



**Sang & 5 others v Board of Management Kenana Secondary School & 2 others (Environment & Land Petition 001 of 2024) [2024] KEELC 4285 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4285 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND PETITION 001 OF 2024**

**A OMBWAYO, J  
MAY 23, 2024**

**BETWEEN**

**NELSON CHUMBEKA SANG ..... 1<sup>ST</sup> PETITIONER  
DAUDI KITILIT ..... 2<sup>ND</sup> PETITIONER  
DAVID KIPROP CHERUTICH ..... 3<sup>RD</sup> PETITIONER  
ALICE TARKOK KIPKOECH ..... 4<sup>TH</sup> PETITIONER  
FRANCIS SIELE ..... 5<sup>TH</sup> PETITIONER  
JELIMO SAMOEI ..... 6<sup>TH</sup> PETITIONER**

**AND**

**THE BOARD OF MANAGEMENT KENANA SECONDARY  
SCHOOL ..... 1<sup>ST</sup> RESPONDENT  
THE NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND  
BOARD ..... 2<sup>ND</sup> RESPONDENT  
THE NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT  
FUND-NJORO CONSTITUENCY COMMITTEE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Brief Facts**

1. This is a judgment in respect of the Petition filed on 8<sup>th</sup> February, 2024. The subject of this Petition is that the Petitioners contend that there was lack of public participation in the decision-making process by the Respondents. The Petitioners contend that the suit property L.R No. Ngongongeri Settlement Scheme/302 had been reserved for construction of a primary school but the Respondents have since commenced construction of Kenana Secondary School without conducting public participation. The



Petitioners also contend that the commencement of the said construction works was in violation of Article 10(2) of *the Constitution*.

2. The Petitioners sought for the following orders:
  1. A declaration that the actions by the Respondents and/or their employees and servants are unreasonable, unlawful and are in violation of Articles 10, 27, 47, 53 of *the Constitution* of Kenya, 2010.
  2. A declaration that the actions by the Respondents and/or their employees and servants are unreasonable, unlawful and are in violation of Article 186 & 187 of *the Constitution* of Kenya, 2010.
  3. A declaration that the actions by the Respondents and/or their employees and servants are unreasonable, unlawful and are in violation of Section 24 of The National Government *Constituencies Development Fund Act*.
  4. An order directing the Respondents to initiate a comprehensive public participation process regarding the allocation and utilization of the parcel of land for the construction of the primary school, giving the Petitioner and the residents of Kapkein Community and Lawina Village a meaningful opportunity to participate in the decision-making process.
  5. The Honorable Court be pleased to issue an order of permanent injunction against the Respondents its servants, employees, agents or any person acting on the Respondent's behalf from entering, taking occupation, operating any business thereon, leasing, transferring and/or interfering with the land parcel known as L.R NO. Ngongongeri settlement scheme/302.
  6. An order for costs.

#### **Petitioners' case**

3. The Petitioners aver that during allocation of the suit land in 1997, the same was specifically reserved for purposes of construction of a primary school to serve the residents of Kapkein Community and Lawina village. They further aver that they had legitimate expectation of utilizing the said parcel for construction of the primary school in the near future. The Petitioners contend that without due public participation and consultation of the residents of Kapkein and Lawina village, the 1<sup>st</sup> Respondent in connivance with the 3<sup>rd</sup> Respondent began the construction of Kenana Secondary School.
4. They contend that the lack of public participation in the decision-making process leading to the construction of the Secondary School was a violation of Article 10(2) of *the Constitution* and the National Government-Constituency Development Fund Act. The Petitioners further contend that there is dire need to put up a primary school at Lawina village owing to the need of pupils faced with challenges while accessing other schools which are far. They contend that the Respondents' actions have made it difficult to construct the said primary school since the funds have been allocated towards the construction of the secondary school.

#### **Response**

5. The 1<sup>st</sup> Respondent filed its Replying Affidavit dated 21<sup>st</sup> February, 2024 sworn by Millicent W. Gitonga the Principal of the 1<sup>st</sup> Respondent. She deposed that Kenana Primary School is the registered owner of the suit land and that as a result of the parents' meeting on 4<sup>th</sup> September, 2018 and 10<sup>th</sup> December, 2018, they agreed to allocate 7 acres of it land to establish Kenana Secondary School. She



further deposed that the primary school communicated their intentions to the Sub County Education Director-Njoro after which the secondary school was registered on 30<sup>th</sup> August, 2022.

