



**Kamket v Cabinet Secretary, Interior and National Administration & another; Parkei & 14 others (Interested Parties) (Constitutional Petition E010 of 2024) [2025] KEHC 4264 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CONSTITUTIONAL PETITION E010 OF 2024**

**RB NGETICH, J**

**MARCH 20, 2025**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: VIOLATION AND THREATENED VIOLATION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES**

**1,2,6(2),10, 11(1), 19, 20, 21, 22(1), 47, 73(1), 153,174,89,232,258(1)  
AND 259(1) (B) OF THE CONSTITUTION OF**

**KENYA**

**AND**

**IN THE MATTER OF: NATIONAL GOVERNMENT CO-ORDINATION ACT, 2013 AND**

**IN THE MATTER OF: THE RIGHT TO FAIR ADMINISTRATIVE ACTION**

**AND**

**IN THE MATTER OF: COUNTY GOVERNMENTS ACT, NO. 17 OF 2012**

**AND**

**IN THE MATTER OF: ESTABLISHMENT SUB COUNTIES AND THEIR HEADQUARTERS**

**AND**

**IN THE MATTER OF: BOUNDARY DISPUTES; GAZETTE  
NOTICE NO. 15341 OF 22ND NOVEMBER, 2024**

**BETWEEN**

**HON. WILLIAM KASSAIT KAMKET ..... PETITIONER**

**AND**



CABINET SECRETARY, INTERIOR AND NATIONAL ADMINISTRATION 1<sup>ST</sup>  
RESPONDENT

ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT

AND

ENG. RENSON KIOLE PARKEI ..... INTERESTED PARTY  
ROSIAN JOHN LESANINGO ..... INTERESTED PARTY  
LOITAMEDO MPAINE ..... INTERESTED PARTY  
PHILIP LEDIDA ..... INTERESTED PARTY  
PAUL KEBEN ..... INTERESTED PARTY  
RANGAL NGAMIA LEMEIGURAN ..... INTERESTED PARTY  
JONES KACHATA LEKIRATI ..... INTERESTED PARTY  
LEWUANTAN CHELALEM LEKICHEP ..... INTERESTED PARTY  
REUBEN MUNYANA LESANINGO ..... INTERESTED PARTY  
SAMWEL POSES SEKEU ..... INTERESTED PARTY  
EDWARD KATEIYA OLE KAICHU ..... INTERESTED PARTY  
GIDEON KIPON ..... INTERESTED PARTY  
HON. SHADRACK AKENO MAILUK ..... INTERESTED PARTY  
HON. PAUL LOLGISIO ..... INTERESTED PARTY  
HON. WESLEY LEMWELI LEKAKIMON ..... INTERESTED PARTY

## RULING

1. This is a ruling on two applications. The Petitioner filed application dated 3<sup>rd</sup> December 2024 brought under the provisions of articles 1,2,6(2),10,11(1),19,20,21,22(1),4773(1), 153, 154, 252, 258(1)] and 259(1) of *the Constitution* of Kenya and Rule 4, 23 & 24 of *the Constitution* of Kenya seeking conservatory order staying the implementation of the impugned Gazette Notice No. 15341 dated the 22<sup>nd</sup> November, 2024 in so far as it relates to the creation of the proposed Mukutani Sub county and Makutani Headquarters within Tiaty Sub-county under Baringo South Sub-County pending the hearing and determination of the petition herein.
2. The second application dated 12<sup>th</sup> December,2024 was filed by the 1<sup>st</sup> to 11<sup>th</sup> interested parties seeking to transfer this petition to Nairobi on ground that this petition is sub judice for the reason that parties herein are litigating in petition No. E064 of 20 where the relief sought herein is one of the reliefs sought in the said petition which was filed earlier. Both applications proceeded by way of written submissions.

### Application For Conservatory Order

3. The application is founded on the grounds that on or about the 22<sup>nd</sup> November, 2024, the 1<sup>st</sup> Respondent while exercising his mandate as the Ag. Cabinet Secretary for the Ministry of Interior and National Co-ordination published Gazette Notice No.15341 establishing new administrative units



- as service delivery co-ordination units and among the Proposed administrative units is the Mukutani Sub County with its Headquarters in Mukutani which has been listed as a sub-county within Baringo South Constituency despite the same being within Tiaty Constituency.
4. That the impugned Gazette Notice No. 15341 purports to reorganize, review and recreate the existing boundary between Tiaty and Baringo South Constituency which falls within the ambit of the Independent Electoral and Boundaries Commission as provided under Article 89 of *the constitution* and Section 26 and 48 of the County Government Act.
  5. That the designation of Mukutani sub-county from Tiaty to Baringo south constituency is further aimed at resolving boundary dispute between the two constituencies through the back door whereas the Independent Electoral and Boundaries Commission is not properly constituted for purposes of exercising their mandate.
  6. That the boundary dispute has been a source of constant and endless conflict between the two sub-counties resulting in constant armed raids and forceful invasion and grazing by persons who are heavily armed and the security situation in the areas was debated upon by parliament in the year 2015 recognizing the need for legislative and policy intervention.
  7. The petitioner aver that the 1<sup>st</sup> Respondent's action is ultra vires as is against the statutory provisions of the National Government Coordination Act, County Government Act and *the Constitution* of Kenya and is also offending the petitioner who represent about 150,000 residents of Tiaty constituency and the people of Tiaty's right to fair administrative action and legitimate expectation; and there was no meaningful public participation of the residents of the two constituencies neither were they given reasons for the relocation of Mukutani Sub County to Baringo South Constituency and the same was unconstitutional by virtue of Article 19 and 47 of *the constitution*; that it risks creating distress, unnecessary tension and conflict among the people of Tiaty and Baringo South area who have had major security challenges arising from the Tiaty-Baringo South boundary.
  8. Further that by designating Mukutani subcounty to Baringo south constituency, the Respondent by implication will also be relocating polling stations forming Tiaty constituency comprising of Sosion, Chemoikut, Ngarua and Katakon polling stations, to Baringo constituency, an act of gerrymandering by the Respondents and it will affect various development programs which were implemented in the new Mukutani Sub County as part of the larger Tiaty Constituency such as dispensaries, roads, water points, markets and grant of bursaries among others to over 150,000 citizens who are residents of Tiaty Constituency.
  9. The petitioner is apprehensive that the 1<sup>st</sup> Respondent's directive if not stayed and set aside, will result in conflict and disruption of the already existing administrative units against the provisions of Section 14 of the National Government Coordination Act, Contrary to the provisions of articles 10, 47 and 232 of *the constitution* as the same violated the principles of democracy and public participation and they therefore, urge this Honourable Court to allow the Application as prayed.

#### **Response by 1<sup>st</sup> and 2<sup>nd</sup> Respondent**

10. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition to the application dated 3<sup>rd</sup> December, 2024 as hereunder: -
  - i. That the subject Application does not disclose material particulars of the alleged infringement of the Petitioner/Applicant's rights by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Respondents herein reiterate that the Application is misconceived, incompetent and without merit.



