



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CONSTITUTIONAL PETITION NO. E2 OF 2020**

**GABRIEL OTIENDE.....1<sup>ST</sup> PETITIONER**

**EVANS ONYANGO.....2<sup>ND</sup> PETITIONER**

**ELIJAH ODINGO OSADHO.....3<sup>RD</sup> PETITIONER**

**DICKSON ORUKO WASONGA.....4<sup>TH</sup> PETITIONER**

**RICHARD ATITO ORONDO.....5<sup>TH</sup> PETITIONER**

**VERSUS**

**COUNTY COMMISSIONER – SIAYA COUNTY.....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY**

**MINISTRY OF INTERIOR & CO-ORDINATION.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**JOHN NYAPOLA OKUKU.....1<sup>ST</sup> INTERESTED PARTY**

**JOSHUA OUMA MINYA.....2<sup>ND</sup> INTERESTED PARTY**

**DUSILA ATIENO TSUMA.....3<sup>RD</sup> INTERESTED PARTY**

**JOSEPH ODIALA MESO.....4<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

1. On 3<sup>rd</sup> July 2020, the 2<sup>nd</sup> respondent herein, who is the **CABINET SECRETARY MINISTRY OF INTERIOR & CO-ORDINATION** vide Gazette Notice Number 4571 Vol. CXXII No. 128 of 3<sup>rd</sup> July 2020 moved to establish the Gem Yala Sub-County headquarters at Yala town. It is that gazette that inspired the five Petitioners, who are residents of Gem Yala Sub-County, within Siaya County, to seek redress from this court arguing that the respondents herein **unilaterally transferred** the Gem Yala Sub-County Headquarters **from Sawagongo to Yala Township** without undertaking the requisite **Public Participation** exercise as envisaged under Article 10(2) (a) of the Constitution of Kenya, 2010.

2. The Petitioners' case, therefore, is that unless the impugned gazette is revoked, the socio-economic gains materialized by the presence of the sub-county offices in Sawagongo shall be clawed back leading to the marginalization of the region thus defeating the objects of Devolution as contemplated in Article 174 (c-h) of the Constitution.

3. The petitioners also raised the issue of the centrality, access and shared prosperity brought about by having Sawagongo as the Sub county headquarters, as opposed to Yala Town, given the level of investment by both the National Government and Constituency through the Constituency Development Fund which would all go to waste if the change of the Sub county headquarters was upheld by this court.

4. In their supplementary affidavit, the Petitioners asserted that allusions of public participation by the respondent was a weighty matter not left solely to Central Gem residents but ought to have had representation of **the entire** Gem Yala Sub-County and further that in any case, the said meetings in the name of public participation were meant to sanitize the respondents' actions after the petitioners raised the issue of public participation.

5. In their said Petition filed on the 19<sup>th</sup> October 2020, the petitioners seek the following orders:

***a. A Declaration that the Gazette Notice Number 4571 Vol. CXXII No. 128 of 3<sup>rd</sup> July 2020 is unconstitutional, null and void for breach of Articles 10(2), (a), (b), (c), (d) and 184 (1)(a), (b) and (c) of the Constitution of Kenya 2010.***

***b. An Order of Judicial Review of Certiorari to remove to the High Court and quash the 2<sup>nd</sup> Respondent's Gazette Notice Number 4571 Vol. CXXII No. 128 of 3<sup>rd</sup> July 2020 purporting to relocate Gem Yala Sub-County Headquarters from Sawagongo to Yala Township, for lack of Public Participation.***

***c. Costs of this petition.***

6. Opposing the Petition, the respondents relied on their, supplementary affidavit filed on the 22<sup>nd</sup> March 2021 in which Mr. **Mwachaunga Chaunga**, the Deputy County Commissioner for Yala Sub-County deposed that Sawagongo ceased to be the central point following the split of Gem Sub-County into Gem-Yala and Gem-Wagai Sub-County and this necessitated a new headquarters for the newly formed Gem-Yala Sub-County.

7. Mr. **Chaunga** further deposed that in lieu of the Covid -19 situation in the country and in line with the Ministry of Health protocols and guidelines, he had organized a public baraza (meeting) under a tree to discuss the issue of Gem-Yala sub- county headquarters.

