

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NO. E001 OF 2025.**

**IN THE MATTER OF: ARTICLES 1(1),2,3(1), 10(1)(a)(b)(c), 10(2)(a)(b)(c)(d),**

**191(1)(2)(3), 20(1)(2)(3)(4), 21(1)(3), 22(b)(c),  
231(1)(3), 24, 27(1)(2)(3)(4), 28, 35(1)(a)(b)(3),  
43(1)(f), 47(1), 159(2)(a)(b)(d)(e), 165(3)(a)(b)(6)(7),  
201(a)(b)(d)(e), 232(1)(a)(b)(c)(d)(e)(f)(2),  
258(1)(2), 259(1)(2)(3)(4)(5)(6) &  
260 OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: THE CONTRAVENTION OF THE FUNDAMENTAL RIGHTS**

**AND FREEDOMS OF THE PETITIONERS UNDER ARTICLES 10(2)(a)(b)(c)(d), 20(4)(a)(b), 21(1)(3),  
27(1)(2)(3)(4), 35(1)(a)(b)(3), 42(1)(f),47(1),  
201(a)(b)(iii)(d), 232(1)(b)(f) OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF: RULES, 4,23 AND 24 OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) (PRACTICE & PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF: SECTION 4(1), 5 AND 12 OF THE FAIR ADMINISTRATIVE**

**ACTIONS ACT, NO 4 OF 2015.**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF SECTIONS 13(1)(d), 14(2), 24(b) OF**

**NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND ACT NO. 30 OF 2015 AS AMENDED IN 2023.**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF LEGITIMATE EXPECTATION**

**BETWEEN**

**ABDIA ABDULA HASSAN.....1<sup>ST</sup>**

**PETITIONER**

**ISSACK BARAK IBRAHIM.....2<sup>ND</sup>**

**PETITIONER**

**IBRAHIM HUSSEIN ABDI.....3<sup>RD</sup>**

**PETITIONER**

**BISHAR OSMAN ALIO.....4<sup>TH</sup>**

**PETITIONER**

**ZAINAB SURAW ADAN.....5<sup>TH</sup>**

**PETITIONER**

**NAJMA HAJI MOHAMED.....6<sup>TH</sup>**

**PETITIONER**

**AHMED BUDOW ALI.....7<sup>TH</sup>**

**PETITIONER**

<b>ABDI HAJI MOHAMED.....</b>	<b>8<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>ABDISALAM AHMED DUBOW.....</b>	<b>9<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>NEHMO AHMED DUBOW.....</b>	<b>10<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>HUSSEIN KASSIM SHEIKH.....</b>	<b>11<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>IBRAHIM HAJI MOHAMED.....</b>	<b>12<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>IBRAHIM ABDI IBREN.....</b>	<b>13<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>MOHAMED KASSIM SHEIKH.....</b>	<b>14<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>HABIBA HASSAN KASSIM.....</b>	<b>15<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>RAHMA MAALIM ABDIKARIM.....</b>	<b>16<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>HALIMA SAMBUROW GIRO.....</b>	<b>17<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>NURIA MALAB DACHE.....</b>	<b>18<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>SHALEY DUBOW ALI.....</b>	<b>19<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>HALIMA IBRAHIM BORU.....</b>	<b>20<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>HABIBA MOHAMED EDIN.....</b>	<b>21<sup>ST</sup></b>
<b>PETITIONER</b>	

<b>ISMAIL HAJI MOHAMED.....</b>	<b>22<sup>ND</sup></b>
<b>PETITIONER</b>	
<b>FATUMA ALIO ALI.....</b>	<b>23<sup>RD</sup></b>
<b>PETITIONER</b>	
<b>ABDIMUHSIN ALI MUKTAR.....</b>	<b>24<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>NASRA ALI SHEIKH.....</b>	<b>25<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>FATUMA IBRAHIM ADAN.....</b>	<b>26<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>MUKTAR ABDI ADAN.....</b>	<b>27<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>ALIO GOSAI IDOW.....</b>	<b>28<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>HASSAN ABDI IBRAHIM.....</b>	<b>29<sup>TH</sup></b>
<b>PETITIONER</b>	
<b>OSMAN SHEIKH ADAN.....</b>	<b>30<sup>TH</sup></b>
<b>PETITIONER</b>	

