



REPUBLIC OF KENYA



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Omar v State Department of Housing & Urban Development & another (Petition E004 of 2025) [2025] KEHC 17572 (KLR) (28 November 2025) (Judgment)

Neutral citation: [2025] KEHC 17572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
PETITION E004 OF 2025
JN ONYIEGO, J
NOVEMBER 28, 2025**

BETWEEN

ABDISALAN ADAN OMAR PETITIONER

AND

**STATE DEPARTMENT OF HOUSING & URBAN DEVELOPMENT 1ST
RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The petitioner herein moved this court via a petition dated 18.02.2025 seeking for orders that:
 - a. A declaration be issued under articles 10(1)(c), (2)(b)(1) (2),27,47, and 232(1)(d), that the respondents are under duty to let the project be implemented in Buna as earlier advertised and intended.
 - b. A declaration be issued that the respondents have failed to have regard to equality, equity and fairness to the people from Buna.
 - c. A declaration be issued that the decision to change location of the project from Buna to Kolondille is null and void ab initio and ought to be reversed so as to pave way for the implementation of the project in Buna.
 - d. An order do issue to remove to this court and quash the respondent's decision to change the location of the project from Buna to Kolondille.
 - e. A permanent mandatory order do issue directing the 1st respondent to carry out the project in Buna.
 - f. The cost of this petition be borne jointly and severally by the respondents.



- g. This court be pleased to grant such further order or orders as it may deem to be just and appropriate.
2. The application is supported by an affidavit sworn on 18.02.2025 by Abdisalan Adan Omar who deponed that on 23.01.2024, the State Department under the Ministry of Lands, Public Works, Housing and Urban Development advertised a tender for the proposed construction of Buna ESP market in Wajir County. That the said tenders were to be delivered on or before Tuesday, 06.02.2024 at 9.00 a.m. via Tender No. MLPWHUD/SDHUD/UDD/318/2023 – 2024. That a few days to the tender opening date of 05.02.2024, the same was changed to 12.02.2024 and an addendum to that effect was published.
 3. He averred that 11 companies tendered their bid for the work and the tender opening was done on 12.02.2024 but the 1st respondent did not communicate the successful bidder. That a year later, on 25.01.2025, the 1st respondent advertised the same project afresh. That 3 days to the opening of the tenders, the 1st respondent changed the date of tender opening from 12.02.2025 to 19.02.2025 and also changed the market location from Buna ESP market to Kolondile ESP market thus issuing an addendum to that effect.
 4. That the people of Buna through their duly elected member of County Assembly, Hon. Adannur Ibrahim protested the change of market location from Buna by a letter dated 17.02.2025 which never elicited any response. It was deponed that the people from Buna area feel frustrated and discriminated against as no justifiable reason was issued to them on the change of location of the said market construction.
 5. As a response, Mr. Charles M. Hinga, the principal secretary in charge of the State Department for Housing and Urban Development at the Ministry of Lands on behalf of the respondents swore a replying affidavit on 12.03.2025 deposing that, the member of parliament for Wajir North Constituency wrote to the 1st respondent requesting that the proposed Buna Economic Stimulus Project Market hereinafter, ESP market be moved to Kolondile Sub County. That the rationale behind the member of parliament's request was that Buna Town has an existing market that is under-utilized and that the town is also set to benefit from the Affordable Housing Programme, hereinafter, (A.H.P) of 400 units.
 6. It was averred that Kolondile and Wajir North sub counties had no project at all and sought the intervention of the regional design team to issue an addendum to relocate the proposed ESP from Buna to Kolondile as the adjustment was crucial to ensuring and aligning projects with the current regional needs. That the State Department in considering the request noted that there was need to balance developments in Wajir North Constituency as expressed by the local leadership. It was stated that Buna and Kolondile are two of the seven wards that form Wajir North Constituency and as such, development of the ESP market in Kolondile is still for the betterment of the lives of the people of Wajir North Constituency.
 7. Additionally, that the government had rolled out an ambitious programme of constructing markets across the country; at least one Economic Stimulus Project Market [ESP] in each of the 290 constituencies. That in executing the programme, the state department for housing and urban development constituted the County AHP and Markets Implementation Committee in each county whose role was to identify suitable places/areas for the construction of the ESP Markets and AHP's. That Buna and Kolondile are two of the seven wards that form Wajir North Constituency and as such, development of ESP market at Kolondile is still for the good of the lives of the people of Wajir North Constituency.



