



**Ndirangu & 7 others v County Government of Nyeri (Constitutional
Petition E017 of 2024) [2025] KEHC 8212 (KLR) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CONSTITUTIONAL PETITION E017 OF 2024**

DKN MAGARE, J

JUNE 11, 2025

**IN THE MATTER OF THE BILL OF RIGHTS
UNDER ARTICLE 22 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE IMMINENT THREAT OF VIOLATION OF ARTICLES
3(1) & (2), 10, 22, 23(3), 27(1), 43(1), 47 AND 196 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE EXECUTIVE ORDER BY THE NYERI
COUNTY EXECUTIVE COMMITTEE MEMBER FOR TRANSPORT,
PUBLIC WORKS, INFRASTRUCTURE AND ENERGY DATED 4.11.2024**

AND

**IN THE MATTER OF 2NK SACCO LTD, FOUR NTE SACCO LTD, NYENYA SACCO LTD,
3NCK SACCO LTD, NIM SACCO LTD, NYENA SACCO LTD, GAKANANGO SACCO LTD**

BETWEEN

**PETER THEURI NDIRANGU 1ST PETITIONER
JAMES KARIUKI KAHIRO 2ND PETITIONER
WILFRED K. DANIEL 3RD PETITIONER
PETERSON NDUNGU WACHIRA 4TH PETITIONER
CHARLES KARIUKI MUCHIRI 5TH PETITIONER
RICHARD NJENGA WAWERU 6TH PETITIONER
JUSTUS GITAHU NDEGWA 7TH PETITIONER
CHARLES THUMBI 8TH PETITIONER**

AND



JUDGMENT

1. The Petition dated 12.11.2024 sought the following reliefs:
 - i. A declaration that the County Government of Nyeri County Executive Committee Member Transport, Public Works, Infrastructure and Energy order dated 4.11.2024 addressed to the PSV Secretariat and all compliant SACCOs relating to relocation to the newly designated operating and parking spaces was not made in accordance with the provisions of the Constitution of Kenya 2010 and the Fair Administrative Action Act and is unconstitutional as it ignored public input or the Petitioner's input.
 - ii. A mandatory order restraining the Respondent through its officials, servants, or agents from implementing the Executive Order dated 4.11.2024.
 - iii. An Order directing the Respondent to amend/rescind/withdraw the executive order dated 4.11.2024 forthwith.
 - iv. Costs
2. The Petition is premised on the grounds in the Petition as well as the supporting affidavit sworn by James Kariuki Kahiro sworn on 12.11.2024. The Petitioners, were Chairpersons of various matatu Saccos named in the petition, that is, 2NK Sacco Ltd, Four NTE Sacco Ltd, Nyenya Sacco Ltd, 3NCK Sacco Ltd, NIM Sacco Ltd, Nyena Sacco Ltd, and Gakanango Sacco Ltd. They challenged an Executive Order dated November 4, 2024, on several grounds. It was their case that the order was issued without their proper involvement, in violation of Article 10 of the Constitution. This article, they contended emphasizes the principles of public participation and accountability. They further stated that the executive order contravened Section 5 of the Fair Administrative Action Act. They posited that the order poses a threat to the established operations of the matatu industry.
3. Moreover, the Petitioners claim that the order infringed upon their fundamental rights and freedoms as guaranteed under Articles 22, 27(1), and 43(1) of the Constitution. They expressed concern that the implementation of the order will lead to the closure of their businesses, thereby undermining their right to a decent livelihood. Additionally, they argue that they have outstanding loans and other financial obligations that would be negatively impacted if their operations are disrupted. They urged the court to allow the petition.
4. The Respondent filed a detailed Replying Affidavit sworn by Benjamin Gachichio on 21.11.2024. He stated that the Petitioners were involved in the Field Marshall Muthoni Kirima Transport Terminus Project from its inception in 2019. He contended that despite their involvement, they did not clearly specify which of their views the Respondent ignored. He further continued that in line with its integrated development plan and Section 36 of the Urban Areas and Cities Act, the County Government of Nyeri began preparing a digital topographic mapping plan for the county in May 2015.
5. They stated that the County Government consistently held public participation sessions for the project. The project's main goal was to decongest Nyeri Town CBD. It was their case that the representatives of the Petitioners, including some Saccos, attended these meetings. Stakeholder meetings took place on April 25, 2023, and July 13, 2023, with the President of the Republic launching the project on August 7, 2023. He thus maintained that the petitioners were not strangers in the new Canaan they were going to.