6. It was her disposition that from 9<sup>th</sup> December, 2023 construction of the secondary school began with the construction of two classrooms which is nearing completion. She deposed that the said construction has been done legally and procedurally. She denied the allegation by the Petitioners that there was no public participation since the establishment of the secondary school was the decision by the parents of Kenana primary school who are also members of the said community.
7. In conclusion, she deposed that the Petitioners failed to attach any documentation in support of their claim and added that the petition lacks merit and ought to be dismissed with costs.
8. The 3<sup>rd</sup> Respondent filed its Grounds of Opposition dated 20<sup>th</sup> February, 2024 on the following grounds:
  1. That this Honourable Court lacks jurisdiction to determine the Notice of Motion Application and Petition dated 7<sup>th</sup> February, 2024 for reasons inter-alia, that jurisdiction in the first instance is reserved for the 2nd Respondent under Section 56 (3) of the National Government Constituencies Development Act, 2015 (hereinafter "the Act").
  2. That the Petition and Application dated 7<sup>th</sup> February, 2024 are an abuse of the process of this Honourable Court for reasons that the Petitioners have not exhausted the statutory avenues available for resolving their complaints under the Act.
  3. That the Petition and the Application dated 7<sup>th</sup> February, 2024 be dismissed with costs to the 3<sup>rd</sup> Respondents.

### **Submissions**

9. The 1<sup>st</sup> Respondent filed its submissions dated 2<sup>nd</sup> May, 2024 where it gave a background of the case and identified one issue for determination, whether the petition as it is meets the threshold for grant of the orders sought. In submitting in the negative, the 1<sup>st</sup> Respondent relied on the cases of Anarita Karimi Njeru V Republic [1979] eKLR and the Court of Appeal case in Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR. They submitted that based on the facts in the petition, the main issue is on the ownership of the suit land but that the Petitioners have only brought the issue of public participation in order to cloak the matter as a constitutional petition. They argued that the petition as pleaded does not set out the particulars of the alleged violations in relation to the constitutional provisions.
10. It was the 1<sup>st</sup> Respondent's submission that it never violated any of the Petitioners' rights and that its actions were done in accordance with the law. It further submits that Kenana primary school being the registered owner of the suit land and through its parents' meeting, agreed to establish Kenana Secondary School. It submitted that the parents' meeting through an annual general meeting is the supreme decision-making organ of a school and thus the school cannot go beyond the same.
11. In conclusion, the 1<sup>st</sup> Respondent submitted that the Petitioners' failed to attach any evidence to substantiate their allegations and urged the court to dismiss the petition with costs.
12. The 2<sup>nd</sup> Respondent filed its submissions dated 18<sup>th</sup> April, 2024 where it identified two issues for determination, first being whether there was public participation. It relied on numerous cases including, Doctors for Life International V Speaker of the National Assembly & Others [2015] eKLR, Poverty Alleviation Network & Others V President of the Republic of South Africa & 19 Others, CCT86/08 [2010] ZACC5 and Kiambu County Government & 3 Others V Robert N. Gakuru &



- Others [2017] eKLR. It submitted that there were members of the public in attendance to deliberate on the matter of the construction of Kenana Secondary School.
13. On the second issue on costs, the 2<sup>nd</sup> Respondent relied on Section 27 of the *Civil Procedure Act* and the case in Party of Independent Candidate of Kenya V Mutula Kilonzo & 2 Others and urged this court to award it costs of the petition.
  14. The 3<sup>rd</sup> Respondent also filed its submissions dated 23<sup>rd</sup> April, 2024 where it identified two issues for determination the first one being whether there was adequate public participation and the second being costs of the petition. On the first issue, the 3<sup>rd</sup> Respondent cited the cases in Robert N. Gakuru & Others V Governor Kiambu County & 3 Others [2014] eKLR and Mui Coal Basin Local Community & 15 Others V Permanent Secretary Ministry of Energy & 17 Others [2015] eKLR. It submitted that it has been demonstrated that there were two meetings held on 4<sup>th</sup> and 10<sup>th</sup> September, 2018 whereby it was agreed on the construction of the secondary school so as to ensure transition of learners from the primary school. The 3<sup>rd</sup> Respondent further submitted that the said meetings were attended by three hundred and sixty-five parents and therefore there was no doubt that public participation was conducted. It added that the construction of the school has progressed to the roofing stage thus public resources have already been disbursed and it would not be in the interest of justice to halt the process.
  15. On the final issue of costs, the 3<sup>rd</sup> Respondent urged the court to dismiss the petition and grant it costs.

