



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

PETITION NO. 1 OF 2019

IN THE MATTER OF ARTICLES 10, 22, 23, 165, 201 & 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 6A, 33, 87, 104 & 115 OF THE COUNTY GOVERNMENT ACT 2012

AND

IN THE MATTER OF SECTIONS 3 & 102 OF THE PUBLIC FINANCE MANAGEMENT ACT

AND

IN THE MATTER OF THE PRINCIPLE OF PUBLIC PARTICIPATION IN THE PLANS TO RELOCATE THE COUNTY HEADQUARTERS OF TANA RIVER COUNTY FROM HOLA TOWN TO DAYATE SUB COUNTY

BETWEEN

SULEIMAN ABARUFA KOMORA.....1ST PETITIONER

LAKICHA HASSAN ELEM.....2ND PETITIONER

VERUS

COUNTY GOVERNMENT OF TANA RIVER....1ST RESPONDENT

GOVERNOR TANA RIVER.....2ND RESPONDENT

COUNTY ASSEMBLY OF TANA RIVER.....3RD RESPONDENT

JUDGEMENT

1. The Petitioners describe themselves as residents and natives of Tana River County. They have brought the petition on their own behalf and members of the public.
2. The 1st Respondent is one of the 47 County Governments established under Article 176(1) of the Constitution while the 2nd Respondent was elected Governor under Article 180 of the Constitution and is the head of the 1st Respondent discharging the executive functions in the County.
3. The 3rd Respondent is established under Article 176(2) of the Constitution and exercises legislative functions of the 1st Respondent and is mandated under section 6A of the County Government Act to pass a resolution to relocate County headquarters

Petitioner's Case

4. The Petition is dated 27th November 2018. According to the Petitioners, Tana River County (hereinafter referred to as the County) has

three administrative sub counties and two urban centers namely Hola and Madogo. That Hola town is the administrative center of the County where the County headquarters is based.

5. The Petitioners claim that the 2nd Respondent announced through the media and political forums that plans were underway to relocate the County headquarters from Hola town to Dayate area.

6. In the 5th Report to the Budget and Appropriation Committee on the Tana River County Budget Estimate for the financial year 2017/2018, the National Government set aside a conditional grant of Ksh. 121million while, the approximate cost of relocation of the County headquarters was projected to be Kshs. 800 million or more because the County would have to put up administrative structures from scratch.

7. The Petitioners state that 60% of the population in the County lives in abject poverty and the County only collected Kshs. 300 million in revenue in four years. They claim that using Kshs. 800 million or more to relocate the County headquarters at the expense of other deserving needs in education, health and food security was a waste of public resources. They assert that the guidelines for preparation of 2019/2020 – 2021/2022 Medium Term Budget (SAK 4) set focus on prioritization of expenditure where the guide for allocation and use of resources was to be based on the degree to which the programme addresses core poverty.

8. The Petitioners claim that the Respondents have jointly and separately, violated the principles of public participation under Article 10, and 201 of the Constitution, sections 6A, 30, 87, 104 and 115 of the County Government Act by failing to involve the residents of Dayate area whom they describe as the natives and pastoralists in the planned relocation of the County headquarters. That it was the Responsibility of the Respondents to facilitate public participation which failure had created reasonable and imminent apprehension that they shall not be involved.

9. Further, the Petitioners allege that the Respondents have violated prudent and responsible use of public resources under Article 201 of the Constitution, and; sections 3 and 102 of the Public Finance Management Act, which provides for openness and accountability including public participation in all financial matters. The Petitioners contend that public money should be used in a prudent and responsible way and that the officers in charge of such public finances were accountable to the public.

10. Consequently, the Petitioners sought the following orders:-

1. A declaration that the decision to relocate the County headquarters of Tana River County from Hola town to any other place in the County is devoid of the principles of public participation is illegal, unconstitutional, null and void.

2. A declaration that the relocation of the County headquarters of Tana River County can only be done in line with the Constitution and Public Finance Management Act in which expenditure has to be expended in a responsible and prudent manner after adhering to the principles of public participation.

3. The decision to relocate the County headquarters of Tana River County from Hola Town to any other place in the County outside the budget and County integrated plan is illegal, null and void.

