



**Oguku & 2 others v Speaker of the County Assembly, Kisii County & 3 others (Environment & Land Petition E002 of 2023) [2025] KEELC 1053 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1053 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND PETITION E002 OF 2023**

**M SILA, J**

**MARCH 6, 2025**

**BETWEEN**

**JOSEPH NYAKWEBE OGUKU ..... 1<sup>ST</sup> PETITIONER  
JOSEPH MAUTI KENYANYA ..... 2<sup>ND</sup> PETITIONER  
ELIJAH MACHONI MOCHAMA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**SPEAKER OF THE COUNTY ASSEMBLY, KISII COUNTY ... 1<sup>ST</sup> RESPONDENT  
HON. PAUL OKOMBO AYIEMBA, MEMBER OF COUNTY ASSEMBLY,  
BOIKANGA WARD, KISII ..... 2<sup>ND</sup> RESPONDENT  
COUNTY ASSEMBLY OF KISII COUNTY ..... 3<sup>RD</sup> RESPONDENT  
KISII COUNTY GOVERNMENT ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

(Petitioners filing suit to contend that there was no adequate public participation before a decision was made on where to locate the Boikanga Ward Offices; need for public participation in issues related to governance; from the facts, apparent that there had been a long running dispute on where to locate the offices with different views being given; a task force was formed; task force making recommendation on where to locate the offices which is now being objected by the petitioners; court persuaded that there has been adequate public participation and the decision on where to locate the offices is not unreasonable; petition dismissed)

1. This suit was commenced through a petition filed on 12 July 2023. The petitioners seek the following orders (just slightly paraphrased) :



- a. A declaration that the respondents violated the right to public participation for Boikanga residents by commencing construction of Boikanga Ward offices on an unapproved parcel of land without conducting any public participation exercise.
  - b. An order of permanent injunction restraining the respondents from authorizing, approving, or permitting the construction of Boikanga Ward Offices on an unapproved parcel of land.
  - c. An order of prohibition be issued restraining the respondents from constructing Boikanga Ward Offices or undertaking any other work in connection with the MCA Offices for Boikanga Ward on an unapproved parcel of land, save as and in accordance with *the constitution* and the law.
  - d. Any other order that may deem fit and just to ensure that law and order is maintained and that the rule of law is upheld.
  - e. Costs of the petition be borne by the respondents.
  - f. Such other orders that the court shall deem fit and just to grant in the circumstances.
2. The petitioners introduce themselves as residents of Boikanga Ward, within Kisii County and they aver that they present the petition in the interests of the residents of the said ward. Their grievance is on the intended construction of the Boikanga Ward offices which they contend is proposed to be built on an unapproved parcel of land. They also claim that there has not been any public participation and therefore they have been denied the right to participate in governance and affairs that affect them. They assert that public participation and stakeholder engagement is a cornerstone of the 2010 Constitution. They do state in the petition that while it is true that there has been some level of consultation, the public participation was not effective as the respondents have commenced construction of the ward offices on an unapproved parcel of land. They also aver that there is no evidence that the residents of Boikanga Ward were given a reasonable opportunity to express their view regarding the establishment of the MCA offices yet they are part of the stakeholders of the ward. It is their position that there has therefore been violation of Article 10 of *the constitution*, touching on national values and principles of governance; Article 174 on the objects of devolution ; Article 201 on the principles guiding public finance; Section 87 and 115 of the County Government Act which call for public participation; and Section 79 of the *Public Finance Management Act*. They bring this petition pursuant to Article 22 and 35 of *the Constitution* which allow citizens the right to approach courts to enforce the bill of rights and enforce the right to access information.
  3. The supporting affidavit to the petition is sworn by Elijah Machoni Mochama the 3<sup>rd</sup> petitioner. He has deposed that the residents of Boikanga Ward, vide a meeting, unanimously agreed and approved that the offices of the Member of County Assembly (MCA) was to be constructed on the land parcel South Mugirango/Bikanga/239 measuring 10 acres. He has attached a copy of some minutes. He adds that this parcel of land is neutrally located between two main clans that form part of Boikanga Ward and that there are other social amenities which have been commissioned and approved to be constructed on the said land. He avers that the land is centrally located and ideal for delivery of services to all residents of the ward. He deposes that despite this unanimous decision, the County Assembly of Kisii blatantly commissioned construction on a piece of land allocated exclusively for the market without seeking approval from the community. He continues to state that tthis proposed location lacks centrality to ensure easy access to services, and further, that public participation was not conducted to commission the project. He contends that the act of constructing the said offices on land allocated for the market is against the intention of the members of Boikanga Ward. He adds that construction on



the land allocated to the market amounts to misappropriation of funds. He thus seeks that the petition be allowed.

