



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 5 OF 2015

IN THE MATTER OF: ARTICLES 1, 2, 3, 19, 22, 23, 47, 196 AND 258 AND THE FOURTH SCHEDULE OF THE CONSTITUTION AND SECTIONS 6, 30, 34 AND 102 OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF: THE HEADQUARTERS OF THE COUNTY OF TAITA TAVETA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF THE PROVISIONS OF THE CONSTITUTION AND THE COUNTY GOVERNMENT ACT REGARDING PUBLIC PARTICIPATION

AND

IN THE MATTER OF: THE PURPORTED DESIGNATION OF MGENO AS THE HEADQUARTERS OF THE COUNTY GOVERNMENT OF TAITA TAVETA

BETWEEN

1. CHRISTOPHER KILETA
2. LISTON JUMA MWALIMU
3. BONG'OSA MJOMBA
4. PRESTON MSAFARI
5. DAVID KILETA
6. LEONARD NGWAI
7. GAMALIEL MWANGI
8. GIBSIN KIRUBAI
9. CHARLES MWAISEGHE

10. PETER MWAZIGHE.....PETITIONERS

VERSUS

1. THE GOVERNOR – TAITA TAVETA COUNTY

2. THE SPEAKER – TAITA TAVETA COUNTY

ASSEMBLY.....RESPONDENTS

JUDGMENT

THE PETITION

1. The Petitioners are constituents and residents of Taita-Taveta County. The Respondents are the Office of Governor and Speaker respectively, leaders of the County Executive and County Assembly of the said County. The Petition dated 22nd January, 2015 seeks orders to quash or nullify the decision of the Respondents to move the headquarters of the Taita-Taveta County to Mgeno instead of Mwatate. In addition, it seeks a declaration that the headquarters of Taita-Taveta County be in Mwatate Town.

2. The Petitioners allegedly bring the Petition on behalf of themselves and on behalf of other residents of Mwatate Division within the County of Taita-Taveta (hereinafter referred to as “the County”). The Petitioners claim that on 11th March, 2011 at a public meeting, (popularly known as “**baraza**” in Kiswahili language), called at Wundanyi Town the (current headquarters of the County), it was unanimously decided that the Headquarters of Taita-Taveta County (“the County”) would be at Mwatate Town because of its central position to the people from Taveta, Wundanyi and Voi, and which already had basic infrastructure, such as the National Government offices including the Administration Police, District Officer and other national Government Departments were located at Mwatate Town. Pursuant to this decision, the inauguration/swearing in of the Governor (the First Respondent) was conducted at Mwatunge Primary School (within Mwatate Town) and the First Respondent declared that Mwatate would be the place where the Headquarters of the County would be built.

3. Contrary to Petitioners legitimate expectation, as shown later in this Judgment, this did not and is not about to happen. The Petitioners consequently accuse the First Respondent of unilaterally moving the proposed Headquarters of the County to an urban centre known as “**Mgeno**” contrary to the wishes of the majority of the residents of the County, without ensuring any public participation, and in contravention in particular of Article 10 of the provisions of the Constitution, upon the pretext that there was not enough land in Mwatate Town.

4. The Petitioners are particularly incensed that The First and Second Respondents even went ahead and organized a ground-breaking ceremony at Mgeno. The First Respondent is accused of having appointed a **Task Force** to identify an alternative site for the proposed Headquarters of the County Government, and alleged that the Task Force was made up of members of one family with connections to a parcel of land known as **Mgeno Ranch**, and that such Task Force could not replace the requirement of public participation.

THE RESPONSE

5. The Petition was however opposed vigorously. In a Preliminary Objection dated 16th February, 2015, the Respondents contended that the Petition as drawn is defective for being predicated on a Supporting Affidavit whose deponent has not demonstrated and/or disclosed at all the authority purportedly given to him by the co-petitioners. In further support of the Preliminary Objection, the Respondents stated that the Second and Seventh Petitioners had stated on oath that they had not at any time instructed the deponent of the Affidavit in support of the Petition Christopher Kileta (who is also the First Petitioner), to institute the Petition on their behalf, nor were they willing to proceed with the Petition filed herein being total strangers to the same and that as such the Petition could not proceed in its current

form, and ought to be struck out.

