



**Kamket v Cabinet Secretary, Interior and National Administration & another; Sam & 5 others (Interested Parties) (Constitutional Petition E011 of 2024) [2025] KEHC 8353 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8353 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CONSTITUTIONAL PETITION E011 OF 2024**

**RB NGETICH, J**

**JUNE 12, 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  
HEADQUARTER**

**AND**

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

**BETWEEN**

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



**AND**

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

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

**AND**

**LOURIEN LIMO SAM ..... INTERESTED PARTY**

**CLEMENT LOMARING'ORIA ..... INTERESTED PARTY**

**DANIEL TUWIT LORERIA ..... INTERESTED PARTY**

**COUNTY GOVERNMENT OF TURKANA ..... INTERESTED PARTY**

**NIXON NKOR NKOLONG ..... INTERESTED PARTY**

**WILLY NAALIMO ..... INTERESTED PARTY**

**RULING**

1. The petitioner has moved this court vide a notice of motion application dated 3<sup>rd</sup> December, 2024 brought under the provisions articles 1, 2, 6(2), 10, 11(1), 19, 20, 21, 22(1), 47(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 the following orders:-
  - i. Spent.
  - ii. Spent.
  - iii. Spent.
  - iv. That this Honourable Court be pleased to issue a conservatory order staying the implementation of the impugned Notice No. 2969 dated the 17<sup>th</sup> March, 2022 only in so far as it relates to the creation of Suguta Sub County within Tiaty Constituency and its Headquarters in disputed area known as Kapedo pending the hearing and determination of the petition herein.
  - v. That this Honourable Court be pleased to issue a conservatory order staying the implementation of the impugned Notice No. 2969 dated the 17<sup>th</sup> March, 2022 pending the hearing and determination of the petition herein.
  - vi. Costs shall be in the cause.
2. The application is founded on the grounds that following the gazette notice no. 2969 dated 17<sup>th</sup> March 2022, Suguta Subcounty was formed with its head quarter in Kapedo which is a disputed area/ border town of Tiaty Constituency, Turkana and Baringo Counties.
3. That the creation of Kapedo as Suguta Subcounty Headquarters purports to review reorganize and recreate the existing boundary of Tiaty constituency and resolve a boundary dispute through back door, an act which is ultra vires and offends the statutory provisions of the National Coordination Act, County Government Act as well as Article 89 of the Constitution as alteration of constituency



and electoral ward boundaries falls under the mandate of the Independent Electoral and Boundaries Commission only.

4. That such alteration and or relocation also offends the petitioner's and the residents' of Tiaty constituency right to fair administrative action and legitimate expectation and having Kapedo as Suguta sub-county Headquarters creates distress, unnecessary tension and conflict within the disputed Kapedo area which has been a source of constant and endless conflict for the Tiaty and neighboring Turkana and Baringo counties.
5. That the issue of insecurity within the disputed area has been debated upon by the parliament in the year 2015 recognizing the need for legislative and policy intervention but so far there are no long-lasting solutions to the biasness and partisanship of security law enforcement agencies to foster/improve security in kapedo and therefore Respondent's arbitrary actions shall heighten the persisting tension between the neighbouring counties risking bloodshed and animosity.
6. That by designating Suguta Subcounty and having its headquarters at Kapedo, the Respondent by implication will also be relocating polling stations forming Tiaty constituency comprising of Kapedo primary and Kapedo Bridge polling stations, an act of gerrymandering by the Respondents.
7. That the alteration of boundaries forming constituencies and wards is the mandate 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 and not the Respondent herein.
8. That in so far as the commission has not altered the boundaries of Tiaty constituencies by publishing the alteration in the Gazette, the Gazette Notice No.2969 remains unconstitutional and ultra vires the provisions of section 26 and 48 of the County Government Act.
9. That the purported re-allocation of Suguta subcounty which is in Tiaty Constituency to disputed area in Kapedo will affect various development programs which were implemented in 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.
10. That the 1<sup>st</sup> Respondent's decision further did not allow for meaningful public participation by the residence of the Tiaty constituency in so far as they needed to be involved in all decisions affecting the areas which they occupy and neither did it give reasons for the relocation of Suguta to disputed area contrary the provisions stipulated in the Constitution.
11. That the Petitioner representing over 150,000 residents of Tiaty Constituency has challenged the creation of the administrative units claiming absence of public participation whereas public participation is important in administrative decision of significant impact on the citizens and article 19, 47 and 232 of the Constitution were therefore violated.
12. That the Participation of the people is an expression of the sovereignty of the people as articulated under Article 1 of the Constitution and Article 10 makes the participation of the people a national value that forms part of an expression of that sovereignty. Hence, the participation of the people is an established right in Kenya and one of the cornerstones of our democracy.
13. That if the orders sought herein are granted, the Respondents will suffer no prejudice as the great public interest tilts in favour of the petitioner and the over 150,000 members of the public who are the registered voters of Tiaty constituency and it is therefore in the interest of justice that the operations of the Respondents be halted pending the hearing and determination of the petition.



