name of Tiriki District for Hamisi District and unilaterally went ahead to appoint a Committee to further his illegal acts and intentions. The decision was therefore not popular having been fraudulently allowed as the District Commissioner acted arbitrarily and in a dictatorship manner in blatant violation to the Constitution. It is further submitted that the name '**Hamisi**' has a negative historical perspective to the people of Tiriki community who are the majority in the District as it militates against their historical and cultural heritage. It is further submitted that TIRIKI is a representative of all the communities living in the area which since time immemorial refer to over 50 clans and that the name has all along been used in the peoples' administrative governance from Tiriki Location to Tiriki Division (Tiriki East and Tiriki West Divisions) hence there can be no problem creating the TIRIKI DISTRICT instead of HAMISI DISTRICT which reminds them of their ugly past.
16. It is also submitted that **Article 73** of the Constitution commands State officers who hold authority in public trust to exercise such in consistence with the purposes and objectives of the Constitution and to demonstrate respect to the people as the Officer is called to serve the people as opposed of ruling them. The Petitioner further submitted that since the District Commissioner decided to unilaterally so act his actions came under Article 47 of the Constitution and he was expected to give written reasons for his actions which were in effect outshining the majority decision.
17. It is further submitted that the decision by the second Respondent remains contrary to **Articles 10, 11, 47** among others of the Constitution as there was no iota of public involvement at all. It was a unilateral decision by a public body which resulted in affecting the public. The reasons given therefore do not upset the constitutional dictates upon the second Respondent. The Petitioner calls for the grant of the prayers sought in the Petition.

### **The First and Third Respondents' Submissions:**

18. By their submissions filed in Court on 12/02/2015 the first and third Respondents raised two issues therein. First, is that of the genesis of the name Tiriki. To them, the name Tiriki has no historical or cultural heritage at all but refers to a particular ethnic group in Kenya and the naming of a District with such a name would promote ethnicity instead. To them, the name Hamisi promotes cohesion and integration and the Article 44 of the Constitution cannot be expected to mean the promotion of ethnicity. Second, it is submitted that the naming of a District is a preserve of the first Respondent in law and that the Petitioner had failed to demonstrate how the rights were infringed by the naming. It is contended that the Petitioner has failed to tender any evidence of vote manipulation by the District Commissioner and that the same remains bare allegations. The Respondents then contend that none of the Petitioner's rights were infringed as alleged or at all and calls for the dismissal of the Petition with costs.

### **The second Respondent's Submissions:**

19. The second Respondent submitted that a Court has an obligation to embrace any changes made by a public body that is geared towards achieving its goals to the community and relied on the persuasive judicial authority of **Thuku Kirui & 4 Others –vs- County Council of Murang'a (2004) eKLR.**

20. It was further submitted that the Petitioner failed to demonstrate how and/or what damage and loss the community had suffered since the change was effected. It is its submission that the decision was reached after the District Commissioner undertook the public participation in January. It referred to the authority of **Anarita Kerimi Njeri –vs- The Republic [1976-1980] KLR 1272** in support of the argument that the Petition is not tailored with precision hence the same ought to fail. It therefore called for the dismissal of the Petition with costs.

### **Analysis and Determination:**

21. Having carefully perused the Petition, the Affidavits and the parties' submissions, the following issues are for determination namely:-

- a) Whether the Petitioner has the locus standi in the matter;*
- b) Whether the Petition raises any constitutional issues for determination;*
- c) Whether there was any violation of the Petitioner's constitutional rights;*
- d) Remedies.*

I will deal with each of these separately and as under.

#### **a. Whether the Petitioner has the locus standi in the matter:**

22. The Petitioner is a duly registered Society under the Societies Act. Though the Constitution was not availed to Court to ascertain the Society's objectives it appears to be an organized group of people who have a common origin. These are the people who are called '***the WATIRIKI***' hence the name of the Society. The Watiriki are largely found within the Vihiga County in Kenya. The Society instituted the Petition on behalf of its membership, the indigenous people of the Tiriki community. The Court has seen the various correspondences exchanged between the Society and the Respondents on the issues at hand. The Society through its meeting held on 01/08/2012 authorized its Secretary General to institute proceedings in respect to the twin issues which the Society felt had constitutionally-infringed the rights of its membership. This was in the naming of the HAMISI DISTRICT and the change of name from TIRIKI POST OFFICE to KAIMOSI POST OFFICE. Broadly speaking, the Society and the membership felt quite aggrieved by how the twin decisions were made which affect them directly both as the residents of the now HAMISI DISTRICT and the consumers of the postal services at the now Kaimosi Post Office.