**VERSUS**

<b>NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND BOARD.....</b>	<b>1<sup>ST</sup></b>
<b>RESPONDENT</b>	
<b>MR. HARO ABDUL EBRAHIM.....</b>	<b>2<sup>ND</sup></b>
<b>RESPONDENT</b>	

**AND**

<b>CABINET SECRETARY, MINISTRY OF EDUCATION.....</b>	<b>1<sup>ST</sup></b>
<b>INTERESTED PARTY</b>	

**MANDERA COUNTY EDUCATION BOARD OF  
EDUCATION.....2<sup>ND</sup> INTERESTED  
PARTY**  
**MANDERA COUNTY COMMISSIONER.....3<sup>RD</sup>  
INTERESTED PARTY**  
**KUTULO SUB-COUNTY DIRECTOR OF EDUCATION.....4<sup>TH</sup>  
INTERESTED PARTY**

**JUDGMENT**

1. The petitioners instituted this suit by way of a petition dated 21.08.2025 initially at Milimani constitutional and human rights division but later on transferred to this court seeking for orders as follows:
  - i. **Declaration be and is hereby issued that the decision by the 1<sup>st</sup> respondent to approve and to allocate funds to the construction of Gode secondary school without public participation was invalid as it suppresses the right to fair administration action enshrined in article 47 of the constitution.**
  - ii. **A declaration be and is hereby issued that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to approve a construction of a Gode Secondary school without community involvement threatened and violated the petitioners' right to public participation as provided for in article 10(2)(a) and the said construction affected infrastructure upgrade in Borehole Eleven Mixed Secondary School in violation of article 43(1) (f).**

- iii. A declaration be and is hereby issued that the ongoing construction is unlawful for the decision giving rise to the said project is invalid.**
- iv. A declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> respondent's actions of approval, execution and disregard of the petitioners' protest violated the petitioners' rights provided for in article 10(2)(a), 27(1)(2)(3)(4), 35(1)(b), 201, 47(1), 201(a)(b)(iii)(d) and 232(1)(b)(f) of the constitution and therefore militate against the public interest of fair procedural, reasonable and transparent administration of public processes and prudent/economic use of public resources.**
- v. A declaration be and is hereby issued that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondent constitute a violation of the petitioners' right to public participation as enshrined in article 10(2)(a) of the constitution.**
- vi. An order compelling the respondents and persons claiming through them to pull down the structure already constructed of the purported Gode Secondary School and the funds allocated to the said project be reallocated.**
- vii. Damage for violation of the petitioners' fundamental rights and freedoms.**
- viii. The respondents be and are hereby directed to bear the costs of this petition.**

**ix. Such other reliefs that this Honourable Court may deem appropriate to meet the ends of justice.**

2. Contemporaneously filed with the petition was a notice of motion of even date seeking conservatory orders restraining further construction of the contested project pending interpartes hearing. The said order was granted on 28-08-2025 but later on parties agreed to compromise hearing of the application for conservatory orders in favor of hearing the petition.
3. The petition was supported by an affidavit of Osman sheikh Adan sworn on his own behalf and that of the other petitioners. It was deposed that they were discriminated against by the respondents purporting to construct a secondary school some meters away from an existing school known as Borehole Eleven Mixed Secondary School which they are aware of its existence and is in deplorable state.
4. That Borehole Eleven Mixed Secondary School lacks essential infrastructure like laboratories, library, sufficient classroom which have affected the quality of education being offered to their children. That when the foundation stone of the secret project was laid, together with other community members, they protested on behalf of the residents of Kutulo sub - County for they ought to have been included to participate in settling for priority projects for their area of which another secondary school was not a priority.

