

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CONSTITUTIONAL PETITION NO. E012 OF 2025

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT,
THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND
PROCEDURE RULES,2013)**

BETWEEN

DUB KATELO BORU.....1st PETITIONER

**DOMINIC KIKA DIDO.....2nd
PETITIONER**

KABALE GALGUMBE OMARE.....3rd PETITIONER

VERSUS

**THE ATTORNEY GENERAL1ST
RESPONDENT**

**CABINET SECRETARY, INTERIOR AND NATIONAL
ADMINISTRATION2nd
RESPONDENT**

AND

COUNTY GOVERNMENT OF MARSABIT

.....INTERESTED PARTY

RULING

A. INTRODUCTION.

1. Through this Petition the petitioners sought several declarations centered on the establishment of SAGANTE-JALDESA Sub -county in North -Horr constituency as opposed to the same being established in Saku constituency and urged

the court to declare the same to be unconstitutional, illegal, null and void. They also challenged the arbitrary acquisition of community land by the national government, belonging to the North Horr community on the same grounds that it was done without public participation and in an unprocedural manner.

2. In response to the said petition, the 1st and 2nd respondent filed their notice of Preliminary objection dated 16th December 2025, rising the following grounds of appeal, namely that;

a) This Honourable court lacks jurisdiction to hear and determine this matter as the dispute substantially concerns land, land administration and/or decision's relating to use, occupation, title or interests in land, which fall within the exclusive jurisdiction of the Environment and land court pursuant to article 162 (2)(b) of the Constitution of Kenya, Section 13 of the Environment and land Act, and the jurisprudence thereunder.

b) There is no Environment and land court sitting at Marsabit, and the court with competent jurisdiction over such matters is the Environment and land court sitting at Isiolo; Consequently, the filing of this matter before the high court at Marsabit is fatally defective.

c) The petition as framed challenges an administrative action/decision and the process leading thereto and raises issues of legality, procedural fairness and/or reasonableness, which are properly the subject of judicial review proceedings under Article 47 and 165(6) and (7) of the Constitution, the fair administrative Action Act and Order 53 of the Civil Procedure Rules.

d) The petitioner has improperly invoked the constitutional jurisdiction of this Honourable court to constitutionalize an ordinary administrative and/or land dispute, in circumstances where adequate and effective statutory and judicial review remedies exist, thereby amounting to an abuse of the court process.

3. The 1st and 2nd respondent therefore prayed that the preliminary objection be sustained and that the petition filed be struck out and be dismissed.
4. The parties did consent that the preliminary objection be urged by way of written submission, with the interested party stating that, they would support the respondents position.

B. PARTIES SUBMISSIONS.

(i)The Petitioners written submissions

5. The Petitioners opposed the preliminary objection through their submissions dated 18th December 2025, where they pointed out that, while they were not opposed to the establishment of **SAGANTE-JALDESA** sub county, its administrative headquarters was picked in an arbitrary manner, without public participation being undertaken and thus the said administrative action did contravene Article **10, 21 35(1), 47, 63, 73,118,174,201 and 232 of the Constitution of Kenya.**

6. They had initially filed a suit before the Environment and land court at Isiolo, but were advised by the Honourable judge to file the suit before the high court, which therefore was the proper court to determine the constitutional violations raised. Reliance was placed in **Joseph Dida Halakhe (Suing as the Chairman of the Borana Council of Elders) Vs Cabinet Secretary for Interior and Coordination of National Government & 2 others (Constitutional Petition No 1 of 2022),(2024) KEHC 3045 (Klr), Gabriel Otiende & 4 Others Vs County Commissioner,, Siaya & 2 Others; John Nyapola Okuku & 3 Others (Interested Parties), Siaya High Court Petition No E2 of 2020,(2021) Eklr & Joanes Bokeye Muruguta & 2 others Vs Attorney General & Another, Petition No 4 of 2020,(2021) eKLR**

which cases addressed similar issues as those raised in this petition.