23. The issue of *locus standi* in constitutional Petitions has been subject of various litigations and to the High Court, the same is now firmly settled. The **Court of Appeal at Nairobi in Civil Appeal No. 290 of 2012** consisting of a 5-Judge Bench of Honourable Justices Kihara Kariuki (PCA), Ouko, Kiage, Gatembu-Kairu and Murgor reported as **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** in dealing with an argument that the Respondent, an NGO (Trusted Society of Human Rights Alliance) whose mandate includes the pursuit of constitutionalism lacked *locus standi* to challenge the appointment of Mumo Matemu as the Chair of the Ethics and Anti-Corporation Commission, firmly stated as follows: -

*“26. It is hard to maintain the argument that the first respondent did not suffer any injury to warrant this standing to lodge the Petition before the High Court. It is equally hard to maintain the position that the first Respondent was acting as an interlocutor for a private third party, in a matter of public interest such as this. In the context of our commitment to integrity in leadership as expressed in the Constitution, we cannot gainsay the importance of the issue of the leadership and institutional integrity of the Ethic and Anti-Corruption Commission.*

*27. Moreso, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the Courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the Courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the Petition was filed before the High Court by an NGO whose mandate includes pursuit of constitutionalism and we therefore reject the arguments of lack of standing by Counsel for the Appellant. We hold that in the absence of a showing of bad faith as claimed by the Appellant, without more, the first Respondent had the locus standi to file the Petition. Apart from this, we argue with the Superior Court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.....*

*28. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some specific interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22(3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28<sup>th</sup> June 2013..... “the Mutunga Rules” to inter alia, facilitate the application of the right of standing..... The rules reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Article 22(2) and 258 of the Constitution.*

*29. It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reasons of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.*

*30. It is in consideration that in filing the Petition the 1<sup>st</sup> Respondent was acting not only on behalf of the members and in accordance with the stated mandate, but also in*

*the public interest, in view of the nature of the matter at hand. The 1<sup>st</sup> Respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.”*

24. Given that the Petitioner is an association and has clearly stated that it brought the Petition on behalf of the membership of the Society on the alleged contravention of the Constitution, **Article 258** of the Constitution comes at hand and since there is no evidence that the Petition has been brought in bad-faith, this Court has no hesitation in holding that the Petitioner has the appropriate *locus standi* in the matter. Needless to say, even one person would have the *locus standi* to institute such a Petition in public interest.

**(b) Whether the Petition raises any constitutional issues for determination:**

25. The manner in which constitutional Petitions are to be drafted has also severally been dealt with by our Courts. In the late 1970's the High Court dealt with this issue in the case of **Anarita Karimi Njeri –vs- The Republic [1976-1980] KLR 1272** and came up with the following precise principles in dealing with constitutional Petitions. It is now required of a Petitioner to:-

*i. Specifically set out the provisions in the Constitution that have been allegedly violated;*

*ii. Provide the particulars of the alleged violations;*

*iii. Provide particulars in which the Respondent has purportedly infringed their rights.*

26. Hon. Lenaola, J. in the case of **Stephen Nyarangi Onsoma & Another –vs- George Magoha & 7 Others [2014] eKLR** in revisiting the principles in **Anarita Karimi's case** said as follows:-

*“.....This Court has in the past expressed its concern about the manner in which parties coming before the Court and alleging a violation to constitutional rights have presented their cases. As a basic minimum a Petitioner is required to cite the provisions of the constitution which have allegedly been violated and the remedy which he seeks, for the violation. In demonstrating the manner in which they have been violated, a Petitioner should present before the Court evidence of the factual basis upon which the Court can make a determination whether or not there has been a violation.”*

