



**Sang & 7 others v Cabinet Secretary for Interior & Co-Ordination of  
National Security & another (Constitutional Petition E014 of 2022)  
[2024] KEHC 11107 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11107 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CONSTITUTIONAL PETITION E014 OF 2022**

**SM MOHOCHI, J**

**SEPTEMBER 19, 2024**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 1, 10,  
11, 19(2) 44(2) 47 AND 56 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 165(3)(D)(II) OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**JOSEPH SANG ..... 1<sup>ST</sup> PETITIONER  
ZAKAKO KIPKOECH LESINGO ..... 2<sup>ND</sup> PETITIONER  
NELSON KIPKOI ..... 3<sup>RD</sup> PETITIONER  
MORENO BONIFACE KASOI ..... 4<sup>TH</sup> PETITIONER  
BONIFACE OTI ..... 5<sup>TH</sup> PETITIONER  
JOSEPH MERITU MIRINGA ..... 6<sup>TH</sup> PETITIONER  
LEONARD MINDORE ..... 7<sup>TH</sup> PETITIONER  
JOHN LOBOLO SIRONGA (NATIONAL CHAIRMAN OGIEK COUNCIL OF  
ELDERS) ..... 8<sup>TH</sup> PETITIONER**

**AND**

**THE CABINET SECRETARY FOR INTERIOR & CO-ORDINATION OF  
NATIONAL SECURITY ..... 1<sup>ST</sup> RESPONDENT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



## **The creation and elevation of certain administrative units in Eastern Mau occupied by the Ogiek Community declared unconstitutional for want of public participation**

*The petitioners, members of the Ogiek community, challenged Gazette Notice No. 6282 of May 31, 2022, which created and elevated certain administrative units in Eastern Mau which were occupied by the Ogiek community without public participation. The court held that no evidence of public participation was provided, rendering the gazette notice unconstitutional. The court issued declarations and orders quashing the gazette notice and related advertisements, directing compliance with constitutional requirements before taking any steps towards creation or elevation of the administrative units.*

Reported by Kakai Toili

**Constitutional Law** – national values and principles of governance – public participation – public participation in the establishment of administrative units - what was the effect of failure to conduct public participation in the establishment of administrative units – Constitution of Kenya, article 10.

**Evidence Law** – burden of proof – burden of proving public participation - who bore the burden of proving whether there was public participation in the process of establishing new administrative units.

### **Brief facts**

The petitioners were members of the indigenous Ogiek Community occupying parts of Eastern Mau Forest which were Marishoni, Nessuit, Sigotik Teret, Likia and Sururu where they had lived and organized their cultural and social lives around those areas. The petitioners claimed that in the year 2020, without the participation of the Ogiek community, sub-locations Nessuit, Marioshoni and Sururu were elevated to locations. The petitioners claimed that the creation of those administrative units was a calculated move to ensure the Ogiek Community was annihilated and assimilated by the larger neighbouring communities which would eventually lead to the loss of identity of the Ogiek Community. The petitioners felt that the Ogiek Community ought to be involved in all decisions affecting the areas which they occupied.

The main grievance and the basis of the petition was that the 1<sup>st</sup> respondent published a gazette notice on May 31, 2022 (the impugned gazette notice) elevating Nessuit Location to a division and Misipei and Sigotik Sub-Locations were elevated to locations. By a further gazette notice of June 16, 2022 by the Deputy County Commissioner Njoro Sub County advertised the positions of chiefs for Misipei and Sigotik Locations. It was the petitioners' contention that the process and the decision was not preceded by public participation in contravention of article 10 of the Constitution.

The petitioners sought for among other orders; that the 1<sup>st</sup> respondent be restrained by conservatory orders from recruiting chiefs, assistant chiefs, support staff, establishing infrastructure or in any other way implementing further implementing Gazette Notice No. 6282 of May 31, 2022; and an order of *certiorari* to quash Gazette Notice No. 6282 of May 31, 2022 and the advertisement for the position of chief.

### **Issues**

- i. What was the effect of failure to conduct public participation in the establishment of administrative units?
- ii. Who bore the burden of proving whether there was public participation in the process of establishing new administrative units?

