REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Petition Case No. 16 Of 2013

IN THE MATTER OF ARTICLE 22 & 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 10, 21, 27, 47(1) AND (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 2(1), 2(4)(4), 10, 73(1)(a), 75 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE RULES, 2006 AND ALL ENABLING PROVISIONS OF LAW

AND

CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013 LNO.117 OF 2013

LESIIT, MAKAU & BWONWONGA JJ.

BETWEEN

AMOS KIUMO…….....1ST PETITIONER

JOHN MUTURIA MUTUA……..…..……2ND PETITIONER

RICHARD MUROKI KARIITHI & 17 OTHERS

Vide Attached List On Behalf of themselves

and Residents of Igembe Central District…….....3RD PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF INTERIOR &

CORDINATION OF NATIONAL GOVERNMENT…….....…....….1ST RESPONDENT

PRINCIPAL SECRETARY MINISTRY OF INTERIOR &

CORDINATION OF NATIONAL GOVERNMENT……....…..2ND RESPONDENT

THE DISTIRCT COMMISSIONER

IGEMBE SOUTH DISTRICT…….…….....……..…….3RD RESPONDENT

HON. ATTORNEY GENERAL…….…….....…….....…4TH RESPONDENT

GODFREY KANAMPIU…….....…1ST INTERESTED PARTY

JEREMIAH MAILUTHA ……..…….…….....….……..2ND INTERESTED PARTY

BENARD THURANIRA M'MWIRICHIA…….....…3RD INTERESTED PARTY

STEPHEN KIREMA MURUNGI…….....……4TH INTERESTED PARTY

THANGICHIA M'MUNYUA…….....…5TH INTERESTED PARTY

JUDGMENT

THE PARTIES

1. The 1st, 2nd and 3rd Petitioners filed this Petition on 2nd September, 2013 describing themselves as residents of Igembe Central District and gave their address for the purposes of service to be that of their advocates. The Petition describes the Respondents as Government officers involved in the creation of Igembe Central District and its Headquarters which is the subject of this Petition.

2. The 1st Respondent is the Cabinet Secretary, Ministry of Interior & Co-ordination of National Government. The 2nd Respondent is the Principal Secretary, Ministry of Interior & Co-ordination of National Government. The 3rd Respondent is the District Commissioner Igembe South District and the 4th Respondent the Attorney General of the Republic of Kenya.

3. The 1stInterestedParty Godfrey Kanampiu a resident of Athiru Ruujine Ward swore an affidavit in response to this Petition on his behalf and that of other four Interested Parties.

BACKGROUND

4. The facts of the case are that in 2012 the Igembe Central District was created in line with the Government Policy of converting all constituencies into Districts. The District was curved out of 3 locations from Igembe North District namely Akira Ngondu, Athiru, Rujiine and Kawiru and 3 locations from Igembe South District namely Igembe East, Njia and Kangeta.

5. Sometimes in 2012, the Government tasked District Commissioner Igembe South to be convener of the leaders and stakeholders meeting with a view of identifying the District Headquarters of the Igembe Central District.

6. On 27th May, 2013 the District Commissioner Igembe South District accepted a Report from a Committee appointed earlier in which Kangeta market was recommended to be the Igembe Central

District Headquarters.

THE PETITION

7. The Petitioners were aggrieved by the recommendation and therefore filed this Petition. They have set out their complaints at paragraphs 17 to 22 of the Petition in the following terms;

> **(i) The Kangeta Market was imposed as the District Headquarters without inputs from the stakeholders, leaders, residents and meeting the agreed criteria thus unconstitutional for lack of public participation and for discrimination against the residents of the 5 locations.**
>
> **(ii) The District Headquarters location was a decision of Physical Planning Officer, then District Commissioner Igembe and the local Member of the National Assembly and violates the Constitution in manner and procedure in which it was imposed on the residents of the new District.**
>
> **(iii) The proposed District headquarter which is yet to be gazetted is on the edge of the new District abutting to the Tigania East District border and very far from the Centre of the new District which will be entailing the residents to travel very far for the services.**
>
> **(iv) The decision marginalizes other residents of other location which are far flung from the location proposed.**
>
> **(v) On 25/7/13, the Petitioners wrote their complaint to the 1st Respondent who is yet to respond though he has not yet gazetted the same Headquarters.**
>
> **(vi) The act by the Respondents to propose to create the District headquarter arbitrarily violates the provisions of the Constitution Articles; 2, 4, 10, 27, 73, 75 and thus null and void or invalid.**

8. The Petitioners are seeking five reliefs on the face of the Petition as follows:

> **(a) A declaration that the decision making Kangeta market to be the District headquarter for the Igembe Central District is invalid, null and void;**
>
> **(b) An order of mandamus to compel Respondents to organize for the public participation in identifying and determining, the District headquarter for the Igembe Central District by all the stakeholders including the residents, their leaders inter alia be issued;**
>
> **(c)An order to nullify any gazette notice which may declare Kangeta as the District HEADQUARTER Igembe Central District.**
>
> **(d) Any other relief that this Honourable court may deem just and appropriate to safeguard the rights and freedoms contained in the cited Articles herein above.**
>
> **(e) Costs and interests**

THE RESPONDENTS RESPONSE

9. The Respondents filed one replying affidavit to the Petition sworn by the 3rd Respondent, District Commissioner Igembe South District. In brief the Respondents contend that there was public participation in determining the Headquarters of the proposed Igembe Central District through a number of consultative leaders meetings. The Respondents contend that invitations to the various Meetings were from the District Commissioner through the respective District officers and local Chiefs. They further contend that the choice of Kangeta as the District Headquarters was based on a Technical Report and that it was supported by leaders from 9 leaders out of 12 from the six wards locations and was therefore the

choice of the majority and in their interest. The affidavit annexes Minutes of meetings held with respective stakeholders.

THE INTERESTED PARTIES RESPONSE

10.The Interested Parties were enjoined in this Petition upon an application dated 23rd October, 2014 allowed by consent of Parties on the 23rd October 2014. The replying affidavit was sworn on behalf of all Interested Parties by the 1st Interested Party Godfrey Kanampiu. The gist of the replying affidavit is that there was public participation during the Selection process for the District Headquarters.

11.The 1stInterestedParty deposes further that the Selection was made after long consultations and a Technical Committee Report which took into consideration four identified factors namely:

(a) Availability land

(b) Communication facilities

(c) Infrastructure

(d) Social amenities

12. The 1st Interested Party contends that the process of identifying the District Headquarters was open and an inclusive process and that it is in the interest of the majority of the people of Igembe Central District that the proposed location is maintained.

THE PRE-TRIAL PROCESS

13. In a Pre-Trial Conference held on 23rd October 2014 the Parties agreed to dispose of the hearing of the Petition by way of v*iva voce* evidence and both written and oral submissions. Parties also agreed to file issues for determination.

THE PETITIONERS CASE

14. The Petitioners case was supported by the evidence adduced by 3 witnesses. These were the PW1, 1stPetitioner Amos Kiumo M'Ithana, hereinafter PW1. PW2 the 2ndPetitioner John Muturia Mutua hereinafter PW2 and PW3 Thiane Pancras Limbiine hereinafter PW3.