27. Indeed the need of precise pleadings in constitutional Petitions was re-emphasised in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** as under:-

*“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.”*

28. The Petition has invoked various Articles of the Constitution but in essence the main correction is how the decisions to name the Hamisi District and Kaimosi Post Office were reached. The said decisions are alleged to have contravened specifically Articles 10 and 73 and the entire Chapter 6 of the Constitution for want of public involvement in the process moreso given that the first Respondent is a public officer and the second Respondent a public institution. In other words, it is alleged that the decisions were either made unilaterally or against the wishes of the people even after being consulted. It is further alleged that the Petitioner sought for but was not availed with any information on the entire process leading to the naming of the Hamisi District.

29. Without belabouring the issue, this Court is convinced that the Petition as tailored has met the requirements as stated in **Anarita Karimi's case** given that the Articles of the Constitution alleged to have been infringed have been clearly stated and clearly demonstrated how they were allegedly infringed with clear particulars. The Petition therefore has a legal leg to stand on.

**(c) Whether there was any violation of the Petitioner's or its members' constitutional rights:**

30. Since the Petitioner has raised two separate issues on the alleged violation, this Court shall deal with each of them independently.

**i. On the naming of the HAMISI District:**

31. It is the naming of the now Hamisi District which is an issue before this Court but not the legality or constitutionality of the creation of the said District. This Court will therefore deal precisely with the process leading to the naming of the said District.

The Petition states as follows:-

***“3. The petitioner avers that on 29<sup>th</sup> of January, 2009 the then District Commissioner, Hamisi District convened a meeting to decide whether to retain the name of the District as ‘HAMISI’ or rename it ‘TIRIKI’.***

***4. THAT, the Petitioner's members were invited as one of the stakeholders and participated in voting for the name which resulted in a majority in favour of the name ‘TIRIKI’.***

***5. THAT contrary to the decision of the majority the said District Commissioner arbitrarily and unilaterally failed to honour the decision of the majority and purported to convene a committee to decide the name of the said District.***

***6. THAT without prejudice to 3 and 4 above the said District Commissioner has failed to disclose the decision of the said committee and it appears that the name ‘HAMISI’ has been retained.***

***7. THAT the Petitioner contends that the said committee is/was not representative of the community affected and any decision emanating from it is not binding.***

***8. ....***

***9. THAT to date the then District Commissioner or any officer from the office of the Ministry of Internal Security have not published any information pertaining to the naming or renaming of ‘HAMISI DISTRICT’.***

32. In the Supporting Affidavit to the Petition, the deponent states as follows:-

***“10. THAT it is within my knowledge that the proposal to have a new district known as TIRIKI as favoured by the majority of the indigenous living within its locality was never effected instead the new district was named HAMISI.***

***11. THAT it is within my knowledge that on 29<sup>th</sup> January, 2009, as a result of efforts made by our society and other stake holders in TIRIKI the then District Commissioner convened a meeting to decide whether to retain the name HAMISI or rename the district TIRIKI.***

***12. THAT our members participated in voting for the name which resulted in a majority vote in favour of the name TIRIKI.***

***13. THAT contrary to the decision of the majority the said District Commissioner arbitrarily and unilaterally failed to honour the people's decision and purported to convene a committee to decide on the name of the said District.***

14. *THAT, in his subsequent committee none of our representative was invited or participated.*

15. *THAT the information relating to how this committee sat, its composition and what criteria was used has todate never been communicated.*

16. ....

17. ....

18. *THAT the matter has since remained shrouded in secrecy and the criteria used unknown yet the old name of HAMISI DISTRICT is still in use as the official name todate.*

33. From the foregone it is clear that the Petitioner put its efforts on the naming of the now Hamisi District. This, it did alongside other stakeholders by engaging the then District Commissioner who eventually called for a consultative meeting. This was on the 29/01/2009 and the sole purpose of the meeting was on the naming of the District. It is also clear that those who participated ended up taking a vote which the Petitioner alleges to have been in favour of the name TIRIKI as opposed to the name HAMISI, but the same was stolen. The Petitioner's main complaint therefore rests with the fact that even after the meeting, on a majority vote, resolved to name the District as TIRIKI, the District Commissioner instead came up with a Committee which ended up with the current name. To the Petitioner, the said Committee was not representative of the people within the District and it was arbitrarily and unlawfully composed. It ended up not honoring the views of the majority of the people in the District.