### **Held**

1. Section 14(1) of the National Government and Co-ordination Act conferred power to the 1<sup>st</sup> respondent to establish service delivery co-ordination units. Article 1(1) of the Constitution gave power to the people of Kenya and contemplated that the power shall be exercised in accordance with the Constitution.
2. All State organs and public officers in the exercise of their responsibilities must observe the principles of governance and national values. Article 2 of the Constitution bound all persons and all State organs at



- both levels of Government and no one could exercise their authority outside the Constitution. Further, article 2(4) of the Constitution invalidated any act or omission in contravention of the Constitution. The Constitution did not preempt a situation where those principles of governance and national values were disregarded or diluted.
3. Public participation was the cornerstone that formed part of the core values and principles of the Constitution. It signified the active involvement of citizens in decision-making processes that directly affected their lives. It entailed the consideration of public input, consultations, and expression of views in decision-making. It was therefore not just a formality but an act of democracy.
  4. The burden as to whether there was public participation lay with the respondents in the circumstances. The respondents had not adduced any evidence to demonstrate there was public participation and in that regard there was doubt as to whether the very corner stone of democracy was respected. Therefore, there was no public participation in creation of the administrative units published in respect of Gazette Notice number 6282 of May 31, 2022.
  5. In constitutional matters where one claimed contravention or violations of the rights or fundamental freedoms protected or guaranteed by the Constitution s/he must in a principle specify the manner in which the alleged infringement came to be in the pleadings.
  6. The Constitution guaranteed the rights of minorities and marginalized groups. While the State had a responsibility to marginalized groups and minorities the petitioners had not tendered any evidence to show or suggest that the process had alienated their community or eroded their cultural practices.

*Amended petition partly allowed.*

#### **Orders**

- i. *A declaration was issued that the Gazette Notice Number 6282 of May 31, 2022 was unconstitutional null and devoid of public participation.*
- ii. *A judicial review order of certiorari was issued bringing into the court and removing for the purposes of quashing the entire decision of the 1<sup>st</sup> respondent in the Gazette Notice Number 6282 of May 31, 2022 establishing the administrative units and the advertisement for the position of chief dated June 16, 2022.*
- iii. *Prior to taking any steps towards creation or elevation of any administrative units in Marishoni, Nessuit, Sigotik Teret, Likia and Sururu, the 1<sup>st</sup> respondent was ordered to take all necessary steps to conduct public participation in compliance with the Constitution and relevant statutes.*
- iv. *Each party to bear their own costs.*

#### **Citations**

##### **Cases**

1. *Kenya Human Rights Commission v Attorney General & another* Constitutional Petition 87 of 2017; [2018] KEHC 9656 (KLR) — Explained
2. *Mugo & 14 others v Matiang'i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Parties)* Constitutional Petition 4 of 2019; [2022] KEHC 158 (KLR) — Explained

##### **Statutes**

1. Constitution of Kenya articles 1, 2, 8, 10, 11, 19(2), 44(2), 47, 56, 189 (1) — (Interpreted)
2. Evidence Act (cap 80) section 108 — (Interpreted)
3. National Government Co-Ordination Act (cap 127) section 14 (1) — (Interpreted)

##### **Advocates**

None mentioned



## JUDGMENT

1. The petitioners commenced these proceedings through the Petition dated 22 June, 2022 which was subsequently amended and duly filed on 29 November, 2023. The Petition was also supported by the sworn affidavit of Joseph Sang the 1<sup>st</sup> petitioner herein on 29 November, 2023.
2. The respondents did not enter appearance nor file a response to the Petition despite being served and return of service duly filed in court.