8. It was also averred that the 1st respondent also considered that there was an upcoming AHP for Buna Town in Wajir North Constituency, which would have placed two developments within Buna Town and left Kolondile which was not earmarked for any development programme.
9. That the suit herein as filed ought not be entertained by this court for the reason that this Honourable Court lacks requisite jurisdiction to handle the matter. That the court under article 162(2)(b) is the proper court where the suit ought to be filed. Further, that the petitioner did not demonstrate any allegations of corruption, impunity and arbitrariness of the decision to transfer the market from Buna to Kolondille. In the end, it was urged that an order to quash the decision of relocation would exacerbate the marginalization of the community in Kolondile Town and condemn them to remain underdeveloped.
10. The court directed that the petition be canvassed by way of written submissions.
11. The petitioner filed submissions dated 21.08.2025 urging that the rights and fundamental freedoms of the people of Buna have been infringed and violated contra the provisions of *the constitution* to wit articles 10(1)(c), (2)(b)(1) & (2), 27, 47 and 232(1)(d) in so far as it purports to change the market location from Buna to Kolondile.
12. That article 10 binds all the state organs, state officers and all persons whenever making or implementing public policy decisions to uphold the national values and principles of governance. It was urged that the 1st respondent is bound by the national values and principles of governance including equality, social justice, inclusiveness, non-discrimination and protection of the marginalized. To support the foregoing, counsel relied on the case of Commission for the Implementation of *the Constitution* vs Parliament of Kenya & 5 Others [2013] eKLR where the High court held that article 10 of *the constitution* is binding and must be upheld in all public decision making.
13. It was contended that the decision by the 1st respondent in changing the location of construction of the market from Buna to Kolondile without public participation, explanation or consultation contravened the national values and principles of governance highlighted under article 10 of *the constitution*.
14. Further, that article 232 of *the constitution* which integrates the involvement of people in the process of policy making as a key value and principle of public service was equally contravened. That the decision by the 1st respondent clearly contravened article 232 of *the constitution* and therefore ought to be annulled.
15. That the people of Buna were not involved in any way in the decision to change the location of construction of the market place from Buna to Kolondile. To that end, the petitioner urged that noting that the 1st respondent unilaterally made a decision to change the location of construction of a market place, the same ought to be rendered null and void.
16. Further reliance was placed on article 47(2) of *the constitution* which provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. The petitioner contended that it is clear that the 1st respondent violated the rights and fundamental freedoms of the people of Buna area by making unilateral decision to change the location of construction of a market place and same ought to be declared null and void. This court was therefore urged to allow the petition as prayed.
17. The respondents on the other hand did not file their submissions.



18. I have considered the petition herein, response thereof and the submissions by the petitioner. Issues that fall due for determination are.
- i. Whether the process leading to the market relocation from Buna to Kolondile was done without public participation hence unconstitutional
 - ii. Whether the prayers sought can issue.
19. The crux of the matter before me is the clamour for lack of involvement or better put, lack of participation by the people of Buna who were allegedly not involved in the decision making process before relocating the proposed construction of a market within Wajir North constituency from Buna to Kolondile. On the other hand, the respondents argued that public participation was not necessary as the project was within the same constituency and that Buna already had a market while Kolondile had none. It was further argued that Buna was scheduled to get another project by the name of affordable housing while kolondile had no project. That it was in the interest of equity that kolondile benefits from the subject project.
20. There is no dispute that public participation was not done. The question is, was it necessary to be done. Article 10(2) of *the constitution* underscores the element of public participation as a critical component of national values and principles of governance. However, not every decision needs public participation. See member of Parliament Balambala Constituency v Abdi & 7 others (Petition 21(E023) OF 2020(2023)KESC35(KLR)(16 June2023)(Judgment) where the supreme court held that;

“101-The act of the 2nd respondent issuing an advertisement while acting within the provisions of section 15 of the National Government Coordination Act cannot be said to be acts that involve ‘making or implementing public policy decisions’. Such an act is merely an administrative act to enable the proper day-to-day operations within a county. So where does article 10 of *the Constitution* come in? At what point was public participation supposed to be undertaken? Was it at the point of issuing the advertisement or after the advertisement to the public was made?