34. The above analysis therefore brings us to the subject of public participation in decision-making processes by public institutions or officers. **Article 10 of the Constitution** vouches for public participation, among other principles, under our national values and principles of governance as follows:-

***“10.(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;***

***(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***

***(c) good governance, integrity, transparency and accountability; and***

***(d) sustainable development.***

35. **Article 10** of the Constitution is clear that it binds all State organs, State officers, public officers and all persons in the discharge of public functions. However the Constitution does not provide for how public participation is to be undertaken. That process is therefore left to those encompassed under Article 10 to see how to undertake the same. This prevailing situation therefore calls for a

national legislation on public participation so as to generally guide the process given that some legislation has already partly embraced the principle including under **Sections 87 and 115** of the County Government Act, 2012 and several other legislations passed by the County Governments in the country.

36. In that state of affairs, the recourse has been to turn to our Courts for guidance on the process on public participation. From the onset, it ought to be clearly and correctly appreciated that the aspect of public participation is one of the components in a process towards the making of a decision or a policy. Public participation is in itself not the end but a means to an end. Other considerations indeed are taken into account coupled with the views collected during the public participation process which enables a decision to be reached. Public participation is therefore to be distinguished from an election exercise as an election has finality in itself as opposed to public participation which is part of a process. Be that as it may, this Court is quite alive to the words of **Mohamed, Ag. JA** in a Namibian case of **S.V. Acheson 1991 (2) SA 805 (NM HC) at 813** when he expressed himself as follows:-

***“the constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.”***

This Court further echoes the words of Odunga, J. in **Robert N. Gakuru & Others –vs- Governor Kiambu County & 3 Others [2014] eKLR** where the importance and centrality of public participation was clearly put as follows:-

***“ 49. From the foregoing provisions it is clear that public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management.”***

37. **So, what exactly amounts to public participation?** This principle was dealt with by **Odunga, J.** in the case of **Robert N. Gakuru (supra)** where the Judge extensively and in a comparative analysis (with other jurisdictions especially South Africa) clearly brought out the essence of the principle of public participation. At paragraph 54 thereof the Judge stated as follows:-

***“54. While appreciating that political participation is also contained in international instruments the Judge then proceeded to determine what constitutes participation in the following terms:***

***“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation...The international law right to political participation reflects a shared notion that a nation’s sovereign authority is one that belongs to its citizens, who ‘themselves should participate in government – though their participation may vary in degree.’.....This notion is expressed in the preamble of the Constitution, which states that the Constitution lays “the foundations for a democratic and open society in which government is based on the will of the people.” It is also expressed in constitutional provisions that require national and provincial legislatures to facilitate public involvement in their***

processes. Through these provisions, the people of South Africa reserved for themselves part of the sovereign legislative authority that they otherwise delegated to the representative bodies they created.....The very first provision of our Constitution, which establishes the founding values of our constitutional democracy, includes as part of those values “a multi-party system of democratic government, to ensure accountability, responsiveness and openness.” Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.....” (emphasis added).

Hon. Odunga, J further went ahead and expressed himself clearly that public participation ought not to be seen as a derogation from Parliamentary representation or representation at the County Assembly level, but is a very element in the attainment of participating democracy as envisaged in the Constitution of Kenya.

38. There is therefore no doubt that public participation ought to be facilitated. The facilitation aspect was also considered by the said Odunga, J. in the following manner:

**“56. What then does facilitation of public participation connote? The issue was dealt with by the Judge thus:**

*“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 phrase 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. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a). This construction of Section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in *New Clicks*, “[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.” The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.....” (emphasis added).*

39. It ought to be always remembered that the nature and extent of public participation will always depend on what is at hand and except where the Constitution or a statute clearly sets out the parameters of public participation, the standard of reasonableness ought to be applied. To this end, it was stated in the **Robert N. Gakuru case** (supra) that:-