8. It was the respondents' contention that the law envisages the principle of separation of powers whereby decisions made in line with the enacting statute and the Constitution would not be interfered with by the court and further that the petitioners had not proved with specificity the infringement of Constitutional rights hence the court should not grant the orders sought but rather dismiss the petition.

9. The interested parties were enjoined in the instant Petition vide orders issued on the 3/2/2021. It was their case, vide an affidavit sworn by the 1<sup>st</sup> interested party John Nyapola Okumu that following the division of Gem into two sub-counties, a number of consultative meetings were held on the 21<sup>st</sup> and the 29<sup>th</sup> April 2020 where the residents of Gem-Yala Sub-County participated in the issue of deciding where the headquarters should be with the majority electing Yala town.

10. It was further deposed that a further meeting was held regarding the same issue on the 14<sup>th</sup> August 2020. The interested parties further deposed that the petitioners would not be prejudiced in any way if the Sub-County headquarters remained in Yala town.

11. The Petition was canvassed by way of written submissions.

#### **Petitioners' Submissions**

12. The petitioners filed their written submissions dated 7<sup>th</sup> April, 2021 through the firm of Mr. Odhiambo Kanyangi Advocate reiterating the contents of the petition and asserting that there was no Public Participation prior to the Gazette Notice No. 5471 Vo. CXXII No. 128 of 3<sup>rd</sup> July 2020, published by the 2<sup>nd</sup> Respondent and that the allegations by the Respondents and the Interested parties that there was Public Participation is an afterthought as the same was allegedly undertaken post gazettement. Reliance was placed on the cases of **Republic v The Attorney General & Another Ex-Parte Hon. Francis Chachi Ganya** and that of **Robert N. Gakuru & Another v The Governor Kiambu County & 3 Others [2014] eKLR** as well as the South African case of **Borbet South Africa Ply Ltd & Others Vs Nelson Mandela Bay Municipality 3751 of 2011 [2014] ZA EA PEHC 35 [2014] 5 SA 256** where the courts expressed themselves on the real role to be played by the public in instances of public participation.

13. Mr Kanyangi, the petitioners' counsel further submitted that the impugned gazette Notice, unless revoked, shall claw back the socio-economic gains materialized by the presence of the offices in Sawagongo, which are central to all residents, accessible and that the region will be marginalized hence defeating the objects of Devolution as envisaged in Article 174 (C-H) of the Constitution of Kenya and further render the existing facilities into a wasted investment, and lead to over-concentration of government services away from the majority of the populace thus exposing the region to insecurity and under-development as the recent gazettement of a Police Post did not consider Sawagongo.

14. According to the Petitioners' counsel, Yala Township is at the extreme East Corner of Gem and is less than 1km from Kakamega County and less than 1.5 km from Vihiga County hence Gem residents shall not enjoy closer government services and the fruits of devolution.

#### **Respondents' Submissions**

15. The respondents' Counsel Mr. Kobimbo filed written submissions contending that the impugned Gazette Notice created a new sub-county called Gem-Yala, which needed new headquarters hence the contention that the Sub-County headquarters was relocated from Sawagongo was untruthful.

16. The respondents further submitted that the Gazette Notice issued by the 2<sup>nd</sup> respondent was valid as Section 14 of the National Government and Coordination Act gave the Cabinet Secretary the mandate to create service delivery coordination units. Reliance was placed

on the case of **Andrew Kipkoskei Too & 6 Others v Principal Secretary, Ministry of Devolution and Planning & 8 Others [2020] eKLR** where the petitioners had contested the location of Sub-County Headquarters and the court in dismissing the Petition and Judicial Review application held that the decision to establish the new sub-county headquarters lay with the National Government.

17. It was further submitted that it was with the concurrence of members of the public that led to the split of the larger Gem sub county which the petitioners themselves admitted and as such, the split then led to the creation of a Gem Yala which had no headquarters thus it was the duty of the relevant state official in line with Article 132 of the Constitution to decide on a central location from which national government services could be coordinated from. The respondents relied on the case of **Joseph Mwangi Gathua & 4 Others V Cabinet Secretary for Interior and Co-Ordination of National Government & 4 Others [2020] eKLR** where the learned judge upheld the mandate of the Cabinet Secretary in publishing the gazette notice.