4. Costs

1st and 2nd Respondent's Case

11. The 1st and 2nd Respondents opposed the Petition by way of a Replying Affidavit of Isaiah Ndisi Munje, the Acting County Attorney, dated 12th September 2019 and filed on 13th September, 2019. He averred that the County, unlike other County governments, did not inherit any County offices and as a result it was forced to put up temporary structures on a quarter acre piece of land belonging to the National government in Hola Town

12. They stated that the County Government (Amendment) Act 2016, introduced section 6A which provides that the County headquarters of all the County governments shall be in the location provided for in the third Schedule and that the said Schedule established the County headquarters of Tana River County to be Hola Urban Area.

13. The Respondents stated that they embarked on physical planning of Hola Urban Area for purposes of identifying adequate land for construction of the County headquarters. On the 24th October 2018, they invited the National Government, National Land Commission, Non-Governmental Organisations and members of the public for a County government visioning workshop on the 1st November 2018. That on the 23rd October 2018, the 1st Respondent issued a notice of invitation to plan the Zubaki, Kalkacha and Dayate areas which notice invited public views on the planning of the said Zubaki, Kalkacha and Dayate areas within Hola Urban Area.

14. That on the 1st November 2018, the stakeholders met and recommended that the County headquarters were to be located near Wayu-Waldena Road and approximately 300 meters from the Garrisa Road junction. That the 1st Respondent identified adequate public land in Dayate area within the Hola Urban Area. On 11th July 2018, a meeting with members of the public was held at Galole Sub-County offices where the public made recommendations that the County headquarters be situated at Dayate area due to its proximity to Hola airstrip, Malindi-Garissa highway, availability of land and that the area had been designated for County Council offices before the inception of County governments.

15. The 1st and 2nd Respondents stated that after identifying Dayate area as the proposed County headquarters, the 2nd Respondent in accordance with section 9 of the Urban Areas and Cities Act conferred Hola town municipality status. The conferment of the municipality status increased the geographical area of Hola Municipality to a radius of 30km from Hola Central Business District covering Dayate area.

16. The 1st and 2nd Respondents further averred that the allegations in the petition that there was no public participation are false and misleading. They state that there was no relocation of the County headquarters but only building the County headquarters in Dayate area, which is in Hola Municipality, and that the community and the stakeholders were at all times involved in the conferment of the municipality status and identification of Dayate area as the proposed County headquarters.

17. On the allegation of imprudent and unreasonable use of public resources, the 1st and 2nd Respondents averred that construction of the County headquarters was a national government project and there was no requirement to have it in the County Integrated Development Plan (CIDP). That the construction of the County headquarters is financed and supervised by the National Government department of Public Works under the umbrella of Kenya Urban Support Programme. They stated that the National Government gave the County a 70% conditional grant for the construction of the County headquarters while the 1st Respondent was required to contribute 30%. That the National Government set a ceiling of Ksh. 500 million for construction of the County headquarters and on basis of the ceiling, the 2nd Respondent awarded a tender of Ksh. 495,268,750/- to M/s DAECO Construction Ltd and that the County would only contribute Ksh. 150 million.

18. The 1st and 2nd Respondents averred that if the orders were granted, the residents of the County would be greatly prejudiced on the ground that the final phase of allocation of the conditional grant will be the financial year 2019/2020. That if the County was unable to identify land for construction of the County headquarters, the County would lose the conditional grant and the County would be unable to build the headquarters as the annual revenue collection is Ksh. 300 million.

3rd Respondent's case

19. The 3rd Respondent reluctantly joined the proceedings at the tail end despite having been served the Petition at inception and court directions by the Petitioner and the 1st and 2nd Respondents at different times in the life of the petition. They entered appearance on 17th September 2019 and filed a statement in support of the Petition by Elias Mashomba Balo, the Senior legal counsel dated 30th October 2019 and filed on the 31st October 2019.

20. The 3rd Respondents stated that the 1st and 2nd Respondents had violated Article 185 of the Constitution as read together with section 8 of the County Government Act by planning to unconstitutionally and illegally relocate the County headquarters without consultation and the approval of the 3rd Respondent which is the legislative arm of the 1st Respondent. He stated that there was no public participation in the 1st and 2nd Respondents' endeavours to relocate the County headquarters from Hola town to Dayate Area in contravention of section 6 A of the County Government Act, and Article 10 and 35 of the Constitution. They averred that they only approved the 1st Respondent's proposal to confer Hola township a municipality status but, did not by implication mean the relocation of the county headquarters.