**“.....Yet however great the leeway given to the legislature, the courts can, and in appropriate cases will, determine whether there has been the degree of public involvement that is required by the Constitution. What is required by section 72(1)(a) will no doubt vary from case to case. In all events, however, the NCOP must act**

**reasonably in carrying out its duty to facilitate public involvement in its processes. Indeed, as Sachs, J observed in his minority judgment in *New Clicks*:**

*“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 issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”*

***The standard of reasonableness is used as a measure throughout the Constitution, for example in regard to the government’s fulfilment of positive obligations to realise social and economic rights. It is also specifically used in the context of public access to and involvement in the proceedings of the NCOP and its committees. Section 72(1)(b) provides that “reasonable measures may be taken” to regulate access to the proceedings of the NCOP or its committees or to regulate the searching of persons who wish to attend the proceedings of the NCOP or its committees, including the refusal of entry to or removal from the proceedings of the NCOP or its committees. In addition, section 72(2) permits the exclusion of the public or the media from a sitting of a committee if ‘it is reasonable and justifiable to do so in an open and democratic society.’ Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. “In dealing with the issue of reasonableness,” this Reasonableness is an objective standard which is sensitive to the facts and circumstances of a particular case. ‘In dealing with the issue of reasonableness,’ this Court has explained, ‘context is all important.’ Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament’s conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation’s content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement. What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as “a continuum that ranges from providing information and building awareness, to partnering in decision-making.” This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity beginning with the broader duty to take steps to ensure that people have the capacity to participate.....”* (emphasis added).**

40. From the evidence before Court, it is clear that the Petitioner and other stakeholders were involved towards the convening of the meeting of 28/01/2009. They so attended and were actively involved upto taking a vote on the name of the District. Being a divided vote it means that some participants supported the name TIRIKI whereas others supported the name HAMISI. It was therefore

incumbent upon the first Respondent to take into account all these views collected at the meeting, among other lawful considerations, towards the making of the decision on the naming of the new District. It seems that the first Respondent eventually made a decision to retain the name HAMISI and the Petitioner was not satisfied with the said decision.

In paragraph 18 of the Supporting Affidavit, the deponent states as follows:-

**“18. THAT the matter has since remained shrouded in secrecy and the criteria used unknown yet the old name of HAMISI DISTRICT is still in use as the official name to date.”**

The foregone led to the Petitioner in framing of the issues under paragraph 26 of the Petition as follows:-

**“a) Whether the 1<sup>st</sup> respondent should provide information on the process leading to renaming or naming of HAMISI DISTRICT.**

**b) Whether by failing to publish information concerning the process of renaming the said District and following the earlier majority vote the 1<sup>st</sup> respondent breached the provisions of Article 3, 6, 10, 35 and 73 of the Constitution.**

**(c) Whether the continued use of the name Hamisi District is in the circumstances contrary to the wishes of the majority.**

**d).....**

**e) Whether the use of the new names in question should be suspended until there is full consultation and participation of concerned communities and/or this case is determined.**

41. This Court therefore finds that the first Respondent reasonably and effectively accorded the Petitioner and all the other stakeholders an opportunity to present their views and to participate in the process towards the making of the decision in naming the now Hamisi District. This was in the meeting held on 29/01/2009. It is not contested that the notice of the meeting was short or that the participants did not know why the meeting was called. The truth of the matter is that the Petitioner and other stakeholders are indeed the ones who proposed to the then District Commissioner to convene this meeting and they took part. The contention is that their views which were majority did not carry the day. But as the Court stated hereinabove, the collection of views in public participation is a segment in a process and not the finality of the process. The Committee eventually made a decision which seems not to be appealing to the Petitioner. To this Court, that is another complete aspect of the matter and cannot be pegged on the issue of public participation. In buttressing that there was reasonable public participation in the process, this Court is guided by the Court of Appeal decision in the case of Nairobi Metropolitan PSV Saccos Union Limited & 25 Others –vs- County of Nairobi Governor & 3 Others [2014] eKLR where the Court held as follows:-