6. In an Affidavit sworn on 13th February, 2015, Gamaliel Stanley Mwangi (the 7th Petitioner), distanced himself from the Petition, and deponed that he had been fraudulently listed as one of the Petitioners without either his consent or authority. Similarly, and on the same date, Juma Mwalimu (the Second Petitioner) disowned the Petition.

7. In response to the Preliminary Objection, Christopher Kileta swore a Further Affidavit on 2nd March, 2015 stating that the two Petitioners had agreed to be part of the Petition, but that their subsequent withdrawal was not objected to. Annexed to his Further Affidavit was a list of the remaining eight (8) Petitioners who are still in the Petition.

8. However on 12th May, 2015, Charles Mwemba Mwaiseghe opted out of the Petition stating inter alia “...*I was misled to be enjoined in this Petition and was made to believe that we were pursuing a just cause only to learn that political interests were at play.*”

9. The Respondents cited various cases in support of their Preliminary Objection. In **Republic vs. District Land Registrar Uasin Gishu District ex parte Somog Limited and 5 others [2012] eKLR** Azangalala, J (as he then was) stated -

“Failure to support the applicants' application with valid verifying affidavits is not a mere procedural lapse. It is a fatal defect which goes to the root of the application. It cannot also be gainsaid that commencing these proceedings without the authority of the applicants is not a mere technical flaw but a fatal omission...

...So if the applicants desire to exercise their rights, be they constitutional or otherwise, they are perfectly entitled to do so in the manner the law recognizes. That is for good order and in their own interests. It has also been said and in my view correctly that rules of Court are not made to flower the statute books and increase their volumes. They are made to be followed and obeyed.”

10. The cases of **Midland Finance and Securities Ltd & Another vs. Kenya Anti Corruption Commission [2015] eKLR**, and, **Saaka Community Internally Displaced Persons Group vs. The Ministry of State for Special Programmes & Another [2014] eKLR** were cited on the question of **locus**, and identification of proper parties.

11. The holding in the above cases notwithstanding, Article 159(2) (d) of the Constitution requires courts to administer justice without undue regard to procedural technicalities. The question of proper parties is important from the point of view of both the enforcement of final orders particularly in ordinary civil and commercial litigation, but also costs. In such cases the rules for identification of proper parties at the preliminary stage are not merely technical and should be followed.

12. In Constitutional Petitions the situation is different. Rule 5 (b) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that -

“a petition shall not be defeated by reason of the mis-joinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.”

13. Consequently the court cannot strike out a Petition on account of misjoinder or non-joinder. The court is obliged by the Constitution to deal with the matter in question in every proceeding. In this case, because the Second, Seventh and Ninth Petitioners voluntarily withdrew from the Petition allegedly because they never consented to or gave authority or were duped (Second and Seventh Petitioners), and was duped (the Eighth Petitioner), to join the Petition led by the First Petitioner, all the court has power to do is to strike out the names of those Petitioners from the Petition. There shall therefore be an order striking out from the Petition (i) Liston Juma Mwalimu (the Second Petitioner, (ii) Gamaliel Stanley Mwangi (the Seventh Petitioner) and (iii) Charles Mwamba Mwaiseghe (the Ninth Petitioner) who shall

henceforth cease to be Petitioners in this Petition, and shall not be liable in costs.

THE RESPONSE TO THE PETITION

14. The Respondents swore their respective Affidavits in Reply on 24th March, 2015. The Replying Affidavit for the First Respondent was sworn by Hon. Eng. John Muta Mruttu and that for the Second Respondent was sworn by Hon. Meshack Maghanga Mganga. The contents of both Affidavits are similar.

15. It is admitted that on 11th March, 2011 at a public meeting it was agreed that the Headquarters of the County would be in **Mwatate** (not Mwatate Town). The then Member of Parliament for Mwatate Constituency, Hon. Calistus Mwatela formed a committee to identify a favourable (sizable) portion of land to build the Headquarters of the County. After the General Elections of 2013 the First Respondent and the Member of Parliament for Mwatate, the Hon. Andrew Mwadime, each formed committees to find a suitable location. The County Assembly also formed its own committee for the same purpose. The three committees were later amalgamated into a Joint Task Force.

