



Halakhe (Suing as the Chairman of the Borana Council of Elders) v Cabinet Secretary for Interior and Coordination of National Government & 2 others (Constitutional Petition 1 of 2022) [2024] KEHC 3045 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CONSTITUTIONAL PETITION 1 OF 2022**

JN NJAGI, J

MARCH 7, 2024

BETWEEN

JOSEPH DIDA HALAKHE (SUING AS THE CHAIRMAN OF THE BORANA COUNCIL OF ELDERS) PETITIONER

AND

CABINET SECRETARY FOR INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

COUNTY GOVERNMENT OF MARSABIT 3RD RESPONDENT

JUDGMENT

1. The petitioner herein, Joseph Dida Halakhe, is the chairperson of the Borana Council of Elders. The Borana are one of the communities residing within Marsabit County.
2. At the heart of the Petitioner's grievance is that of the creation of new administrative units by the 1st respondent through Gazette No. 9534 vol CXXXIV No. 152 dated 5th 2022 within Marsabit County all of which are said to be in favour of the Gabra Community despite the county having other dominant communities such as the Borana and Rendile. It is the averment of the Petitioner that the administrative units were created without consultation and or public participation.
3. The petitioner, therefore cited the Cabinet Secretary Ministry of Interior and Coordination of National Government, the Attorney General and the County Government of Marsabit.



The Petition

4. Through the petition dated 24th August 2022, supported by the petitioner's affidavit deposed to on the even date, the petitioner challenges Gazette Notice No. 9534 dated 5th August 2022.
5. Contemporaneously with the filing of the petition was the filing on an even date an application by way of Notice of Motion seeking conservatory orders for the suspension of implementation of the Gazette Notice pending the hearing and the determination of the petition.
6. This judgment is therefore in respect to the main petition and will as well dispose of the application.
7. The petitioner contended that the Gazette notice violated articles 10, 27, 28, & 47(1), (2) of *the Constitution*.
8. It was the petitioner's case that the Gazette notice was a recipe for escalation of chaos and conflicts in the county as it seeks to rob one community of its legitimate grazing, administrative and political areas at the expense of another community.
9. The petitioner averred that unless this Honourable court grants the petition as prayed, the petitioner and his entire community at large will be greatly prejudiced and further marginalized.
10. On the foregoing arguments, the petitioner prayed for the following reliefs;
 - a. A declaration that the 1st respondent violated articles 10, 27, 28 and 47 of *the Constitution* by discriminating, and unfairly creating new administrative units in Marsabit County through Gazette Notice No. 9534 dated 5th August 2022;
 - b. A declaration that the establishment of the new administrative unites created vide Gazette Notice No. 9534 dated 5th August 2022 was conducted without any public participation;
 - c. A declaration that there was no public participation resulting in recommendation for the creation of the impugned administrative units.
 - d. An order of Certiorari bringing into this court the quashing of Gazette Notice No. 9534 dated 5th August 2022 establishing the impugned administrative units.
 - e. Costs of the petition; and
 - f. Any other or further relief as this Honourable court may deem fit to grant.
11. The 1st and 2nd respondents filed their grounds of opposition dated 16th September 2022 and further grounds of opposition dated 14th February 2023. The respondents averred that the petitioner had not demonstrated any prima facie case with a likelihood of success or that they would suffer any prejudice.
12. The respondent argued that the Petitioner had not laid any legal basis for the grant of the orders sought since the issues raised in the petition are administrative in nature and solely aimed at bringing service closer to the people.
13. That the petitioners have latched on the phrase participation of the people in a selective and selfish manner since there is no express requirement that participation of the people should read to mean that the people must be present during interviews but taken in its widest context that their input is recognized.



14. That the administrative units were lawfully established after adequate public participation and with authority from the President of the Republic of Kenya as provided under article 131 (1) (b) and 132 (3) (b) of *the Constitution*.
15. It was the respondents' contention that section 14(1) of the *National Government Co-ordination Act* expressly authorizes the 1st respondent by approval of the President and by a notice in the Gazette to establish national government service delivery units.

