



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 4 OF 2020

IN THE MATTER OF ARTICLES 22,(1), 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS & FUNDAMENTAL
FREEDOMS UNDER ARTICLES 1, 2, 6 (3), 10, 11 (1), 19, 20, 21, 23, 24, 27, 44, 45, 47, 73

(1), 153, 154, 174, AND 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF NATIONAL GOVERNMENT CO-ORDINATION ACT

BETWEEN

JOANES BOKEYE MURUGUTA.....1ST PETITIONER

MANASE NYAISIRI MOGENDI.....2ND PETITIONER

MWITA M. NSATO.....3RD PETITIONER

-VERSUS-

ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY FOR INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

JUDGEMENT

This Petition was filed on 8/12/2020. The Petitioners seek the following orders and declarations:

i. A declaration that the decision, action made by the Cabinet Secretary vide Gazette Notice No. 9587 on 20th November 2020 as corrected in corrigenda appearing in Gazette Notice Number 4724 of 27th November 2020 and all other directive and/or pronouncements thereto are unlawful and unconstitutional and in violation of Articles 1, 2, 6, 10, 11, 19, 20, 21, 24, 27, 44, 45, 47, 73, 153, 154, 174 and 232 of the Constitution respecting creation of new Divisions of Nyamohanse and Nyamosense.

ii. A declaration that the direction and or actions by the Cabinet Secretary Interior and Co-ordination of National Government vide Gazette Notice No. 9587 of 20th November 2020 and corrigenda appearing in Gazette Notice 4724 in Vol. CXXII No. 207 of 27th November 2020 and all other directives and or directives thereto have discriminated against the residents of Old Masaba Division more especially its old Bugumbe East Location and more especially the Resident of the Old

Nyangonge Sub Location now new Nyangonge Location.

iii. An order of Certiorari be issued calling into court and quashing the entire decision and or actions of the Cabinet Secretary for Interior vide Gazette Notice No. 9587 and corrigenda aforementioned above as respecting the creation of new Divisions Nyamohanse and Nyamosense out of the Old Masaba and Mabera Divisions.

iv. An order of Prohibition be and is hereby issued restraining the 2nd Respondent from implementing his decision creating two new divisions as disclosed vide Gazette Notice Number 9587 of 20th November 2020 and corrigenda No. Gazette Notice 4724 in Gazette Notice Vol. CXXII No. 207 of 27th November 2020 or any directive in furtherance of such decision creating Divisions Nyamohanse and Nyamosense out of the Old Masaba and Mabera Divisions.

v. A Conservatory Order be issued suspending the directive made by the Cabinet Secretary Interior and Co-ordination of National Government vide Gazette Notice No. 9587 of 20th November 2020 and corrigenda No. 4724 creating new Divisions Nyamohanse and Nyamosense out of the old Divisions of Masaba and Mabera Divisions pending the hearing and determination of the Petition.

vi. A Conservatory Order be issued restraining the 2nd Respondent acting by himself or any other person under his command from implementing the decisions contained in the aforesaid Gazette Notices creating new Divisions Nyamohanse and Nyamosense out of the old Divisions of Masaba and Mabera.

vii. An Order of Mandamus compelling the 2nd Respondent to create a new Division exclusively out of the old Masaba Division and another new one out of old Mabera Division as was agreed lawfully Constitutionally and legitimately expected.

viii. Any other relief.

ix. Costs be provided for.

Filed simultaneous with the Petitions is an application dated 7/11/2020. The Respondents were served with the said application together with the Petition. Having failed to respond to the application on 14/4/2021, this court granted temporary Conservatory orders against the 2nd Respondent by himself or any other person from implementing the decision published in the Gazette Notice NO. 9587 dated 20/11/2020.

The Court gave directions that the Petition be canvassed by way of written submissions. Again, the Respondents were served but failed to respond. The Petitioners filed their written submissions on 7/6/2021 through the firm of Amonde Kisera Advocate.

The 1st petitioner, who also has the authority to act on behalf of the other petitioners, describes himself as a resident of Nyankore Sub-Location in the old Bugumbe East Location in old Masaba Division of old Kuria West sub county within Migori County.

The 1st petitioner stated that he, together with the other co-petitioners brought this petition on their own behalf and on behalf of the citizens who inhabit the Old Masaba Division more specifically its old Location of Bugumbe East which comprised old Nyangonge and Nyankore Sub-locations.