16. No doubt after carrying out its search (for a suitable location), the Task Force reported that the only available land in Mwatate Town owned by the County Government was half an acre, an area too small for the establishment of the Headquarters of the County. As a result, the search for an alternative portion of land begun. A Notice was sent out on 1st November, 2013 inviting the public to offer land for building of the County's Headquarters.

17. Only two bids were received by the Task Force, one from Mgeno Ranching and the second from Taita Sisal Estate Limited on 15th November, 2013. The bids were however held in abeyance by the Task Force as it continued to seek out public land until it located a twenty (20) acre portion of public land in Mgeno, an area situate approximately eight (8) kilometers from Mwatate Town, and located within Mwatate Sub-County in Mwatate Ward. This land was identified as vacant and un-utilized.

18. The Respondents contend that pursuant to several stakeholder participation and consensus building fora (forums), initiated by the County Government and the Joint Task Force, it was resolved that the County Headquarters be established on the twenty (20) acre public land with a vision to expand it into a portion of the adjoining land known as L. R. No.3880/3, which is also public land and is said to measure about twelve thousand and forty five (12,045) acres, and that one Mr. Kenneth Mwaita Mwangodi, the County Chief Officer – Lands, assured the Respondents through a memo, that the area identified was the perfect location for the Headquarters.

19. The Respondents contend that following the identification of the site at Mgeno, and assurance of its availability, the public was made aware of the selection of the site and public participation was conducted in each Ward, with the help of the respective Ward Representatives, and relevant stakeholders were also involved and consensus forums held in every Ward. A twenty-one (21) days notice in the local daily newspapers with country-wide circulation in respect of the planning intention was carried and appeared on 25th April, 2014 inviting the public to participate in the preparation of the Headquarters Physical Development Plan, as well as a ground breaking ceremony at the site on the said date.

20. According to the averments in paragraph 40 and 38 of the respectively Respondents, the public was invited prior to the ceremony via loud speakers, Anguo FM radio announcement, free transport was made available to the public from all the four sub counties. The Respondents aver that the ceremony was attended by thousands of members of the public from all the four sub-counties as well as local (current and former), political leaders and that thereafter a special stakeholders meeting was convened for 5th July, 2014.

21. On 5th July, 2014, the First, Second and Seventh Petitioners were granted an opportunity to come up with proposals for other potential locations. Their proposals were promptly scrutinized by County Government officials on 9th July, 2014, and all of their proposals were found unsuitable. In support of

their averments, the Respondents annexed receipts for public address systems, Anguo Radio announcements, tents, bus hire, newspaper cuttings and photographs of the events.

22. Also annexed to the Replying Affidavits of the Respondents were detailed reports (including pictures) and minutes of various meetings of the Task Force, stakeholders, local leaders and public participation forums at which the selection of land for the County Headquarters was discussed. The Task Force presented a Report on the selection of land for the Headquarters to the Taita-Taveta County Assembly on 10th July, 2014, and the Report was adopted.

23. In the course of the debate to adopt the Report, Hon. John Maghanga and Hon. Arresmus Mwarabu who happened to be in the meeting of 11th March, 2011 (at which the question of the location of the County Headquarters was discussed and resolved), stated that the people had agreed to have the Headquarters in Mwatate (Sub-County), and not Mwatate Town specifically. The minutes of the meeting are clear that the contenders for hosting the Headquarters of the County were Wundanyi, Voi, Taveta and Mwatate Districts and that eventually, it came down to a choice between Mwatate and Voi Districts, with the former carrying the day in a vote of 3 to 1. These Minutes are part of the documents relied upon by the Petitioners at page 81 – 99 of the bundle marked “CK-1” in the Affidavit of Christopher Kileta (the First Petitioner) sworn on 22nd January, 2015.

24. In the Report of the Task Force (page 45), the Mwatate Sub-County Headquarters at **Kambi ya Punda** is considered with the following remarks -

“It was established that there was only half an acre remaining in the 10 acre sub-county headquarters when the proposal to have the headquarters at Mwatate was reached in November 2011. However, most of the land has been allocated to the various Government Departments and at the time the task force was conducting the field trips only half an acre was remaining! Members of the task force were of the opinion that the land was inadequate for establishing the envisioned county headquarters. They instead suggested that the land could be used for establishing the sub-county headquarters.”