Petitioner's Submissions

16. The Petitioner filed written submissions in further support of his case. He identified issues for determination as being:-
 - a. Whether a declaration should issue that the 1st respondent violated articles 10, 27, 28 and 47 of *the constitution* by discriminating, and unfairly creating administrative units in Marsabit County through Gazette Notice no. 9534 dated 5th August 2022 and without public participation.
 - b. Whether a declaration that the establishment of the new administrative units created vide Gazette Notice No. 9534 dated 5th August 2022 was conducted without public participation;
 - c. Whether a declaration should issue that there no public participation resulting in recommendation for the creation of the impugned administrative units;
 - d. Whether an order of Certiorari bringing into this court and quashing the Gazette Notice No. 9534 of 5th August 2022 establishing the impugned administrative units should be issued;
 - e. Costs of and Incidental to the petition.
17. On the first issue, the petitioner submitted that the Gazette Notice violates Article 10 of *the constitution* by failing to adhere to the value of public participation, non-discrimination and protection of the marginalized.
18. The petitioner submitted that the gazette notice offends Article 27 of *the constitution* since the administrative units as created do not reflect equality as they are skewed in favour of an ethnic group and secondly it is discriminatory to create several administrative units in areas affiliated to the foremost political figure then Cabinet Secretary for treasury, Hon. Ukur Yattani.
19. It was submitted that the hidden intention of the Gazette notice was to bring in more voters to Mr. Yattani's voting basket even as such the new administrative units in favour of the Gabra ethnic community alone is discriminatory to the other ethnic communities.
20. It was submitted that administratively Marsabit previously had 9 operational sub-counties with 4 in Noth-Horr. The effect of the Gazette notice has effectively added North- Horr two more sub-counties making Noth-Horr constituency having 6 sub-counties. North Horr is largely dominated by the Gabra which has top representation in the national government and therefore better placed to hold sway.
21. It was submitted that the directive violates article 28 of *the constitution* by robbing the disenfranchised groups the dignity they deserve as a community. In an area where there are existing conflicts with regards to the scramble of resources, creation of skewed administrative units in favour of one ethnic group as against another furthers these conflicts.
22. The petitioner urged that having the Borana people's grazing land to the North-Horr is an economic sabotage especially for a community that fully and heavily depends on livestock grazing. Taking away



the petitioner's community's grazing land, their only source of livelihood robs them of their human dignity as it confines them to hunger and reduces them to beggars depending on humanitarian aid.

23. The petitioner submitted that it was unfair administrative action for the 1st respondent to gazette the new units without public participation or consulting the inhabitants of the affected areas as required by article 10 of *the constitution*.
24. That it was unfair administrative action for the 1st respondent to gazette the new units when the region was already a security operation zone placed under a down-dusk curfew. The Petitioner wondered at what point and date was public participation conducted.
25. On the 2nd issue, it was submitted that the creation of the new units was without public participation. Counsel placed reliance in the case of Communications Authority of Kenya & 5 others vs. Royal Media Services Limited & 5 others (2014) to stress the importance of public participation in which case the Supreme Court stated that:

[379] Public participation is the cornerstone of sustainable development and it is so provided in *the Constitution*....

[381] Public participation calls for the appreciation by State, Government and all stakeholders implicated in this appeal that the Kenyan citizenry is adult enough to understand what its rights are under Article 34. In the cases of establishment, licensing, promotion and protection of media freedom, public participation ensures that private "sweet heart" deals, secret contracting processes, skewed sharing of benefits-generally a contract and investment regime enveloped in non-disclosure, do not happen. Thus, threats to both political stability and sustainable development are nipped in the bud by public participation. Indeed, if they did the word and spirit of *the Constitution* would both be subverted.

26. The Petitioner cited the case of British American Tobacco Kenya PLC (formally British American Tobacco Kenya Limited) v Cabinet secretary for the ministry of health & 2 others; Kenya Tobacco Control Alliance & another (interested parties) mastermind Tobacco Kenya Limited (The Affected party) (2019) eKLR, where the Supreme Court stated as follows:

(96) From the foregoing analysis, we would like to underscore that 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 opt fine 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:

Guiding Principles 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 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.