7. Specific reference was also made to the Supreme court case of **Nicholas Vs Attorney General & 7 others, National Environmental Complain Committee & 5 Others (Interested parties), Petition No E 007 OF 2023),(2023) KESC 113 (KLR)**, where it was held that redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms and/or that availability of an alternative remedy did not necessarily bar an individual from seeking constitutional relief.
8. The petition as filed therefore did not amount to abuse of the court process as it expressly challenges administrative action/decision and process leading to the creation and establishment of the SAGANTE- JALDESA Sub County. It was also to be noted that they had an inalienable right to file this petition to challenge the merits of the impugned decision, more so where there were allegations made of violations of fundamental rights and freedoms. The same had been affirmed in the Supreme court case of **Edwin Harold Dayan Dande & 3 others Vs Inspector General, National Police Service & 5 Others; Petition No 6 (E007), 4(E005) & 8 (E010) of 2022 (Consolidated), (20230 KESC 40 (KLR);** where the court held that entrenchment of judicial review

under the constitution of Kenya, 2010 elevated it to a substantive and justiciable right under the constitution. Accordingly, judicial review was no longer a strict administrative law remedy but was also a constitutional fundamental right established under Article 47 of the said Constitution.

9. Based on the foregoing, the petitioners urged the court to disallow the preliminary objection and proceed to determine the main petition on its merits.

(ii) **The Respondents Submissions.**

10. The 1st and 2nd respondents emphasized that the dispute concerned land, land administration and administrative action relating to land, all of which properly fell under the jurisdiction of the Environment and land court as provided for under **Article 162(2),(b) of the Constitution of Kenya, 2010.** They placed, reliance in **United States International university (USIU) Vs Attorney General (2012) Eklr and Supreme court case of Nicholus Vs Attorney General & 7 Others (Petition No E007 OF 2023)**, which expressly affirmed that disputes concerning land and constitutional violations concerning/relating to land fell exclusively under the Environment and land court.

11. Secondly, it was their contention that the petition challenged administrative decisions and the process leading to the

creation of an administrative unit on grounds of lack of public participation, lack of procedural fairness, transparency, failure to follow due process and unlawful administrative action. These were classic grounds the basis upon, which the petitioner ought to have filed for judicial review under **Article 47 and Fair Administrative Action Act** on grounds of illegality, procedural impropriety and irrationality. Reliance was placed in the court of appeal case of **Speaker of the National Assembly Vs Karume (2008) 1 KLR, 425 & Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another (2015) eKLR**, where it was emphasized that where statute provided dispute resolution mechanism, those mechanisms must be followed and that the parties cannot invoke the High court's original jurisdictions in the 1st instance.

12. The respondents thus urged the court to find that the preliminary objection as filed has merit and be pleased to strike out the suit on the basis that the court lacks jurisdiction to determine the issues raised.

C. DETERMINATION.

13. I have considered points raised in the preliminary objection and the submissions filed by both parties herein, regarding the same. The issues, which arise for determination is whether the petitioners ought to have filed a judicial review to articulate their grievance's and/or whether the courts lack jurisdiction to hear and determine this petition on grounds

that the issues raised concerns land, land administration and administrative action relating to land, and thus ought to have been filed before the Environment and Land court under **Article 162(2), (b) of the Constitution**.

14. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same were set out in the case of **Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors (1969) EA 696**; Where at page 700 Law JA stated that:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, at page 701, **Sir Charles Newbold, P. stated:**

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

15. Also, in **John Musakali v Speaker County of Bungoma & 4 others [2015] eKLR** the Court stated that:

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

(i) Whether, the Petitioner ought to have filed a judicial Review Application instead of this Constitutional Petition.

16. **Article 23(3), (f) of the constitution** provides that the court may grant appropriate relief, including issuing an order of judicial review. Traditionally, judicial review was not concerned with the merits of the decision but rather the propriety of the process and procedure in arriving at the decision.

17. **Article 47 (1) of Constitution of Kenya 2010** entrenched the importance of fair administrative action and provides that every person has the right to administrative

action that is expeditious, efficient, lawful, reasonable and procedurally fair and this was entrenched by the ***Fair Administrative Action Act, 2015*** (“the Act) whose purpose was to give effect to Article 47 of the Constitution. In a complete shift from a tradition which was rigid and limited in the extent in which a Court could examine administrative actions, the Act under section 7 reveals an implicit shift of the scope judicial review to include power of the Court to inquire into some aspects of ***merit*** of administrative action.