18. It was further submitted on behalf of the respondents that public participation was undertaken as evidenced by the depositions by Deputy County Commissioner through his supplementary affidavit. Reliance was placed on the cases of **Joseph Mwangi Gathua & 4 Others v Cabinet Secretary for Interior and Co-Ordination of National Government & 4 Others [2020] eKLR** and **Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR** where the issue of public participation was deliberated upon and it was held that the same is dependent on the nature of the subject matter, culture, logistical constraints and many other aspects and further that 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.

19. The respondents submitted that the petition was unfounded and based on frivolous grounds as the powers of the President in the coordination of national government functions are housed in Article 132(3) (b) & (c) of the Constitution and operationalized by the National Government Co-ordination Act, 2013 and not Article 184 as pleaded by the petitioners and as such, the actions of the Cabinet Secretary as per the gazette notice are therefore compliant with the Constitution and the law. It is further submitted that the petitioners have only pleaded the aspect of Public Participation without pleading the other aspects alleged to have been breached.

#### **Interested Parties' Submissions**

20. On behalf of the Interested Parties, it was submitted that the decision to make Yala town the Sub-County headquarters vide the gazette notice herein aforementioned was valid as it was made by the right institution that is the 2<sup>nd</sup> respondent herein. Reliance was placed on the case of **Andrew Kipkoskei Too (supra)**.

21. Regarding compliance with Article 10 of the Constitution, it was submitted that the same was undertaken as evidenced by the minutes of meetings annexed by both the interested parties as well as the respondent. The interested parties relied on the case of **Nairobi Metropolitan PSV Sacco Union Limited & 25 Others v County Government of Nairobi & 3 Others [2014] eKLR**.

22. Further submission on behalf of the interested parties were that the assertions by the petitioners that there was a relocation of sub-county headquarters from Sawagongo to Yala was actually misleading the court as Gem Yala sub-county was a new sub-county which had never existed and as such the decision as to where to locate its headquarters lay with the executive. Reliance was placed on the case of **Ahmed Jelle Maday v Attorney General [2012] eKLR**.

23. Regarding costs, it was submitted that the instant petition ought to be dismissed and costs awarded to the interested parties.

#### **Analysis & Determination**

24. Having set out the Parties' respective positions in the pleadings and affidavits for and against the petition, and having considered the detailed submissions by each party's counsel on record and the issues framed by the parties' counsel in their respective submissions, in my humble view, there are four main issues for determination in this Petition. These issues are:

- a. Who has the constitutional and statutory mandate to establish and determine the location of a sub county headquarter, and in this case, the GemYala Subcounty Headquarters?***
- b. Was the Constitutional requirement for public participation complied with in making the decision by the National Government to establish and gazette the GemYala SubCounty headquarters at Yala Township?***
- c. Whether the orders sought should be granted?***
- d. Who should bear costs of these proceedings?***

25. On who has the constitutional and statutory mandate to establish and determine the location of sub county headquarters, on the question of whether or not the 2<sup>nd</sup> Respondent acted within the confines of the law while creating the said administrative unit, Section 4 of the National Government Co-ordination Act offers a guide. The section provides in clear terms that:

***"In fulfilling its mandate, the national government shall act in accordance with the national values and principles of the Constitution in particular, those set out in Articles 10, 189, 201(d) and 232.***

26. As was rightly stated in **Andrew Kipkoskei Too (supra)**, the Constitution of Kenya 2010 does not specifically state the entity which has the responsibility for establishing such headquarters. However, under section 14 of the National Government Coordination Act No.1 of 2013, the function of establishing administrative units for coordination of National Government functions is a function of the National Government. It follows, therefore, that the establishment of the County and Sub-County headquarters of such units is a function of the

National Government.

27. In the present petition, it is noteworthy and it is not disputed by any of the parties, not even the petitioners, that GemYala sub-county did not exist prior to the aforementioned gazette notice and as such, its headquarters also did not exist as alleged by the petitioners. There is no evidence on record to show that Sawagongo was the GemYala Subcounty Headquarters, to warrant such headquarters being moved from Sawagongo to Yala Town.