Submissions

21. Parties agreed to dispose the petition by way of written submissions. The Petitioners' submissions are undated and were filed on 13th February 2019 while; the 1st and 2nd Respondents are dated the 18th February 2020 and filed on the 19th February 2020 and; the 3rd Respondents submissions are dated 19th February 2020 and filed on the 20th February 2020.

Petitioners' Submissions

22. It was the Petitioners' submission that the decision to relocate the county headquarters was devoid of public participation as the Respondents did not provide evidence of public participation having been done and, even if any public participation had been done, it had to be weighed to ensure that it met the qualitative and quantitative tests. That it is not enough to show that public participation was done but to show the extent to which it was done.

23. The Petitioners submitted that Article 10 of the Constitution sets out the national values and principles of government, which include participation of the people, good governance, transparency and accountability. That Article 201 of the Constitution requires that the principles of openness and accountability including public participation be incorporated in all aspects of financial matters. They further submitted that public participation was provided for under sections 30(3)(g), 87, 104, 115 of the County Government Act and, section 3 and 102 of the Public Finance Management Act. They urged that public participation was not a cosmetic process or public relations exercise. For this argument they relied on **Simeon Kioko Kitheka & 18 others vs County Government of Machakos & 2 Others [2018] eKLR** and **Okiya Omtatah vs Commissioner General, Kenya Revenue Authority & 2 Other [2018] eKLR**.

24. Finally, the Petitioners submitted that public participation would only be effective if the public was facilitated and granted reasonable access to forums for participation. They prayed that the petition be allowed and placed reliance on **Robert N. Gakuru & Others vs Governor Kiambu County & 3 Others [2014]**.

1st and 2nd Respondent's submissions

25. The 1st and 2nd Respondents identified three issues for determination being whether they made a decision to move the county headquarters from Hola; whether the necessary public participation was conducted, and; whether their actions violated the principles of prudent and reasonable use of public resources.

26. On the first issue, the 1st and 2nd Respondents submitted that the Petitioners had failed to demonstrate that a decision to relocate the county headquarters had been made. They stated that the Petitioners had only an online article in support of their contention. They argued that the decision to relocate was anchored in statute and could only be made after the culmination of certain statutory processes.

27. They submitted that under section 6A of the County Government Act, the only way to relocate the county headquarters was by a resolution passed by two-thirds majority of the 3rd Respondent's members and that such resolution must be forwarded to parliament for approval. They urged that no such resolution had been passed by the 3rd Respondent and therefore the Petitioner did not have a decision to challenge on the basis of lack of public participation.

28. The 1st and 2nd Respondents submitted that under the 3rd schedule of the County Government Act, Hola Urban Area is the designated county headquarters. They stated that Dayate area was within Hola Municipality and that the Petitioners and the 3rd Respondents had not controverted this position. They submitted that the Petitioners had failed to demonstrate that the County headquarters had been relocated and that they were challenging a non-existent action and therefore the petition must fail. They relied on the case of **Legal Advice Centre & 2 others vs County Government of Mombasa & 4 others [2018] eKLR**.

29. On whether public participation had been conducted, the 1st and 2nd Respondents reiterated that there was no decision to relocate the county headquarters under section 6A of the County Government Act. That the only decisions they made were to confer Hola town a municipality status and identify the new location for construction of the county headquarters and that both decisions were made after public participation.

30. The 1st and 2nd Respondents submitted, with respect to the decision to confer Hola town with municipality status, that the 3rd Respondent vide an advert on page 8 of the Daily Nation Newspaper dated Thursday 28th February 2019 invited the public to give their views during a public forum to be held on the 14th March 2019. That in addition, the 3rd Respondent gave an alternative venue to give views for those members who could not attend the public forum by the 19th March 2019.