27. Also cited is the case of Robert N Gakuru & others vs. Governor Kiambu County & 3 others (2014) eKLR to assert the place and importance of public participation.

28. Counsel submitted that section 107 of the *Evidence Act* provides that he who alleges must prove. The same position was reiterated in Evans Otieno vs. Cleophas Bwana Onguro (2015) eKLR.

29. He submitted that the burden of proof of public participation is on the respondent's as was held in Ndegwa (Suing on his own behalf, in the public interest and on behalf of other bar owners in Nyandarua County) vs. Nyandarua County Assembly & another (Petition E011 of 2021) [2021] KEHC 299 (KLR) 16 November 2021) (judgment).

30. On the third issue, the petitioner submitted that no documentary evidence has been placed before this court to show that indeed public participation was carried out.



31. On whether an order of certiorari should issue, the petitioner relied in the case of Republic vs. Kenya National Examination Council Ex parte Gathenji and other Civil Appeal No. 266 of 1996 where the Court of Appeal stated that:

“that an order of certiorari can only quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not adhered to or any other reasonable cause. It is trite law that the remedy of Judicial Review is not concerned with the merits of the case but the decision-making process. In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal.”

32. The Petitioner urged the court to find that that the gazette notice violates *the constitution* and hence should be quashed.

33. On the issue of costs, the petitioner submitted that costs follow the event and that a successful party ought to be compensated as was held in the case of Key Construction Limited vs. Eco Bank Kenya Ltd & 6 others (2015) eKLR.

1st and 2nd Respondents` submissions

34. The 1st and 2nd respondents filed their written submissions and identified two issues for determination namely;

- a. Whether a declaration should issue that the 1st respondent violated the petitioner’s constitutional rights as enshrined under articles 10, 27, 28 and 47 of *the Constitution*; and
- b. Whether the petitioner is entitled to the reliefs sought in the petition.

35. On the 1st issue the respondents submitted that the powers and responsibilities conferred upon the 1st respondent are intended to give full effect to Articles 131 (1) (b) and 132 (3) (b) of *the constitution*.

36. That section 14(1) of the *National Government Co-ordination Act* No. 1 of 2013 expressly authorizes the 1st respondent by approval of the president and by a notice in the Gazette to establish government service delivery units.

37. It was submitted that one of the pillars of *the Constitution* of Kenya, 2010 was the concept of devolution or decentralization of government services from the capital of Kenya. That a sub-county was a creation of *the Constitution* under Article 176(2) and Section 48(1) (b) of the *County Governments Act*, 2012 through which a County Government performed their functions and provided services.

38. The respondent submitted that public participation forms part of the core values and principles of *the constitution*. *The constitution* is silent on what constitutes public participation. There is no legislation that provides a comprehensive definition and parameters on what constitutes public participation.

39. The Respondents submitted that the petitioner has latched on to the phrase “public participation of the people” in a selective and selfish manner since there is no express requirement that the same should be read to mean that the people must be present during interviews but taken in its widest context that their in-put is recognized.

40. The respondents asserted that the administrative units were established after adequate public participation had been carried out in Marsabit regardless of communities and that they had involved



the county and its leaders. The county government had not complained that the said public participation was not carried out.