5. That the funds managed by the 1<sup>st</sup> respondent are public funds whose use and process of allocation is governed by articles 10, 201,232 and sections 13(1)(d), 14(2) and 24(1) of the National Government Constituency Development Fund (NG-CDF) Act No. 30 of 2015 as amended in 2023 and other public management laws and regulations of this country. That the respondents are under the obligation to abide by the said laws which provide for public participation in funds allocation to projects within their areas which was violated and continues to be violated.
6. As a response on behalf of the 1<sup>st</sup> respondent, Christine Nadzua Mwangolo, the acting manager, field Operations at the National Government Constituencies Development Fund Board deposed that the suit herein is not only frivolous but also lacks merit. That only projects submitted to the 1<sup>st</sup> respondent by Constituency committee under section 27 of NG-CDF are considered; approved for funding and funds disbursed to the constituencies for implementation of such approved projects.
7. That in line with the provisions of the NG-CDF Act, relevant government circulars and other enabling provisions of the law, the 1<sup>st</sup> respondent on 22.10.2024, issued guidelines to constituencies on preparation and submission of constituencies' projects proposals for the financial year 2024/2025 with a submission timeline of not later than 06.12.2024. It was stated that in light of the foregoing, the 1<sup>st</sup> respondent received the list of proposed projects from Mandera South constituency on 05.02.2024 for consideration and subsequent approval. That while submitting the list of proposed projects, the Mandera South

Constituency Committee, provided the constituency's ward report dated 27.11.2024.

8. That the said ward report detailed outcome of public participation exercise conducted on various dates across the constituency identifying the constituency's priority projects for the financial year 2024/2025. It was averred that the public participation exercise for Kutulo ward was reported to have been conducted on 25.11.2024 and the schools identified for funding were listed in the said ward report pursuant to provisions of section 27 of the Act.
9. That the 1<sup>st</sup> respondent considered the proposed list of projects for financial year 2024/2025 and approved the projects listed for funding hence authorized the same for implementation culminating to issuance of approved code-lists dated 27.12.2024 and 13.02.2025.
10. It was further deposed that from the aforementioned project identification, project proposal and approval documents, the 1<sup>st</sup> respondent did not receive a proposal for establishment, construction or any infrastructural development at a school identified and/or known as Gode secondary school, the subject matter of the petition herein. She further stated that the 1<sup>st</sup> respondent did not approve any funding to the subject project and consequently no funds have been disbursed for implementation of any project at the school.
11. That any project implemented or purported to be implemented outside the procedures and legislative frame work

established under the NG-CDF Act, is not a project of the NG-CDF hence not fundable. The 1<sup>st</sup> respondent reiterated that it did not in the financial year 2024/2025 or any other previous financial year receive any proposal and approved for funding any project of any nature at the said Gode Secondary school.

12. That the 1<sup>st</sup> respondent has well established administrative and public finance controls and protocols which ensure that public resources are applied and utilized within the national values and principles stipulated under the constitution and thus upholds the tenets of the constitution in project identification, approval, funding and implementation. That the petitioners failed to adduce any evidence that the 1<sup>st</sup> respondent considered and approved for funding any project on the said Gode Secondary School.

13. The 2<sup>nd</sup> respondent in his response sworn on 13.10.2025 deposed that he is the duly elected Member of Parliament for the people of Mandera South Constituency. That the petition is an abuse of the court process and therefore, ought to be dismissed with costs. It was averred that the petition offends the principle of drafting a petition as was espoused in the case of **Anarita Karimi Njeru vs Republic [1979] KLR** as the suit herein lacks specificity and precision.

14. That the crux of the petition is the construction of class rooms by the residents and parents of Gode location where Gode Senior Secondary School is situated, which construction is done in furtherance of and in realization of fundamental rights to

education of children protected under art 53 (1)(b) of the constitution.

15. It was stated that public participation as a constitutional principle does not extend to privately initiated projects by individual members of the community. That the initiation and development of community project where finance is not involved does not mandate conduct of public participation. Equally, that the petitioners lack requisite locus to present this suit before the court as they don't hail from Gode location but Borehole Eleven Location.