31. On the decision to build the county headquarters at Dayate, the 1st and 2nd Respondents submitted that they invited members of the 1st Respondent, the 3rd Respondent, the National Government, National Land Commission, Non-Governmental and the public for a workshop to be held on the 1st and 2nd November 2018. That at the said workshop it was agreed that the county headquarters was to be located near Wayu-Waldena road approximately 300 meters from Garissa road junction. Further, that there was another stakeholders meeting held at Galole sub county offices on the 18th July 2018.

32. It was the 1st and 2nd Respondents' submission that they had carried out the necessary public participation to the required constitutional standard in making the above decisions and that the public were accorded reasonable opportunity to be heard. They placed reliance on the case of **Legal Advice Centre & 2 Others vs County Government of Mombasa & 4 Others [2018] eKLR**, and **British American Tobacco Ltd vs. Cabinet Secretary for the Ministry of Health & 5 Others [2017] eKLR**.

33. The 1st and 2nd Respondents argued that once they had demonstrated that public participation had been conducted, the burden shifted to the Petitioners to demonstrate that the same was not sufficient. They relied on the Court of Appeal decision in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs County Government of Nairobi & 3 others [2014] eKLR**.

34. On the third issue which is whether or not there was prudent and reasonable use of public resources, the 1st and 2nd Respondents urged that the doctrine of separation of powers precluded the court from going into the merits and the demerits of policies and decisions of other arms of government and replacing them with those that the court deemed fit. They relied on the decision of the Court of Appeal in **Peter Odoyo Ogada & 9 Others vs Independent Electoral and Boundaries Commission of Kenya & 14 Others [2013] eKLR**.

35. They further submitted that the Petitioners had failed to prove any illegality in the appropriation of funds to construct the county headquarters and that the Petitioners had a different view on what ought to have been the priority for the Respondents in terms of use of resources. They contended that the Petitioners were challenging the Respondents' use of resources solely on the ground that the construction would cost Kshs. 800 million from county coffers. They underscored that the National Government had given a conditional grant of 70% of the construction costs since the County had not inherited county offices from their predecessors. Further, the 1st and 2nd Respondents argued that the conditional grant could not be used for any other purpose.

36. Finally, the 1st and 2nd Respondents submitted that the 3rd Respondents were consulted and after several deliberations they recommended that Ksh. 121,000,000/- be allocated to supplement for the construction of the county headquarters. That all the necessary approvals were sought and that proper finance management was conducted and therefore the Petitioners' claims under Article 201 of the Constitution were unsubstantiated.

3rd Respondent's submissions

37. The 3rd Respondent identified three issues for determination being: whether the 1st and 2nd Respondents sought the approval of the 3rd Respondent to relocate the county headquarters from Hola to Dayate; whether the residents and natives of Tana River County were involved in the decision making process of relocating the county headquarters through public participation, and; whether the decision to relocate the county headquarters took into consideration the responsible and effective use of public resources as enshrined in the Constitution and Public Finance Act.

38. On the first issue, the 3rd Respondents submitted that the 1st Respondent, in total violation of Articles 176 and 185 of the Constitution, unveiled unconstitutional and illegal plans to relocate the county headquarters from Hola town to Dayate without the approval of the 3rd Respondents. Further, the 2nd Respondent failed to consult the 3rd Respondent in accordance with section 30(2)(f) of the County Government Act.

39. On the second issue, the 3rd Respondent stated that public participation plays a vital and central role in both legislative and policy

functions of the government at national and county levels as enshrined on Article 10 of the Constitution and sections 87, 93, 95, 98, and 101 of the County Government Act. They submitted that there were no public meetings for residents to give their views on relocation of the county headquarters. They placed reliance on **Republic vs County Government of Kiambu ex-parte Robert Gakuru & Another [2016] eKLR**.

40. The 3rd Respondent contended there was no evidence of any meaningful public involvement and participation by the residents of the County in the decision to relocate the county headquarters. As a result, the residents were apprehensive that the relocation project was likely to cost Kshs. 800 million without their participation in the decision-making. For this, they relied on **Human Rights Commission vs Attorney General & Another [2018] eKLR** and **Independent Electoral and Boundaries Commission vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR**.