The 1st respondent is sued as the Principal Legal Advisor of the Government of the Republic of Kenya and a Member of the Cabinet as established under Articles 156 and 152 (i) (a) of the Constitution of Kenya respectively.

The 2nd respondent is sued as an appointee of the President in charge of matters of Interior and Co-ordination of National Government pursuant to Article 154 of the Constitution.

Article 1 of the Constitution recognises the sovereignty of the people of Kenya and that the sovereign power vested in the people is exercised only in accordance with the Constitution and is exercised at the National level and County level through the different Arms of Government. Article 2 of the Constitution recognises the supremacy of the Constitution and that it binds all the organs of State. The 2nd Respondent exercises delegated power from the Executive and must act in accordance with the Constitution and any other statutory provision made there under.

The crux of the Petitioners' case is hinged on the **Gazette Notice No. 9587 of 20/11/2020 and corrigenda No. 4724 (Gazette Notice)** published by the 2nd respondent, which created new Divisions, namely Nyamohanse and Nyamosense out of the old Divisions of Masaba and Mabera Divisions.

Prior to the publication of the Gazette Notice, there existed Kuria West Sub - County comprising of 5 Divisions namely **Masaba, Mabera, Ikerege, Isebania and Kehancha.**

That pursuant to Section 14 (1) and (3) of the National Government and Co-ordination Act, the 2nd Respondent created a **new sub-county called Mabera** comprising of the **old Divisions of Masaba and Mabera** with its headquarters in **Mabera Town**. Out of the new sub-county, two more Divisions were created comprising of **Nyamohanse and Nyamosense** and also new locations were created out of the geographical area initially comprised in the old Masaba and Mabera Divisions.

The Petitioners further contend that the old Divisions of Masaba and Mabera are predominantly inhabited by the Bugumbe Clan while the

old Divisions of Isebania, Ikerega and Kehancha are predominantly inhabited by the Bukira Clan of Kuria Tribe.

It is also documented by the Petitioners that the idea to create the new Divisions from the Old Divisions was to maintain consistency and familiarity of services and geographical locations. Thus, **the new Division to be created out of the old Masaba Division was to be called Nyankore and the new Division to be created exclusively out of old Maberera Division was to be called Nyamosense.**

In consideration of the creation of the new Divisions, public consensus was formed and took into account some considerations like the issues of population, clan features, proximity to the administrative headquarters and the historical boundaries of the administrative units of Locations and Sub - Locations and Communal Investments and cohesions which were curved out by identifying the existing geographical and administrative boundaries.

The 2nd respondent is faulted, for being in contravention of the aforementioned public consensus, by irregularly, arbitrarily and though the abuse of the Constitution, created two new Divisions from the area comprised of the Old Masaba and Maberera Divisions vide the impugned Gazette Notice in an unfair, biased and skewed manner, against the Old Masaba Divisions and more especially to the inhabitants of the former Bugumbe East Location.

The discriminatory actions of the 2nd respondent against the inhabitants of the old Masaba Division were particularised as follows:-

a. Creation of two new Divisions of Nyabohanse and Nyamosense within the old Maberera Division at the expense of the old Masaba Division whereas the purpose of the new creations was to equitably benefit each of the old Divisions.

b. Creating the new Divisions in a way that leaves the Old Masaba Division with a huge population which makes it appear not to have been spilt at all as the new Divisions are comprised of comparably very small populations thereby defeating the purpose of creation of new administrative units.

The old Maberera Division was comprised of Bugumbe West, Bugumbe South and Tagare Locations while the old Masaba Divisions was comprised of Bugumbe East, Bugumbe Central, Bugumbe North and Kombe Locations.

a. In the old Maberera Division, the 2nd Respondent created and renamed Ngisiru Location out of the said Tagare Location and renamed it as Maberera Division.

b. Out of the old Bugumbe West Location, was created Moheto Location and the said Bugumbe West and Moheto Locations were renamed Nyamosense within the old Maberera Division.

c. The old Bugumbe East Location was comprised of two sub-locations namely Nyankore and Nyangoge. The 2nd Respondent hived off Nyangoge, made it a location and combined it with Bugumbe South location of old Maberera Division and named it Nyabohanse.

d. The old sub-location of Bugumbe East of Nyankore has been renamed Bugumbe East Location and there is now confusion as the said Bugumbe East Location appears in both the new Masaba and new Nyabohanse Divisions as a location.