16. It was alleged that the petitioners failed to demonstrate how their personal rights or specific rights of any identifiable segment of the public they purport to represent, have been violated or are under any threat arising from the legitimate construction of classrooms at Gode School. The 2<sup>nd</sup> respondent averred that the two schools, Borehole Eleven Mixed Secondary School and new Gode Senior Secondary School are in two distinct locations of about 8 km apart and therefore, serving two different areas. As such, the construction of the said school was informed by the needs of the said location.

17. It was denied that any NG-CDF funds had been used in the project but instead, the alleged amount used to build Gode School came from *harambees* by the locals. That the prayer that the structure be demolished is unreasonable and wasteful as the same would deprive the children an opportunity to attend school. He further decried that the institution of this petition was laced

with political interests emanating from his political distractors hence the suit is not beneficial to the residents of Gode.

18. It is however worth noting that the interested parties did not participate in this proceedings.

19. The court thus directed that the petition be canvassed by way of written submissions.

20. The petitioners filed submissions dated 09.11.2025 contending that their petition had been substantiated by affidavits and pleadings already on record, which demonstrated breaches of fundamental rights and legitimate expectations. They argued that the replying affidavits filed by the respondents did not controvert their claims, noting that the 2nd respondent's affidavits were contradictory and therefore strengthened the petitioners' position.

21. The petitioners pointed out that the 1st respondent had categorically denied ever receiving or approving a proposal for the construction of Gode Mixed Secondary School, while the 2nd respondent insisted that the project had been duly approved following public participation. They highlighted that the 2nd respondent later shifted his position, claiming the project was a community initiative, but failed to provide any supporting documents or evidence of such a community committee.

22. It is the petitioners' contention that the contradictions between the respondents' affidavits confirmed the validity of their claims. They urged the court to allow the petition as prayed, asserting

that the matter had been proven by the pleadings and evidence on record. They concluded by respectfully praying for the court's intervention in granting their prayers.

23. The 1<sup>st</sup> respondent adopted and relied on submissions dated 03.10.2025 filed through the firm of Abigael Mengich in opposition to the application for conservatory orders thus urging that, the NG-CDF Act, 2015 governs the approval and financing of constituency projects and that the proposals for Mandera South Constituency for the financial year 2024/2025 did not include Gode Secondary School. Counsel opined that, there was no proof that funds had been approved or disbursed for the disputed project hence any purported construction undertaken outside the statutory framework could not be attributed to the 1st respondent.
24. It was further contended that the petitioners did not establish a prima facie case for grant of a conservatory order as espoused in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014)e KLR and Board of Management Uhuru Secondary School vs City County Director of Education and two others (2015)e KLR.**
25. It was further contended that the 1<sup>st</sup> respondent's mandate is established under Section 14 of the National Government Constituencies Development Fund Act, 2015, and that Section 16 required it to consider project proposals submitted by constituencies, approve those consistent with the Act, and disburse funds accordingly. They emphasized that

disbursements must follow the criteria set out in Section 5 of the Act, including approval recorded in board minutes, release through constituency accounts, and compliance with prescribed procedures.

26. It was further submitted that project identification and approval involved constituency committees convening public forums to deliberate on development priorities, after which proposals were submitted to the Board for scrutiny and approval. According to counsel, the proposals received from Mandera South Constituency for the 2024/2025 financial year did not include the construction of Gode Secondary School, and therefore no approval or funding could have been granted. It was urged that any construction undertaken outside the statutory framework could not be attributed to the Board.
27. In conclusion, the Board contended that the petitioners had made unsubstantiated accusations without evidence and therefore, the suit herein ought to be dismissed with costs.
28. The 2nd Respondent in his submissions dated 05.11.2025 urged that the petition challenging the construction of Gode Secondary School was misconceived, politically motivated, and an abuse of the court process. He stated that the petitioners had failed to meet the constitutional threshold for a competent petition as laid down in **Anarita Karimi Njeru v Republic (supra) and Mumo Matemu vs Trusted Society of Human Rights Alliance [1979] KLR 154**, since they had not identified with precision the specific acts or omissions by the Respondents that

violated the Constitution, nor had they provided evidence linking the project to NG-CDF funds. He emphasized that the project was a community-driven initiative funded through *harambee* contributions, a fact that the petitioners had not controverted.