15. PW1 started by going into details of information he received from PW1 at the end of November 2012. It is following the information that he received from PW2 that PW1 filed this Petition alongside other Petitioners. PW1 testified that his complaint and the reason he filed this Petition was the fact the technical team chosen to prepare a Report after the site visits did not present the Report to the Select Committee of Ward Representatives. Rather the Committee presented the Report directly to the District Commissioner and later to the open fora. He also complained that the Committee did not have the maps of Igembe Central District and so involved the Physical Planner and District Land Adjudication Officer and the resultant Selection of the District Headquarters.

16. PW1 stated that he is one of the leaders from Igembe Central District yet he was not invited to the meetings. He contended that in his view there was not enough public participation in the choice of Kangeta as the District Headquarters.

17. PW2 produced the list of the Petitioners as P.Exh.1. It shows that each of the Petitioners named therein signed to give authority to the 1stPetitioner, PW1, to file the Petition and to swear the supporting affidavit.

18. PW2 testified that he was invited to and attended a meeting at Maua Polytechnic on 14th November 2012. The convener was the District Commissioner Igembe South District, Mr. Kipkemei. The District Officer 1 Igembe North and Government Departmental Heads from Igembe South and North and other leader from Igembe Central District also attended.

19. PW2 stated that the meeting discussed the location of Igembe Central District Headquarters and during the meeting four locations were proposed namely Njoune, KK Muuti, Kangeta and Maili Tatu. The meeting formed a Committee of 12 persons comprised of 2 representatives from each of the six Wards which form the District. He was chosen to represent Athiru Ward. Their mandate was to visit the four proposed sites and choose the most ideal for the Headquarters bearing in mind five factors namely;

i) Centrality

ii) Availability of land

iii) Infrastructure

iv) Social amenities

v) Communication facilities

20. PW2 stated that during the same meeting a Technical Committee was formed to join the Select Committee of Ward representatives. This Technical Committee comprised Departmental Heads from Igembe North and Igembe South Districts. PW12 stated that members of the Select Committee and Technical Committee visited the four sites on 22nd November 2012. He stated that after the site visits, two places were identified as meeting the set criteria except for the issue of centrality which was not considered as they had no maps for the area. These were Kangeta and KK Muuti.

21. PW2 testified that the Select Committee tasked the Technical Committee to get the map of Igembe Central District and Estate which of the two identified locations were nearest to the centre and then Report back to the Select Committee. PW2 stated that the Select Committee was never invited to any meeting. He said that he did not hear of the matter again until the meeting of 27th May, 2013.

22. PW3 gave similar evidence as PW2 in regard to the events at the meeting held on 14th November 2012 at Maua Youth Polytechnic. PW3 stated he attended the meeting after the Chief from his area of Akirangondu location invited him through phone. The only variation in PW3's evidence was that only one committee was formed comprised of Government officers and 2 representatives from each of the six Wards which formed the District. PW3 was chosen to represent Akirangondu Ward but as he could not attend the site visit he gave up his position and the same was taken over by another.

23. PW3 attended the meeting of 27th May 2013 after the District Commissioner, the convener mentioned to him about the meeting in passing. PW3 stated that after the DC Mr. Kipkemei called the meeting to order he invited the District Physical Planner to read the Report prepared by the Technical Committee. PW3 testified that there were protests from those present including him for reason the Report had not been presented to the select committee.

24. PW3 stated that after the Report was read, those present discussed it. According to him the centrality of the proposed District Headquarters, Kangeta Centre was questioned at the meeting. PW3 said that the DC's response was that centrality was only one of the factors the committee had to consider alongside other factors.

25. PW3 testified that centrality was the most important factor. PW3 testified that of the suggested Centres, only KK Muuti was at the Centre of the District. He produced a map accepted by all Parties "J.M. 2A' and stated that Igembe East and Athiru Ruujine were in the East of the District while Kangeta and Njia Wards were in the west. According to him only KK Muuti was in the middle and persons

travelling from either East or west of the District travelled similar distance.

THE RESPONDENTS CASE

26. The Respondents called three witnesses. The first witness was the current Deputy County Commissioner, Igembe South sub-county, Apollo Odhiambo Okello, hereinafter RW1. RW1 stated that he was not based in Igembe at the material time but was the current custodian of the documents. He relied on his replying affidavit together with annexures. The annexures were the minutes of the Meetings of 14th November 2012 and of 27th May, 2013 marked 'A001' and Report of the Technical Committee held on 22nd November, 2012 marked 'A002'.

27. RW1 maintained that going by the various Minutes he produced;there was enough communication to the people and overwhelming attendance.

28. RW2 was Patrick Masila Munyalo, the District Land Adjudication and Settlement Officer (DLASO) Igembe. RW2 testified that Igembe area which forms his jurisdiction was Igembe North, Igembe Central and Igembe South Districts. RW2 stated that the then District Commissioner, Igembe South District Mr. David Kipkemei informed him of a meeting held on the 14th November 2012, at Maua Youth Polytechnic convened by him to discuss the Headquarters of Igembe Central District. RW2 testified that the DC informed him that the said meeting had resolved to have him (RW2) and other Government Officers incorporated into the Technical Team.

29. RW2 stated that after the information he and other Government officers were incorporated into a Technical Team comprising the Government Officers and Elders who were leaders from the Wards. The Elders were mandated to take the Government Officials to four identified sites that is Njouni, Maili Tatu, Kangeta and KK Muuti. The team was given terms that is to highlight;

(i) The centrality of the location;

(ii) The infrastructure and other amenities;

(iii) The availability of land;

(iv) Resources and Economic potential.

30. RW2 testified that since land in the areas identified as possible Headquarters for the Igembe Central District was under Adjudication, he was the best placed person to give the status of the land. RW2 testified that indeed he gave the said status.

31. RW2 stated that all factors they were to consider were important but that in his view, availability of land was the most critical. RW2 said that after the sites visit the Government Officials sat and came up with a Report of the Technical Committee in answer to the terms of reference and factors for consideration. RW2 testified that the Report did not come up with any particular recommendation on the site suitable. RW2 however denied PW2's evidence that the Team was expected to draw vertical and horizontal lines to come up with the central place.

32. Regarding the meeting of 27th May 2013, RW2 stated that he attended it alongside the Government Officers in the Technical Committee. He stated that the Report was presented to the DC first before it was tabled at the Meeting. According to the Report only Kangeta and KK Muuti were found suited with Kangeta having the largest parcel of land in one area i.e. 9.75 acres and KK Muuti next with 2 acres on which the Chief's Camp was built. RW2 testified that Kangeta had a total of 15 acres available for the Headquarters while KK Muuti had 6 acres. Njoune had no land and Akiragondu had 16 acres on which a school stood but the land had a dispute pending in court.

33. RW3 was Elizabeth Wanjiru Mburu, the Director of Physical Planning, Meru County. Her evidence

was similar to that of RW2 in regard to how they were incorporated into the Technical Committee and the work the Committee performed. RW3 confirmed that the Technical Committee comprising 2 representatives for each of the six Wards and the Government officials visited the four sites on 22nd November, 2012. RW3 testified that after the site visits the Government Officials sat together and analyzed all the lands they were shown and generated a Report. RW3 said she was the secretary to the Technical Committee.

34. RW3 stated the officials then presented the Report to the DC and to the meeting held on 27th May, 2013. RW3 testified that after Report was tabled and deliberated, the DC who was convener of the meeting asked the community leaders who accompanied them to the site visit to endorse the Report. RW3 stated that after the deliberations, those present favoured Kangeta by a show of hands and the Report was therefore adopted.