## RESPONSE BY 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS

14. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed application dated 3<sup>rd</sup> December, 2024 setting out the following grounds: -
- 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; 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. 2969 dated the 17<sup>th</sup> March.2022, 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 has 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/Applicant's Application dated 3<sup>rd</sup> December, 2024 be dismissed with costs to the Respondents.

## RESPONSE BY 1<sup>ST</sup> AND 3<sup>RD</sup> INTERESTED PART

15. The 1<sup>st</sup> to 3<sup>rd</sup> interested parties filed affidavit in support of the petition sworn jointly by Hon. Lourien Limo Sam, Hon. Clement Lomaring'oria and Hon. Daniel Tuwit Loreria who aver that they are Members of County Assembly- Ward Representative (MCA) for Tirioko, Silale and Ripkwo Wards within Kapedo in Tiaty Constituency.
16. They aver that through Gazette Notice No.2969 dated 17<sup>th</sup> March, 2022, the Cabinet Secretary for the Ministry of Interior and National Co-ordination established new administrative units as service delivery co-ordination units to include Suguta Sub County with its Headquarters in Kapedo Town.
17. That the said Gazette Notice seek to resolve the boundary dispute by relocating the polling stations within Tirioko, Silale, and Ripkwo Wards-in Tiaty Constituency to Turkana East Constituency.
18. That there are also established Polling stations comprising of Kapedo primary, Kapau primary school, Akoret, Kongor, Chesawach primary polling station's register of voters eligible to vote within the said polling stations in Tirioko ward. They aver that the Polling stations within Silale Ward include Natan Primary, Toplen Primary, Pklaghit Primary, Acham Polling Station, Sitot Polling Station, Akiriamet Polling Station and Cheparwas Polling Stations. That Ripko Wards is made out of three polling stations comprising of Chesitet Primary, Kapedo Bridge and Kasakaram Primary; that they are before court on their own behalf, of residents and on behalf of registered voters within the aforementioned wards.
19. They aver that the mandate of altering the boundaries of Tirioko, Silale and Ripkwo Wards in Tiaty Constituency is reserved to the Independent Electoral and Boundaries Commission (IEBC) as per article 89 of the *[Constitution](#)* and not the 1<sup>st</sup> Respondent as per the express provisions of Article 89 of the *[Constitution](#)*; that it provides that IEBC has the power to review the names and boundaries of constituencies and wards at intervals and shall review the number, names and boundaries of wards periodically.