### **Analysis and Determination**

16. This court has considered the case put forward by the Petitioners together with their supporting affidavit, the Respondents' response and submissions filed and is of the view that the sole issue for determination is:

Whether the Petitioners' constitutional principle of the right to public participation was adhered to prior to commencement of the construction of Kenana Secondary School.

17. Before delving into the main issue, this court appreciates that the 3<sup>rd</sup> Respondent raised the issue of jurisdiction in filing the instant petition. However, in the ruling dated 14<sup>th</sup> March, 2024, this court dismissed the Petitioners application seeking conservatory orders restraining the Respondents from inter alia carrying out any works on the suit land pending the hearing and determination of Petition. It is this court's view that the said issue of jurisdiction at this juncture has already been overtaken by events.
18. It is the Petitioners case that there was lack of public participation in construction of Kenana Secondary School. They contend that the lack of public participation in the decision-making process leading to the construction of the Secondary School was a violation of Article 10(2) of *the Constitution* as well as the National Government-Constituency Development Fund Act. The Respondents on the other had disagreed with the Petitioners and argued that there was adequate public participation which met the Constitutional threshold.
19. Article 10 (2) a of *the Constitution* outlines participation of the public as one of the national values and principles of governance which bind all state organs and public officers. Article 69(1) (d) of *the Constitution* on the other hand provides that:

...the State shall encourage public participation in the management, protection and conservation of the environment.”



20. In addition, the case of *Mui Coal Basin Local Community & 15 Others vs Permanent Secretary Ministry of Energy and 17 Others* [2015] eKLR, the Court set out the minimum basis for adequate public participation as follows: -

From our analysis of the case law, international law and comparative law, we find that public participation in the area of environmental governance as implicated in this case, at a minimum, entails the following elements or principles:

- a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.
- b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation. Sachs J. of the South African Constitutional Court stated this principle quite concisely thus:

The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day, a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. (*Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2006 \(2\) SA 311 \(CC\)](#))”

- c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya* (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:

Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”

- d. Fourth, public participation does not dictate that everyone must give their views on an issue of environmental governance. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, especially in environmental governance matters must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in



the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

- e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional Box.
- f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.”

21. On the threshold of public participation, the Court of Appeal in *Legal Advice Centre & 2 others V County Government of Mombasa & 4 others* [2018] eKLR referred to *Independent Electoral and Boundaries Commission (IEBC) V National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR and held as follows:

the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances.”

22. In the instant case, the Respondents argued that public participation was conducted as evidenced by Kenana's primary school meetings held on 4<sup>th</sup> and 10<sup>th</sup> September, 2018. This court has keenly perused and evaluated the evidence from the Affidavit sworn by Millicent W. Gitonga and it is without a doubt that the said meetings took place as evidenced from the annexed minutes.
23. It is this court's view that facilitation of public participation is key in ensuring legitimacy of the law, decision or policy is reached. This Court is satisfied that there was sufficient evidence that indeed public participation was conducted vide the meetings that took place on 4<sup>th</sup> and 10<sup>th</sup> September, 2018. I therefore find that the same was adequate since members of the public were afforded an opportunity to air their views in respect to the proposed construction of the Secondary School.
24. In the upshot, I find that the Petition herein lacks merit and the same is hereby dismissed. I find that this being a public interest case, each party shall bear its own costs. It is so ordered.

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23<sup>RD</sup> DAY OF MAY 2024.**

**A.O. OMBWAYO**

**JUDGE**