25. Annexed to the Replying Affidavit of Hon. Eng. John Mtuta Mruttu on the Report on **the Governor's Statement on the Headquarters** at Mgeno, compiled by the Bura Ward Administrator Christopher Mwachia are reports detailing proceedings of meetings at various places. For instance on 11th July, 2014, at Mwakitau Sub-Location at the Assistant Chief's Office, the following remarks are recorded -

“30 percent of the public didn't know where Mgeno is and explained to them that it's just near Mwatate Town and near the main road and after more elaborations members of the public accepted it whole heartedly.... Another one wanted to know whether Mgeno is near the main road and was told that its near the road, the reason he asked the question was because he was misled that Mgeno is far away from Mwatate Town. One Mzee wa Kijiji wanted explanations why the county headquarters is to be constructed at Mgeno and not Mwatate Town. I explained to him that Mwatate Town has no ample land to construct the County Headquarters that's why they arrived for the idea of Mgeno. Another one wanted to make sure that Mgeno is at Mwatate and explained to her since she was misled by some unscrupulous people that Mgeno is in Voi.” (page 203 – 204).”

26. The Reports annexed from the other three wards carry similar content.

27. The Petitioner annexed minutes of a meeting held on 27th June, 2014 attended by seventy two (72) locals who oppose Mgeno as the location for the Headquarters. Their contention is that the available land in Mwatate (Town) is sufficient as the buildings currently housing the Government Departments if found unsuitable can be demolished to make way for the new buildings. This meeting was attended among others, by Christopher Kileta, the Petitioner.

28. The other documents in the Petition refer to an issue that is in my view totally unrelated and therefore irrelevant – agitation for the issue of Title Deeds for land in Mgeno area by a group known as **Mgeno Graziers Welfare Society**. According to the Petitioners, this group (Mgeno Graziers Welfare Society), has raised a dispute over the land. The group's agitation begun in 2012 after the group was formed. In one undated Petition to the County Assembly of Taita-Taveta they pray –

“The county assembly of Taita Taveta, help us in working with the National Land Commission and other relevant institution to commence and complete the process of registration of Mgeno Reserve as our Community Land so that we can legally protect our land and the rightful [owners] therein as petitions;” (sic).

29. However at page 16 of the Petition (dated 3rd May, 2014) it becomes clear that the issue at Mgeno Graziers Welfare Society is that the Task Force when selecting Mgeno for the County Headquarters did not approach them, thereby failing to recognize the group as the legitimate owners of the property. They are concerned that the Task Force, and by extension, the County Government instead, recognized a splinter group known as Mgeno Graziers Trust. They referred to other instances where land in Mgeno was allocated to the National Youth Service, in consultation with them, in which case the splinter group had opposed the allocation. In a Petition to the County Assembly dated 5th May, 2014, they urge -

“8. Please Honourable members note that Mgeno Graziers Welfare Society would indeed and are for the idea of having Mgeno land sourced for putting up county headquarters. However, we humbly advice them to involve the rightful owners. Let them desist from using the back door (Wakishamba Group – Mgeno Graziers Trust).

9. We therefore humbly request you as our honourable members of our county The Chief Land Registrar in a letter to the group on 10th January 2013 had advised that, “...the Community Land Act is yet to be passed into law, as it is still in the drafting stage. Therefore, the only way you can address the issue is through the Environment and Land Court, or negotiate with the Council to get an amicable solution on the matters raised.”

30. In the hand-written memorandum at page 119 – 120 of the Petition, signed by the Chairman Jasper Ambi, the Group states -

“1. WAKAYA/ WAKIPUSI WAKIWA WAHUSIKA WAKUU WA MGENO HAWAKUHUSISHWA KABLA NA BAADA YA 'GROUND BREAKING' YA HQ ZA TAITA/TAVETA COUNTY HAPO MGENO.

2. MGENO GRAZIERS WELFARE NDIO WAMILIKI HALISI WA MGENO – NDIO SABABU WAKAPEANA NYS NAFASI KUTEKELEZA MIRADI YA MAENDELEO.

3. TUKIWA WAMILIKI HALISI TUNAJUA KABISA HATUKUPEANA EKARI 20 KWA COUNTY YA TAITA/TAVETA.

....

....