28. Further, there is no dispute that GemYala sub-county was established by the National Government under Gazette Notice Number 4571 Vol. CXXII No. 128 of 3rd July 2020. The National Government proceeded vide the said Gazette Notice to name Yala Town as the Sub-County headquarters. That being the case, I have no doubt in my mind that the National Government, through its representative, the 2<sup>nd</sup> respondent herein was the right institution to establish and designate or gazette the sub-county headquarters.

29. On whether the requirement for public participation was complied with in making the decision by the National Government to establish the GemYala Subcounty headquarters at Yala Town, these petitioners asserted that there was no such public participation, while the respondents and the interested parties all contend that there was such public participation in establishing the Sub-County headquarters at Yala.

30. Public participation in the making of decisions that affect the public is a constitutional imperative. Article 10 of the Constitution of Kenya 2010 highlights Public Participation as one of the national values and principles of governance. This requirement for public participation in making a decision to establish the GemYala SubCounty Headquarters is not denied by the respondents. They however maintain that there was adequate public participation, in the circumstances, in establishing the Gem Yala Sub-County headquarters at Yala.

31. Article 10 (1) of the Constitution provides that:

***"The national values and principles of governance 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.***

32. Sub-article (2) (a) and (c) 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; (c) good governance, integrity, transparency and accountability."***

33. 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."***

34. The importance of adequate public participation was emphasized in Nairobi High Court Petition No.522 of 2017, Okiya Omtata v Kenya Revenue Authority [2018] e KLR where Mativo J stated:

***"65. It is not enough to rely on attendance sheets for two meetings attended by a few persons with no supporting minutes to help the court to appreciate the nature of the decisions. More fundamental is the fact that the alleged meetings took place in Nairobi, yet the impugned legislation affects the citizens of Kenya. In crafting a meaningful public participation programme, the decision maker should deliberately as much as possible design a programme to reach a reasonably wide population in the country." [emphasis added].***

35. In the Matter of the Mui Coal Basin Local Community (supra) a three-judge bench of the High Court considered relevant case law, international law and comparative jurisprudence on public participation and enunciated the following practical elements or principles which both the Court and public agencies can utilize to gauge whether the obligation to facilitate public participation has been reached in a given case:

***"a. 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.***

***b. 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.***

***c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs 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.”*

*d. Fourth, public participation does not dictate that everyone must give their views on the issue at hand. 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, 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.*

*e. 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.*

*f. 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.”[emphasis added]*

36. From the documents filed by both the respondents and the interested parties, I note that some public meetings were held with some leaders where the issue of Subcounty headquarters for Gem Yala was mentioned. Mr. Chaunga who swore an affidavit on behalf of the respondents deposed that in lieu of the Covid -19 situation in the country and in line with the Ministry of Health protocols and guidelines, he had organized a public baraza (meeting) under a tree to discuss the issue of Gem-Yala sub- county headquarters.

37. However, I note that the said meeting took place on the 14<sup>th</sup> August 2020 at Sinaga Girls Secondary School, more than a month after the Gazette Notice Number 4571 Vol. CXXII No. 128 of 3/7/2020 had been published. For avoidance of doubt, a meeting or meetings held after gazette of the Subcounty Headquarters are not for all purposes, public participation exercises as the meetings were held after the fact. It follows that had this meeting of 14/8/2020 been the only evidence of alleged public participation produced by the Respondents and interested parties, then the respondents would have miserably failed to meet the bare minimum test of public participation and this judgment would end here. This is so because the meeting held on 14<sup>th</sup> August 2020 at Sinaga Girls, annexure [‘JNO1’] is irrelevant as far as the decision to establish Yala as the GemYala Subcounty Headquarters was and is concerned. It was a meeting after the fact. One cannot gazette the subcounty headquarter then go back to the residents to seek their permission or their ratification. I must emphasize that the question of prejudice to be suffered by the petitioners does not arise. Compliance with the constitutional requirement for public participation, which is a key National Value and principle of governance that binds all persons and state organs is not a matter of choice and prejudice but a Constitutional mandatory command. If that were not to be the case, then anybody would flagrantly defy the Constitutional provisions on account that no one will be prejudiced by their breach. That would lead to constitutional anarchy.