6. It was their case that some Petitioners even displayed their vehicles at the new terminus on the day of the launch. Furthermore, on November 22, 2023, the Petitioners requested a postponement of the relocation until January 2024, which the Respondent granted. Finally, they stated that the classification of routes involved no discrimination.

Submissions

7. The Petitioners filed their submissions on 17/3/2025, asserting that the Petition raised significant constitutional issues under Articles 10, 27, 40, 43, and 47 of the Constitution. In support of their arguments, they cited, among others, the cases of *Minister of Safety & Security v Luiters* (2007) 28 ILJ 133 (CC) and *Munene v Director of Public Prosecutions & 3 others* (2023) eKLR. They contended that, based on these authorities, the Court's primary concern should not be whether the constitutional issues raised are likely to succeed, but rather that such issues have been legitimately and substantially presented for consideration. This was a difficult postulation given that this was a final determination, where success was paramount.
8. They posit that they have shown through their petition that they have a purely constitutional matter that ought to be heard. It was their view that they have been in the business park for over 50 years and the new terminal has no business prospect. There was no research attached or even anecdotal evidence to that effect. It is their case that they have been close to the CBD for the last 50 years and have built businesses and good will. This was indicated to be in contravention of Article 43(1) and 40 of the *Constitution*.
9. The Petitioners submitted that the Respondent abrogated Article 10 and 296 of the *Constitution* on public participation as their views were not considered. Further, that the decision was discriminatory as they were being moved to an area without prime income. They cited Article 27 of the *Constitution*. The Petitioner cited a number of authorities including *Robert N. Kaguru & Others v Kiambu County Government & 3 Others* (2014) eKLR and *Joseph Enock Aura v Cabinet Secretary for Health & 14 Others* (2023) eKLR to anchor the argument that public participation was overlooked.
10. Loss of business, according to the Petitioners was also a constitutional right breached in line with Article 40 of the *Constitution* as they could be deprived their business and good will. The Petitioners also urged this court to find breach of their social economic rights under Article 43(1) of the *Constitution* due to loss of business. It was also submitted for the Petitioners that their right to fair administrative action would be breached against the requirements of article 47 of the *Constitution*.
11. The Respondent filed submissions dated 27.5.2025. It was submitted heavily that the Petition lacked the precision required of Petitions as per the *locus classicus* on *Anarita Karimi Njeru v Republic* Criminal Appeal No. 4 of 1979.
12. It was also submitted that the Petitioners had admitted under paragraph 11 of the Petition that there was public participation and there was no basis for the allegation that their views were ignored as this was not precisely pleaded. In this light, it was the submission of the Respondent that the relocation of the parking was done pursuant to the County Integrated Development Plan and the *Urban Areas and Cities Act* and participation of residents was carried out. The Respondent relied on Section 36 of the *Urban Areas and Cities Act* 2011.
13. The Respondent further submitted that there was no material or evidence placed before this court to demonstrate how the alleged rights would be violated. Reliance was placed on *Mumo Matemu v Trusted Society of Human Rights Alliance*, (2013) eKLR.



Analysis

14. The issue for determination is whether County Government of Nyeri County Executive Committee Member Transport, Public Works, Infrastructure and Energy Order dated 4.11.2024 addressed to the PSV Secretariat and all compliant SACCOs relating to relocation to the newly designated operating and parking spaces and the subsequent proposed relocation was not made in accordance with the provisions of the *Constitution* of Kenya 2010 and the *Fair Administrative Action Act* for want of public participation.
15. Though raised as three issues, the petitioners appear to have mixed the qualitative and quantitative aspect of their petition both in submissions and in the petition. The only impugned notice is dated 4.11.2024. The notice reads as follows:

TO: PSV Secretariat

All compliant saccos

Relocation to newly designated operating and parking spaces

As you are aware, the purpose of constructing Field Marshal Muthoni Kirima Transport Terminus was to provide an opportunity to decongest and improve the overall flow of traffic in the Nyeri Town Central Business District (CBD). The facility is ready for use by Public Transport Service Vehicles (PSVs) and traders.