20. They aver that Kapedo Town which is now the Headquarter of Suguta Sub-County is a killer border town between Baringo and Turkana counties with the two counties openly laying claim on the volatile border; that there exist a boundary dispute between Baringo [Tiaty] and Turkana communities living on the boundaries of Kapedo-Baringo and Turkana counties with each community and county producing/having different maps to justify the boundaries of the two counties of Baringo and Turkana.
21. That the issue of boundary has been a major cause of the rising dispute between the communities that have over the years led to massive deaths, bloodshed, illegal activities such as banditry and lack of peaceful environment within the residences of Turkana and Baringo Counties and the issue was debated by the Parliament in the year 2015 but the recommendations did not bring any lasting solution.
22. That the alteration of the boundaries to have Kapedo as the Headquarter of Suguta subcounty and relocating polling Stations within Tirioko, Silale and Ripkwo Ward to Tukana East Constituency will only stir violence, which has for years seen thousands of families lose their kin.
23. They aver that neither the Residents of Tiaty Constituency nor the Independent Electoral and Boundaries Commission (IEBC) were involved in the decision that alters the boundaries of their Electoral Wards against Article 89, 10, 47 and 232 of the Constitution and the surveyors from the Ministry of Lands have never been deployed to the volatile area to determine the accurate boundary and put beacons on the ground.
24. That records indicate that Kapedo Primary and Kapedo Bridge Polling stations, vote under Tiaty Constituency whereas the impugned gazette notice seek to designate the polling stations to Turkana East Constituency and the outcome of this petition without the applicants' participation may adversely affect their rights and that of the residences Tirioko, Silale and Ripkwo wards within Tiaty Constituency.
25. That in keeping in mind Article 159 of the Constitution of Kenya 2010, for the promotion of substantial justice without undue regard to technicalities of procedure, it is in the best interest of justice for the entire dispute between the parties to be heard and determined as one whole after hearing all the parties and that no harm shall be occasioned upon the petitioner and/or respondents.
26. The Court directed that the Application be canvassed by way of written submissions.

### **Petitioner's Submissions**

27. The Petitioner submits that the threshold for the grant of conservatory orders is clearly stated in the case of *Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 Others* (2014) eKLR and the case of *Bundid & another v Ministry of East African Community (EAC), the Asals and Regional Development & 3 others* (Petition E002 of 2024) [2024] KEHC 3479 (KLR) (26 March 2024) (Ruling) where the court stated that :-

“Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. ”
28. And submit that the Petitioner's rights are under threat of being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted.
29. The petitioner restated grounds of appeal and averments by the petitioner captured above and cited the case of *Kenya Human Rights Commission vs Attorney General & Another* [2018] eKLR where



the court emphasized that public participation is an essential national value and principle that must be observed by all persons, state organs and public officers in the exercise of their responsibilities.

30. Further that various courts have held that public participation remains a crucial pillar of the 2010 Constitution and what this court seek to establish is whether the people of Suguta sub location within Tiaty Constituency were consulted in reference to the decision to alter administrative boundaries herein by relocating them to disputed Kapedo area/border claimed by Turkana County and Baringo County and largely inhabited by a different sub-tribes and relied on the case of *Olonkishu & 650 others v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 others (Petition 1 of 2022)*[2022] KEHC 14446 (KL,R) (31 October 2022).
31. That establishment of administrative boundaries by the 1<sup>st</sup> respondent is not an internal operational decision ;that it is executive decision in exercise of executive powers which is regulated by law and the *Constitution* as reaffirmed in the case of *Shuri & another v Cabinet Secretary for Interior & National Administration & 4 others (Petition E008 of 2024)* [2024] KEHC 16631 (KLR)(20 December 2024) (Judgment) and failure to subject it to public participation was unconstitutional and in violation Articles 1,2, 6(2) 10, 19, 20, 21, 22(1), 47, 73(1), 174,232,258 and 259 of the *Constitution* and failure to comply is a real threat to their rights as provided for by the *Constitution*.
32. The petitioner restated grounds and averments of the petition and submit that this is a suitable suit in which the court ought to intervene by exercising its checks and balances against, the excesses of the 1<sup>st</sup>Respondent, which it has purported to use administrative process to extend its powers and public interest would greatly be jeopardized and compromised should the court decline to grant the interim orders preserving the substratum of the suit herein.

### **Respondent's Submissions**

33. On whether the petitioner is deserving orders sought, the respondents cited the case of Centre for Rights Education and Awareness (CREAW) & 7 Others =Vs=Attorney General (2011) eKLR, where the court stated as follows: -

“ At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.”
34. That the 1<sup>st</sup> Respondent in exercise of its mandate under Section 14 of the National Government Coordination Act through Gazette No. 2969 dated 17<sup>th</sup> March. 2022 created an administrative unit being Suguta Sub County within Tiaty Constituency and its Headquartered at Kapedo.
35. That the aim of the new administrative unit known as Suguta Sub County was for better service delivery and coordination of national government functions as provided for under Section 14 of the National Government Coordination Act.
36. They submit that the 1<sup>st</sup> Respondent followed the laid down procedure provided for under Section 14 of the National Government Coordination Act, which provide that the Cabinet Secretary may with the approval of the President and by a notice in the Gazette establish anational service delivery co-ordination units and that the same shall accord and respect the county government decentralized units established under Section 48 of the County Government Act.
37. That the 1<sup>st</sup> Respondent decision to establish a new administrative unit is based on the current statistics on population and the proximity of national government services to the people of the area and public