102. If saying that advertisements inviting applicants to fill in vacancies for all positions should be subjected to public participation would without a doubt, result in more harm than any intended good. This would mean that public bodies would have to subject all their operative decisions to public participation. Therefore, decisions such as issuing advertisements inviting applicants to fill out vacancies, albeit involving administrative units, need not be subjected to public participation.

103. Again, in the BAT, case we gave guiding principles for public participation with one of the principles being that:

(viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.”

104. From the record, it is clear that the High Court and Court of Appeal, while interrogating the evidence before them, failed to consider the peculiar circumstances of this case in determining whether it was one where lack of public participation would automatically vitiate the process of calling out for



candidates for the positions advertised. To our minds, at no point were the superior courts called upon to determine any issue involving the lack of public participation in the creation of administrative units”.

21. The Supreme Court in *Petition No. 5 of 2017, British American Tobacco Kenya, PLC (formerly American Tobacco Kenya Limited) vs Cabinet Secretary for the Ministry of Health & 2 others* held that:

(85) Public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of *the Constitution* and is binding on all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the Appellate Court, public participation is anchored on the principle of the Sovereignty of the People “that permeates *the Constitution* and in accordance with Article 1(4) of *the Constitution* is exercised at both national and county levels”.

(87) Since the promulgation of *the Constitution* 2010, the question of the rationale, scope and application of public participation as a principle of governance has been subject of numerous decisions by the courts.

It is to be noted that, the very essence of checks-and-balances touches on the principles of public participation, inclusiveness, integrity, accountability and transparency; and the performance of the constitutional and statutory functions is to be in line with values of integrity, transparency, good governance and accountability...”

Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation

- i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
- ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- v. Public participation is not an abstract notion; it must be purposive and meaningful.
- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.



- viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
 - ix. Components of meaningful public participation include the following:
 - a. clarity of the subject matter for the public to understand;
 - b. structures and processes (medium of engagement) of participation that are clear and simple;
 - c. opportunity for balanced influence from the public in general; d. commitment to the process;
 - e. inclusive and effective representation;
 - f. integrity and transparency of the process;
 - g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.
22. This court has been invited to find that the action by the respondents was contra the provisions of *the constitution* and particularly, article 10 of *the constitution*. That the move to relocate a market from Buna to Kolondile was contra the spirit of public participation noting that the decision was unilaterally made.
23. Of importance to note is the response by Mr. Charles M. Hinga, the Principal Secretary for the State Department for Housing and Urban Development. He stated that the Member of Parliament for Wajir North Constituency had written to the first respondent requesting the relocation of the proposed Economic Stimulus Project (ESP) Market from Buna Town to Kolondille Sub County. He explained that the MP's rationale was based on the existence of an under-utilized market in Buna and the fact that Buna was already set to benefit from a 400-unit Affordable Housing Programme (AHP).
24. Mr. Hinga further deposed that Kolondille and Wajir North sub-counties had no development projects at the time, prompting the regional design team to issue an addendum to facilitate the relocation of the ESP Market. He emphasized that this adjustment was necessary to align with regional development needs and to ensure equitable distribution of projects within the constituency.
25. He added that Buna and Kolondille are two of the seven wards in Wajir North Constituency, and therefore, the development of the ESP Market in Kolondille would still serve the broader interests of the constituency.
26. This court carefully notes the sentiments of Mr. Hinga that the said Buna and Kolondille fall within the same constituency. The foregoing sentiments were not opposed by the petitioners save for their prayer that the ESP market ought to be maintained at Buna.
27. I am alive to the provisions of article 10 of *the constitution* but at the same time, this court notes and as guided by decisions by the Supreme Court in the cases: In the Matter of Interim Independent Electoral Commission, SC Application No 2 of 2011; [2011] eKLR and; In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, SC Advisory Opinion No 2 of 2012 [2012] eKLR, among other decisions, the court affirmed that, in interpreting *the Constitution* and developing jurisprudence, the court will always take a purposive and holistic interpretation of *the Constitution* as guided by *the Constitution*.