38. However, the interested parties came to the rescue of the respondents and filed minutes that show that on the 21/04/2020, at a meeting was held at the Chief’s Camp, East Gem, attended by 19 people, whose Agenda was: Covid 19 and Review of Administrative units in East Gem Location, under **Agenda No. 2 at Min05/21/04/2020, a member suggested that the Gem SubCounty be divided into two GemYala Subcounty and Gem Wagai Subcounty. He further suggested that GemYala Subcounty Headquarters be at ACC’s Office Yala, which was unanimously agreed by members present.**

39. For avoidance of doubt, the agenda for the above meeting was not establishment of Yala as the Subcounty headquarters for GemYala Subcounty. The agenda was review of administrative units in East Gem Location, not to discuss the establishment of Yala as a subcounty headquarter for Gem Yala subcounty, which latter was only suggested by a member at the meeting. A location is smaller than a subcounty. The meeting went on to discuss the sublocations that were to be created from East Gem Location and reasons for such subdivision were given with population figures highlighted. It was then that a member suggested subdivision of **Gem subcounty into two namely, Gem Yala and Gem Wagai and he also suggested that the headquarters for Gem Yala be at Yala and the meeting agreed unanimously.**

40. The interested parties also filed minutes of the meeting held on 29/4/2020 at the Chief’s Office Central Gem Location attended by, according to minute 2/29/4/2020, different leaders namely: **village elders, opinion leaders, church leaders, youths and women leaders, who all introduced themselves to the chair.** The said minutes and letter dated 5/5/2020 forwarding the minutes to the Deputy County Commissioner, Gem, are crystal clear. Nothing like the issue of establishment of Yala as the Gem Yala Subcounty Headquarters was an agenda or minuted or discussed. Even the letter forwarding the minutes states as follows:

*“Dear Sir,*

**RE: REVIEW OF ADMINISTRATIVE BOUNDARIES OF CENTRAL GEM LOCATION**

*I hereby wish to submit the minutes of the meeting which was held on 29/4/2020 which discussed the above and the proposals and agreement reached.*

*The meeting agreed that Central Gem Location be subdivided into two and two sublocations Kagilo and Nyandiwa also be subdivided. I therefore forward to you for further action sir,*

*Yours Faithfully,*

*Signed*

*Chief's Office Central Gem Location*

*5/5/2020*

41. I have carefully read the minute in question and the agenda for that day which reads:

**“1. INTRODUCTION**

**2. CORONA VIRUS DISEASE**

**SUBDIVISION OF NYANDIWA SUBLOCATION**

**4. ANY OTHER BUSINESS”**

Even the opening remarks by the Chairman of the meeting, Mr. John B. Oloo was clear that the meeting was called with the main agenda being **subdivision of Nyandiwa sublocation for close administration**. Nowhere in his remarks was the issue of establishment of Gem Yala sub-county headquarters.

42. The Interested Parties further filed minutes of a meeting held on 27/4/2020 attended by 20 people whose agenda was preliminaries, sensitization and preparedness against Covid 19, proposed subdivision of National Government administrative units in North Gem Location and AOB.

43. Under Minute 2/27/4/2020, discussions were held on the North Gem Location and four sublocations were proposed to be subdivided namely Malanga, Maliera Ludha and Got Regea. More sublocations were suggested

44. Before closure of the meeting, the '**Committee**' proposed the subdivision of the subcounty into two, namely, Gem Yala with headquarters at Yala Current ACC's Office and Gem Wagai with headquarters to be at Wagai, current ACC'S Office.

45. I reiterate that in those meetings, there was no substantive agenda for the establishment of GemYala Subcounty Headquarters. The minutes are clear on what the agenda of each of the meetings was.

46. The question is, how would the issue of establishing a subcounty and its headquarters be such a periphery issue suggested by a member and on another occasion, simply proposed by the committee on 27<sup>th</sup> April 2020 and left at that for the 2<sup>nd</sup> respondent to proceed and gazette the same?