MWISHO:- WAKAYA/WAKIPUSI HAWAJAKATAA HQ KUJENGWA MGENO LAKINI TUNAWASII (GAVANA NA WATU WAKE) WAACHANE NA TABIA YA KUPITIA MLANGO WA NYUMA.”

31. Translated in my colloquial Kiswahili this means –

1. The relevant owners of Mgeno, the Wakaya/Wakipusi were not involved in the arrangements for the Ground Breaking Ceremony.

2. **The group, Mgeno Graziers Welfare Group are the true owners of the land at Mgeno, and that is why when approached, they approved and gave land to the National Youth Service for its development projects.**

3. **As the true owners of Mgeno, we never gave 20 acres to the County of Taita-Taveta.**

Lastly: We, the Wakaya/Wakipusi do not refuse the construction at Mgeno as the County Headquarters, but we urge the Governor (as leaders of the people) to avoid using the wrong people (passing by the back door).”

32. The totality of my understanding of the complaint by the Mgeno Graziers Welfare Group is that they were not well accommodated in the arrangements for the Ground Breaking Ceremony at Mgeno. I do not understand this to mean that the site at Mgeno is encumbered by rival claims of ownership. If it were, there are processes, which do not concern this Judgment, for removing such encumbrances. But as earlier noted, the issue of ownership is irrelevant in this discussion. However, looked at from the point of view of consultation, it is clear from their own memorandum they were always aware of the events leading to the Ground Breaking Ceremony except that they were specifically not approached, as it allegedly happened in the donation of land to the NYS for development projects.

THE PETITIONERS SUBMISSIONS

33. The Petitioners filed written submissions dated 24th April, 2015. The Petitioners reasoned that from the proceedings of the meeting on 11th March, 2011, it was clear that those present were considering the towns for the Headquarters and not the Districts. They submitted that in rejecting Wundanyi, for instance, it was noted that there was not enough space for expansion. They reckoned that since there is actually a lot of space in Wundanyi District, but not so much within Wundanyi Town, the consideration at the meeting was on the 4 towns (Wundanyi, Voi, Mwatate and Taveta), and not the larger Districts. In this way, the Petitioners submitted that by moving the Headquarters from Mwatate Town to Mgeno, the Task Force needed to go back to the people to get their views and consent.

34. Further, it was submitted, that the public participation, the Task Force Reports and adoption by the County Assembly as evidenced by the Respondents Affidavits in response, all came **AFTER** the decision to move the Headquarters had already been made and a ground breaking ceremony was held on 25th April, 2014. The Petitioners term what the Respondents claim to be public participation forums (fora), to be attempts to popularize and legitimize an illegal decision.

35. The court was consequently urged to find that the Petitioners are in breach of Article 176 of the Constitution which provides that a County Government and its functions must be decentralized so that services can be offered effectively and easily. The new site the Petitioners submitted was without infrastructure and inaccessible to the people and that moving the Headquarters to the new site would deny the people the right to access the County offices for services. The Petitioners therefore urged the court to find that the Respondents had acted unconstitutionally and that their actions breached the rights of the Petitioners, and therefore allow the Petition and grant the orders thereunder.

36. The Petitioners cited the case of **Robert N. Gakuru & Others vs. Governor Kiambu & 3 Others [2014] eKLR**, in which Odunga, J. explored in detail the requirements and considerations to be taken into account in determining whether there was sufficient public participation in the accordance with the provisions of the Constitution of Kenya 2010.

THE RESPONDENTS SUBMISSIONS AND DETERMINATION.

37. The starting point in this determination is Article 10(1) of the Constitution which sets out the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any one of them - (i) applies or interprets the Constitution, (ii) enacts, applies or interprets any law; or (iii) makes or implements public policy decisions. A public office means an office in the national government, a county government ... and a **“state office”** means any of the offices

enumerated in Article 26 and includes a member of a County Assembly, Governor or Deputy Governor of a County or other member of the Executive Committee of a County Government. Article 10(1) therefore binds the Respondents in executing their functions under Article 176(1) of the Constitution – decentralization of their services and under the County Government Act, 2012 (No. 17 of 2012), Section 87, the County Government is enjoined to grant, **inter alia** -

(a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;

(b) reasonable access to process of formulating and implementing policies, laws and regulations, including approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;

(c) protection and promotion of the interest and rights of minorities, marginalized groups and communities, including women, the youth and disadvantaged communities.