In view of the above, you are hereby given a notice of relocation to your newly designated operating and parking spaces as per your operational/and approved routes from Monday 11th November, 2024.

For purposes of clarity, PSV routes have been classified into three levels as follows:

1. Level 1 – Routes which operate in a radius of up to about 10km from Nyeri town CBD. These areas are Chaka, Marua, Giakanja, Ihururu, Kagundu-ini, Embassy, etc.
2. Level 2 – Routes which operates in radius of up to 25km from Nyeri town CBC. These areas are: Naromoru, Karatina, Mukurwe-ini, Othaya, past Ihururu and Nairutia.
3. Level 3 – Routes which operate beyond 25km from the Nyeri town CBD.

The re-organization and relocation will be based on the following;

- The lower and upper terminal will remain operational for level 1 vehicles only.
- The middle terminal will be used by Sienta vehicles. No Sienta vehicle will be allowed to pick passengers outside this terminus.
- Both the lower and upper terminal will allow for the dropping of passengers by PSVs using the Field the Field Marshal Terminal and vice versa.

16. The question whether the new terminal ought to be built or its location does not flow from the notice. It is therefore imperative to sieve the issues and deal with what is essentially grievances relating to one place and not the other as a terminal. In this case, there are economic issues. On whether the new terminus is more economic than the old one, was dealt with in the earlier public participation. This is what the court shall address in the subsequent sections as follows:



- a. Economic arguments for and against the terminal
 - b. The constitutional threshold for the petition
 - c. The notice/order dated 4.11.2024
 - d. Public participation
17. There is however, a rider that there is a difference between beautiful arguments and laying a case before the court. Public participation as a necessary national value and principle of governance warranting immediate implementation has been discussed by courts in a number of decisions. In *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, the Court of Appeal had this to say about the importance of national values and principles of governance set out in Article 10(2) of the *Constitution*:

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that article 10(2) of the *Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 *Constitution* in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

18. Likewise, in *Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others* (Interested Party) (Petition E242 of 2022) [2022] KEHC 11630 (KLR) (Constitutional and Human Rights) (17 August 2022) (Judgment) it was held as doth:

Participation of the people is not a progressive right to be realized sometime in the future. It is enforceable immediately. Any laws or rules made pursuant to constitutional or statutory provisions, must take this into account. Accordingly, and applying the above considerations, the inevitable conclusion that can be drawn is that the decision by the Supreme Court to exclude the participatory rights of the people before promulgation of the impugned rules, is unlawful and unconstitutional.

19. The content and the manner in which legislation or a decision that affects the interest of the members of the public is adopted must conform to the Constitution. Participation of the people in decisions that affect them is a national value engrained in our constitution and is at the center of democratic governance which applauds equality and respect for human rights. Article 10 of the *Constitution* as follows:

- (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them--
 - (a) applies or interprets this Constitution;



- (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
- 2) The national values and principles of governance include--
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non- discrimination and protection of the marginalised;
 - (c) good governance, integrity, transparency and accountability; and;
 - (d) sustainable development.
20. Therefore, under Article 10 of the Constitution, the national values and principles of governance are binding on all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law, or makes or implements public policy decisions. This however has to be in the context that the courts cannot dictate the manner and type of public participation. There must be public participation.
21. Public participation as a constitutional law imperative plays a pivotal role in legislative, policy and executive functions of both National and County Government and is an inevitable tool through which the views of citizens have to be considered in public decision-making processes. It informs stakeholders and the public of what is intended and affords them an opportunity to express, and have their views considered. That is why I tend to disagree with the submission by the Respondent that the views of the Petitioner were not meant to be considered as a matter of necessity or as a *carte blanche*. If this were the case, the Respondent had to state reasons for failure to consider such views in line with public participation feedback.
22. Counties have in place, County Public Participation Guidelines, which were promulgated in January 2016.
23. Engagement with the public is essential. It allows for the citizens to express concerns, fears and even to make demands about what they expect that should be done or not done in the manner they opine. It cannot be said to be a formality. It has to be seen to be done and the real test is the views of the people as presented. Participation does not connote information. I am fortified by the reasoning of the Court in the South African case of Poverty Alleviation Network & others v President of the Republic of South Africa & 19 Others CCT 86/08 [2010] ZACC 5, where the Constitutional Court stated as doth:
- Engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision Public participation has been entrenched in our Constitution as one of the national values and principles of governance that binds all state organs, including the Supreme Court when, *inter alia* enacting law.
24. Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is an activity and not a paper plan.