- ii. That, under Section 14 (1) of the *[national Government Co-ordination Act](#)*, 2013, the 1<sup>st</sup> Respondent herein, has the power to establish Administrative Units for better service delivery and co-ordination.
- iii. That the Administrative units established by the 1<sup>st</sup> Respondent via the Gazette Notice No. 15341 dated the 22<sup>nd</sup> November, 2024, are distinct and/or separate from the Electoral units to be reviewed by the independent Electoral and Boundaries Commission as provided for under Article 89 of *[the Constitution](#)* of Kenya, 2010.
- iv. That the Application therefore does not establish a prima facie case against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to warrant the issuance of the reliefs sought.
- v. That it is in the interests of fairness and justice that the Petitioner's/Applicant's Application dated 3<sup>rd</sup> December, 2024 be dismissed with costs to the Respondents.

### **1<sup>st</sup> and 2<sup>nd</sup> Interested Party's Response**

11. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed a replying affidavit sworn by the 1<sup>st</sup> interested party Hon. Paul Lolgiso the current elected Member of County Assembly for Mukutani Ward. He avers that he has authority of 2<sup>nd</sup> interested party who is the current elected MCA of Ilchamus Ward to swear affidavit on his behalf.
12. He avers that Gazette Notice No. 15341 published on 22<sup>nd</sup> November 2024 by cabinet secretary ministry of interior establishing new administrative units came as a breath of fresh air to the residents of Mukutani as it will bring peace in the 2 Constituencies. That boundary between Tiaty and Baringo South Constituency has caused a lot of conflict between the 2 Constituencies and the Gazette Notice seeks to organize, review and recreate the existing boundary between Tiaty and Baringo South Constituency and will solve the existing security challenges and creation of administrative units seeks to bring Service delivery closer to the residents. He avers that the Petitioner is not a resident of any of the 4 locations comprising Mukutani Ward and his interest is merely political as he fears loss of voters which is an unfortunate reason for anyone to seek to halt development.
13. He further avers that the Ilchamus are a minority tribe in Kenya, being a Maa speaking people living in South East of Lake Baringo, Kenya, with a population of about 50,000 people and the Ilchamus fall within the present Baringo South Constituency, occupying only two administrative divisions of the current Marigat district and the rest of Baringo Constituency is occupied by members of the Tugen and Pokot Communities; that the Ilchamus occupy 2 wards in Baringo County, the Ilchamus Ward and the Mukutani Ward and the most they have are two MCAs representing the Community at the County Level and in Parliament they remain unheard.
14. He avers that Article 100 of *[the Constitution](#)* provides for the promotion of representation of Marginalized groups and the Ilchamus are a minority group both at the County level and at the National level and their small number in population is a numerical weakness as they cannot overpower the other communities represented in Baringo County particularly the Kalenjin who are the main occupants of Baringo County. That Article 89 of *[the Constitution](#)* recognizes the need for equitable representation and stipulates the criteria for Constituency delimitation and they believe that the Ilchamus Community meets these criteria and should be granted its own constituency.
15. He further avers that the Ilchamus Community has severally sought, in vain, the attention of the Kenyan Government and other state organs to claim their right to adequate representation in the National Assembly of Kenya and in their quest to claim their right of representation, they filed



memoranda with Hon Zakayo Chesoni and Hon. Samuel Kivuitu (Chairpersons of the defunct ECK) before they finally moved to court for legal redress in the year 2004 vide Miscellaneous Application No. 305 OF 2004 where the High court issued an order that the interests of the Ilchamus Community be considered in the next exercise on boundaries review by the then ECK or any other incoming body to create by an Act of Parliament or any other review being undertaken, a Constituencies for the Ilchamus Community but has not been complied.

16. He avers that Gazette Notice No. 15341 is an attempt by the Government to solve the boundary dispute and to bring Administrative Services closer to the people of Baringo South Constituency and is therefore much welcome to the residents of Mukutani Ward and should be allowed to proceed as directed and this petition should be dismissed in the interest of the public as stopping the implementation of Gazette Notice No, 15341 at this stage will be highly prejudicial IIChamus community who are marginalized.

### **Response by 1<sup>st</sup> to 11<sup>th</sup> Interested Parties**

17. The 1<sup>st</sup> to 11<sup>th</sup> interested parties filed a replying affidavit sworn by Eng. Renson Kiole Parkei on his own behalf and on behalf of the rest of the Interested Parties in opposition to the Petitioner's Application for conservatory orders dated 3<sup>rd</sup> December 2024.
18. He avers that the Petitioner's Application for conservatory orders is baseless and premised on falsehoods as the circumstances along the Tiaty or Baringo boundary have not changed up to date since the setup of Mukutani Administrative unit within Baringo South Constituency by the Cabinet Secretary for Interior and National Administration.
19. That the Petitioner's allegations on anticipated potential blood violence and clashes among the communities on account of creation of the Mukutani Sub County were merely speculative as none has happened and the area enjoy relative peace and there is therefore no urgency in the application; that the aim and purpose for establishing Mukutani sub county within Baringo south Constituency is to bring and enhance access to government services and not stir up communal hostilities or alter constituency boundaries.
20. That the Petitioner's misrepresentation of the self-evident objective in putting up Mukutani sub county administrative unit, is a deliberate scheme to hoodwink and mislead this Honorable Court into issuing orders with effect of perpetuating systemic and historical marginalization of the minority Ilchamus community. That the Petitioner's allegation that Mukutani fell within Tiaty constituency is factually incorrect as Mukutani is both an electoral and administrative unit within Baringo South constituency as evidenced by the census report annexed to the Interested Parties' Application dated 12<sup>th</sup> December 2024.
21. That as matter of fact, the Independent Electoral and Boundaries Commission (IEBC) itself had, during the last general elections of 2022, placed Mukutani as an electoral unit within Baringo South Constituency and avers that the Petitioner's Application is founded on miasma of confusion as to the role of IEBC under Article 89 of *the Constitution* of Kenya which is limited only to review of names and boundaries of constituencies and not creation of sub-counties and there is a stark distinction between a constituency and a sub county, and IEBC plays no role whatsoever in the putting up of the latter.
22. That Furthermore, the petitioner's averments that public participation is needed before forming national government administrative units manifest gross misapprehension of the no brainer provisions of Section 14 of the *National Government Co-ordination Act*, Chapter 127, laws of Kenya. He avers that the cabinet secretary only requires the approval of the president in establishing sub counties.



23. That the Petitioner's Application does not meet the principles for grant of conservatory orders thus unmerited, incompetent, bad in law and dead on arrival on grounds that in the unlikely event the application is allowed, it will not serve the purpose of enriching constitutional values of dignity, equity and human rights as the orders sought will be entrenching the further segregation and marginalization of the minority Ilchamus community and will not promote the enjoyment of rights to greatest extent possible by the minority Ilchamus community as access to essential government services by the community shall be hampered.
24. He avers that Ilchamus community lack political representation due to their small population and the established Mukutani Sub county administrative unit serves to bring governance structures closer to them whilst the Petitioner's Application seek to reverse this much awaited relief by the community to participate in governance and access critical public services; that public interest in the instant matter dictates that the Ilchamus community be allowed to access government service and participate in governance of public affairs through the established Mukutani Sub county in Baringo Constituency.
25. That presently there being no real and imminent danger as to escalation of hostilities among the communities within Tiaty/Baringo boundary, the denial of conservatory orders will not render the substratum of the petition nugatory as the complained against actions by the Petitioner are reversible at the conclusive meritorious determination of the petition. He further avers that the petition and application is subjudice as it substantially relates to Milimani High Court Constitutional Petition No. E064 of 2021 wherein same issues involving the same Respondents is being heard by a sister court of equal, concurrent and competent jurisdiction.
26. That in view of the pending Milimani Constitutional Petition No. E064 of 2021, this Honorable Court ought to refuse the grant of conservatory orders as doing so might lead to inconsistent orders thereby subjecting itself to judicial embarrassment and waste of precious judicial time and resources. The application was canvassed by way of written submissions.