38. The Petitioners do not plead that they are either minorities, marginalized groups or communities, nor are they disadvantaged groups or communities. Though disguised as lack of participation, the Petitioners sole contention is that the decision to locate the Headquarters of the County to Mgeno-Mwatate, was unprocedural and ought to have been taken back to the County Assembly for further scrutiny, approval or otherwise. To answer that question requires the court to answer the question as to how the decision to locate the County Headquarters from Mwatate (Mwatate-Town), to Mgeno (Mgeno-Mwatate) was made.

39. **Firstly** the location of the County Headquarters was so important that the three pillars of political power in the County each formed a committee to lead the search for a suitable site for the County Headquarters. The **first** committee was formed by the Governor, (the First Respondent herein). He called it the County Government Technical Team”. The **second** committee was formed by Hon. Andrew Mwadime, the Member of Parliament for Mwatate. The **third** committee was formed by the County Assembly. These three committees were later amalgamated into one committee and became known as the **Joint Task Force**. There was therefore consensus at the political leadership level that a suitable site for the County Headquarters be formed, to give effect to the County Leadership decision that the County Headquarters be at Mwatate County, not necessarily Mwatate Town.

40. **Secondly** the documentation provided by the Respondents in their respective Replying Affidavits, details clearly how the location of the County Headquarters was determined. From the Task Force Report, it is quite evident that Mwatate District (now Sub-County), was selected to host the County Headquarters. The documents show that, initially, it was desired to have the Headquarters of the County within the neighborhood of Mwatate Town, and potential land owners were sought to secure room for expansion from the existing Government facilities. However, it soon emerged that there was not enough room for expansion. Part of the land identified for expansion was found to be at the end of a long legal dispute in court involving one Mwasima Mbuwa and the Directors of Teita Sisal Estate which began in 1988.

41. A tender was issued and advertised in the Daily Nation of 1st November, 2013 to purchase land, and two bids were received. The bids were analyzed and a report made, [and none of the two bids were found suitable]. The Mgeno site was identified later on when the **Joint Task Force** had been constituted. The general consensus of the Task Force members was that the Mgeno land was ideal for the establishment of the County Headquarters **firstly** because the land had no dispute, **secondly**, it had potential for expansion to accommodate (a) **County Headquarters Building**; (b) **County Assembly Chambers**; (c) **Judiciary Court House**; (d) **County Police Headquarters** and (e) **Other amenities like Bus Parks, gardens**, etc. **Thirdly**, it was next to the main road and railway (Voi, Taveta-Moshi) and **fourthly**, the County Government would not purchase it, it was government land.

42. The Task Force having concluded its mandate made the following resolution and handed it to the Governor, the First Respondent on 14th April, 2014 –

“The County Headquarters shall be located on a 20 acre piece of Government land at Mgeno

on which the county Government shall do a ground breaking ceremony on 25th April, 2014. In the meantime, the Task force shall conduct public participation and consensus building forums for acquisition of 2000 acres from Mgeno Graziers/Reserve land to establish Mgeno City from 23rd to 29th April, 2014.”

43. The purpose of the ceremony on 25th April, 2014 is stated as “**Ground Breaking**” in the reference. Traditionally a “**ground breaking**” ceremony is an event to mark the first day of construction of a building or other project. The Replying Affidavits of the Respondents however, allude to the intention of being “**to show the public the proposed location of the County Headquarters**”.

44. Be it as it may, even after 25th April, 2014, there are documents detailing continued collection of views, proposals, public participation and sensitization on the issue. The fact that the ceremony on 25th April, 2014 was called a **Ground Breaking Ceremony** may or does imply that the decision had been made and was irreversible. However, the conduct of the Respondents through their various officers and the Task Force as detailed in the documents annexed to the Respondents Replying Affidavits show otherwise. Significantly also, different and alternative proposals were received over time, and considered but were found unsuitable. All these indicate that the decision to establish the Headquarters at Mgeno Centre, and not Mwatate Town, was taken in strict requirements of the Constitution (Article 10(1)(e)) and the County Governments Act, (s.87).