Back home in the case of *Okiya Omtatab Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR, Mativo, J (as he then was) stated:

In a recent decision of this court, I observed that "my analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government." Both local and foreign jurisprudence are awash with decisions holding that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. Any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.

25. The question of public participation has been litigated in all levels of superior courts. For instance, in the case of *National Assembly & another v Okoiti & 55 others* (Civil Appeal E003 of 2023 & E016, E021, E049, E064 & E080 of 2024 (Consolidated)) [2024] KECA 876 (KLR) (31 July 2024) (Judgment), the Court of Appeal [K M'Inoti, AK Murgor & JM Mativo JJA] posited as follows in regard to public participation:

The Supreme Court in *British American Tobacco Kenya, PLC (Formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance and Another (Interested Parties); Mastermind Tobacco Kenya Limited (the affected party)*, SC Petition No. 5 of 2017; [2019] eKLR (BAT Case) enunciated inter alia, the following guiding principles regarding public participation:

- (i) As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
- (ii) The public officer and /or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- (iv) Public participation must be real and not illusory. It is not a cosmetic or public relations act. It is not a mere formality to be undertaken as a matter of course just to fulfil a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- (v) Public participation is not an abstract notion; it must be purposive and meaningful. ..."

179. In addition, the Apex Court in the above case stated:

"(85) Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of the Constitution and is binding on all State organs, State officers, public, officers and all persons whenever any of them:

- (a) applies or interprets the Constitution;



- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions. As aptly stated by the Appellate Court, public participation is anchored on the principle of the sovereignty of the People “that permeates the Constitution and in accordance with Article 1(4) of the Constitution is exercised at both national and county levels”...

180. The Supreme Court went on to issue the following guidelines on public participation:

“(96) From the foregoing analysis, we would like to underscore that the public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

- i. As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
- ii. The public officer and or entity charged with the performance of a particular duty bears the onus of



ensuring and facilitating public participation.

- iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- v. Public participation is not an abstract notion; it must be purposive and meaningful.
- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- viii. Allegation of lack of public participation does not automatically vitiate



the process. The allegations public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

- ix. Components of meaningful public participation include the following:
- a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general;
 - d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency



of the process.

- g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

26. The Petitioners herein alleged that the process leading to the County Government of Nyeri County Executive Committee Member Transport, Public Works, Infrastructure and Energy Order dated 4.11.2024 addressed to the PSV Secretariat and all compliant SACCOs relating to relocation to the newly designated operating and parking spaces was not made in accordance with the provisions of the *Constitution* of Kenya 2010 and the *Fair Administrative Action Act* and is unconstitutional. It was their case that it ignored public input or the Petitioners' input. In the case of *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR, it was stated that:

“Once a Petitioner attacks the legislative process on grounds that the law making process did not meet the constitutional standard of public participation, the Respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation”.

27. The questions that the petitioners addressed are fourfold:

- a. Their views were ignored
- b. The new site is uneconomical
- c. The notice was arbitrary
- d. There was no public participation

28. This then brings out the architecture of the impugned decision. The question that was being raised was addressed by the county government of Nyeri County Executive committee member transport, public works, infrastructure and energy order dated 4.11.2024 addressed to the PSV secretariat and all compliant Saccos. Ipso facto, the location of the stage is not and cannot be the subject of this decision. The decision was made in 2015 to build the stage to decongest the Nyeri CBD. There are correspondence and minutes showing adequate participation in the design and construction of Field Marshall Muthoni Kirima Transport Terminus Project.