THE INTERESTED PARTIES CASE

35. The Interested Parties called two witnesses. 1PW1 testified that he was involved in the meetings called to identify a suitable location for Igembe Central District Headquarters. He too was involved in the Leaders' meeting of 14th November 2012 convened by the DC, Igembe South District. He confirms that the meeting came up with four names of Centers for consideration as possible District Headquarters and that each of the Ward members present were advised to choose 2 representatives to form a committee to deliberate on the issue. 1PW1 contradicted the Petitioners and Respondents when he said that there were 5 not 6 Wards and that one Ward picked 4 instead of 2 representatives.

36. 1PW1 testified that after the site visits to the four selected Centers, there was tension as a result of which the Committee left it to the Technical Committee to analyze the terms of reference and make a report. It was his evidence that the role of the Wards Representatives ended with the visit to the Centre sites.1PW1 stated that he was invited by the D.C., through the D.O. to a meeting which took place on the 27th May 2013. He stated that in the meeting he heard only one person protesting but that the Report by the Technical Committee was adopted. 1PW1 agreed that the Technical Committee did not sit with the Select Committee to write the Report.

37. 1PW2 testified that he swore the Replying Affidavit in answer to the Petition on behalf of the Interested Parties. In his evidence 1PW2 stated that he attended the meeting of 14th November 2012 convened by DC Igembe South District at Maua Youth Polytechnic. He said that he was invited to the meeting through his Area Chief. He said that the participants in the meeting came from 5 Wards which form Igembe Central District and that they came up with four sites for the District Headquarters.

38. The evidence of 1PW2 in regard to the outcome of the meeting of 14th November 2012, the one of 22nd November 2012 and 27th May 2013 was similar to that of 1PW1. The only variation in his evidence was to effect the issue of centrality of proposed Headquarters was not part of the factors for consideration. 1PW2 in his evidence described the meeting of 27th May 2013 as stormy and that it was he who recommended the adoption of the Technical Committee Report.

SUBMISSIONS

PETITIONERS' SUBMISSIONS

39. Ms. Kiome represented the Petitioners and also made the submissions on their behalf. Ms. Kiome highlighted her submissions dated 5th November 2014. Counsel contended that public participation is deeply entrenched in the Constitution of Kenya 2010 and that it was a fundamental right with backing from International and Regional Instruments. For that proposition Mrs. Kiome relied on the case of **Robert Gakuru and Others –vs – The Governor Kiambu County and Others (2014) eKLR.**

40. Ms Kiome counsel for the Petitioners urged that the violation of rights of the stakeholders, residents and members of the locations that make up the new Igembe Central District to participate in the

determination of its Headquarters amounted to discrimination and was contrary to the provisions of Article 27 of the Constitution. In addition, learned counsel submitted the Respondents employed unreasonable, unfair and unlawful administrative procedures and actions to make this decision contrary to Articles 47 & 10(2) of the Constitution.

41. The Petitioners' counsel urged that the imposition of Kangeta market as the District Headquarters without input from the stakeholders, leaders and residents of the new District recently created by the IIEBC, was a decision taken by the area Member of Parliament to impose Kangeta market as the new District Headquarters not withstanding the fact that it did not meet the agreed criteria; and that it was unconstitutional as it did not involve public participation and also discriminated against the residents of the five locations.

42. Ms. Kiome cited various Articles of the Constitution and submitted that the Constitution provided a strong legal framework for citizen participation. Counsel highlighted the need to appreciate fundamental aspects of public participation such as the promotion of credibility and integrity in public institutions, in a way that expressed the Sovereign Power of Citizens.

43. The learned counsel Ms. Kiome cited Article 1 of the Constitution of Kenya as the genesis of Citizen Participation and a core part of the Constitution, as well as the preamble, which vested all sovereign power in the Kenyan people. The exercise of this sovereign power,counsel urged found expression at the national and county levels either directly through citizen participation or indirectly through democratically elected representatives.

44. Ms. Kiome the Petitioners' counsel argued that the Constitution made citizen participation a central part of Kenya's governance and cited Article 10(2) (a) which signifies "*participation of the people*" as one of the National core values and principles of governance. Further, counsel noted that the inclusion of citizens by public servants in the process of policy making is provided for in Article 232(1) (d), as one of the values and principles of public service. Participation according to the Petitioner's counsel meant more than just informing people, or even asking them for their views, rather the heart of the public participation lay in the ability to impact the final outcome.

45. Ms. Kiome urged that the Objects of Devolution enshrined in Article 174of the Constitution were also highlighted as including public participation and more specifically sub Article (c) that provides:

> ***"to:***
>
> ***(a)...***
>
> ***(b)…***
>
> ***(c) enhance the participation of people in the exercise of the powers of the State and in making decisions affecting them."***

46. Ms. Kiome urged that Article 184(1) (c) of the Constitution requires mechanisms for public participation be included in national legislation to provide for governance and management of urban areas and cities. Counsel urged that Citizens are equally expected to participate in the decision making process of the Legislatures and also undertake other duties of the national and county legislative bodies. Counsel relied on Articles 118(1) (b) and 196(1)(b) which, she urged requires the national and county legislatures respectively to "*facilitate public participation*" in their work.

47. Ms. Kiome submitted that the participation by citizens must be facilitated in an open and transparent manner to allow the citizens access to vital information as envisaged by the Constitution of Kenya 2010 in Articles 118(1)(a) and 196(1) (a) which specifically direct Parliament and the county assemblies respectively to hold public meetings and conduct their work in full view of all citizens.

48. Ms. Kiome for the Petitioners further urged that the main objective behind the principle of *"public*

participation" was to facilitate the involvement of those that were potentially affected by or interested in decisions of government bodies. They therefore had a right to be involved in the process leading to those decisions. In the premises, counsel urged, attaching importance to such participation ensured that there was a clear departure from a centralized, hierarchical decision-making structure to one that embodied the spirit of devolution and involvement of the people as enshrined in our Constitution.

49. Ms. Kiome for the Petitioners urged that the powers of County Governments as provided in Schedule 4 of the Constitution includes among others, at Schedule 4 Part 2 para 14:

> **"Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level."**

RESPONDENTS' SUBMISSIONS

50. Mr. Kieti, Learned Litigation Counsel for the State represented all the Respondents in this case. The learned Litigation Counsel submitted that the Petitioners had made sweeping and general assertions against the Respondents accusing them of violations of Articles2, 4, 10, 27, 73 and 75 of the Constitution without any basis. The Litigation Counsel argued that the Petitioner's case lacked precision and sufficient clarity for the following reasons;

> **a)Failure to set out with precision the relevant sections, subsections or even sub- paragraphs.**
>
> **b)Failure to plead specifically the various breaches alleged, merely citing the sections and seeking a remedy under those provisions was not sufficient.**
>
> **c)Failure to set out any particulars of the allegations and manner of alleged infringements which omission was not only serious but also hindered the court from ascertaining the issues in controversy.**
>
> **d)The Respondents maintained that on the face of the Petition, no cause of action was established as there were absolutely no allegations set out against the 1st and 2ndRespondents who were wrongly enjoined. The Petitioner had made general assertions devoid of any particulars regarding the 3rd and 4thRespondents.**
>
> **e) The issues for litigation and adjudication that would enable dispensation of substantive justice by the court were notably missing.**

51. It was their position therefore that no Constitutional cause of action had been disclosed against the Respondents by the Petitioners.