45. In **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 others**, (supra) Odunga J. in defining what public participation entails expressed himself at paragraph 75 as follows -

“75. In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfillment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many forums as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

46. Lenaola J in **Nairobi Metropolitan PSV Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others** [2013] eKLR opined on public participation that -

“...it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

47. The case of **Kenya Small Scale Farmers Forum and 6 Others vs. Republic Of Kenya and 2 Others**, [2013] eKLR a decision of a three Judge Bench, (Lenaola, Mumbi Ngugi and Majanja JJ) was brought by an organization calling itself Kenya Small Scale Farmers and Six other Petitioners challenging

the state that it had not accorded the Petitioners sufficient or any opportunity at all, to engage in the negotiations on Economic Partnership Agreements with among others, the European Union (EU) and African, Caribbean and Pacific (ACP), countries, leading to the **Lome Conventions** which preceded the signing of the **Cotonou Protocol 2000**. After discussing various alternatives on what public participation entails, the court ordered the Respondents to publish within thirty (30) days information regarding negotiations in at least two dailies, and other official communication, the progress of the negotiations for public awareness and in order to stimulate public debate.

48. In the case of **John Muraya Mwangi & 495 others vs. Minister for State for Provincial Administration & Internal Security and 4 Others [2014] eKLR** the court dismissed the challenge on the constitutionality of certain provisions of the Alcoholic Drinks Control Act and affirmed the constitutionality of the challenged provisions as well as the provisions of the Licence Fees under the Third Schedule to that Act.

49. Petition Nos. 628 and 630 of 2014, were brought by the **Coalition for Reform and Democracy (CORD) and the Kenya National Commission on Human Rights** against the **Republic of Kenya and the Attorney General**, with the Director of Public Prosecutions (DPP) as First among Four Interested Parties, with the Law Society of Kenya, and the **Commission on Implementation of the Constitution**, being 1st and 2nd Amicus Curiae, and in which the court, Odunga J, granted conservatory orders on certain provisions of the Security Law (Amendment) Act, 2014.

50. The immediate foregoing cases (paragraph 47-49), also discussed generally the question of public participation and indicated that **“not every suggestion from the public will be incorporated into an Act of the Legislature, and the fact that certain views of the public have been left out of an Act is not ground to claim that there were no discussion.”** The courts here were in essence echoing the caution, with which I entirely agree, by the eminent Judge of the South African Supreme Court, Sacks J. in the case of **MERAFONG DEMARCATION FORUM & OTHERS VS. PRESIDENT OF SOUTH AFRICA & OTHERS [2008] ZACC 10**, said at paragraphs 50-51 –

“50. But being involved does not mean that ones views must necessarily prevail. There is no authority for the preposition that the views expressed by the public are binding on the legislature if they are indirect 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.”

“51. 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.”

51. The requirement for public participation does not mean that a certain view must ultimately be adopted. Certainly while collecting views and proposals from the public, various views will be considered. What is important is that the County Government shows that the public were afforded an opportunity to participate in the process, and that their contribution was given consideration. In such instances, it is inevitable that some members of the public may see gains in the final decision where their views are incorporated, while other members of the public may perceive loss, where their views are not adopted.

52. Both the Petitioners and the Respondents must always keep in mind that public participation like governance itself is a continuous process. It does not cease or stop at the decision stage. Indeed it commences and continues at the implementation stage, be it of the law, or the policy decision

incorporated in the law.

53. In this case, the County Executive, through the Governor, the First Respondent, and the County Assembly through the Speaker, the Second Respondent, have shown clearly through documented annexures attached to their respective Affidavits in reply to the Petition, that the public was involved in the process, views and proposals of the public were considered, and the final decision was justified as being in the best interest of the constituents of Taita-Taveta County.

54. In conclusion therefore the Petitioners have failed to show an iota of breach of any of their rights to public participation as enshrined in the Constitution and the County Governments Act. In the circumstances, the Petitioners Petition dated 22nd January, 2015 is hereby dismissed, and for the avoidance of doubt any interim or conservatory orders, if at all granted are hereby vacated accordingly.

55. This being public interest litigation, I direct that each party shall bear its own costs.

56. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 22nd day of October, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Magolo for Petitioners

Miss Egessa holding brief for Kibara for Respondents

Mr. Kaunda Court Assistant