### Petitioner's Case

3. It is the petitioners case that that they are members of the indigenous Ogiek People occupying parts of Eastern Mau Forest which are Marishoni, Nessuit, Sigotik Teret, Likia and Sururu where they have lived and organized their cultural and social lives around these areas. That over the years the government has been on missions to evict them and they have filed numerous court cases over the same.
4. In the year 2020 without the participation of the Ogiek community sub-locations Nessuit, Marioshoni and Sururu were elevated to locations. That the creation of those administrative units is a calculated move to ensure the Ogiek Community is annihilated and assimilated by the larger neighbouring communities which will eventually lead to the loss of identity of the Ogiek Community. The Petitioners felt that the Ogiek Community ought to be involved in all decisions affecting the areas which they occupy.
5. The main grievance and the basis of this Petition is that the 1<sup>st</sup> respondent published a Gazette Notice on 31 May, 2022 elevating Nessuit Location to a Division and Misipei and Sigotik Sub-Locations were elevated to Locations. That by a further Gazette Notice of 16 June, 2022 by the Deputy County Commissioner Njoro Sub County advertised the positions of chiefs for Misispei and Sigotik Locations.
6. It was their contention that the process and the decision was not preceded by public participation in contravention of article 10 of the Constitution. That failure to implement prior decisions on the courts is an act of bad governance. That decision of the 1<sup>st</sup> respondent violated their right under article 44 of the Constitution and was in contravention of the provisions of article 56 of the Constitution.
7. That article 8 of the Constitution recognizes culture as the foundation of a nation and the 1<sup>st</sup> respondent amalgamated areas traditionally occupied by the petitioners in an attempt at assimilating the Ogiek community into larger communities that boarder the land occupied by them and eliminate the community as an independent minority community and as a cultural group.
8. It is on the foregoing premise that the petitioners seek the following prayers: -
  - i. In the first instance the 1<sup>st</sup> respondent whether acting in person, through County Commissioner, Deputy County Commissioners, his agents, servants, employees or any other person acting at his behest be restrained by conservatory orders from recruiting chiefs, assistant chiefs, support staff, establishing infrastructure or in any other way implementing further implementing gazette Notice number 6282 of 31 May, 2022.
  - ii. A declaration that Gazette Notice Number 6282 of 31 May, 2022 is unconstitutional null and void for public participation;



- iii. A declaration that the process of establishment of Nessuit division, Misipei Location and Sigotik Location lacked transparency, inclusiveness, constitutes bad governance and is in breach of the Constitutional principle and value of protection of the minority
- iv. A declaration that the process and the decisions of establishment of Nesuit division, Missipei Location and Sigotik Location is in breach of article 56 of the Constitution
- v. An Order of Certiorari to quash gazette Notice number 6282 of 31 May, 2022 and the advertisement for the position of chief dates 16 June, 2022;
- vi. Costs of the Petition

### **Analysis and Determination**

9. This Court has duly considered the Petition, the arguments propounded and the annexures thereto. The Petitioners were directed to file written submissions. None is on record.
10. Section 14(1) of the National Government and Co-ordination Act, 2013 confers power to the 1<sup>st</sup> Respondent to establish service delivery co-ordination units. It provides thus: -
 

“The Cabinet Secretary with the approval of the President and by a notice in the Gazette, establish national government service delivery co-ordination units.”
11. The main grievance being not the authority to create the administrative units but the process and that the process did not involve the petitioners and the Ogiek community living within those areas. Therefore, the issues for determination are: -
  - i. Whether or not there was public participation in the creation of the administrative units
  - ii. Whether the petitioners’ rights were violated.
  - iii. Whether the petitioners are entitled to the reliefs sought.
  - iv. Who bears costs of these proceedings

### **Whether or not there was public participation in the creation of the administrative units**

12. As the petitioners have challenged the creation of the administrative units claiming absence of public participation. Before making any administrative decision that is likely to have a significant impact on the citizens, public participation is of great importance.
13. Article 1(1) of the Constitution gives power to the people of Kenya and it contemplates that the power shall be exercised in accordance with the Constitution.
14. Article 10(2) of the Constitution provides: -
  10. National values and principles of governance –
  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;
    - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;



- c. good governance, integrity, transparency and accountability; and
- d. sustainable development.

15. Article 189(1) of the Constitution provides inter alia that: \_

“The Government at either level shall—

- (a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level.”

16. All state organs and public officers in the exercise of their responsibilities must observe the principles of governance and national values. Article 2 binds all persons and all State organs at both levels of government and no one can exercise their authority outside the Constitution. Further, article 2(4) of the Constitution invalidates any act or omission in contravention of the Constitution. the Constitution does not preempt a situation where these principles of governance and national values are disregarded or diluted.

17. Limo J in Mugo & 14 others v Matiang’i & another; Independent Electoral and Boundary Commission of Kenya & 19 others (Interested Party) [2022] KEHC 158 (KLR) rightly observed that: -

“Public participation is now the centerpiece of every decision made by state agencies and even non-state agencies in Kenya. 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.”