- participation is not anticipated under Section 14 of the National Government Coordination Act as it entails establishing of a new administrative unit and does not in any way affect the already existing ones.
38. They submit that the Petitioner has failed to demonstrate how the establishment of the Suguta Sub County has violated and/or curtailed the enjoyment of rights by the residents of that area. Further that the impugned Gazette Notice was issued on 17<sup>th</sup> March 2022 and the Petitioner/Applicant has failed to provide any evidence to this honourable court if the establishment of the Suguta Sub County, three (3) years down the line, has occasioned any distress and or conflict within the disputed Kapedo area as alleged.
  39. It is their submissions that the 1<sup>st</sup> Respondent in establishing an administrative unit known as Suguta Sub County was not only complying with the provisions of Section 14 of the National Government Coordination Act but also entrenching the national values as provided for under Article 10 of the Constitution which includes sharing and devolution of power, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized and good governance.
  40. They further submit that in no way did the 1<sup>st</sup> Respondent via Gazette Notice No. 2969 dated the 17<sup>th</sup> March 2022 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 functions of the 1<sup>st</sup> Respondent under Section 14 of the National Government Co-ordination Act to establish administrative units are 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.
  41. That it is very clear from the provisions of Article 89 (2) of the Constitution that the Independent Electoral and Boundaries Commission shall review the names and boundaries of the constituencies while Article 89 (2) provides for review of the number, names and boundaries of wards periodically. The 1<sup>st</sup> Respondent through Gazette Notice No.2969 dated 17<sup>th</sup> March 2022 has neither reviewed the names and boundaries of constituencies and or wards.
  42. It is their humble submissions that the Applicant has failed to establish a prima facie case as the Application is based on false averments and mere speculations. Further that there is no prejudice that shall be suffered by the Applicant by the court not granting the orders sought. They further urge this court in considering the Application for grant of conservatory orders ought to be guided by The Supreme court in Civil Application No.5 of 2014 Gatirau Peter Munya=Vs= Dickson Mwenda Kithinji & 2 Others (2014) eKLR.
  43. It is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions that the public interest tilts in favour of not granting the conservatory orders as no case has been established that there is a violation and or threat of violation of rights and or if the said orders are not granted, the Petition shall be rendered nugatory.
  44. They urge this court to find that the Petitioner/Applicant has failed to establish any prima facie case with a likelihood of success and therefore not deserving of any orders at this stage and pray that the Application be dismissed with costs.

#### **Submissions By 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties**

45. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> interested parties submit that Gazette Notice No.2969 seeks to resolve the boundary dispute by relocating the polling stations as captured in their averments under paragraph 7,18,19 and 23 above and restated grounds in support of the petition and their averments. They restate that the new Constitutional dispensation now requires that every decision whether administrative, regulatory or statutory in so far as it affects the lives of the people, must have key component of public participation