52. As to whether public participation pursuant to the various meetings that had been held met the Constitutional threshold, Mr. Kieti urged that although they were in agreement that Article 10(2) (a) of the Constitution provided for the concept of public participation, in principle they were of the view that the same could be actualized in various infinite ways. Besides,Litigation Counsel urged that the Constitution was silent on how public participation should be realized. Mr. Kieti submitted that in line with various court findings there was need to establish that reasonable steps were taken to afford the public a chance to participate in the impugned process. For that proposition counsel relied on the case of **Muraya Mwangi& 495 others & 6 others -vs- Minister for Provincial Administration & Internal Security & 4 others(2014) eKLR.**

53. Mr. Kieti urged that the Petitioners conceded to have participated in several meetings held at the instance of the three Respondents, and that Minutes produced by the 1st Respondent attested to that fact and was proof that there was actual provision of opportunity given to all present at those meetings to deliberate on the proposed District Headquarters.

54. The Respondents Counsel argued that the main bone of contention according to the Petitioners was that certain MCA's were not invited and secondly that their proposed site was not adopted; however it was Mr. Kieti's submission that in view of the various meetings held, the Petitioners were indeed afforded reasonable time and meaningful opportunity to participate in the whole process.

55. On the issue of *locus standi* whether the Petitioners had the requisite locus to file this Petition, Mr. Kieti argued that the 1st Petitioner lacked the requisite authority as they did not move the court in terms of Articles 22 and 258 of the Constitution which provide the required locus. The gist of these Articles is that any person seeking to move a court for judicial redress must be acting bona fide with a view of vindicating the cause of justice and therefore any proceeding tainted by personal gain, private profit or other oblique considerations must be rejected by the courts. For that proposition, learned Litigation Counsel relied on the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.**

56. Mr. Kieti for the Respondents submitted that the order of Mandamus sought was not available to the Petitioners as they had not demonstrated the existence of a duty sought to be enforced as against the Respondents; that they requested the performance of the duty by the Respondents, and there was refusal to perform.

INTERESTEDPARTIES CASE

57. Ms. Thibaru represented the Interested Parties in this Petition. In her submissions Ms. Thibaru challenged the Petition for lacking in merit, and for being an abuse of the judicial process. The learned counsel urged that due process had been followed by the Committee that was constituted to physically visit the proposed sites of Njoune, Maili Tatu, Kangeta and Kiolu Kia Muutito ascertain if they met the required criteria to host the District Headquarters. Ms. Thibaru urged that the criteria to be met by the was set for the Committee tasked to visit the sites as:

(a) Whether or not the proposed site was central to the District.

(b) Whether or not the proposed site had land available to build on for the District Headquarters.

(c) Whether or not the proposed site had infrastructure to host the District Headquarters.

(d) Whether or not the proposed site had communication facilities and social amenities to host a District Headquarters.

58. Ms. Thibaru submitted that the Committee formed included Government Departmental Heads from Igembe North and South Districts who were co-opted as technical experts and who were to assist in writing a Report based on the findings after the physical visits to the proposed sites. Counsel urged that the Committee visited all the sites in one day. Counsel urged that it was the Interested Parties case that the mandate of the Selected Representatives of the Wards ended after the site visits; and that the Technical Committee compiled a Report.

59. Ms. Thibaru submitted that from the Report, two possible sites for the proposed Headquarters emerged Kiolu Kia Muuti and Kangeta, based on the availability of land and that Kangeta was found best suited as the land available there was entirely located in one place and was far bigger. Regarding the centrality of both sites, there wasn't much of an issue as they both were a few kilometers apart, almost equally and easily accessible from all parts of Igembe Central District.

60. Ms. Thibaru submitted that the whole process was people driven and no person was locked out of the meeting that informed the entire process. Ms. Thibaru urged that the process was not arbitrary but rather one that entailed public participation as enshrined in the Constitution of Kenya. Learned counsel for the Interested Parties urged that the action of the District Commissioner in announcing the venue and purpose of the meeting through the Chiefs and District Officers ensured that nobody was prevented from attending

the meeting that adopted the Report.

61. Ms. Thibaru submitted that the Petitioners had not shown in their affidavit or witness statements that there was no public participation, or that it did not meet the required threshold under the Constitution. Counsel cited the case of **Law Society of Kenya vs Attorney General & 2 Others 2013 eKLR** where Majanja, J. while commenting on public participation and burden of proof thereof observed:

> ***"the burden of showing that there has been no public participation, or that the level of public participation within the process does not meet the Constitutional standards is on the Petitioner"***.

ISSUES FOR DETERMINATION

62. Having considered each parties' evidence, their submissions and their suggested issues for determination we are of the view that the issues for determination are the following:

a) Whether the Petition is fatally defective?

b) Whether the Petitioners have *locus standi* to prosecute the Petition; and whether this Court has jurisdiction to determine this Petition?

c)Whether the process of determining the proposed District Headquarters was a matter of public interest requiring public participation and whether there was public participation?

A) WHETHER THE PETITION IS FATALLY DEFECTIVE?

63.The Respondents' case is that this Petition is fatally defective firstly because the Petitioners failed to plead the various breaches alleged to entitle them to the orders sought. Secondly, that they failed to set out any particulars of the allegations and manner of alleged infringements thereby hindering the court from ascertaining the issues in controversy.

64. The essentials of a Valid Constitutional Petition are clear. The Petition as drafted is wanting in that the facts relied upon and Constitutional provision allegedly violated are not all stated in the body of the Petition but at the title of the Petition instead. The particulars in support of the Petition are generalized instead of being specifically pleaded with some degree of precision and setting the manner in which each Respondent in the Petition has violated which specific Articles of the Constitution.

65. The Respondents in the instant Petition have not sufficiently been described nor did their functions and the role each play in violating the specified Articles of the Constitution. The 1st, 2nd and 4thRespondents have not been described who they are and their function and what Articles of the Constitution they violated.

66. We note that the Petition is brought pursuant to Articles 22, 23, 10, 21, 27, 47, (I) & (2), 2(I), 2(4), 73(I) (a), 75 and 58 of the Constitution of Kenya. The said Articles are stated at the title of the Petition. The only Articles pleaded in the body of the Petition are under paragraph 22of the Petition being Articles 2, 4, 10, 27 and 73, of the Constitution in which the Petitioners aver that the Respondents' proposal to create the District Headquarters is arbitrary and violates the mentioned Articles of the Constitution.

67. Article 22 of the Constitution of Kenya provides for enforcement of Bill of Rights. It requires a strict interpretation of the Article. Article 22(3) of the Constitution provides that the Chief Justice shall make rules providing for the court proceedings referred to in that Article, which shall satisfy the criteria, set out there under. Pursuant to the provisions of Article 22(3), of the Constitution the Honorable the Chief Justice gazetted the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 vide Legal Notice Number 117 of 2013 on 28th June 2013. Rule 4(I) of the said Rules provides that where any rights or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to the rules.

68. Rule 10(2) of the said rules further states that a Petition shall contain the following:-

a. The Petitioner's name and address

b. The facts relied upon

c. The Constitutional provisions violated

d. The nature of injury caused or likely to be caused to the Petitioner or the person in whose name the Petitioner has instituted the suit, or in a public interest case to the public, class of persons or community

e. Defaults regarding any civil or criminal case involving the Petitioner or any of the Petitioners which is related to the matters in issue in the Petition

f. The Petition shall be signed by the Petitioner or the advocate of the Petitioner and

g. The relief sought by the Petitioner.