18. Public participation is the cornerstone that forms part of the core values and principles of the Constitution. It signifies the active involvement of citizens in decision-making processes that directly affect their lives. It entails the consideration of public input, consultations, and expression of views in decision-making. It is therefore not just a formality but an act of democracy.

19. The Petitioner with the authority of the other Petitioners swore that, they were not involved in the creation of the administration units and that the same was unconstitutional. They felt that, they ought to have been involved in all decisions affecting the areas which they occupy. The Respondents chose not to participate in these proceedings. They failed to file a response as to whether there was public involvement in the creation of those administration units.

20. Section 108 of the Evidence Act provides that

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

21. This Court I guided by the reasoning in the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR, it was stated that:

- “34. Article 2 of the Constitution decrees that the Constitution is the Supreme Law and binds all persons, state organs and public officers. Article 3 of the Constitution obligates every person to respect, uphold and defend the



Constitution. Every person here includes the National Assembly as a state organ.

35. 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. And because it is the constitutional duty of Parliament to ensure that there is public participation, the Attorney General as the respondent, has the legal burden to disprove this contention. This is so because it is a constitutional requirement that the National Assembly conducts its affairs in compliance with the Constitution.”
22. It therefore meets that burden as to whether there was public participation lay with the respondents in the circumstances. The respondents have not adduced any evidence to demonstrate there was public participation and in that regard the court is in doubt as to whether the very corner stone of democracy was conducted.
23. In light of all the foregoing, this court is convinced that there was no Public Participation in creation of the administrative units published in respect of Gazette Notice number 6282 of 31 May, 2022.

#### **Whether the Petitioners’ rights were violated.**

24. The petitioners contend that that their rights under the Constitution were contravened. In Constitutional matters where one claims contravention or violations of the rights or fundamental freedoms protected or guaranteed by the Constitution must in a principle specify the manner in which the alleged infringement came to be in the pleadings.
25. According to the petitioners, the process and the decisions of establishing of Nesuit Division, Missipei Location and Sigotik Location is in breach of right under article 44 and article 56 of the Constitution. They maintained that they are the indigenous people of the Ogiek community and that the new units will occasion the assimilation of the Ogiek community into larger communities that boarder the land occupied by them and eliminate the community as an independent minority community and as a cultural group.
26. Article 44 encompasses Language and culture that:-
  1. Every person has the right to use the language, and to participate in the cultural life, of the person’s choice.
  2. A person belonging to a cultural or linguistic community has the right, with other members of that community—
    - a. to enjoy the person’s culture and use the person’s language; or
    - b. to form, join and maintain cultural and linguistic associations and other organs of civil society.
  3. A person shall not compel another person to perform, observe or undergo any cultural practice or rite.



27. Article 56 provides that: -

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups

- a. participate and are represented in governance and other spheres of life;
- b. are provided special opportunities in educational and economic fields;
- c. are provided special opportunities for access to employment;
- d. develop their cultural values, languages and practices; and
- e. have reasonable access to water, health services and infrastructure.

20. the Constitution guarantees the rights of minorities and marginalized groups and under article 56 the State is required to put in place affirmative action programs designed to ensure that minorities and marginalized groups. While the state has a responsibility to marginalized groups and minorities the court finds that the Petitioners herein have not tendered any evidence to show or suggest that the said process has alienated their community or eroded their cultural practices.

20. The upshot of the foregoing is that this court finds partial merit in the Amended Petition dated 29 November, 2023 and is hereby allowed in the following terms:

- i. A declaration be and is hereby issued that the Gazette Notice Number 6282 of 31 May, 2022 is unconstitutional null and devoid of public participation;
- ii. A Judicial Review Order of Certiorari is hereby issued bringing into this Court and removing for the purposes of quashing the entire decision of the 1<sup>st</sup> respondent in the Gazette Notice Number 6282 of 31 May, 2022 establishing the administrative units and the advertisement for the position of chief dated 16 June, 2022;
- iii. That prior to taking any steps towards creation or elevation of any administrative units in Marishoni, Nessuit, Sigotik Teret, Likia and Sururu, the 1<sup>st</sup> Respondent is ordered to take all necessary steps to conduct public participation in compliance with the Constitution and relevant statutes comply;
- iv. Each party to bear their own costs.

It is so ordered.

**DATED, AND DELIVERED AT NAKURU ON THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**MOHOCHI SM**

**JUDGE**