**“.....from the averments in the affidavit of Lilian Ndegwa sworn on 16<sup>th</sup> October 2013, in respect to the appellant’s Petition in the High Court, it is clear that “representatives of Motorists Association of Kenya, Kenya Bus Operators, Double M Operators among other stakeholders attended and gave their views.” As Kenya Bus operators and Double M operators are among the PSV operators, it means that the appellant had notice of the public forum but only a few attended. As the trial Judge correctly observed, this words of Chaskalson, C.J. in the South African case of MINISTER FOR HEALTH vs NEW CHICKS SOUTH AFRICA (PTY) LTD succinctly cover the situation in this case:**

**“It cannot be expected of the law maker that a personal hearing will be given to any individual who claims to be affected by regulations that are being made.”**

**What is necessary is that reasonable notice is given and the views of those who attend are taken into consideration.**

32.....*none of the above .....complained that the notice given to them was too short. Similarly, the other appellants did not adduce any evidence that the notice given was insufficient. In the circumstance, it would not be right to annul the 1<sup>st</sup> Respondent's Finance Act on mere submissions of Counsel that the Appellants were not accorded a reasonable opportunity to air their view on it."*

42.Hon. Odunga, J. also added his voice on the foregone in the **Robert Gakuru case** (supra) as follows:

***"71. However the caution expressed by Sachs, J in Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) must always be kept in mind. In that case the learned Judge of the Constitutional Court of South Africa pronounced himself thus:***

*"The passages from the **Doctors for Life** majority judgment, referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them. To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public. It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of 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.....Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better even if just to buy time for future negotiations than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication..... There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat." (emphasis added).*

43.With the foregone, I need not say anything more.

44. The Petitioner has also raised the issue of access to information. It is on record that indeed the Petitioner has all along been requesting for the information on the process leading to the naming of the new HAMISI DISTRICT. This is evident on the Petitioner's Exhibit JOB-3 which is a letter to the Chairman Public Complaints Standing Committee. The first and third Respondents did not do much to assist the Court on this aspect. They did not file any Affidavit in response to the allegation even though the Exhibit JOB 3 refers to some correspondences exchanged.

45. **Article 35** of the Constitution states as follows:

*“35 (1) Every citizen has the right of access to—*

*a. information held by the State; and*

*(b) information held by another person and required for*

*the exercise or protection of any right or fundamental*

*freedom.*

*(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*

*(3) The State shall publish and publicise any important information affecting the nation.*

The information the Petitioner sought affected its members indeed directly and it is not in doubt that the same is in the custody of the first Respondent. The Petitioner is entitled to have access to the information sought for. Whether or not the Petitioner will agree with the said information is another issue altogether but the right to access the said information stands tall. Going by the record and the insufficiency of the first and third Respondents' response on this issue this Court finds that the Petitioner's right under Article 35(1)(a) of the Constitution stands infringed.

**ii) On the naming of the Kaimosi Post Office:**

46. The complaint against the second Respondent is that it unilaterally decided to and changed the name of one of its Post Offices in Vihiga County from TIRIKI POST OFFICE to KAIMOSI POST OFFICE. This decision was reached without any consultation upon the people who are served by the said institution including members of the Petitioner. The second Respondent, it is further alleged, that it only informed the renters of its postal boxes vide its notice issued on 26/04/2012 long after the decision was made and implemented. It is contended that the decision was reached in flagrant disregard of Articles 10 and 47 of the Constitution and ought not be allowed to stand.

47. The second Respondent on its part does not deny that it truly made its decision and proceeded to implement the same. It however goes ahead to justify the decision it made to the extent that the same was to avoid confusion resulting in misdirection of letters to its customers so as to serve the community most effectively. I have seen the notice dated 16/04/2012 to that effect which states in part:-

***“...To address the confusion in the two offices, we have renamed Tiriki, Kaimosi Post Office and Kaimosi, Sirwa Post Officer. The codes remain the same. Please note and circulate.”***

I have equally seen and perused the correspondence between the second Respondent and the Petitioner and the renters on the issue. This Court has no difficulty in finding that the decision by the second Respondent, being a public institution, was reached without involvement of not only the renters of the postal boxes but also the public at large. It would have been a different ball game

altogether had the second Respondent at least, and in any manner whatsoever, sought the views of its renters if not the public at large. Whereas the purport and intention of the decision may have been well grounded, the way the decision was taken does not legitimize the process. The second Respondent was bound to involve the consumers and the public prior to the making of the decision noting that the name TIRIKI POST OFFICE had been in use since the center was set up. The decision was hence reached in breach of Article 10 and 47 of the Constitution.