69. Sub rule (3) therefore further provides that subject to rules 9 and 10, the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

70. The case of **ANARITA KARIMI NJERU VERSUS AG (No. 1) [1979] K.L.R. 154** it was held that:

"We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

71. In the earlier case of **MATIBA –*VS- ATTORNEY-GENERAL* High Court Misc. Application No. 666 of 1990 (unreported) the court held:**

> **"An Applicant in an application under Section 84 (1) of the Constitution is obliged to state his complaint the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the Section. It is not enough to allege infringement without particularizing the details and the manner of infringement."**

72. We are alive of the fact that the said cases were decided prior to the enactment of the new Constitution (2010). In a recent High Court case, **DR Rev. Timothy Njoya versus The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013** Lenaola, J. referred to **Anarita's case, supra, and Mumo Matemu's case, supra,** and held:

> **"The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated."**

73. That decision was by a court of parallel jurisdiction as ours and is persuasive. However we are aware of a more recent case which binds us and which came to a similar conclusion as **Njoya's case**, supra, which is **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.** In

that case the Court of Appeal held:

> **"It was the High Court's observation that the petition before it was not the 'epitome of precise, comprehensive, or elegant drafting. "Yet the principle in** Anarita Karimi Njeru **(supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that the compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under** Section 1A **and** 1B **of the Civil Procedure Act (Cap 21) and** Section3A **and** 3B **of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in** Anarita Karimi Njeru **(supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of** Thorp v Holdsworth **(**1876**)** 3Ch**.** D.637 **at 639 holds true today:**
>
> **"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules ….was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."**

74. That makes the principle in **Anarita's case**, supra, which within the old Constitutional dispensation set certain requirements for Constitutional Petitions, is good law even under the new Constitutional dispensation.

75. We have carefully looked at the Petition before us. As already stated the Petitioners have listed three Respondents. At paragraph 22 of the Petition the Petitioners aver that the Respondents violated Articles 2, 4, 10, 27, 73 and 75 of the Constitution by proposing to create a District Headquarters arbitrarily. Under paragraph 17, 19, and 20 general complaints are raised to effect there was no inputs from stakeholders and leaders; that the choice of the Headquarters would cause difficulties to some members of the District who will be forced to travel long distances; and that the decision would marginalize far flung locations. At paragraph 18 the Physical Planner, the District Commissioner and the local Member of the National Assembly are accused of imposing the location of the new District Headquarters. The Petitioners have not pleaded with some degree of precision the specific Articles of the Constitution violated, the party that violated them and the manner in which they have been violated.

76. Even though the Petition quotes the relevant Articles of the Constitution alleged to have been violated under the title to the Petition, it does not state these Articles specifically under the paragraphs of the Petition, detailing the alleged violations and by whom they were violated as required. Paragraph 22 of the Petition where certain Articles are quoted in general terms does not suffice because the Petitioners did not plead their case with some degree of precision, neither did they set out the manner in which the Constitution has been violated and by whom.

77. We have come to the conclusion that the Petition before us did not meet the threshold established in the **Anarita's case**, and as a result we find that the little or no particulars of alleged violations must have presented difficulties to the Respondents to know what it is they were alleged to have done which violated the Constitution, and therefore how to respond to the Petition.

B) WHETHER THE PETITIONERS HAVE *LOCUS STANDI* TO PROSECUTE THE PETITION; AND WHETHER THIS COURT HAS JURISDICTION TO DETERMINE THIS PETITION?

78. The Respondents position was that while Article 22 and 258 of the Constitution envisage a wide approach in the interpretation of the issue of locus, a person seeking to move the court for judicial redress must be acting bona fide with a view of vindicating the cause of justice. Mr. Kieti urged that proceedings

tainted by personal gain or private profit or other oblique considerations must be rejected it was Counsel's submission that the 1st Petitioner did not have the requisite authority and further that he had not moved the court in the terms recognized under Articles 22 and 258 of the Constitution.

79. Mr. Kieti relied on the case **Mumo Matemo –vs- Trusted Society of Human Regents Alliance & 5 Others (2013) eKLR** where the court observed:

> **"However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject their application at the threshold."**

80. In the same cited case, the court relied on an observation of the court in **S. P. Gupta vs. President of India & Others AIR (1982) SC 149** that:

> **"The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal or such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and can thereby improve the administration of justice. Lord Diplock rightly said in Rex. Vs. Inland Revenue Commrs. (1981)2 WLR 722 at p. 740:**

'It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by a outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped... It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of Justice for the lawfulness of what they do, and of that the Court is the only judge.'

> **This broadening of the rule of *locus standi* has been largely responsible for the development of public law, because it is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality. It is only by liberalizing the rule of locus standi that it is possible to effectively police the corridors of powers and prevent violations of law."**

81. The Petitioners did not directly deal with the issue of *locus standi*, however we noted that the Petitioners were clear that the reason they came to court was because the matter at hand was of great public interest, that it affected them and that the Constitution clothed them with the right to public participation and inclusiveness.

82. We agree with the Petitioners. We agree that the National Values provided under Article 10 of the Constitution provide for public participation, inclusiveness, transparency and accountability. This has broadened access to justice and any party feeling aggrieved has a right to access the court so long as the litigation is not "hypothetical, abstract or an abuse of the court process" (See **Mumo Matemo case**, supra). Further, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings

under the Bill of Rights either for themselves or on behalf of others as provided there under. The Petitioners were members of the Igembe Central District and their complaint was that their rights as members of that community were threatened by the imposition of the District Headquarters. The Respondents argument that the Petitioners action was *mala fide,* motivated ortainted by personal gain or private profit or other oblique considerations was neither demonstrated nor proved. We are satisfied that the Petitioners had the *locus standi* to file this Petition. Nothing turns on this point.

83. As to the issue of jurisdiction it was the submission of the Respondents counsel that the Petitioners' case was an abuse of the court process as the Petition did not disclose any cause of action and instead contained sweeping and general assertions of violations of the Constitution that did not merit the court's attention. We noted that Mr. Kieti was a little mixed up in his submission and appeared to deal with the issue of lack of a cause of action as though it was the same as the issue of jurisdiction. The issue of the jurisdiction of court is not the same as lack of a cause of action. That notwithstanding, we shall consider the issue raised.

84. In the oft cited case of **Owners of Motor Vessel "Lillian S" Vs Caltex Oil (K) Ltd [1989] KLR 1** the Court defined jurisdiction thus:

> **"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision."**

85. It therefore follows that jurisdiction of a court is fundamental and goes to the root of the matter, and without it the court cannot take any step, make any determination or issue any orders thereon, and the entire proceedings would be null and void *ab initio.*

86. The High Court is a creature of the Constitution. Under Article 165 (d) of the Constitution of Kenya 2010, the High Court is vested with the jurisdiction to hear and determine any question respecting the interpretation of the Constitution including the determination of inter alia:

> ***"The question whether any law is consistent with or in contravention of the Constitution;***
>
> ***The question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution, or;***
>
> ***Any matter relating to the Constitutional powers of state organs in respect of County Governments and any matter relating to the Constitutional relationship between levels of government."***

87**.** Article 23 of the Constitution vests the High Court with jurisdiction to hear and determine applications for redress of a denial, violation, or infringement of, threat to, a right or fundamental freedom in the Bill of Rights. Therefore, all persons and institutions are subject to review by the High Court in exercise of its jurisdiction to safeguard the principles and values of the Constitution and to uphold its supremacy.

C) WHETHER THE PROCESS OF DETERMINING THE PROPOSED DISTRICT HEADQUARTERS WAS A MATTER OF PUBLIC INTEREST REQUIRING PUBLIC PARTICIPATION AND WHETHER THERE WAS PUBLIC PARTICIPATION?