The Petitioners contend that the effect of the creation of the two new Divisions out of the old Masaba and Maberera Divisions has been to create two new Divisions out of the Old Maberera with the help of just one former sub-location in Masaba called Nyangoge, now a location being transferred from the old Masaba to be combined with Bugumbe South Location to form Nyabohanse Division all for the benefit of the old Maberera at the expense of the old Masaba Division.

For the public participation, it was unanimously agreed that the new Division to be created out of the old Masaba Division would be called Nyankore Division to comprise of Old Bugumbe East and Bugumbe Central with its headquarters in Nyankore; that the names Nyangoge and Nyankore carry a cultural and historical values hence the names of the old sub-location of Nyankore within the Old Bugumbe East should be maintained even as the same is made a new location like her sister Nyangoge has retained her name.

It was urged that the residents of old Bugumbe East are not happy with the arbitrary splitting which took the old Sub Location of Nyangoge out of the old Masaba area to the old Maberera area and merged with Bugumbe South to form the new Nyabohanse Division; that it was contrary to the legitimate expectations of the petitioners that there would be creation of a new Division exclusively within the old Masaba and another exclusively within the old Maberera which would not necessitate any transfer from any portion of either the old Divisions into each other.

It is the Petitioners' case that the Gazette Notices are unreasonable, unfair, arbitrary while considering the geographical location, population, proximity to the headquarters, historical, cultural and public opinions gathered during the consultations with the public.; that the action has exposed the inhabitants of the former Masaba Division to open discrimination, bias and unfairness.

The Petitioners further contend that the 2nd Respondent denied them their fundamental rights and contravened the following Constitutional provisions;

i. Article 47 which gives them a right to expeditious, efficient, lawful, reasonable and procedural sound administrative action as provided for in the fair and Administration Act and National Co-ordination Act.

ii. The decision by the 2nd Respondent offends the public service values and principles of responsiveness, prompt effective

impartial and equitability contrary to Article 232 of the Constitution.

iii. The 2nd Respondent's decision defeats the purpose of devolution as espoused in Section 14 of the National Co-ordination Act which must proximate accessibility of services as it discriminated against the inhabitants of the old Masaba Division contrary to Article 174 of the Constitution of Kenya.

iv. The impugned decision offends Article 10 of the Constitution which promotes the value of openness in taking administration action and infringes on the Petitioners' right to fairness, non-discrimination and respect.

The Petitioners filed their submissions dated 4/6/2021 and mainly addressed the court on the alleged infringed rights contrary to the various constitutional provisions.

The 2nd Respondent being represented by the 1st Respondent, did not participate in this Petition despite being served severally.

I have carefully considered the entire Petition, the Supporting Affidavit and the respective annexures. On that account, it is this court's considered opinion that the issues for determination which arise therefrom are:-

a) Who has the constitutional and statutory mandate to establish and determine the location of a sub-county headquarters?

b) Was the constitutional requirement for public participation complied with and taken into account in making the decision by the National Government to establish and gazette the sub-counties in Gazette No. 9587 of 20/11/2020 as corrected in corrigenda appearing in Gazette Notice Number 4724 of 27/11/2020.;

c) Whether the orders sought can be granted.

The National Government and Co-ordination Act, 2013 was enacted by Parliament to establish administrative and institutional framework for co-ordination of national government functions at both the national and County Government levels of governance and to give effect to Articles 131 (1) (b) and 132 (3) (b) of the Constitution.

On who has the constitutional and statutory mandate to establish and determine the location of county sub-headquarters, **Section 14** of the National Government and Co-ordination Act, 2013 offers guidance. It provides:-

“The Cabinet Secretary with the approval of the President and by a notice in the Gazette, establish national government service delivery co-ordination units.”

It therefore follows that the establishment of County and Sub - County headquarters is a function of the National Government.

The importance of establishment of such administrative units is well captured under **Section 14 (3)** of the aforementioned Act as follows:-

“Where a county government has not decentralised its units pursuant to Section 48 (1) of the County Government Act, 2012, the National Government may, where necessary, establish its own service delivery co-ordination units for purposes of co-ordination of national government functions.”

The National Government through the 2nd Respondent in performing its mandate under the National Government and Co-ordination Act, 2013 does not operate in a vacuum. **Section 4** of the National Government and Co-ordination Act, guides them as follows:-

“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.”

That being settled, that the 2nd Respondent in consultation with the national government has the mandate to establish the administrative units at the County level.

The next issue to be determined is whether the views made during the public participation were taken into account before making the impugned decision.