29. The Respondent was under a legal obligation to demonstrate that the impugned process of migrating the public service vehicles to Field Marshall Muthoni Kirima Transport Terminus Project did meet the constitutional standards of public participation.

30. The Respondent's case was that the Petitioners failed to achieve the precision required of Petitions. I understand the Respondent to urge that they carried out public participation. That the Petitioners admitted under paragraph 11 of the Petition that their views were taken but not considered.



They attached the minutes of the Digital Topographic Mapping of the Integrated Strategic Urban Development Plan for Nyeri Town. The minutes are dated 19.3.2025, 20.3.2015 and 23.3.2025. The attendees were surveyors, planners, ward representatives, consultants, environmentalists, Transport Sacco representatives and other professionals.

31. There was also the stakeholders' meeting on the decongestion of Nyeri Town CBD. The same was dated 15.5.2019. There were stakeholder meetings on 25.4.2023 and 13.7.2023 by the County Department for Lands, Physical Planning and Urban Development.
32. The right of public participation is not meant to usurp the technical or democratic role of the Respondent. It should cross-fertilize and enrich their views as viewed against the views of those who will be most affected by the decision or policy at hand. In other words, public participation shapes decision making but is not the actual decision. The public views, where they are overwhelming on certain aspects need to reflect that consideration and not just cosmetic changes. In the case of *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, a 3-judge bench of this court set out the following principles that public participation entails:

First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J of the South African Constitutional Court stated this principle quite concisely thus: The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (*Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC))”

Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic v The Attorney General & another ex parte Hon Francis Chachu Ganya* (JR Misc App No 374 of 2012). In relevant portion, the court stated:

“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.

Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however,



show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.

Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

33. It was incumbent upon the Respondent to fashion a programme of public participation that could accord with the nature of the relocation and the people to be affected directly and indirectly. This they did. The petitioners admitted that they were consulted but their views were not heard. Public participation has a high notch responsibility for it enables people to participate in decision making processes. It is one of the greatest and surest test for a democratic, transparent and accountable government. The views of the subjects must be seen to have been presented and considered. Faced with the same issues, the Court in *Ndegwa (suing on his own behalf, in the public interest and on behalf of other Bar Owners' in Nyandarua County) v Nyandarua County Assembly & another* (Petition E011 of 2021) [2021] KEHC 299 (KLR) (16 November 2021) (Judgment) held as doth:

According to the Public Participation in the Legislative Process, Factsheet No. 27 by the National Assembly, public participation could be defined as the process of interaction between an organization and public with an aim of making an acceptable and better decision. The process involved informing, listening, dialogue, debate and analysis as well as implementation on agreed solutions. Public access and participation in both the national and county legislature was guaranteed specifically under articles 118(1)(b) and 196 (1) (b) of the *Constitution* which directed the national and county legislatures to respectively facilitate public participation. Furthermore, the legal framework for public participation was guaranteed by articles 10, 27, 33, 35 and 119 of the Constitution of Kenya, 2010

... The County Assembly had a constitutional obligation to facilitate public participation on policy formulation, legislative process and any other decision affecting residents of the county. However, the respondents did not adduce any evidence to justify that any reasonable efforts were made by the Nyandarua County Government to facilitate public participation in accordance with the principles of public participation as entrenched in sections 3 and 87 and 91 *County Governments Act* in line with articles 10, 174 and 196 of the Constitution.

No reasonable opportunity was given to the public and all interested parties. The residents of Nyandarua and relevant stakeholders were not accorded with timely access to information that was relevant to a process of legislation, which was the amendment to facilitate the appreciation of the issue for consideration and an opportunity to make a response especially



by the stakeholders. The petitioner on behalf of other the bar owners and the public at large alleged that none of them were consulted during the amendment process; an allegation the respondents had not disproved. No explanation(s) was advanced to account for the flawed participation processes.