41. On the third issue, the 3rd Respondents contend that the relocation of the county headquarters from Hola to Dayate will cost the county residents Kshs. 800,000,000/- against an annual revenue collection of Kshs. 300,000/- which would amount to imprudent use of public resources at a time when the majority of residents lived in abject poverty. They urged that the 1st and 2nd Respondents did not put into consideration the principles, values and considerations of public finance as outlined in Article 210 of the Constitution and sections 3 and 102 of the Public Finance Management Act.

Analysis and determination

42. From the pleadings and the written submissions of the parties, the following four inter related issues lend themselves for my determination: -

- i. Whether the county headquarters is being relocated from Hola town to Dayate.**
- ii. Whether there was public participation in the decision to build the county headquarters at Dayate.**
- iii. Whether the construction of the county headquarters violated the principles of responsible and prudent use of public finances**
- iv. Whether the orders sought should be granted.**

Whether the county headquarters is being relocated

43. The petition challenges the relocation of the County Headquarters on grounds that there was no public participation in the making of the decision and further that the cost of such relocation was untenable.

44. The location of the county governments headquarters is provided for in Section 6A (1) of the County Government Act which stipulates that: -

Each of the county governments shall be located in the respective physical location set out in the Third Schedule.

The Third Schedule of the County Government Act provides that the physical location for the county government of Tana River shall be at **Hola Urban Area** and an urban area is defined in section 2 of the Urban Areas and Cities Act No. 13 of 2011 as - **a municipality, a town or a market centre**.

45. From the foregoing provisions of law, it is clear that the county headquarters of Tana River is in Hola Urban Area, which can be either a municipality, a town or a market centre. The question then before this court is whether Dayate is within Hola Urban Area and whether the building of the County headquarters within the designated area amounts to a relocation.

46. According to the 1st and 2nd Respondents, the Hola Town was conferred special municipality status in accordance with section 9 of the Urban Areas & Cities Act. This position has been upheld 3rd Respondent which agreed that it approved the proposal.

47. The Special Municipality of Hola Charter (INM-5), exhibited by the 1st and 2nd Respondents, provides for the boundaries of the municipality. Paragraph 1(3) of the charter provides that the boundaries of the municipality of Hola is thirty (30) kilometres radius with the central point being Kalkacha.

48. The 1st and 2nd Respondents have stated that Dayate is within the 30 kilometres radius as shown in the Hola municipality satellite boundary (INM-6) exhibited by the 1st and 2nd Respondents. Neither the Petitioners nor the 3rd Respondent have rebutted this position or shown the court contrary mapping on the ground.

49. Based on the foregoing, and in the absence of any evidence to the contrary, I find that Dayate is within the boundaries of Hola Municipality and therefore within the definition of Hola Urban Area as provided for in section 6A as read with the Third Schedule of the County Government Act. Having found that Dayate is within Hola Urban Area it therefore follows that there is no relocation of the county headquarters outside the legally stipulated area as has been pleaded by the Petitioners.

50. In addition, the procedure for relocation of the county headquarters has been clearly laid out in section 6A of the County Government Act which, states that:-

(1) ...

(2) A County Assembly may, by a resolution supported by at least two-thirds of the members of the County Assembly and with the approval of Parliament, transfer the headquarters of the county government from the physical location specified in the Third Schedule to such other physical location as it may consider appropriate.

(3) A County Assembly shall, before passing a resolution under subsection (2), facilitate public participation

51. It is clear that in order to relocate the county headquarters to a different physical location not set out in the County Government Act, the County Assembly has to facilitate public participation, thereafter it has to pass a resolution supported by two thirds of its members; and, finally, the resolution has to be approved by Parliament.

52. In the current case, there is no doubt that the procedure above has not been followed. The 1st and 2nd Respondents admit that they have not followed the procedure above. It is their argument that the same was not necessary as they have not made a decision to relocate the county headquarters. As stated earlier in this judgment, they have argued that what they have done is construct new offices within Hola municipality.

53. The 3rd Respondents on their part have conceded to having approved the conferment of municipality status on Hola Town. They have however, stated that the 1st and 2nd Respondents have not sought their approval to relocate the County headquarters and that therefore the decision was null and void.

54. Following my finding above that the building of the county headquarters within the area designated in The Third Schedule of the County Government Act would not amount to relocation, it follows that the grievance respecting relocation has no basis. No decision has been made to relocate outside the legally designated area and therefore there is no decision to be annulled.