4. I need to state that together with the petition, the petitioners filed an application for injunction to restrain construction of the ward offices for Boikanga pending hearing and determination of the petition. I gave the orders of injunction in a ruling delivered on 7 November 2023.
5. The 4<sup>th</sup> respondent, the County Government of Kisii, has opposed the petition through the replying affidavit of Dr. Kennedy Mwengei Ombaba, its Chief Officer in the Department of Lands, Physical Planning and Urban Development. He contends that the petition does not meet the threshold of a constitutional petition. He continues to depose that on 3 February 2014 the residents of Boikanga Ward presented a Memorandum to the Sub-County Administrator, South Mugirango, demanding that the Boikanga Ward offices be built in a central/agreed place. He has attached the said memorandum and a list of the members who presented it. He has stated that on 10 July 2014, a public participation meeting of residents of Boikang'a ward was held at Nyamarambe in South Mugirango Sub-County, where over 500 residents attended and a resolution was reached as to where the Headquarters was to be built. He has attached copies of the minutes and list of attendees. He deposes that on 5 February 2014, a suit was filed being Kisii HCCC No. 4 of 2013, seeking orders on the said offices. He has annexed the pleadings thereof. He states that on 4 August 2014, the minutes of the public participation exercise that was held on 10 July 2014 were presented to court and the court adopted the decision arrived at in the said public participation exercise. He avers that the petition is therefore moot as the issues being raised were conclusively dealt with in the suit Kisii HCCC NO. 4 of 2014.
6. Together with the replying affidavit, a preliminary objection was filed to the effect that the suit is res judicata. I will get to this a little later.
7. The 1<sup>st</sup> & 3<sup>rd</sup> respondents have opposed the petition through the replying affidavit of Jacob M. Onkeo, the Acting Clerk of the Kisii County Assembly. He also contends that the petition does not meet the legal threshold of a constitutional petition. His affidavit in some parts is more or less a replica of what Dr. Ombaba deposed, which I have already set out above. What he has added is that in the year 2019, various consultative meetings were held in August, October and November, addressing location of land for government projects including the ward office, whereby a request was made to Nyakembene Market Committee to consider allocating land to the Government projects. He deposes that it was agreed that the market centre land be subdivided to create room for construction of a ward office hence land measuring 100 feet x 100 feet was assigned for the same. He avers that this decision was as a result of a meeting held by the Boikanga Ward Task Force and the Nyakembene Market Committee Members. He has attached a copy of the minutes and the attendance list. He has stated that the Boikanga Ward Task Force Team subsequently held a meeting on 22 November 2019 indicating that it was agreed that the ward offices be constructed at Nyakembene Market which is public land. He avers that there was also confirmation from the Kisii County Government that it did not have funds to purchase land for construction of the ward office. He has tabled the task force report. He has further deposed that on 10 November 2022, the Kisii County Government, in the spirit of public participation, invited for views from the public on the construction of the MCA Ward New Office project to be constructed at Nyakembene Market and many residents of Boikanga attended, and this instigated the construction of the current Boikanga Ward Office. He has attached the public participation attendance register. He thus seeks that this petition be dismissed.
8. It will be recalled that a preliminary objection had been raised that this suit was res judicata. The 1<sup>st</sup> & 3<sup>rd</sup> respondents filed an application for this petition to be struck out on that ground. The issue of whether or not this suit is res judicata was argued and I delivered ruling on it on 17 September 2024.



I was not persuaded that this petition is res judicata, and dismissed the preliminary objection and the application, thus paving the way for the hearing of this petition.