41. That it is only the petitioner who claims to be a clan elder who has issues with the 1st respondent's actions. It was submitted that the petition is based on sectarian interests of the petitioner which is contrary to articles 1, 10 and 40 of *the constitution*.
42. The petitioner relied in the case of Republic vs. County Government of Kiambu Ex parte Robert Gakuru & another (2016) eKLR and Nairobi Metropolitan PSV Sacco Union Ltd & 25 others vs. County of Nairobi Government and 3 others (2013) eKLR to submit that the yardstick for public participation is a reasonable opportunity for the members of the public and interested parties to know the issues at hand and have an adequate say on them.
43. On the 2nd limb of its submission counsel submitted that although the petitioner had alleged that he is the chairperson of the Borana Council of Elders he had not filed any document to prove the same.
44. It was further submitted that the petitioner had made serious allegations in the petition without evidence. It was submitted that the new administrative units were not created to favour any ethnic community as claimed.
45. The respondent submitted that the petitioner is by all means trying to seek for preferential treatment when *the constitution* that he claims to rely on provides for equal treatment of all residents of Marsabit County.
46. The 1st and 2nd respondents concluded by urging this Court to find that the creation of the new administrative units in Marsabit County was done through due process as was held in Martin Nyaga Wambora & 30 others vs. County Assembly of Embu & 4 others.

Analysis and Determination

47. I have duly considered the petition, the grounds of opposition thereto and the rival submissions by counsels for the Petitioner and the 1st and 2nd Respondents. The main issue for determination is whether public participation was carried preceding the publication of Gazette No. 9534 of 2022.
48. One of the pillars of *the Constitution* of Kenya 2010 is the concept of devolution or decentralization of government services from the capital of Kenya. This is clearly spelt out under article 174 (a) of *the Constitution* of Kenya 2010. The objects of the devolution of government are listed inter alia as, "to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya...."
49. A further reading of the sixth schedule of *the Constitution* of Kenya 2010 under Part 4 Section 17 stipulates as follows: -

"Within five years after the effective date, the national government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under this Constitution."
50. The creation of administrative units and specifically sub-county level of administration is provided to under section 48 of the County Government Act, 2012 which state:

"Decentralized Units

 - 1) subject to subsection (3), the functions and provisions of services of each County Government shall be decentralized to-.....



- (b) the sub-counties equivalent to the Constituencies within the County established under article 89 of *the Constitution*...”
51. A Sub-County is therefore a creature of *the Constitution* under article 176(2) of *the Constitution* and section 48(1)(b) of the County Government Act 2012, through which the County Government perform their functions and provide services. The National Government, as noted in the 6th Schedule of *the Constitution* were required to align and structure its systems of administration to accord and respect the system of devolved government.
52. The respondents have maintained that in creating the impugned sub-counties, the first respondent acted on the powers donated to that office under section 14 of the National Government Coordination Act 2013, which provides as follows:
- “Service delivery coordination Units
- 1)The Cabinet Secretary may with the approval of the president and by a notice in the Gazette, establish national government service delivery coordination units.”
53. Under subsection 2 of the same section, the spirit and letter of article 176 (2) of *the Constitution* and Section 48 of the County Government Act 2012 is well captured. The subsection reads;
- “In establishing the National Government service delivery units, the Cabinet Secretary shall accord and respect the County Government decentralized units established under section 48 of the County Government Act.”
54. Public participation forms part of the core values and principles of *the Constitution* of Kenya 2010. Article 10 of *the Constitution* of Kenya provides that one of the National values and principles of governance in Kenya is public participation. Article 10(2) provides that;
- “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...”
55. The above values and principles bind all state organs, state officers and all other persons in applying or interpreting *the constitution*, enacting or applying any law or implementing policy decisions. The importance of public participation in all spheres of life is now a must and a reality in Kenya.
56. It is important to note that, public participation as a principle though important has not been coded comprehensively through legislation. *The Constitution* is silent on what constitutes Public participation. There is also no national legislation as yet that provides a comprehensive definition and parameters on what constitutes public participation. Be that as it may the essential features of public participation have been developed overtime through case law.
57. What are the parameters or what practical steps must be undertaken to ensure that this Constitutional principle is attained? In the case of *Doctors for Life International v Speaker of the National Assembly & others* [2015]eKLR it was held as follows:-
- “The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law making process. The key words in this are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier” “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process.



The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as (a) taking part with others (in an action or matter);the active involvement of members of a community or organization in decisions which affect them. 'According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something... it is clear and I must state so, that it is impossible to define the forms of facilitating appropriate degree of public participation. To my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation.’”