- and relied on 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.
46. The interested parties further submit that the Respondents filed Grounds of Opposition in response to the application, and petition contrary to the provisions of Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and as such it is their position that there is no opposition to the application and petition by the Respondents.
  47. Further that over the years, courts have developed and adopted the conditions that must be met for grant of conservatory orders to issue and this petition as indicated therein, is brought in the public interest. That Article 258 of the Constitution provides for the right to institute court proceedings by any person.
  48. They submit that the Petitioner is properly before this court pursuing this petition on behalf of the public whose right is protected by Article 22 and Article 258 which are framed in similar terms vesting an individual(s) with the legal standing to be able to bring before a Court of law a constitutional petition while acting on behalf of another person, and on their behalf and relied on the case of Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR in respect to legal standing.
  49. Further that Article 3(1) of the Constitution assigns an obligation to every citizen including the Petitioner/Applicant to not only respect the Constitution but also to uphold, and defend it. That the Petitioner hold the view that the Respondents have been violating this provision by not fulfilling their obligations, and disregarding the views, and interest of the people of Tiaty Constituency.
  50. The interested parties submit that the question that must be asked is, how public interest can be ascertained without public participation and by filing grounds of Opposition, instead of a Replying Affidavit, as per Rule 15(1), of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; consequently, the Respondent have denied themselves the opportunity to demonstrate whether there was public participation in order to determine what the public wants.
  51. 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 they urge this 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.
  52. That the Ministry of Interior in establishing Suguta Sub County, declared its Headquarters in Kapedo Town but Kapedo Town is a killer border town between Baringo, and Turkana counties with the two counties openly laying claim on the volatile border and the two counties and its residences often fight to have control of the border town. That Consequently, the 1<sup>st</sup> Respondent should have sought the public views from the affected stakeholders before the said establishment of Suguta Sub County with its Headquarters in Kapedo Town.
  53. The interested parties restated that the Gazette notice seek to relocate polling stations as captured in paragraphs 7,18,19 and 23 above and that establishment of Suguta 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 from the foregoing, the creation of Suguta Sub County did not accord



and respect the county government decentralized units established under Section 48 of the County Government Act and rely on the sixth schedule of the Constitution of Kenya 2010.

54. Further that the Respondents should be able to tell this Honourable Court, which Constituency is Suguta Sub-County equivalent to, as demanded by Section 48 of the County Government Act. That the import of Section 48 of the County Government Act is that the boundaries of a certain Sub-County, should be the same as a specific Constituency, and so are the number of people, and polling stations.
55. That with the creation of Suguta 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.
56. That due to the great public interest involved and the far-reaching implications, a decision as in the impugned Gazette Notice, must and should have been subjected to public participation, as it is one of the national values and principles under Article 10 of the Constitution which must be employed by the 1<sup>st</sup> Respondent, in making a decision of such magnitude. That the IEBC should also have been involved and relied on the case of Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR.
57. That 1<sup>st</sup> Respondent acted in violation of Article 10 of the Constitution of Kenya,2010, and Section 14 of The National Government Co-Ordination Act, and Section 48 of the County Governments Act, No. 17 of 2012, in the creation of Suguta Sub-County and that they are likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted and submit that application and petition is unopposed.
58. In conclusion, they submit that the law, authorities cited and legal arguments tendered demonstrate sufficient grounds for the grant of conservatory orders so that the petition herein is not reduced to mere academic exercise and it is therefore just and equitable in light of the foregoing submissions that the orders sought in the application be granted and urged this court to grant the orders sought in the Notice of Motion Application dated 3<sup>rd</sup> December,2024.

#### **Submissions by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Interested Parties**

59. The 4<sup>th</sup> -6<sup>th</sup> interested parties submit that the Application before court dated 3<sup>rd</sup> December 2024 seeks 7 orders but principally orders in the nature of conservatory orders staying implementation of Gazette Notice No 2969 of 17<sup>th</sup> March 2022. That the basis of the prayers is that the creation of Suguta Sub County with headquarters in Kapedo is unlawful as Kapedo is a disputed area. That in the estimation of the Petitioners, the Cabinet Secretary acted unlawfully as he ought to have consulted the Independent Electoral & Boundaries Commission (IEBC) in accordance with Article 189).
60. On their part, the 4<sup>th</sup> -6<sup>th</sup> Interested Parties take the view that the disputed area is and has always been within Turkana County. For this reason, the Respondents did not act ultra vires or unilaterally as their mandate under the National Co-ordination Act includes creation of administrative units for purposes of bringing services closer to the people.
61. Further, the 4<sup>th</sup> -6<sup>th</sup> Interested Parties take the view that the creation of Suguta Sub County with Kapedo as the headquarters has already helped the residents of the region to access government services hence it is an act that has led to realization of the rights under the Constitution for the people of the affected area. It is averred that if this court grants the proposed orders, it will be clawing back on the realization of these rights. This being the case, and there being no averment that there are people or



groups that have been so denied, then the court must presume legality and legitimacy and decline to grant the orders sought.