### **Petitioner's Submissions**

27. In respect to prayer for conservatory orders pending the hearing and determination of the petition herein, the petitioner submits that this court derives authority to uphold and enforce the Bill of Rights under Article 23 of *the Constitution* and can issue conservatory orders in constitutional petitions brought under Article 22 and *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) Rule 23, as rightly emphasized by the court in *Malua v Yatta & 3 others (Constitutional Petition 1 of 2021)* [2023] KEELC 16713 (KLR) (28 March 2023) (Ruling).
28. Counsel submits that in the case of *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (2017) eKLR and from various authorities of the Courts, the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following: -
  - a. An Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
  - b. whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - c. The court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.



- d. whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
29. In respect to prima facie case, counsel submit that the court needs to consider whether the Petitioner has established a prima facie case to warrant interim orders of Protection in order to secure the substratum of the suit and not to render the petition herein nugatory and become a mere academic exercise and submit that the disputed decision inter alia purports to relocate Mukutani subcounty from Tiaty Constituency to Baringo South Constituency and the decision is already in force having been published on 22<sup>nd</sup> November, 2024; and the creation and relocation of the sub- county and sub-locations is a public venture which affects the public and more particularly those residing in the affected Mukutani sub-county and in absence of the interim conservatory orders of protection, the instant petition shall be rendered nugatory as various key irreversible decisions shall be made which will largely affect the Petitioner and the residents of Mukutani Sub-county and its sub-locations.
30. On the issue of public interest, counsel submit that public interest lies in favour of issuance of conservatory orders and restates averments already captured above; and further submit that the court ought to intervene by exercising its checks and balances against the excesses of the 1<sup>st</sup> Respondent which has purported to use administrative process to extend its powers.
31. In conclusion, counsel for the petition submit that public interest would be greatly jeopardized and compromised should the court decline to grant the interim orders to preserve the substratum of the suit as irreparable harm will be caused to the public and restated reasons why interim orders should issue as follows: -
- a. The Petitioner is aggrieved that the 1<sup>st</sup> Respondent has given itself powers and a mandate unknown in law by purporting to alter boundaries Mukutani sub-county and by extension Tiaty Constituency that are outside its control.
- b. The 1<sup>st</sup> Respondent must be conscious of the vital limits on its authority and *the Constitution's* design to conduct a sensitization exercise involving the affected citizens about the relocation from their sub-county to another Constituency. It requires community participation. That does not in any way take away the cabinet secretary's power to create new administrative units nor does it amount to judicial interference with the doctrine of separation of powers.
- c. The importance of Article 10 on public participation or stakeholders' engagement at the very least and conformity to the requirements of Article 47 of *the constitution*.
- d. The import of the 1<sup>st</sup> Respondent's decision without first engaging in public participation was unconstitutional and in violation of articles 1, 2, 6(2) 10, 19, 20, 21, 22(1), 47, 73(1), 174, 232, 258 and 259 of *the Constitution*.
- e. The alteration or establishment of administrative boundaries by the 1<sup>st</sup> Respondent is not an internal operational decision; it is an executive decision in exercise of executive powers which is regulated by law and *the Constitution*.
- f. That the balance of convenience lies in granting of the orders sought as its failure will result in great prejudice to the public and public interest.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions**

32. On whether the Petitioner/Applicant has established a prima facie case, counsel submit that the answer is to the negative as by issuing Gazette Notice No. 15341 dated the 22<sup>nd</sup> November, 2024,



- the 1<sup>st</sup> Respondent exercised the powers given to it under Section 14 of the *National Government Co-ordination Act* by establishing an administrative unit known as Mukutani Sub County with its headquarters at Mukutani with the aim of bringing national government services closer to the residents of the area but also for better co-ordination of national government functions within that area.
33. Counsel further submits that the 1<sup>st</sup> Respondent via Gazette Notice No.' 15341 dated the 22<sup>nd</sup> November, 2024, did not encroach on the functions of the Independent Electoral and Boundaries Commission as provided for under Article 89 of *the Constitution* of Kenya, 2010, as alleged by the Petitioner/Applicant. That the 1<sup>st</sup> Respondent's function under Section 14 of the *National Government Co-ordination Act* to establish administrative units is separate and distinct from the functions of the Independent Electoral and Boundaries Commission as provided for under Article 89 of *the Constitution* of Kenya to review electoral boundaries and electoral units; and it is very clear from the provisions of Article 89 (2) of *the constitution* which provides for review of the number, names and boundaries of wards periodically and the 1<sup>st</sup> Respondent through Gazette Notice No. 15341 dated 22<sup>nd</sup> November 2024 has neither reviewed the names nor boundaries of constituencies and or wards.
34. That the Petitioner/Applicant has further raised an issue that alteration of the said boundaries by relocation of Mukutani Sub County from Tiaty to Baringo South Constituency risks creating distress, unnecessary tension and conflict among the people of Tiaty and Baringo South area who have had major security Challenges. However, the Petitioner/Applicant has failed to substantiate this allegation. That bringing government services closer to the people shall in no way create tension and/or conflict but on the other, shall help resolve any conflicts that may be existing and in any event it is also the mandate of the 1<sup>st</sup> Respondent to come up with ways of solving any conflicts in any part of the county.
35. Counsel submit that granting the orders as sought by the Applicant will only delay enjoyment of the national values by the people of Kenya as provided by Article 10 of *the constitution* more particular the sharing and devolution of power, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized and good governance which was the aim of Gazette Notice No. 15341 dated 22<sup>nd</sup> November 2024 and no evidence has been adduced to proof that through Gazette Notice No. 15341 dated the 22<sup>nd</sup> November, 2024 the 1<sup>st</sup> Respondent violated any constitutional provisions and urged this court to find that the Applicant has failed to substantiate any of the allegations and/or any violations of rights and therefore no deserving of the orders sought and therefore pray that the Application may be dismissed with costs.

#### **Submissions by 1<sup>st</sup> to 11<sup>th</sup> Interested Parties**

36. In respect to application for conservatory orders they submit that it must meet the settled law on the enabling principles for grant of conservatory orders as espoused in Board of Management of Uhuru Secondary School v City County Director of Education, Duncan Juma & Teachers Service Commission [20151 KEHC 2174 (KLR)].
37. On whether the Petitioner has demonstrated an arguable prima facie case with likelihood of success, they submit that Petitioner's Application is non-starter because it is founded on non-factual and false averments regarding the established Mukutani sub-county as an administrative unit within Baringo South Constituency; that prior to its elevation to a sub-county vide Gazette Notice No. 15341 dated 22<sup>nd</sup> November 2024, Mukutani was a division recognized administratively within Marigat Sub-county as reflected in the 2019 Kenya Population and Housing Census at page 7 of the census report; Makutani as one of the 3 divisions within marigat subcounty and not in Tiaty East Sub-county and gazettelement of the Mukutani sub-county as an Administrative unit within Baringo South Constituency by the



Cabinet Secretary for Interior and National Administration was in tandem with the Census Report for the year 2019 which has never been challenged and gazettement was in line with the provisions of Section 14 of the *National Government Co-ordination Act*, Chapter 127, laws of Kenya and public participation is not a requirement under Section 14 of the *National Government Co-ordination Act*, Chapter 127, laws of Kenya thus an imagination of the Petitioner.