29. It was further submitted that the petitioners lacked locus standi under Articles 22 and 258 of the Constitution, as they were residents of Borehole Eleven Sub-Location, eight kilometres away from Gode, and had not demonstrated any genuine or identifiable interest in the project. He contended that their grievances were politically coloured, noting that they belonged to a sub-clan aligned to his political rivals. He relied on precedents inter alia; **John Wekesa Khaoya vs Attorney General, Petition No. 60 of 2012; [2013] eKLR** and **Trusted Society of Human Rights Alliance vs Mumo Matemu [2014] eKLR** and **Law Society of Kenya vs Commissioner of Lands [ 2001] eKLR** to argue that constitutional remedies could not be invoked to settle political disputes.
30. On whether the petition disclosed a reasonable cause of action, the 2nd Respondent maintained that the allegations were speculative, generalized, and unsupported by evidence, and therefore incapable of sustaining a constitutional claim. He cited decisions including **Centre for Rights Education & Awareness vs Attorney General (CREAW) and 7 Others [2011] eKLR** and **Communications Commission of Kenya v Royal Media Services [2014] eKLR**, to urge that constitutional litigation must be grounded in cogent proof of

actual or threatened violations, and not trivialized for personal or political agendas.

31. He concluded by urging the Court to dismiss the petition in *limine* with costs, on grounds that it was frivolous, vexatious, and an abuse of judicial process, having failed to establish any constitutional violation, locus standi, or reasonable cause of action.
32. In response to the petitioners' supplementary affidavit dated 3.11.2025, the 2<sup>nd</sup> respondent filed supplementary submissions dated 11.11.2025 urging that the petitioners had shifted their allegations from accusing the 1<sup>st</sup> respondent of illegal allocation to alleging that the 2<sup>nd</sup> respondent had secretly funded the project. The respondent categorically denied all allegations, terming them speculative and unsupported by credible evidence. It reiterated that no NG-CDF proposal, approval, or allocation existed for the project.
33. The 2<sup>nd</sup> respondent emphasized that under Sections 107 and 108 of the Evidence Act, the burden of proof lay on the petitioners who had failed to discharge it. He contended that the petitioners' claims were based on misapprehensions and assumptions rather than documentary proof. It was emphasised that the operative response is that dated 13.10.2025 hence not the one dated 05.09.2025 as the same had been compromised. The respondent therefore prayed that the petition be dismissed and costs awarded in its favor.

34. I have considered the petition herein, grounds of opposition and submissions by the parties. Issues for determination are:

- i. **Whether the suit herein meets the threshold of a constitutional petition.**
- ii. **Whether there was public participation prior to the construction of Gode School.**
- iii. **Whether the petitioners' rights were breached.**
- iv. **Whether the prayers sought can issue**

35. It is trite that a litigant who wishes to institute a claim through a Constitutional Petition, must with reasonable degree of precision establish the nature of violation or breach complained of and the provision violated. This position was succinctly laid out in the case of **Anarita Karimi Njeru vs Republic(supra)** wherein Trevelyan & Hancox, JJ, summarized it as follows;

**“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”.**

36. As stated in the Anarita case above quoted and reiterated in the Mumo Matemu case, the petitioners ought to set out their complaint against the respondents with precision and specificity

to enable the court to ascertain whether or not a given right or fundamental freedom has been infringed as alleged.