28. Coming back to the matter herein, the respondents in their responses stated that the government had launched a nationwide initiative to construct at least one ESP Market in each of the 290 constituencies, and that County AHP and Markets Implementation Committees had been established to identify suitable locations for these developments. In considering the MP's request, the State Department recognized the importance of balancing development across the constituency and acknowledged that placing both the ESP Market and the AHP in Buna would result in an uneven distribution of resources, leaving Kolondille without any development project.
29. From the foregoing, and having in mind that this a constitutional petition wherein the petitioner has alleged violations of their rights and having in mind article 43 of [the constitution](#) on social - economical rights the sentiments by the respondent and further, that the two wards exist in the same constituency, I firmly believe that [the Constitution](#) of Kenya, in its pursuit of fairness, affirms the interdependence and interconnectedness of rights by embedding the full spectrum of civil, political, economic, social and cultural rights within the Bill of Rights.
30. This comprehensive framework recognizes that rights are mutually reinforcing, and that genuine societal transformation can only be achieved when all fundamental rights are fully realized without an iota of discrimination. The importance of the concept of indivisibility and interrelatedness of rights was affirmed by the South African court in the case of the Government of the Republic of South Africa v Grootboom & Others 2001 (1) SA 46 (CC), para 83 where the court stated that:
- “The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom”.
31. Closer home, the High Court of Kenya in the case of Federation of Women Lawyers Kenya and Others vs The Attorney General and Others Petition No. 102 of 2011, stated as follows:
- “In addressing that question, it is important to understand the basics which are that the rights contained in the Bill of Rights are interrelated and mutually supportive. The specific Constitutional rights must not be seen in isolation but must be understood in their textual settings and in their social and historical context”.
32. Similarly, in the case of Mitu-Bell Welfare Society v Attorney General & 2 others, Nairobi Petition No. 164 of 2011, the High Court affirmed the importance of the concept of interdependence, indivisibility and interrelatedness of rights.
33. Further in finding the violation of the right to life, non-discrimination, equal protection and benefit of the law, the right to human dignity and right to personal security as per Articles 26-29 of [the Constitution](#), the Court affirmed that, the realisation of these rights were not possible without the realisation of the economic and social rights entrenched in Article 43 of [the Constitution](#). To further emphasise this interrelatedness of rights, the Court stated as follows:
- “ A failure by the state to ensure that citizens have access to the rights guaranteed by Article 43 directly impacts on the ability of citizens to enjoy all the other rights set out in [the Constitution](#)”.



34. The above notwithstanding, *the constitution* binds everyone whether a state actor or not to act in a manner expected of it constitutionally. The High Court in the case of Amy Kagendo Mate vs Prime Bank Limited & Another [2013] eKLR held as follows:

“The jurisprudence that has emerged from this Court is that *the Constitution* now contemplates both vertical and horizontal application of the Bill of Rights. Article 2(1) and 20(1) both clearly provide that *the Constitution* binds all persons. This has been the finding of this court in various decisions.

[See Abdalla Rhova Hiribae & 3 Others-v-The Hon Attorney General & 6 Others High Court Civil Case No. 14 of 2010; Law Society of Kenya –v- Betty Sungura Nyabuto & Another Petition No. 21 of 2010 and B.A.O & Another –v-The Standard Group Limited & 2 Others Petition No. 48 of 2011].

Consequently, I agree with the petitioner that *the Constitution* binds both the state and non-state actors such as the respondents.

35. The above corroborates that whatever decision made by either a state organ or private person, the same must meet the provisions of *the constitution*. In this case, the area member of parliament was condemned for not involving the Buna people on the decision to relocate the ESP market to Kolondile, which allegation I agree with, but I choose to look at the whole situation as an attempt to apportion developmental rights to all the constituents without any discrimination. The foregoing is supported by the fact that access to the rights guaranteed by Article 43 directly impacts on the ability of citizens to enjoy all the other rights set out in *the Constitution*.

36. But of importance, having in mind the sentiments by the principal secretary, which as I have already mentioned were not controverted, it will be unfair for the people of Buna to claim superior right and entitlement while forgetting that the earlier proposal to locate the same market at Buna was not in the first place subjected to public participation which they are now claiming.

37. The people of Kolondile are equally entitled to development. This is the first economic stimulus project in Wajir North constituency hence can be located anywhere within the constituency. By its peculiar nature being the first economic stimulus project, it is logical that public participation was not necessary as the citizens of Wajir North have equal rights to economic rights. Buna people have no better rights than Kolondile. If there was a similar project or other projects in Kolondile, the issue of discrimination would have arisen or the need for public participation. Why would Buna demand for more development while others have none?

38. In a nutshell, I do not find any merit in the petition. The same is geared towards delaying the implementation of the project for political gain. Accordingly, the petition herein is dismissed. Being a public interest litigation, each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF NOVEMBER 2025

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J. N. ONYIEGO

JUDGE