9. I directed that the petition be canvassed by way of written submissions and I have taken note of the submissions filed by counsel for the petitioners and counsel for the 1<sup>st</sup> & 3<sup>rd</sup> respondents. No submissions were filed by the 4<sup>th</sup> respondent and the 2<sup>nd</sup> respondent did not participate at all in the matter.
10. I take the following view.
11. The petitioners challenge the decision of the respondents to construct the offices of the MCA Boikanga Ward in what they contend to be an ‘unapproved parcel of land.’ They further assert that this decision is not only an unwise one but that there was no adequate public participation involving them as stakeholders.
12. It is not in doubt that public participation is a cornerstone of *the Constitution*, 2010, and the need for public participation and stakeholder engagement is indeed mentioned in a number of Articles within *the Constitution*. For example, Article 10, recognises ‘democracy and participation of the people’ as one of the national values and principles of governance. Under Article 174, one of the objects of devolution at Article 174 (c) is ‘to give powers of self governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affection them.’ Article 201 of *the Constitution*, which espouses the Principles of Public Finance, provides at Article 201 (a) that ‘there shall be openness and accountability including public participation in financial matters.’ It cannot therefore be overemphasized that public participation is a critical component of good governance.
13. It has been established in past decisions that what is critical in public participation is that the people are given reasonable opportunity to give their views regarding the subject matter at hand and those views have been taken into account before arriving at the decision in issue. In the case of Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR Odunga J (as then was) observed as follows;

“ 50. However, it must be appreciated that the yardstick for public participation is that a reasonable opportunity has been given to the members of the public and all interested parties to know about the issue and to have an adequate say. It cannot be expected of the legislature that a personal hearing will be given to every individual who claims to be affected by the laws or regulations that are being made. What is necessary is that the nature of concerns of different sectors of the parties should be communicated to the law maker and taken in formulating the final regulations. Accordingly, the law is that 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.

51. Therefore the mere fact that particular views have not been incorporated in the enactment does not justify the court in invalidating the enactment in question. As was appreciated by Lenaola, J in Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No.



486 of 2013, public participation is not the same as saying that public views must prevail.”

14. As can be deduced from the above dicta, an assessment of whether a reasonable opportunity has been given to the people to present their views on the subject at hand will depend on the circumstances of the case at hand. It is with the above in mind that I embark on an analysis as to whether in the circumstances of our case, the respondents met the test of public participation.
15. From the facts, it is clear that the residents of Boikanga ward have had a long running dispute over where the MCA’s office ought to be located. The dispute is in fact older than 10 years. In 2014, the matter even went to court through the case Kisii HCCC No. 4 of 2014. From the pleadings in that dispute, the plaintiffs who came to court wanted the offices to be located at Nyakembene and they were protesting an intention to move the offices to Nyakeboireire. To resolve the matter, a public forum was held on 10 July 2014 and views taken. Within that meeting various proposals were tabled and debated, including not having the offices at Nyakembene or Nyakeboireire. Other places such as Emesa and Nyakorere were proposed. Eventually, four resolutions came out of that meeting as follows :
  1. That a neutral and central place which is not any of the contested places be adopted as the ward headquarters. Ichuni centre was proposed by Hon. Kombo and was unanimously accepted by all people.
  2. That community should identify suitable public land at Ichuni for the ward office and if none is available, Mr. Onderi the Executive Committee member in charge of lands who was present was tasked to purchase land for that purpose.
  3. That the court case be unconditionally withdrawn by the people who filed it as the issue of the location of the ward office has been resolved.
  4. That a task force was formed constituting the following members from both sides to assist the MCA in identifying the land for the ward office and other relevant matters (12 names given).
16. It will be seen from the foregoing that more or less it was resolved to have the office at Ichuni.
17. In the affidavit of Mr. Onkeo, it is said that in 2019, pursuant to meetings held between the Boikanga Ward Task Force and the Nyakembene Committee Members, it was resolved to locate the offices at Nyakembene. It is elaborated that it was agreed that land measuring 100 x 100 feet would be subdivided from the market centre for this purpose. It is explained that the reasoning was that this is public land and the County Government of Kisii did not have funds to purchase land for construction of the ward offices. It will be recalled that Mr. Onkeo attached the minutes of the discussion and the resultant report in his affidavit. He also mentioned that on 10 November 2022 there was public participation and he has attached the minutes thereof. I have gone through these documents.
18. I have seen that in a meeting held sometime in 2019, the Nyakembene Market Centre Committee agreed to put aside land for various projects. Part of what they agreed is that the market centre land measuring 100 x 100 feet be subdivided to create room for the ward office. I have seen the Task Force report and indeed it was resolved that the ward offices be located at Nyakembene where there is public land. I have also seen a public participation attendance register of 10 November 2022.
19. From the above, it is apparent that the public did resolve in 2014 to get land at Ichuni and a Task Force was formed for this purpose. The public entrusted this Task Force to identify the location of the proposed office. It appears that the Task Force was unable to get land at Ichuni and they eventually resolved to have the offices located at Nyakembene with concurrence of the Nyakembene Market Committee who agreed to carve out land measuring 100 x 100 feet to accommodate the offices.