The words of the 3-Judge bench in the famous case of **Institute of Social Accountability & Another –vs- National Assembly & 4 others [2015] e KLR** reconfirms the foregone position. The Court expressed itself as follows:-

**“142. Good faith and well-meaning intentions are meaningless if the object and design are constitutionally objectionable. As was stated in Executive Court of Western Cape Legislature and Others –vs- President of the Republic of South Africa & Others [CCT 27/95] [1995] ZACC 8 at para 100:**

*“Constitutional cases cannot be decided on the basis that petitioner or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new Constitutional order, to establish respect for the principle that the constitution is superior..... Our duty is to declare legislature and executive action which is inconsistent with the constitution to be invalid, and then to deal with the consequences of the inability in accordance with the provision of the Constitution.” (emphasis added).*

**143. In coming to the conclusion we have, we draw inspiration from the words of Mutunga C.J. in the Speaker of the Senate case (supra) where he stated as follows:-**

*“(161) The court must patrol Kenya’s Constitutional boundaries with vigor, and affirm new institutions, as they execute their constitutional mandate, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also in the proclivities of the old order.”*

**d. Remedies:**

48.As discussed hereinabove, the Petitioner and its membership reserve their right to the information on the process leading to the naming of the now Hamisi District. On the issue of the decision by the second Respondent, the Court notes that whereas the current state of affairs does not legitimize the action undertaken, an abrupt change may be undesirable since the decision was long implemented and certain rights acquired and obligations undertaken. This Court may have to invoke its powers under Article 23 (3) of the Constitution to grant an appropriate remedy including the suspension of the invalidity of the decision made for such a period as would enable the second Respondent remedy the defect. This approach will further forestall a state of confusion since the names have already been changed since 2012 and that position has so prevailed since then. The above holding is buttressed by the reasoning in the **Robert N. Gakuru case** (supra) where the Court stated as follows:-

**“66. On this part the Judge expressed himself as follows:-**

*“However, these two statutes have come into operation. Members of the public may have already taken steps to regulate their conduct in accordance with these statutes. An order of invalidity that takes immediate effect will be disruptive and leave a vacuum. In terms of section 172(1)(b)(ii), this Court has discretion to make an order that is just and equitable, including an order suspending the declaration of invalidity. Parliament must be given the opportunity to remedy the defect. In these circumstances, I consider it just and equitable that the order of invalidity be*

*suspended for 18 months to enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution.”*

The above is the approach this Court will take in the circumstances of this matter.

**Conclusion:**

49. Towards the disposition of the Petition before Court, it remains the desire of the Court that the Honourable Attorney General looks into the issue of the possibility of a statute on public participation. The Court therefore makes the following orders:-

***a. A declaration be and is hereby issued that the Petitioner’s right to access information under Article 35 of the Constitution was infringed by the First Respondent;***

***b. The First Respondent, or its successor and the Third Respondent shall avail all the information on the process leading to the naming of the now HAMISI DISTRICT within Vihiga County to the Petitioner within 60 days hereof.***

***c. A declaration is hereby issued that the decision by the Postal Corporation of Kenya to change the name of TIRIKI POST OFFICE to KAIMOSI POST OFFICE is unconstitutional and therefore invalid.***

***d. The order of invalidity in (c) above is hereby suspended for a period of six months from the date of this judgment.***

***e. The Postal Corporation of Kenya may remedy the defect within that period and the said decision shall stand invalidated at the expiry of the six (6) months and the name of the now KAIMOSI POST OFFICE shall reverse to TIRIKI POST OFFICE.***

***f. As the matter involves matters of public interest and on the way in which our Constitution is being implemented, each party shall bear its own costs.***

**DELIVERED, DATED and SIGNED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF MAY, 2015**

**A. C. MRIMA**

**JUDGE**