Public participation is categorised as one of the national values and principles which binds all state organs, state and public officers in discharging their mandate. Article 10 of the Constitution provides:-

10. (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.

Sub Article 2 (a), (b) and (c) of the aforementioned Article provides for the national principles and values of governance as follows:-

1. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

2. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

3. good governance, integrity, transparency and accountability;

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.”

Section 87 of the County Government Act details the extent of public participation in governance at the County Government level. One of the values to be considered is: -

(c) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information.

The above provisions are in tandem, that public participation is paramount before the making of any administrative decision by either state or public officers which decision is likely to significantly impact and affect the citizens.

In *Kiambu County Government & 3 Others v Robert N. Gakuru & Others* [2017] eKLR the Court of Appeal stated that:-

“...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation... *The bottom line is that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation.*”

The agitation for the creation of new administrative units began in the year 2009 and thereafter a comprehensive meeting was held on 30/7/2013 in the Chief's Office at Nyakore and the main agenda being the sub-divisions of Bugumbe East Location. The proposal being that the Bugumbe East Location be divided into two locations and four sub locations as follows: -

i. Bugumbe East Location to be comprised of Nyangoge and Nyabirongo sub – locations.

ii. Nyankore Location to be comprised of Nyakore and Muchebe sub – locations.

Thereafter, a meeting was held in the year 2014 in which a Memorandum dated 15/2/2014 was sent and addressed to the Cabinet Secretary in the office of the President appealing for the creation of Maberu District in Migori County. Subsequently, another meeting was held in the year 2015 and a Memorandum dated 21/8/2015 was addressed to the office of the 2nd Respondent with their attached proposal as a follow up of their earlier letter.

The Petitioners' case is not hinged on the fact that there was no adequate public participation prior to the publishing of the Gazette Notices. The documents presented by the Petitioners are indicative that there was public participation in making the proposals on creation of the new administrative units. Rather, the case of the Petitioners is that their views were not taken into account by the 2nd Respondent. The essence of Public participation was aptly captured in the case of *Poverty Alleviation Network & Others vs= President of South Africa and 19 Others CCT86/2006 (2010) ZACCJ* as follows:

“...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 within and consulting the parties, the result can never be an informed decision.”

As demonstrated in their pleadings, the actions by the 2nd Respondents favored the residents of the Old Maberu Division at the expense of the residents of the old Masaba region and hence the actions were discriminatory contrary to Article 27 of the Constitution. Their legitimate expectations was that there would have been a creation of new Divisions within the old Masaba and Maberu regions to avoid transfer of any portion of either old Divisions into each other.

In particular, the Petitioners contended that out of the public participation forums, it was concluded that the new Division to be created out of the old Masaba region would be called Nyankore Division with its headquarters at Nyankore. This was so significant to the Petitioners and the residents of old Bugumbe East because the name Nyankore bears a significant cultural and historical value to them. Instead, the 2nd Respondent demonstrated open bias in having the residents in Masaba to retain their name Nyangonge which also has a cultural significant value to them. The said Nyankore has now lost its identity as in its place, is now a location called Bugumbe East which is shown to fall both under the existing Masaba and new Nyabohanse Divisions. The acts of the 2nd Respondent were discriminating to the petitioners. The above actions breached the petitioners rights to practice their culture a guaranteed under Articles 11 and 44 (1) of the Constitution.

It is the Petitioners' further contention that out of the old Maberera Division, it was agreed that it would produce one new Division to be named Nyamosense. Instead, 2nd Respondent created an extra new Division named Nyabohanse out of the old Maberera Division see pages 38 of petition. The net effect being the old Masaba remains unsplit with a population of over 30,000 inhabitants while the new divisions retain populations which are unproportional to the new Masaba Division. The other effect of the actions of the 2nd Respondent, would force the inhabitants of the Old Bugumbe East to travel long distances to access services to the new Nyabohanse Division. This denial of services contravenes Article 6 of the Constitution which guarantees access to services for all Kenyans.

In **Kenya National Chambers of Commerce and Industry (Kilifi Chapter) v County Government of Kilifi & 3 others [2021] eKLR** the court observed the significance and importance of taking into account the views of the public by administrative authorities as follows: -

“That being the case public participation is not a mere cosmetic venture or a public relations gimmick. Whereas it is not to be expected that administrative authorities would at all times be beholden to the public in a manner which enslaves such authorities to the public, to contend that public views ought not to count at all in making a decision to draft a Valuation Roll that touches on their property and other rights would be to negate the spirit of public participation as enshrined in the Constitution and the Fair Administrative Action Act, 2015. In my view, public views ought to be considered in the decision-making process and as far as possible the product of the legislature ought to be a true reflection of the public participation so that the end product bears the seal of approval of the public. That is the only way the end product can be said to be owned by the public.”