62. That it is also important to note that the 4<sup>th</sup> -6<sup>th</sup> Interested Parties have raised the question of Article 188 of the Constitution on delimitation of the boundaries between Counties. It is the position of the 4<sup>th</sup> -6<sup>th</sup> Interested Parties that the Petition is an attempt by the Petitioners to delimit the boundary in the absence of input by both houses of parliament as required by Article 188. This being the case, the Petition should be dismissed as the court lacks jurisdiction.
63. The 4<sup>th</sup> -6<sup>th</sup> Interested Parties further submit that contrary to the allegations of the Petitioners that the Gazette Notice No 2969 of 17<sup>th</sup> March 2022 is a back door alteration of the boundary, the objective of the Petition is to declare a part of Turkana County as being part of Baringo which is alteration of boundaries which would ordinarily require intervention by both houses of Parliament per Article 188.
64. They submit that based on the foregoing, this court cannot make declarations whose effect is to delimit county boundaries. That at the time of creation of the counties under the 2010 constitution, reliance was placed on the Districts and Provinces Act No. 5 OF 1992 and more importantly by the time the decision to settle on the 47 counties was made, different proposals had been made to the CKRC and the 47 was the most appropriate starting point subject to the changes that would be made in accordance with Article 188.
65. That based on the above, they submit that on this point, this court ought to down its tools for want of jurisdiction. They rely on the widely cited decision of Owner of the Motor Vessel Lillian “S” v Caltex Oil (Kenya) Ltd 1989 KLR 1.
66. Further that the purpose of this is to ensure wise utilization of scarce judicial resources and also ensure that the specialized bodies of government with mandate to undertake such responsibilities are allowed the time to undertake their legal/constitutional mandate. For this position they urge the court to consider the decision made in International Centre for Policy and Conflict and 5 Others v The Hon. Attorney-General & 4 others [2013] eKLR.
67. They urge the court to dismiss the application as the Petitioner’s Application misapprehends the nature and purpose of conservatory orders and it fails to appreciate the object of conservatory orders and also fails to align with the principles of granting of conservatory orders. They urge the court to decline the invitation to grant orders that do not uphold the rule of law and constitutionalism.
68. On the issue of costs, they submit that it is always the principle, costs are at the discretion of the Court and usually follow the event as captured under Section 27(1) of the Civil Procedure Act. They pray that the Court dismisses the Application and grants costs to the 4<sup>th</sup> -6<sup>th</sup> Interested Parties.

### **Analysis and Determination**

69. I have considered averments herein and submissions filed and wish to consider whether the petitioner has demonstrated grounds for grant of prayers sought. The principles guiding grant of conservatory orders in Kenya are well settled. The Supreme Court in Civil Application No 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others discussed, at paragraph 86, the court stated as follow concerning the nature of conservatory orders:-

- (86) Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions,



linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay.

70. 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 as follows:-
- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.
  - b. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
  - c. The public interest must be considered before grant of a conservatory order.
71. Conservatory orders therefore are aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. Given the interlocutory nature of conservatory orders, it is often argued that there is need for the court to exercise caution when dealing with any request for such prayers the rationale being that, matters which are the preserve of the main petition ought not to be dealt with finality at the interlocutory stage.
72. On whether the applicant has established a prima facie case, it need not be a case which must succeed at the hearing of the main case. It is enough for the applicant to demonstrate that arguable issues have been raised and, in this case, arguable constitutional issues. The applicant’s argument is that the 1<sup>st</sup> respondent did not conduct public participation before deciding to create Suguta subcounty with its headquarters in Kapedo town which is an area claimed by both the residents of Turkana and Baringo county and it is an area prone to violence and therefore contravened the constitutional requirement for public participation. The petitioner further argue that the creation of the subcounty moved polling stations from Tiaty constituency to Turkana and it therefore purport to review reorganize and recreate the existing boundary of Tiaty constituency and resolve a boundary dispute through back door, an act which is ultra vires and offends the statutory provisions of the National Coordination Act, County Government Act as well as Article 89 of the *Constitution* as alteration of constituency and electoral ward boundaries falls under the mandate of the Independent Electoral and Boundaries Commission only.
73. Further that the creation of the subcounty creates distress, unnecessary tension and conflict within the disputed Kapedo area which has been a source of constant and endless conflict for the Tiaty and neighboring Turkana and Baringo counties.
74. On the other hand, the Respondents argue that Article 89 (2) of the *Constitution* gives the Independent Electoral and Boundaries Commission the mandate to review the names and boundaries of the constituencies and under Article 89 (2) to review the number, names and boundaries of wards periodically and the 1<sup>st</sup> Respondent through Gazette Notice No.2969 dated 17<sup>th</sup> March 2022 has neither reviewed the names and boundaries of constituencies and or wards.
75. Prima facie case does not necessarily mean raising of issue that will succeed in the main suit but arguable issues. I am aware that I must warn myself against determining issues which should be reserved for the main petition at this stage.
76. As to 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, I note of the fact that the application/petition