58. In *Khelef Khalifa & 2 others versus Independent Electoral and Boundaries Commission and another* [2017] eKLR, it was held that to attain the principle of public participation in a decision-making process, the following parameters are required;
- a. There must be evidence of inclusivity that is to say that all stakeholders or those affected by an administrative policy, or law must be given an opportunity to express or ventilate their view well aware of what is at stake.
 - b. The affected people must be given sufficient notice of the nature of the decision to be made and when the consultations will be held. The information must be disseminated through public barazas, churches, mosques, print and electronic media and other avenues to ensure that the information reaches the targeted audience.
 - c. The government agency or a public officer in charge of the programme of public participation must of essence take into account the participation of the governed in quantitative as well as qualitative way. In other words, the engagement must be meaningful and done in good faith rather than a mere formality.
 - d. Public participation calls for innovation and some level of malleability depending on the nature of subject matter for example culture, geographical issues, logistical constraints etc. The test to be applied is effectiveness and efficiency. The question to be asked is, is the mechanism effective in achieving sufficient public participation.
 - e. Public participation does not mean that everyone must give their views on the issue at hand as to attain such a standard at times can be impractical. A public participation exercise must however show intentional inclusivity and diversity. A programme of public participation cannot disregard bona fide major stakeholders otherwise the program would be ineffective and illegal. Those mostly affected by the policy must have a bigger say in that policy, legislation or action and their views must be sought, taken into account. In other words, the view of the major stakeholders must be captured through minutes or any other proof that shows that their view were captured and had a bearing in the final decision.
 - f. Public participation is not a public relations exercise. It must be meaningful and done in good faith.
59. As I have observed above, the main dispute in this matter revolves around whether or not there was public participation in the creation of the administrative units within Marsabit county.
60. The 1st and 2nd respondents claim that there was adequate public participation on the creation of new sub-counties in Marsabit County, yet they have not adduced any evidence of list of attendees, minutes, agenda, the place of meeting, etc, to prove that there was public participation. To reach the required



threshold of public participation, the above must be adduced in evidence. It is not enough to just suggest that public participation was carried out.

61. The 1st and 2nd respondent argued that Section 14(1) of the *National Government Co-Ordination Act* authorizes the 1st Respondent by a notice in the gazette to establish government service delivery units. The 1st Respondent is a public officer and is thus bound by national values and principles of governance as stipulated in Article 10 of *the Constitution* whenever he makes or implements public policy decisions. Nothing in Section 14 (1) of the *National Government Co-Ordination Act* precludes the 1st Respondent conducting public participation when creating administrative units. Such an important task that involves the sharing of resources cannot be left at the whim of the 1st Respondent. In my considered view he was obligated to conduct public participation before creating the impugned units.
62. I find no evidence of there having been any public participation in the creation of the impugned units and if there was any as alluded to by the respondents, it did not reach the requisite threshold exemplified in the cited decisions of Khelef Khalifa & 2 others, Robert N Gakuru & others and Okiya Omtata Okoit versus County Government of Kiambu [2018] eKLR.
63. The long and short of this is that this court finds merit in this petition. The same is hereby allowed in the following terms:
 - (1) A declaration be and is hereby given that the 1st respondent violated Article 10, 27, 28 and 47 of *the Constitution* by creating new administrative units in Marsabit county through Gazette Notice No. 9534 of 5th August 2022 without public participation
 - (2) An Order of Certiorari be and is hereby issued bringing into this court and quashing Gazette Notice No 9534 dated 5th August 2022 establishing the impugned administrative units
 - (3) An Order is hereby issued compelling the 1st and 2nd Respondents to take all such measures and steps as provided by *the Constitution* and the relevant statutes to create such administrative unit(s) as they deem necessary in compliance with section 14(1) of the National Government Coordination Act, 2013 preceded by public participation.
 - (4) Each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 7TH DAY OF MARCH 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oganda HB for Prof. Ojienda, SC, for Petitioner

No appearance for 1st and 2nd Respondents

Court Assistant – Jarso

30 days R/A.