Section 4 of the Fair Administrative Action Act as read together with Article 47 of the Constitution, provides for the entitlement of every Kenyan to administrative action that is **expeditious, efficient, lawful, reasonable and procedurally fair**. It further provides that every person is entitled to be given written reasons for any administrative action taken against them, the information, material and evidence to be relied upon to reach the decision. It is also incumbent upon the administrator to give the person prior and adequate notice of the nature and reasons for the proposed administrative action and at the same time, be given an opportunity to be heard and make representations.

It is my view that although the 2nd Respondent rightly ensured that there was adequate public participation, did not take into account the views of the local people who would be directly affected by his decisions before gazettment of the new administrative boundaries were made. The contributions of the Petitioners and the people of the old Masaba Division were taken as pedestrian, thereby, making a mockery of the fundamental principles of public participation espoused under Article 10 of the Constitution and the right to Fair Administrative Action under Article 47 of the Constitution. The legitimate expectations of the Petitioners was that in rejecting their proposals, the 2nd Respondent would have at least attempted to explain to them how it came up with the impugned Gazette Notice. It did not. In **the Gakuru case (supra)** the Court of Appeal relied on the decision of Sachs J. in **Marajong Demarcation Forum & others vs= President of the Republic of South Africa** where the Judge emphasized the need for the decision making body to give reasons in the event the view of the people were not taken into account:-

“..... In my view, then, it was constitutionally incumbent on the legislature to communicate and explain to the community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation and to pay serious attention to the community's response....”

In conclusion, I make the finding, that although there was adequate public participation, the 2nd Respondent did not take into account the views of the residents of the old Masaba Division to their detriment without advancing any reasons. The Respondent's actions were biased; discriminatory and breached the petitioners' legitimate expectations. There being no counter arguments against this Petition, the Petitioners are entitled to the orders sought in the petition as follows:-

i. A declaration is hereby made that the decision, action made by the Cabinet Secretary vide Gazette Notice No. 9587 on 20th November 2020 as corrected in corrigenda appearing in Gazette Notice Number 4724 of 27th November 2020 and all other directive and/or pronouncements thereto are unlawful and unconstitutional and in violation of Articles 1, 2, 6, 10, 11, 19, 20, 21, 24, 27, 44, 45, 47, 73, 153, 154, 174 and 232 of the Constitution respecting creation of new Divisions of Nyamohanse and Nyamosense.

ii. A declaration is hereby made that the direction and or actions by the Cabinet Secretary Interior and Co-ordination of National Government vide Gazette Notice No. 9587 of 20th November 2020 and corrigenda appearing in Gazette Notice 4724 in Vol. CXXII No. 207 of 27th November 2020 and all other directives thereto have discriminated against the residents of Old Masaba Division more especially its old Bugumbe East Location and more especially the Residents of the Old Nyangonge sub location now new Nyangonge Location.

iii. A Judicial Review Order of Certiorari is hereby issued bringing into this court and removing for the purposes of quashing the entire decision and or action of the Cabinet Secretary for Interior vide Gazette Notice No. 9587 and corrigenda aforementioned above as respecting the creation of new Divisions Nyamohanse and Nyamosense out of the Old Masaba and Maberera Divisions.

iv. A Judicial Review Order of Prohibition is hereby issued restraining the 2nd Respondent from implementing his decision creating two new divisions as disclosed vide Gazette Notice Number 9587 of 20th November 2020 and corrigenda No. Gazette Notice 4724 in Gazette Notice Vol. CXXII No. 207 of 27th November 2020 or any directive in furtherance of such decision creating Divisions Nyamohanse and Nyamosense out of the Old Masaba and Maberu Divisions.

v. A Judicial Review Order of Mandamus is hereby issued compelling the 2nd Respondent to perform its Constitutional, and Statutory duty in relation to Division of the Old Masaba and old Maberu Divisions of Migori County as was agreed and legitimately expected.

Since the matter involves public interest, there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 8TH DAY OF DECEMBER 2021

R. WENDOH

JUDGE

Ruling delivered in the presence of:

Mr. Oywer for the Petitioners.

No appearance for the 1st Respondent.

No appearance for the 2nd Respondent.

Nyauke Court Assistant