37. Besides the Court of Appeal affirming the test outlined in **Anarita Karimi Njeru (supra)** and in **Mumo Matemu (supra)**, the Supreme Court confirmed the importance of complying with the stated principle by stating in **Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR** as follows:

**“[349] ...Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Annarita Karimi Njeru v. Republic* (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”**

38. The legal burden of proof on the above stated criteria is consciously or unconsciously the acid test applied when coming

to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in **Britestone Pte Ltd vs Smith & Associates Far East Ltd [2007] SGCA** where it was stated that :-

**“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”**

39. In the instant case, the first question therefore is, whether the petitioners have disclosed a violation of the Constitution, the constitutional provisions violated and the manner in which the provisions were violated. In their pleadings, the petitioners allege violation of their rights and principles enunciated and protected by *inter alia* Articles 1(1), 2,3(1, 10(1)(a)(b)(c)(d),232, (1)(a)(b)(c)(d)(e)(f), (2), 258(1)(2) of the Constitution. The main complaint is that the construction of a new school known as Gode Secondary School was not a priority as there is already another school existing nearby. Secondly, that there was no public participation conducted.

40. Their case is hinged on the premise that the actions of the respondents have affected the rights of the residents and members of public of Borehole Eleven Location, Kutulo Sub County and of Mandera South Constituency for greater public interest for violation of their rights under the Bill of Rights and violation of their legitimate expectation to participate in deciding on priority development projects within their location based on funds allocated to the constituency for development.

41. The alleged infringement of the petitioners' rights under the said provisions is then tied to alleged violation of other constitutional rights inter alia, being the right to public participation and sound use of public funds under Articles 10 and 232 respectively. The same brings out values and principles of public service.
42. It is trite that the petitioners do bear the burden to prove their claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities that there was no public participation. [ See **Deynes Muriithi & 4 Others vs Law Society of Kenya & Another, SC Application No. 12 of 2015; [2016] eKLR**].
43. It is trite that public participation has been entrenched in our Constitution as a national value and a principle of governance under Article 10 of the Constitution hence 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.*
44. The Supreme Court in Petition No. 5 of 2017 underscored the fact that 'public participation and consultation is a living principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments'.

45. The Supreme Court went ahead to delimit the following framework and/or guidelines 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.**

46. Having in mind the above, I will now seek to determine whether in constructing the new school, there was in place public participation and whether, public money was misused.

47. Section 3 of the National Government Constituencies Development Fund Act provides as Objects of the Act as follows:

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- a) provide for the establishment and administration of the Fund;**
- b) recognise the constituency as a platform for identification, performance and implementation of national government functions;**
- c) facilitate the performance and implementation of national government functions in all parts of the Republic pursuant to Article 6(3) of the Constitution;**
- d) provide for the participation of the people in the determination and implementation of identified national government development projects at the constituency level pursuant to Article 10(2)(a) of the Constitution;**
- e) promote the national values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized pursuant to Article 10(2)(b) of the Constitution;**
- f) provide for the sustainable development of all parts of the Republic pursuant to Article 10(2)(d) of the Constitution;**
- g) ...**
- k.) provide for mechanisms for supplementing infrastructure development at the constituency level in matters falling within the exclusive functions of the**

**national government at that level in accordance with the Constitution;**

**(I) provide a framework for citizens led development to assist the national government in planning and prioritizing the use of its resources;**

48. From the above guidance, it is clear that any project that is to be carried out with the support of the NG-CDF Act, the same must meet the objects set out. As such, it was imperative that public participation be employed before such money can be spent on any project.

49. In the instant case, the 2<sup>nd</sup> respondent did fully admit that the disputed project was indeed funded by the NG-CDF and that there was public participation. There was no proof of such public participation as per the guidelines above stated by the supreme court. There was no notice of any meeting called by the NG-CDF inviting members of the public to give their views on the intended project. This is contrary to the 1<sup>st</sup> respondent's denial that the disputed project was funded by the NG-CDF.