38. That to further fortify the position that Mukutani Sub- County is not found in Tiaty Constituency, they submit that the Independent Electoral and Boundaries Commission (IEBC) which is in charge of establishing constituencies and ward boundaries, placed Mukutani as an electoral unit within Baringo South Constituency as evidenced by the list of registered polling stations published by the IEBC during the 2022 general elections.
39. And submit that the petitioner did not raise any objection when IEBC placed Mukutani as an electoral unit within Baringo South Constituency during the 2022 general elections and objection raised now is grand scheme of boundary shifting and name changing of the areas domiciled by the Ilchamus community in order to suppress their inherent right to self-determination and political representation and this petition is sub judice as Ilchamus community boundary issues are already pending before the High Court in Milimani High Court Constitutional Petition No. E064 of 2021 and the Petitioner ought to have sought Joinder and present his case. That set up Mukutani Sub County as an administrative unit within Baringo South Constituency is meant to realize and promote the rights of the ilchamus community which has been systemic and historically marginalized; and grant of conservatory order will curtail and further perpetuate the marginalization of the Ilchamus community.
40. Further that the community has suffered perennial violation of their fundamental rights including but limited to lack of political representation, unconstitutional invasion of their homes, torching down of schools, hospitals and other essential public utilities, indiscriminate killings and as such, they submit that the preservation of constitutional values and rights lies in the refusal to grant the conservatory orders sought by the Petitioner.
41. They restate their averments and submit that there is no change of circumstances on the ground and the Application has therefore been overtaken by events and the court's limited resources should be directed to the expeditious determination of the Petition and submit that the public interest is better served by allowing the impugned gazette notice to stand so that the Ilchamus community can access National government services through the established Mukutani sub county and prayed that the petitioner's application dated 3<sup>rd</sup> of December 2024 be dismissed with costs.

#### **Submissions by 12<sup>th</sup> & 13<sup>th</sup> Interested Parties**

42. The 12<sup>th</sup> and 13<sup>th</sup> interested parties submit that the issue for determination is Whether the Petitioner/ Applicant's has met the conditions requisite for the grant of conservatory orders and submit that conditions requisite for the grant of conservatory orders have developed over the years; they submit that this petition is brought in the public interest and quoted the definition of public interest in Black's Law Dictionary, 9th Edition defines public interest as hereunder :-

“...the general welfare of the public that warrants recognition, and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation”. In litigating on matters of “general public importance”, an understanding of what amounts to ‘public’ or ‘public interest’ is necessary. “Public” is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than



private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land.”

43. They further submit that the petitioner is properly before court as provided by Article 258 and 22 of *the Constitution* which gives any person a right to file constitutional petition on own behalf and on behalf of the public and relied on the case of Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR. Further that Article 3(1) assigns an obligation to every citizen including the Petitioner/Applicant the duty to not only respect *the constitution* but also to uphold, and defend it but the respondents have failed by disregarding the views, and interest of the people of Tiaty Constituency and by filing grounds of opposition instead of replying affidavit, the respondents have denied themselves, the opportunity to demonstrate whether there was public participation in order to determine what the public wants; that the 1<sup>st</sup> to 11<sup>th</sup> and 14<sup>th</sup> and 15<sup>th</sup> Interested Parties have not suggested that there was public participation in the creation of Mukutani Sub County. That the only justification by the Respondents for violation of the law, in regards to public participation is that the 1<sup>st</sup> Respondent is empowered to create the Sub-County, by Section 14 of the National Government Ordination Act and 1<sup>st</sup> to 11<sup>th</sup> Interested Parties have averred that public participation is not a requirement and what is required is the approval by the president. They invite the Court to appreciate the decision of Isaac Mugo & 14 others v Fred Okengo Matiang’i, the Cabinet Secretary, Ministry of Interior and Coordination of National Government & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Parties) [2022] eKLR.
44. And even if Makutani is in Baringo south constituency which is denied, it does not diminish the requirement for public participation as stated in the case of Isaac Mugo & 14 others v Fred Okengo Matiang’i, the Cabinet Secretary, Ministry of Interior and Coordination of National Government & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Parties) [2022] eKLR and averment by 14<sup>th</sup> and 15<sup>th</sup> Interested parties that the Petitioner fear loss of voters as the Member of Parliament of Tiaty demonstrates that the Gazette Notice affects Tiaty Constituency and without public participation, the Gazette Notice cannot be rescued.
45. They restate averments in their affidavit and submit that the establishment of Mukutani Sub-county is in violation of Section 14 of The *National Government Co-Ordination Act*, and Section 48 of the *County Governments Act*, No. 17 of 2012 and creation of Mukutani Sub- County, and bearing in mind the provisions of Section 48 of the County Government Act, there is an implication that a Constituency has been created through the back door, and tinkering with the existing polling stations, in this case, Ng’arua Primary, Chemoigut Primary, Sosion, and Katakou, which have been transposed to Baringo South Constituency against the express provisions of Article 89 of *the constitution* of Kenya, 2010.
46. In conclusion, they submit that the conditions requisite for the grant of Conservatory orders have been met by the Petitioner/Applicant to warrant the of the issuance of orders in the subject application and the Respondents have not provided any evidence before this court to counter the assertions made in the Application.

#### **Submissions by 14<sup>th</sup> and 15<sup>th</sup> Interested Parties**

47. The 14<sup>th</sup> and 15<sup>th</sup> interested parties on their part submit that the sole issue for determination is whether the Petitioner’s Application meets the threshold for the grant of conservatory orders and in the case of Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & others Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR, the court summarized three main principles for consideration on whether to grant conservatory orders.



48. On prima facie case, they submit that the argument that the Cabinet Secretary for Interior and National Administration has usurped the role of the Independent Electoral and Boundaries Commission (IEBC) by creating an administrative unit Makutani Sub-County which is the foundation of the Applicant's Petition and Application, is fatally misguided, and perhaps even deliberately calculated to mislead this Honourable Court; that IEBC has no role in the creation of administrative units as it is a preserve of the Cabinet Secretary for Interior and National Administration. They submit that in view of the above, the Applicant's Petition has no likelihood of success and cannot therefore be the basis for granting conservatory orders. They relied on the case of *Bundid & another v Ministry of East African Community (EAC), the Asals and Regiona Development & 3 others* (Petition E002 of 2024) [2024] KEHC 3479 (KLR) and submit that the standard has not been met.
49. Further, that the Applicant has not tabled any evidence that, or demonstrated how, his case will be rendered nugatory in the event the orders sought are not granted and allegation that there is imminent violence in Makutani Sub-County on account of the contested gazette notice is unfounded and on the issue of public interest, they submit that public interest favours not granting the conservatory orders sought as doing so would deny the residents of Makutani Sub County essential government services, which services they are entitled to. They prayed for dismissal of Application dated 3<sup>rd</sup> December 2024 with costs.