Whether there was public participation in the decision to build the county headquarters at Dayate.

55. I have found that there is no decision to relocate the county headquarters within the meaning of Section 6A of the County Government Act. The decision to construct a new county headquarters is however of such significance to the public that it must be done through public participation. Article 10 (2) of the Constitution sets out national values and principles and underscores that:-

(1).....

(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;

56. The County Government Act details the extent and the manner of public participation in governance at the County Government level. Section 87 of the Act provides that: -

Principles of citizen participation in counties Citizen participation in county governments shall be based upon the following principles—

(a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;

(b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;

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

(d).....

65. Section 115 of the Act provides public participation in county planning by stating that: -

Public participation in the county planning processes shall be mandatory and be facilitated through—

(a) mechanisms provided for in Part VIII of this Act; and(Emphasis mine)

57. There is ample authority emphasising the constitutional demand for citizen participation in public affairs and decisions that affect the public. Most of the authorities are in respect of citizen participation in budget making. However, the principles equally apply to any decision affecting the public. Petitioners and Respondents were acutely aware of this constitutional edict and to that extent cited a number of authorities. I have considered the authorities cited by the parties. They espouse the principles that the public must be given reasonable opportunity to be heard (**Legal Advice Centre & 2 Others vs County Government of Mombasa & 4 Others [2018] eKLR**); that the modalities of public participation vary and should take into account the circumstances of the target population. (**Diani Business Welfare Association and others v County Government of Kwale [2015] eKLR**); that a decision made devoid of public participation was null and

void (**Robert N. Gakuru & others v Kiambu County Government & 3 others [2014] eKLR**);

58. Section 91 of the County Government Act makes it mandatory for a county government to facilitate the establishment of structures for citizen participation including town hall meetings, and other public fora. In **Kiambu County Government & 3 Others v Robert N. Gakuru & Others [2017] eKLR** the Court of Appeal stated that:-

“[20]...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...”

59. I have already set out the activities that the 1st and 2nd Respondents are said to have undertaken in public participation. They include a visioning workshop held on the 1st and 2nd November 2018 and another stakeholders meeting at Galole sub-county offices on the 11th July 2018. The Petitioners’ claim is that they were neither aware of nor invited to the consultative forums above. It therefore behoved the Respondents to demonstrate the efforts that they undertook to facilitate effective public participation at the community level.

60. In **Robert N. Gakuru & others v Kiambu County Government & 3 others [2014] eKLR** Odunga J observed that:-

“Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.”

61. In expressing the importance of facilitating public participation the Court of Appeal in **Kiambu County Government & 3 others v Robert N. Gakuru & Others (Supra)** held that:-

“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.”

62. In the present case, the documents produced by the 1st and 2nd Respondents do not validate their claim that the public, residents and natives of the county were invited to attend the fora stated. I observe that the copy of the invitation (INM-1) was a Memo from the 2nd Respondent to all the heads of department of the 1st Respondent. There is no evidence that a similar invitation had been extended to the public for a workshop. Furthermore, the workshop report (INM-2) does not have a list of participants and the court cannot therefore discern whether the members of the public attended. The minutes of the meeting held on 11th July 2018 indicate that seven community members attended the meeting but there was no indication that the said community members participated in the meeting as there were no views collected by the members. This is in stark contrast compared with the Public Participation report on the Hola Municipality Charter (INM-4) where the details of the public participation were well captured in the document.

63. Effective participation by the local community would have been achieved through town hall fora as well as grass root meetings where even the local dialect would have been used. This is in line with what Emukule J (as he then was) stated in **Diani Business Welfare Association and others v County Government of Kwale [2015] eKLR** that:-

“35. The modalities set out in section 91 of County Governments Act for citizen participation include town hall meetings, budget preparation and validation fora, notice boards, project development sites...A paid advertisement in any of the popular (by circulation and readership), and by radio listened to by citizens of the County is adequate information to the citizens. ... Consequently, a flexible approach is important to account for the significant variations which exist among and between counties such as population density, literacy trends, media use, geographical location and distance from the centre, community interests and levels of income. Investment in effective units of communication (as envisaged in the modalities referred to in section 91 of the County Government Act) is required to strengthen capacities for effective public participation to fit local realities...”