18. The entrenchment of judicial review in the Constitution led to the emergence of divergent views on the scope of judicial review. One group postulate that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while another group opine that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.

19. The Court of Appeal in ***Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others*** [2016] KLR noted as follows:

“Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review.....The test of proportionality leads to a “greater intensity of review” than the traditional

grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision.”

20. The Supreme Court in **SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR** had a different view as follows:

“[40] The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.' We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1st respondent did not owe any delimited statutory duty to the petitioner.”

21. Recently, the Supreme Court clarified the conflicting approach to Judicial review In **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR)**, where it set the scope of Judicial and the circumstances under which the

scope may be expanded to include inquiry into the merits of administrative action.

22. In the said case ***Dande & 3 others (Supra)***, the Supreme Court while disagreeing with the reasoning of the Court of Appeal and in complete shift from its previous decision in ***SGS Kenya Limited*** case held *inter alia* that:

“With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under the Constitution if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the Jirongo and Praxedes Saisi cases speaks succinctly

to this issue. That is also why, the question below is pertinent to the present appeal.”

23. Based on the above decision of the Supreme Court, the current position can be summarized as follows:

(i) The entrenchment of judicial review under the Constitution of Kenya, 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution.

(ii) When a party approaches a court under the provisions of the Constitution, then the court ought to carry out a merit review of the case. However, if a party files suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of the Constitution, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision per se.

24. This court is empowered under **Article 165 (3),(b) of the Constitution of Kenya, 2010** to determine any question concerning denial, violation, infringement or threat to fundamental rights/freedom . Accordingly on the 1st issue

raised, i do find and hold that the administrative decisions made by the 2nd respondent with respect to where the headquarters of SAGANTE-JALDESA Sub County will be situated and whether or not it was effected after public participation are valid constitutional questions, which can be addressed through this petition and appropriate orders be issued as the circumstance will dictate.

(iii) Whether the court lacks jurisdiction to hear and determine this dispute as it substantially concerns land, land administration and/or decisions relating to the use, occupation, title and interest in land.

25. The petitioners also sought for a declaration that the arbitrary acquisition of the community land by the national government to establish SANTE -JALDESA sub county headquarters is unlawful, illegal, null and void and was made contrary to various provisions of the constitution. The Supreme Court has had an opportunity in numerous occasions clarified the extent of jurisdiction of this Court and Courts of equal status. In **Republic v Karisa Chengo & 2 others [2017] eKLR**, the supreme court posited as doth:

“79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts It also follows that the Judges appointed to those Courts exercise varying jurisdictions,

depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).”

26. Thus, while this court has original jurisdiction to examine and determine if the administrative decision to establish SAGANTE-JALDESA Sub county in North Horr as opposed to Saku constituency was made after undertaking a lawful process, it does not possess jurisdiction to determine if acquisition of public/ community land to establish the proposed headquarters is lawful or not, as that would extend to the question of use, occupation, title or interest in land, which squarely falls under the Environment and land court.
27. To that extent, the respondents are right and the court cannot extend jurisdiction where none is conferred by statute or the constitution. Be that as it may, it would be in the interest of justice to sustain the petition rather than to have it partially struck out. Based on the provisions of **Article 159(2) of the constitution** the petitioners are directed to amend their

petition and rephrase the prayers sought as shall be appropriate.

D. DISPOSITION

28. The upshot is that preliminary objection dated 16th December 2025, though partially successful, does not raise enough grounds the basis upon, which the petition could be struck out.

29. The same is therefore dismissed, with costs in the cause

30. It is so ordered.

Read, signed and delivered virtually at **MARSABIT** on this **22nd** day of **APRIL**, 2026.

FRANCIS RAYOLA OLEL
JUDGE

Delivered on the virtual platform, Team this **22nd** day of **APRIL 2026.**

In the presence of: -

.....PETITIONER

..... RESPONDENT

..... Court Assistant

ORIGINAL