#### **Application for Transfer of Petition**

50. The 1<sup>st</sup> to 11<sup>th</sup> interested parties filed application dated 12<sup>th</sup> December, 2024 brought under Section 5, 6 and 18 of the *Civil Procedure Act* and Rule 7 (1) and 7(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking to transfer this petition to the High Court at Milimani, Constitutional Division for determination alongside Milimani High Court Constitutional Petition No. E064 of 2021.
51. Grounds of the application are that the Milimani High Court Petition No.E064 of 2021 is already seized of the issues raised in this Petition; that one of the salient issues raised by the applicants in the aforesaid Petition involves the boundaries of Mukutani within the recognized electoral and administrative units established by the IEBC and the Cabinet Secretary, Ministry of Interior and Coordination of National Government and 5 others and further ownership of customary land belonging to the Ilchamus Community.
52. The application is supported by the annexed affidavit of ENG.RENSON KIOLE who swears on his own behalf and on behalf of the other 10 interested parties. They aver that all the Respondents in the instant petition are equally respondents in Constitutional Petition no. E064 of 2021 and the issue herein is already before a concurrent court of competent jurisdiction, and cannot therefore be canvassed before this Honourable Court and it is therefore imperative that this Petition be heard either concurrently with Constitutional Petition no. E064 of 2021 or consolidated with Constitutional Petition no.E064 of 2021 or stayed pending the determination of Petition no. E064 of 2021 to avert the possibility of two conflicting decisions on the same issues so as not to embarrass the court.
53. That the Constitutional Petition E064 of 2021 is scheduled for mention before Mwita, J. on 16 December 2024 for purposes of taking a hearing date. Accordingly, the Petitioners shall have ample time and opportunity to organize their case prior to the hearing date.



## Response to Application for Transfer of Petition

54. In response to the application dated 12<sup>th</sup> December, 2024, the Petitioner filed replying affidavit sworn by Hon. William Kassait Kamket, who avers that all the Petitioners reside in Baringo County and the cause of action arose in Baringo county and on account of existence of a High Court Registry and a High Court Judge at Kabarnet High Court, the instant Petition is before the Appropriate forum whereas Petition E064 is improperly before the High Court at Nairobi, the Nairobi High Court lacks the territorial Jurisdiction to hear and determine both Petitions.
55. Further, that Petition E064 of 2021 itself poses as a constitutional petition whereas it features land and environmental issues of implementation of boundaries, cancellation of titles and registration of Community Land as sought in the amended Petition, which issues ought to be dealt with by the Environment and Land court as the appropriate forum and the two petitions relate to distinct causes of action, parties and different prayers.
56. That the cause of action in Nairobi Petition E064 of 2021 is the Boundary review by the Independent Electoral and Boundaries Commission (IEBC) in the year 2012, which the Petitioners therein allege that during the said boundary review, the commission did not take into account the interests of the Ilchamus Community as per the Judgment of the court dated 18th December, 2006 in Misc. Application No. 305 of 2004. That the Petitioner's claim in Petition E064 of 2021 is majorly against the conduct and/or omission of the defunct Electoral Commission of Kenya or the current Independent Electoral and Boundaries Commission who are not parties in the Instant Petition.
57. That the cause of action in the instant petition exclusively relates to Gazette Notice No. 15341 Vol. CXXVI-203 of 22<sup>nd</sup> November, 2024 and the implication of reorganizing, reviewing and recreating the existing boundary between Tiaty and Baringo South Constituencies whereas prayers sought in Petition E064 of 2021 is for creation and delimitation of a new constituency for the Ilchamus community, implementation of protocol on cattle rustling and small arms, representation of the members of Ilchamus community in Baringo County Government, ownership of Ilchamus and demarcation of boundaries of the community land belonging to the members of Ilchamus community and registration of the same as community land and definition with precision the already established administrative boundaries between the areas inhabited by Ilchamus community, pokot community and tugen community.
58. That the Applicants have not demonstrated the similarity in the two petitions for the instant Petition to be transferred, heard together and one decision to be rendered and proceeding with the matter separately will not be prejudicial to the Applicants who are now the interested parties and have an opportunity to address their concerns if any in the instant Petition. That it shall serve the ends of justice if the two distinct Petitions proceed separately.
59. That transferring the instant Petition to Nairobi is highly prejudicial to the Petitioner/Respondent who together with his witnesses reside in Baringo County-Tiaty constituency, would be expensive to ferry witnesses and even attend hearing in Nairobi when required and the overriding objective in civil litigation mandates this Court to ensure just, cost effective and expeditious resolution of disputes and proceedings before it and this shall only be achieved if the suit(s) is prosecuted in Kabarnet. He urged this court to protect his constitutional rights and those of other consumers of the services offered by the Judiciary and allow the petition to proceed in this court.



### **Response by 12<sup>th</sup> and 13<sup>th</sup> Interested Parties**

60. In response to the application dated 12<sup>th</sup> December, 2024, the 12<sup>th</sup> and 13<sup>th</sup> interested parties filed a replying affidavit sworn by Gideon Kipon the 12<sup>th</sup> Interested Party herein, and a member of Professional, and Community Participatory Association, and with authority from the 13<sup>th</sup> Interested Party who is a member of the County Assembly of Baringo representing Tangulbei/ Korossi ward.
61. That the Professional and Community Participatory Association comprises of members who are residents of Tiaty Constituency representing the views of Tiaty People and they aver that the application dated 12<sup>th</sup> December, 2024 seeking to transfer the petition herein to Nairobi, on account of existence of Petition E064 of 2021 is lacking in merit for the reasons Petition E064 of 2021 is a discombobulated land matter masquerading as constitutional matter.
62. That Petition E064 of 2021 seeks in part from its prayers and not in specify words, a declaratory order, that all parcels of land, that were curved out of Ilchamus Community land and private titles issued were illegally allocated; An Order of return of land parcels, that belonged to Ilchamus Community, and cancelation of titles deeds that were issued to private individuals; An Order compelling the demarcation of boundaries and registration of community land belonging to the Ilchamus people and issues of Historical land injustices among other land related prayers.
63. That consequently, land related conflicts cannot be handled within the arena of this Honourable Court, or any other Court other than the Environment and Land Court. He avers that this is not a land Court and to have this matter transferred to Nairobi to be heard with Petition E064 of 2021 would amount to this Honourable Court abdicating its duty.
64. That the only prayers, that may be relevant to this petition, when juxtaposed with Petition E064 of 2021 are prayers seeking creating of a constituency and administrative boundaries between Ichamus, Pokot and Tugen of Baringo, which Petition E064 of 2021, at prayer (h), the Petitioners are seeking an Order compelling the Cabinet Secretary, Ministry of Interior, to define with precision the administrative boundaries between Ichamus, Pokot, and Tugen of Baringo and prayers (n) and (o) which seek orders directing the IEBC to create a Constituency to be called Ilchamus Constituency whereas the main issue herein is whether the creation of Mukutani Sub county, and Makutani Headquarters, was done in accordance with the pertinent legislation which is in contrast with prayers in Petition E064 of 2021.
65. He further aver that the prayer in Petition E064 of 2021, seeking the creation of a Sub County is overtaken by events, owing to Gazette Notice No. 15341 Vol. CXXVI-203, of 22nd November, 2024, creating of Mukutani Sub county and is no longer an issue for determination in Nairobi; it is now moot and the 1<sup>st</sup> to 11<sup>th</sup> Interested Parties cannot use a moot prayer to persuade this Honourable Court to abscond duty and transfer this matter to Nairobi; and even if the creation of Mukutani Sub county was a result of orders emanating from Petition E064 of 2021, the question as to whether the creation of it was in consonance with the existing laws would have to be determined by a different Court. That even worse, the cause of action both in Petition E064 of 2021 and the Petition herein arose within the jurisdiction of this Court, and it is only the 1<sup>st</sup> to 11<sup>th</sup> Interested Parties who knows why they parachuted their Petition all the way to Nairobi.