34. The Respondent produced no public participation schedules as to gauge the effect of the undertaking that would see the relocation of the parking terminuses for crucial transport Saccos and the public that feeds on it; from Nyeri Town CBD. The views of the Sacco operators and members of the public would demonstrate the influence on their rights guaranteed in the Constitution, and not the rights to the Respondent to implement its integrated plans. In *Doctors for Life International v Speaker of the National Assembly and Others Others* (CCT 12/05) 2006 ZACC), the Court stated as follows:

“It is true, as discussed previously, that time may be a relevant consideration in determining the reasonableness of a legislature’s failure to provide meaningful opportunities for public involvement in a given case. There may well be circumstances of emergency that require urgent legislative responses and short timetables. However, the Respondents have not demonstrated that such circumstances were present in this case. When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.

35. The Petitioners did not demonstrate the manner in which the impugned public participation in respect of the relocation of transport terminuses was contrary to the letter and spirit of the Constitution on public participation.
36. Based on the findings, I do not see the manner in which the Petitioners’ allegations against public participation exercise failed the test of constitutional petitions. The Petition met the sufficient precision anticipated by law. The specificity and precision taken in drafting petition was established by the High Court in the case of *Anarita Karimi Njeru v Republic* (1979) KLR 154. The test was stated thus:

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

37. The Petitioner had to properly lay out the necessity of a link between the aggrieved party, the provisions of the Constitution alleged, in this case public participation, and the manifestation of contravention or infringement which was the effect of failure to take into consideration proper public participation as a tool that undermined the opportunity for the members of the public and the Petitioners to adequately present their grievances. The Supreme Court of Kenya in *Communications Commission for Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR on the same element of specificity and precision stated thus:

“Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be



infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic* [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

38. The Petitioners also lamented that the Respondent discriminated against them from a business park in the CBD where they had established business and good will for the last 50 years to Field Marshall Muthoni Kirima Matatu Terminus and that they stood to lose substantial business income as a result. The Petitioners relied on Article 27 of the *Constitution*.
39. On discrimination, this Court observes that Article 27 of the *Constitution* guarantees the right to equality and freedom from discrimination.
- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- ...
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
4. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
40. The *Black’s Law Dictionary*, 10th Edition defines “discrimination” as “Differential treatment; a failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured.” It also defines “differential treatment” as “..., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”
41. The test is whether the alleged conduct unfairly differentiates between people or categories of people. The South African Constitutional Court in *Harksen v Lane No & others* (1997) ZACC 12, set out a three-stage enquiry for ascertaining whether discrimination had been proved as follows:
- a. Does the provision differentiate between people or categories of people? If so, does the provision bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- b. Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:- Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics, which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
- Secondly, if the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it is found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test for unfairness focuses primarily on the impact of the discrimination on



the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...

- c. If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause of the Constitution.
42. The Petitioners failed to demonstrate that discrimination had occurred and they were treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds. The Court of Appeal in *Nairobi Bottlers Limited v Ndung'u & another* (Civil Appeal 99 of 2018) [2023] KECA 839 (KLR) (7 July 2023) (Judgment) stated as follows:
16. Article 27 of the *Constitution* guaranteed the right to equality and freedom from discrimination. Discrimination could be said to have occurred where a person was treated differently from other persons who were in similar positions on the basis of one of the prohibited grounds like race, sex disability among others or due to unfair practice and without any objective and reasonable justification. Discrimination could be either direct or indirect. The discrimination alleged by the 1st appellant was indirect in nature.

... From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc. or due to unfair practice and without any objective and reasonable justification.
43. The Constitution prohibits unfair discrimination and not mere discrimination as was stated by the High Court in *Mohammed Abduba Dida v Debate Media Ltd & another* (2017) eKLR that “the right to equality does not prohibit discrimination but it prohibits unfair discrimination.”
44. The Petition is not merited.

Determination

45. The upshot is that I dismiss the Petition and make the following orders: -
- a. The petition lacks merit and is accordingly dismissed.
 - b. In order to have a smooth transition, the Respondent shall give directions on implementation of the notice with effect from a date not earlier than 1.08.2025.
 - c. Each party to bear their own costs of the petition due to the public interest in the Petition.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2025.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Waweru Kiragu for the Petitioners

Mr. Irungu for the Respondent

Court Assistant – Jedidah