88. The Petitioners contend that the Respondents acted arbitrarily and infringed on the Petitioners rights to participate in the process of determining the District Headquarters of Igembe Central District. It is the Petitioners position that announcing Kangeta Market as the District Headquarters of the new Igembe Central District violated the Petitioners Constitutional rights

89. Ms. Kiome for the Petitioners cited the case of **Robert Gakuru & Others**, supra**,** where Odunga, J. while commenting on the issue of the extent of Public participation in the legislation process at the County level observed:

"In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behoves he 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 may for a 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."

90. The Respondents on their part argued that the Constitution was silent on how public participation is realized. Mr. Kieti urged that in the instant case however, while appreciating that Article 10(2) (a) of the Constitution provided for the concept of public participation, in principle the same had been actualized via the various meetings that were held. Mr. Kieti urged that the recorded Minutes produced in court as an Exhibit attested to same as it was a record of the actual deliberations held on the proposed District Headquarters by the concerned Parties.

91. This was a unique Constitutional case because the parties agreed by consent to adduce *viva voce* evidence before rendering their submissions. From the evidence adduced before court we shall examine and determine whether public participation was achieved.

92. The matter before the court was the process adopted in selecting a District Headquarters of Igembe Central District. The District was created by the defunct Interim Independent Electoral Boundaries Review Commission, herein after IIEBRC. That Commission was established under section 41Bof the Old Constitution. It was mandated under section 41Cto among other things do the following:

a. "Make recommendations to Parliament on:

1) delimitation of constituencies and local authority electoral units

2) optimal number of constituencies on the basis of equality of votes taking into account –

i. Density of population and in particular the need to ensure adequate representation of urban and sparsely populated rural areas;

ii. Population trends,

iii. Means of communication,

iv. Geographical features and Community interests,

a. Make recommendations to Parliament on

1)administrative boundaries, including the fixing, reviewing and variation of boundaries and other units,

2) and …"

93. IIEBRC's mandate under the former Constitution was therefore advisory in nature. However after the promulgation of the Constitution of Kenya 2010, Parliament deemed it necessary to make transitional arrangements for the completion of the IIEBRC work. These transitional arrangements were contained in

the Fifth Schedule to the IEBC Act.

94. The Fifth Schedule of the *IEBC Act* under which the IEBC was given the mandate to resolve issues arising out of the first review of boundaries includes elements of public participation. The IEBC was required to prepare and publish a Preliminary Report which was to be made available to the public for a period of twenty one-days and which required representations from the public on proposals contained in the Report.

95. Under the Constitution of Kenya, 2010, Article 89 gives the Independent Electoral and Boundaries Commission (IEBC) the mandate of creating and delimiting Constituencies and Wards at intervals of not less than eight and not more than twelve years. Article 89 (5) of the Constitution spells out the criteria to be used in boundary delimitation.

96. Pursuant to the first review of boundaries that was done by the now defunct IIBRC, the IEBC Act, 2011 empowers the IEBC to resolve issues arising from the said first review and to use IIBRC Report as its primary reference material and Parliamentary Committee Report as its secondary reference material.

97. It is worth noting that the delimitation of boundaries of Constituencies and Wards under the Constitution of Kenya Amendment Act 2008, Section 41C was a mandate of the IIBRC which was among others specifically responsible for:

> "**b) Making recommendations to Parliament on administrative boundaries, including the fixing, reviewing and variation of boundaries of Districts and other units;"**

98. The IIBRC conducted the first review and submitted its Report to the Parliamentary Departmental Committee on Justice and Legal Affairs which Report was adopted. However, there were several outstanding issues raised by the Public and Members of Parliament, which resulted in the wide perception that the IIBRC mandate was not complete, hence the requirement that the successor(the IEBC) addresses issues and concerns emerging from their Report.

99. These issues were addressed in the preliminary Report by the IEBC. The Report was meant to provide information to the public on these outstanding issues so as to elicit debate on presentations and proposals contained in the Report.

100. The Fifth Schedule of the IEBC Act, 2011 lists the issues arising out of the first review, and one of these was to;

> **"*(a)* re-distribute such Wards or administrative units in the affected constituencies as may be appropriate;"**

101. Section 6 of the Fifth Schedule to the IEBC Act requires the IEBC to apply the principles of public participation and involvement in its consultative processes. This would be done by conducting public sensitization on the proposed boundaries. This re-distribution of administrative units in our view has not been achieved.

102. Had the issue of administrative boundaries been determined with finality, we believe the location of a District Headquarters would also have been determined with ease. It is complaints arising out of this past process that led to the institution of the case of **Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councilllor Eliot Lidubwi Kihusa& 5 others [2012] Eklr** where the following observations were made:

"*Though the determination of administrative boundaries was not part of the IEBC delimitation process,* ***we cannot ignore the complaints we have heard about administrative boundaries.*** *Part of the mandate of the IIBRC which was not completed was to make recommendations regarding delineation of administrative boundaries.* ***Parliament must address the comprehensive recommendations of the IIBRC***

to institute a structured review of the administrative boundaries in accordance with the values and principles of our Constitution."(emphasis ours)

103. The determination of location for a District Headquarters in our view is a function of the National Government. The County Government does not have a legal framework to determine this. That said however, Legislation is silent on how District Headquarters are to be determined. To demonstrate this, Article 186(1) and (3) deals with Respective functions and powers of National and County governments and stipulates as follows:

> **"(1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.**
>
> **(3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government."**

104. The Fourth Schedule is silent on the body that is responsible for the determination of District Headquarters. Consequently, in line with section 186(3) of the Constitution, the function of determining the location of a District boundary and the Headquarters as well is therefore a function of the National Government. It is our view that it was the role and function the District Commissioner Igembe North District he undertook to execute, as the representative of the National government and of the Executive at the District level.

105. The question is whether there was public participation in the process of determining the District Headquarters. The whole issue of public participation, who has the burden of proof; what public participation entails; and how it can be achieved has been the subject of discussion in both local and regional courts.

106. The first issue we shall consider is that of burden of proof. In **Samow Mumin Mohamed & 9 Others V Cabinet Secretary, Ministry of Interior Security and Co-Ordination & 2 Others [2014] eKLR Lenaola and Majanja JJ** dealing with the issue whether there was violation of the Petitioners fundamental rights and freedoms and whether there was public participation before Gazette Notice was published designating refugees to specified areas held:

> **"As regards Gazette Notice, the Cabinet Secretary has the power, under section 16(2) of the Refugee Act, to designate specific areas as Refugee camps. In Law Society of Kenya v Attorney General and Others Nairobi Petition No. 318 of 2012 [2013] eKLR, the court held that, "[52] The burden of proof of showing that there has been no public participation or that the level of public participation within the process does not meet constitutional standards is on the petitioner." The reason for this is that once the Cabinet Secretary has exercised a statutory power, the court is entitled to presume that all the antecedents including public participation have been complied with. According to the case of Raila Odinga v IEBC & Others SCK Petition No. 5 of 2013[2013]eKLR, "This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. "Omnia praesumuntu rite et solemniteresseacta" - All acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescription of the law,"**
>
> **Other than making a bare allegation that there has been no public participation, the petitioners have not established that Gazette Notice No. No. 1927 of 2013 is void for want of public participation."**

107. We associate ourselves with the observation and holding of the above case. We find and hold that the burden of proof of showing that there has been no public participation or that the level of public participation within the process does not meet constitutional standards is on the Petitioners.