47. I find that there was no substantive agenda for discussion and or deliberation on the impugned issue herein and therefore it cannot be assumed that the mere mention of the suggestion and or proposal by a member of the meeting that Yala Division remain in Yala Subcounty with Headquarters at YALA was sufficient public participation on the impugned issue. Needless to say that the 20 people who attended the meetings were only aware of the Agenda as presented as reproduced above which was on the Review of Administrative boundaries of Central Gem Location and North Gem Location respectively, **NOT** the establishment of Yala as the GemYala Subcounty Headquarters. It is also not clear how the so called committee as recorded in the minutes of 27/4/2020 was established to represent the whole population of the Gem Yala Subcounty in matters of this magnitude.

48. The other question is, even assuming that the issue of subcounty headquarters was agreed upon by mere suggestion or proposal at the meetings, did the rest of the members present get the mandate of the residents of Gem Yala Subcounty to discuss the issue of establishment of Yala as the Subcounty headquarters for Gem Yala Subcounty? I find no evidence of such mandate. There is furthermore no evidence of any programme for public participation prepared and send out to the subcounty residents.

49. The Petitioners submitted that the issue of a sub-county headquarter was a weighty matter and representation of Central Gem by 5 people (the area MCA and 4 others) was not representative enough to make a decision of such weighty constitutional magnitude. I can't agree more. From the minutes filed by the Interested parties, besides the meeting held after the fact, the meetings held on 21<sup>st</sup>, 27<sup>th</sup> and 29<sup>th</sup> April 2020 did not have the Agenda for discussion on the establishment of GemYala Subcounty Headquarters.

50. The question is whether the meetings and agenda as shown above could be said to be sufficient to qualify as public participation by residents of the Subcounty to determine where the Subcounty Headquarter would be? In my humble view, those minutes and meetings of 21<sup>st</sup>, 27<sup>th</sup> and 29<sup>th</sup> April 2020 alone attended by some few people failed to meet the threshold of public participation as envisaged in the Constitution and as interpreted by courts in the above cited cases.

51. There is no reason why the County Commissioner or his representative did not prepare or design a programme or agenda items for those meetings, dedicated to the discussions on establishment of and determination of GemYala Subcounty Headquarters and disseminated in all the sublocations or even villages for the residents to know that deliberations of issue of where the subcounty Headquarters would be were underway, a programme that must be designed to reach a reasonably wide population in the subcounty, considering the population shown in the minutes of 21/4/2020 and 27/4/2020. Leaders being chiefs and assistant chiefs or village elders and an MCAs representative attending one or two meetings and deciding for the entire population of Gem Yala is not adequate public participation as members of the public who are residents of the Subcounty have a right to participate in their affairs.

52. The Respondents were under a duty which duty they failed to take into account, the quantity and quality of the governed to participate in their own governance. One or two fora for ventilation where only a few people were invited to attend to make decisions on behalf of a larger population does not, in my humble view, meet the threshold of public participation. This is not to say that everyone in the subcounty must give their views or that those views must all be yes. It is to say that in this case, the administrators and other leaders who attended the meetings did not have the agenda of establishing Gem Yala Subcounty headquarters in mind that is why the issue only emerged as suggestions and proposals at the end of the meetings referred to above. In addition, I find that there was no intentional inclusivity and diversity in decision making. I therefore find that the 2<sup>nd</sup> respondents' discretion in gazetting Yala as the Gem Yala Subcounty headquarters was not properly exercised.

53. This court takes judicial notice of the fact that at the time the meetings evidenced by the interested party took place, the country was under lockdown as a result of the first wave of the Covid 19 pandemic and as such, it would have been unreasonable and practically impossible to have huge congregations of people gathered in one place to deliberate on the issues. In addition, it is worth noting that the spirit of public participation as emerges from the Mui case(supra) does not envision every single individual taking part but that the same is dependent on the nature of the subject matter, culture, logistical constraints and many other aspects.

54. However, as the situation in the country could not allow for huge gatherings owing to the novel Corona Virus situation, the question is whether it was an emergency situation for the Respondent to gazette the Subcounty Headquarters without engaging the residents of the sub county yet it was clear that majority of the people could not be allowed to gather due to the MOH Protocols on gatherings. I think not, and no emergency situation has been established in this petition.