is hinged on the allegation on violation of inter alia; articles 1,2,6(2),10,11(1),19,20,21,22(1), 47,73(1), 153,154,174,232,258(1) and 259(1)(b) of the Constitution. It is trite that the Constitution being the supreme law of the republic, the same binds all persons and all state organs at both levels of government. As such, it follows that its provisions must always be upheld.

77. Consequently, every member of the public whether individually or collectively is enjoined to respect, uphold and defend the Constitution. See *Law Society of Kenya v Officer of the Attorney General & another; Judicial Service Commission (Interested Party)* [2020] eKLR. In my view, it is critical that if there is any allegation however slight it may be in relation to violation of the Constitution, then the same must be checked and rectified if need be. I am however of the view that this can fully be determined upon examining the merits of the issues raised upon hearing of the petition. In view of the above, upon considering averments and submissions by parties herein, I am of the view that prima facie case has been established.

#### **(b) Whether the petition may be rendered nugatory**

78. I note that the petitioner and the 3<sup>rd</sup> parties are not against creation of a subcounty but their argument is that its headquarters is Kapedo an area claimed by residents of Turkana and Baringo counties and prove that it is an area which is prone to violence; further that some polling stations have been relocated to Turkana but I am however of the view that this is an issue for determination in the main petition. I further take note of the fact that Gazettement of the subcounty by Gazette Notice No 2969 was done on 17<sup>th</sup> March 2022. I also note that the petitioner has not demonstrated that the creation of its headquarters in Kapedo town has caused unrest and conflict nor any prejudice may be occasioned during the pendency of this petition. In view of the above, I find that the petitioner has failed to demonstrate real danger or prejudice that may be occasioned if conservatory orders are not issued pending determination of this petition.

#### **(c) Public interest**

79. On public interest test, the applicant has argued that the public were not involved before creating Suguta sub county with its headquarters in kapedo which from petitioner's and 1<sup>st</sup> to 3<sup>rd</sup> interested parties is a disputed area. In the averments e they have not indicated that they are against creation of subcounty but location of its headquarters and there is no doubt that the creation of subcounty as argued by the respondents and 4<sup>th</sup> to 6<sup>th</sup> Interested Parties will take government services closer to the people. Besides arguing that the issue was not subjected to public participation, the applicant argues that a constituency has been created through back door and the polling stations have been relocated to Turkana which is denied by the respondents and will therefore be an argument in the main petition. In respect to public participation, the respondents argue that under Section 14 of The National Government Co-Ordination Act, the minister does not need to subject their decisions to public participation. This is again a matter for argument in the main petition. Considering the fact that creation of administrative units closer to the people comes with benefit of government services closer to the people, I am of the view that public interest tilts in favor of not granting conservatory orders. In view of the above, I decline to grant conservatory orders sought.

#### **Final orders:-**

- 80.
1. Application dated 3<sup>rd</sup> December 2024 is hereby dismissed.
  2. Costs to the Respondents.



**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT ELDAMA RAVINE HIGH COURT (SUB-REGISTRY) THIS 12<sup>TH</sup> DAY OF JUNE 2025.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Mr. Ekuru Aukot alongside Ms Bosire for 4<sup>th</sup> to 6<sup>th</sup> Interested Party.

No appearance for 1<sup>st</sup> to 3<sup>rd</sup> Interested Party.

No appearance for 1<sup>st</sup> & 2<sup>nd</sup> Respondent.

No appearance for Petitioner.

CA, Karanja.