108. On the general provisions providing for Public participation this has constitutional underpinning as evidenced in the Preamble to the Constitution,2010 and is one of our National Values under Article 10. The Preamble to the Constitution recognizes the aspirations of all Kenyans based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." It also acknowledges the people's 'sovereign and inalienable right to determine the form of governance of our country.

109. In the case of **Kenya Small Scale Farmers Forum & 6 Others Vs Republic Of Kenya & 2 Others [2013] eKLR** Lenaola, Mumbi and Majanja, J.J held-

> **"One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, "the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." It also acknowledges the people's 'sovereign and inalienable right to determine the form of governance of our country…" Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of 'inclusiveness' and 'participation of the people.' Other principles include the rule of law, democracy, human rights, integrity, transparency and accountability. These principles bind all State organs, State officers, public officers and all persons generally. Under Article 129, executive authority derives from the people of Kenya is to be exercised in accordance with the Constitution."**

110. Regarding what public participation envisages, in the case **John Muraya Mwangi& 495 Others & 6 Others V Minister For State For Provincial Administration & Internal Security & 4 Others [2014 eKLR,** Emukule, J held:

> **"The concept of public participation enshrined in Articles 10 and 12 of the Constitution of Kenya 2010, is a difficult one but needs to be given effect both before and after legislative enactment. This may take several forms -**
>
> **i)The concept envisages political participation in the conduct of public affairs, such as the right to vote, and to be elected or appointed to public office,**
>
> **ii) The right to be engaged in public debate and dialogue with elected representatives at public hearings,**
>
> **iii)The duty to facilitate public participation in the conduct of public affairs,**
>
> **iv) Ensuring that ordinary citizens the "hoi polloi," the "lala hoi" have the necessary information and are given opportunity to exercise their say not merely in election and appointment to political office but also economic participation, and conduct of their affairs.**
>
> **But, this begs the question on the methods or mechanisms for achieving public participation in the conduct of political and economic affairs of the country. Again the South African experience** (para. 80 Merafong Demarcation Forum and Others V The Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10) **is of assistance – the obligation to facilitate public involvement maybe fulfilled in different ways.** "It is open to innovation" **- my emphasis. Legislative procedures are alien to ordinary citizens, more so to rural folk. The County Commissioners, and their deputies (the successors of the ubiquitous Provincial Administration) must mobilize their chief agents, the Chiefs and Assistant Chiefs (whose titles have remained unchanged even in the new dispensation) and inform ordinary citizens of impending legislation that would affect their welfare or the way they conduct their businesses. Such meetings or** "barazas"**must be documented and reduced into reports to the relevant ministries or state agencies, as records of public participation. The print and electronic media ought to give prominence to such public participation in respect of every County and Sub-County. The media have that mandate under Article 34 of the Constitution**

on the freedom of the media. Invitation to file memoranda by ordinary citizens, and records thereof be kept. Innovation is the name of the game to give effect to the concept of public participation. There are Rwandan Government documentaries showing H. E. Kagame, the President of Rwanda with shirt sleeves rolled-up attending public barazas at County and even Sub-County levels and listening to questions and issues raised by ordinary citizens, and requiring the relevant technocrat or bureacrat to answer them. Such occasions are absent among our relevant Cabinet Secretaries, and their Principal Secretaries. Let the Cabinet Secretary go to every County and seek citizen's views on new legislation in particular that which would affect the way they conduct their affairs."

111. in the case of **Benson Riitho Mureithi Vs J. W. Wakhungu& 2 Others [2014] eKLR** by Mumbi, J. when considering public participation in public appointments observed:

"There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles."

112. The learned Emukule, J. expressed the view that the obligation to facilitate public involvement may be fulfilled in different ways and is open to innovation; that records of the Public participation must be documented and reduced into Reports to the relevant Ministries or State Agencies, as records of public participation. That view was also expressed by Mumbi, J. who in not so many words observed that public participation must be clearly evidenced to legitimize a decision. We are persuaded by the observations of both judges. The concept of Public participation may be fulfilled in different ways open to innovation, but such ways should be documented and reduced to Reports.

113. We are of the view that before any attempt is made to engage the public in the manner under review, there must be dissemination of information necessary to enable for effective participation. The public must be given adequate information whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views. This information must be given to the public before the actual public participation takes place so that the public may know what the issues are, the decision under consideration, and the purpose for the participation in order to the make the dialogue effective and informed. That issue was considered in a South African case as it stated what the concept of facilitation of public involvement entails in **Doctor's For Life International Vs. The Speaker National Assembly and Others 9CCT12/05)[2006] ZACC II,** as follows-

"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."

114. In the same case (**Doctors for Life,** supra), the court expressed its view as to the form the public participation may take. The court was of the view that it should take the form of engaging in public debate and dialogue with elected representatives at public hearings and that they be given effective opportunity to exercise the right to political participation. In this case, public debate with the representatives of the Executive or the representatives of the State Agency which called the Meeting would suffice to meet the constitutional requirement for public participation.

115. The issue which arises is how to measure whether there was sufficient public participation. As we have already shown, there is no specific manner in which public participation is to be conducted as the constitution is silent about it. However there are principles or tests which can be applied to test same. In the case of **Merafong Demarcation**, supra it was held:

> **"The obligation to facilitate public involvement may be fulfilled in different ways. It is open to innovation. Legislatures have discretion to determine how to fulfill the obligation. Citizens must however have a meaningful opportunity to be heard. The question for a court to determine is whether a legislature has done what is reasonable in all the circumstances. In determining whether the legislature acted reasonably, this Court will pay respect to what the legislature assessed as being the appropriate method. The method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the legislation and the intensity of its impact on the public."**

116. We are aware that the court in the **Merafong case** was dealing with the issue of public participation in the legislative process. While that is a different issue from determination of a District Headquarters which is the subject in the instant case, the principle applicable is the same. The principle is that what is required is to establish that reasonable steps were taken to afford the public a chance to participate and a meaningful opportunity to be heard. The question for a court to determine in this case is whether the Executive did what is reasonable in all the circumstances.

117. The test of what is reasonable will depend on, for instance the nature and importance of the matter and the intensity of effect on the public. The question of what is reasonable was considered in the case of **KENYA SMALL SCALE FARMERS FORUM & 6 OTHERS (2013) EKLR** Lenaola, Mumbi and Majanja, JJ observed:

> **"Points to note:-**
>
> **1. It must be clear that a reasonable level of participation has been afforded to 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.**
>
> **2. Being involved does not mean that one's views must necessarily prevail**
>
> **3. 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.**
>
> **The Court in Commission for the Implementation of the Constitution v Parliament of Kenya and another, Petition No. 454 of 2012, had a chance to deal with the constitutionality of the Leadership and Integrity Act, No. 19 of 2012 on the basis, inter alia, that there was no public participation, the Court observed as follows:**

'[74] The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, "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."

118. The other test to bear in mind is the need to consider public interest. In **Republic Vs Ministry of Finance and Another ex parte Nyong'o(2007) eKLR,** the court held:

> **"Good public administration requires a proper consideration of the public interest. There is**

considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any reasonable Government to empower the people because the government holds power in trust for the people. People's participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests.

Good public administration requires a proper consideration of legitimate interests…….. Once public participation is attained and the decision making authority after considering the views expressed makes a decision, the issue whether or not such decision ought to have been made, can no longer be a subject of judicial review since the decision is no longer questionable on the process of arriving thereat but can only be questioned on the merits and that is not within the realm of judicial review."