55. In the **Andrew Kipkoskei** (supra) case, Dulu J had this to say, persuasively and I concur:

***“26. The importance of adequate public was emphasized in the case of Nairobi High Court Petition No.522 of 2017 OKIYA OMTATA – VS – KENYA REVENUE AUTHORITY [2018]eKLR wherein Mativo J. stated as follows –***

***“65. It is not enough to rely on attendance sheets for two meetings attended by a few persons with no supporting minutes to help the court to appreciate the nature of the decisions. More fundamental is the fact that the alleged meetings took place in Nairobi, yet the impugned legislation affects the citizens of Kenya. In crafting a meaningful public participation programme, the decision maker should deliberately as much as possible design a programme to reach a reasonably wide population in the country.”***

***27. It follows from the above reasoning that for there to have been adequate and effective public participation herein, there should have been a programme which involved a reasonable involvement of a wide population of the people in the Soin/Sigowet sub county. From the documents filed, I note that several public meetings were held and a committee of 24 people appointed to resolve the issue amicably as early as 2014 but no agreement was reached on the location of the Sub-County headquarters. Even by 2016 that committee had failed to come up with an amicable or mutually agreed location for the headquarters. Subsequently therefore in the same 2016 the National Government set up the present Sub-County headquarters as a temporary measure at a chief's camp.”***

56. The National Government owes a duty to the citizens. It should have designed a programme for public participation and waited until it was able to move around the subcounty locations or gather sufficient quorum at various venues before concluding the process of gazetting Yala Town as the Subcounty headquarters. The venues for the meetings of 21<sup>st</sup> and 29<sup>th</sup> April 2020 was at Chief's office Central Gem while the venue for the meeting of 27<sup>th</sup> April 2020 is not disclosed. The minutes are however signed by Chief, North Gem Location. There is no evidence of a meeting that was held to appoint a committee to represent the area residents in the discussions subject of this petition.

57. In my humble view, it cannot be said that public participation was adequately enabled by the National Government in the circumstances. The respondents claim that the question of establishment of administrative units is for the national government and this court should not interfere. The first part of that statement is true. However, this court exist to correct the errors committed or omitted in the exercise of those administrative powers. For that reason, it cannot determine where the administrative units or headquarters for the subcounty should be. It exists to determine whether Constitutional provisions and the law has been followed or breached in the exercise of such powers.

58. For the above reasons, I find and hold that there was no adequate public participation before a decision to gazette Yala as the Gem Yala Subcounty headquarters was made and effected by the 2<sup>nd</sup> respondent.

#### **On whether the orders sought should be granted?**

59. Having made a finding that on the evidence presented before this court to counter the petition, there was no adequate public participation prior to the establishment and gazette of Gem Yala Subcounty Headquarters at Yala Township, in the circumstances, the order that commends itself is:

***a. A Declaration is hereby made that the Gazette Notice Number 4571 Vol. CXXII No. 128 of 3<sup>rd</sup> July 2020 was premature, null and void for non-compliance with Article 10(2), (a), (b), (c), (d) of the Constitution and for want of public participation;***

***b. Judicial Review Order of Certiorari is hereby issued bringing into this court and removing for purposes of quashing and I hereby quash the 2<sup>nd</sup> Respondent's Gazette Notice Number 4571 Vol. CXXII No. 128 of 3<sup>rd</sup> July 2020 establishing Gem Yala Sub-County Headquarters at Yala Township, for lack of sufficient Public Participation;***

***c. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are hereby directed to develop a programme for holding of and engage in appropriate***

*consultative and sensitization fora with the residents of GemYala Subcounty on the suitable place for establishment of Gem Yala Subcounty headquarters, before gazetting such Headquarters. Such fora shall observe all the current COVID-19 Ministry of Health Protocols and Government issued Guidelines;*

*d. As the petition was instituted in the public interest, I make no orders as to costs of the petition.*

Dated, Signed and Delivered at Siaya this 7<sup>th</sup> Day of June, 2021 in open court and via Microsoft teams.

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

**Mr Odhiambo Kanyangi Advocate for the petitioners**

**Mr Kombimbo Adv for the respondents**

**Mr Odera a Were Advocate for the Interested parties**