### **Submissions by 1<sup>st</sup> to 11<sup>th</sup> Interested Parties**

66. The 1<sup>st</sup> to 11<sup>th</sup> interested parties submits that issues to be determined by this court are whether a case for subjudice has been made and in the alternative, whether this Instant Petition ought to be consolidated/concurrently determined with constitutional Petition No. E064 of 2021; and submit that



pursuant to Section 6 of the Civil Procedure Act(LOK),the instant Petition suffers from subjudice as the preceding Milimani Constitutional Petition No. E064 of 2021 directly and substantially involves the same issues and the Respondents herein are exactly the same Respondents in the Milimani Petition; that the remedies sought are broadly similar as well and the Petition is before a sister court of equal, concurrent and competent jurisdiction.

67. That as a matter of fact, the 12<sup>th</sup> and 13<sup>th</sup> Interested Parties in their submissions dated 14<sup>th</sup> January 2025 at paragraph 11 concede that indeed the issues and prayers in the instant petition and those in Milimani Constitutional Petition No. 064 of 2021 are similar as they relate to the creation of constituency and administrative boundaries between the Ilchamus, Pokot and Tugen of Baringo.
68. That additionally, the Petitioner in blowing hot and cold, makes the very same admission in its submissions dated 6th February 2025 at paragraph 7 that the Milimani Constitutional Petition No. E064 of 2021 is challenging the 2012 boundary review by the Independent Electoral and Boundaries Commission (IEBC) which review did not factor in the Ilchamus community and on the other hand, the Petitioner is challenging the establishment of Mukutani sub county, which Mukutani is domiciled by the very Ilchamus community, for reasons that such establishment is tantamount to alteration of electoral boundaries and usurpation of the IEBC exclusive mandate in determining electoral boundaries.
69. That despite the Petitioner's approbation and reprobation on the similarities of the two petitions in its submissions, which is outrightly unacceptable, the discernable fact is that the two petitions are akin to Siamese twins. That further, through the instant petition, the court is being asked to determine the exact location of Mukutani which question cannot be determined without creating adverse implications on the petition in Nairobi.
70. That moreover, both parties admit that there is long standing boundary issue regarding the Mukutani area which has led to constant attacks, killings and maiming of citizens. Therefore, the facts in the instant petition and that in Nairobi are similar and inextricably intertwined warranting determination by one court not two.
71. They further submit that upon a clear case of subjudice as this, the court is mandated on account of judicial principle and practice to stay the proceedings on account that the matter at hand is already under judgment by another court of competent jurisdiction which was rightly held in Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya 120201 eKLR.
72. They thus submit that this Court, as the subsequent Court, is barred from entertaining this petition and ought to order stay of proceedings pending the determination of the Petition at Milimani High Court Constitutional and Human Rights Division and in the unlikely event that this Honorable Court permits these proceedings to continue, it will be countermanding the salutary aim of the doctrine of subjudice which is to prevent multiplicity of suits. This was explained by the Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) 2020 eKLR.
73. And urge this court to rise to the occasion by downing its tools, save precious judicial time and resources, safeguard its integrity and obviate the oddity of arriving at an inconsistent finding with its sister court at Milimani and in so doing, it will be in consonance with the elementary principle of the subjudice doctrine as stated in Bundotich - v - Managing Director Kenya Airports Authority and another 200712 EA 90(HCK).
74. They further reiterate that the Petitioner's Petition is incurably defective and an abuse of court process by the Petitioner and this Honorable Court has a duty to defend the integrity of its processes as was



observed in *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya*.

75. That whilst the above suffice, it is imperative to rebut the misplaced and misleading argument by the petitioner that the High Court at Nairobi does not have territorial jurisdiction to entertain the instant Petition and the Court sitting at Kabarnet ought to proceed to determine the same and submit that it is preposterous for a court sitting at Karbarnet to be called upon to determine whether a court sitting at Nairobi which has been handling Constitutional Petition No. E064 of 2021 since 2021, and in respect of which no party thereto has contested the jurisdiction of the court, can continue to deal with the matter.
76. That in raising this issue, the petitioner and the 13<sup>th</sup> to 14<sup>th</sup> Interested Parties, are convoluting the issue at hand with the intention of misleading this court into determining issues which it has no power or authority to delve into and relied on the case of *David William Tell v Republic* [20161 eKLR and submit that this Honorable Court cannot determine whether Constitutional Petition No. E064 of 2021 is rightly lodged before Milimani High Court or whether the Milimani High Court has the jurisdiction, territorial or otherwise to determine Petition E064 of 2021.
77. And even if it were to be looked from the Petitioner and the 13<sup>th</sup> to 14<sup>th</sup> Interested Parties' point of view that Milimani High Court has no territorial jurisdiction, they submit that it is trite law that the High Court of Kenya is not bound by territorial boundaries and if any, they are purely administrative and relied on the Court of Appeal (*KOOME, MWERA, SICHALE, ODEK & KANTAI, JJ.A.*) in *Mukazitoni Josephine v Attorney General Republic Of Kenya* [p20151 eKLR
78. That further and without prejudice to the above, the argument that Constitutional Petition No. E064 of 2021 contains a myriad of issues key among them, land issues, is not enough for the matter to be determined in an Environment and Land Court, whether as alleged or at all. That admittedly, Constitutional Petition No. E064 of 2021 is a mixed grill case and the facts in support thereof are intertwined such that it cannot be split among various courts.
79. That accordingly, the argument that the High Court at Milimani properly seized of Constitutional Petition No. E064 of 2021 cannot adjudicate upon consequential or factual questions which on the face of it appear to be within the exclusive jurisdiction of another court, in the same judicial tier would unreasonably emasculate and whittle down the inherent of a court of law to deliver justice without undue regard to technicalities.
80. They further submit that in as much as those issues somewhat appear to be within the jurisdiction of the Environment and Land Court, they are still constitutional matters touching on violation and infringement of fundamental rights and freedoms, hence the High court has concurrent jurisdiction with the Environment and Land Court to entertain the same as was well settled by the court of Appeal in *Leisure Lodges Ltd v Commissioner of Lands And 767 others* [20161 eKLR.
81. Counsel further submit that there is unanimity on the view that pursuant to the incidental concurrent jurisdiction, the High Court and two Equal Status Courts have jurisdiction to hear and determine any additional other issues raised or pleaded in a case which is primarily on their area of specialization even if those issues normally fall outside their jurisdiction as was expressed in *Spinners & Spinners Limited v Spinners & Spinners Limited* [20171 eKLR
82. And besides that, the fact that the Respondents in Milimani constitutional Petition No. E064 of 2021 are national government entities situate and carrying out their operations in Nairobi, the High Court at Milimani has jurisdiction to entertain the matter and the argument by the petitioner that the High



Court at Milimani does not have jurisdiction to entertain matters relating to Baringo is utterly false and unfounded.