119. The evidence adduced before us was not in dispute regarding certain facts. It was not in dispute that the District Commissioner, Mr. Kipkemei called for two public meetings held on the 14th November, 2012 and 27th May, 2013. The invitations were by word of mouth from the D.C. through the District Officers and from D.O.s' to Chiefs' offices under his jurisdiction. Some of those who attended the Meetings were invited directly by the D.C. for reason they had attended other meetings in his office around the same time. Others heard of the invitations at Chiefs Barazas', others from persons who had either attended the Barazas' or had heard of the said Meetings from others; and others through announcements made in religious meetings.

120. In regard to invitations to the public meetings called by the DC, we are satisfied that sufficient notice and dissemination of the information was made. There is proof that the invitations were to the general public without any discrimination or limitations. It was not necessary that each and every member of the community was invited or attended. The principle is to ensure information relevant to the process under consideration reached the community and that the purpose of the meeting was known in advance. We are satisfied that those who heard of the meetings were aware of the purpose and could therefore make informed and effective contributions at the two forums.

121. There is no dispute that the two Meetings took place at the time appointed, and held at Maua Youth Polytechnic in Maua town, as indicated. The purpose of the Meetings was to kick start and finalize, respectively, the process of identifying and determining the District Headquarters of the new District of Igembe Central. Indeed the deliberations of the first meeting produced some resolutions. The participants came up with four Centers proposed to be the Headquarters of the Igembe Central District. These were Kangeta, Njoune, KK Muuti and Maili Tatu. It was resolved that two representatives from each of the six Wards which formed the District be selected by Ward members present to form a Select Committee to look into the matter.

122. There were two meetings held by the Select Committee and the Technical Team of six government officers selected by the D.C. to assist in identifying the most suitable location for the Headquarters. The Select Committee and the Technical Team met on 22nd November, 2012 during which time the sites of the four proposed Centers were visited. There was an agreement made by the two teams that the Technical team should prepare a Report on the site visit. There was a dispute as to whether the Report was to be presented to the Select Committee members before being given to the D.C. for presentation at the public forum. Nonetheless the Report was presented to the D.C. and then to the public. That Report formed the basis of the discussion at the Meeting of 27th May, 2013.

123. We are satisfied from the evidence given before us that the meetings were held on the dates and the times as per the notices given. For those who got the information and wished to attend the forums, they had the chance to do so.

124. The Petitioners have complained that the Meetings, especially of the 27th May, 2013 when the final decision was made were not conducted properly. It was there evidence that their views were not considered. It was there complaint that had their views been considered, the decision reached should have

been different.

125. We have considered the evidence given and find that all the parties in this Petition are in agreement that the meeting of 27th was called to order. The Report by the Technical Committee was read and then all those present were given a chance to air their views and that they were heard. The evidence of the Petitioners and the Interested Parties shows that the meeting was stormy because the views expressed were varied and each party stood their ground on the basis of their common or individual interest.

126. It is our view that each party present at the meeting was given ample opportunity to express their views, and that they were heard. The test whether the public participation was good or ample cannot be measured by the outcome of the decision reached. What is required is that a proper consideration of the public interest was made by empowering the public to participate on the issue, and allowing them an opportunity to ventilate it at the forum held for that purpose. We find that the public were engaged at several levels of the considerations. They were involved in the Meeting that identified possible sites for the Headquarters. They were involved in the physical site visit to the four identified Centers. They were also involved in the final deliberations when the Report on the findings of the Select and Technical Teams was discussed. We are satisfied from the evidence adduced that there was great public engagement at every level of the deliberations.

127. In the replying affidavit filed by the 3rd Respondent there are Minutes of meetings held on the 14th November, 2012 and on the 27th May, 2013. There is therefore a proper documentation of the meetings. That documentation is important as it is required to legitimize the process. Those who attended included the local administrative authorities, leaders and members of the community, Chiefs and the interested parties. We are clear in our minds that public participation was attained.

128. The issue is whether the views expressed at the meeting should have influenced the outcome differently? We associate ourselves with the views expressed in the South African case of **Merafong Demarcation Forum case**, supra, that 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 executive or Government. Government certainly can be expected to be responsive to the needs and wishes of interest groups and the public generally but they are not bound by these views. The public participation which the Constitution envisages, is supposed to supplement and enhance the democratic nature of decision making process especially where issues of public interest are under consideration. It is not supposed to conflict with or even overrule or veto them. While we agree that Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public that does not mean that those expressed views are binding and must carry the day. It is our view that there was opportunity given to the public to express their views and that their views were taken into consideration.

129. That there was reasonable participation. In their submissions, they were able to demonstrate this through Exhibit "AOOl" that public participation as provided for under the Constitution required a reasonable participation. The aforementioned documents therefore confirm the attendance by members of the public as well as the Petitioners in this case. They were involved in the Selection of the technical Committee as well as in other processes thereafter. The Petitioners and members of the public were further given opportunity to air their views. The technical Committee executed its mandate, the 12 Ward representatives had clearly defined roles that were conferred upon them by the meeting of 14th November 2012, while the other co-opted technical members were to present the factual picture on the ground based on their technical knowledge and expertise. They submitted that each category carried out their role satisfactorily and diligently. The Report was thereafter adopted at the Meeting of 27th May 2013 by the majority.

130. Before we end we wish to make some recommendations based on our experience in this case. Under the Preamble and Article 10 of the Constitution, public participation is provided for and recognized as one of our National Values as a Nation. There is however no legislative provisions governing how that right to public participation in the conduct of public affairs should be realized. We are of the view that some legislation spelling out how that right can be actualized, the nature and the scope of it, and the form it

may take needs to be enacted. That way we shall not be roaming in the dark trying to decide what public participation means and entails.

131. The **UN General Comment No. 5** which comments on the concept of public participation recognizes at paragraph (5) as follows;

> **"5. The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. <u>The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the Constitution and other laws." (emphasis ours.)</u>**

132. The need for legislation setting out how Public Participation should be actualized cannot be over emphasized.

133. Having come to the conclusion that we have on all the issues raised in this petition, we find as follows:

> **1. That the Petition as filed did not meet the threshold in the Anarita's case and was therefore defective in form.**
>
> **2. By dint of Articles of Articles 22 and 258 of the Constitution of Kenya, 2010 the Petitioners had *locus standi* to institute these proceedings.**
>
> **3. Under Article 165 (d) of the Constitution of Kenya 2010 this court is vested with the jurisdiction to hear and determine any question respecting the interpretation of the Constitution and any contraventions thereof.**
>
> **4. We find that reasonable opportunity was given to the public and all interested parties with timely access to the information relevant to the process of identifying and determining the suitable District Headquarters and their contributions and views were given the due consideration.**

134. We now order as follows:

> **(a) That the decision making Kangeta market, the District Headquarters for Igembe Central District is valid.**
>
> **(b) That an order of mandamus against the respondents cannot issue.**
>
> **(c) That an order to nullify any gazette notice declaring Kangeta as the District Headquarters of Igembe Central District cannot lie.**
>
> **(d) In view of the great public interest involved in this matter, we order each party to bear their own costs of the petition.**

DATED, SIGNED, DELIVERED IN MERU THIS 18TH DECEMBER, 2014

J. LESIIT,

JUDGE.

J. A. MAKAU,

JUDGE.

J. BWONWONGA,

JUDGE.