64. In the end I have found no evidence that the 1st and 2nd Respondents invited the public for any meetings, town halls, barazas or any kind of fora to discuss the construction of the county headquarters in Dayate. As demonstrated in the pleadings of both the Petitioners and the Respondents, the construction of the county headquarters in Dayate was of importance to the residents of the County and they ought to have been facilitated or provided an opportunity to ventilate their views. Such effort would also have afforded the 1st and 2nd Respondents an opportunity to explain or justify their choice of Dayate for the construction of the county headquarters and to resolve any issues of displacement of inhabitants, if any. It is my finding therefore that the public participation undertaken by the 1st and 2nd Respondents was inadequate and fell short of the constitutional and statutory standard.

Whether the construction of the county headquarters violated the principles of responsible and prudent use of public finances.

65. The Petitioners and the 3rd Respondent have challenged the construction of the county headquarters at Dayate, on the ground that it would cost the County approximately Kshs. 800,000,000/- which, was a violation of the principle of prudent and responsible use of public resources. They urge that the County had other priority development issues including poverty alleviation. In short, their opposition is that the County cannot afford the project and that it was imprudent use of resources. On their part the 1st and 2nd Respondents submit that the construction of the county headquarters was a project of the national government and that they had received a conditional grant of 70% of the construction which had a ceiling of Ksh. 500,000,000/-. That the claims by the Petitioners and the 3rd Respondents were misplaced.

66. The Constitution establishes the principles of public finance under Article 201 which include openness, accountability, public participation and equity. The Public Finance Management Act (PFMA) No. 18 of 2011 also provides in Section 3 for reasonable and prudent use of public finances by both the National and County Governments. While section 107 of the same Act behoves county governments to exercise fiscal responsibility principles and provides specifically that over the medium term a minimum of thirty percent of the county government's budget shall be allocated to the development expenditure.

67. It was the 1st and 2nd Respondents' position that Tana River County was one of the counties that did not inherit offices from the now defunct local governments and that the county government was forced to use temporary structures on land owned by the National government. This position was not controverted by the Petitioners. The 1st and 2nd Respondents also went ahead and demonstrated that there was a recommendation by the Commission of Revenue Allocation which was approved by the Senate, that county governments which did not inherit county offices were required to construct county headquarters. This position too was not controverted by the Petitioners and the 3rd Respondents.

68. In addition, the 1st and 2nd Respondents submitted that the Commission on Revenue Allocation in consultation with the ministry of Transport, Infrastructure, Urban Development, Housing and Public Works had put a ceiling of Kshs. 500,000,000/- on the construction of county headquarters in line with prudent use of public resources. 70% of the cost would be met by the national government and the ministry would develop designs, documentation and supervise the construction. The 1st and 2nd Respondents submitted that the recommendations were adopted by the Senate as evidenced by the Report of the Standing Committee on Finance and Budget on County Governments' Infrastructure Projects Comprising County Executive Headquarters, Assembly Chamber & Offices and County State Officers Residence. They exhibited the Plan (INM-10).

69. With respect to funding from National Government, I observe that Article 202(2) of the Constitution allows the National Government to give County Governments additional allocations conditionally or unconditionally and it provides that:-

County governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally.

70. The evidence presented above by the 1st and 2nd Respondents has not been controverted in any way by the Petitioners and the 3rd Respondents. There is no evidence therefore to support the claim that the 1st and 2nd Respondents have failed to adhere to the principles of prudent and responsible use of public resources or undertaken any unlawful action. There is also no evidence that the County coffers would foot a bill of Kshs. 800,000,000/=. As shown in exhibit INM-8 the construction costs have been capped at Kshs. 500,000,000/-, and a contract amount of Kshs, 495,268,750/- awarded. It is also not lost to the court that the 3rd Respondent has the constitutional mandate to oversee the 1st and 2nd Respondents through the budget and other processes. In supporting the Petition, the 3rd Respondent has failed to show how its constitutional mandate had been curtailed or violated by the 1st and 2nd Respondents.