83. In conclusion, they submit that the High court at Nairobi has the requisite jurisdiction and the instant petition having been preceded by the Milimani constitutional Petition No. E064 of 2021 is subjudice, and the Petitioner and the 13<sup>th</sup> to 14<sup>th</sup> Interested Parties have not adduced any cogent reasons for this court not to reach this inescapable conclusion.
84. That bearing in mind the command of Article 159 of *the Constitution* of *the Constitution* on just and expeditious disposal of disputes and the need to safeguard the limited judicial resources, they submit that, in the alternative, this Honorable Court order for the consolidation/concurrent hearing of this petition together with the one at Milimani High Court and relied on the Supreme Court Petition No. 14 of 2013 Law Society of Kenya vs Center for Human Rights and Democracy and 12 Others (2014) eKLR to support their case and urged this court to invoke its power under Rule 17 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, to order for the instant petition to be consolidated and/or concurrent heard with Milimani Constitutional Petition No. E064 of 2021 and in the alternative and if the court deems so fit, the instant petition be stayed pending the hearing and determination of the Milimani constitutional Petition No. E064 of 2021.

#### **Submissions by Petitioner on Application for Transfer**

85. On whether the Interested Parties have met the threshold for transfer of the instant suit to Milimani High Court for determination alongside Petition No. E064 of 2021, counsel for the petitioner submit that Jurisdiction is what gives a court power to hear and determine a suit and placed reliance in the locus classicus case of Owners of Motor Vessel “Lilian S” -vs- Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989).
86. Counsel for the petitioner further submit that Order 47 Rule 6 (2) of the Civil Procedure Rules provides that the Court may on its own motion or on the application by any party to a suit and for cause shown, order that a case be tried in a particular place to be appointed by the Court. Provided that in appointing such particular place for trial, the Court shall have regard to the convenience of all parties and of their witnesses and the date on which such trial is to take place and all other circumstances of the case.
87. The petitioner restated averments in response to application for transfer of this petition to Milinani High court constitutional and Human Rights Division and argue that the two Petitions, Kabarnet Petition EO11 of 2024 and Nairobi Petition E064 of 2021 relate to distinct causes of action, parties, both have different prayers and cannot, therefore, be heard together and one decision rendered.
88. Further that Nairobi Petition E064 of 2021 is the boundary review of the Independent Electoral and Boundaries Commission (IEBC) in the year 2012, which the Petitioners therein allege that during the said boundary review, the commission did not take into account the interests of the Ilchamus Community as per the Judgement of the Court dated 18<sup>th</sup> December, 2006 in Misc. Application No. 305 of 2004. That this claim is majorly against the conduct and/or omission of the defunct Electoral Commission of Kenya or the current Independent Electoral and Boundaries Commission who are not parties in the Petitioners suit.
89. That the cause of action in this suit relates to the Gazette Notice No. 15341 of 22<sup>nd</sup> November, 2024 and the implication of reorganizing, reviewing and recreating the existing boundary between Tiaty and Baringo South Constituencies and prayers sought in Petition E064 of 2021 are for creation and delimitation of a new constituency for the Ilchamus constituency, implementation of protocol on



cattle rustling and small arms, representation of the members of Ilchamus community in Baringo County Government, ownership of Ilchamus and demarcation of boundaries of the community land belonging to the members of Ilchamus community and registration of the same as community land and definition with precision the already established administrative boundaries between the areas inhabited by Ilchamus community, pokot community and tugen community.

90. Counsel further submit that the prayers sought in the instant Petition are distinctive as they are for quashing of the impugned Gazette Notice No. 15341 dated the 22nd November, 2024 in its entirety, alternatively an order of certiorari quashing the impugned Gazette Notice No. 15341 dated the 22nd November, 2024 only in so far as it relates to the creation of the proposed Mukutani Sub County and Mukutani Headquarters and for a permanent injunction and in the interest of justice and a matter of convenience for the parties and witnesses the Court finds that the High Court at Kabarnet has the jurisdiction to hear and determine this instant Petition.
91. That suffice to say it is a general principle of the law that every suit shall be instituted in a court within whose local limits the cause of action arose and/or the parties resides or work for gain as can be discerned from paragraph 1 of the Amended Petition E064 OF 2021 and Paragraph 1 of this Petition, all the Petitioners reside in Baringo County and therefore Kabarnet High Court is best suited to hear and determine both cases. As can be gleaned from the pleadings in both Petitions, the cause of action arose in Baringo County which is within the local jurisdiction of Kabarnet High Court.
92. Further that the Applicants have not demonstrated the similarity in the two petitions for the instant Petition to be transferred, heard together and one decision to be rendered and proceeding with the matter separately will not be prejudicial to the Applicants who are now the interested parties and have an opportunity to address their concerns if any in the instant Petition as they have already done through their Replying Affidavit sworn on 27th January, 2025 and submit that the Application lacks in merit and should be dismissed with costs to the Petitioner.

#### **12<sup>th</sup> and 13<sup>th</sup> Interested Parties' Submissions**

93. The 12<sup>th</sup> and 13<sup>th</sup> interested parties filed written submission in opposition to the 1<sup>st</sup> to 11<sup>th</sup> interested parties' application dated 12<sup>th</sup> December, 2024. They submit that Petition E064 of 2021, is a discombobulated land matter, masquerading as a purely constitutional matter. That it seeks in part, from its prayers, and not in specific words,
  - a. A declaratory order, that all parcels of land, that were carved out of Ilchamus Community land, and private titles issued, were illegally allocated;
  - b. An Order of return of land parcels, that belonged to Ilchamus Community and cancelation of titles deeds that were issued to private individuals;
  - c. An Order compelling the demarcation of boundaries, and registration of community land, belonging to the Ilchamus people; and
  - d. Issues of Historical land injustices, among other land related prayers.
94. They submit, that land related conflicts cannot be handled within the arena of this Honourable Court, or any other Court, other than the Environment, and Land Court. That this is not a land Court, and to have this matter transferred to Nairobi to be heard with Petition E064 of 2021, would amount to this Honourable Court abdicating its duty. They rely in Court of Appeal, in the case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR, regarding jurisdiction.



95. They submit, that the only prayers, that may be relevant to this petition, when juxtaposed with Petition E064 of 2021, are prayers seeking creating of a constituency, and administrative boundaries between Ichamus, Pokot and Tugen of Baringo. That at prayer (h), the Petitioners are seeking an Order compelling the Cabinet Secretary, Ministry of Interior, to define with precision the administrative boundaries between Ichamus, Pokot, and Tugen of Baringo. The other prayers in Petition E064 of 2021, are prayers (n and (o) which seek orders directing the IEBC to create a Constituency to be called Ilchamus Constituency.
96. They further submit that the main issue before this Honourable Court, is whether the creation of Mukutani Sub- County, and Makutani Headquarters, was done in accordance with the pertinent legislation, which is in contrast with prayers in Petition E064 of 2021. That it is a question of public participation and compliance with Section 14 of The *National Government Co-Ordination Act*, and Section 48 of the *County Governments Act*, No. 17 of 2012 and has absolutely nothing to do with ownership of land, and issues of historical land injustices.
97. That in any case, the prayer in Petition E064 of 2021, seeking the creation of a Sub County is overtaken by events, owing to Gazette Notice No. 15341 Vol. CXXVI-203 of 22nd November, 2024 creating of Mukutani Sub-County. That in Petition E064 of 2021, it is a question of whether a Sub County should be created or not while in this petition, it is a question of whether the law was followed, in its creation.
98. They submit that, with the issuance of Gazette Notice No. 15341 Vol. CXXVI-203, of 22nd November, 2024, the issue of creation of a Sub County is no longer an issue for determination in Nairobi; it is now moot. That further, Gazette Notice No. 15341 Vol. CXXVI-203, of 22nd November, 2024, is not a result of orders from Petition E064 of 2021, but on the ministry's own volition, and the 1st to 11th Interested Parties cannot use a moot prayer, to persuade this Honourable Court to abscond duty, and transfer this matter to Nairobi and concluded that this court cannot relinquish its jurisdiction by transferring this matter to Nairobi; and if any transfer should be done, then the Nairobi case should be transferred to this Honourable Court and prayed for the 1st to 11<sup>th</sup> Interested Parties' application to be dismissed.