50. In as much as the 2<sup>nd</sup> respondent claimed that the replying affidavit dated 05.09.2025 was compromised and thus ought not to be referred to in any way, the same remained part of the pleadings in this suit as it was not expunged from the record. From the said response, the 2<sup>nd</sup> respondent acknowledged that NG-CDF's intervention was in accordance with section 41 of the NG-CDF Act and not to create a new school but to support, expand and strengthen a community driven institution which

had been established out of necessity. That the disputed project was approved under the NG-CDF Act and that the photos annexed by the petitioners were not only lawful but also depicted an existing structure.

51. Upon the 1<sup>st</sup> respondent denying the allegation that it had approved the project, the 2<sup>nd</sup> respondent made a sudden U-turn via a response dated 13.10.2025 stating that the construction was supported by the locals through *harambees*. It is unfortunate that the respondents are not reading from the same script.
52. An analysis of the above clearly denotes that indeed, there was no public participation as would be expected considering that undisclosed amount of public money was expended in building the said Gode Secondary School.
53. I have however, noted with serious concern the prayer that the already constructed classrooms be pulled down. I am alive to the fact that Gode school was built using public money without public participation. However, the question that I ask myself at this juncture is whether bringing down an already erected school structure would be beneficial to the society noting that public funds have already been expended? In my considered view, an order to that effect would not only be uneconomical and unreasonable but also absurd and punitive noting that it was not contested that the building is a school that would provide an opportunity for the children in that area to study and further, would reduce the distance covered in search of that very

education. As to the question of misuse of resources, there are other agencies charged with the mandate to oversee prudent use of public resources e.g EACC, Auditor General and many more.

54. Why did it take that long to file this petition? To seek an order for demolishing the classrooms which are complete will not be in the public interest. I do not find any prejudice that the petitioners or community will suffer by the school being constructed next to another school. To the contrary, students intended to benefit from the constructed school will also suffer prejudice by travelling long distance in search of education. In balancing both interests, I do not find the prayer to demolish the school classrooms a viable idea.

55. Although I have held that sufficient public participation was not done, it would be prudent for this court to balance the public interest of the people of Mandera South Constituency benefiting from the mentioned school and the due process being followed. Comparatively, the Constitutional Court of South Africa in the case of **Johncom Media Investments Limited vs M and Others** (CCT 08/08) [2009] ZACC 5, had the following to say as regards dealing with competing rights:

**“[25] To effect a proper balance, the right infringed must be identified, and its nature as well as its importance in a particular context must be considered. The purpose of the limitation must be pin-pointed, together with its extent, so as to**

**determine the relation between the limitation and the purpose it is designed to achieve. We must also consider whether the purpose could be achieved by less restrictive means.”**

56. To that extent, justice would demand that instead of bringing down the said classrooms, the school should be left to serve the children from the very and nearby locality to quench their thirst for education. Nothing stops the already existing school from seeking funding from the same NG-CDF to improve on its infrastructure. Competition of schools is healthy and the Bore Eleven school should work hard to achieve high standards of academic excellence.
57. In view of the above holding, the court is left with the question whether the reliefs sought can issue. It would appear from the petition that the orders sought other than being declaratory, are moot and not practically possible to implement. The declarations sought even if granted are inconsequential given that the project is of public interest hence cannot be demolished.
58. In conclusion therefore, the petition hearing partly succeeds and partly fails to the extent that there was no public participation conducted before the establishment and construction of Gode secondary School thus contravening Article 10 (2) of the constitution.

59. On the other hand, the school being a project for the benefit of the general public whose construction is at an advanced stage cannot be demolished.

60. Therefore, the only commendable declaration and oral orders to make are as follows;

**a) A declaration be and is hereby made declaring that the establishment, approval and construction of Gode Secondary School by the respondent without public participation was unconstitutional and therefore contravenes Article 10 (2) of the constitution.**

**b) That despite lack of the said public participation, the said construction cannot be stopped nor be demolished as it will be against public interest given the amount of public funds already spent.**

**c) This being a public interest matter each party shall bear own costs.**

Dated, signed and delivered virtually this 19<sup>th</sup> day of January 2026.

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**J.N.ONYIEGO  
JUDGE**