Thus, the decision to locate land at Nyakembene is actually a result of a recommendation of the Task Force which Task Force the people themselves chose in 2014. It cannot be said to be a whimsical and capricious decision. Neither can it be said to have resulted without public participation. There was indeed public participation and in my opinion the same was sufficient.

20. It is of course highly improbable that you will have a coalescence of similar views during public participation. It is also highly improbable that you will have unanimity in opinions. Some will be for, and some will be against a project. At the end of the day, a decision, one way or the other has to be made. So long as it is clear that all views were taken into account before a final decision was arrived, and the final decision is reasonable given the circumstances surrounding it, it is not for the court to interfere in such decision.
21. In our case, it is apparent that the petitioners oppose the location of the offices at Nyakembene but there are also those who oppose the location of offices at Nyakeboireire (which the petitioners support) and it is in fact this which led to the case of 2014. As I have mentioned above, what is important is that the end product is a result of all views having been synthesised. In our case all opinions were taken into account in 2014 when a Task Force was formed. As I have pointed out, members entrusted the Task Force to come up with a decision on the location of the offices. The Task Force has made that decision. It may not augur well for everyone but the decision is by a body that the public themselves created and had faith in.
22. And neither can it be argued that the said decision is an unreasonable one. In their petition they assert that the offices are best located in the land parcel South Mugirango/Bikanga/239 which they say measures 10 acres, and which they contend was unanimously agreed and they have annexed minutes which they purport are to that effect. I have looked at the minutes attached but I cannot see any mention in those minutes that resolved that the offices should be located in the land parcel South Mugirango/Bikanga/239. In fact it is not even clear who owns this land and whether it is land that is available for establishment of any public office. No search nor Green Card was attached to show who owns this land and whether the proprietor has agreed to have the land used for purposes of the ward office. Thus essentially, the petitioners have failed to demonstrate that there is alternative land for constructing the ward offices. I cannot see on what basis they fault the decision to have the offices in the land set aside by the Market Committee.
23. The petition also urges that the decision offends Section 79 of the *Public Finance Management Act* which provides as follows :

79. Public officers to comply with laws relating to national government resources

- (1) Every public officer employed in a national government state organ or public entity shall comply with *the Constitution* and all laws relating to the conduct of public officers when carrying out a responsibility or exercising a power under this Act.
- (2) Without prejudice to provisions under subsection (1), a public officer employed in a national government state organ or public entity shall—
  - (a) comply with the provisions of this Act so far as they are applicable to the officer; and
  - (b) ensure that the resources within the officer's area of responsibility are used in a way which—
    - (i) is lawful and authorised; and
    - (ii) is effective, efficient, economical and transparent;



(c) within the officer's area of responsibility—

- (i) ensure that adequate arrangements are made for the proper use, custody, safeguarding and maintenance of public property; and
- (ii) use the officer's best efforts to prevent any damage from being done to the financial interests of the national government.

24. I see no violation of the above provision of the law. It will in fact be discerned that among the reasons made for the decision is lack of funds to get alternative land and therefore the office is to be located on public land. I would imagine that such decision saves the public money and I do not see how it can be argued that in making the said decision the respondents have engaged in imprudent management of public finances.

25. When I first encountered the petition through the application for injunction, an impression had been formed that there could be some violation in planning laws as it was urged that the construction would be in a market. After going through all the material herein, it appears to me that the construction is not on land set aside for a market but is in a market centre where various activities take place.

26. For the above reasons, I do not find any merit in this petition and it is hereby dismissed. There was an order of injunction issued. That is lifted with the dismissal of the case.

27. Since this petition was brought in public interest, there will be no orders as to costs.

28. Judgment accordingly.

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF MARCH 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Ms. Chepkorir for the petitioners

Ms. Muma h/b for Mr. Onserio Ondimu for the 1<sup>st</sup> & 3<sup>rd</sup> respondents

Ms. Bonareri h/b for Ms. Githinji for the 4<sup>th</sup> respondent

No appearance on part of 2<sup>nd</sup> respondent

Court Assistant – Michael Oyuko