### **Analysis and Determination**

99. I have considered averments by the parties herein and submissions filed and wish to consider the following issues: -
  - a. whether the petition herein is sub judice and ought to be transferred to Nairobi for hearing and determination and
  - b. whether threshold for grant of conservatory orders have been met

(a) whether this petition is sub judice and ought to be transferred to Nairobi for hearing and determination
100. I wish to consider whether the 1<sup>st</sup> to 11<sup>th</sup> interested parties have demonstrated that this matter is subjudice; whether the application has met the threshold as provided for under Section 6 of the *Civil Procedure Act* and should be transferred to Nairobi. The applicants are expected demonstrate that the issue for determination herein is directly and substantially in issue in Petition NO. E064 of 2021 which was filed earlier in Milimani High court constitutional and Human Rights court, whether the matter is in respect of the same parties or between parties under whom they or any of them claim, whether they litigating under the same title and finally whether the court has jurisdiction to grant the reliefs sought.



101. The purpose of Section 6 is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter. It is meant to prevent abuse of the court process and diminish the chances of courts with competent jurisdiction issuing conflicting decisions over the same dispute. Further, the purpose of ensuring that the court handling the other matter is seized with jurisdiction is intended to prevent miscarriage of justice that may result from transferring a suit to a court not seized with jurisdiction.
102. In the case of NAIROBI JUDICIAL REVIEW DIVISION(HCJR/E045/2020): REPUBLIC VS PAUL KIHARA KARIUKI, ATTORNEY GENERAL & 2 OTHERS & LAW SOCIETY OF KENYA, EX PARTE APPLICANT, Justice Mativo had the following to say on sub judice.
- “.....19. In order to check this very problem, there exists the concept of sub judice which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.”
20. In this regard, section 6 of the *Civil Procedure Act* expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
103. The learned Judge further relied on the decision by the Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) where the court had occasion to pronounce itself on the subject of sub judice as follows: -
- (67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.
104. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.



105. From the foregoing, sub judice would apply only if there is identity of the matter in issue in both the suits, meaning that the whole of the subject- matter in both the proceedings is identical. The key words in applying sub judice rule is that the matter in issue is directly and substantially in issue in the previously instituted suit. The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit and when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.
106. The prayers sought in Petition E064 of 2021 are for creation and delimitation of a new constituency for the Ilchamus constituency, implementation of protocol on cattle rustling and small arms, representation of the members of Ilchamus community in Baringo County Government, ownership of Ilchamus and demarcation of boundaries of the community land belonging to the members of Ilchamus community and registration of the same as community land and definition with precision the already established administrative boundaries between the areas inhabited by Ilchamus community, pokot community and tugen community.
107. From the averments and pleadings herein, the petitioner seeks quashing of the impugned Gazette Notice No. 15341 dated the 22nd November, 2024 in its entirety, alternatively an order of certiorari quashing the impugned Gazette Notice No. 15341 dated the 22nd November, 2024 only in so far as it relates to the creation of the proposed Mukutani Sub County and Mukutani Headquarters and for a permanent injunction. The petitioner argues that Makuti falls within Tiaty and not Baringo south constituency and the creation of subcounty administration unit under Baringo south Constituency is taking away Makutani from Tiaty.
108. On the other hand, the 12<sup>th</sup> and 13<sup>th</sup> interested parties argue that Makutani is in Baringo South Constituency and creating the subcounty is intended to bring services closer for the Ilchamus community. They also argue that the Ilchamus community has suffered historically by not benefiting from services from government as it has had only one administrative unit being Marigat.
109. This was confirmed by submissions by 12<sup>th</sup> and 13<sup>th</sup> interested parties dated 14<sup>th</sup> January 2025 at paragraph 11 where they concede that the issues and prayers in the instant petition and those in Milimani Constitutional Petition No. 064 of 2021 are similar as they relate to the creation of constituency and administrative boundaries between the Ilchamus, Pokot and Tugen of Baringo.
110. In submissions, 13<sup>th</sup> and 14<sup>th</sup> interested parties admit that prayer (h) in Milimani constitutional petition No. E64 of 2021, the Petitioners are seeking an Order compelling the Cabinet Secretary, Ministry of Interior, to define with precision the administrative boundaries between Ichamus, Pokot, and Tugen of Baringo which is similar to prayer sought in this petition. And the other prayers in Petition E064 of 2021 are prayers (n and (o) which seek orders directing the IEBC to create a Constituency to be called Ilchamus Constituency.
111. In response to the application for transfer of this suit to Nairobi, the Petitioner argue that Constitutional Petition No. E064 of 2021 is challenging the 2012 boundary review by the Independent Electoral and Boundaries Commission (IEBC) which review did not factor in the Ilchamus community and on the other hand, the Petitioner is challenging the establishment of Mukutani sub county, which Mukutani is domiciled by the very Ilchamus community.
112. Upon considering averments and submissions by parties herein, I note that reliefs sought in Petition No. Eo64 of 2021 are broader but one of the reliefs sought is an order compelling the Cabinet Secretary, Ministry of Interior, to define with precision the administrative boundaries between Ichamus, Pokot, and Tugen of Baringo while in this petition, the petitioner is opposed to creation of proposed



Mukutani Sub County and Mukutani Headquarters. It is therefore clear that the main relief sought in this petition is one of the reliefs sought in petition No. E064 of 2021 being prayer (h).

113. In respect to argument that petition no E064 of 2021 is a land matter disguised as constitutional petition, I note from averments that the matter was scheduled for fixing a hearing date in December 2024 before the High court, a court with concurrent jurisdiction with this court and the matter having been set for hearing, the court must have satisfied itself that it has jurisdiction to hear and determine the issues raised in the petition. Gazette Notice No. 15341 dated the 22nd November, 2024 relate to issue of administrative boundary which is listed among reliefs sought Petition number E064 of 2021 and allowing this petition to proceed independently pose the risk of conflicting orders being issued by the two courts with concurrent jurisdiction.
114. Having found that the main issue for determination in this petition is substantially similar to one of the issues raised in petition No. E064 of 2021, I find this suit sub judice and in my view, this petition ought to be transferred to Milimani High court constitutional and human rights division to be dealt with alongside Petition No. of 2021 which was filed earlier than this petition.
115. Having found this matter is subjudice, I am of the view that prayer for conservatory orders should be dealt with by the court presiding over Petition number E 064 of 2021 to avoid issuance of conflicting orders over the same issue.
116. Final orders: -
  - a. This file is transferred to Millimani Constitutional and Human Right Division.
  - b. To be mentioned by presiding alongside Petition no. E064 of 2021.
  - c. Costs to be in the cause.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 20<sup>TH</sup> DAY OF MARCH 2025.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:

CA Elvis

Kipkoech for Petitioner

Mr. Rotich for Respondent

Ms. Bosire & Ekuru Aukot for interested parties

No appearance for 1<sup>st</sup> to 11<sup>th</sup> Interested parties

No appearance for 12<sup>th</sup> to 13<sup>th</sup> Interested parties

Ms. Mangla H/B for Ms.Adunga