Conclusion

71. I have arrived at the conclusion that the building of the County headquarters does not amount to relocation and does not offend the law as the new headquarters falls within the legally designated area. I have also found no evidence to demonstrate that the project violated the principles of prudent management of public resources or violated any law. My finding on the issue of public participation conducted by the 1st and 2nd Respondents is that it did not meet the constitutional threshold. This brings me to the reliefs that I should grant.

72. The Petitioners sought three declarations as set out earlier in this judgement. The issuing of a declaration or any other relief under Article 258 of the Constitution however is a matter of discretion for the court. The court has a wide discretion whether to grant relief at all and what form of relief to grant. In the matter of **Amoni Thomas Amfry & another v Minister for Lands & another & Mohamed Swazuri & 8 others [2013] eKLR** Majanja J held that:-

“The nature and extent of relief for breach or non-compliance with the Constitution is within the discretion of the Court. Such discretion must be exercised judicially and in light of the circumstances of each case. In Jayne Mati and Another v Attorney General Nairobi Petition No. 108 of 2011 [2011]eKLR, I stated as follows; “[18] The petitioners have sought certain declarations. The issuing of a declaration or any other relief under Article 258 of the Constitution is a matter of discretion for the court dependent on the circumstances of each case. While a right is granted to every person to institute proceedings claiming that the Constitution has been contravened or is threatened, it is not in every case that the court will grant relief. What constitutes a threat to the Constitution will of course be dependent of on the facts of each particular case. [19] What is clear to me is that Court must exercise its role in a manner that promotes constitutionalism and supports state organs, authorities and state and public officers to work together in concert to realise the dream of a new Kenya.”

73. In granting relief, the court has to take into consideration the public interest to ensure that the relief granted to a party does not harm the public. This principle demands that the court balances the private interest and the public interest. Besides the public interest, the court must take into account the principle of proportionality. In **Republic v Speaker National Assembly & 4 others Ex-parte Coalition for Reform and Democracy (CORD) [2018] eKLR**, Odunga J expounded this twin principles as follows:-

“204. It is therefore my view and I so hold that in appropriate circumstances, Courts of law and Independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore, the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of our jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination.

205. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie.....”

74. The same principles were applied by Lenaola J (as he then was) in **Tyson Ng’etich & another v Governor, Bomet County Government & 5 others [2015] eKLR**. In that case the court found that the Bomet County Appropriation Act of 2014 and Bomet County Appropriation (Amendment) Act of 2014 had been passed in contravention of the Constitution but refused to nullify the Acts on account of the public interest as the County had already implemented the Acts and spent or committed the money pursuant to the two Acts.

75. In the present case, I have found that the 1st and 2nd Respondents did not involve the petitioners in the decision to construct the County headquarters at Dayate. I have however found that the project was a partnership between the County and National Governments where the later has already provided a grant towards the development and a contract to that effect issued. Further, the construction of county headquarters was a public utility and the County would lose out on the grant already secured and to no converse benefit to the Petitioners. It is my considered view that the scales of justice tilt heavily in favour of execution of the project. The public interest militates against the grant of the orders sought by the Petitioners.

76. Needless to state, it is important for the County Government and leadership at all levels to cultivate and maintain harmony, cohesion and inclusivity in development matters. It therefore behoves the 1st and 2nd Respondents to bring on board the residents of Dayate area who to my understanding were likely to be affected by the building of the county headquarters in their locality.

77. In view of the above, I dismiss the prayers sought by the Petitioners and order as follows: -

i. A declaration that the decision to construct the County headquarters of Tana River County at Dayate area was reached without adequate public participation.

ii. The prayer to declare the decision to construct the county headquarters null and void is denied.

iii. The 1st and 2nd Respondents do hold appropriate consultative and sensitization fora with the residents of Dayate on the County headquarters project. Such fora should observe the current COVID-19 Regulations.

iv. Each party shall meet their costs.

Orders accordingly.

Judgment delivered, dated and signed at Garsen this 19th day of May, 2020.

.....

R.LAGAT KORIR

JUDGE

Due to the COVID – 19 pandemic and consequent regulations, this Judgement has been emailed to the parties as follows:

i. The Petitioners’ advocates at malenyalaw@gmail.com

ii. The 1st and 2nd Respondents advocates at bwireokano@gmail.com

iii. The 3rd Respondent’s advocates at maurice.kilonzo@yahoo.com